The Floating Charge

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The Floating Charge

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Preface

This book is a revised version of my PhD thesis, *The Attachment of the Floating Charge in Scots Law*, which was submitted to the University of Edinburgh in August 2017 and examined in December of the same year. Minor changes have been made to update and, hopefully, improve the thesis for publication purposes; however, the substance remains largely unaltered.

The title of the book may suggest a comprehensive account of all facets of the floating charge in Scots law but that has not been possible due to the particular restrictions and requirements of a doctoral thesis. The justification for the title is that an analysis of the floating charge's attachment, in the context of property law and insolvency law, tells us much about its nature within the Scottish legal system. The work contained within this book is unashamedly academic yet also inescapably practical. Consequently, I am hopeful that it will find a place on the shelves of legal practitioners as well as in university libraries.

Doctoral research is an apprenticeship for an academic career and I learnt a great deal during my time as a PhD student. That was in large part due to the assistance of many individuals, only some of whom can be mentioned here. First of all, I am grateful to my supervisors. Scott Wortley's teaching and research inspired me to examine the law of floating charges in the first place and he was an ongoing source of guidance and encouragement. My second supervisor, Professor George Gretton, helped to improve my work immeasurably. I was delighted that he continued as my supervisor despite his retirement and I am honoured to have been his final student. I would also like to express gratitude to my examiners, Professor Andrew Steven and Donna McKenzie Skene. They made my viva a pleasant experience and their comments on the thesis were useful. I thank Professor Reinhard Zimmermann for his generosity in giving me the opportunity to spend a year at the Max Planck Institute for Comparative and International Private Law in Hamburg. The experience was both enjoyable and enlightening. And I am grateful to Professor Kenneth Reid for arranging my research stay at the Institute and for his sage counsel, including as regards the publication of this book. I also thank Professor Reid and Margaret Cherry for their editorial work during the book's production. On a related note, the doctoral research could not have been undertaken without the financial support of the Edinburgh Legal Education Trust. I greatly appreciate ELET's sponsorship of my work and the financial assistance provided by the Max Planck Society and the Clark Foundation for Legal Education too. I am also grateful for the assistance provided by the staff at the various libraries visited for the purposes of my research, and I am especially thankful to Liz McRae and Piroska Nemeth at the University of Edinburgh Law Library in this regard.

Lastly, I wish to thank my family and friends for their invaluable support. This book is dedicated to the memory of my grandfather, David Murray MacPherson, who was always a rich source of wisdom.

Alisdair D J MacPherson

Aberdeen
April 2020

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1 Introduction

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A. BACKGROUND

1-01. At common law, floating charges were rejected in Scotland.[1] Due to their failure to comply with the required formalities for creating security rights, Lord President Cooper famously described them in 1951 as "utterly repugnant to the principles of Scots law".[2] However, the then existing system, requiring delivery of corporeal moveables to the creditor and an equivalent step for other property types, came to be considered too burdensome and restrictive for commerce, especially in comparison to the position in England.[3] This led to the introduction, in 1961,[4] of a statutory floating charge. This was a non-possessory security adapted from the floating charge of English equity.[5]

1-02. The Scottish floating charge (like its English counterpart) is available over all types of property held by the chargor, as that property changes from time to time, and enables the chargor to continue to use and trade with the charged property until particular future events intervene. Under Scots law, only incorporated companies and certain other corporate entities can grant a floating charge.[6] The introduction of the floating charge has been described as "the most important innovation in commercial

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[1] *Ballachulish Slate Quarries Co v Bruce* (1908) 16 SLT 48; *Carse v Coppen* 1951 SC 233. See also *Clark v West Calder Oil Co* (1882) 9 R 1017.
[2] *Carse v Coppen* 1951 SC 233 at 239 per Lord President Cooper.
[3] See Law Reform Committee for Scotland, *Eighth Report* paras 1-16.
[4] By the Companies (Floating Charges) (Scotland) Act 1961. This originated as a Private Members' Bill presented under the Ten-Minute Rule by (Alexander) Forbes Hendry (1902-1980), Conservative and Unionist MP for Aberdeenshire West from 1959 until 1966. Only one other Bill introduced under the Ten-Minute Rule in session 1960-61 ultimately passed and received Royal Assent: see House of Commons Information Office, *The Success of Private Members' Bills* (Factsheet L3) (2010) 11, available at https://www.parliament.uk/documents/commons-information-office/l03.pdf.
[5] For the classic description of the floating charge in England, see *Re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284 at 295 per Romer LJ. See also *Illingworth v Houldsworth* [1904] AC 355 at 358 per Lord Macnaghten. The leading case on what constitutes a floating charge in English law is now *Re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680.
[6] Companies Act 1985 s 462(1). The other entities are: (i) LLPs (see Limited Liability Partnerships (Scotland) Regulations 2001, SSI 2001/128, reg 3); (ii) European economic interest groupings (see European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 18); (iii) co-operative societies and community benefit societies (see Co-operative and Community Benefit Societies Act 2014 s 62; these were formerly known as industrial and provident societies, which could also grant floating charges: see the Industrial and Provident Societies Act 1967 s 3); (iv) and building societies (see Financial Services (Banking Reform) Act 2013 (Commencement (No 8) and Consequential Provisions) Order 2015, SI 2015/428, Art 4 and Sch 1).

law in the [twentieth century]".[7] Yet, despite the charge's apparent popularity with legal practitioners and some of their clients,[8] it has received a great deal of academic and judicial criticism.[9]

1-03. These criticisms have often focused on the floating charge's supposed incompatibility with wider Scots law, particularly property law. Undoubtedly, the story of the floating charge in Scotland has been a difficult one. There are many reasons for the problems encountered. The charge represented a departure from long-standing principles regarding the creation and operation of security rights. It was introduced from English equity into a non-equitable system at a time when Scots law lacked the conceptual coherence and academic rigour of more recent decades. Provisions within the various iterations of the legislation are abstruse, use terms unfamiliar in Scots law, and lack clarity of thought, and this has sometimes been compounded by ill-advised judicial interpretation. Meanwhile, attempts to achieve better integration of the floating charge into Scots law have largely been unsuccessful.[10] Another issue is that consideration of the floating charge is inherently complicated, as it stands at the intersection points of company law, commercial law, property law and insolvency law. Consequently, there are many competing interests and legal principles at work.

1-04. This book explores a crucial aspect of the floating charge in Scots law, namely "attachment".[11] Like much of the floating charge, it has suffered from an

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[7] G L Gretton, "What Went Wrong with Floating Charges?" 1984 SLT (News) 172, 172. See also R B Jack, "The Coming of the Floating Charge to Scotland: An Account and an Assessment", in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987) 33.

[8] See eg Scottish Law Commission, *Discussion Paper on Moveable Transactions* (Scot Law Com DP No 151, 2011) para 9.15. See also J Hardman, "Some Legal Determinants of External Finance in Scotland: A Response to Lord Hodge" (2017) 21 EdinLR 30, 49 f, who argues in favour of greater uniformity between Scots law and English law for floating charges. In Law Reform Committee for Scotland, *Eighth Report* para 30, it is stated that in commercial law it is "desirable" for Scots law and English law to be the same, "unless there is good reason to the contrary". See also HL Deb, 5 July 1961, vol 232, col 1436 (Viscount Colville of Culross).

[9] See eg G L Gretton, "What Went Wrong with Floating Charges?" 1984 SLT (News) 172; G L Gretton, "Should Floating Charges and Receivership Be Abolished?" 1986 SLT (News) 325; G L Gretton, "Reception without Integration? Floating Charges and Mixed Systems" (2003) 78 Tulane LR 307; D Cabrelli, "The Case Against the Floating Charge in Scotland" (2005) 9 EdinLR 407. For judicial criticism, see eg *Lord Advocate v Royal Bank of Scotland* 1977 SC 155 at 173 per Lord Cameron; *Re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680 at paras 49-50 per Lord Hope of Craighead; and, most recently, *MacMillan v T Leith Developments Ltd* [2017] CSIH 23, 2017 SC 642 at paras 121 f per Lord Drummond Young. Cf eg R B Jack, "The Coming of the Floating Charge to Scotland: An Account and an Assessment", in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987); Lord Rodger of Earlsferry, "'Say Not the Struggle Naught Availeth': The Costs and Benefits of Mixed Legal Systems" (2003) 78 Tulane LR 419, 423 ff.

[10] Most notably, Pt 2 of the Bankruptcy and Diligence etc (Scotland) Act 2007, which would remedy various difficulties but is now unlikely ever to be brought into force: see A J M Steven and H Patrick, "Reforming the Law of Secured Transactions in Scotland", in L Gullifer and O Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (2016) 262 f.

[11] In practice the English-law term "crystallisation" is often used.

absence of systematic analysis.[12] Attachment is the means by which the charge affects particular property. It thereby facilitates ranking against other competing rights, can lead to enforcement through sale of the property by an insolvency practitioner and, ultimately, is necessary for distribution to the chargeholder.[13] As a result, it is central to the floating charge's nature in Scots law.

1-05. Throughout this book, attention is paid to the floating charge attaching to the property of limited companies in liquidation, administration and receivership. The possibility of a chargeholder appointing a receiver has now been significantly curtailed;[14] however, it was formerly the most common means of enforcing a charge and many cases have involved interpreting the charge through the prism of receivership.

1-06. In order for a floating charge to be effective against creditors, an administrator or a liquidator, specified documentation must be delivered to the registrar of companies (for registration) within 21 days beginning with the day after the floating charge's creation.[15] The date of creation was formerly the charge's execution date, but is now generally considered to be the date of delivery of the executed charge instrument to the chargee.[16] Yet the current law on the point is not wholly certain.[17] In any event, where floating charges are mentioned in this book, it is assumed that the registration-related requirements have been complied with, unless otherwise stated.

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[12] There have been some exceptions, eg R Rennie, *Floating Charges: A Treatise from the Standpoint of Scots Law* (PhD Thesis, University of Glasgow, 1972). However, as noted in J Hardman, *A Practical Guide to Granting Corporate Security in Scotland* (2018) para 1-03, "there exists no holistic modern academic text that authoritatively covers a floating charge in Scotland".

[13] The concept needs to be distinguished from "attachment" in other systems, such as within the American Uniform Commercial Code Art 9 (see especially Pts 2 and 3) and in Personal Property Security Acts systems (eg Australia, New Zealand and the Canadian Provinces except Quebec). Insofar as it creates an interest in property that is effective against third parties, attachment in Scots law has more in common with the concept of "perfection" in those functionalist systems. See, generally, Scottish Law Commission, *Report on Moveable Transactions* (Scot Law Com No 249, 2017) ch 18; H Beale, "An Outline of a Typical PPSA Scheme", in L Gullifer and O Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (2016) 7. Some scholars have also sought to use the distinction between attachment and perfection to explain the English law of security rights: see eg E McKendrick, *Goode on Commercial Law*, 5th edn (2016) para 22.78 and chs 23-24; cf L Gullifer (ed), *Goode and Gullifer on Legal Problems of Credit and Security*, 6th edn (2017) paras 2-23 and 4-06.

[14] This is discussed in detail in ch 3 below.

[15] Companies Act 2006 ss 859A-859H. This is to enable registration in the companies register (also known as the charges register).

[16] Scottish Law Commission, *Report on Moveable Transactions* para 36.7; G Morse (ed), *Palmer's Company Law*, 25th edn (looseleaf) para 13.207; H Patrick, "Charges Changing" (2013) 58(2) JLSS 20, 20 and 22. See Companies Act 2006 s 859E, for the current statutory provision. For the former position, see the now-repealed s 879(5)(a). See also *AIB Finance Ltd v Bank of Scotland* 1993 SC 588.

[17] See A D J MacPherson, "Registration of Company Charges Revisited: New and Familiar Problems" (2019) 23 EdinLR 153.

B. METHODOLOGY

1-07. This book is, principally, a doctrinal work. Legal sources have been examined to determine the current law. The most important sources for the floating charge are, of course, the relevant legislation and the case law interpreting that legislation. At various points, the currently prevailing views of aspects of the floating charge's attachment, and wider operation, are criticised and contrary interpretations are proposed. Some suggestions for reform are also provided. The focus on attachment means that the primary area of research is property law. The book presents an account of the floating charge that coheres with wider property law and insolvency law in Scotland. An inter-connected approach to the charge's attachment, ranking and enforcement is also evident.

1-08. Legal historical research has been undertaken to help understand the background to the current law. As well as consideration of superseded legislation, this has involved archival research relating to the introduction of the floating charge. In addition, papers published by the Law Reform Committee for Scotland and the Scottish Law Commission, as well as *Hansard* documentation, have been consulted as aids to understanding the historical and modern law. From a doctrinal perspective, superseded legislation and related materials are used for interpretive purposes. This is justified given that the current legislation contains some identical or similar provisions and these represent a continuation of the previous law.[18]

1-09. The doctrinal work is also supplemented by comparative analysis. Given the floating charge's adaptation from English law, and the fact that certain elements of company law and corporate insolvency are common across the jurisdictions, there are a number of references to the legal position in England, past and present. However, although the English and Scottish floating charges are arguably of the same genus, they are separate species operating in different environments. Consequently, English law is of limited value when considering certain aspects of the Scottish floating charge, especially as regards its interaction with property law.[19] Other legal systems, particularly German law, are referred to at points to help explain features of Scots insolvency and property law or to act as comparators. This work does not consider international private law or cross-border issues involving the floating charge.[20] There is much scope for further work on the Scottish floating charge.

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[18] See eg *MacMillan v T Leith Developments Ltd* [2017] CSIH 23, 2017 SC 642 at paras 58 ff per Lord President Carloway and at paras 98 ff per Lord Drummond Young; S Wortley, "Squaring the Circle: Revisiting the Receiver and 'Effectually Executed Diligence'" 2000 JR 325, 337 ff. For relevant statutory interpretation authorities, see eg *AG v Prince Ernest Augustus of Hanover* [1957] AC 436; *United States Government v Jennings* [1983] 1 AC 624 at 641 ff per Lord Roskill; *Pepper v Hart* [1993] AC 593; D Bailey and L Norbury (eds), *Bennion on Statutory Interpretation: A Code*, 7th edn (2017) 585 ff.

[19] See eg S C Styles, "The Two Types of Floating Charge: The English and the Scots" 1999 SLPQ 235; *National Commercial Bank of Scotland v Liquidators of Telford Grier Mackay & Co* 1969 SC 181 at 202 f per Lord Cameron.

[20] These are particularly difficult matters.

C. STRUCTURE

1-10. This work is divided into two main parts. The first is the general part and comprises chapters 2 to 6. The floating charge is a universal security, and the focus of the first part reflects the fact that, in particular respects, the charge's operation is not dependent upon the type of property charged. This is certainly true as regards the charge prior to attachment, as property subject to the charge is interchangeable and freely circulates; this is dealt with in chapter 2. The following chapters examine, in turn: the events that cause attachment to take place, the property attached by the charge, and the general effect of attachment. These issues, to a lesser or greater degree, are not dependent upon the specific types of property affected. And no matter what property is attached, the enforcement mechanisms of administration, liquidation and receivership are the same; these are analysed in chapter 6.

1-11. The general part is followed by the special part, forming chapters 7 to 9. A floating charge interacts with specific regimes based upon the type of property attached. Chapter 7 examines attachment within the context of the transfer of corporeal heritable property, as well as competition between floating charges and heritable securities, past and present. The next chapter analyses attachment and corporeal moveable property. The final substantive chapter deals with the problematic relationship between the floating charge and incorporeal property.

PART A: GENERAL PART

2 The Floating Charge before Attachment

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A. INTRODUCTION

2-01. There are two principal stages to consider when examining the nature of the floating charge in Scots law: (i) between creation and attachment; and (ii) upon attachment. The former will be the focus of this chapter. The nature of the Scottish floating charge at stage (i) has received minimal attention from commentators.[1] By contrast, the position in English law has been much discussed and there are various competing theories as to the nature of the floating charge before crystallisation.[2] There is widespread support, however, in favour of the floating charge creating an immediate proprietary interest of some description.[3]

2-02. These interpretations of English law are of limited value in the Scottish context as they are dependent upon the background system of English law and equity. There is no system of equity in Scotland and the Scottish floating charge is a statutory creation, unlike its English counterpart. It is therefore necessary to analyse the nature of the Scots law floating charge by interpreting the relevant legislation and

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[1] However, see S C Styles, "The Two Types of Floating Charge: The English and the Scots" 1999 SLPQ 235.

[2] W J Gough, *Company Charges*, 2nd edn (1996) 97 ff and 132 ff; S Worthington, *Proprietary Interests in Commercial Transactions* (1996) 79 ff; R Nolan, "Property in a Fund" (2004) 120 LQR 108; *Goode and Gullifer on Legal Problems of Credit and Security* para 4-03; E McKendrick, *Goode on Commercial Law*, 5th edn (2016) paras 25.04 ff. For summaries of the various theories, see H Beale et al, *The Law of Security and Title-Based Financing*, 3rd edn (2018) paras 6.66 ff; Sheehan, *Principles of Personal Property Law* 355 ff.

[3] See Nolan, "Property in a Fund" 108; P Giddins, "Floating Mortgages by Individuals: Are they Conceptually Possible?" (2011) 3 JIBFL 125; *Goode and Gullifer on Legal Problems of Credit and Security* para 4-03; E McKendrick, *Goode on Commercial Law*, 5th edn (2016) para 25.07; Sheehan, *Principles of Personal Property Law* 355ff. Yet there are differences between the particular theories outlined by these writers.

framing it against the background of Scotland's principally Civilian system of property.[4] The charge's statutory existence means that it does not need to conform to the existing dichotomy of personal and real rights in Scots property law, either before or upon attachment. Nevertheless, it is sensible, for coherence purposes, to attempt to fit the charge within this model.

B. A REAL RIGHT?

(1) History

2-03. The Law Reform Committee for Scotland's description,[5] in 1960, of the proposed floating charge included a reference to its status before attachment: "A security over the whole or a specified part of a company's undertaking and assets which shall not preclude the company from selling or otherwise dealing with such assets in the ordinary course of business until the company goes into liquidation…"[6] The reference to "security" here provides few details beyond the floating charge's general purpose. Allowing for the dealing of assets "in the ordinary course of business" was in line with the position in English law,[7] and might have facilitated an analysis of the charge as an immediate real right, but with the chargor having general authority to transfer ownership and create other real rights. The Committee's report did not, however, offer a remedial mechanism if there was dealing before liquidation outside the ordinary course of business. Notably, an "ordinary course" dealing provision was left out of the legislation that followed.[8]

2-04. The Companies (Floating Charges) (Scotland) Act 1961 provided that an incorporated company could create a floating charge "over all or any of the property, heritable and moveable, which may from time to time be comprised in its property and undertaking".[9] The Act further stated that a floating charge would "not affect any property which ceases prior to the commencement of the winding up of the company to be comprised in, and remains outwith, the company's property and undertaking…". But, upon the commencement of winding up, the charge would "attach to the property then comprised in the company's property and undertaking".[10] The most obvious interpretation of this combined wording is that a floating charge only affected the company's property at winding up, thus implying

[4] As Styles, "The Two Types of Floating Charge" 239 asserts, the English floating charge is a different concept from the Scottish floating charge and therefore the English authorities should (largely) be "eschewed". Cf R Rennie, "The Tragedy of the Floating Charge in Scots Law" 1998 SLPQ 169; R Rennie, *Floating Charges: A Treatise from the Standpoint of Scots Law* (PhD Thesis, University of Glasgow) (1972).
[5] It is misleadingly referred to as a "definition" in the Law Reform Committee for Scotland, *Eighth Report*, Appendix II para 1.
[6] Law Reform Committee for Scotland, *Eighth Report*, Appendix II para 1.
[7] See eg *Re Yorkshire Woolcombers Association* [1904] AC 355, affirming [1903] 2 Ch 284, in which Romer LJ, at 295, provided the standard description of the floating charge.
[8] Despite having been included in early drafts of the Bill: see NRS AD63/481/3.
[9] Companies (Floating Charges) (Scotland) Act 1961 s 1(1).
[10] Companies (Floating Charges) (Scotland) Act 1961 s 1(2).

that before attachment the charge was not "real". Indeed, the statement of the Bill's promoter (Forbes Hendry MP) at the House of Commons Committee Stage, that the floating charge "does not come into effect until the beginning of the winding-up", can be read in the same way.[11] And, in *National Commercial Bank of Scotland v Liquidators of Telford Grier Mackay & Co*,[12] the First Division considered that the effect of a floating charge upon attachment,[13] under the 1961 Act, was akin to a real right being obtained,[14] from which it might be inferred that the charge was not real prior to attachment.

2-05. Although the provisions in the 1961 Act can help determine the original intended nature of the charge, the replacement legislation of 1972, the Companies (Floating Charges and Receivers) (Scotland) Act 1972, altered the applicable wording. Instead of stating that the floating charge would not affect property which left the company's property and undertaking before winding up, the Act simply referred to attachment of property in the company's property and undertaking at winding up, and upon receivership.[15] The 1972 Act also removed the express reference to heritable and moveable property,[16] thus reinforcing the notion that a floating charge treats all types of property in the same way, at least until attachment intervenes and specific property systems apply.[17] In these respects, the currently applicable Companies Act 1985 is in the same terms.

(2) Theories

2-06. The absence of a clear legislative statement regarding the charge's pre-attachment nature means it is necessary to discover this nature from the current creation provision and through comparison with the charge's nature upon attachment. The Companies Act 1985 s 462(1) allows companies to create floating charges and describes a floating charge as "a charge … over all or any part of the property … which may from time to time be comprised in [the company's] property and undertaking".[18] This provision applies irrespective of whether or how the floating charge attaches and is enforced. Unlike in English law, "charge" has no

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[11] Parliamentary Debates, House of Commons, Official Report, Scottish Standing Committee, 20 June 1961, cols 15 f, and see the Lord Advocate's similar comment at col 19. See also HL Deb, 5 July 1961, vol 232, cols 1436 f (Viscount Colville of Culross).

[12] 1969 SC 181 especially at 194 f per Lord President Clyde and at 198 f per Lord Guthrie.

[13] The "statutory hypothesis" of attachment is discussed in ch 5.

[14] However, the extent to which the chargeholder's interest upon attachment is a real right is debatable: see paras 5-32 ff and paras 6-88 ff below.

[15] Companies (Floating Charges and Receivers) (Scotland) Act 1972 s 1(2); and ss 13 and 14 for receivership.

[16] Companies (Floating Charges and Receivers) (Scotland) Act 1972 s 1(1).

[17] Indeed, there are advantages in property being treated in a uniform way, given the revolving nature of the charged property before attachment.

[18] Companies Act 1985 s 462(1). The Bankruptcy and Diligence etc (Scotland) Act 2007 s 38(1) has similar wording (although, unlike s 462(1), contains no express reference to uncalled capital) but is unlikely now ever to be introduced.

core, established meaning in Scots property law[19] but in this context it could be a real interest in each piece of property contained in a fluid and changeable fund[20] or alternatively simply the *potential* for a real interest in specific items of property.[21] The former (the immediate-interest theory) might involve the existence of a right in each charged item in the company's property and undertaking at any given point, but where the chargor's exercise of its power to dispose of property extinguishes the chargeholder's right.[22] By contrast, the latter approach (the potential-interest theory) does not involve the creation of any right in property but only the possibility for such a right to arise in the future.

(3) An immediate interest in property?

2-07. The immediate interest theory has some support from the fact that the charge is created "over… the property". This terminology is used in a number of other contexts where property *is* directly affected.[23] The Conveyancing and Feudal Reform (Scotland) Act 1970 states that it is competent to grant and register a standard security "over any land or real right in land".[24] (Formerly, before amendment, this read as "over any interest in land".) The term "over" can, however, also be viewed as a general expression referring to a security interest relating to property, but which requires further explanation as to its nature at a given time. Indeed, for the standard security, a separate provision states that it confers an immediate real right in security in specific property.[25]

2-08. Stating that the floating charge creates an immediate real right in property, upon creation, is arguably inappropriate (or meaningless), unless the chargeholder has rights exercisable against the property at that time. It is not infeasible that a floating charge confers an inherent right to prevent the debtor from destroying or damaging the charged property. Likewise, could a chargeholder stop the granting of a limited real right,[26] such as a lease, liferent or servitude, or render that grant ineffective, unless it had consented? This might be particularly useful to the

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[19] However, "charge" does appear in related contexts with different meanings – consider eg charges for payment as regards diligence, and agricultural charges created under the Agricultural Credits (Scotland) Act 1929.
[20] There is a resemblance here to some of the theories in English law (see above). For example, Nolan, "Property in a Fund" 126 ff suggests the chargee has an immediate right in the property in a fund but the chargor has an immunity regarding property alienated in the ordinary course of business.
[21] The potential impact might extend to the effect of negative pledges: see below.
[22] This is similar to the landlord's hypothec, albeit that the acquisition of property free from the landlord's hypothec is dependent upon the transferee being in good faith: see Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(5).
[23] Including the attachment effect of a floating charge as if it is "a fixed security over the property": see Companies Act 1985 s 463(2); Insolvency Act 1986 ss 53(7), 54(6) and Sch B1 para 115(4).
[24] Conveyancing and Feudal Reform (Scotland) Act s 9(2).
[25] See 1970 Act s 11(1) (as amended). And see the rest of that Act for details as to how the encumbered property is affected by the existence of the standard security.
[26] Except for rights in security, which are expressly catered for in the floating charges legislation by means of ranking.

chargeholder where the grant would diminish the value of the charged property.[27] The chargeholder having such preventive and prohibitory rights is, nevertheless, unlikely. There is no evidence to suggest that the floating charge in Scots law (apparently unlike in English law)[28] has any direct effect on property before attachment. The floating charge in Scotland is a statutory device and, therefore, one would expect pre-attachment enforcement mechanisms for property to be outlined in the legislation, but they are not.[29]

(4) The absence of a real right

2-09. The chargor's ability to use and freely trade with charged property until attachment is a fundamental aspect of the floating charge and also undermines the argument that it is real before attachment. Ownership of the property can be transferred, and subordinate real rights created, in spite of the charge's existence. If the pre-attachment floating charge is a real right, subsequently obtained real rights ought to be subject to it. But this is not so. Any effect the charge has regarding real rights must derive from the legislation; and given the absence of relevant provisions, it can be strongly presumed that the floating charge, in its unattached state, does not affect real rights subsequently acquired by third parties in charged property. Even when the charge attaches, it generally remains subject to real rights already in existence; it is the chargor's property at the time of the attachment that is affected by the floating charge, and the chargor may no longer own particular property or its proprietary interest may already be encumbered by other real rights. (It will not usually be possible for real rights to be transferred or created by the chargor after attachment as it will no longer have power over the property.)[30]

2-10. It seems that express statutory provision is necessary to produce an exception to the general position that a floating charge does not affect real rights established before attachment. In fact, such provision is only made for the relationship between the charge and other security rights. If the charge is a real right in security from its creation, it should rank ahead of other subsequently-created real security rights (*prior tempore potior jure*). Yet the default legislative rule provides that a charge ranks *behind* a fixed security created at any time prior to the charge's attachment.[31] However, a statutory exception allows a charge to rank from its creation as against voluntary fixed securities (and floating charges) granted in breach of a negative

[27] For a potential model, see eg *Edinburgh Entertainments Ltd v Stevenson* 1926 SC 363 in which the granter of an *ex facie* absolute disposition qualified by back letter was held to retain the power to grant leases, so long as the grant did not depreciate the bank's security.
[28] See eg Sheehan, *Principles of Personal Property Law* 355 f.
[29] See eg the description of the (then-applicable) floating charges legislation as a "code, complete in itself" (albeit in relation to receivers' powers) in *Forth & Clyde Construction Co Ltd v Trinity Timber & Plywood Co Ltd* 1984 SC 1 at 11 per Lord President Emslie (and similar wording at 9).
[30] See paras 6-37 ff below.
[31] Companies Act 1985 s 464(4)(a). And see the implications of this at: Companies Act 1985 s 463(1)(b); Insolvency Act 1986 ss 55(3)(b) and 60(1)(a); Insolvency Act 1986 Sch B1 para 116(a), (e).

pledge contained in the charge instrument.[32] As negative pledges are ubiquitous, a floating charge will, in reality, usually rank ahead of any voluntary fixed security (or further floating charge) created after the charge.[33] Yet, for the charge to compete directly with other security rights as regards property, or proceeds of property, attachment is necessary. For such competition to arise, the enforcement mechanisms connected with attachment are important, as is the fact that the charge attaches as if it were a fixed security. An *attached* charge is expressly subject to the rights of those with prior-ranking fixed securities (and floating charges). Conversely, it prevails against lower-ranking fixed securities (and floating charges).[34]

2-11. If an unattached charge does not have real effect, one might expect an express legislative statement specifying that a charge in that state is subject to all fixed securities. However, the absence of such provision is apt: the charge does not affect property, but subject to these securities; instead, it has no effect at all on property before attachment. The unattached charge is therefore entirely ineffective, in property terms, in relation to all other security rights. One provision which superficially gives credence to an alternative view is s 27(1) of the Conveyancing and Feudal Reform (Scotland) Act 1970, which could be interpreted as requiring an enforcing standard-security holder to distribute proceeds of sale to the holder of an unattached charge.[35] Instead, it is more appropriate to read "securities" in the section as referring to security rights directly in the property sold, and the charge does not create any such interest until attachment.[36]

2-12. Ranking against diligence provides another test of the "realness" of a security right. In this regard, attachment again appears to be the key milestone for floating charges. Upon attachment a charge is subject to the rights of those with "effectually executed diligence",[37] and so impliedly prevails against diligence not falling within this category.[38] The absence of any statutory provision dealing with a floating charge and diligence before attachment again indicates that the charge will not affect any type of diligence (effectually executed or not) unless and until attachment occurs. Once more, this is because the unattached charge does not give an interest in property.

2-13. The above material suggests that the potential-interest theory is preferable. An unattached floating charge does not directly affect property or allow any real actions by the chargeholder. It is therefore not appropriate to describe it as a real

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[32] Companies Act 1985 s 464(1)(a), (1A).
[33] Without negative pledges, floating charges rank against each other according to their dates of registration in the charges register: Companies Act 1985 s 464(4)(b).
[34] This is due to the combination of: Companies Act 1985 s 463 and the attachment mechanism; Insolvency Act 1986 s 60(2); Insolvency Act 1986 Sch B1 para 116(e), (f).
[35] In practice, a chargeholder may, by this point, have sought to enforce the charge.
[36] See paras 6-09 ff below for further discussion of this provision.
[37] Companies Act 1985 s 463(1)(a); Insolvency Act 1986 ss 55(3)(a) and 60(1)(b). The position for diligence in administration is more complicated and the attached charge is not specifically made subject to any diligence.
[38] See *Lord Advocate v Royal Bank of Scotland* 1977 SC 155; *MacMillan v T Leith Developments Ltd* [2017] CSIH 23, 2017 SC 642.

right (which would be the result of adopting the immediate-interest approach). But once attachment occurs there is a more clearly identifiable connection between the floating charge and specific property; the floating charge attaches "to the property" and there are "real" consequences arising from this.[39] The relevant remedies for a chargeholder concerned about the actions of a chargor, before attachment, seem only indirectly related to property: to bring about attachment and/or the displacement of the chargor's management, or to use personal contractual rights to enforce obligations binding the chargor. The precise nature of the charge between creation and attachment will be discussed in the next section.

C. PERSONAL RIGHTS AND POWERS

2-14. If the floating charge is not a real right between its creation and attachment, then what is it? Styles characterises the floating charge, at this stage, as a "conditional real right",[40] which the Scottish Law Commission acknowledge is correct in a "broad sense".[41] Likewise, Gow provides an anticipatory description by referring to the floating charge as a "voluntary dormant hypothec".[42] These are descriptions of the floating charge before attachment with reference to what it becomes when attachment occurs.[43] Styles notes, however, that a conditional real right is a personal right. He uses legislation and judicial decisions to argue that attachment causes a floating charge to become a real right.[44] By implication, the charge cannot be such a right prior to attachment and, therefore, must be a personal right, according to the real/personal dichotomy of Scots law.[45] Styles suggests that, in its pre-attachment form, the floating charge is "merely the personal right to appoint a receiver, if the company defaults on the loan, and nothing more".[46] As will now be discussed, this is an insufficient explanation of the rights a floating charge confers before attachment, but Styles is correct to identify the absence of a real interest.

(1) A conditional real right?

[39] Companies Act 1985 s 463(1), (2); Insolvency Act 1986 ss 53(7), 54(6), and Sch B1 para 115(1B), (3)-(4).
[40] Styles, "The Two Types of Floating Charge" 240.
[41] Scottish Law Commission, *Discussion Paper on Moveable Transactions* (Scot Law Com DP No 151, 2011) paras 9.14 n 33 and 22.5 n 10.
[42] Gow, *Mercantile Law* 279. Here, Gow also describes the landlord's hypothec as an "involuntary" or "legal" dormant hypothec.
[43] And presuppose that the charge is a real right upon attachment.
[44] Using the "as if" statutory hypothesis in s 53(7) of the Insolvency Act 1986 and the standard security mentioned in the definition of fixed security, in s 70(1) of the same Act, as the "guide" to the floating charge's operation upon attachment and "by implication" its nature before attachment. The statutory hypothesis is also used in Companies Act 1985 s 463(2), and there is an accompanying definition of "fixed security" (s 486(1)).
[45] Styles "The Two Types of Floating Charge" 240-41.
[46] Styles, "The Two Types of Floating Charge" 240-41.

2-15. If A Ltd contracts to create a floating charge in favour of B Bank, then clearly B Bank has a personal right to compel A Ltd to create the charge and A Ltd has a personal obligation to create it. Importantly, A Ltd also has the power to create a charge by virtue of the Companies Act 1985 s 462(1). But once creation happens, B Bank no longer has the aforementioned personal right and it does not (yet) have a real right in the property encompassed by the charge. Is the floating charge a conditional real right in security at this stage? And what does it mean to say that a floating charge is such a right? By definition, such a right is not a real right in security until the relevant conditions are fulfilled. Likewise, a floating charge does not have real effect until the company enters receivership or liquidation, causing attachment, or until an administrator is appointed and an attachment event subsequently occurs. The fact that these events, which change the charge's nature, are also the starting point for enforcement, at least for liquidation and receivership, is another odd aspect of this form of security.[47]

2-16. If we focus on the attachment events as "conditions", the floating charge between creation and attachment seems aligned with a certain type of conditional real right in security, one in which a real right is created automatically upon fulfilment of a condition.[48] This can be contrasted with a right where the fulfilment of a condition only confers a personal right to compel another party to grant a real right.[49] However, even regarding the first-mentioned type, the floating charge is unusual because if, before the attachment condition is fulfilled, the grantor alienates its property, or grants other security rights,[50] this is not a breach of the chargeholder's right.[51] (Ordinarily, such actions would constitute a breach of the personal right of a party with a conditional real right in security.)[52] This is because the floating charge is tied to the person of the debtor and that person's changing property, rather than to specific property, whereas a "normal" conditional real security is dependent upon gaining an interest in a particular item of property. The latter is a right to receive a real right in specific property when a condition is fulfilled, whereas the floating charge is a conditional real right over non-specific property, applying simply to whatever property belongs to the chargor when attachment occurs (assuming all property is charged).

2-17. The floating charge has a divided nature;[53] but, whether it is a conditional real right following creation, or has attached and thus has real effect, it is still a

[47] As is the transformation of the charge's nature in insolvency-related scenarios.
[48] This might include eg where A agrees to pledge property to B subject to fulfilment of a condition and, before fulfilment, the property is delivered to B: see A J M Steven, *Pledge and Lien* (2008) para 6-27.
[49] An example would be where a party agrees to deliver property to create a pledge but only upon a condition first being fulfilled.
[50] A negative pledge will, however, enable a chargeholder to rank ahead of a subsequently created security, but this will only have a property effect upon attachment (see further below).
[51] This has potential implications for the (non-)applicability of the "offside goals" rule. Separately, unfairly prejudicial transactions and gratuitous alienations could be challenged, but these are challengeable on the basis of the chargeholder as a creditor, rather than as a chargeholder.
[52] Unless it was contractually agreed that this would not be a breach.
[53] Ie its nature differs depending upon whether it has attached or not.

floating charge.[54] The division created by these two distinct stages causes Cabrelli to describe the floating charge as "truly unique" compared to other security rights.[55] Cabrelli even declares it "perverse" to refer to the floating charge as a form of security in Scots law terms, as it "may never confer a real right in security".[56] Yet, when we consider the floating charge and the definition of security in a wider sense, it is clear that the mere possibility of attachment (as well as, later, attachment itself) gives protection to the chargeholder, as do powers available to the chargeholder that can bring about attachment.

(2) Rights or powers?

2-18. A conditional real security, by itself, is passive and future-focused. It is therefore also necessary to consider what exercisable rights are actually held by a chargeholder before attachment.[57] The holder has the power to petition the court to wind up the chargor company where "the security of the creditor entitled to the benefit of the floating charge is in jeopardy".[58] A creditor's security is considered to be in jeopardy "if the court is satisfied that events have occurred or are about to occur which render it unreasonable in the creditor's interests that the company should retain power to dispose of the property which is subject to the floating charge".[59] Of course, even without a floating charge a creditor can seek to have a debtor company placed into liquidation. But the existence of the floating charge gives an additional ground for doing so.

2-19. The holder of a floating charge may also have the power to appoint a receiver over the charged property or to apply to court for a receiver to be appointed.[60] Administrative receivership has, however, largely been replaced by administration, and the "holder of a qualifying floating charge"[61] has the power to appoint an

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[54] Certain comparisons could be drawn with eg a standard security which exists under the Conveyancing and Feudal Reform (Scotland) Act 1970 upon granting but requires registration for a real right to be conferred (s 11(1)). Yet a floating charge requires creation, registration and attachment for effect against third parties. Cf pledge which, strictly speaking, is a real right and cannot be a conditional real right. But see Steven, *Pledge and Lien* paras 2-06 ff for details of different ways in which the term "pledge" is used.

[55] D Cabrelli, "The Curious Case of the 'Unreal' Floating Charge" 2005 SLT (News) 127. This is true if we conflate the creation and registration of securities like the standard security, as per the Companies Act 2006 s 859(E)(1).

[56] Cabrelli, "The Curious Case of the 'Unreal' Floating Charge" 128. Here, Cabrelli is discussing the floating charge in the specific ontext of administration.

[57] But note the discussion of conditional and exercisable rights below.

[58] Insolvency Act 1986 s 122(2). There is an equivalent provision for unregistered companies (s 221(7)).

[59] Insolvency Act 1986 s 122(2).

[60] Insolvency Act 1986 s 51(1) and (2) respectively. (The court approach is, understandably, far less common.) There is precedence among receivers appointed, based upon the ranking of the relevant floating charges: s 56(1).

[61] For the term's meaning, see Insolvency Act 1986 Sch B1 para 14(2), (3). In essence, the charge instrument has to allow for the appointment of an administrator, and the charge, alone or with other securities, must cover "the whole or substantially the whole" of the company's property. These chargeholders also have rights and powers involving the appointment of administrators by the court:

administrator of the company, without the normal requirement to convince the court that the debtor is, or is likely to become, insolvent.[62] The exercise of each of these powers involves displacing the existing management of the chargor, as regards particular property or the company's whole estate (patrimony), and replacing them with an alternative party. Not only this, but the successful exercise of the powers leads directly to the attachment of the floating charge (in the case of liquidation and receivership) or can do so indirectly and subsequently (in certain situations in administration).[63]

2-20. Between creation and attachment the powers of a chargeholder can either be: (i) conditional; or (ii) exercisable (following the fulfilment of the relevant condition(s)). For example, the instrument creating a floating charge might provide that a receiver can be appointed in situation X. Before X occurs, the chargeholder's power is only conditional and is not exercisable, but this automatically changes once X takes place. In addition, the fulfilment of the conditions relating to the respective powers (to appoint an administrator or receiver or to petition for the company's liquidation) differ as the conditions for each are not the same. Instruments creating the charges can specify the exact circumstances in which a receiver or administrator may be appointed, but there are additional statutory possibilities for the appointment of a receiver,[64] and liquidation is limited to statutory grounds.[65]

2-21. The above-noted powers (in addition to normal creditors' powers) are personal rights in a wide sense. However, they are not rights (or claim rights) in the

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Sch B1 paras 35-37 (eg the ability to have the court appoint an administrator without having to show that the company is or is likely to become unable to pay its debts – para 35(2)). For some consideration of what proportion of assets would be necessary for a floating charge to cover "substantially the whole" (or "substantially all") of the chargor's assets, see J Hardman, *A Practical Guide to Granting Corporate Security in Scotland* (2018) paras 6-12f.

[62] Insolvency Act 1986 Sch B1 para 14(1). See the remainder of para 14 and para 15 for related conditions and for priority rules for appointment, which correspond to ranking (albeit that there is something of a disparity between what is meant by a prior floating charge in para 15(2)(a) and (3) and the ranking provisions in the Companies Act 1985 s 464 – I am grateful to Scott Wortley for this point). (Cf Insolvency Act 1986 Sch B1 paras 10-13, which outline the rules that other creditors, including those with non-qualifying floating charges, must comply with to have an administrator appointed by the court. These include giving notice to a qualifying floating-charge holder under para 12(2)(c) to enable such a party to appoint their own administrator instead.) The stipulation, in para 16, that an administrator may not be appointed if the charge is not enforceable must mean that the conditions in the charge instrument justifying the appointment of an administrator require to be met and/or that the charge has been validly registered and therefore is enforceable against a party such as an administrator (subject to attachment occurring). An alternative meaning, that it is not enforceable until attachment, would clearly be absurd, as attachment (outside liquidation and receivership) could only arise during the course of administration.

[63] It should be mentioned that a floating-charge holder has certain other rights too, such as the right to lodge a caveat (Act of Sederunt (Sheriff Court Caveat Rules) 2006, SSI 2006/198, r 2(3)). A qualifying floating-charge holder also requires to be given advance written notice of a resolution for the voluntary winding up of a company (Insolvency Act 1986 s 84(2A), (2B)). See also s 100(4), regarding the appointment of a liquidator, which is not currently in force.

[64] Insolvency Act 1986 s 52. For administration, see also Sch B1 paras 35-37.

[65] In comparison to English law where crystallisation is available in a wide range of situations, including as a result of automatic crystallisation clauses: see paras 3-10 f below.

strict Hohfeldian sense,[66] for there are no corresponding duties (or obligations) incumbent upon the chargor. For example, the chargor has no duty, corresponding to the chargeholder's right, to appoint a receiver over its charged property. Instead, the chargor has a contingent *liability* to have a receiver or administrator appointed or to be placed into liquidation and the chargeholders have correlative Hohfeldian *powers*.[67] It is instructive to compare these powers with the underlying secured debt, where there is a right and a duty in the normal sense – for example, the right to receive re-payment of a loan and the correlative duty to repay this. But this is one step removed from the floating charge itself. Indeed, many of the "rights" outlined in a charge instrument are separate from the charge proper.

2-22. The floating charge can thus be analysed as conferring powers to change the legal relations between the parties concerned. In this respect, there are similarities between the charge and the German legal concept of *Gestaltungsrecht*.[68] Certain examples of the latter, when exercised, provide a real interest in property.[69] And the exercisability of a *Gestaltungsrecht* can also be conditional, like a chargeholder's powers.[70] In addition, the exercise may be by the unilateral act of the holder of the power or by court action (*Gestaltungsklage*).[71] There appears to be some equivalence between these two different means of exercise and, for example, (i) the appointment of a receiver, and (ii) applying to the court either to put the chargor into liquidation or to have a receiver appointed. (The appointment of an administrator does not immediately lead to a change in the floating charge's nature but using this power can ultimately cause such a change and thereby alter the rights held by the parties involved.) Simply enforcing an existent right would not generally be considered a *Gestaltungsrecht*; however, the floating charge's enforcement brings about the transformation of the charge, and this comprises a change in legal relations between the parties.

2-23. The German law notion of *Anwartschaftsrecht* also appears relevant when examining the rights held by a chargeholder; they both involve a party acquiring an interest in expectation of obtaining a "full" real right in the future.[72] However, the

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[66] W N Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913-14) 23 Yale LJ 16; W N Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1916-17) 26 Yale LJ 710.

[67] The position for liquidation is not directly correlative, as the court will need to make the decision upon the petition from the chargeholder.

[68] See M Wolf and J Neuner, *Allgemeiner Teil des Bürgerlichen Rechts*, 11th edn (2016) 237; A von Tuhr, *Der Allgemeiner Teil des Deutschen Bürgerlichen Rechts* vol 1 (1910, reprinted 1997) 161.

[69] See eg von Tuhr, *Der Allgemeiner Teil des Deutschen Bürgerlichen Rechts* vol 1, 162, who refers to: "Befugnis, durch einseitiges Handeln Eigentum oder ein anderes dingliches Recht zu erwerben". Examples of *Gestaltungsrechte* relating to the acquisition of property rights under the BGB are § 456 (*Wiederkaufsrecht*) and § 463 (*Vorkaufsrecht*), which are a repurchase right and pre-emption right respectively, and § 956(1) which allows an entitled party to obtain ownership of the products or components of a thing by taking possession. And see Wolf and Neuner, *Allgemeiner Teil des Bürgerlichen Rechts* 237.

[70] Eg in the case of pre-emption rights.

[71] Wolf and Neuner, *Allgemeiner Teil des Bürgerlichen Rechts* 239 f.

[72] For details of *Anwartschaftsrecht*, see eg M-R McGuire, "National Report on the Transfer of Movables in Germany", in W Faber and B Lurger (eds), *National Reports on the Transfer of*

immediate rights and protections for specific property given by *Anwartschaftsrechte* extend beyond those available to a chargeholder before attachment. These include the right of use and enjoyment of particular property, delictual rights against those who damage the property, and some protection against the insolvency of the "owner".[73]

(3) Transfer of the floating charge

2-24. Before attachment a floating charge itself may be transferred by assignation and intimation to the debtor,[74] which is the form of transfer used for personal rights.[75] This implies that a floating charge, even before attachment, is itself an item of property.[76] However, it is clear that it is not a typical claim-right. Perhaps due to a floating charge's potential to become a real interest, it is assumed that, even if the

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Movables in Europe vol 3 (2011) 28 f, who notes that it can be translated as an "equitable interest"; J F Baur and R Stürner, *Sachenrecht*, 18th edn (2009) 30 ff and 843 ff, who state at 30-31: "… die Anwartschaft mehr ist als eine bloβe Erwerbsaussicht, weniger als das Vollrecht".

[73] The floating charge requires attachment (and thus a change in its nature) to affect property directly in insolvency, albeit that attachment will be automatic upon liquidation or receivership.

[74] Ie the chargor. The extent to which the floating charge is accessory to the underlying debt is unclear; Companies Act 1985 s 462(1) suggests that there needs to be a present or future obligation for the charge to secure and, at least initially, the chargeholder and the creditor of the secured obligation must apparently be the same party. In *Libertas-Kommerz GmbH v Johnson* 1977 SC 191 the court accepted that the charge and the debt-claim were both transferred under the assignation documentation, with intimation by exchange of letters only occurring after attachment of the charge. However, the court did not expressly consider the accessoriness issue. See also the style assignation of a bond and floating charge in J M Halliday, *Conveyancing Law and Practice in Scotland*, 2nd edn by I J S Talman, vol 2 (1996) para 56-31. And see *Joint Liquidators of Simclar (Ayrshire) Ltd v Simclar Group Ltd* [2011] CSOH 54, 2011 SLT 1131, in which a charge was assigned (after attachment) but without the chargeholder's debt also being assigned. See Hardman, *Practical Guide to Granting Corporate Security* para 6-30 for some further discussion of accessoriness and transfer of floating charges. It has been judicially decided that standard securities are enforceable where they are held by a party that is not the creditor: *3D Garages Ltd v Prolatis Co Ltd* 2017 SLT (Sh Ct) 9 and *UK Acorn Finance Ltd v Smith* 2014 Hous LR 50. See Scottish Law Commission, *Discussion Paper on Heritable Securities: Pre-default* (Scot Law Com DP No 168, 2019) paras 3.21 ff and 10.2 ff for discussion. It is unclear how far the law of standard securities here could be applied to floating charges. For more in-depth consideration of accessoriness, see A J M Steven, "Accessoriness and Security over Land" (2009) 13 EdinLR 388.

[75] See *Libertas-Kommerz GmbH v Johnson* 1977 SC 191; Scottish Law Commission, *Memorandum on Examination of the Companies (Floating Charges) (Scotland) Act 1961* (Scot Law Com Memorandum No 10, 1969) para 62; Scottish Law Commission, *Report on the Companies (Floating Charges) (Scotland) Act 1961* (Scot Law Com No 14, 1970) para 19. Cf W Lucas, "The Assignation of Floating Charges" 1996 SLT (News) 203 who criticises the current position and proposes a registration requirement for the assignation of floating charges. Were the relevant provisions to come into force, the registration of an assignation of a floating charge would be provided for by Bankruptcy and Diligence etc (Scotland) Act 2007 s 42. This was recommended by the Scottish Law Commission, *Report on Registration of Rights in Security by Companies* (Scot Law Com No 197, 2004) para 2.20. For the transfer of personal rights, see ch 9 below.

[76] It is an item of property which could also be involuntarily assigned to a trustee in sequestration, prior to attachment, if the holder was a natural or legal person subject to sequestration: see eg the Scottish Government's *Explanatory Notes* to the Bankruptcy and Diligence etc (Scotland) Act 2007, para 128.

chargor and chargee agreed a prohibition on the charge's assignation, such a transfer by the chargee would be valid, albeit in breach of the parties' agreement. By contrast, a claim-right would be intrinsically limited and non-transferable by virtue of an agreement not to transfer.[77]

2-25. When we consider the floating charge from a general transfer perspective, it is a *sui generis* package consisting of (i) conditional or unconditional personal powers regarding placing the chargor into liquidation, receivership or administration, and (ii) a conditional real interest relating to each item of charged property in the chargor's property and undertaking, the condition of which is purified when attachment occurs.[78] These things are not synonymous but they cannot be separately transferred. It is the floating charge that is transferred and such a transfer gives the transferee both (i) and (ii).[79] Indeed, the independent yet connected content of these atomised elements of the floating charge is shown by the fact that the exercise of (i) can fulfil the condition of (ii), but (ii) can be realised without the exercise of (i) (eg if the chargor is placed into liquidation upon the petition of another party or if the company enters voluntary liquidation), which can render the need to use (i) redundant or make it unavailable.

D. ANALOGIES

2-26. Analogies with other areas of Scots law fail to offer any clearer answers as to the floating charge's nature before attachment. The term "attach" did not have a single, clear, pre-existent meaning in Scots law before the floating charge was introduced,[80] but was (and is) sometimes used to describe the effect of certain diligences as akin to that of a real security.[81] This is in contrast to the more limited "litigious" effect of other diligences.[82] It might be asked whether the distinction between litigiosity and attachment for diligences corresponds to the nature of a floating charge before and after its attachment. However, litigiosity is of no

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[77] See eg *James Scott Ltd v Apollo Engineering Ltd* 2000 SC 228. And see paras 9-09 ff below.

[78] Although the chargeholder can change through transfer, the party subject to the charge cannot (even with the permission of the chargeholder). This is because it is not specific property that is charged by a floating charge, but the *chargor's* property at a future point. The alternative is also undesirable on registration and ranking grounds.

[79] Also, in the unlikely event that a chargeholder's creditor wished to carry out diligence over the charge, (i) and (ii) would, seemingly, be conjointly subject to adjudication (Scots law's default diligence), given the inapplicability of other diligences.

[80] See eg "attachment" in *Bell's Dictionary* 76, which is described as a judicial proceeding in English law, equivalent to arrestment in Scots law. (See also the related term "attachiamentum", at 76.) The term did not seem to be commonly used for voluntary security rights.

[81] See eg *Lucas's Trs v Campbell & Scott* (1894) 21 R 1096 at 1101 ff per Lord Kinnear; Bell, *Principles* § 2272; Stewart, *Diligence* 1. And see para 9-47 below. It is also often stated that such a diligence-creditor acquires a "nexus" over the property – see eg *Lord Advocate v Royal Bank of Scotland* 1977 SC 155 in which both terms are used. The term "attach" is now most obviously applicable to the diligence of attachment: see Debt Arrangement and Attachment (Scotland) Act 2002 ss 10 ff, which introduced this diligence.

[82] For discussion, see G L Gretton, "Diligence" in *Stair Memorial Encyclopaedia* vol 8 (1992) paras 115 f and 285 f.

assistance in describing the floating charge's relationship with property before attachment. The charge allows the debtor to transfer property and this would be prohibited by litigiosity.

2-27. Certain comparisons can be made between property in a trust and property over which a floating charge has been granted.[83] Both chargor and trustee may deal with property freely, the property fluctuates and changes, yet the chargeholder and beneficiary have potential interests in whatever property is held by the chargor or trustee at a given point. But a beneficiary has a vested or contingent personal right against the trustee as regards property in the latter's *trust* patrimony. By contrast, a chargeholder prior to attachment has certain conditional or unconditional powers, as well as a conditional real interest in property, in the chargor's *private* patrimony.

2-28. The landlord's hypothec has been described as a "form of floating security"[84] and does resemble the floating charge in particular ways, even though it is an implied (tacit) security right. The hypothec applies to changing assets and, formerly, its nature (apparently) altered when enforced by a special diligence, sequestration for rent, whereby the hypothec was "converted into an attachment of specific subjects".[85] The abolition of sequestration for rent and the current statutory provisions suggest that the hypothec now has a unitary nature from its creation onwards,[86] but it is open for debate whether the hypothec is currently a real right or merely a preference.[87] In fact, there remains a stronger argument for the hypothec being a real right in security, as the landlord still has certain rights or powers relating directly to particular property.[88] Also, as the former nature(s) of the hypothec are under-researched and the current position has been referred to as a "theoretical mess",[89] the hypothec is (currently) of little help in analysing the floating charge.[90]

[83] In English law, a number of commentators have drawn comparisons between trusts and floating charges: see eg Nolan, "Property in a Fund", and *Goode and Gullifer on Legal Problems of Credit and Security* para 4-04. See also A D J MacPherson, "Trusts and Floating Charges in Scots Law: A Tale of Two Patrimonies?" (2018) 22 EdinLR 1.
[84] R Rennie et al, *Leases* (2015) para 17.17. However, in its relationship with the floating charge it is a "fixed security arising by operation of law": see paras 8-61 f below.
[85] Gloag and Irvine, *Rights in Security* 430 and, generally, 416 ff. And see A McAllister, *Scottish Law of Leases*, 4th edn (2013) para 6.6. Cf D A Brand et al, *Professor McDonald's Conveyancing Manual*, 7th edn (2004) para 25.94, where it is stated that only through sequestration for rent was the hypothec "converted into a real right".
[86] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208.
[87] See McAllister, *Scottish Law of Leases* para 6.6, and the sources cited there.
[88] For the remedies traditionally available, see G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967) 212 ff. Under the Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(2) the landlord's hypothec ranks in any insolvency or ranking situation as a right in security, and other remedies may still be available to the landlord: see McAllister, *Scottish Law of Leases* paras 6.13ff.
[89] McAllister, *Scottish Law of Leases* para 6.17.
[90] The same applies to the agricultural charge, which the Agricultural Credits (Scotland) Act 1929 s 6(1) states is enforced by sequestration and sale in the same manner as the landlord's hypothec.

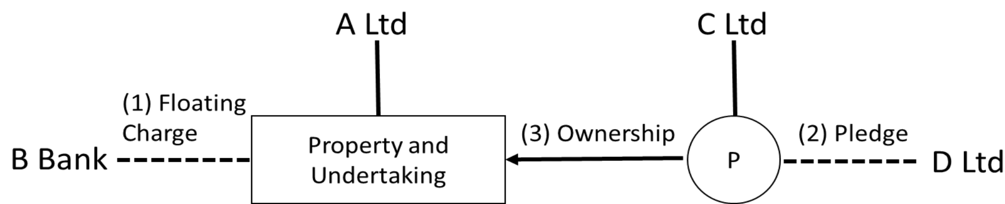
E. NEGATIVE PLEDGE

2-29. One final issue of note regarding the floating charge's nature before attachment is the status of the negative pledge. The inclusion in a floating-charge instrument of such a prohibition on the granting of prior- or *pari passu*-ranking security rights, enables the charge, upon attachment, to rank ahead of securities granted in breach of the prohibition.[91] This has the effect of ranking the floating charge from the date of its creation.[92]

2-30. When interpreting the Companies (Floating Charges) (Scotland) Act 1961 in *National Commercial Bank of Scotland v Liquidators of Telford Grier Mackay & Co*,[93] Lord President Clyde considered that the fact a floating charge could rank from its registration date (which has subsequently been replaced by the charge's creation date)[94] supported the view that the charge was a real right from the outset.[95] However, this was in the context of analysing the nature of the charge upon attachment. A negative pledge cannot be considered to give the chargeholder a real interest prior to attachment: there are no property effects unless and until attachment occurs. Furthermore, the negative pledge is probably only binding on the acts of the chargor. Let us take an example:

> On day 1 A Ltd grants a floating charge, with negative pledge, over all of its present and future property, to B Bank. On day 2 C Ltd creates a pledge[96] over item of property P in favour of D Ltd. Then on day 3 C Ltd transfers ownership of P to A Ltd. At some later point B Bank's floating charge attaches to P (and other property). The diagram below assists with this scenario. The issue is whether the negative pledge enables B Bank to prevail over the pledgee, D Ltd.

[91] Companies Act 1985 s 464(1)(a), (1A).
[92] See para 1-06 above for the meaning of creation.
[93] 1969 SC 181.
[94] The date from which a floating charge with negative pledge now ranks is actually rather complicated: see A D J MacPherson, "Registration of Company Charges Revisited: New and Familiar Problems" (2019) 23 EdinLR 153, 165 ff.
[95] 1969 SC 181 at 194 f per Lord President Clyde, referring to Companies (Floating Charges) (Scotland) Act 1961 s 5(2).
[96] This could be another fixed security, such as a standard security.



2-31. Clearly, if *A Ltd* (rather than C Ltd) had granted the pledge after the creation of the floating charge, then B Bank would rank ahead. And the wording of the Companies Act 1985 s 464(1A), using a strict literalist construction, appears to lead to the same outcome in the example above, as it states that a negative pledge "shall be effective to confer priority on the floating charge over *any* fixed security or floating charge created after the date of the instrument".[97] However, when we consider the matter purposively, an alternative, more appropriate, interpretation arises. The negative pledge is contained in an instrument agreed between the chargor and chargeholder and which principally comprises personal rights and obligations for those parties. Prohibitions or restrictions on granting (referred to in s 464(1)(a)) must surely be directed solely towards the chargor, as third parties have not agreed to be bound by the instrument, and the charge and the corresponding negative pledge only apply to the *chargor's* property from time to time.

2-32. It would seem that the negative pledge could only potentially have any effect on the property from the time when it enters the patrimony of A Ltd, by which point D Ltd's security already exists. Also, the charge is registered against A Ltd, rather than the property in question. Therefore, subjecting parties like D Ltd to the consequences of a breach of the prohibition seems manifestly unjust, as D Ltd could not be expected to search the charges register against A Ltd (a party with no discernible connection to the property at that time). The effect of s 464(1A) therefore ought not to extend to security rights subsequently granted by third parties over property which later enters the chargor's patrimony.[98] The point has even greater weight if the Companies (Floating Charges) (Scotland) Act 1961 is used for interpretive purposes, and if consistency across the different iterations of the floating-charges legislation is sought. The Companies (Floating Charges) (Scotland) Act 1961 provided that a fixed security would rank ahead of a floating charge unless, *inter alia*, the charge was already registered and the instrument creating the charge

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[97] Emphasis added.
[98] The same should also apply to the following example. A Ltd owns P and grants a floating charge with negative pledge over P to B Bank, and then transfers P to C Ltd. C Ltd pledges P to D Ltd, before transferring ownership back to A Ltd. B Bank's floating charge then attaches to P.

"prohibited *the company* from subsequently creating…" prior- or equal-ranking fixed securities.[99]

2-33. The express reference to a floating charge with a negative pledge ranking from its registration date against fixed security rights was omitted from the Companies (Floating Charges and Receivers) (Scotland) Act 1972, and was not reinstated in the Companies Act 1985. This has led to a floating charge with negative pledge being interpreted as ranking from its execution,[100] a view which has been reinforced by s 464(1A) of the 1985 Act. This is unfortunate from a publicity and practical point of view. A preferable position would be for the floating charge only to be effective as from the date of registration. The Bankruptcy and Diligence etc (Scotland) Act 2007 s 38 would provide that a floating charge is only created upon registration in a new Register of Floating Charges; however, the relevant provisions are unlikely ever to be brought into force.[101]

2-34. A negative pledge confers on a chargeholder a contingent interest limited to ranking, which only affects property when attachment occurs and only as regards property in the chargor's property and undertaking at that point.[102] It can be interpreted as having, upon attachment, retroactive effect from the creation of the charge, but probably only as regards other security rights created by the chargor in breach of the negative pledge.[103] Alternatively, it may be considered as immediately limiting the power of the chargor to grant security rights ranking ahead of the floating charge, but with the effects of such limitation being dependent on the charge subsequently attaching to the property.

F. CONCLUSION

2-35. The identification of the floating charge's nature before attachment is not a purely academic exercise. There are many contexts in which such classification can have practical implications: where there are external Scots law rules which apply

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[99] Companies (Floating Charges) (Scotland) Act 1961 s 5(2)(c) (emphasis added). And see Parliamentary Debates, House of Commons, Official Report, Scottish Standing Committee, 20 June 1961, cols 25-27, where Forbes Hendry noted that ranking from the date of the charge's registration (against other securities) was more appropriate than from its date of execution, and this was considered to provide adequate notice to others. See also Law Reform Committee for Scotland, *Eighth Report* para 51 and Appendix II paras 4 f.

[100] *AIB Finance Ltd v Bank of Scotland* 1993 SC 588. But see para 1-06 above. The creation date of a floating charge is now generally considered to be the date of delivery of the charge instrument to the chargee but it is unclear whether this is also the relevant date for ranking purposes: MacPherson, "Registration of Company Charges Revisited" 165 ff.

[101] For discussion of why the provisions have not been brought into force, see A J M Steven, "Reform of Security over Moveables: Still a Longstanding Reform Agenda in Scots Law", in D Bain, R R M Paisley, A R C Simpson and N J M Tait (eds), *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller* (2018) 217, 225 f.

[102] As noted above, it does also have a pre-attachment ranking effect regarding priorities for appointing a receiver or administrator, but this is not directly property-related.

[103] But note that the creation of a prohibited fixed security apparently extends to the act of registration in the Land Register after creation of the charge, even if that registration is by the fixed-security holder and not the chargor: see *AIB Finance Ltd v Bank of Scotland* 1993 SC 588.

dependent upon a particular classification;[104] in the consideration of how to reform floating charges or areas of law interacting with floating charges; when dealing with new cases considering the effects of the floating charge; and in the categorisation of the floating charge in private international law.[105] It also gives indications as to whether the charge is truly anomalous or whether it can be integrated into existing Scots property law.

2-36. Between creation and attachment, a floating charge is not a real right; it only confers a potential interest in property belonging to the chargor at a future point. More precisely, it is a combination of different (but connected) personal rights, broadly defined to incorporate powers and conditional real interests. A floating charge with negative pledge also provides the chargeholder with a contingent ranking interest, which enables ranking from the date of the charge's creation, but which depends upon attachment for it to affect particular property.

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[104] Eg the application of doctrines, such as the "offside goals" rule, to the floating charge may be dependent upon how the charge is conceptualised. For details of the rule, see Reid, *Property* paras 695ff; J Macleod, "The Offside Goals Rule and Fraud on Creditors", in F McCarthy, J Chalmers and S Bogle (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (2015) 115. The relationship between the rule and the granting of security rights is not entirely clear: see D A Brand et al, *Professor McDonald's Conveyancing Manual*, 7th edn (2004) para 32.61; W M Gordon and S Wortley, *Scottish Land Law*, 3rd edn, vol II (forthcoming) paras 19-87 ff. Connected to the offside goals rule, a prohibition on the transfer of particular property in the floating charge instrument would probably not be part of the floating charge *per se*, even if valid, but rather a separate obligation.

[105] See eg C Bisping, "The Classification of Floating Charges in International Private Law" 2002 JR 195.

3 Attachment Events

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A. INTRODUCTION

3-01. The timing of attachment is significant. It is only from this moment that particular property is directly affected by the floating charge. The attached property might be different if the charge attaches on one particular date rather than sometime later. Between those two dates, the chargeholder could alienate or acquire property. In general, attachment is the point at which property must belong to the chargor to become attached. There is, though, uncertainty as to whether attachment also extends to property obtained after attachment takes place, and whether multiple attachments of one charge are possible. These issues will be considered below.

3-02. First, however, it is necessary to outline the events that cause a floating charge to attach. Considering these events, and the development of the law in this area, helps us to comprehend the function and purpose of the charge, as well as the chronological disparity between the charge's attachment and accompanying publicity to third parties.

B. THE ATTACHMENT EVENTS

(1) History

3-03. Originally, it was only possible for a floating charge in Scotland to attach upon liquidation of the chargor. The Law Reform Committee for Scotland believed that introducing receivership would necessitate codifying English law on the matter, and would thus be too complicated.[1] However, the Scottish Law Commission, when examining the issue a decade later, considered codification to be unnecessary and recommended providing for receivership. It did so on the ground that a receiver might, in some instances, "revive the fortunes of a company and prevent unnecessary liquidation" and because the rights of a chargeholder were "weakened by his inability to take possession of and realise the security without liquidation".[2] Furthermore, the arrival of receivership would further align the laws of England and Scotland in this area, an apparently desired goal.[3] Receivership was consequently introduced by the Companies (Floating Charges and Receivers) (Scotland) Act 1972 and the appointment of a receiver became an attachment event.[4]

3-04. This change involved a significant increase in chargeholders' powers as the ability to appoint a receiver gave greater control over when their floating charges would attach.[5] Furthermore, exercising this power displaces the existing management and transfers control of the company's property to the receiver, a party of the chargeholder's choosing. A receiver acts as an "agent" of the chargor company for the purposes of realising assets to pay the chargeholder.[6]

3-05. A further development, the general prohibition on administrative receivership introduced by the Enterprise Act 2002, has significantly curtailed the controlling power of the chargeholder.[7] This change represented a growing emphasis on survival of the company as a going concern and a belief that this could be better facilitated by a party running the business in the interests of all creditors, not just the chargeholder (as a receiver does).[8] Consequently, a chargeholder's general recourse is now to appoint an administrator, which does not automatically cause a floating charge to attach.[9] Despite the fact that administrators act in the interests of all creditors,

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[1] Law Reform Committee for Scotland, *Eighth Report* paras 39 f.

[2] The reference to "security" in this passage should be taken to mean the property subject to the security: see Scottish Law Commission, *Report on the Companies (Floating Charges) (Scotland) Act 1961* (Scot Law Com No 14, 1970) para 37. *Cork Report* para 495 was also praiseworthy about the role of receivers in rescuing companies and being able to dispose of the business as a going concern. See also A Keay and P Walton, *Insolvency Law: Corporate and Personal*, 4th edn (2017) para 7.1.

[3] SLC, *Report on the Companies (Floating Charges) (Scotland) Act 1961* para 38.

[4] Companies (Floating Charges and Receivers) (Scotland) Act 1972 ss 13(7) and 14(7).

[5] G L Gretton, "Reception without Integration? Floating Charges and Mixed Systems" (2003) 78 Tulane LR 307, 325 refers to the harm caused by the introduction of receivership and the fact that the receiver controls the debtor and acts for that party. He also refers to significant practical difficulties where the receiver is only appointed over some of the debtor's property.

[6] See paras 6-46 ff below.

[7] Insolvency Act 1986 s 72A, as inserted by Enterprise Act 2002 s 250(1).

[8] For the purpose(s) of administration: see Insolvency Act 1986 Sch B1 para 3. For a critical perspective on administrative receivership, see R J Mokal, *Corporate Insolvency Law: Theory and Application* (2005) 208 ff.

[9] See further below. Following proposals in the *Cork Report*, administration was first introduced into Scots law by the Insolvency Act 1985 ss 27 to 44, and then consolidated in the Insolvency Act 1986 ss 8 to 27, but few used the regime before the Enterprise Act 2002 reforms (which included the ability

however, there are often close links between them and charge-holding financial institutions.[10] Furthermore, the mere ability to appoint an administrator gives significant power to a qualifying floating-charge holder.[11]

(2) Current law

3-06. Under the current law, a floating charge attaches upon the occurrence of any of the following events: (i) the company going into liquidation;[12] (ii) the appointment of a receiver by the chargeholder,[13] or by the court[14] upon the chargeholder's application; (iii) a court consenting to a distribution by an administrator to a party other than a secured creditor, preferential creditor or by virtue of the prescribed part;[15] and (iv) the delivery of a notice by an administrator to the registrar of companies specifying that, in the administrator's view, the company has insufficient property to enable a distribution to unsecured creditors (other than by virtue of the prescribed part) to take place.[16]

3-07. A receiver can still be appointed in certain circumstances. It can be done where the floating charge does not attach to the "whole or substantially the whole" of the company's property, in which case the receiver will not be an administrative receiver.[17] There are also a number of specific exceptions to the prohibition on the appointment of an administrative receiver.[18] And floating charges created before 15 September 2003 still give their holders the power to appoint an administrative receiver over the charged property, or to apply to the court for this.[19] The ability of

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to appoint an administrator out of court for the first time). For details regarding the history of administration, see St Clair and Drummond Young, *Corporate Insolvency* paras 5-01 ff.

[10] See eg St Clair and Drummond Young, *Corporate Insolvency* paras 5-05 and 5-80; and L Gullifer and J Payne, *Corporate Finance Law: Principles and Policy*, 2nd edn (2015) para 7.3.3.4.

[11] In the context of the collapse of BHS, a floating charge enabling the appointment of an administrator was described as a "weapon of mass destruction": for details, see https://www.ftadviser.com/pensions/2018/01/10/court-told-bhs-collapse-was-weapon-of-mass-destruction/.

[12] Companies Act 1985 s 463(1). A company goes into liquidation "if it passes a resolution for voluntary winding up or an order for its winding up is made by the court at a time when it has not already gone into liquidation by passing such a resolution": Insolvency Act 1986 s 247(2).

[13] Insolvency Act 1986 s 53(7). See s 53(6) for details as to when appointment of a receiver is effective.

[14] Insolvency Act 1986 s 54(6). As specified in s 54(5), the receiver will be regarded as having been appointed on the date of his appointment by the court.

[15] Insolvency Act 1986 Sch B1 para 115(1A)-(1B) in combination with para 65(3)(b). This attachment event was added by the Small Business, Enterprise and Employment Act 2015 s 130(2).

[16] Insolvency Act 1986 Sch B1 para 115(2), (3). This attachment event was added by the Enterprise Act 2002 Sch 16.

[17] See the combination of Insolvency Act 1986 ss 51, 72A(3), 251 and Sch B1 para 14. For discussion of the implications of restricting charged property before attachment, see St Clair and Drummond Young, *Corporate Insolvency* para 6-03.

[18] Insolvency Act 1986 ss 72B ff.

[19] Insolvency Act 1986 s 72A(4); Insolvency Act 1986, Section 72A (Appointed Date) Order 2003, SI 2003/2095, Art 2.

such chargeholders to block the appointment of an administrator[20] led to some creditors acquiring a charge for this very purpose: a so-called "lightweight floating charge".[21] In addition, some lenders providing finance have sought the transfer of pre-Enterprise Act floating charges from other lenders in order to obtain the advantages of such a security. Those with floating charges created before 15 September 2003 do also have the ability to appoint an administrator instead, which might be preferable to receivership in certain instances.[22] As time passes, it may reasonably be expected that the volume of receiverships in Scotland will continue to decline. Yet, although there is a general downward trend, receiverships are still taking place each year.[23]

3-08. Despite administration largely replacing receivership it is notable that the appointment of an administrator does not cause a floating charge to attach.[24] Instead, on the basis of the administration attachment events described above, what underlies attachment in administration is either: (a) that a court has consented to a lower-ranking party receiving a distribution, or (b) that there are insufficient assets to pay parties ranking below the chargeholder. The charge therefore attaches to protect the ranking preference of the chargeholder in a distribution context and to enable a distribution to be made to the chargeholder.[25]

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[20] An administrator cannot be appointed where there is an administrative receiver, unless the person appointing the receiver consents (or in certain other cases relating to challengeable transactions): Insolvency Act 1986 Sch B1 paras 17(b) and 39(1).
[21] See St Clair and Drummond Young, *Corporate Insolvency* para 5-28; D Cabrelli, "The Case Against the Floating Charge in Scotland" (2005) 9 EdinLR 407, 414. However, the existence of a *non*-administrative receiver does not seem to stop the appointment of an administrator: Insolvency Act 1986 Sch B1 paras 17(b) and 39(1); para 41(1) provides that an administrative receiver shall vacate office when an administration order takes effect, while 41(2) states that a receiver of part of the company's property shall vacate office only "if the administrator requires him to".
[22] Although an administrator's appointment does not cause a charge to attach and he acts in the interests of all creditors, there are certain circumstances in which it is advantageous for a chargeholder to appoint an administrator: notably, administration is expressly included by Regulation (EU) 2015/848 on insolvency proceedings (Recast Insolvency Regulation), while receivership is not (see Annex A of that Regulation).
[23] Statistics show that there were five receiverships in each year from 2016 to 2018 and two in 2019. As recently as 2012 there were 31: see Insolvency Service, *Company Insolvency Statistics October to December 2019 Tables* (2019), Table 4 (available at https://www.gov.uk/government/statistics/company-insolvency-statistics-october-to-december-2019). Figures for Scottish companies are also available from the Accountant in Bankruptcy website, but these differ from the Insolvency Service figures as they correspond to financial years (rather than calendar years) and depend upon the AiB administrative system's data: https://www.aib.gov.uk/about-aib/statistics-data/quarterly-statistics. The AiB's statistics disclose that there were 122 receiverships recorded in 2002-3 (ie the final year before the Enterprise Act 2002 reforms came into force): https://www.aib.gov.uk/about/statistics-data/aib-corporate-insolvency-statistics-2000-present.
[24] This means that in administration the charge is unattached. By statutory provision, it no longer covers property disposed of by the administrator, but does encompass property acquired by the company in place of that property disposed of: Insolvency Act 1986 Sch B1 para 70.
[25] See eg Insolvency Act 1986 Sch B1 paras 115-116. And see eg the *Explanatory Notes* to the Small Business, Enterprise and Employment Act 2015 paras 747 ff. Paras 115(1) and 116(e) and the *Explanatory Notes* confirm that only attached charges allow for distribution to a floating-charge holder.

3-09. As Cabrelli has pointed out, there is a strong argument that floating charges ought to attach upon an administrator's appointment, as was once thought to be the case in England.[26] However, there is now growing support for the view that, unless a provision in the charge agreement provides otherwise, the appointment of an administrator does not cause a charge to crystallise in English law.[27] It may, nevertheless, be queried why the appointment of an administrator does not cause a floating charge to attach in Scots law. This outcome would be consistent with the position for attachment upon liquidation and receivership, and would align the real effect of a floating charge with the commencement of a process that is being used for the charge's enforcement.[28] If attachment did take place upon administration, policy considerations regarding the use of administration as a recovery process for companies would probably need to be taken into account when formulating the law. This issue could be (partially) addressed by providing that a charge that had attached upon administration would "re-float" when the chargor exited that process. Under the current law the need for such a rule is obviated and an administrator also has the convenience of being able to dispose of charged property as if it were not subject to the charge,[29] but this power could be preserved even if administration caused immediate attachment of a floating charge.[30]

3-10. Cabrelli also considers whether non-attachment upon administration can be circumvented by an "automatic attachment" clause in the instrument creating the floating charge. He rightly doubts that a court would accept automatic attachment

[26] D Cabrelli, "The Curious Case of the 'Unreal' Floating Charge" 2005 SLT (News) 127. The law has not been changed to accommodate this suggestion.

[27] See eg *Goode and Gullifer on Legal Problems of Credit and Security* para 4-45. (By contrast, it had been suggested in L Gullifer (ed), *Goode on Legal Problems of Credit and Security*, 4th edn (2008) paras 4-37 and 4-42 that appointment of an administrator by the debenture holder did crystallise the charge.) The apparent justification of the position outlined in the current edition is that the administrator acts in the interests of a wide range of parties (with corresponding duties), not just the chargeholder, and can dispose of charged assets without the court's leave. Thus, the chargeholder arguably does not exercise control through the appointment of an administrator alone (see the categories of crystallisation specified in n 35 below). See also *Goode on Principles of Corporate Insolvency Law* para 11-31; *Goode on Commercial Law* para 25.17. Cf G Lightman and G S Moss, *The Law of Administrators and Receivers of Companies*, 5th edn (2011) para 3-062.

[28] In the absence of attachment of the charge, questions may also be asked as to how the unattached charge would rank against any security rights granted by the administrator over the company's property. Even if the floating charge had a negative pledge, would this affect the ranking of administrator-granted security rights (due to that party's status as "agent" of the company), or is the grant of security by the administrator unaffected by the negative pledge? The former is the preferable position but the answer is not certain.

[29] Insolvency Act 1986 Sch B1 para 70. By contrast, if an administrator wishes to dispose of property that is subject to a fixed security as if it were not subject to that security, a court order is required: Sch B1 para 71.

[30] Indeed, the Insolvency Act 1986 Sch B1 para 70, is not expressly limited to unattached floating charges and therefore presumably also applies to attached charges, despite the fact that a floating charge attaches as if it were a fixed security. See Sch B1 para 111(1), which states that floating charge "means a charge which is a floating charge on its creation". See also s 251, which provides that a floating charge "means a charge which, as created, was a floating charge and includes a floating charge within section 462 of the Companies Act".

based upon agreement by the chargor and chargee.[31] Floating charges are a statutory creation, and all of the attachment points are also statutorily defined.[32] No express power is given by statute to parties to agree a separate attachment event, either through notice by the chargeholder or automatically upon an event occurring. Furthermore, the rejection of floating charges at common law and the absence of publicity, in spite of the purported creation of a real interest upon attachment, negates the possibility of there being a non-statutory power that enables a charge to attach. A functionally similar alternative is possible where receivership is available; the parties can agree precisely when receivership may take place. Yet this will still involve a delay (albeit a potentially very short one) between the event allowing for receivership and attachment, as the chargeholder must still take the active step of appointing the receiver.[33]

3-11. The Scottish position on automatic attachment can be contrasted with England where contractually-agreed automatic crystallisation is effective, as is crystallisation where notice is given by the chargeholder in accordance with the charge agreement.[34] In general terms, the attachment events in Scots law are narrower and more limited than in England, where they are numerous and varied.[35] This is due to the statutory constrictions of attachment in Scotland, in comparison to the contractual and equitable origins and development of the English floating charge. Scots law also places a higher value on publicity to third parties than English law and it is therefore understandable that contractually agreed crystallisation is permissible in English law but not in Scots law. To allow such crystallisation in Scotland would exacerbate some of the issues involving the floating charge's relationship with property law and would mean that a charge could have priority over competing rights due to a "private" attachment event that involves even less publicity than the existing attachment events (as to which see further paras 3-16 ff below). In addition, it would increase uncertainty as to whether a floating charge had already attached at any given point and could therefore affect the willingness of third parties to transact with the chargor.

(3) Attachment events and the purpose of the floating charge

[31] D Cabrelli, "The Curious Case of the 'Unreal' Floating Charge" 2005 SLT (News) 127, 130 f. Cabrelli cites the *obiter* views of Lord Penrose in *Norfolk House Plc (In Receivership) v Repsol Petroleum Ltd* 1992 SLT 235. Cabrelli's position is also supported by the *Explanatory Notes* to the Small Business, Enterprise and Employment Act 2015 paras 748 f. Cf D A Brand et al, *Professor McDonald's Conveyancing Manual*, 7th edn (2004) para 34.7.

[32] See eg D A Bennett, "Companies" in *Stair Memorial Encyclopaedia*, Reissue (2013) para 166; R R M Paisley, *Land Law* (2000) para 11-27.

[33] See Insolvency Act 1986 s 52.

[34] See *Re Brightlife Ltd* [1987] Ch 200; S D Girvin et al, *Charlesworth's Company Law*, 18th edn (2010) para 25-015; *Goode and Gullifer on Legal Problems of Credit and Security* paras 4-51 ff. But see paras 4-55 ff of the latter for some drawbacks relating to automatic crystallisation clauses.

[35] See eg *Goode and Gullifer on Legal Problems of Credit and Security* paras 4-32 ff. There, crystallising events are placed into three categories (excluding agricultural charges): (1) events denoting cessation of trading as a going concern; (2) intervention by debenture-holder to take control of assets; and (3) other acts or events specified in the debenture as causing crystallisation.

3-12. The traditional account of the floating charge's principal purpose is that it is a device used to give security, over a range of property, by way of ranking priority. This view has been challenged in relation to English law by Mokal, who describes the floating charge as a "residual management displacement device" (for the replacement of failed or failing management), which works optimally only as part of a "package of security interests" over all, or the majority of, the chargor's property.[36] Mokal therefore emphasises a control-based explanation of the charge rather than a traditional priority-based one.[37] In other words, parties seek to obtain a floating charge primarily because of the control it offers them over the chargor's business, rather than to give a security preference over property.[38] This is partly because of the low-ranking priority of the English floating charge and the consequent limitations on how much chargeholders tend to recover, as displayed by certain empirical evidence.[39] As Mokal notes, the value of the charge has also diminished due to changes arising from the Enterprise Act 2002, including the general replacement of receivership with administration.[40] But to what extent is Mokal's analysis applicable to the floating charge in the Scottish context?

3-13. The use and function of the Scots law floating charge have, to some extent, developed in accordance with the changing means of attachment and enforcement. Originally, the limitation of attachment to liquidation meant that the primary value of the charge was as security over a range of property in the chargor's insolvency (in combination with allowing the chargor freedom to trade up to this point). This was, however, accompanied by the threat of a chargor being placed into liquidation where the chargeholder's floating charge was jeopardised. The introduction of receivership made the floating charge more of a dual-purpose device, based upon the chargor's control as well as the charge's priority effect. The chargeholder could thereafter appoint a receiver (or apply to the court for such appointment) as the controller of charged property, and the receiver would act in the interests of the chargeholder and seek to make distributions to it. The appointment could (and can) occur at a time of the chargeholder's choosing, so long as agreed or statutory conditions were fulfilled. Even with the general abolition of administrative receivership, appointing a receiver remains an attractive proposition for the control it confers and, therefore, a limited-assets floating charge is sometimes sought by a lender.

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[36] R J Mokal, *Corporate Insolvency Law: Theory and Application* (2005) 194.

[37] Mokal, *Corporate Insolvency Law* 195. In doing so Mokal refers to J Armour and S Frisby, "Rethinking Receivership" (2001) 21 OJLS 73, 90 (who note that it is "conceptually possible" to imagine a system in which a floating charge confers only "control rights" and no priority benefits), and J Franks and O Sussman, "The Cycle of Corporate Distress, Rescue and Dissolution" (IFA Working Paper 306, 2000) 6.

[38] Control in this context differs from the control element distinguishing fixed and floating charges in English law, as considered in *Re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680.

[39] See Mokal, *Corporate Insolvency Law* 191 f and the sources cited there. Cf K Akintola, "What is Left of the Floating Charge? An Empirical Outlook" (2015) 7 JIBFL 404, who uses more recent empirical data on administrations to challenge the notion that insolvency law has limited the charge to being a "control/management-displacement device".

[40] Mokal, *Corporate Insolvency Law* 219 ff.

3-14. The largescale replacement of receivership with administration has, however, diminished the traditional security function of the charge. Anderson and Biemans suggest that floating charges are now largely used in Scotland (and England) as a "residual security document", the "primary utility" of which is to provide the chargeholder with a power to appoint an administrator.[41] Certainly, the function of the floating charge has shifted, in relative terms, away from a security function towards control (even though administration gives a chargeholder less absolute control than receivership). This is largely because, unlike with receivership, attachment, and corresponding priority effects and distribution requirements, are not connected directly to the onset of administration. But the floating charge's security function still retains significance, particularly as compared to England. In English law, a wider range of alternative security rights is available whereas in Scots law there are inconvenient formalities for creating other security rights. One can therefore speculate that floating charges in Scotland are still often obtained to confer a ranking priority. The ranking preference of a Scottish floating charge with negative pledge against later fixed securities, in contrast to the more nuanced ranking relationships in England,[42] also supports this conclusion. Unfortunately, there is an absence of collated data regarding recovery percentages by chargeholders under Scots law, relative to other security-holders, preferential creditors and unsecured creditors. This means it is difficult to use empirical evidence to bolster a particular explanation of the Scottish floating charge, including in comparison to the English version.[43] What is certain is that the move towards administration has also diminished the chargeholder's control over the precise timing of the charge's attachment.

3-15. Finally, in Scotland (as in England) creditors often obtain fixed securities over various items of property, especially immoveable property, in addition to the floating charge. This gives creditors more control and protection over specific items:

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[41] R G Anderson and J Biemans "Reform of Assignation in Security: Lessons from the Netherlands" (2012) 16 EdinLR 25, 32.

[42] The ranking position of floating charges in English law has, however, been somewhat improved (since 6 April 2013), as the existence of a negative pledge now requires to be disclosed to the registrar in a statement of particulars, and the information appears on the charges register (Companies Act 2006 s 859D). Persons who consult that register are likely to be considered to have notice of the negative pledge, and this can have ranking consequences: see *Goode on Commercial Law* para 24.47ff. It is also interesting to ponder the impact of this bolstering of the floating charge's ranking priority with respect to Mokal's thesis (see above at para 3-12).

[43] Mokal, *Corporate Insolvency Law* 191 f used data of recoveries by secured creditors, preferential creditors and unsecured creditors to ascertain how much a chargeholder recovered under the pre-Enterprise Act 2002 law. The equivalent data for Scotland in R3, *9th Survey of Business Recovery in the UK* (2001) 27, is "marginally too small to be statistically sound but still provides indicators and trend analysis". The statistics are, however, consistent with the view that floating charges have more of a priority purpose in Scots law than in English law. Unfortunately, post-Enterprise Act 2002 figures are unavailable. More up-to-date information for the UK as a whole (received 3 November 2015 via a Freedom of Information request to the Insolvency Service) shows that in a sample of 165 administrations from 2012-13, secured creditors (excluding floating-charge holders) received 50% of their debt, preferential creditors 26%, floating charge holders 13%, and unsecured creditors 0.3%. In a number of these cases the chargeholder also held another security right (or rights) and the recovery percentages correspond to how much was recovered due to the floating charge and the other security right(s) respectively.

the debtor will be subject to various restrictions regarding the use of the property; the property cannot be sold unencumbered without the creditor's permission; and fixed securities rank ahead of preferential creditors and are not postponed to a prescribed part. Having a floating charge as well as fixed security is of value as the charge allows a creditor to obtain an interest in a wider range of property than fixed security (in practical terms). The charge's enforcement mechanisms offer a further advantage, especially in comparison to the relatively cumbersome enforcement procedures for a standard security.[44]

(4) Publicity

3-16. The timing of attachment can cause practical difficulties because, just as there is an absence of publicity accompanying the creation of a floating charge, there is often a lack of publicity upon attachment.[45] Given that attachment has real effect, and thus affects the rights of third parties, some form of registration (or equivalent) should ideally be a precondition for attachment. This would cohere with the publicity principle, whereby some form of public act is necessary to establish a real right. Such an act would provide a means of notice for third parties who might wish to transact with the chargor but who would be adversely affected by an attached charge. In general terms, greater certainty would be provided to all interested parties, and the costs of discovering the true status of the charge would be minimised.

3-17. The present law falls short of this standard. When a chargeholder appoints a receiver, the charge attaches immediately, a further seven days being allowed for delivery of a copy of the instrument of appointment and a notice to the Accountant in Bankruptcy and registrar of companies, for registration purposes.[46] There is thus a chronological disparity between attachment and registration. And even the failure to register within the prescribed time period will only lead to a fine[47] rather than invalidating or delaying the attachment. There are equivalent registration and penalty provisions which apply after the appointment of a receiver by the court.[48] When the Scottish Law Commission recommended the introduction of receivership, they had proposed that a receiver would only be appointed, and therefore a floating charge

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[44] It would even be possible for the same creditor to take a limited-assets floating charge over certain heritable property along with a higher-ranking standard security. This would seem to allow for enforcement through the appointment of a receiver but with the secured creditor receiving proceeds in priority to, *inter alia*, preferential creditors and the prescribed part, due to the secured creditor holding the prior-ranking standard security. The enforcement of standard securities is currently being reviewed by the Scottish Law Commission.

[45] See eg Scottish Law Commission, *Report on Sharp v Thomson* (Scot Law Com No 208, 2007) paras 5.1 ff for criticism.

[46] Insolvency Act 1986 s 53(1); Scotland Act 1998 Sch 8 para 23. And see *Greene and Fletcher, Law and Practice of Receivership* paras 10.01 ff; D W McKenzie Skene, "Corporate Insolvency", in *Stair Memorial Encyclopedia*, Reissue (2008) para 155. See also Insolvency Act 1986 s 53(5) regarding the registrar having to enter the particulars of appointment in the register.

[47] Insolvency Act 1986 s 53(2).

[48] Insolvency Act 1986 s 54(3); Scotland Act 1998 Sch 8 para 23. And see McKenzie Skene, "Corporate Insolvency" para 156. See also Insolvency Act 1986 s 54(4) regarding the registrar having to enter the particulars of appointment in the register.

would only attach, when the registrar of companies issued a certificate of appointment of the receiver.[49] However, a less publicity-conscience model, in line with English law, was chosen.[50]

3-18. Where a company goes into liquidation upon the making of a court winding-up order, a copy of that order is to be sent "forthwith" to the registrar of companies[51] and Accountant in Bankruptcy.[52] This is in addition to earlier publicity requirements relating to the petition for winding up.[53] But, again, there might be a delay between the attachment of a charge and the registration of the attachment event, albeit that the court proceedings would provide some form of notice to existing interested parties. If the winding up is voluntary, the company also has to give notice in the *Edinburgh Gazette* within 14 days after the passing of the resolution, otherwise the company and its officers are subject to a fine.[54] Likewise, these parties are subject to a fine if there is a failure to file a copy of the resolution with the registrar of companies and the Accountant in Bankruptcy within 15 days of the passing of the resolution.[55]

3-19. Attachment in administration, in the form of event (iv) listed at para 3-06 above, more closely complies with the publicity principle: a notice filed by the administrator with the registrar of companies causes attachment.[56] However, the other situation in which a charge attaches in administration, where the court gives permission for a distribution to certain parties, involves a weaker form of publicity than registration.[57] In any event, the publicity necessary for an attaching floating charge in the course of administration is likely to be limited as there is a moratorium on other parties enforcing security rights and obtaining diligence, while administration expenses rank ahead of the floating-charge holder.[58]

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[49] SLC, *Report on the Companies (Floating Charges) (Scotland) Act 1961* para 51.
[50] See also the comments by E Marshall on the Companies (Floating Charges and Receivers) (Scotland) Act 1972 ss 13 and 14, in *Current Law Statutes Annotated 1972*. For registration of the appointment of a receiver under English law, see now Companies Act 2006 s 859K.
[51] Insolvency Act 1986 s 130(1). When the floating charge was introduced, in 1961, the relevant time periods were different; however, the Law Reform Committee for Scotland, *Eighth Report* para 52 did not identify the problem raised by the time delay between attachment and the attachment event's publication through registration.
[52] Scotland Act 1998 Sch 8 para 23.
[53] See McKenzie Skene, "Corporate Insolvency" para 243, for details.
[54] Insolvency Act 1986 s 85(1), (2). But it is another matter whether offences under the legislation are actually prosecuted. And see Insolvency Act 1986 s 109, and Scotland Act 1998 Sch 8 para 23, for the notice requirements once a liquidator is appointed.
[55] Insolvency Act 1986 s 84(3) applying Companies Act 2006 ss 29-30; Scotland Act 1998 Sch 8 para 23.
[56] Insolvency Act 1986 Sch B1 para 115(2), (3). Also note the publicity requirements for administration itself in Insolvency Act 1986 Sch B1 paras 18(1) and 46; and see the earlier notice requirements detailed in McKenzie Skene, "Corporate Insolvency" paras 63 ff.
[57] Insolvency Act 1986 Sch B1 para 115(1A), (1B).
[58] For the ranking position upon attachment of the floating charge in administration, see Insolvency Act 1986 Sch B1 para 116. And for administration expenses, see Sch B1 para 99, and Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules 2018, SI 2018/1082, rr 3.50-3.52 and 3.115-3.116.

3-20. As well as there often being no reasonable means by which a third party can tell immediately that a floating charge has attached, the differing forms and timing of registration (or equivalent acts) following attachment are unnecessarily diverse and disjointed. Making registration in the charges register a compulsory constitutive act for attachment of a floating charge, irrespective of the enforcement method, would resolve these issues. The Scottish Law Commission recommended the introduction of a "no attachment without registration" principle across all types of enforcement mechanism.[59] However, the continued non-operation of Part 2 of the Bankruptcy and Diligence etc (Scotland) Act 2007 has blocked this reform, given that the Commission's recommendation depended upon the new regime of registration in the Register of Floating Charges which is provided for in Part 2.

3-21. Certain provisions in the 2007 Act would bring the floating charge further into line with the publicity principle in another respect: creation of a charge would only occur upon the registration of a document granting the charge (in the proposed Register of Floating Charges).[60] Under the current law, registration is not a precondition for either creation or attachment. There is, consequently, the possibility of "invisibility" periods, where third parties cannot tell from the register whether a floating charge has been created or attached.[61] Absurdly, a charge could potentially even be created *and* attach before *any* registration takes place.[62]

3-22. The problems created by the absence of publicity accompanying attachment mean that practical workarounds have to be resorted to. Most obviously, a third party acquiring property from a chargor will often seek a certificate (or letter) of non-crystallisation from the chargeholder. In this certificate the chargeholder will commonly state that the charge has not attached and that it will not be made to attach for a specified period of time.[63] The precise legal effect of such certificates is not certain, and in any case a chargeholder could be unwilling to provide what has been requested or could fail to respond, or the transaction might not be completed when

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[59] Scottish Law Commission, *Report on Sharp v Thomson* (Scot Law Com No 208, 2007) paras 5.2 ff. And see the clauses in the proposed Attachment of Floating Charges etc (Scotland) Bill appended to the Report, at Appendix A.

[60] Bankruptcy and Diligence etc (Scotland) Act 2007 s 38(3). But there would be certain special exceptions: see s 38(3A)-(3B). A 21-day advance notice period would also be possible (s 39).

[61] Although the issue is not free from difficulty, within the registration period after creation (see Companies Act 2006 s 859A and para 1-06 above) it seems that a not-yet registered security is valid against all parties, but is rendered invalid against various parties if there is a failure to register within the time limit.

[62] This unlikely event would arise if there was attachment prior to the expiry of the registration period after creation. (Registration within that period would still, however, probably be necessary.) The registration of the attachment event could also, apparently, occur before the registration of the charge's creation.

[63] See eg G L Gretton and K G C Reid, *Conveyancing*, 5th edn (2018) para 29-09. As Gretton and Reid note, it is often advisable for the certificate to contain the chargeholder's express consent to the sale. Gretton and Reid also state that banks sometimes go further than this and provide a certificate expressly releasing the property from the security, which will often be preferable. With reference to letters of non-crystallisation, Hardman, *Practical Guide to Granting Corporate Security* para 10-39 suggests that relevant confirmations should be "limited to the recipient's awareness" and should "avoid providing an objective statement that the floating charge has not crystallised".

the specified time period expires. It is unfortunate that the law requires third parties to resort to this relatively unsatisfactory solution. A regime whereby a floating charge could only be created and attach upon registration would not only better integrate the floating charge into Scots property law, it would also provide more certainty. If a third party could rely on public registration to discover the status of a charge, it would minimise the costs of trying to discover whether the charge had attached and would reduce the need to seek (related) information from the chargeholder.

C. ATTACHMENT: EVENT AND PROCESS?

3-23. A floating charge attaches to property held by the chargor at the point of attachment.[64] Property which was earlier disposed of is not attached. But what is the status of property acquired after attachment? Is attachment a single event which only strikes property held when the charge first attaches, or is it also an ongoing process affecting certain newly obtained property the instant that property belongs to the chargor? This necessitates consideration of whether "acquirenda" are attached.

3-24. Although receivership is relatively rare now, the following section focuses on that process, as it featured in the leading case on the issue (and in subsequent commentary) and is more likely to involve post-attachment acquirenda than liquidation or administration. This is due to the combination of the receiver's role in managing the company's business (which is greater than a liquidator's) and the fact that a floating charge will already have attached (unlike in an administration).

3-25. Acquirenda issues revolve around examining the consequences of one general attachment event. However, what must also be considered is whether it is possible for a charge to attach on more than one occasion. And can a charge "re-float" and re-attach at a future point? The answers to these questions allow us to determine if attachment is a singular irreversible change in the charge's nature or whether the charge retains a residual floating effect and/or its attachment transformation can be reversed.

(1) Acquirenda

[64] As D P Sellar, "Future Assets and Double Attachments" (1985) 30 JLSS 242, 243 notes, this includes not only vested rights but even *spes*. Sellar explains this on the basis that the charge has effect as an assignation in security and such property can be assigned in security, but notes that, due to the requirement of intimation, only "contemplated" contingent rights will be attached. Alternatively, one could simply say that everything deemed "property" in Scots law may be attached by the charge (see ch 4 below).

3-26. According to *Ross v Taylor*,[65] the answer to whether acquirenda are attached depends upon whether the attachment event is liquidation or receivership.[66] In *Ross*, a company had entered receivership and subsequently liquidation. The (then-applicable) receivership provisions provided that the floating charge attached "to the property then subject to the charge",[67] and this was interpreted as tying the attachment of newly acquired property to the continuing effectiveness of the instrument of charge. Since the instrument subsisted until some point after the commencement of the chargor's liquidation, and it expressly covered all of the chargor's property, the charge was held to attach to property acquired by the chargor after the receiver's appointment. This was contrasted with the position for liquidation, the provisions for which stated that the floating charge attached "to the property then comprised in the company's property and undertaking".[68] That wording was believed to limit attachment to property held at the moment liquidation commenced.

3-27. The court's emphasis on the content of the charge instrument, however, overstates what can be agreed by the parties regarding the charge's coverage; in Scots law its extent is statutorily limited. This contrasts with the more contractually and equitably-driven position in England,[69] where it has been held that a debenture that creates a charge extends to choses in action obtained by a receiver after crystallisation.[70] However, it is possible to read the relevant English case as involving the shifting of the crystallised charge from sold goods to post-crystallisation choses in action arising from such sale, which might be consistent with the Scots law position outlined below.

3-28. The words "property *then* subject to the charge"[71] in the Scottish receivership provisions (present and past),[72] in combination with the fact that the provisions

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[65] 1985 SC 156.

[66] 1985 SC 156 at 161 f per Lord President Emslie. For discussion, see St Clair and Drummond Young, *Corporate Insolvency* paras 6-08 f; *Greene and Fletcher, Law and Practice of Receivership* paras 2.37 ff. And see McKenzie Skene, "Corporate Insolvency" para 164.

[67] Companies (Floating Charges and Receivers) (Scotland) Act 1972 s 13(7).

[68] Companies (Floating Charges and Receivers) (Scotland) Act 1972 s 1(2).

[69] Which makes the English floating charge more flexible and less narrow than the Scottish version. *Goode and Gullifer on Legal Problems of Credit and Security* para 4-65 notes: "The [English] floating charge owes nothing to statute; it is the pure creation of equity judges of the nineteenth century." There are other examples of the difference, such as in relation to "partial crystallisation", which is possible in England (but only if such a power is conferred by debenture) (see eg *Goode and Gullifer on Legal Problems of Credit and Security* paras 4-48 and 4-60), but not in Scotland, as attachment, by virtue of the legislation, extends automatically to all property covered by the charge at the given time (see eg St Clair and Drummond Young, *Corporate Insolvency* para 6-08, for receivership) and there is no scope for contrary contractual agreement.

[70] See the majority decision in *N W Robbie & Co Ltd v Witney Warehouse Co Ltd* [1963] 1 WLR 1324. See also *Goode and Gullifer on Legal Problems of Credit and Security* para 4-31. In *Ross* the court suggested *N W Robbie* and *Re Yagerphone Ltd* [1935] Ch 392 were limited to their facts and the content of the respective debentures. However, a debenture-focused approach (combined with statutory interpretation) seems nevertheless to have been influential in *Ross*.

[71] Emphasis added.

[72] Companies (Floating Charges and Receivers) (Scotland) Act 1972 ss 13(7) and 14(7); Insolvency Act 1986 ss 53(7) and 54(6).

apply at the moment when the receiver is appointed and the charge attaches, raise doubt as to whether acquirenda were truly intended to be covered.[73] But it is notable that the word "then" is missing from the administration attachment provisions, which suggests that the reasoning in *Ross* applies more forcefully in that context.[74] Yet, even the relevant wording for administration can still be read as referring to property charged at the moment of attachment.

3-29. The differing wording in the receivership and liquidation contexts is still applicable in the current legislation. It has been contended that there is no legal significance in this divergence, and McKenzie Skene also notes that it is not obvious whether the result in *Ross*, regarding acquirenda, would apply to the current receivership provisions.[75] However, despite recognising the changes in legislative wording over time, St Clair and Drummond Young suggest it is "clear", following *Ross*, that future assets of a company are attached in receivership.[76] Bennett argues in favour of uniformity for acquirenda across liquidation and receivership, stating that a chargeholder should not be prejudiced because of attachment in liquidation rather than receivership.[77] Sellar similarly queries why receivership, introduced as an additional enforcement mechanism for floating charges, should extend the chargeholder's security.[78] The argument in favour of uniformity of attachment ought also to apply to administration.

3-30. Bennett is sceptical too regarding the correctness of floating charges attaching to anything beyond the rights held at the point of attachment.[79] It is certainly difficult to see why a chargeholder should receive a bonus of additional property in comparison to other creditors of the company.[80] The chargeholder has control over when it wants to appoint a receiver or administrator, and its general position of strength should not be further fortified by enabling it to have a priority interest in acquirenda.

(a) Realisation

3-31. Yet the force of the argument that the chargeholder should not have a claim to acquirenda, as it would benefit unfairly, depends upon what is meant by

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73 This argument was made (unsuccessfully) by counsel for the liquidator in *Ross* (at 161). See also D A Bennett, *Palmer's Company Insolvency in Scotland* (1993) para 207.
74 Insolvency Act 1986 Sch B1 para 115(1B), (3).
75 D W McKenzie Skene, *Insolvency Law in Scotland* (1999) 169. And at 154 n 43, she agrees with the apparent doubt expressed by St Clair and Drummond Young, *The Law of Corporate Insolvency in Scotland*, 2nd edn (1992) 139 (now 4th edn (2011) para 6-08), that the difference between the receivership and liquidation wording regarding attachment has "legal import".
76 St Clair and Drummond Young, *Corporate Insolvency* para 6-09.
77 *Palmer's Company Insolvency in Scotland* (1993) para 207.
78 Sellar, "Future Assets and Double Attachments" 243.
79 *Palmer's Company Insolvency in Scotland* para 207. See also G Morse (ed), *Palmer's Company Law*, 25th edn (looseleaf) para 13.209.2.
80 However, preferential creditors will, of course, rank ahead of the chargeholder and so will usually not lose out.

"acquirenda". Clearly, if attached property is sold, the chargeholder has a right to the proceeds.[81] This "realisation" is necessary to satisfy the debt due to a chargeholder. Indeed, it is only by virtue of a liquidator, receiver or administrator having the power and duty to realise attached property, and distribute, that a chargeholder can receive payment for sums due.

(b) Conversion

3-32. Beyond simple realisation of attached assets, much property received after attachment will, in some way, be connected to property which has been attached. One type of situation generating such post-attachment property is "conversion",[82] where attached property is exchanged for another item of property (other than monetary proceeds). Let us take an example:

> A Ltd grants a floating charge, over all of its property and undertaking, to B Bank. A Ltd agrees a contract for C Ltd to supply expensive machinery. Under the terms of the agreement, A Ltd is to make payment on a certain future date, and will receive ownership of the machinery upon such payment. However, before that date, B Bank appoints a receiver, R, to A Ltd. R considers that the contract is a favourable one and therefore makes payment with the result that A Ltd acquires ownership.

The money used for payment for the machinery had been attached by the floating charge. Where there is direct exchange of property, as in this case, there is a strong argument in favour of the charge attaching to the received property. If the charge affects proceeds of attached property sold, it ought also to affect other property acquired in return for charged property. It would, of course, be unjustifiably prejudicial to the chargeholder if property acquired in exchange for attached property was not itself attached. Indeed, the fact that the receiver is only appointed in relation to attached property, and therefore can only deal with these items, suggests that any property obtained in the course of a receiver's work with charged property ought to be covered by the charge.[83] And, in statutory terms, newly-obtained property, whether acquired through conversion or otherwise, may be considered property within the company's "undertaking", and thus attached by the charge.[84]

3-33. There may be cases where there is an imbalance between the value of the item received and the property used for payment. For instance, let us adjust the

[81] Indeed, Insolvency Act 1986 s 60(1) premises distribution to the chargeholder on the basis of moneys obtained by a receiver. See also Sch B1 paras 115-116, for administration.
[82] As this involves replacement of one piece of property with another, it fits into the wider concept of real subrogation.
[83] *Palmer's Company Insolvency in Scotland* para 208 suggests that because *Ross* involved a receiver using his powers to continue the company's business, and he was acting in the normal course of business, it was unnecessary to consider whether the charge attached the acquired stock.
[84] *Greene and Fletcher, Law and Practice of Receivership* para 2.37 notes the argument that the undertaking "includes the right to acquired property". See paras 4-39 ff below for more details regarding the meaning of "undertaking".

example above so that the contractual payment is by instalments, and R is appointed before the final instalment is due. The attached money R uses for the final instalment, which transfers ownership of the machinery, is of far lower value than the property received. Before payment the chargeholder only had an attached interest in the money; now it may have such an interest in a much more valuable item. This may be perceived as an unfair windfall. However, earlier payments were used to contribute to the overall price of the machinery and these moneys might otherwise have been in the estate and remained attachable by the charge. Therefore, the chargeholder seems entitled to the benefit.

3-34. In *Ross*, the court's fall-back position[85] was that the goods in question were re-acquired by the chargor, through the receiver, on credit terms and the effect regarding attachment was the same as if immediate payment had been made.[86] The liquidator had accepted that the charge would attach to goods obtained by the company through "purchase or conversion", carried out by the receiver, where already-attached property was used as payment for the "new" goods. But what is the connection where new property is acquired by the receiver in return for incurring a monetary obligation (through the receipt of credit or other borrowing)? The obligation can be secured on attached property, in which case there is an obvious relationship between existing attached property (its value diminished through encumbrance) and the newly-acquired property. This supports the attachment of "new" property.[87] However, even where existing property is not used to secure the obligation, attachment in respect of the new property can be warranted. As Sellar notes, a receiver who is personally liable under a contract is entitled to be indemnified from the property over which he was appointed,[88] and this, in a sense, means that the value of existing attached property available to satisfy a chargeholder is reduced and that lost value is replaced by the new property obtained through borrowing.[89] The Insolvency Act 1986 s 60 also makes distribution of proceeds to the chargeholder subject to, *inter alia*, "creditors in respect of all liabilities, charges and expenses incurred by or on behalf of the receiver",[90] and, next, the receiver's "liabilities, expenses, remuneration, and any indemnity to which he is entitled out of the property".[91] The fact that a chargeholder will potentially suffer due to the debts incurred by a receiver justifies attachment of the charge to property acquired in return for the creation of those debts.

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[85] If they were wrong about all "acquirenda" being available to the receiver.
[86] 1985 SC 156 at 162.
[87] The creditor might be able to use the receivership creditor provisions in Insolvency Act 1986 s 60(1)(c) (mentioned below) to rank ahead of the chargeholder. *Greene and Fletcher, Law and Practice of Receivership in Scotland* para 3.08 notes that a receiver granting security is unusual, except where there is a hive-down and the receiver is procuring the creation of a charge by a subsidiary.
[88] See now Insolvency Act 1986 s 57(3).
[89] Sellar, "Future Assets and Double Attachments" 243. Contracts entered into by a receiver often provide, however, that he will not be personally liable. See also G Morse (ed), *Palmer's Company Law*, 25th edn (looseleaf) para 14.224.2; *Hill Samuel & Co Ltd v Laing* 1989 SC 301.
[90] Insolvency Act 1986 s 60(1)(c).
[91] Insolvency Act 1986 s 60(1)(d).

(c) Extinction

3-35. Another type of post-attachment property is that which causes the "extinction" of attached property. This is similar to conversion, insofar as "new" property is being received in place of existing attached property. But with conversion one party transfers property to another and receives property from that second party in exchange; there is mutual transfer, from A Ltd to C Ltd and from C Ltd to A Ltd. With extinction, however, there is only transfer from C Ltd to A Ltd, but this has the effect of extinguishing A Ltd's personal right to the property. For instance, A Ltd has a contractual right to receive ownership of goods from C Ltd. However, before C Ltd transfers ownership to A Ltd, B Bank appoints a receiver, R, to A Ltd. As the contractual right is attached by the charge, and is extinguished upon C Ltd transferring ownership of the goods after attachment, the charge should be deemed to attach to the goods from when they enter the patrimony of A Ltd. They have indirectly replaced the property that was already attached. Again, penalising the chargeholder would seem inappropriate here.

3-36. It might be thought that property which returns to the company, or an equivalent payment made to the company, following a successful challenge of a gratuitous alienation, would be covered by the attached charge because the property replaces extinguished property (a right to challenge). However, claim rights for the reduction (or equivalent) of a gratuitous alienation, unfair preference or other challengeable transaction are not the chargor's property.[92] Rather, these are statutory rights of the liquidator or administrator or of any creditor of the chargor, and are not therefore attachable.[93] And equivalent rights at common law are also rights held by creditors.[94] Since s 176ZB(2) of the Insolvency Act 1986 was introduced (by the Small Business, Enterprise and Employment Act 2015 s 119), there is also legislative authority that the proceeds of statutory claims by an administrator or liquidator (including for unfair preferences and gratuitous alienations)[95] "are not part of a company's net property", which is the property subject to a floating charge. As specified in the *Explanatory Notes* to s 119 of the 2015 Act, this was merely a codification of (English) case law. For example, in *Re Yagerphone Ltd*[96] money recovered by joint liquidators from a creditor, who had received it on the basis of an alleged fraudulent preference, was not attached by a floating charge, as the money was not the company's property or a contingent interest of the company when the

[92] The English position regarding challengeable transactions and the remedies available is somewhat different: see *Goode on Principles of Corporate Insolvency Law* ch 13.
[93] On this point, similar considerations apply in English law: see *Goode on Principles of Corporate Insolvency Law* para 13-136. As noted at this paragraph, there are important implications in relation to issues such as set-off.
[94] See St Clair and Drummond Young, *Corporate Insolvency* paras 10-02 ff and the authorities cited there. More broadly, see W W McBryde, *Bankruptcy*, 2nd edn (1995) ch 12.
[95] This also includes claims relating to fraudulent trading (Insolvency Act 1986 ss 213 and 246ZA), wrongful trading (ss 214 and 246ZB) and extortionate credit transactions (s 244).
[96] [1935] Ch 392.

charge crystallised. Instead, the right to recover was deemed to have been conferred for the benefit of the general body of creditors.[97]

3-37. Prior to the recent legislative change, St Clair and Drummond Young asserted that the reasoning in *Re Yagerphone Ltd* was questionable in Scots law.[98] Their view was that the rights relating to gratuitous alienations and fraudulent preferences were assets of the company and, by implication, attachable by a floating charge. They considered the relevant statutory actions were merely "machineries" to vindicate the company's rights and that reduction of voidable transactions was not completely without retrospective effect.[99] The foregoing perspective has been overtaken by the new legislative provisions; however, it could still represent the position for *creditors'* statutory and common law rights of challenge.[100] But the likelihood is that it does not. It seems artificial to state that rights that are stipulated to be those of a creditor are actually the company's. Also, the fact that liquidation (for statutory challenges) or insolvency (for challenges at common law)[101] is necessary to trigger the creditors' rights suggests there is also collectivity amongst creditors as to property obtained through the exercise of those rights. This is supported by the fact that an individual creditor does not directly receive the benefit of a successful challenge but, rather, property is returned or payment made to the debtor, which is in a state of liquidation and/or insolvency.[102] In situations like these, the default position is equal treatment to all creditors and this is also indicated here by the claims potentially being available to any creditor, as well as to a liquidator or administrator. Indeed, St Clair and Drummond Young acknowledge that the rights were intended to benefit the creditors collectively,[103] which appears at odds with the view that they can be attached by the floating charge of one creditor.

3-38. Interestingly, *Ross v Taylor* featured a situation relating to rights of challenge: the receiver had convinced a creditor of the company to return goods,

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[97] See also *Re Oasis Merchandising Services Ltd* [1998] Ch 170.

[98] This is also argued in D P Sellar, "Floating Charges and Fraudulent Preferences" 1983 SLT (News) 253.

[99] St Clair and Drummond Young, *Corporate Insolvency* para 6-14. See also Sellar, "Floating Charges and Fraudulent Preferences" 253 who refers to retroactive consequences of reduction and suggests that effect should be given to the rights of parties at the date of preference, thus allowing the property to be attached by the charge. And see Scottish Law Commission, *Consultative Memorandum on Floating Charges and Receivers* (Scot Law Com CM No 72, 1986) paras 2.26ff.

[100] A liquidator or administrator has the same rights of challenge as a creditor at common law for gratuitous alienations and fraudulent preferences by virtue of Insolvency Act 1986 ss 242(7) and 243(6). See *Bank of Scotland v R W Forsyth Ltd* 1988 SC 245.

[101] W W McBryde, *Bankruptcy*, 2nd edn (1995) paras 12.32 f suggests that one of the requirements for a successful challenge at common law is that at the time of the transaction the debtor must have been absolutely insolvent or about to become so. See also D W McKenzie Skene, *Bankruptcy* (2018) paras 14-44 and 14-67. Of course, insolvency by itself does not cause the attachment of a charge. So it would technically be possible for a creditor to challenge a transaction successfully and for property to be received by the company, only for a floating charge granted by that company subsequently to attach. This means that it could be beneficial for creditors without a floating charge to use a statutory challenge rather than a challenge at common law.

[102] It is also notable that a receiver does not have the same rights as a liquidator or administrator in this context.

[103] St Clair and Drummond Young, *Corporate Insolvency* para 6-14.

allegedly on the basis that the creditor's acquisition of them would have been challengeable as a fraudulent preference in liquidation. Ultimately there was no agreement or decision on whether there had been a fraudulent preference.[104] But the circumstances represent a plausible scenario in which a creditor, under threat of its transaction being challenged, retransfers property (or makes equivalent payment) to the company after attachment of a charge. If the right of challenge is not attachable by the charge then such property should not be either, unless there is some other direct relationship with property that is attached.[105] Therefore, without such relationship, a receiver should not have power or control of property recovered in this way, and proceeds from the property cannot be distributed by the receiver to the chargeholder or others. It is a separate question whether a third party can validly acquire from the receiver; a person dealing with the receiver in good faith and for value does not need to enquire whether the receiver is acting within his powers.[106]

3-39. The position for challengeable transactions may differ from the position for other voidable transactions for which the company itself has the right to reduce a transfer. In these cases, a floating charge can attach the right to reduce and ought also to attach the returning property, if the reduction takes place. The position for voidable transactions, including challengeable transactions, also differs from where a "transferee" believes it has acquired property from the chargor but the transfer is void. In this case, the property has remained in the chargor's patrimony throughout (assuming it has title) and is therefore attached in the normal way.[107]

(d) Property from services rendered

3-40. A further possibility regarding post-attachment property is "property from services rendered". A Ltd may have a valuable contract with C Ltd which requires A Ltd to carry out some additional work for payment. R, upon appointment to A Ltd by B Bank, may decide to carry out such work to receive the money. If these services are rendered, will B Bank's floating charge attach to the money received? There seems to be a more fragile argument for attachment here. There is less proximity between attached property and the property received. Nevertheless, A Ltd's conditional contractual rights against C Ltd are attached by the charge, and property enters the patrimony of A Ltd in return for the work. The work done will purify certain conditions of the contractual rights and then particular contractual rights will be extinguished once payment is made. Therefore, there is again some form of exchange of the attached property for newly-received property, which may justify attachment.

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[104] *Ross v Taylor* 1985 SC 156 at 159 f per Lord President Emslie.
[105] Such as if payment is made for returned property using eg attached property: see discussion above.
[106] Insolvency Act 1986, s 55(4). There are related provisions for administration (Insolvency Act 1986 Sch B1 para 59(3)). And see also, for liquidation, Insolvency Act 1986 s 185(1)(b), applying Bankruptcy (Scotland) Act 2016 s 109(10).
[107] This is in line with the English position: see *Goode on Principles of Corporate Insolvency Law* para 13-135.

3-41. This can be contrasted with a situation in which new contracts are entered into by a receiver (or equivalent), which would create new property rights perhaps unconnected to existing attached property. The contention that a charge attaches to such new property is correspondingly weaker. It is paradoxical if a receiver, who only has powers in relation to attached property, has control over new property which is not attached. In reality, the "new" property will be dependent upon, for example, payment being made using attached moneys, or through services requiring the use of attached goods or machinery. Even if this is not so, liabilities and indemnities involving a receiver are given a ranking relationship against attached property, as already noted. It is therefore difficult for there to be many instances in which acquirenda in this category will not be attached upon their acquisition.

(e) Gifts

3-42. There are other transactions which result in acquirenda. In the unlikely event that property was gifted to the company following attachment,[108] it seems hard to justify such property being attached. Bennett rightly attacks the argument of the court in *Ross* because it appears to imply that gifted property would be attached.[109] Sellar also criticises this possibility.[110] A post-attachment gift should only be attached if it is received in fulfilment of a binding promise pre-dating attachment, which is itself attached. In other cases, there is no connection between property already attached and the newly-gifted property and the latter should therefore benefit the company or its creditors as a whole.

(f) Original acquisition

3-43. Another acquirenda possibility arises where property is obtained through original acquisition. For this, it is probably most simple and appropriate to fit attached property into the relevant rules of original acquisition. As an example, a new item of property could be created on behalf of a company after attachment, through specification from two items of property using a manufacturing process. The default ownership position would be that the manufacturer would own the new property if the thing could not be returned to its original materials, while if it could be so returned, then the owners of the constituent items would remain such owners.[111] In the latter case, the chargor would therefore continue to be owner of any constituent items it owned before specification, and this property would be attached. More problematic is where the owner of the new thing is the manufacturer. Again though, using the pre-attachment ownership position provides an answer. If the property used for manufacture was owned by the chargor before specification and the chargor was also the manufacturer, the new property ought to also be

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[108] This could be an *ex gratia* payment, ie where there was only a moral rather than a legal obligation to pay.
[109] *Palmer's Company Insolvency in Scotland* para 207.
[110] Sellar, "Future Assets and Double Attachments" 243.
[111] See Reid, *Property* paras 559 ff and the authorities cited there.

attached. By contrast, if the property had belonged to the chargor and a different party was the manufacturer, and became owner by specification, then the charge would not extend to that property. This would be true for rights in security generally but is even more applicable to the floating charge because of its patrimonial limitations.[112] The charge would, however, attach to any claim of the chargor for compensation from the manufacturer for use of the chargor's materials.[113]

3-44. If, in the example above, accession rather than specification had taken place, then the rules on ownership of acceded property should apply. The owner of the principal becomes the owner of the accessory as well.[114] Consequently, if the principal belonged to the chargor and was attached property, the accessory could subsequently also be attached. But if neither item, or only the accessory, was already attached property, then the charge would not attach to the property after accession. However, there could be attachment to a compensation claim, if the chargor owned the accessory and another owned the principal and had brought about accession without the chargor's permission.[115] These scenarios represent either a potential windfall or a potential loss for the chargeholder. However, any alternative view suffers from significant complications. For example, if a charge attached an item that then acceded to a principal and thereafter attached a corresponding proportion of the principal, this would require calculations based on the respective values of the principal and accessory, and might raise questions as to ranking priority against parties with security over the (principal) property.

(g) Administration and liquidation

3-45. While a receiver has the power to carry on the company's business, to the extent covered by the relevant floating charge,[116] a liquidator can only continue business so far as necessary for the company's "beneficial winding up".[117] Thus, he will not ordinarily have the ability to exchange attached property for other items, or to carry out services for payment, except to the extent that these are undertaken for the company's winding up. A liquidator would, though, be entitled to perform a contract if it was profitable to do so, as this would benefit the winding up and the company's creditors. In general, a company can also receive property even though it is in liquidation, including in situations where property is transferred to it to fulfil a personal obligation to transfer. Further, a liquidator is empowered to do certain things which can lead to the acquisition of new property, such as raising money on the security of the company's property.[118]

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[112] See ch 6 below.
[113] See Reid, *Property* paras 561 f for the position as to claims.
[114] See Reid, *Property* paras 570 and 574 and the authorities cited there.
[115] Reid, *Property* para 577.
[116] Insolvency Act 1986 s 55 and Sch 2 para 14.
[117] Insolvency Act 1986 ss 165 and 167, and Sch 4 para 5.
[118] Insolvency Act 1986 ss 165 and 167, and Sch 4 para 10. And see St Clair and Drummond Young, *Corporate Insolvency* para 4-52.

3-46. In English law, there is an apparent difference between assets received by the company after the beginning of winding up which are not the result of the liquidator's activities, and assets which the liquidator acquires through contractual performance or due to proceedings for fraudulent or wrongful trading and similar actions.[119] The former can be caught by an "after-acquired property clause" in a charge, while the latter are statutorily recovered assets which the liquidator holds for the general body of creditors. As regards the former, the suggested Scots law position outlined above appears narrower than English law, as the contractual emphasis of English law seems not to require a connection between attached property and newly-obtained property. With reference to the latter, it could be that Scots law accords with English law regarding property obtained through contractual performance of the liquidator. The charge may have attached to contractual rights but if these are conditional upon performance by the liquidator, a party acting on behalf of all creditors, then it seems logical that all creditors ought to benefit from any property acquired as a result. The position is, of course, different where *attached* property is transferred by the liquidator in return for other property.

3-47. An administrator will be expected to carry on the company's business and in that connection can dispose of charged property and acquire new property.[120] The floating charge will no longer cover property disposed of by the administrator but will secure the "acquired property"[121] that replaces it.[122] However, the vast majority of relevant transactions will take place without the charge having attached. Therefore, although it is possible for all of the above types of property acquisition to occur after attachment within administration, the usual position is that the property obtained will not be acquirenda in the post-attachment sense. Where property is acquired in administration after attachment, the same logic regarding liquidation (above) will apply. This includes the fact that an administrator acts on behalf of all creditors. Therefore, if performance by the administrator is needed to acquire property, and this leads to the purification of attached contractual rights, then there is a powerful case for the charge not attaching the new property. But, again, the position will be otherwise if the administrator's actions involve transferring attached property in return for "new" property.

(h) Transferred property

3-48. An important point, although one rarely commented upon, is that even though a floating charge attaches to property as if it were a fixed security, it does not continue to affect that property if the property is transferred to another party by the

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[119] *Goode on Principles of Corporate Insolvency Law* paras 6-01 and 6-06, and also paras 13-134 ff.
[120] Insolvency Act 1986 Sch B1 para 70.
[121] This is defined as "property of the company which directly or indirectly represents the property disposed of": Insolvency Act 1986 Sch B1 para 70(3).
[122] Insolvency Act 1986 Sch B1 para 70(2). This provision seems unnecessary for unattached charges as this is already how the floating charge operates. Even without such provision, the administrator, as representative of the company, would be able to transfer charged property unencumbered and acquired property would be charged in its place.

receiver, administrator or liquidator. A transferee, in such a situation, is deemed to acquire the property free of the floating charge.[123] Despite there being no specific authority on the point, this general view is supported by the fact that a chargeholder depends on a liquidator, receiver or administrator for enforcement. As will be discussed in chapter 6, the rights of these parties are apparently limited to the property of the chargor. This suggests that, at least in practical terms, a floating charge cannot be enforced against a third party that has validly obtained attached property. Consequently, the floating charge seems to provide a right to be satisfied from attached property in the chargor's patrimony, rather than from the property regardless of who owns it.

3-49. Assuming that a floating charge does not affect charged property transferred by a liquidator or equivalent, it should, conversely, attach to any property obtained in exchange for the "old" property, from the moment the "new" property enters into the chargor's patrimony. The importance of property being within the chargor's patrimony, for the charge to affect it, suggests that attachment to new property will not apply retroactively to the date when the old property was attached. This would mean that attachment to the new property is subject to any existing security rights or other real rights affecting that property, even if these were created by the previous owner between the date of the charge's attachment and the property being transferred to the chargor. As noted elsewhere,[124] the ranking rules seem to limit the charge's ranking to the property in the chargor's patrimony at attachment, and affect only security rights granted by the chargor. It is, of course, possible to have statutory exceptions to this, such as where an administrator disposes of charged property (before attachment) and acquires new property in exchange.[125] Yet it can be argued that even in those circumstances a chargor with a negative pledge would only have priority against chargor-granted security rights (fixed and floating).

(2) Double attachment

(a) Separate attachment events

3-50. It is also suggested, *obiter*, in *Ross v Taylor* that there can be double attachment of a floating charge: in a receivership and again if the company enters liquidation. The court considered that the imperative "shall", used in the liquidation provision to describe the charge's attachment upon winding up,[126] meant attachment occurred irrespective of whether the charge had earlier attached upon the appointment of a receiver.[127] As well as that point of literal statutory interpretation,

[123] But see J M Halliday, *Conveyancing Law and Practice in Scotland*, 2nd edn by I J S Talman, vol 1 (1996) para 2-128, where it is suggested that a liquidator should gain the chargeholder's consent when selling attached property.
[124] See paras 2-29 ff above.
[125] As it is stated that the chargeholder "shall have the same priority in respect of acquired property as he had in respect of the property disposed of": Insolvency Act 1986 Sch B1 para 70(2).
[126] Under the then-applicable Companies (Floating Charges and Receivers) (Scotland) Act 1972 s 1(2).
[127] *Ross v Taylor* 1985 SC 156 at 162 f per Lord President Emslie.

the court believed that the policy of the Act gave the chargeholder the opportunity to protect its interests using receivership, rather than having to wind up the company. If attachment in receivership meant the charge would not attach (again) in the liquidation, the court believed the chargeholder might be discouraged from appointing a receiver and would instead push the company into liquidation. This is perhaps unlikely given the priority a receiver has over a liquidator, and also because receivership offers a chargeholder far more control than a liquidator.

3-51. Commentators have criticised the notion of double attachment on both formalist and consequentialist grounds. Bennett, for example, suggests that attachment cannot be repeated as the Companies Act 1985 s 463(3) provides that nothing in s 463 derogates from the provisions of ss 53(7) and 54(6).[128] Sellar makes a similar argument (regarding the antecedent legislative provisions), suggesting that attachment upon liquidation is subject to attachment upon receivership.[129] It is notable, however, that, even if this is the case, s 463(3) does not refer to attachment in administration. Therefore, the provision would not stop a charge attaching in administration and then again, subsequently, in liquidation.[130]

3-52. St Clair and Drummond Young have suggested that changes in the applicable legislative provisions for attachment (upon different events) mean that "it is not possible to say whether in future a court would stick to the concept of 'double attachment'".[131] Indeed, one potentially significant change (from the Companies (Floating Charges and Receivers) (Scotland) Act 1972) is that "shall" is not included in the (currently applicable) Companies Act 1985 provisions for attachment in liquidation.[132] Meanwhile, Sellar has noted the potential, unintended, second ranking of preferential creditors upon a second attachment.[133] This criticism could also be applicable in the context of attachment occurring in both administration and liquidation.

3-53. In addition to these points, it is difficult to see, conceptually, how a floating charge can attach if it has already done so. Upon attachment the nature of the charge transforms and it attaches to property as if it were a fixed security. It is not possible for a floating charge to be both floating and fixed at the same time.[134] Attachment has either occurred for all charged property or it has not; it is an absolute event for property covered by the charge. Sellar similarly contends that double attachment is at odds with the nature of the floating charge and the "fundamental change" that occurs

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[128] *Palmer's Company Insolvency in Scotland* (1993) para 207. And see G Morse (ed), *Palmer's Company Law*, 25th edn (looseleaf) paras 13.235 ff.
[129] Sellar, "Future Assets and Double Attachments" 244.
[130] Even if such double attachment is unlikely, given that attachment in administration will only occur in limited circumstances.
[131] St Clair and Drummond Young, *Corporate Insolvency* para 6-09.
[132] Companies Act 1985 s 463(1), (2).
[133] Sellar, "Future Assets and Double Attachments" 244. For the current legislative provisions, see Insolvency Act 1986 ss 59 and 175.
[134] See D A Bennett, "Companies" in *Stair Memorial Encyclopaedia*, Reissue (2013) para 166, who also notes that it is not possible for a Scots law security to shift between being floating and fixed.

upon attachment.[135] It could be argued that a second attachment event causes the charge to attach only to property obtained between the attachment events and which is not already attached through conversion or otherwise. A major objection to this is that it requires the floating charge to float residually (in addition to its attachment to property), when the clear statutory effect upon any attachment event is for it to attach, and to do so in respect of all of the property charged.

(b) "Re-floating" and attachment

3-54. What is possible, at least in certain circumstances, is that the floating charge can "re-float". Thereafter, the re-attachment of a floating charge can occur. The Insolvency Act 1986 s 62(6) provides that if a new receiver is not appointed within one month after a previous one is removed, or otherwise stops acting as receiver, then the charge will cease to attach and will again subsist as a floating charge.[136] In scenarios where such express statutory authority does not apply, it is presumed that a charge which attaches and is then enforced does not re-float (allowing for further attachment) once the enforcement process is complete. A chargeholder does not have the ability to decide to attach and unattach a floating charge at its pleasure, as this would be problematic for other creditors and for the running of the chargor's business. Although a chargeholder would have some limited power to do this through seeking the removal of a receiver, it must follow the statutory process for doing so, and the receiver has entitlement to payment only by using attached property.[137]

3-55. The chargeholder has less power over liquidation and administration. However, there is scope to argue that a charge can re-float after attachment in a liquidation.[138] This will not be the case if the liquidation is successfully concluded. But once a liquidation is underway, it can be stopped. The court may, at any time after a winding up order, sist proceedings completely or for a limited period.[139] In such a case, the chargeholder would lose the mechanism by which its attached charge was to be enforced. Does the charge then re-float? There is no easy answer to this question. In practical terms, continued attachment might make little difference, as the charge cannot be enforced outside one of the recognised enforcement mechanisms. However, it will give a ranking priority if and when the charge is

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[135] Sellar, "Future Assets and Double Attachments" 244. Sellar prefers what he refers to as the "previously unchallenged" pre-*Ross* view that only one attachment is possible.
[136] And see *Greene and Fletcher, Law and Practice of Receivership* para 11.12, which suggests that if a charge is not satisfied and the chargeholder later becomes aware of further assets, then the chargeholder may reappoint a receiver and cause the charge to attach.
[137] Insolvency Act 1986 s 62(4).
[138] The position for administration is more straightforward as attachment will only occur when distributions are taking place.
[139] Insolvency Act 1986 ss 112(1) and 147(1). See St Clair and Drummond Young, *Corporate Insolvency* para 4-114, who note that a sist will not normally be granted without "firm and acceptable proposals for satisfying all creditors" and "consent from, or arrangements binding, the liquidator and all members". And see *McGruther v James Scott Ltd* 2004 SC 514 for a Scottish case in which the sisting of proceedings was granted.

enforced.[140] In any event, if the liquidation is stopped, it may be because the company is able to pay its debts and can therefore satisfy the debt due to the chargeholder, in which case the issue of re-floating is unlikely to arise.

3-56. It is generally accepted that "de-crystallisation" (re-floatation) is possible in English law.[141] This is explainable by virtue of the contractual elements of the English floating charge. The parties can, for example, incorporate a clause in the charge agreement allowing the charge to de-crystallise upon notice or the happening of an event.[142] The effect of de-crystallisation is more uncertain; is a new charge created and therefore requires registration (which affects priority dates for ranking) or is the charge the same as the crystallised one?[143] In Scots law, in the limited circumstances in which re-floating and re-attachment are possible, it seems that the charge should be considered the same one, as there is nothing in the legislative provisions to suggest otherwise. A new charge can also only be created through compliance with the statutory creation requirements.

3-57. If, however, a charge re-floats and then re-attaches, the second attachment should be the relevant point for ranking and other purposes (subject to the instances when the charge ranks from its creation). Attachment and the applicable enforcement mechanism should be viewed as a package, with the receiver or equivalent using the attachment date as a relevant point for its dealings relating to the charge. If the charge, having returned to a floating state, ranks from the date of an earlier attachment, this may be misleading to other parties dealing with the chargor and could also have an unfortunate effect on transactions between such parties and the chargor.

[140] Until that happens, there is a danger that attached property could be transferred, but property received in return would surely be caught in its place.
[141] See eg *Goode and Gullifer on Legal Problems of Credit and Security* paras 4-56 and 4-61 ff.
[142] *Goode and Gullifer on Legal Problems of Credit and Security* para 4-61.
[143] *Goode and Gullifer on Legal Problems of Credit and Security* para 4-62. Different theories regarding the nature of the charge seem to lead to different outcomes in this context.

4 Property Attached

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A. LIMITS

4-01. There are two elements which determine the property attached by a floating charge. Firstly, there is a legislative limit. The legislation identifies the full range of property over which a floating charge can be granted, and subsequently attach. Attachment is chargor-relational and time-dependent. In other words, its application is reliant upon the chargor having a particular relationship to property at a certain point in time (ie when attachment occurs). Secondly, in each particular case, the chargor must determine which property, within the set limit, over which it wishes to create the charge, and thus make potentially attachable.

4-02. The Companies Act 1985 s 462(1) empowers an incorporated company to create a floating charge "over all or any part of the property (including uncalled capital) which may from time to time be comprised in its property and undertaking". A floating charge can therefore be created over any item or items of property in a company's property and undertaking, with the maximum legislative limit being all such property at a given time. In similar vein, the attachment provision for liquidation ties attachment directly to property "comprised in the company's property and undertaking or, as the case may be, in part of that property and undertaking…" at the commencement of liquidation.[1] The provisions for attachment in receivership and administration limit attachment to property in the company's

[1] Companies Act 1985 s 463(1).

property and undertaking indirectly by referring to "property … subject to the charge".[2]

4-03. One additional point is that, under the current company law regime, the "validity" of a company's acts "shall not be called into question on the ground of lack of capacity by reason of anything in the company's constitution".[3] Previously it could happen that the grant of a floating charge was outside a company's objects and therefore void.[4] The removal of *ultra vires* constraints does not, however, change the inability of a Scottish company to grant a floating charge (over property in Scotland) at common law, as determined in *Ballachulish Slate Quarries Co v Bruce*[5] and *Carse v Coppen*.[6] That is because the underlying law of security rights, applicable to Scottish-registered companies, proscribes the creation of floating charges irrespective of the content of a company's constitution. It is only express statutory provision that enables the granting of a floating charge by a company.

4-04. The creation and attachment of a floating charge correspond to what is allowable by statute. Only property which falls within both the legislative limit and the terms of the charge instrument will be attachable by a floating charge. Any property that is attached must therefore be located in the inner area in figure 1 below.[7] Attempts to charge property not contained in the property and undertaking of the company will be invalid and, likewise, property in the property and undertaking but not charged in the instrument will not be covered. As well as property presently owned by the chargor, the charge instrument will typically seek to charge future property, either expressly or impliedly. A company's property and undertaking extends to such property but, of course, the property only becomes charged once the chargor acquires it. At that point, it will automatically fall under the charge's ambit. Understandably, floating charges are most commonly granted in line with the legislative maximum limit – over the "whole" (or "all of the") property in the chargor's property and undertaking[8] – and therefore, in most cases, there will be complete overlap between the two limits, unlike in figure 1. However, limited-assets floating charges do also exist.[9]

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[2] For receivership, "the property then subject to the charge" (Insolvency Act 1986 ss 53(7) and 54(6)), and see s 51(1). And for administration, "the property which is subject to the charge" (Insolvency Act 1986 Sch B1 para 115(1B), (3)).

[3] Companies Act 2006 s 39(1). This is so even if the company's objects are expressly limited. See also s 31(1).

[4] See D A Bennett, "Companies", in *Stair Memorial Encyclopaedia*, Reissue (2013) para 48 for details regarding objects under the previous law, and what was done to circumvent the restrictions.

[5] (1908) 16 SLT 48.

[6] 1951 SC 233. For criticism of the decision in *Carse*, see Lord Rodger of Earlsferry, "'Say Not the Struggle Naught Availeth': The Costs and Benefits of Mixed Legal Systems" (2003) 78 Tulane LR 419, 423.

[7] The diagram could be applicable where, for example, a company charges all of its stock-in-trade or debts due from customers.

[8] See eg D J Cusine (ed), *Green's Practice Styles* (looseleaf, 1995-) B01-02 and E03-22; *Greene and Fletcher, Law and Practice of Receivership* 239.

[9] It may be that more floating charges than before the Enterprise Act 2002 are being granted over only part of the assets of a chargor, to allow for the appointment of a receiver despite the wider circumscription of administrative receivership. However, there is scant information to verify this.

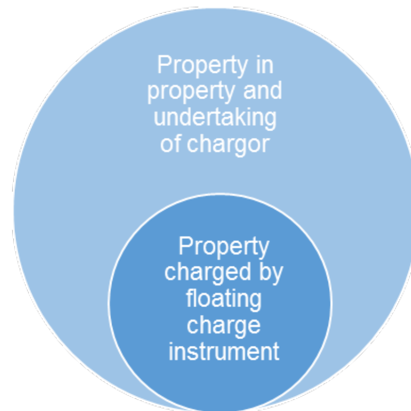

Figure 1

4-05. For most voluntary real securities there is a legal limit which determines the property over which the security may be granted. This usually means that a party can only grant a particular form of security corresponding to specific property which that party owns. By contrast, the floating charge can be granted over all property, or over a collection of assets encompassing different property-types. For rights in security more widely, the specificity principle usually requires that the security property be identified at the moment of creation. The necessary steps for this, and the varying ways in which the publicity principle is met for different security rights, mean it is generally not possible for the same security right to be granted over multiple different types of property. With the floating charge there is a weak form of specificity. Individual items of property do not need to be identified: description by category (as part of all of the property of the chargor, or as eg intellectual property or book debts) is sufficient. This also facilitates the granting of the security over future property, which is often not possible for other types of security right.[10]

4-06. The floating charge is also less compliant with the publicity principle than other security rights. As already noted, creation of a charge was formerly upon execution of the floating charge instrument but now seems to be upon the instrument's delivery to the chargee.[11] This represents a positive advance but it is still essentially a private act.[12] The floating charge must thereafter be validly

[10] As identification of property and carrying out formalities, such as delivery, intimation or registration, for fixed security rights can usually not be done (or is at least not feasible) for property that a company does not yet own. The Scottish Law Commission have proposed that a new fixed security right over moveable property, the "statutory pledge", should be capable of encumbering future property: Scottish Law Commission, *Report on Moveable Transactions* (Scot Law Com No 249, 2017) paras 23.22 ff. For discussion, see A MacPherson, "The Future of Moveable Security in Scots Law? Comments on the Scottish Law Commission's *Report on Moveable Transactions*" 2018 JR 98, 103 f.

[11] At least for registration purposes: see SLC, *Report on Moveable Transactions* para 36.7; H Patrick, "Charges Changing" (2013) 58(2) JLSS 20. The position is not, however, entirely clear: see MacPherson, "Registration of Company Charges Revisited" 165 ff.

[12] It differs from eg the requirement of delivery of corporeal moveables to create a pledge. Delivery to, and possession by, the pledgee of the *property* pledged, gives publicity to those who may wish to

registered in the company charges register to be fully effective.[13] This involves registration against a juristic person (the chargor), with general specification as to the property covered, rather than publicity by reference to specific property affected. The stage at which the floating charge becomes a security with real effect is attachment, which depends upon an event affecting the person of the chargor, through the appointment of a receiver, commencement of liquidation, or in certain circumstances during administration. As noted at paras 3-16 ff above, there are publicity problems with respect to property attached by the charge.

B. "PROPERTY AND UNDERTAKING": PAST AND PRESENT

4-07. The term "property and undertaking" of a company has proved to be particularly controversial. The interpretation of this wording was the central focus in *Sharp v Thomson*,[14] which is discussed in detail in chapter 7. However, due to the term's significance in determining property attached by the floating charge, its usage and background will be examined here.

(1) Legislative usage in Scots law

4-08. The term "property and undertaking" was included within the legislation which first introduced the floating charge into Scots law. The Companies (Floating Charges) (Scotland) Act 1961 s 1(1) provided that it was competent for an incorporated company to create a floating charge "over all or any of the property, heritable and moveable, which may from time to time be comprised in its property and undertaking". The next sub-section (s 1(2)) specified that a floating charge would not affect property:

> which ceases prior to the commencement of the winding up of the company to be comprised in, and remains outwith, the company's property and undertaking, but shall on the commencement of the winding up of the company … attach to the property then comprised in the company's property and undertaking not being excepted property ….[15]

4-09. Consequently, from the outset, both the creation of the floating charge, and its attachment, have been connected to property in the chargor's "property and undertaking". If property was outside the company's property and undertaking then it was automatically excluded, but could also be non-attachable if it was "excepted property", ie particular property consensually excluded from the created charge's ambit.[16]

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obtain an interest in the *property*. By contrast, with the floating charge, it is the instrument that is delivered, not the charged property.

[13] See para 1-06 above.

[14] 1997 SC (HL) 66.

[15] But this attachment was subject to the rights of various specified parties. See also ch 2 above for discussion of this provision.

[16] See Companies (Floating Charges) (Scotland) Act 1961 s 1(3).

4-10. The 1961 Act apparently caused practical difficulties as regards the charging of particular property.[17] The Scottish Law Commission noted that s 2[18] had been criticised by some as making it "possible to create a floating charge over only the whole of the undertaking of the company, or over the undertaking other than specified excepted assets".[19] As an aside, this seems to imply a belief that the undertaking incorporated all of the company's assets. The Scottish Law Commission contrasted the position with English law, in which a floating charge could "be created over any part of the assets of a company". The "more flexible" English approach was considered preferable and therefore recommended,[20] and it was subsequently introduced by the Companies (Floating Charges and Receivers) (Scotland) Act 1972.

4-11. The 1972 Act allowed (at s 1(1)) for the creation of a floating charge "over all or any part of the property (including uncalled capital) which may from time to time be comprised in its property and undertaking". A few differences in comparison with the 1961 Act are notable: the insertion of a reference to "part" of the property, to address the issue noted above; and the removal of "heritable and moveable", and its replacement with the express inclusion of uncalled capital.

4-12. The reference to "property and undertaking" in the 1972 Act attachment provision was also slightly altered. The mention of when a floating charge would *not* affect property was removed, as was the reference to "excepted property". Instead, it was stated that on attachment a floating charge attached "to the property then comprised in the company's property and undertaking or, as the case may be, in part of that property and undertaking", but again subject to the rights of certain parties.[21] The reference to "part of that property and undertaking" suggests that "property and undertaking" ought to be considered as a single, combined concept rather than as two separate terms.

4-13. The Companies Act 1985 s 462(1) – the provision currently in force – repeats the wording of the 1972 Act regarding "property and undertaking" in the creation context, and s 463(1) does likewise for property and undertaking for attachment. So, although there have been some changes in the relevant legislative provisions since the floating charge was introduced, these are apparently immaterial regarding the meaning of "property and undertaking".[22]

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[17] Scottish Law Commission, *Report on the Companies (Floating Charges) (Scotland) Act 1961* (Scot Law Com No 14, 1970) para 13. And there were doubts as to the chargeability of uncalled capital.
[18] Which referred to the creation of a floating charge with reference to an instrument of charge as nearly as practicable in the form of the Act's First Schedule.
[19] SLC, *Report on the Companies (Floating Charges) (Scotland) Act 1961* para 13.
[20] SLC, *Report on the Companies (Floating Charges) (Scotland) Act 1961* para 13.
[21] Companies (Floating Charges and Receivers) (Scotland) Act 1972 s 1(2).
[22] The terms "property and undertaking" (s 859D(2)(b)) and "property or undertaking" (ss 859C-859D, 859H-859L, and 859O-859P) are also used in the context of the current registration of charges regime in the Companies Act 2006.

4-14. "Property" is a defined term in the Insolvency Act 1986 but not in the Companies Act 1985. In the 1986 Act, property "includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property".[23] This is an English law-focused definition but it is non-exclusive and gives a broad meaning of property. It also seems to extend to the notion of property as both a "thing" and as "belonging" to a party (see further at paras 4-34 ff below). Despite the absence of a definition in the Companies Act 1985, there should be a presumption of uniformity between the two pieces of legislation, given the intertwining nature of various legislative provisions and because the terminology of "property and undertaking" in the Insolvency Act 1986 is a reflection of the Companies Act 1985.[24]

4-15. Before examining why the terminology was originally chosen, it is interesting to note that "undertaking" is now defined in the companies legislation. The Companies Act 2006 s 1161(1) states that, in the Companies Acts, "undertaking" means "(a) a body corporate or partnership, or (b) an unincorporated association carrying on a trade or business, with or without a view to profit". The "Companies Acts" includes the provisions of the Companies Act 1985 still in force.[25] The effect of the definition for current purposes is not obvious and it may be that the Companies Act 1985 provisions were simply overlooked when the new definition was decided upon. There are, of course, other contexts within which "undertaking" is used in a different way, even in the Companies Act 2006 – most notably as a type of promise or agreement.[26] The new definition does not expressly apply to the Insolvency Act 1986.

(2) Why was "property and undertaking" used in the 1961 Act?

4-16. The *Eighth Report* of the Law Reform Committee for Scotland, which preceded the Companies (Floating Charges) (Scotland) Act 1961, used the term "undertaking and assets" rather than "property and undertaking".[27] It is clear from archived correspondence that there was uncertainty about the meaning of the terminology. When J H Gibson, the Committee's Secretary, was writing to W A Cook, a Committee member, he queried whether it was necessary to refer to "undertaking" as well as "assets", as he doubted that the former included anything

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[23] Insolvency Act 1986 s 436.

[24] And all of the provisions for floating charges were previously together in the Companies (Floating Charges and Receivers) (Scotland) Act 1972. The term "property and undertaking" is used at various points within the Insolvency Act 1986: ss 51(1), 122(2), 221(7).

[25] Companies Act 2006 s 2(1)(c).

[26] See eg ss 583 ff. Cf the use of "undertaking" in Treaty on the Functioning of the European Union Arts 101 ff; *Höfner and Elser v Macrotron GmbH* (1991) C-41/90. And see the use of the term in the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246.

[27] As well as being used in this context, "assets" rather than "property" was used elsewhere within Law Reform Committee for Scotland, *Eighth Report* Appendix II. *Bell's Dictionary* 72 states that assets "is an English law term (now much used in Scotland) … applied more generally to the estate and effects of every description available for the payment of the debts of a bankrupt or insolvent".

that was not already covered by the latter. He acknowledged, however, that a draftsman might eventually need to decide whether to conform to the terminology of the Companies Act 1948 s 95(2)(f), which set out the registration requirements, for English-registered companies, of a floating charge on the "undertaking or property of the company".[28] On the basis of this statutory provision, Gibson also enquired whether there was any real difference between "property" and "assets" and asked if the latter was also to include incorporeal property, such as book debts and goodwill.[29]

4-17. In response to Gibson's letter, Cook specified that "undertaking and assets" was "always used in England" at that time.[30] He added that "assets" in isolation, within a sale context, suggested a "break-up" whereas "undertaking and assets" would "clearly cover a sale of the undertaking as a going concern".[31] The suggestion by Cook appears to be that "assets" alone would be limited to property on an itemised basis, whereas "undertaking" in combination with "assets" would include the business as a whole, and also incorporate individual items. Although Cook expressed a preference for retaining the term "undertaking and assets", he stated that he "did not feel strongly on this point", and suggested that if it was Gibson's preference to delete "undertaking" he should do so.[32] However, the word was not removed from the *Eighth Report*.

4-18. In attempting to imitate English law and practice there appears to have been inadequate consideration of the potential meaning, or lack of meaning, of the terminology in Scots law. This was not addressed during the Bill's progress through Parliament. When introducing the floating charges Bill in December 1960, Forbes Hendry MP proposed that "Scottish companies should be enabled to give floating charges over their undertakings and assets in exactly the same way as English companies."[33]

4-19. Ultimately, the Companies (Floating Charges) (Scotland) Act 1961 adopted the term "property and undertaking" in the creation and attachment provisions rather than "undertaking and assets" or "property *or* undertaking".[34] The precise

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[28] NRS AD61/55 – Note on Draft Appendix II to Report to the Lord Advocate on Remitted Subject No 10, enclosed with copy letter from J H Gibson, Lord Advocate's Chambers, to W A Cook, Biggart, Lumsden & Co, dated 10 March 1960.

[29] NRS AD61/55 – Note on Draft Appendix II. See also ch 9 below. And see Parliamentary Debates, House of Commons, Official Report, Scottish Standing Committee, 20 June 1961, cols 45-48, for discussion of goodwill in the context of the Bill that would become the Companies (Floating Charges) (Scotland) Act 1961.

[30] NRS AD61/55 – Letter from W A Cook, Biggart, Lumsden & Co, to J H Gibson, Lord Advocate's Chambers, dated 14 March 1960.

[31] This would perhaps have had more relevance if enforcement was to be by the chargeholder or through a receiver, rather than through a liquidator.

[32] NRS AD61/55 – Letter from W A Cook, Biggart, Lumsden & Co, to J H Gibson, Lord Advocate's Chambers, dated 14 March 1960.

[33] HC Deb, 20 December 1960, vol 632, cols 1118-1120.

[34] Companies (Floating Charges) (Scotland) Act 1961 s 1(1), (2). The term "property or undertaking" was, however, used within the context of registration of charges in the new s 106A(1) of the Companies Act 1948, which was inserted by the Second Schedule of the 1961 Act. It has remained a

difference between "property and undertaking" and "property or undertaking" is not clear, although the former proposes a conjunctive meaning whereas the latter provides for "property" and "undertaking" as alternatives. The extent to which "property" and "undertaking" have aligned meanings will be discussed below.

(3) The history of "property and undertaking"

4-20. As already noted, English authority is of limited assistance in considering the Scottish floating charge. However, given that the terminology of "property and undertaking" was used in the Companies (Floating Charges) (Scotland) Act 1961, to reflect both English practice and existing provision within the Companies Act 1948, it is appropriate to examine the term's origin and meaning in English law. This will enable a better understanding of the intended operation and application of the Scottish legislative provisions. Thereafter, it is helpful to analyse how such terminology was used in Scots law prior to the introduction of the floating charge.

(a) English law

4-21. The practice of charging the "undertaking" of companies created under the Companies Acts seems to have derived from legislation and practice for companies and undertakings created by private Acts.[35] The Companies Clauses Consolidation Act 1845 s 2 and Lands Clauses Consolidation Act 1845 s 2 both define "undertaking" as the "undertaking or works, of whatever nature, which shall by the special Act be authorized to be executed".[36] In *Gardner v London, Chatham, and Dover Railway Company*[37] it was held that the undertaking of a statutory railway company was the going concern created by the relevant Act, which was not to be broken up by virtue of the use of the undertaking as security. The security was considered to affect the "earnings of the undertaking", rather than its "ingredients".[38] An undertaking in this context is a specific unified business or operation provided for by private Act, but which can be one of a number of undertakings given, by private Acts, to a particular company. The company then usually has the power to "mortgage" the undertaking(s).[39]

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commonly used term in the various iterations of the registration provisions, up to and including the present provisions (see eg Companies Act 2006 ss 859C, 859D(1)(b), (3)(d), 859H(3), and 859J).

[35] This is referred to in some of the commentary on the origins of the floating charge: see eg R R Pennington, "The Genesis of the Floating Charge" (1960) 23 MLR 630, 638 ff.

[36] Before the recognition of the floating charge in England, it was judicially stated that "undertaking", in the context of a charge by a registered company, was as defined in the Lands Clauses Consolidation Act: *King v Marshall* (1864) 33 Beav 565. And see also the Railway Clauses Consolidation Act 1845 s 2 – "'the undertaking' shall mean the railway and works, of whatever description, by the special Act authorized to be executed".

[37] (1866-67) LR 2 Ch App 201. This case was distinguished in *Re Panama, New Zealand and Australian Royal Mail Co* (1869-70) LR 5 Ch App 318, as it related to a railway company and undertakings arising from private Acts.

[38] (1866-67) LR 2 Ch App 201 at 217 per Cairns LJ.

[39] See Companies Clauses Consolidation Act 1845 s 38.

4-22. The term "undertaking" has been connected with the English floating charge since the latter was first judicially recognised, and it was given a broad meaning in the relevant case. *Re Panama, New Zealand and Australian Royal Mail Co*[40] concerned a company, incorporated under the Companies Act 1862, which had issued debentures charging its "undertaking". Counsel for the appellant sought to separate the meaning of "property" and "undertaking" by arguing that the latter constituted "enterprise" and could not be held to include property "unless the context require[d] such a construction".[41] It was submitted that all the company sought to charge was its income. However, Giffard LJ held that "undertaking", in the context, "had reference to all the property of the company, not only which existed at the date of the debenture, but which might afterwards become the property of the company". He added that the term "necessarily infers that the company will go on, and that the debenture holder could not interfere until either the interest which was due was unpaid, or until the period had arrived for the payment of his principal, and that principal was unpaid".[42] He also stated that "under these debentures they have a charge upon all property of the company, past and future, by the term 'undertaking'".[43]

4-23. *Re Panama* proved significant for establishing an expansive meaning of "undertaking" as all present and future property of the company.[44] It became increasingly normal for a company registered under the Companies Act to issue a debenture charging all of its present and future property or its undertaking, and this was considered to create a floating security.[45] As Palmer noted in 1898, the following common debenture clause was treated by the courts as such a security: "The company hereby charges with such payments its undertaking, and all its property, present and future, including its uncalled capital."[46] The combination of property *and* undertaking here is notable. Although "undertaking" was an apparently useful shorthand for the creation of a floating charge, such a charge could be created using other words.[47] The view of James LJ in *Florence Land and Public Works Co*[48] supports this point:

> the words "estate, property, and effects" were in fact exactly equivalent to the word "undertaking", which we find in the other cases, that is to say, it was to be, so far as the company could make it, a special charge upon the assets of the company, the assets which would be forthcoming at the time when the charge was to be made available.[49]

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[40] (1869-70) LR 5 Ch App 318.
[41] (1869-70) LR 5 Ch App 318 at 320.
[42] (1869-70) LR 5 Ch App 318 at 322.
[43] (1869-70) LR 5 Ch App 318 at 323.
[44] F B Palmer, *Company Law* (1898) 212 f.
[45] See Lord Lindley, *A Treatise on the Law of Companies*, 6th edn by W B Lindley (1902) 315 ff.
[46] F B Palmer, *Company Law* (1898) 196. This is repeated in later editions.
[47] F B Palmer, *Company Law* (1898) 198. See also *Re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284 at 294 f per Romer LJ; and later editions of Palmer.
[48] (1878) 10 Ch D 530.
[49] (1878) 10 Ch D 530 at 546 per James LJ.

4-24. In relation to registered companies, Palmer stated that it was "of the essence" of a floating charge that it was "dormant" up to the point at which "the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes".[50] Consequently, by the early twentieth century, a charge over a company's undertaking was understood to mean a security over all of its circulating property, a floating charge, which only became truly active upon the occurrence of certain events.

4-25. Around this time, legislation began to use "undertaking" and "property" together in relation to floating charges. The Companies Act 1900 s 14(1)(d) required "a floating charge on the undertaking or property of the company" to be registered within 21 days after the date of the charge's creation, so as not to be void against the liquidator and creditors of the company. This was, of course, repeated in subsequent legislation and the term "property or undertaking" also came to be used in other legislative contexts involving the floating charge.[51] By the time the floating charge was being introduced into Scots law, the relevant piece of legislation using the terminology in English law was the Companies Act 1948.

4-26. As evidenced by the English law reference works published shortly before the floating charge's arrival in Scotland, the meaning of "undertaking" had changed little over the previous decades. The 1959 edition of *Palmer's Company Law* referred to "undertaking" in similar terms to earlier editions[52] and noted that although "convenient … as a typical term, it must not be supposed that the word 'undertaking' has any magic in it, or that an effective floating charge on the property, both present and future, of a company, cannot be created by other forms of words".[53] Thus, equivalence was still being drawn between a charge on the undertaking and a floating charge over the company's present and future property. In *Buckley on the Companies Acts* a number of cases were used to highlight the fact that a floating charge was produced by debentures on the "undertaking", "undertaking and property" or "all the estate property and effects".[54] Gower, who was consulted by the Law Reform Committee for Scotland regarding the English law of floating charges,[55] stated, in the then-current edition of *Principles of Modern Company Law*, that it was possible for a creditor to "obtain an effective security on 'all the undertakings and assets of the company both present and future'".[56] This was presumably a common debenture clause used to create floating charges. In addition, he noted that a charge on the "undertaking" of a company was a general equivalent of stating the charge was "by way of floating charge" on the present and future property, and pointed out that the chargor's power to deal with its property could

[50] F B Palmer, *Company Law* (1898) 214.
[51] Eg Companies (Consolidation) Act 1908 s 93(1)(f). A registration provision in essentially the same terms was included in the Companies Act 1948 s 95(2)(f). See also the use of "property or undertaking" and similar wording in eg Companies Act 1948 ss 100, 104(1), 192, 208(1), and 322.
[52] See C M Schmitthoff and T P E Curry, *Palmer's Company Law*, 20th edn (1959) 374 and 398 ff.
[53] *Palmer's Company Law*, 20th edn (1959) 400.
[54] Lord Wrenbury, *Buckley on the Companies Acts*, 13th edn by J B Lindon (1957) 225 f.
[55] Law Reform Committee for Scotland, *Eighth Report* para 3.
[56] L C B Gower, *The Principles of Modern Company Law*, 2nd edn (1957) 75.

include the sale of the whole undertaking to another company in exchange for securities in that company.[57]

4-27. The English authorities were also referred to in commentary on the term "undertaking" shortly after the floating charge's introduction in Scots law. Gow cited Palmer and *Re Panama* when stating that "undertaking" in the Companies (Floating Charges) (Scotland) Act 1961 "means all the property of the company not only existing at the time of the creation of the charge but in the interim coming into existence and being the property of the company at the time when the charge attaches or 'crystallises'".[58] According to current English law texts, such as *Charlesworth's Company Law*[59] and *Goode on Commercial Law*,[60] "undertaking" continues to correspond to all of the company's present and future property, as specified in *Re Panama*.

(b) "Undertaking" in Scots law

4-28. Given the common company law elements of England and Scotland, "undertaking" was not an entirely new term when used in the Scottish floating charges legislation. Gloag and Irvine discuss the term, in the *Law of Rights in Security* (1897), while acknowledging the increase of companies created by private Acts in the middle of the nineteenth century and the consequent passing of the Companies Clauses Consolidation (Scotland) Act 1845 and the Companies Clauses Act 1863 (which applies in England and Scotland) to provide consistent legal rules for such companies.[61] The 1845 Act s 2 states that "'the undertaking' shall mean the undertaking or works, of whatever nature, which shall by the special Act be authorized to be executed".[62] Companies are given the power to mortgage their undertakings by s 40, with a mortgage deed in the prescribed form having the "full effect of an assignation in security duly completed".[63] The intended meaning here is not obvious, but it suggests that the undertaking is incorporeal property that is transferred to the mortgagee for security purposes. Yet it is unlikely that the property encompassed by the undertaking in this context is limited to incorporeal property.[64] The 1845 Act contains a form of mortgage in Schedule C, which caters for the mortgaging of the "undertaking" along with *inter alia* the "estate, right, title, and

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[57] L C B Gower, *The Principles of Modern Company Law*, 2nd edn (1957) 390 n 31, citing *Re Borax Co* [1901] 1 Ch 326.

[58] Gow, *Mercantile Law* 279 n 76; *Palmer's Company Law*, 20th edn (1959) 400.

[59] S D Girvin et al, *Charlesworth's Company Law*, 18th edn (2010) para 25-015: "Thus a floating charge is an equitable charge on some or all of the present and future property of a company, eg the company's undertaking, ie all its property, present and future." *Re Panama, New Zealand and Australian Royal Mail Co* (1869-70) LR 5 Ch App 318 is cited in support.

[60] *Goode on Commercial Law* para 25.10.

[61] Gloag and Irvine, *Rights in Security* 629. The 1845 Act's provisions apply to any company incorporated by Act of Parliament, except in so far as varied by provisions of the relevant private Act; the 1863 Act only applies where it is expressly incorporated by the private Act.

[62] This reflects the Acts noted above at para 4-21. An equivalent definition is also found in the Lands Clauses Consolidation (Scotland) Act 1845 s 2.

[63] Companies Clauses Consolidation (Scotland) Act 1845 s 43.

[64] Gloag and Irvine, *Rights in Security* 632 ff are not entirely clear on this issue.

interest of the company" in the tolls and sums of money arising from the private Act creating the undertaking. The "mortgages" require to be included in a register kept by the company.[65]

4-29. Gloag and Irvine also consider the effect of a mortgage of a company's undertaking in terms of the 1845 Act. They recognise that the statutory provisions are "exceedingly vague"; however, they state that the security seems to give the mortgagee a right to "the property comprised in it as it may happen to exist at the time being".[66] Despite its designated status as an assignation in security, Gloag and Irvine do not consider the mortgage to "prevent the company from dealing with, or even disposing of, that property in the ordinary course of their business".[67] If this is the case, it seems that the effect of the mortgage as a deemed assignation in security is not divestive regarding the mortgagor's property (incorporeal or not), as otherwise the mortgagor would not be able to transfer the property as it would belong to the mortgagee.[68] The ability of a company to transfer mortgaged property is further emphasised by Gloag and Irvine when they note that, if the business of the company requires the sale of "some portion of the property contained in the wide phrase 'undertaking,' the sale could probably be made without obtaining the consent of the mortgagees … and the property so sold would pass to the purchaser free from any charge on the part of the mortgagee."[69] The influence of English law here is palpable, from the terminology to the characteristics of the "mortgage" of an "undertaking" in accordance with the floating charge of English law.

4-30. Gloag and Irvine add that a mortgage in statutory form, though it "assigns" the undertaking, does not necessarily "assign" all the property of the company.[70] They cite the decision in *Gardner*[71] that a mortgage of an undertaking does not convey any right to "surplus lands" belonging to the company or sums received from the sale of these lands. But reference is also made to cases which provide that possession of tolls by mortgagees, through a receiver, is sufficient to give a preference over an "ordinary judgment-creditor".[72] According to Gloag and Irvine, the rights of a mortgagee which are probably "of most practical importance" are the right to rank as a preferred creditor over the company's property if it is insolvent, and the right to make the security immediately effective by petitioning for a judicial

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[65] 1845 Act s 48. There is no stated penalty for non-compliance.
[66] Gloag and Irvine, *Rights in Security* 632. See also their discussion, at 631 ff, of security involving debenture stock under the Companies Clauses Act 1863 and security in terms of the Railway Companies (Scotland) Act 1867.
[67] Gloag and Irvine, *Rights in Security* 632.
[68] For some consideration of the extent and effect of the security here, see *Cotton v Beattie* (1889) 17 R 262. This is cited by G W Wilton, *Company Law and Practice in Scotland* (1912) 640-41, who suggests the security is a real security. However, a judicial factor is required to enforce the "mortgage" (this also undermines the view that the mortgage is actually an assignation in security of the property).
[69] Gloag and Irvine, *Rights in Security* 632 f.
[70] Gloag and Irvine, *Rights in Security* 633.
[71] (1866-67) LR 2 Ch App 201.
[72] Gloag and Irvine, *Rights in Security* 633; *Potts v Warwick and Birmingham Canal Navigation Co* (1853) Kay 142; *Ames v Trs of Birkenhead Docks* (1855) 20 Beav 332.

factor.[73] Related to this, s 31 of the 1863 Act provides that debenture stock is considered to entitle its holder to the rights and powers of a mortgagee of the undertaking, other than the right to require repayment of the principal sum paid up in respect of the stock. This is considered by Gloag and Irvine to confer the right to rank as "preferred creditors" on the company's "general assets", and the right of a mortgagee "to make their general security specific" by applying for a judicial factor.[74] They further suggest that debentures issued in Scotland under the Companies Clauses Acts are comparable to English floating charges (granted by registered or private Act companies).[75] There are also unmistakeable analogies here with the later Scottish floating charge, particularly the ranking preference the floating charge provides in liquidation and the ability to seek liquidation or the appointment of a receiver and thus cause the charge to attach.

4-31. More than half a century later, the Law Reform Committee for Scotland, *Eighth Report* likewise drew comparisons between receivers appointed by chargeholders and the use of judicial factors for enforcement purposes under the Companies Clauses Acts[76] and the Railway Companies (Scotland) Act 1867 s 4.[77] It was acknowledged that the duties of a judicial factor appointed under the first-mentioned Acts are limited to receiving tolls and other sums due, and paying the mortgagee (or debenture holder); however, the 1867 Act was noted as giving a judicial factor power to manage the undertaking of the company and its whole works and property, and to enter into negotiations for the sale of the undertaking.[78]

4-32. When the floating charge first arrived in Scots law in 1961, therefore, specific types of legal person (those created by private Acts) could already grant a security device akin to the floating charge.[79] The same can be said for agricultural charges, which could (and can still) be granted under the Agricultural Credits (Scotland) Act 1929 ss 5 ff by agricultural societies registered in Scotland under the Industrial and Provident Societies Acts 1893 to 1928. Thus, although the floating

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[73] Gloag and Irvine, *Rights in Security* 633.
[74] Gloag and Irvine, *Rights in Security* 636.
[75] Gloag and Irvine, *Rights in Security* 634 ff.
[76] 1845 Act ss 56-57 and 1863 Act ss 25-26.
[77] Law Reform Committee for Scotland, *Eighth Report* paras 36 ff. Of course, despite making this comparison, the Committee rejected the introduction of both for the enforcement of floating charges. (Appointing a judicial factor is available under s 4 of the Railway Companies (Scotland) Act 1867, as a substitute for diligence, to a party that has obtained decree.)
[78] Law Reform Committee for Scotland, *Eighth Report* para 37; *Haldane v Girvan and Portpatrick Junction Railway Co* (1881) 8 R 1003; but not apparently power to sell the undertaking without the court's authority: see *Haldane v Rushton* (1881) 9 R 253.
[79] This was not considered in either *Ballachulish Slate Quarries Co v Bruce* (1908) 16 SLT 48 or *Carse v Coppen* 1951 SC 233, which dealt with companies registered under the Companies Acts. A J M Steven, "One Hundred Years of Gloag and Irvine" 1997 JR 314, 326 contends that the possibility of a company granting a floating charge under the 1863 Act s 31, as suggested by Gloag, is mistaken, on the basis of *Carse*. However, a distinction must be drawn between companies and undertakings established by private Acts of Parliament and those companies registered under the general Companies Acts. The former could grant floating charge-like security rights due to specific statutory provisions (as noted above) but for other parties the general restrictive law regarding security rights remained in place.

charge was novel and has had a much greater impact than these other security rights, it also constitutes just one example of particular legal entities being allowed to grant floating charge-type security rights, based on an English model, but adapted the better to conform to the existing laws of Scotland.[80]

4-33. It is true that when the floating charge was introduced, there was a recognised close connection between the term "undertaking" and the company's property. There was also undoubtedly a desire to replicate perceived commercial advantages of the English law of security rights. Yet there was no discernable notion that the term itself introduced English conceptions of property or equity to Scots law in place of existing property law.

(c) "Property" in Scots law

4-34. Of course, in comparison to undertaking, the term "property" has a deep and rich provenance in Scots law. However, although the judicial assertion that "property" does not have a technical meaning is somewhat absurd,[81] the term can be used in different ways. Stair describes "property" as the "main real right",[82] while *Bell's Dictionary*, citing institutional authorities, states that property "is the exclusive right of using and disposing of a subject as one's own".[83] In this context, "property" is being used to describe a particular right in a thing or object. But, in other contexts, "property" refers, not to a right but to the objects of rights. This is acknowledged by Reid, who also suggests that the term "law of things" is a more accurate term than "property law".[84] He notes that "property law is the law of things, and of rights in things (real rights)."[85]

4-35. Given that the floating charge legislation was inserted into Scots property law, and the term "property" was not given a special definition, it can be assumed

[80] For example, the availability of agricultural charges in Scots law followed on from the charges made available in English law under legislation of the previous year, the Agricultural Credits Act 1928; however, the Scots law agricultural charges are "enforced by sequestration and sale … in like manner in all respects as in the case of the hypothec of a landlord": Agricultural Credits (Scotland) Act 1929 s 6(1). Given the abolition of sequestration for rent for the landlord's hypothec, it is unclear how agricultural charges would now be enforced outside the insolvency of the grantor. The Scottish Law Commission have proposed that it should no longer be competent to create agricultural charges: Scottish Law Commission, *Report on Moveable Transactions* (Scot Law Com no 249) (2017) paras 38.13ff and Draft Bill s 115. A further unusual point regarding agricultural charges is that they can only be granted *to* a certain type of entity: a "bank", as defined in s 9(2).
[81] See ch 7 below for discussion of this in the context of *Sharp v Thomson* 1997 SC (HL) 66.
[82] Stair II, 1, 28.
[83] *Bell's Dictionary* 864-65. It is added that "the proprietor of a subject, whether heritable or moveable, may give it away or sell, or burden, or pledge it, or create a servitude over it." And see Stair II, 1, 28; Erskine II, 1, 1; Bell, *Principles* §§ 938ff, 1283-1284; Bankton I, 1, 32, I, 3, 10 and II, 1, 7.
[84] Reid, *Property* para 3 n 1. As Reid also notes, German law and South African law are examples of systems where "thing law" (*Sachenrecht* and *Sakereg* (in Afrikaans) respectively) is used for the equivalent of our property law. See also R R M Paisley, *Land Law* (2000) para 1.8.
[85] Reid, *Property* para 11.

that "property" in this context corresponds to one or more of the established meanings in Scots law.[86] However, as will be seen, there is apparent divergence between the modern understanding of property in Scots law and its interpreted meaning in the floating charges legislation.

C. "PROPERTY … COMPRISED IN [THE COMPANY'S] PROPERTY AND UNDERTAKING"

(1) Two uses of "property"

4-36. The term "property … comprised in [the company's] property and undertaking" is used in the provisions for the floating charge's creation, and attachment in liquidation, in ss 462(1) and 463(1) of the Companies Act 1985. It also applies to attachment provisions for receivership and administration in ss 53(7), 54(6) and Sch B1 para 115 of the Insolvency Act 1986, due to their necessary connection to the property affected by a charge after its creation. The term is therefore of fundamental importance for the charge's operation and must be unpicked. The first use of "property" in the phrase may mean "things". On this view, any "thing" deemed to be an item of property in Scots law would fall within the term's meaning.[87] In Scots law, incorporeal property is almost always included within the meaning of property.[88] Consequently, the most likely explanation for the content of the first "property" reference is that it is all things traditionally recognised as property in Scots law: corporeals and incorporeals, heritables and moveables. An alternative view is to regard things as meaning rights, real or personal, dependent upon the object in question.[89] This latter position is attractive given the preferable interpretation of the second usage of "property" noted below.

4-37. The second use of "property" in the phrase above is tougher to untangle. The words "comprised in [the company's] property and undertaking" appear to require that the property identified in the first sense above belongs to the company in some way. The use of "property" in this second part of the phrase is either property in the sense of things, or it means in the company's ownership. If it is the latter, it must mean ownership in a wide sense to include incorporeal property. The first meaning of property extends to such property, thus making all different types of property potential objects of "ownership". Either way, the connection between property here and the possessive reference to the chargor means that there is a necessary

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[86] Comparison can be drawn with the Sale of Goods Act 1979 ss 2 and 16 ff (and formerly the Sale of Goods Act 1893 ss 1 and 16 ff) where "property" is used rather than ownership. The influence of English law and terminology is notable in both pieces of legislation.

[87] In *Independent Pension Trustee Ltd v L A W Construction Co* 1997 SLT 1105 it was held that a floating charge attached not only property in a "narrow sense" but also rights and powers insofar as they have "commercial value or significance". See also D W McKenzie Skene, *Insolvency Law in Scotland* (1999) 168.

[88] Cf eg German law, where "things" (*Sachen*), which is often equated to "property", is limited to corporeal objects: BGB § 90 *Begriff der Sache* – "Sachen im Sinne des Gesetzes sind nur körperliche Gegenstände."

[89] See G L Gretton, "Ownership and its Objects" (2007) 71 *Rabels Zeitschrift* 802.

relationship between the company and the property. In this context the advantage of considering property to mean rights, rather than items of property, is apparent. Scots property law is structured on the basis of rights, personal and real, and here this analysis would provide an obvious answer. If the company held (or "owned") a particular right, then it would be that party's "property".

4-38. As a result, when it is said that a floating charge attaches to, for instance, an item of corporeal property, this is shorthand for the charge attaching to the chargor's right of ownership in the corporeal object. By contrast, if the second use of "property" translates as the company's object or thing, this postpones and obfuscates the question of what legal relationship the company needs to have with a particular thing. This approach to "property", along with the interpretation of the accompanying term "undertaking", enabled the court in *Sharp v Thomson*[90] to adopt a meaning divorced from the personal and real rights foundation of Scots property law.[91]

(2) "Property and undertaking"

4-39. The meaning of "undertaking" in the floating charge legislation is a question of further difficulty. As noted above at paras 4-16 and 4-17, it may have been intended as a means to secure all present and future property of a company and to allow for the company's business ultimately to be sold as a going concern to satisfy the debt due to the chargeholder. However, the term, especially when paired with "property", is open to interpretation.

4-40. It is sensible to analyse the possible meanings of "property and undertaking" by reference to ownership in the sense of Scots property law. This can be justified on a number of grounds. Ownership is used as a synonym for one of property's meanings, the highest form of real right, and thus is readily distinguishable from mere personal rights. It is a readily understood and well-defined concept in Scots property law. Ownership is also unititular so it can be easily traced to one particular party and the point of transfer for property (of all types) is clearly identifiable where ownership is the measuring stick.[92] Despite the decision reached by the House of Lords in *Sharp v Thomson*, Lord Clyde seems to have accepted the First Division's interpretation of general heritable property law and the acquisition of ownership

[90] 1997 SC (HL) 66.
[91] As beneficial interest does not fit within the personal and real rights model. In the context of trust law, the separate patrimony analysis integrates beneficial interest into the personal and real rights dichotomy. For that analysis, see eg G L Gretton, "Trust and Patrimony", in H L MacQueen (ed), *Scots Law into the 21st Century: Essays in Honour of W A Wilson* (1996) 182; G L Gretton, "Trusts without Equity" (2000) 49 ICLQ 599; K G C Reid, "Patrimony not Equity: The Trust in Scotland" (2000) 8 ERPL 427, updated and republished in R Valsan (ed), *Trusts and Patrimonies* (Edinburgh Studies in Law vol 12, 2015) 110.
[92] See chs 7-9 below for rules for particular property types.

(title).[93] This perspective was affirmed in *Burnett's Tr v Grainger*.[94] Legislation has further clarified the position for heritable property.[95] Ownership's role in the context of attachment of a floating charge is also a potential dividing line in the speeches of Lords Jauncey and Clyde in *Sharp*.[96]

(a) Four approaches

4-41. Where property is in a company's "property and undertaking" this means a floating charge (created by the company) can attach to that property. As such, determining the relationship between ownership and attachment helps us to understand the term's meaning. If we consider whether the company's ownership of property is a necessary and/or sufficient criterion for the attachment of a floating charge, this gives four possibilities: (1) ownership is necessary and sufficient (full-ownership attachment approach); (2) ownership is necessary but insufficient (limited-ownership attachment approach); (3) ownership is unnecessary but sufficient (limited-equitable attachment approach); and (4) ownership is neither necessary nor sufficient (full-equitable attachment approach). These approaches are more clearly outlined in table 1.

Table 1

	Ownership sufficient	**Ownership not sufficient**
Ownership necessary	Full-ownership attachment: *approach (1)*	Limited-ownership attachment: *approach (2)*
Ownership not necessary	Limited-equitable attachment: *approach (3)*	Full-equitable attachment: *approach (4)*

4-42. The differences between these approaches are best highlighted by an example. A Ltd grants a floating charge to B Bank, and C Ltd grants a floating charge to D Bank. Subsequently, A Ltd wishes to transfer property to C Ltd. Table 2 provides details as to whether the floating charges can attach under each approach.

Table 2

Full-ownership attachment: *approach (1)*	**Limited-ownership attachment: *approach (2)***

[93] 1997 SC (HL) 66 at 80.
[94] [2004] UKHL 8, 2004 SC (HL) 19. See, in particular, Lord Hope at paras 11 ff, and Lord Rodger at paras 87 ff.
[95] Land Registration etc (Scotland) Act 2012 s 50(2); and, formerly, the Abolition of Feudal Tenure etc (Scotland) Act 2000 s 4.
[96] See paras 4-53 ff below for further details.

<table>
<tr><td>If A Ltd still owns the property, B Bank’s floating charge can attach to the property.

If C Ltd does not yet own the property, D Bank’s floating charge cannot attach to the property. (D Bank’s floating charge can, however, attach to a personal right to acquire the property.)</td><td>If A Ltd still owns the property, B Bank’s floating charge may attach to the property, but will not do so in certain circumstances.

If C Ltd does not yet own the property, D Bank’s floating charge cannot attach to the property. (D Bank’s floating charge may, however, attach to a personal right to acquire the property.)</td></tr>
<tr><th>Limited-equitable attachment:
approach (3)</th><th>Full-equitable attachment:
approach (4)</th></tr>
<tr><td>If A Ltd still owns the property, B Bank’s floating charge can attach to the property.

However, B Bank’s floating charge may attach to the property in some circumstances even if A Ltd no longer owns it.

If C Ltd does not own the property, D Bank’s floating charge may still be able to attach to the property. (D Bank’s floating charge can also attach to a personal right to acquire the property.)</td><td>Whether or not A Ltd still owns the property does not determine if B Bank’s floating charge attaches to the property.

Whether or not C Ltd owns the property yet also does not determine if D Bank’s floating charge can attach. (C Ltd’s holding of a personal right to acquire the property may also not determine whether D Bank’s floating charge can attach to this.)</td></tr>
</table>

4-43. The only one that is (almost) entirely clear in its scope, and from which the outcome in any given case is readily discernible, is approach (1). This is because it is formalistic and coheres with property law. For the other approaches, the non-ownership elements are ill-defined and problematic due to the necessary interaction between underlying property law and the floating charge. These approaches utilise a greater degree of functionality and (arguably) responsiveness to perceived unfairness towards particular parties, in comparison to approach (1). In other words, there is greater individual equity inherent in them. The principal reason for adopting such an approach would appear to be as a counter-measure to the apparent unfairness of the floating charge, in terms of its potential reach and ability to capture, for example, both the price paid and the property in a sale transaction.[97] Consequently, approach (3) has little to recommend it: protection is not given to a party in the process of buying property, as B Bank’s floating charge can still attach, and it may even allow D Bank’s charge to attach as well.

4-44. Approach (2) can give protection to those acquiring property from a party that has granted a floating charge. It also has the advantage of using ownership as an

[97] See *Sharp v Thomson* 1997 SC (HL) 66; paras 7-14 ff below.

identifiable anchor but there are specific situations, as yet not mapped out, in which this is not enough to stop property drifting out of a floating charge's reach. Uncertainty also abounds with the alternative to ownership in approach (3).

4-45. Approach (4) offers the least certainty but the most flexibility. For that approach, ownership might be an indicator of what is necessary for the floating charge to attach but the required conditions for attachment are independent of ownership. Although this may seem the most commercially-focused approach, the interests of commerce also require certainty from the law. By contrast, this approach would mean that each case would have to be considered on its merits, at least until the relevant factors determining attachment were identified. The necessity of having to scope out exactly what the other factors were for attachment, and when these arose, is a significant disadvantage for approaches (2) to (4).

(b) The approaches and "property and undertaking"

4-46. In any event, for an approach to be valid, it must correspond to the company's "property and undertaking". This term may constitute one concept comprised of two components. But, assuming the components are not exact equivalents, the meaning of one could be narrower than the other, and be subsumed within it. For example, "undertaking" might be all of the property owned by the company less certain things (see figure 2), or all of the property owned by the company plus some additional things (see figure 3). (But, if one falls entirely within the other, it can be queried why the legislation does not just refer to the narrower one.) An alternative is that they are two distinct and independent concepts both of which must be met in a given case for a floating charge to attach. Therefore, ownership of property does not mean that the thing is automatically in the chargor's undertaking or vice versa. Yet a thing must be able to fall into both in particular cases, as otherwise attachment would not be possible. It should be noted that if a floating charge attaches to more than a company owns, then there would be problems establishing how the charge could be enforced through a liquidator, administrator or receiver, as the property would be within the patrimony of another person, and therefore only subject to that party's insolvency.[98] This is a major problem for approaches (3) and (4). A further issue for these approaches is that if ownership is not a necessary condition for attachment, it must be questioned to what the charge actually attaches.

[98] See paras 6-37 ff below for more details.

Figure 2

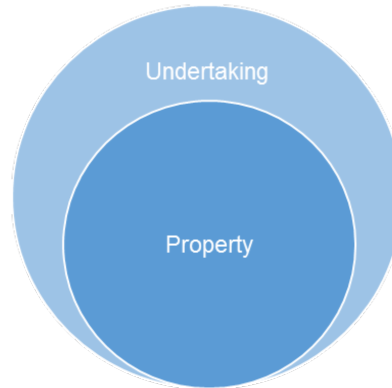

Figure 3

4-47. For approach (1), "property and undertaking" is a single concept that incorporates all of the property owned by the company. It is also possible that the use of "undertaking" gives a more expansive meaning to the term, which allows for additional property to be included. As already noted, a core meaning of "undertaking" is all of the company's present and future property. This could enable attachment to property that is not the company's at the time when attachment occurs but is subsequently acquired.[99] Conversely, it could exclude property that is validly transferred after attachment.[100] Such an interpretation would also be consistent with "undertaking" corresponding to an ongoing business with fluctuating property, even if this trading is being continued by a receiver, administrator or a liquidator. Alternatively, "undertaking" could allow for a charge to attach to certain assets not usually considered (separately) "ownable", "transferable" or "securable".[101] An additional possibility is that it limits the property to the company's personal patrimony (therefore excluding any trust property), as arguably only the property in this patrimony is generally part of the business. It may also have been intended to exclude property "obtained" by the chargor through *ultra vires* acts, although this exclusion no longer applies today.[102]

4-48. Furthermore, the use of "undertaking" could have an impact on how enforcement takes place. A secured creditor ordinarily enforces by selling the specific item of property over which the security is granted. If the floating charge were to reflect the position for real security, which is plausible given its attachment as a "fixed security", this could mean that property items would have to be individually sold to pay the chargeholder.[103] This would preclude the possibility of the whole business (or a large part of it) being realised.[104] Although this would not

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[99] See paras 3-26 ff above.
[100] See paras 6-37 ff below.
[101] Eg goodwill, or non-transferable or non-securable property, such as certain non-assignable personal rights. For the latter, see paras 9-09 f below.
[102] See above at para 4-03.
[103] But it may be possible to sell items collectively if the debtor has agreed to this.
[104] On a related note, the Insolvency Act 1986 distinguishes between the company's business and its property in a similar manner – see eg Sch 2 para 19, which states that a receiver has the "Power to

limit a liquidator's ability to deal with the estate, as the liquidator's powers are independent of the floating charge, it might restrict the way a receiver, as a party specifically introduced to enforce a floating charge, could deal with the chargor's property and business. It may be that it is the use of "undertaking" that allows a receiver to control and realise the chargor's estate as a unified whole rather than having to deal with a fragmented collection of individual items. This meaning of "undertaking" would not have had an immediate effect when the charge was introduced in 1961, as it awaited the introduction of a specific floating charge enforcement mechanism. However, connecting undertaking to enforcement through the sale and control of the business as a whole also corresponds to a particular identified meaning of the term around the time when the charge was being introduced.[105]

4-49. As regards approach (2), "property and undertaking" has a meaning which is more limited than the ownership of property alone. This is either because "undertaking" limits the meaning of "property" when combined with it (so that, for example, a thing must fall within the inner area of figure 2 to be attached) or because they are distinct concepts without undertaking being entirely confined within ownership.

4-50. If we consider "property" and "undertaking" to be separate and independent then only one of these would require to be met according to approach (3), but this disjunctiveness is at odds with the conjunctive "and" in "property and undertaking". This is less problematic where "property" and "undertaking" are a single concept (see eg figures 2 and 3) and the term's meaning is expansive enough to include property that is not owned by the chargor.

4-51. Finally, under approach (4), "property" and "undertaking" do not separately mean ownership, nor is ownership a necessary component of them as a combined term (see figures 2 and 3). The alternative meaning of "property" in this context is hard to ascertain. However, it could correspond to "beneficial interest", as identified in *Sharp v Thomson*.[106]

(c) Current law

4-52. Approach (1) was considered by many to reflect the law of floating charges prior to the House of Lords decision in *Sharp*. Indeed, the Outer House and the Inner House in that case adopted such a position.[107] It is the approach which most

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transfer to subsidiaries of the company the business of the company or any part of it and any of the property".

[105] See paras 4-16 f above.

[106] 1997 SC (HL) 66.

[107] And see the commentary on *Sharp v Thomson* discussed at paras 7-27 ff below. Also note *Hawking v Hafton House Ltd* 1990 SC 198, in which it was held that sums consigned to the clerk of court were no longer part of the company's "property" and therefore were not subject to a receiver's powers (cf the position in English law regarding money paid into court: *Crumpler v Candey Ltd* [2018] EWCA Civ 2256, [2019] 1 WLR 2145); and see *Greene and Fletcher, Law and Practice of*

obviously integrates the floating charge into existing Scots property law. However, it should be noted that prior to *Burnett's Tr v Grainger*,[108] the Scots law position regarding transfer of ownership of heritable property was in some respects contentious.[109]

4-53. A careful reading of Lord Clyde's speech in *Sharp* suggests that he may favour approach (2). He seems to propose that ownership and "beneficial interest" are both required for a floating charge to attach.[110] According to approach (2), beneficial interest is not necessarily the only further required element (in addition to ownership).[111] But it may represent the present law, on the basis of Lord Clyde's opinion. Approach (3) has not found obvious favour amongst either academics or judges. Meanwhile, Lord Jauncey in *Sharp* may lean towards approach (4).[112] His view appears to be that attachment corresponds to whether the chargor has beneficial interest in the property concerned.

4-54. Opinions expressed by commentators can also be analysed using the ownership framework. For example, Professor McDonald did not think that, in a *Sharp* scenario, the floating charge granted by the transferor ought to attach and suggested that a receiver of the transferee would expect that the property was within the transferee's property and undertaking, prior to title being completed.[113] He seems therefore to have favoured approach (4).

4-55. On the basis of *Sharp*, either approach (2) or approach (4) is the current position in Scots law, at least for the transfer of heritable property and attachment in receivership.[114] If the *ratio* is limited to certain types of property, sale transactions, or receivership, then one of the other approaches represents the applicable law in areas beyond those to which the *ratio* applies.

4-56. Approaches (2) and (4) converged in *Sharp*, but there are other circumstances in which they would diverge. For instance, if beneficial interest but not ownership had passed from A Ltd to C Ltd in the example above (at para 4-42), D Bank's floating charge could attach under approach (4) but not approach (2). In reality, this might make little difference as D Bank's floating charge would, in all likelihood, attach to a personal right to acquire the property. But this right could be defeated if A Ltd were to become insolvent in the meantime, as other creditors of A Ltd could then

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Receivership para 2.36. Another case relevant to the meaning of "property" is *Myles J Callaghan Ltd v City of Glasgow District Council* 1987 SC 171, in which it was held that property attached in a receivership is subject to rights such as set-off for pre-liquidation debts. The outcome would no doubt have been the same if the charge had, instead, attached upon liquidation.

[108] [2004] UKHL 8, 2004 SC (HL) 19.

[109] See ch 7 below, especially paras 7-27 ff, for more details.

[110] See further paras 7-60 ff below.

[111] Other potential elements have not been formally identified. However, see eg the discussion of Wilson's analysis in the context of corporeal moveables at paras 8-18 ff below.

[112] And despite generally favouring (2), some of Lord Clyde's *dicta* are in this direction too.

[113] A J McDonald, "*Sharp v Thomson*: Feudal Purism – But is it Justice?" (1995) 40 JLSS 7, 9.

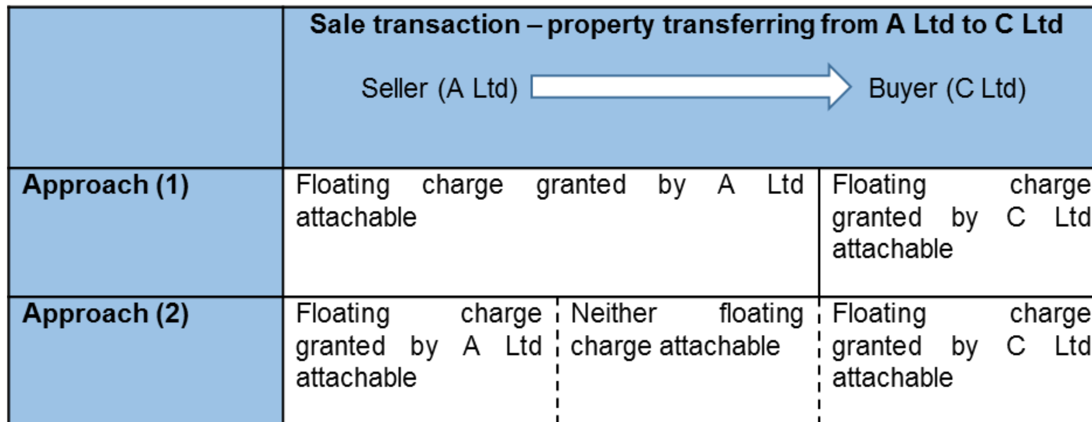
[114] See paras 7-36 ff below. See also paras 8-11 ff and paras 9-13 ff.

claim the property too.[115] And how could the floating charge be enforced in the insolvency of a party other than the chargor? The consequences arising from (2) and (4) also appear to differ where ownership of property is transferred for the purposes of security. Let us assume beneficial interest is the additional attachment element for (2), and the only element for (4), and that A Ltd transfers property, in security, to C Ltd, yet A Ltd retains beneficial interest. In neither case would D Bank's charge attach; however, B Bank's floating charge would do so under approach (4) but not approach (2). This difference between an "equitable approach", epitomised by (4) (and also provided for by (3)), and an approach for which ownership by the chargor is necessary, can have significant implications for the attachment and ranking of a floating charge.[116] Yet approaches (3) and (4) face the sizeable obstacle that floating charges are enforced through mechanisms which are proprietarily limited to the chargor's patrimony. Enabling charges to function upon attachment where property is not owned by the chargor may require an interpretation of property and insolvency law that corresponds with beneficial interest rather than ownership. This would provoke much uncertainty and is not justified under the current law.[117]

4-57. An issue with approach (2) is that, at some point during certain sale transactions, neither B Bank nor D Bank's floating charges can attach to the property being sold. It seems illogical if, at a currently indeterminate point, floating charges granted by A Ltd and C Ltd, over all of the property in their respective property and undertakings, cannot attach to property being transferred from one to the other.[118] For purposes such as insolvency, the property would be part of the transferor's patrimony, due to that party's ownership of the thing.[119] A particular difficulty is demonstrated by table 3 below. If there is a gap in coverage (a "no-man's land"), there are two indistinct borders to identify and overcome. We must determine when the floating charge granted by A Ltd becomes non-attachable and also at what point the floating charge becomes attachable by the charge granted by C Ltd. It is also unclear whether it would be possible to move backwards once a new "zone" is entered, and when this would happen. The position can be contrasted with the simplicity of approach (1), in which there is one clearly-defined boundary, and the property can only fall in one of two sectors. With approach (4) there might only be two sectors but identifying the border point is currently an impossible task.

Table 3

[115] And their rights would be dependent upon A Ltd's ownership of the property.
[116] See, especially, paras 9-73 f below.
[117] See chs 6-9 below.
[118] There can, of course, also be exceptions to universalities, for various reasons; consider eg the diligence of attachment which applies to all corporeal moveables but from which certain articles are exempted: see Debt Arrangement and Attachment (Scotland) Act 2002 ss 10-11.
[119] See chs 6-9 below.



	Sale transaction – property transferring from A Ltd to C Ltd Seller (A Ltd) → Buyer (C Ltd)		
Approach (1)	Floating charge granted by A Ltd attachable		Floating charge granted by C Ltd attachable
Approach (2)	Floating charge granted by A Ltd attachable	Neither floating charge attachable	Floating charge granted by C Ltd attachable

4-58. It might be contended that the "no-man's land" is not, after all, a lacuna. A contractual right to acquire the property will be held by C Ltd and thus can be attached by D Bank's floating charge. A Ltd could then be compelled to perform and the transferred property would become attachable by D Bank's charge, once ownership was obtained by C Ltd. But if A Ltd has entered an insolvency process, there is a problem. A liquidator or equivalent would not have to fulfil an obligation to transfer the property. Does this mean the property would revert back to the "property and undertaking" of A Ltd and become attachable by B Bank's charge? And, if so, when and how would this occur? There are no satisfactory answers here.

4-59. Whichever of (2) or (4) represents the current law, however confined or expansive, they are flawed approaches. As already outlined, (1) is preferable for a number of reasons, not least its coherence with Scots property and insolvency laws and its straightforward operation. In addition, as will be shown in chapters 6 and 7, the justifications for (2) and (4) arising out of the deemed unfairness in the particular circumstances of *Sharp* can be satisfied without damage to the concept of property and its relationship with the floating charge.

(d) The approaches and the attachment mechanism

4-60. The different theories regarding the attachment mechanism of the floating charge will be discussed in the next chapter. But it is appropriate to consider here how these theories fit with the various attachment approaches outlined above. When considering property attached and the mechanism of attachment, it is proper to begin with the question of whether property is attached, as only then does the effect of such attachment have meaning.[120] However, in more general terms, given that the floating charge attaches "as if" it is a "fixed security" (a so-called "statutory hypothesis"),[121] greater credence ought to be afforded to a property-attachment approach which

[120] On this, see eg the discussion in R Rennie, "The Tragedy of the Floating Charge in Scots Law" 1998 SLPQ 169, 177.
[121] See paras 5-12 ff below for further details of the "statutory hypothesis".

facilitates the attachment mechanism in an understandable manner. It might seem irrational if a floating charge could attach as a fixed security, if the chargor did not have the power to grant such a security over the property at that time.

4-61. The prevailing "statutory hypothesis" analysis (the "integrated approach"), whereby an attached floating charge takes on the characteristics of relevant fixed security rights, clearly aligns with attachment approaches where ownership is necessary. Fixed securities can generally only be granted by the owner of property.[122] Therefore, allowing a floating charge to attach to property not owned by the chargor is inconsistent with the attachment mechanism.

4-62. It might be argued that the integrated approach to the statutory hypothesis supports approach (2) more than approach (1), at least for some property. This is because ownership is not the only legal requirement for creating a fixed security over certain types of property. For example, a pledge requires the delivery of property to the pledgee and for that party to maintain possession. Yet this argument is undermined by the fact that even though the pledgor has insufficient possession to confer a second pledge, and a chargeholder does not possess the property, a floating charge can attach to property pledged to another. There is, consequently, disparity between the requirements beyond ownership for creating particular security rights and the attachment of a floating charge.

4-63. The additional requirement(s) for attachment under approach (2) (ie beyond ownership) also do not always match up with the legal conditions for creating a fixed security. This is the case where beneficial interest is the additional requirement and this passes to the transferee, even though the transferor still has the power to grant a fixed security over the property, as was the case in *Sharp*. It could be argued that being able to grant a fixed security in this context refers to a security that is not voidable. But any fixed security granted at the time when a floating charge attaches upon liquidation, or when the chargor is otherwise insolvent, is likely to be voidable as an unfair preference. For simplicity, there is again much to commend approach (1), as these issues are avoided.

4-64. The "*sui generis*" mechanism theory also corresponds to attachment approaches requiring ownership. A party cannot (generally) grant a fixed security over property it does not own, which undermines the application of non-ownership approaches. Under the *sui generis* theory, a floating charge attaches as if it were a generic security (over property) that is effective in the chargor's winding up.[123] The property within the estate of a chargor in winding up is the property owned by that party. Therefore, the floating charge may be considered to attach to property that the chargor company owns. Indeed, the fact that the floating charge is enforced through

[122] There are, however, some statutory exceptions: Conveyancing (Scotland) Act 1924 s 3; Conveyancing and Feudal Reform (Scotland) Act 1970 s 12; and see Reid, *Property* para 644.
[123] Corresponding to the definition(s) of "fixed security": see Companies Act 1985 s 486(1) and Insolvency Act 1986 s 70(1).

insolvency mechanisms and officeholders suggests that property needs to be within the chargor's insolvent estate for the charge to affect property.[124]

4-65. As approach (1) requires only ownership by the chargor for a charge to attach, it explains clearly what is attached, and most neatly aligns with insolvency law and the meaning of fixed security in that context. By contrast, the other approaches involve an unwarranted dissonance between: what is necessary for attachment, the relevant attachment mechanism (whether it is the prevailing statutory hypothesis or a *sui generis* interpretation), and insolvency law.

[124] See paras 6-37 ff below.

5 The Attachment Hypothesis

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A. LEGISLATIVE HISTORY

5-01. Upon crystallisation in English law, a floating charge becomes a fixed charge over each item of charged property.[1] This was already long-established by the time the floating charge was introduced into Scotland.[2] By contrast, Scots law did not have a fixed charge or other security right which applied across different property types.[3] Instead, it had, and still has, specific security rights which correspond to certain types of property. In this sense, the Scottish system of security rights is less unitary and more fragmented than the English law system.[4] And as Gretton notes, the flexibility of the English charge concept can be contrasted with the clearly defined institutions of Scots law.[5]

5-02. The English floating charge fits within an established category of equitable charge, whereas in Scots law there is no such category and no system of equity. The notion of a general category of real rights in security was underdeveloped in Scots law, even in 1961. But the arrival of the floating charge represented a step towards a more unified approach to security rights. As well as being a security available over all types of property, the charge also brought with it (by way of contrast) the

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[1] See eg *N W Robbie* [1963] 1 WLR 1324; *Buchler v Talbot* [2004] UKHL 9, [2004] 2 AC 298, especially at para 29 per Lord Hoffmann; *Goode and Gullifer on Legal Problems of Credit and Security* para 4-31.

[2] See eg *Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979. See also *Re Crompton* [1914] 1 Ch 954; *Cork Report* paras 102-104.

[3] The quasi-security provided by using a trust as a security device may be considered an exception to this.

[4] English law too has certain security rights corresponding to particular types of property but to a lesser degree than Scots law, and it also has security rights such as mortgages and charges that apply to various property categories. It could be said that Scots law has the general notion of a real right in security that extends across different property types; however, the form that this takes depends on the property in question.

[5] See G L Gretton, "Reception without Integration? Floating Charges and Mixed Systems" (2003) 78 Tulane LR 307, 315. The defined nature of the existing Scots law security rights, as opposed to the unknown new charge, was no doubt an attraction for adopting the integrated attachment approach (see further below at paras 5-12 ff).

identification of a previously non-elucidated concept of "fixed security". This concept has applicability for different security rights across the full range of property law and is used to describe the attachment effect of the floating charge.

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

5-03. When the floating charge was being introduced, it was considered necessary to produce a general attachment effect similar to the English position but within the Scottish context. The Companies (Floating Charges) (Scotland) Act 1961 s 1(2) stated that the provisions of the Companies Act 1948 relating to winding up (except s 327(1)(c))[6] would have effect "as if the charge were a fixed security over the property to which it has attached". The wording suggested that the floating charge attached as if it were a fixed security only for the purposes of the winding up provisions in the Companies Act 1948. This was an apparent departure from the Law Reform Committee for Scotland's *Eighth Report*, which stated that the floating charge would "crystallize" and "become a fixed security" over assets subject to the charge upon liquidation.[7]

5-04. Correspondence involving J H Gibson, who assisted with the Bill that became the 1961 Act, sheds light on the intended meaning of the attachment-effect provision that was ultimately included. Within the Bill as it then stood, the floating charge was simply to have effect as if it were a fixed security, which, it was supposed, implied that the property subject to the floating charge could be sold by the chargeholder. Yet there were no provisions enabling sale, and it was considered too problematic to attempt, given the potential variety of property involved.[8] It was also noted that the holder of a fixed security would, upon liquidation, have a right *in rem* to the property. However, a chargeholder would only have "a sort of postponed preferential claim, to the extent of the value of the property subject to the charge".[9] The "postponed" element of the claim referred to the priority to be given to preferential creditors over a floating charge in terms of s 319 of the Companies Act 1948. Meanwhile, the analysis of the floating charge as a preferred claim reflected its status as a fixed security right for ranking purposes, with priority over ordinary unsecured creditors, but with enforcement limitations. Cook, a member of the Law Reform Committee for Scotland, agreed with Gibson, stating that the right of a chargeholder in terms of the Bill was "in reality a postponed preferential claim over the proceeds of the assets subject to the charge" and that it was therefore "not

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[6] This was a provision relating, *inter alia*, to the sale of heritable property by a secured creditor. The current equivalent provision is s 109(7) of the Bankruptcy (Scotland) Act 2016, as applied to liquidation by Insolvency Act 1986 s 185.

[7] See paras 42 and 52. References to the English term "crystallization", incorporated in early versions of the Bill, were removed: see Parliamentary Debates, House of Commons, Official Report, Scottish Standing Committee, 20 June 1961, col 7 (Forbes Hendry).

[8] NRS AD63/481/1 – Letter from J H Gibson, Lord Advocate's Department, to F Hendry, House of Commons dated 8 June 1961. It was stated that this was not intended as a suggestion for what was to be said in parliamentary proceedings.

[9] NRS AD63/481/1 – Copy letter from J H Gibson, Lord Advocate's Chambers, to W A Cook, Biggart, Lumsden & Co, dated 18 May 1961.

necessary to provide that the charge crystallizes into a fixed security on liquidation".[10]

5-05. What was apparently desired was "to arrange that the holder of the charge will get the benefit of the charge through the liquidator".[11] It was suggested that this was "not dissimilar" to saying that the chargeholder would be "like an unsecured creditor but preferred, as against the general unsecured creditors, to the extent of the property charged". Yet it was acknowledged that this could not be stated directly as it would be anomalous compared to other parts of the Bill, in which the floating charge had some of the characteristics of a security, such as for ranking. The replacement provision which was included in s 1(2) of the Companies (Floating Charges) (Scotland) Act 1961 therefore provided that the floating charge attached as if it were a fixed security for specifically limited purposes.

5-06. During the Bill's progress through Parliament, some further explanation of the attachment mechanism was provided. Immediately prior to moving the Bill for second reading in the House of Lords, Viscount Colville of Culross mentioned that the provision regarding the effect of the floating charge's attachment seemed, at first glance, a "most obscure phrase".[12] He stated that it had been included to attract s 61 of the Bankruptcy (Scotland) Act 1913, as applied by s 318 of the Companies Act 1948, so that upon liquidation the floating charge would be considered a security under the legislation (ie for the valuation and ranking of the charge on the estate). This would give the chargeholder the means to acquire, from the liquidator, sums due to it, as if it were a fixed security-holder. Importantly, Viscount Colville stated that the phrase "does not mean that the floating charge can be considered to be a fixed security for any other purpose".[13]

5-07. Viscount Colville also noted that an ordinary fixed security can be "dealt with in the market, it can be sold and it can be subject to various other transactions. Not so the floating charge, which is only a fixed security for this one purpose of liquidation; it cannot be realised in any other way than on liquidation."[14] The reference to the selling of the security appears, at first sight, to involve assigning the security right itself. However, the passage is more intelligible, especially given the final reference to realisation of a charge in liquidation, if it is read as meaning that a fixed-security holder could sell the security property, or otherwise deal with it, in a way that a chargeholder could not.[15] In any event, a clear contrast is drawn between the limited fixed-security effect of the floating charge and fixed-security rights proper.

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[10] NRS AD63/481/1 – Letter from W A Cook, Biggart, Lumsden & Co, to J H Gibson, Lord Advocate's Chambers, dated 31 May 1961.
[11] NRS AD63/481/1 – Letter from J H Gibson, Lord Advocate's Department, to F Hendry MP, House of Commons dated 8 June 1961. And see NRS AD63/481/1 – Copy letter from J H Gibson, Lord Advocate's Chambers, to W A Cook, Biggart, Lumsden & Co, dated 18 May 1961.
[12] HL Deb, 5 July 1961, vol 232, col 1437.
[13] HL Deb, 5 July 1961, vol 232, col 1437.
[14] HL Deb, 5 July 1961, vol 232, col 1437.
[15] This seems to be supported by NRS AD63/481/2 – Revised Note (HL) on Companies (Floating Charges) (Scotland) Bill, Notes on Clauses, clause 1(2).

5-08. It is noteworthy that those involved with the Companies (Floating Charges) (Scotland) Act 1961 considered a "fixed security" would give its holder a right in particular property enabling them to sell it. The Royal Faculty of Procurators in Glasgow, which responded to the Bill, were of a similar view, suggesting that the floating charge even after attachment did not operate as a security, especially a fixed security, as the characteristic of such a security was that it could be operated by its holder independently of the liquidator.[16]

5-09. The intended mechanism for the floating charge's attachment under the 1961 Act was therefore that the charge was deemed a fixed security only for the purpose of giving effect and priority to the charge within the chargor's liquidation.[17] There was no suggestion that the charge, upon attachment, would take on the characteristics of particular rights in security over relevant types of property. That view was first adopted much later, in *Forth & Clyde Construction Co Ltd v Trinity Timber & Plywood Co Ltd*,[18] when the court was interpreting provisions in the Companies (Floating Charges and Receivers) (Scotland) Act 1972.[19]

(2) Later legislation

5-10. The phraseology used for the *receivership* attachment provisions within the 1972 Act (which introduced receivership),[20] and now the Insolvency Act 1986,[21] was, and is, in slightly different terms to the equivalent provisions for attachment upon *liquidation* in the 1961 Act, the 1972 Act[22] and now the Companies Act 1985. The current wording for attachment in liquidation, in the 1985 Act s 463(2), is:

> The provisions of Part IV of the Insolvency Act (except section 185) have effect in relation to a floating charge, subject to subsection (1), as if the charge were a fixed security over the property to which it has attached in respect of the principal of the debt or obligation to which it relates and any interest due or to become due thereon.

5-11. By contrast, the effect of attachment in receivership or administration is not expressly restricted to Part IV of the Insolvency Act 1986 or any equivalent set of statutory provisions. The present receivership provisions merely state that "attachment has effect as if the charge was a fixed security over the property to

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[16] NRS AD63/481/1 – Memorandum on Companies (Floating Charges) (Scotland) Bill by the Royal Faculty of Procurators in Glasgow, para 3, enclosed with letter from Royal Faculty of Procurators in Glasgow to the Secretary, Lord Advocate's Department, dated 28 April 1961.
[17] See also NRS HH41/1434 – Letter from J H Gibson, Lord Advocate's Chambers, to G Black, Registers of Scotland, dated 13 January 1961, in which Gibson noted that it was "only in the distribution of a company's assets by a liquidator that a floating charge has effective operation".
[18] 1984 SC 1.
[19] See further below at paras 5-16ff.
[20] Companies (Floating Charges and Receivers) (Scotland) Act 1972 ss 13(7) and 14(7).
[21] Insolvency Act 1986 s 53(7). Section 54(6) is in the same terms except "were" is used in place of "was".
[22] Companies (Floating Charges and Receivers) (Scotland) Act 1972 s 1(2).

which it has attached", without reference to the statutory hypothesis applying within a particular limited context. Almost identical wording is used for the attachment effect in administration.[23] As a result, it is arguable that attachment upon liquidation has a different effect from attachment upon receivership or in an administration. But it can also be contended that attachment and its consequences in receivership and administration are inherently limited by the fact that the charge is only enforceable in these particular contexts (and in liquidation). In other words, the floating charge is only a fixed security for the statutory regimes of administration and receivership and for the law interacting with those regimes.

B. A STATUTORY HYPOTHESIS

5-12. Wilson describes the attachment mechanism for floating charges as a "statutory hypothesis".[24] What this means is that the legislation causes the floating charge to act and be treated like a fixed security. But what is a fixed security here, and to what extent does the floating charge take on characteristics of such a security?

(1) Competing theories of attachment

5-13. It is suggested by Wilson that the alternative theories of attachment correspond to two "philosophies" of receivership.[25] The first philosophy restricts the effect of receivership to the relationship between the chargeholder and the company. It considers there to be little difference between the company and the receiver, and is supported by the receiver's status as an agent and the absence of vesting of property in the receiver. This aligns with viewing the deemed fixed security, when the floating charge attaches, as a general *sui generis* security "which merely gives a preference in the winding-up of the company".[26] As we have seen, there is an especially strong case for such an analysis in relation to attachment in a company's liquidation.

5-14. The second philosophy views attachment in a similar way to sequestration, so that there is thus a clear division between the company and the receiver. Wilson claims this is supported in the legislation by the floating charge's priority over some types of diligence.[27] The basis for this assertion regarding diligence is unclear but is presumably rooted in the highly criticised interpretation of "effectually executed diligence" in *Lord Advocate v Royal Bank of Scotland*.[28] Given that this authority was recently overturned in *MacMillan v T Leith Developments Ltd*,[29] and bare

[23] Insolvency Act 1986 Sch B1 para 115(4): "as if the charge is a fixed security over the property".
[24] He seems first to use this description in W A W(ilson), "The Receiver and Book Debts" 1982 SLT (News) 129, and W A Wilson, *The Law of Scotland Relating to Debt* (1982) 142.
[25] W A Wilson, "The Nature of Receivership" 1984 SLT (News) 105.
[26] Wilson, "The Nature of Receivership" 105.
[27] Wilson, "The Nature of Receivership" 105.
[28] 1977 SC 155. See S Wortley, "Squaring the Circle: Revisiting the Receiver and 'Effectually Executed Diligence'" 2000 JR 325.
[29] [2017] CSIH 23, 2017 SC 642.

diligence[30] now constitutes "effectually executed diligence" (if not rendered ineffective by its proximity to liquidation), and thus ranks ahead of the floating charge, the legal basis for the second philosophy is undermined. In any event, this philosophy apparently causes the attaching charge to take on characteristics of the existing form of voluntary security for the property-type in question. Although Wilson's discussion is limited to the law of receivers, the attachment mechanism applies in liquidation and administration too and therefore it must also be considered within these contexts.

(2) The integrated approach

5-15. In Wilson's view, the "more natural approach" (at least in receivership) is for the floating charge to attach like the appropriate fixed security for each type of property.[31] This can be described as the "integrated approach", as it embeds the floating charge's operation within existing Scots law. The approach means it attaches to heritable property as if it is a standard security, to corporeal moveables as if it is a pledge, and to most incorporeal property as if it is an assignation in security. These security rights have different natures. The generally accepted position is that assignation in security involves the transfer of a right to the creditor,[32] while a pledge is a subordinate real right founded upon possession and a standard security is a non-possessory subordinate real right established by registration.

5-16. In *National Commercial Bank of Scotland v Liquidators of Telford Grier Mackay & Co*,[33] a case decided before the introduction of receivership, the First Division considered that a floating charge was a real right in security upon attachment.[34] The court did not, however, ascribe a particular security right to the attachment. It was only after the arrival of receivership that the integrated approach was judicially adopted by the First Division in *Forth & Clyde Construction Co Ltd v Trinity Timber & Plywood Co Ltd*.[35] A book debt had been arrested after the appointment of a receiver. The court held that, upon attachment of the floating charge, the book debt was deemed assigned to the chargeholder with intimation to the claim debtor. This was because assignation in security with intimation was the only "effective security" for such property. Consequently, the arrestment by the chargor's creditor was invalid. (If the property was not considered to be assigned to the chargeholder, in the competition with the arrester the charge would simply have ranked ahead). According to Lord President Emslie, the chargeholder was intended to have "the advantages" which the holder of the relevant "effective security" would have under the law.[36]

[30] Ie where diligence has been executed but the process has not been completed, such as where there is arrestment without furthcoming or if arrested funds have not yet been automatically released, or where property has been attached (in the diligence sense) but not yet sold.
[31] W A W(ilson), "The Receiver and Book Debts" 1982 SLT (News) 129.
[32] See paras 9-16 ff below.
[33] 1969 SC 181.
[34] Especially per Lord President Clyde at 193 ff.
[35] 1984 SC 1.
[36] 1984 SC 1 at 11.

5-17. The court in *Forth & Clyde* recognised there was no actual transfer, but the extent of the fiction is unclear. On the basis of the Lord President's suggestion that, despite the deemed assignation in security and intimation, the company "retains the title to demand payment of the debt but no longer for its own behoof", it is apparent that the integrated approach does not (in the court's view) circumvent the fact that the receiver is only agent for the company, as regards its property.[37] By not applying all of the characteristics of the relevant security, the approach taken by the court is a restricted integrated approach.

(3) The *sui generis* approach

5-18. An alternative interpretation of the statutory hypothesis is that, upon attachment, the floating charge is a *sui generis* security. This is an argument outlined by Reed[38] and also discussed by Wilson (see para 5-13 above). Although Reed suggests that the approach adopted in *Forth & Clyde* represents a *sui generis* position regarding attachment in receivership,[39] the *sui generis* approach is more helpfully categorised as an approach which does not tie the operation of the floating charge to particular characteristics of specific security rights (unlike in *Forth & Clyde*). Instead, attachment under this interpretation causes the floating charge to operate like a "fixed security" in a generalised sense.

5-19. In the relevant legislation, the term "fixed security" means "… any security… which on the winding up of the company in Scotland would be treated as an effective security over that property…"[40] Thus, on this view the floating charge upon attachment functions like a generic security that is effective over property in a winding up, supplemented by the specific rules relating to floating charges.

5-20. An argument along the above-noted lines was put forward by the respondents (reclaimers) in *Forth & Clyde*. It was argued that "the effect of the floating charge is to create a new species of security in a general form, the effect of which is not determined by the kind of security appropriate to each type of property under the general law".[41] This approach did not find favour with the court. Further, as well as

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[37] 1984 SC 1 at 11. G L Gretton, "The Floating Charge in Scotland" [1984] JBL 344, 344 f queries the meaning of the Lord President's statement and its compatibility with the law of incorporeal moveable property. And see *McPhail v Lothian Regional Council* 1981 SC 119 and *Taylor Petr* 1981 SC 408 which consider the related issue of whether a receiver can recover book debts by raising an action using his own name. They reach different conclusions on the point. See also *Myles J Callaghan Ltd v City of Glasgow District Council* 1987 SC 171.

[38] Now Lord Reed, President of the UK Supreme Court. See R J Reed, "Aspects of the Law of Receivers in Scotland: II The Effect of Receivership" 1983 SLT (News) 237; R J Reed, "Aspects of the Law of Receivers in Scotland: III The Receiver's Duty of Care" 1983 SLT (News) 261.

[39] Reed, "Aspects of the Law of Receivers in Scotland: III" 265 f. This is true insofar as the deemed assignation in security does not involve all of the effects of that form of security.

[40] See Companies Act 1985 s 486(1), and Insolvency Act 1986 s 70(1).

[41] *Forth & Clyde Construction Co Ltd v Trinity Timber & Plywood Co Ltd* 1984 SC 1 at 6.

Forth & Clyde, the Inner House in *Sharp v Thomson*[42] specified that upon attachment a floating charge operates like a recorded standard security as regards heritable property,[43] and on appeal the House of Lords did not depart from the Inner House on this point.[44]

C. A SECURITY *SUI GENERIS*?

5-21. Despite the significant support for some form of the integrated approach, there are powerful, even compelling, arguments against it and in favour of the *sui generis* position. Firstly, as noted at paras 5-03 ff above, the intention of those involved with the Companies (Floating Charges) (Scotland) Act 1961 was for the floating charge to be principally an insolvency preference and for it to operate as a fixed security only for statutorily limited purposes.

5-22. Secondly, the current legislative provisions for attachment upon liquidation limit the attachment effect to purposes outlined by statute. The Companies Act 1985 s 463(2) provides that a floating charge attaches as if it were a fixed security for the purposes of Part IV of the Insolvency Act 1986, except s 185.[45] This latter section applies certain sequestration provisions in the Bankruptcy (Scotland) Act 2016 (in adapted form) to liquidation.[46] These modified provisions outline the effect of diligence in liquidation and provide rules regarding the management and realisation of property in that process, including restrictions upon a liquidator's ability to sell heritable property where he is subject to higher-ranking secured creditors.[47] The non-application of the latter to an attaching charge further reinforces the view that a chargeholder cannot itself enforce the charge, and does not have the power to stop a liquidator from realising charged property.

5-23. There is noticeable consistency too between the attachment effect in liquidation and the express meaning of fixed security as a security over property effective in such a process.[48] Admittedly, the explicit limitation of the statutory hypothesis in liquidation contrasts with the provisions for receivership and administration. Nevertheless, if there is to be a single attachment mechanism for floating charges, then it is much easier to read in limitations to the receivership and administration provisions than to ignore the express restrictions for liquidation.

5-24. Within the Insolvency Act 1986, the references to the floating charge operating as if it is a fixed security appear to have only limited meaning because,

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[42] 1995 SC 455.

[43] Especially per Lord Coulsfield at 488.

[44] *Sharp v Thomson* 1997 SC (HL) 66 at 70 per Lord Jauncey and at 79 per Lord Clyde.

[45] Bankruptcy and Diligence etc (Scotland) Act 2007 s 45 adopts the same approach as the current provisions for the effect of attachment in liquidation. However, it is unlikely that s 45 (and the rest of Pt 2 of that Act) will now ever be introduced.

[46] Insolvency Act 1986 s 185(1), applying Bankruptcy (Scotland) Act 2016 ss 23A(3)-(10), 24, and 109(6)-(7), (10)-(11).

[47] Bankruptcy (Scotland) Act 2016 s 109(7).

[48] See para 5-19 above.

throughout the Act, there is a continuing distinction between fixed and floating charges, even after floating charges attach.[49] Yet the provisions serve to emphasise the floating charge's status as an effective security over property in liquidation, as well as in receivership and administration.[50] This status can be used to answer any unforeseen points, where, for example, distinguishing the floating charge from the claims of unsecured creditors may be important.[51] It may also enable a floating charge to have priority over subordinate real rights that are only created after the charge has attached.

5-25. Thirdly, the *sui generis* approach is consistent with the floating charge's nature. With reference to the creation of the charge and its attachment, the legislation does not make distinctions based upon the types of property affected. It would therefore be appropriate for the floating charge to attach to property in a uniform and non-fragmentary way, albeit that the charge must interact with specific regimes for particular types of property. This would mean the charge being considered a generic fixed security for each item of property attached, the consequences of which are provided by the floating charge legislation and other legislation relevant to the charge's enforcement.

5-26. Fourthly, the considerable uncertainties about the content and extent of the integrated approach raise doubts about its credibility. In *Forth & Clyde*[52] the court decided that a deemed assignation in security to the chargeholder rendered a post-attachment diligence by the chargor's creditor invalid. However, the effect of attachment is not a full (fictional) divestment of the chargor, as the chargeholder does not obtain title to sue and is limited by the enforcement mechanism of the charge.[53] A receiver, acting as a representative of the *chargor*, can deal with the property, raise actions and receive proceeds, while the purported "assignee" cannot do any of these things.[54] There are also unclear implications for issues like (so-called) "set-off".[55] A further point of uncertainty is whether a post-attachment arrestment is only ineffective against a chargeholder and a receiver, or whether it would also be ineffective more widely, such as in liquidation.[56] In addition, as Reed queries, does the assignation in security effect mean that once the debt to the

[49] For example, in relation to distribution in receivership (s 60) and administration (Sch B1 para 116).
[50] For ranking purposes and otherwise.
[51] As was the case in *National Commercial Bank of Scotland v Liquidators of Telford Grier Mackay & Co* 1969 SC 181, which dealt with a chargeholder's entitlement to interest on the principal debt between the date of liquidation and the repayment of the principal. For this matter, see now Companies Act 1985 s 463(4).
[52] 1984 SC 1.
[53] And see G L Gretton, "Receivers and Arresters" 1984 SLT (News) 177, 178 f.
[54] See the argument along these lines by the respondents (reclaimers) in *Forth & Clyde Construction Co Ltd v Trinity Timber & Plywood Co Ltd* 1984 SC 1 at 6 f.
[55] See eg St Clair and Drummond Young, *Corporate Insolvency* paras 17-10 ff; Wilson, *Debt* para 9.19. For discussion of the general misapplication of the term "set-off" in the Scots law context, see L Richardson, "Examining 'Equitable' Retention" (2016) 20 EdinLR 18, 19 f; L Richardson, "Set-off: A Concept Divided by a Common Language? (2017) LMCLQ 238.
[56] It is also uncertain if it would become effective where the company exited receivership, or if a new diligence would instead need to be executed.

chargeholder is satisfied there is a deemed intimated retrocession to the chargor?[57] And if a claim is non-assignable, does the attachment mechanism fail and the property become unsecured?[58] A further difficulty arises where there are multiple charges. Incorporeal property is unititular, so it cannot be effectively assigned to more than one party, which may mean that only one charge can attach the property. This is especially problematic if a lower-ranking charge attaches before a higher-ranking one. By contrast, a *sui generis* approach would more clearly enable multiple charges to rank over the same property.

5-27. Moving now to other property types, the pledge of a corporeal moveable requires possession by the pledgee, which cannot be validly split between different parties. So, if the chargeholder is a deemed pledgee, does this mean it is considered to have possession, and, if so, how does this impact upon a pledgee (or other party) who actually does have possession? As Gretton notes, there is a certain absurdity in providing that the charge operates like particular deemed fixed securities on attachment.[59] For example, heritable securities, unlike floating charges, are registered in the Land (or Sasine) Register and various consequences flow from this. Floating charges also do not confer the enforcement rights available to standard-security holders.

5-28. Furthermore, how does one explain the disparity between the ranking rules for floating charges and those for the fixed securities that a charge is deemed to become? These issues (and others) are largely avoided by using the *sui generis* approach, which more readily confines and clarifies the attachment mechanism through statutory provisions.

5-29. Fifthly, the integrated approach appears dependent upon there being only one fixed security for each type of property, but this is not the case for all forms of property. For instance, when the floating charge was introduced into Scots law, there was more than one type of heritable security available, and the then principal forms of heritable security, the bond and disposition in security and the *ex facie* absolute disposition in security qualified by back letter, had different natures. Yet both of these were fixed securities under the Companies (Floating Charges) (Scotland) Act 1961.[60] Consequently, what form would the charge's attachment to heritable property have taken? Also, as Reed asks, did the charge's nature for heritable property change upon the introduction of the standard security in 1970?[61] It is notable that the integrated approach was first proposed and judicially adopted a number of years after the standard security became the only security that could be granted over heritable property.

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[57] R J Reed, "Aspects of the Law of Receivers in Scotland: II The Effect of Receivership" 1983 SLT (News) 237, 239.
[58] See Reed, "Aspects of the Law of Receivers in Scotland: II" 239. And see paras 9-09 ff below.
[59] G L Gretton, "Reception without Integration? Floating Charges and Mixed Systems" (2003) 78 Tulane LR 307, 321 f.
[60] See paras 7-93 ff below.
[61] Reed, "Aspects of the Law of Receivers in Scotland: II" 239.

5-30. For certain property-types there continue to be multiple voluntary security rights available. For instance, ships and aircraft can be pledged or "mortgaged", and a ship can also, in theory, be the subject of a bond of bottomry.[62] Which form(s) would an attaching charge take, and why? Moreover, if a new form of security over moveable property is introduced (as currently proposed by the Scottish Law Commission), will that affect the deemed effect of the charge's attachment?[63] Even under the current law of security over incorporeal property, there are distinctions between assignation expressly in security and assignation *ex facie* absolute.[64] Despite counsel for the respondents (reclaimers) in *Forth & Clyde* raising this issue, the court ignored the point.[65]

5-31. All of the above suggests that the *sui generis* approach is the preferable one. Admittedly, it may seem contradictory to propose that the property attachable by the floating charge ought to be determined by the underlying Scots law while also arguing that the attachment mechanism should not conform directly to that law. But the different analyses are justified. The starting point of the former necessarily involves examining property law and legal relationships external to the floating charge, and the approach taken is more amenable, in doctrinal terms, than adopting English equitable concepts. Meanwhile, an approach to the attachment mechanism that does not involve the charge transforming into particular existing security rights reflects the charge's singular nature and still fits it suitably into the wider law. These analyses are consistent in perceiving the floating charge as a *sui generis* creation operating within the environment of Scots property law.

D. THE NATURE OF THE ATTACHED CHARGE

5-32. The particular effect of the attachment mechanism is also closely related to questions about the floating charge's nature. Obviously, the closer the attached charge is to particular types of real rights in security, the more appropriate it is to describe it as a real right. Indeed, based upon the prevailing deemed effect of the charge, commentators state that it becomes a real right upon attachment.[66] But it has also been pointed out that there are key differences between the post-attachment charge and the particular security rights it is considered to mirror, such as the

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[62] See eg A J Sim, "Rights in Security over Moveables", in *Stair Memorial Encyclopaedia* vol 20 (1992) paras 26 ff.

[63] See SLC, *Report on Moveable Transactions* chs 21-22 for details of the property that the proposed statutory pledge could encumber.

[64] See paras 9-16 ff below.

[65] *Forth & Clyde Construction Co Ltd v Trinity Timber & Plywood Co Ltd* 1984 SC 1 at 7. Counsel also argued that an intimated assignation is not a security over property but a transfer of a claim against a debtor.

[66] See eg Reid, *Property* para 5 and n 5; Styles, "The Two Types of Floating Charge" 240. And see eg *National Commercial Bank of Scotland v Liquidators of Telford Grier Mackay & Co* 1969 SC 181. However, the discussion in that case revolves around the status of the floating charge within liquidation, where it is to have the effect of a fixed security. Indeed, at certain points it is acknowledged that a charge only attaches "as if" it is a fixed security, ie it is an equivalent to this rather than actually becoming a fixed security: see eg Lord Guthrie at 197 f and Lord Cameron at 205 f.

absence of the remedies available to the fixed-security creditor.[67] If, instead, the effect of attaching as a fixed security is limited to certain purposes, such as ranking in liquidation, receivership and administration, then the notion of the floating charge as a real right is more precarious. This is particularly true when we consider the limitations on a charge's enforcement, outlined in the next chapter. If a floating charge is a *sui generis* security upon attachment, it is easier to accept that the charge is, or was intended to be, a preference right with some real effects, or a preference/real right hybrid,[68] or a preferred personal right,[69] rather than a real right in the traditional sense.[70]

5-33. When attachment takes place, there is necessarily some fragmentation of the floating charge as it applies to individual items of property affected by different regimes. Nevertheless, the charge itself seems to remain a unit which can only be transferred as a whole. For example, it probably would not be possible to transfer the attached charge over heritable property separately from the remainder of the charge. The attachment and enforcement provisions are apparently constructed on the basis of the charge remaining a unified whole, and there might be significant complications if, following assignation, there were multiple chargeholders stemming from one original charge.[71] This is consistent with viewing the floating charge's relationship with property as unitary, and seems to add further weight to the view that the attachment mechanism is *sui generis*.[72]

5-34. One issue that emerges from the charge's unified status is whether it should be characterised as moveable or heritable property.[73] There would be considerable challenges if its nature corresponded proportionally to the types of property charged. The property may continue to change and fluctuate, making calculations for the relevant apportionments fiendishly difficult. Perhaps an appropriate date could be identified for calculation purposes but the outcome would still not be

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[67] R R M Paisley, *Land Law* (2000) paras 2.6 and 11.27 cites the attached charge as an addition to the *numerus clausus* of real rights but points to the limited fixed-security effect of the charge (eg regarding ranking) and the absence of enforcement remedies that a fixed-security creditor has.
[68] G L Gretton, "The Concept of Security", in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987) 146 suggests that floating charges "lie half-way between traditional security rights and rights of preference".
[69] See Scottish Law Commission, *Report on Diligence on the Dependence and Admiralty Arrestments* (Scot Law Com No 164, 1998) paras 9.7 ff. The Report states that "protected personal rights" entitle a personal creditor to exclude property from the debtor's sequestration while "preferred personal rights" do not exclude affected property from such a process but do give a preference.
[70] This is discussed further at paras 6-83 ff below.
[71] Eg the receivership distribution provisions (Insolvency Act 1986 s 60) refer to payment of proceeds to the chargeholder by virtue of which the receiver was appointed, suggesting a singular floating charge and one receiver (or joint receivers) deriving therefrom. There would also be tension with the fact that one charge was created, and the charges register would only show a single charge.
[72] If instead it attached like specific forms of security, the charge would be more piecemeal and there would be a greater likelihood of it being considered severable.
[73] Given that chargeholders are almost invariably non-natural persons, the distinction is of limited practical importance.

straightforward. It would be simpler, but arbitrary, to regard the charge as moveable and for the proceeds received from a liquidator or equivalent to be treated as such.[74]

5-35. In any event, the particular property attached does impact upon whether the charge is viewed as a real right, if certain analyses of real rights and property are adopted. Some would contend that it is not possible for there to be a real right where the (immediate or ultimate) object is not corporeal property. And if "real right" is inappropriate in this context, then the charge might have a divided nature upon attachment depending upon the property attached – part real right, part limited personal right.[75]

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[74] Scottish Law Commission, *Consultative Memorandum on Floating Charges and Receivers* (Scot Law Com CM No 72, 1986) noted that it was unclear whether the debt secured by a floating charge was heritable or moveable (para 2.91), and also mentioned the uncertainty regarding which diligence ought to be used (para 2.92). They recommended legislative provision to classify the rights under a debt secured by a floating charge as moveable property (para 2.92). Cf Titles to Land Consolidation (Scotland) Act 1868 s 117.

[75] This would be consistent with the arguments made in G L Gretton, "Ownership and its Objects" (2007) 71 Rabels Zeitschrift 802.

6 Enforcement of the Floating Charge

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A. INTRODUCTION

6-01. This book seeks to place the floating charge in the wider context of Scots property law. Yet understanding the nature and operation of the charge also necessitates an analysis of the charge and its relationship with attached property within the law of insolvency. The present chapter will do this by focusing on the enforcement of the floating charge. Here, enforcement means a process by which the charged property is used to satisfy the debt due to the chargeholder.[1] Although attachment is seemingly a necessary condition for enforcement of a floating charge, as it gives the chargeholder the right to receive proceeds for satisfaction, the means

[1] It is recognised that this does not necessarily apply to administrations, but enforcement here includes administrations in which the floating charge attaches and the administrator is making distributions.

of enforcement are not attachment as such but rather liquidation, receivership and administration.[2] Nevertheless, attachment and enforcement are intertwined and there is a stronger connection between the real effect of the charge (upon attachment) and its enforcement than there is for other security rights.

6-02. Consideration of the floating charge in Scots law has often involved discussion of aspects of the enforcement regimes, especially receivership.[3] However, minimal attention has been paid to the patrimonial, limiting effect of the relevant processes on property potentially subject to the charge. It is often assumed that, whenever property is attached by a floating charge, the charge can be successfully enforced against such property.[4] Instead, there is the possibility that the enforcement methods render a floating charge ineffective even for property that was attached. This ineffectiveness is more serious than a charge attaching but being subject to higher-ranking competing interests, which may or may not exhaust the property charged. Instead, it means that the floating charge cannot be utilised in relation to the property at all, irrespective of the ranking position of its holder against other creditors.

6-03. The fact that there are different regimes to enforce a floating charge, each with its own features, also raises the question as to whether there is one law of floating charges, with certain deviations regarding enforcement only, or whether the distinct regimes mean there are actually multiple laws of floating charges, corresponding to the various enforcement methods. This issue will receive some attention in this chapter.

B. SELF-ENFORCEMENT?

6-04. Here, "self-enforcement" means enforcement by the chargeholder alone without the necessity of intervention by a third party. From a practical perspective, it is more sensible for the law to require a non-creditor third party, such as a liquidator, receiver or administrator, to identify, control and realise the (potentially) wide range of property that is subject to a floating charge. It is unlike the usual secured-creditor scenario in which a particular item is specifically identified as secured through, for example, registration or delivery, which facilitates enforcement by a single creditor. Nevertheless, English law allows for a range of enforcement methods following

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[2] Cf S C Styles, "Rights in Security", in A D M Forte (ed), *Scots Commercial Law* (1997) 196, describing attachment as the process of enforcing the floating charge.

[3] As the only floating charge-specific, and formerly the most common, enforcement regime. Indeed, prior to the publication of this book, the only book specifically on floating charges in Scots law focused on receivership: I M Fletcher and R Roxburgh, *Greene and Fletcher, The Law and Practice of Receivership in Scotland*, 3rd edn (2005).

[4] Eg in *Sharp v Thomson* 1997 SC (HL) 66 the argumentation revolved around attachment and it was assumed that the receiver would automatically prevail if the property was attached. In the commentary on *Sharp* there is also an absence of consideration of enforcement as a separate issue. A connected view of attachment and enforcement is also highlighted (and partially negated) by the Land Registration etc (Scotland) Act 2012 s 93, which provides that a good-faith acquirer is not affected by a floating charge granted by the disponer's predecessor in title.

crystallisation of a floating charge, including self-enforcement.[5] The English floating charge seems able to offer a closer enforcement relationship between the chargeholder and the property charged than the Scottish version.[6] But are there any circumstances in which self-enforcement by a chargeholder is permitted in Scots law?

6-05. In *Libertas-Kommerz GmbH v Johnson*[7] the issue of self-enforcement was raised. Counsel for the liquidator argued that, because a floating charge becomes a fixed security over property upon liquidation, the property would not vest in the liquidator, and the chargeholder would have to realise the property.[8] This seems to ignore the fact that even non-encumbered property does not vest in the liquidator and that the liquidator can himself, subject to qualifications, deal with property encumbered by a security.[9] Nevertheless, in support of the argument, reference was made to *National Commercial Bank of Scotland v Liquidators of Telford Grier Mackay & Co*,[10] in which the Inner House had emphasised that a floating charge becomes a real right upon attachment (in liquidation). Lord Kincraig, in *Libertas-Kommerz*, rejected the submission and stated that *National Commercial Bank* did not mean the chargeholder would have to realise the security itself.[11] He also suggested that there would have been difficulties doing this before receivership was introduced,[12] presumably due to the absence of an enforcement mechanism except for realisation and distribution by the liquidator. Indeed, the apparent intention behind the Companies (Floating Charges) (Scotland) Act 1961 was for the charge to be enforced through a liquidator and it is hard to read *National Commercial Bank*, and the limited real-right effect of a charge outlined in that case, as changing anything in this regard. In fact, it was suggested in the case that enforcement at that time would, in practice, need to be carried out by the liquidator giving effect to the charge.[13]

6-06. In no Scots law case has it been held that a chargeholder can self-enforce, and this is in line with the original intended operation of the charge, as outlined in the previous chapter. The issue of self-enforcement has not been discussed in detail by commentators, which can itself be read as an endorsement of the view that self-enforcement is not possible.[14]

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[5] See eg *Goode and Gullifer on Legal Problems of Credit and Security* para 4-64, where it is stated that the floating-charge holder has all the remedies conferred by the relevant debenture and these will usually include "the power to take possession of the charged assets, to sell them and to appoint an administrator or, in certain cases, a receiver".

[6] For the English position, see eg *Goode and Gullifer on Legal Problems of Credit and Security* paras 4-40 ff.

[7] 1977 SC 191.

[8] 1977 SC 191 at 204.

[9] See paras 6-14 and 6-37 ff below.

[10] 1969 SC 181.

[11] 1977 SC 191 at 204.

[12] This implies that he viewed enforcement by the chargeholder in a wide sense to include receivership.

[13] See eg Lord Guthrie at 198 and Lord Cameron at 210.

[14] However, it is, for example, stated in *Palmer's Company Insolvency in Scotland* para 481 that a chargeholder may rank as a secured creditor in liquidation "instead of pursuing his rights under the

6-07. It could be argued that an integrated approach to the statutory hypothesis facilitates self-enforcement. If the charge attaches as if it is a fixed security, could this extend to the enforcement methods available to the holders of corresponding fixed securities? This view is, however, undermined by the absence of specific statutory provisions for self-enforcement. The recognised enforcement methods are expressly constructed in the legislation and the floating charge is, of course, a statutory device. In liquidation, the charge attaches as if it were a fixed security expressly for the purposes of that process, and the attachment effect in receivership and administration occurs within those enforcement contexts, which provide for distribution to the chargeholder and others, suggesting that the chargeholder cannot proceed independently. This is also a logical consequence of the fact that attachment only takes place within these processes.

6-08. It would be problematic if the statutory hypothesis allowed for enforcement as if the charge were a particular fixed security. For example, the provisions of the Conveyancing and Feudal Reform (Scotland) Act 1970 are clearly not designed for a floating charge to take on characteristics of the standard security regarding enforcement or otherwise. There are no direct translation provisions which fit the charge into the contents of the 1970 Act.[15] The various forms for notices of enforcement even refer to a standard security which has been registered or recorded in the Land Register or Register of Sasines;[16] and floating charges are not so registered or recorded. There would also be problems for enforcement as regards other types of property if the charge attached like the corresponding fixed securities.[17] Professor Paisley rightly notes that the statutory hypothesis "cannot be taken too far": although the chargeholder has certain ranking rights like a fixed security from attachment, the attachment effect does not extend to enforcement mechanisms.[18]

C. ENFORCEMENT IN COMPETITION WITH A FIXED-SECURITY HOLDER

(1) Higher-ranking fixed-security holder

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charge". Yet the alternative enforcement suggested is almost certainly the appointment of a receiver rather than actual self-enforcement.

[15] Cf Abolition of Feudal Tenure etc (Scotland) Act 2000 s 69, involving pre-1970 forms of heritable security, which by virtue of their content and registration against particular property in the Register of Sasines, more closely correspond to standard securities than does the floating charge.

[16] See the notices in Conveyancing and Feudal Reform (Scotland) Act 1970 Sch 6; and see ss 19 ff.

[17] Eg for corporeal moveable property and pledge, the absence of possession by the chargeholder presents difficulties for realising the property, and for incorporeal moveable property, the non-existence of an assignation to the chargeholder and related intimation undermines enforcement against a claim debtor.

[18] Paisley, *Land Law* para 11.27. Paisley states, however, that the only means of enforcement is receivership. He may here be referring to receivership as the only floating charge-specific enforcement mechanism.

(a) An enforcement scenario

6-09. A more difficult question is whether, and how, an attached floating charge can be enforced where a fixed-security holder sells property for realisation purposes.[19] For example:

> *Example 1.* A Ltd grants a standard security to B Bank, which is registered in the Land Register, and then later grants a floating charge to C Bank. B Bank's standard security ranks ahead of C Bank's floating charge.[20] A Ltd defaults on its repayments to B Bank and C Bank. B Bank seeks to enforce using the standard security.

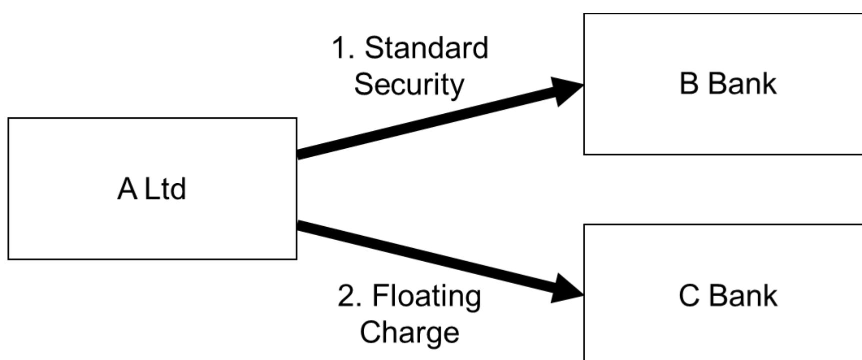

Figure 1

6-10. C Bank will have no ranking entitlement unless attachment takes place. Without such attachment, B Bank would simply distribute to any other secured creditors according to their priorities, with any residue to be paid to A Ltd.[21] C Bank might, however, benefit by a subsequent attachment to such residual proceeds held by A Ltd, or to A Ltd's right to receive them.[22]

6-11. Yet, to protect its interest, C Bank may take enforcement steps that can lead to its charge attaching. If C Bank's charge does attach, how can it receive a ranking entitlement if B Bank enforces? As C Bank's floating charge can attach within any of (i) administration, (ii) receivership, and (iii) liquidation, the potential for

[19] The focus of this section is *sale* by a fixed-security holder. Where other remedies are used, as to which see eg Conveyancing and Feudal Reform (Scotland) Act 1970 Sch 3 paras 10(3)-(7), there are additional ranking and enforcement problems.

[20] Due to Companies Act 1985 s 464(4)(a). This would also be the case, irrespective of creation dates, if a ranking agreement with real effect provided that C Bank's charge was to rank behind B Bank's standard security (Companies Act 1985 s 464(1)(b)). The following discussion could, therefore, also be relevant in that context. However, an agreement may provide precisely how realisation and distribution is to take place. For consideration of ranking by agreement, see Hardman, *Practical Guide to Granting Corporate Security* paras 9-16 ff.

[21] See the order of priority of distribution in Conveyancing and Feudal Reform (Scotland) Act 1970 s 27(1).

[22] If C Bank's charge attached later it would not affect the transferred heritable property. It would also give no right to the proceeds unless A Ltd had a right to them.

enforcement by B Bank during these processes will need to be examined in turn. This will be followed by consideration of whether C Bank has a ranking priority in the property and, if so, how this can be claimed, in spite of enforcement by B Bank.

(b) Administration

6-12. Administration causes a moratorium on steps to "enforce security over the company's property", except with the consent of the administrator or the court's permission.[23] Therefore, B Bank could not usually proceed with enforcement of the standard security, and if C Bank's charge attached, the administrator would distribute in line with the ranking priorities.[24] Were a fixed-security holder to apply for permission to enforce, either before or after the attachment of the charge, guidelines generated through case law assist with determining whether the administrator or court ought to grant or refuse.[25] It is suggested that if the circumstances may justify granting permission, conditions should be imposed requiring the fixed-security holder to transfer all surplus proceeds to the administrator, rather than directly to any other secured creditors (of any type). This would avoid prejudicing the chargeholder or other parties such as preferential creditors.[26] There is significant doubt in this context regarding the power of a court to depart from the distribution regime in s 27(1) of the Conveyancing and Feudal Reform (Scotland) Act 1970 when laying down conditions for enforcement. However, if a court is allowed to order a secured creditor to transfer all surplus proceeds to a liquidator (see below at paras 6-19 ff), despite the wording of s 27(1), then the provisions may be flexible enough to enable the imposition of equivalent conditions on administration when permitting a secured creditor to enforce. If, instead, a fixed-security holder has already received proceeds of sale by the time the administrator is appointed, then it seems that permission of the court or administrator would not be required. The moratorium will not affect the distribution of proceeds, as this is a post-enforcement step and the property does not belong to the company in administration.

(c) Receivership

6-13. Next, we must consider the position where the appointment of a receiver has caused C Bank's charge to attach. If so, the receiver will often realise the property and distribute to creditors in the statutory order of priority; B Bank will therefore

[23] Insolvency Act 1986 Sch B1 para 43(2).
[24] Insolvency Act 1986 Sch B1 paras 115 and 116.
[25] See *Re Atlantic Computer Systems Plc* [1992] Ch 505 at 541 ff per Nicholls LJ; *Scottish Exhibition Centre Ltd v Mirestop Ltd* 1993 SLT 1034; and see the discussion in St Clair and Drummond Young, *Corporate Insolvency* paras 5-66 f.
[26] Insolvency Act 1986 Sch B1 para 43(7) allows a court to "impose a condition on or a requirement in connection with the transaction". The statutory provisions for administration could justify overriding the distribution-order requirements of the Conveyancing and Feudal Reform (Scotland) Act 1970 s 27(1).

receive payment before C Bank.[27] The receiver can seek the court's permission to sell if a prior-ranking secured creditor, like B Bank, does not consent.[28] But this application will only be granted if the court "is satisfied that the sale or disposal would be likely to provide a more advantageous realisation of the company's assets than would otherwise be effected".[29] The powers of a receiver are subject to the rights of those with prior-ranking fixed securities (and floating charges)[30] and thus it seems that a higher-ranking fixed-security holder can enforce against property despite the existence of a receiver.[31] However, a fixed-security holder may decide to defer to enforcement by the receiver and await payment of the proceeds.

(d) Liquidation

6-14. Finally, what is the position for liquidation? Where there is a fixed security over heritable property, which is preferred to the liquidator, as with B Bank's standard security, the liquidator can only sell the property if he can obtain a high enough price to discharge the preferred fixed security or if he has the fixed-security holder's permission.[32] A fixed-security holder, for any property type, has a number of options when its debtor goes into liquidation: to realise the security separately from the liquidation;[33] to realise and then claim for any shortfall in the liquidation;[34] to claim in the liquidation after deducting the value of the security;[35] or to surrender the security and claim for the total debt in the liquidation.[36] From 12 weeks after the commencement of winding up, the liquidator may require a fixed-security holder to discharge the security or convey or assign it to him upon payment of its value, and the fixed-security holder can claim for any balance.[37] In many cases, however, a fixed-security holder will decide to enforce outside the formal liquidation process. This is also apparently allowable where there is a floating charge, as the charge's

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[27] Insolvency Act 1986 s 60(1).
[28] Insolvency Act 1986 s 61(1)(a).
[29] Insolvency Act 1986 s 61(3). Perhaps this test would also factor into the court's thinking if an application were made in administration for sale of secured subjects, where there is a moratorium (see para 6-12 above). Given that a standard-security holder is under a duty to "take all reasonable steps to ensure that the price at which all or any of the subjects sold is the best that can be reasonably obtained" (Conveyancing and Feudal Reform (Scotland) Act 1970 s 25), it is unclear how realisation by a receiver could be "more advantageous". The same is true of other secured creditors who are under a general duty to maximise the price for which the property is sold.
[30] Insolvency Act 1986 s 55(3)(b).
[31] See eg *Imperial Hotel (Aberdeen) Ltd v Vaux Breweries Ltd* 1978 SC 86, where a chargeholder also had a standard security and enforced using the latter after the appointment of a receiver. See also *Greene and Fletcher, Law and Practice of Receivership* para 2.30.
[32] Insolvency Act 1986 s 185(1)(b), which applies Bankruptcy (Scotland) Act 2016 s 109(7). Companies Act 1985 s 463(2) provides that a floating charge will not be a fixed security for this purpose.
[33] The liquidation distribution rules do not affect the right of a secured creditor "which is preferable to the rights of the liquidator": Insolvency (Scotland) (Receivership and Winding up) Rules 2018, SSI 2018/347, r 7.27(6)(a).
[34] SSI 2018/347, r 7.24(5).
[35] SSI 2018/347, r 7.24(1).
[36] SSI 2018/347, r 7.24(2).
[37] SSI 2018/347, r 7.24(3)-(4). See also St Clair and Drummond Young, *Corporate Insolvency* paras 19-06 and 19-15.

attachment is subject to the rights of those with prior-ranking fixed securities.[38] Thus, B Bank could enforce despite the commencement of liquidation having caused C Bank's charge to attach.

(e) Enforcement solutions?

6-15. If B Bank were to enforce, during one of the above-noted processes,[39] would C Bank have an entitlement to the property or its proceeds? And, if so, on what basis? The law is not certain on these matters but there are various possibilities that must be considered. The following diagram assists:

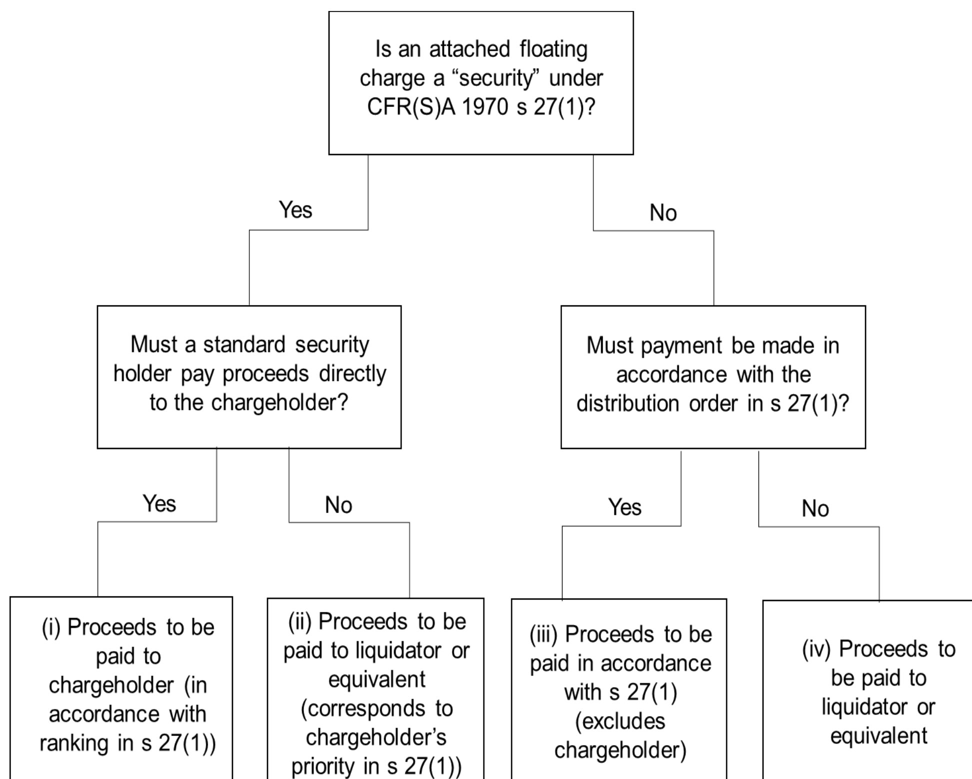

Figure 2

6-16. By virtue of the Conveyancing and Feudal Reform (Scotland) Act 1970 s 27(1), a standard-security creditor holds proceeds of sold property in trust for distribution according to a stated order of priority. The section provides, *inter alia*, that after payment of the whole sum due under the standard security, payment is to be made to those with "securities" postponed in ranking to that standard security, according to their respective rankings. Only after the satisfaction of debts due to

[38] Companies Act 1985 s 463(1)(b).
[39] Including in administration where enforcement permission is obtained but no condition has been imposed requiring all surplus proceeds to be paid to the administrator.

those with such "securities" is any residue to be given to the party that was entitled to the property at the time of its sale or to another authorised person. The term "securities" clearly includes lower-ranking standard securities, but it has also been held to extend to inhibitions and no doubt also applies to adjudications.[40]

6-17. Given that a floating charge attaches to heritable property "as if" it is a fixed security, there is a reasonable case that it is a "security" under s 27. This would ordinarily mean that surplus proceeds must be paid directly to the lower-ranking security holder. Thus, if approach (i) in figure 2 applies, B Bank would use the proceeds of sale to satisfy sums due to it, and then give any surplus proceeds to C Bank. This would circumvent the statutory enforcement structures for the floating charge, which necessitate a representative of the company distributing to the chargeholder in an insolvency-type process.

6-18. Direct payment to C Bank, and rights for C Bank directly against B Bank, could cause problems for preferential creditors and those with entitlement to the prescribed part; it is the liquidator (or receiver or administrator) who is obliged to make sums available to these parties.[41] There is not an express duty, or specific mechanism, for the chargeholder to do this itself, if it receives payment from a secured creditor. The preferential creditors and prescribed-part creditors could thus be left in the unfortunate position of trying to rely on unjustified enrichment in raising a claim against the chargeholder.[42] Although this is a live risk with an unclear outcome, in some cases the issues could be avoided by the liquidator (or equivalent) using proceeds from another part of the estate to pay the preferential creditors and prescribed-part creditors.

6-19. Approach (ii) in figure 2 can be supported by a broad reading of the phrase "in payment of any amounts due under any securities with ranking postponed to his own security", in s 27(1)(d) of the 1970 Act. Given that enforcement of a floating charge involves payment to its holder via a liquidator, receiver or administrator, B Bank might be correct to send proceeds, to the value of C Bank's security, to one of these parties in order to pay C Bank.

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[40] For inhibition, see eg *Halifax Building Society v Smith* 1985 SLT (Sh Ct) 25, and the discussion in Gretton, *Inhibition and Adjudication* 142 ff. However, the Bankruptcy and Diligence etc (Scotland) Act 2007 s 154(1) now provides that inhibitions give no preference in any ranking process. For some discussion of this, see MacPherson, "The Circle Squared?" 235 ff. For adjudication and s 27, see Gretton, *Inhibition and Adjudication* 221.

[41] Insolvency Act 1986 s 176A, and s 175(2)(b); Companies Act 1985 s 463(3); Insolvency (Scotland) (Receivership and Winding up) Rules 2018, SSI 2018/347, r 7.27(1)(b). (And see para 6-84 below.) However, a receiver is required to deliver the prescribed-part sums to any liquidator or administrator or, where there is no such party, he must apply to the court for directions as to the manner in which to discharge the duty under s 176A(2)(a) and he must act in accordance with any such directions given: see SSI 2018/347, r 7.27(6)(a); see *Palmer's Company Law* para 13.213.2. Note also the proposed partial reinstatement of the Crown's status as preferential creditor: for discussion, see R Caldwell, "Enterprise Goes into Reverse for Floating Charge-holders" 2019 JR 103.

[42] The potential success of which would be uncertain. For the English law position, see eg *Re BHT (UK) Ltd* [2004] EWHC 201 (Ch), which provides that preferential creditors can claim against a floating-charge holder that has been paid before them; however, there is no discussion as to the nature of such a claim.

6-20. This wide interpretation of the provision does, however, become more strained when it is recalled that payment for the chargeholder will need to extend to sums due to parties which rank ahead of the floating charge but which are certainly not "securities". These include preferential creditors and the prescribed part for unsecured creditors. Even if these parties are included in the payment under s 27(1)(d), B Bank would have considerable practical problems in identifying how much of the surplus proceeds ought to be paid over to the liquidator or equivalent. In the present example this would be of little consequence, as the next-ranking party after the holder of the floating charge would be the company and therefore, in reality, its insolvency representative. However, it could have implications if D Bank was a further standard-security holder, but with a ranking lower than both B Bank and C Bank. This would mean that B Bank would require to make payment to satisfy C Bank (as well as those ranking ahead of C Bank such as preferential creditors), then to D Bank, before any further proceeds would be given to the company.

6-21. As will be seen from figure 2, approaches (ii) and (iv) both involve B Bank making payment to the liquidator or equivalent. The difference is that in (ii) payment is made corresponding to the charge's ranking priority in s 27(1) of the 1970 Act, wheras (iv) consists of payment contrary to the provisions of s 27(1). Under (iv) a floating charge is not a security requiring direct payment to its holder for the purposes of s 27(1). This approach could perhaps be justified by the fact that the charge is not a heritable security under the legislation due to the absence of registration in the Land (or Sasine) Register[43] and because the charge's fixed-security effect is limited to the enforcement context of liquidation, receivership or administration. Despite this, (iv) involves payment by B Bank to a liquidator or equivalent, which will then facilitate distribution to C Bank.

6-22. Payment by B Bank to a liquidator or equivalent can be justified by a certain interpretation of the interaction of s 27 and insolvency law. Higgins states that where property is sold by a standard-security creditor and an insolvency practitioner has been appointed to the debtor company, the first-ranking creditor should deduct an amount sufficient to discharge the security and then pay the remaining proceeds to the insolvency practitioner, irrespective of whether there are other creditors.[44] The judgment in *Alliance & Leicester Building Society v Hecht*[45] supports this analysis. In that case, property was sold under a standard security and the security holder raised a multiplepoinding regarding the disposal of the free proceeds. The debtor's trustee in sequestration and inhibiting creditors defended the action. It was held that the action was incompetent; the correct procedure was to pay the residue to the trustee, who could better ascertain and determine claims.[46]

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[43] See para 7-80 below.
[44] Higgins, *Enforcement of Heritable Securities* para 14.19.
[45] 1991 SCLR 562.
[46] 1991 SCLR 562 at 566. In his commentary on the case, at 568, Gretton states that the decision "seems sound". See Gretton, *Inhibition and Adjudication* 144 for more detailed discussion of the case from an inhibitions perspective. There may also be the possibility of consigning the proceeds in court if the creditor is unable to obtain a discharge (Conveyancing and Feudal Reform (Scotland) Act 1970

6-23. Floating charges do not feature in *Hecht* or in Higgins' discussion, but the approach just outlined makes considerable sense for their enforcement. A liquidator, receiver or administrator will be well-placed to distribute according to relative priorities.[47] The proceeds which replace the attached heritable property that has been sold will be attached by the charge in turn. This is more efficient than having a multiplepoinding running parallel to an insolvency process, which will already involve the identification of priorities for competing claims. The approach is desirable in practical and policy terms, but it departs from a formalist reading of s 27(1), and the apparent mandatory nature of the distribution order therein. Perhaps, however, the combination of (a) s 27(1) necessitating the distribution of proceeds according to respective priorities, and (b) the insolvency process rendering the order of such priorities more uncertain, justifies the standard-security holder giving monies to the liquidator or equivalent in order to fulfil his duties as trustee under s 27(1). The exact same outcome could even apply where the floating charge *is* recognised as a security under s 27(1), if, rather than paying only the amount due to C Bank, all surplus proceeds are paid to the liquidator or equivalent when C Bank is the next-ranking creditor. This would mean that the outcomes of approaches (ii) and (iv) converge.

6-24. Approach (iii) in figure 2 arises if (a) surplus proceeds do not require to be paid by an enforcing fixed-security holder to the administrator, receiver or liquidator, and (b) the floating charge is not deemed a security for the purposes of s 27(1). If this applies, then the floating-charge ranking provisions in s 464 of the Companies Act 1985 would be undermined. For example, a standard security in favour of D Bank, which ranks after B Bank's standard security and C Bank's floating charge, would receive proceeds under s 27(1) from B Bank, while C Bank would not.

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s 27(2)) but it is unclear how this fits with the decision in *Hecht*. In any event, if proceeds were consigned in court, the court itself would need to consider how to allocate the relevant sums and this would necessitate interpretation of s 27(1) and connected law.

[47] The fact that *Hecht* involved a trustee in sequestration (rather than eg a liquidator) seems to make no difference here. In addition, the outcome of the case may have depended upon the particular nature of inhibitions, and the necessity of a trustee in sequestration giving effect to these; however, the floating charge has a similar status on this point, as it relies on a liquidator or equivalent for its enforcement.

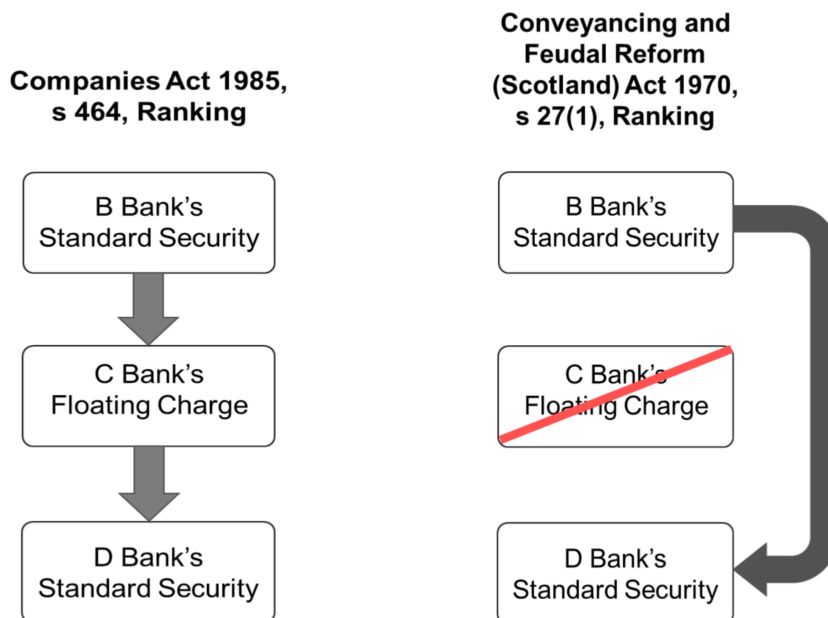

Figure 3

6-25. In terms of this approach, C Bank could only receive surplus proceeds once B Bank gives monies to the company, for distribution by the liquidator, administrator or receiver, which it will only do after paying any lower-ranking securities. An apparent conflict between the ranking outcomes of s 464 of the Companies Act 1985 and s 27(1) of the Conveyancing and Feudal Reform (Scotland) Act 1970 is resolved, under approach (iii), in favour of s 27(1). This could be considered a result of an attaching charge's subjection to the rights of a higher-ranking standard security. But it would be a strained interpretation of the *rights* of that standard-security holder. It would also mean that preferential creditors and the prescribed-part claimants would lose out (unfairly) to D Bank. Approach (iii) should therefore be rejected.

6-26. There is, unfortunately, no definitive answer as to the present law on this enforcement issue. However, the preferred option from both a policy and a practical perspective is for the standard-security holder to give surplus proceeds to the receiver, liquidator or administrator to deal with all other priorities and distribute accordingly. Consequently, approach (iv) has a desirable outcome but it may be inappropriate to deem a floating charge not to be a "security" in the context. Approach (ii), therefore, is recommended, but only where it involves the transfer of all surplus proceeds and not just the chargeholder's allocation to a liquidator or equivalent.

(f) Wider enforcement issues

6-27. The above material has focused on standard securities, as the conflict between the statutory distribution provisions and how any entitlement of a

chargeholder can be given effect is the context within which the problem is most apparent. An interpretation which avoids a strict and narrow view of s 27 of the 1970 Act also allows greater scope for consistency with enforcement for other types of property and security rights. For instance, a pledgee, as a secured creditor,[48] can seek to enforce separately from the liquidation or receivership, but the common law background dealing with proceeds of sale allows for more flexibility in holding that surplus proceeds should be directed to the pledgor's receiver, liquidator or administrator.[49]

6-28. Nevertheless, the introduction of a new form of security over moveables proposed by the Scottish Law Commission could provide some further statutory complications, depending upon the details of the eventual legislation, and may make problems of the kind described above more common for moveable property as well.[50] In fact, the distribution rules in s 27 of the 1970 Act were influential in the Law Commission's formulation of the equivalent rules for the proposed statutory pledge and this is reflected in the Draft Bill accompanying the *Report on Moveable Transactions*.[51]

(2) Lower-ranking fixed-security holder

6-29. There are also issues if we create a new example by amending example 1 (para 6-09 above) so that C Bank's floating charge, which attaches to heritable property belonging to A Ltd, ranks *ahead of* B Bank's standard security.[52] The example would then read:

> *Example 2.* A Ltd grants a floating charge to C Bank, and then later grants a standard security to B Bank which is registered in the Land Register. C Bank's floating charge ranks ahead of B Bank's standard security. A Ltd defaults on its

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[48] In the Insolvency Act 1986 s 248, "secured creditor" is defined widely as "a creditor of the company who holds in respect of his debt a security over property of the company" and "security" means "in relation to Scotland, any security (whether heritable or moveable), any floating charge and any right of lien or preference and any right of retention (other than a right of compensation or set-off)".

[49] Ordinarily, surplus proceeds are paid to the pledgor: see Steven, *Pledge and Lien* para 8-06; and see para 15-08 where it is suggested that a lienholder would pay surplus proceeds to the liquidator (or equivalent) rather than the debtor.

[50] There are currently few circumstances in which moveable property can be encumbered by more than one fixed security. Further problems could arise for heritable property if the diligence of land attachment were to be introduced and if property attached were also subject to a floating charge, as there is a statutory order of priority for proceeds of sale in similar terms to s 27(1) of the 1970 Act: see Bankruptcy and Diligence etc (Scotland) Act 2007 s 116.

[51] See SLC, *Report on Moveable Transactions* paras 28.21 ff; SLC, Draft Moveable Transactions (Scotland) Bill s 82.

[52] Additional difficulties would arise where there are all-sums securities and notice is given in terms of Conveyancing and Feudal Reform (Scotland) Act 1970 s 13, or Companies Act 1985 s 464(5). These include the extent to which notice by a chargeholder can affect the priority of a standard security holder and vice versa. See eg Halliday, *Conveyancing Law and Practice* paras 51-19 f, 56-26 and 57-31 for general discussion of such notice.

repayments to B Bank and C Bank. B Bank seeks to enforce using the standard security.

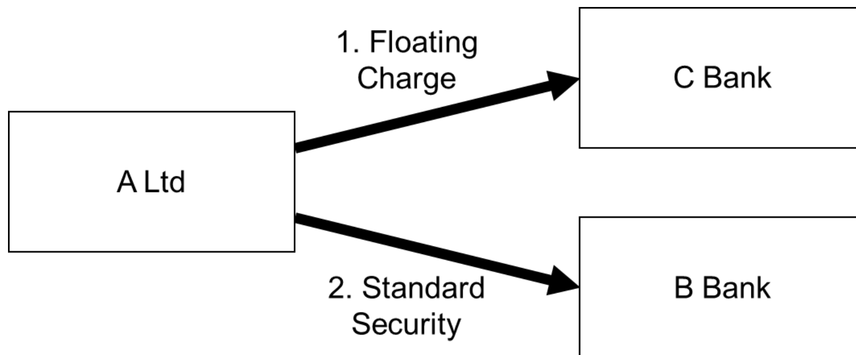

Figure 4

(a) Administration

6-30. For administration, similar considerations as above (para 6-12) will apply. However, if an administrator or court allows a lower-ranking fixed-security holder to enforce, this could be highly prejudicial to the chargeholder if attachment has not occurred.[53]

(b) Receivership

6-31. With respect to receivership, the powers of a receiver are not subject to the rights of a lower-ranking fixed-security holder.[54] This may preclude the possibility of enforcement by such a fixed-security holder. However, it is more likely that either party can enforce but that the receiver's powers have higher priority than those of the

[53] The guidelines derived from *Re Atlantic Computer Systems Plc* [1992] Ch 505 would suggest that permission ought not to be granted in such a situation. Alternatively, permission could be granted subject to appropriate conditions regarding priority payments to the administrator.
[54] By implication due to Insolvency Act 1986 s 55(3)(b). Cf the position for higher-ranking fixed-security holders outlined at para 6-13 above. It should also be noted that under s 60 the receiver's liabilities, expenses and remuneration have higher priority than the claim of a fixed-security holder who ranks lower than the holder of the floating charge by virtue of which the receiver was appointed (and of course the chargeholder and various other parties are also ahead of the lower-ranking fixed-security holder in the distribution priority list).

fixed-security holder.[55] Thus, a fixed-security holder's power (or right)[56] to sell the property is subject to the receiver's power of sale. In this area, the receiver's powers have a connection with the ranking position of the chargeholder. Given the relative "ranking" and the implications of this, a fixed-security holder wishing to enforce should obtain the consent of a receiver. Conversely, a receiver requires the consent of even a lower-ranking secured creditor (or the court) to sell secured property free from the encumbrance.[57]

(c) Liquidation

6-32. The attachment of a floating charge in liquidation is not subject to lower-ranking fixed securities (or floating charges).[58] But the liquidator ranks behind the fixed-security holder and, without an unnaturally wide reading of the effect of an attaching charge on a liquidator's powers, cannot act on behalf of the chargeholder to stop the creditor from selling.

(d) Enforcement solutions?

6-33. Usually when enforcing, B Bank would be required to pay proceeds to the holder of "any prior security to which the sale is not made subject",[59] before itself taking payment for sums secured by its standard security.[60] This poses some questions if B Bank is able to enforce, despite its lower ranking relative to C Bank's attached charge. It is again necessary to consider if C Bank's charge is a "security"

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[55] In some cases, it could be advantageous to the chargeholder for the fixed-security holder to enforce instead of the receiver seeking immediately to realise: eg where on day 1 a floating charge is created with a negative pledge; on day 2 a fixed security is created; on day 3 another type of subordinate real right is established; and on day 4 the floating charge attaches. (It is assumed that the floating charge is not invalidated under Insolvency Act 1986 s 245.) There is a priority problem of sorts: the charge ranks ahead of the fixed security, to which the other real right seems to be subject, but the floating charge itself is subject to the other real right. This is a result of there being separate priority rules involving: (i) the charge and fixed-security rights, and (ii) the charge and other real rights. While a receiver may be unable to reduce the other real right, it seems that the fixed-security holder could do so: see eg *Trade Development Bank v Warriner & Mason (Scotland) Ltd* 1980 SC 74; *Trade Development Bank v David W Haig (Bellshill) Ltd* 1983 SLT 510; Higgins, *Enforcement of Heritable Securities* para 13.9; but cf K G C Reid, "Real Conditions in Standard Securities" 1983 SLT (News) 169 and 189. (It should be noted, though, that Professor Reid's position has developed over time: see Reid, *Property* paras 695 ff on the law relating to offside goals and its connection with the above-noted cases; see also Scottish Law Commission, *Discussion Paper on Heritable Securities: Pre-default* (Scot Law Com DP 168, 2019) paras 8.12ff for discussion of these cases.) Similar situations might arise in liquidation or administration but it will be more difficult for the chargeholder to exert control over how enforcement against the property takes place.

[56] Some of the difficulty here arises from the uncertain extent to which the terms "powers" and "rights" can be conflated in the statutory context.

[57] Insolvency Act 1986 s 61(1)(a): as well as the consent of higher-ranking or *pari passu*-ranking secured creditors (s 61(1)(a)) and those with effectually executed diligence (s 61(1)(b)).

[58] By implication from Companies Act 1985 ss 463(1), (2) and 464.

[59] Conveyancing and Feudal Reform (Scotland) Act 1970 s 27(1)(b).

[60] Conveyancing and Feudal Reform (Scotland) Act 1970 s 27(1)(c).

under s 27(1) of the Conveyancing and Feudal Reform (Scotland) Act 1970, and whether payment can be made directly to C Bank or if payment is instead to be made to A Ltd's liquidator or equivalent. It would be inconceivable if both of the following applied: (i) that the charge is not a security; and (ii) that payment to the liquidator or equivalent is not required. And, as before, there are practical and policy arguments against payment to the chargeholder directly.

6-34. Where payment is being made in accordance with s 27(1), perhaps B Bank, as a lower-ranking fixed-security holder, is bound to pay proceeds to the liquidator, receiver or administrator. These latter parties would be the vehicle for payment of amounts due to C Bank, the higher-ranking security holder, with any surplus to be retained by B Bank itself up to the amount of debt owed to it. This is, however, counter-intuitive, as determining such an amount will be extraordinarily challenging for a creditor, especially when preferential creditors, the prescribed part, the chargeholder's claim, and expenses of the liquidator or equivalent are to be taken into account.[61] Claims could be made against the fixed-security holder by a liquidator, receiver, administrator or another affected party if an incorrect amount was paid over.

6-35. If B Bank did sell the property, the uncertainty regarding the allocation of the proceeds might justify a multiplepoinding. However, the competence of this may be doubted.[62] Alternatively, B Bank could give all the proceeds to the liquidator or equivalent for distribution, but then what would be the point of a sale of the property by B Bank?[63] In fact, in certain cases B Bank will receive little or nothing after the deduction of prior claims and there will thus be minimal value in enforcing. It will therefore be sensible for the fixed-security holder to let the liquidator or equivalent realise the property and distribute according to priorities.

6-36. A further possibility, that a sale of the property by B Bank could mean that a transferee's title remains subject to C Bank's floating charge, by virtue of s 26(2) of the 1970 Act, must be rejected. Even if a floating charge can be a "security",[64] it would apparently be unenforceable against the transferred property as the enforcement of the charge is limited to the patrimony of the chargor;[65] there is no mechanism that allows for enforcement against a valid purchaser.[66] The liquidator of the transferor will not be able to proceed against the transferee, and a secured

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[61] These claims do not require to be paid from proceeds arising from the enforcement of the heritable property but are rather claims against the estate as a whole. However, discovering the extent to which the rest of the estate can bear the claims will prove troublesome.

[62] See *Alliance & Leicester Building Society v Hecht* 1991 SCLR 562, where a multiplepoinding was held not to be competent in the circumstances of that case. Cf Higgins, *Enforcement of Heritable Securities* para 14.19.

[63] See, however, n 55 above for when it might be of benefit.

[64] Or "heritable security": see Conveyancing and Feudal Reform (Scotland) Act 1970 s 26(1), (2). In the context of land registration, a floating charge is not a "heritable security": Land Registration etc (Scotland) Act 2012 s 113(1).

[65] See further below at paras 6-37 ff.

[66] There is also no registration in the Land Register (or equivalent), as there is for other security rights, only registration against the person of the chargor in the charges register.

creditor or liquidator (or equivalent) of the *transferee* could not be expected to give effect to the charge.

D. LIQUIDATION

6-37. When considering the floating charge's nature and operation, it is important to recall that liquidation was the only method of enforcement upon the charge's introduction to Scotland in 1961. The charge was therefore constructed in this context, and its effect on liquidation offers a template for the security more widely. However, despite the floating charge being a single concept in Scots law, the consequences of attachment may vary depending upon whether the charge attaches in a liquidation, receivership or administration.[67] In the present context, liquidation is the most fertile ground for the view that attachment and enforcement are separable. And the enforcement of a charge attaching in liquidation appears limited to the property which a liquidator, from time to time, has power to realise.

(1) Property limitations

6-38. As regards the property of a company in liquidation, a liquidator principally acts as that company's agent (and administrator, in the broad sense of that term).[68] His role is "to secure that the assets of the company are got in, realised and distributed to the company's creditors".[69] To do this, the liquidator is required to "take into his custody or under his control all the property and things in action[70] to which the company is or appears to be entitled".[71] It is assumed that entitlement here corresponds to the company's ownership of property (in accordance with Scots property law). The liquidator has a range of powers relating to the company's property, include powers to sell and transfer it and to do all acts and execute deeds on the company's behalf.[72] The liquidator's reach is, however, limited to the

[67] See eg *Commissioners of Customs and Excise v John D Reid Joinery Ltd* 2001 SLT 588.
[68] See Insolvency Act 1986 ss 165(2), 167(1), and Sch 4; *Joint Liquidators of Scottish Coal Co Ltd v Scottish Environment Protection Agency* [2013] CSIH 108, 2014 SC 372; *Smith v Lord Advocate* 1978 SC 259 at 273 per Lord President Emslie; and see the discussion of the liquidator's status in St Clair and Drummond Young, *Corporate Insolvency* paras 4-36 ff. However, a liquidator, like a receiver or administrator, is not a typical agent. Usually, an agent is appointed by a principal, his agency status is revocable and, even though an agent has authority to act on the principal's behalf, the principal still retains the power to carry out the same acts. This is not true for liquidation, receivership and administration. The wider term "representation" may be more appropriate in these contexts.
[69] Insolvency Act 1986 s 143(1). This is for winding up by the court.
[70] This term is inappropriate in Scots law and is already included in "property".
[71] Insolvency Act 1986 s 144(1). See also Insolvency (Scotland) (Receivership and Winding up) Rules 2018, SSI 2018/347, r 5.36(1)(a), which provides that the liquidator "must as soon as reasonably practicable after the liquidator's appointment take possession of (i) the whole assets of the company; and (ii) any property, books, papers or records in the possession or control of the company or to which the company appears to be entitled".
[72] Insolvency Act 1986 Sch 4 paras 6 and 7. And see St Clair and Drummond Young, *Corporate Insolvency* paras 4-47 ff for further details of the liquidator's powers.

company's private patrimony and the property therein.[73] This has implications for a chargeholder seeking enforcement through the liquidator.

6-39. A related issue is that, unlike for a trustee in sequestration, property does not automatically vest in a liquidator upon appointment. Instead, an application to the court for the vesting of "property … belonging to the company" could be made.[74] To acquire title to heritable property, the liquidator would then need to register in the Land Register. A quicker method would be to record or register a notice of title, which completes title in favour of the liquidator, without having to apply to the court for vesting under s 145 of the Insolvency Act 1986.[75]

6-40. Upon winding up, some previous transactions (unfair preferences, gratuitous alienations, and extortionate credit transactions)[76] can be challenged by the liquidator or particular creditors and, if successful, can cause property to revert to the insolvent company.[77] Conversely, where ownership of property remains with the insolvent company, it is possible for other parties to acquire it after commencement of winding up, but only in certain limited circumstances. In voluntary liquidations, the appointment of a liquidator causes the powers of directors to cease, which serves to stop disposals except by the liquidator.[78] It seems that a winding up by the court also removes the powers of the directors.[79] In the latter case, any "disposition" of the company's property after the commencement of winding up is void unless otherwise

[73] Property in the company's trust patrimony is seemingly excluded from liquidation (see para 6-87 below). For discussion of floating charges and trust property, see also A D J MacPherson, "Floating Charges and Trust Property in Scots Law: A Tale of Two Patrimonies?" (2018) 22 EdinLR 1.
[74] Insolvency Act 1986 s 145(1). In *Joint Liquidators of Scottish Coal Co Ltd v Scottish Environment Protection Agency* [2013] CSIH 108 2014 SC 372, the court noted (at para 121) that s 145 orders are "rare". St Clair and Drummond Young, *Corporate Insolvency* para 4-05 n 28 states: "The authors know of no case in which these provisions have been used in Scotland". As St Clair and Drummond Young note, there is also the possibility of an application for vesting under s 112(2) for a voluntary winding up.
[75] Titles to Land Consolidation (Scotland) Act 1868 s 25, as amended, and Conveyancing (Scotland) Act 1924 ss 3 and 4; Reid, *Property* para 648 n 10. Reid notes that liquidators "rarely complete title in their own name". For discussion, see G L Gretton "The Title of a Liquidator" (1984) 29 JLSS 357; A J McDonald, "Bankruptcy, Liquidation and Receivership and the Race to the Register" (1985) 30 JLSS 20; G L Gretton and K G C Reid "Insolvency and Title: A Reply" (1985) 30 JLSS 109; Scottish Law Commission, *Report on Sharp v Thomson* (Scot Law Com No 208, 2007) paras 4.1 ff. For details of the registration of notices of title, see K G C Reid and G L Gretton, *Land Registration* (2017) paras 6.9 and 7.7.
[76] Insolvency Act 1986 ss 242-244.
[77] See paras 3-36 ff above regarding the implications of this for the attachment of a floating charge.
[78] Insolvency Act 1986 ss 91(2) and 103. This is true except insofar as their continuance is sanctioned by the liquidator or company in general meeting for members' voluntary liquidation or by the liquidation committee (or creditors in the absence of such a committee) for creditors' voluntary liquidation. Where the company has not appointed or nominated a liquidator in a voluntary winding up, Insolvency Act 1986 s 114 provides that the sanction of the court will generally be required for the exercise of directors' powers until a liquidator is appointed or nominated.
[79] There are no equivalent provisions for compulsory liquidations but the directors' powers must generally cease (even if they formally remain in office and retain certain residual powers), as the liquidator acquires a wide range of powers and it would be odd and highly impractical if the directors could also exercise them: McKenzie Skene, *Insolvency Law in Scotland* 176; McBryde, *Contract* para 3-108. And see St Clair and Drummond Young, *Corporate Insolvency* para 4-06.

ordered by the court.[80] "Disposition" is used here in a wide sense, and has been interpreted to mean the company "dealing with or settling or transferring its property to another".[81] In other words, positive acts (whether voluntary or obligatory)[82] by the company relating to transfer of property are void, unless ordered by the court or carried out by the liquidator. This places a significant obstacle in the way of attempts to defeat a floating-charge creditor by a transfer of attached property which moves the property beyond the ambit of the liquidation.

6-41. As McKenzie Skene states, the time at which a disposition is deemed to occur is critical.[83] English law seems to utilise the transfer of beneficial entitlement, upon conclusion of a sale contract, as the key stage – after which there is no "disposition".[84] Beneficial entitlement is unlikely to be the equivalent test in Scotland, not least because of the rejection of the beneficial interest doctrine in wider law in *Burnett's Tr v Grainger*.[85] Nevertheless, in Scots law, there is little doubt that the concept of a "disposition" (in the sense required by the Insolvency Act 1986 s 127) does not extend to certain acts leading to the transfer of ownership. "Disposition" implies that the insolvent company is taking an active step (whether or not in fulfilment of an existing obligation) to, for example, transfer property (or create a real right in that property).[86] If the company had carried out all of *its* obligations relating to the transfer before the commencement of the winding up, then later steps taken by the *transferee* to complete title would not constitute a disposition. This is supported by the fact that if a transfer deed of heritable property (also called a "disposition") has been delivered to the transferee[87] before liquidation of the transferor, the transferee can defeat the liquidator by registering first in the Land Register.[88] If such registration by the transferee (and thus the transfer of ownership) was regarded as a "disposition", then the transfer would be void, the liquidator would succeed, and the "race to the register" would not apply. That does not appear to be the current law.[89]

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[80] Insolvency Act 1986 s 127(1). For a recent Supreme Court case considering s 127, see *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424.
[81] *Site Preparations Ltd v Buchan Development Co Ltd* 1983 SLT 317 at 319 per Lord Ordinary (Ross). Lord Ross held that such a disposition included the creation of a floating charge after commencement of winding up, due to its immediate attachment to property.
[82] Inhibition (another person- and property-focused security interest) only affects future voluntary acts, and only makes such acts voidable *ad hunc effectum*: see Gretton, *Inhibition and Adjudication* 97 f and 129 f.
[83] McKenzie Skene, *Insolvency Law in Scotland* 175. See also *Palmer's Company Law* para 15.702.
[84] *Re French's Wine Bar Ltd* (1987) 3 BCC 173; *Goode on Principles of Corporate Insolvency Law* paras 13-121 ff; L Sealy, D Milman and P Bailey, *Annotated Guide to the Insolvency Legislation*, 22nd edn (2019) vol 1, 152f. And see McKenzie Skene, *Insolvency Law in Scotland* 175.
[85] [2004] UKHL 8, 2004 SC (HL) 19. See paras 7-24 ff below.
[86] This would mean that delivery of a disposition in fulfilment of an existing obligation is also a "disposition".
[87] Which is ordinarily the last active step by the transferor.
[88] Reid, *Property* para 648.
[89] On the race to the register, see: *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19 (in the specific context of sequestration); Reid, *Property* para 648; *Greene and Fletcher, Law and Practice of Receivership* paras 2.04 f; cf D McKenzie Skene, "The Shock of the Old: *Burnett's Tr v Grainger*" 2004 SLT (News) 65, 70 f.

(2) Removal of property from patrimony

6-42. If a buyer is in a position to obtain property and then completes the final step in the transfer, the property is removed from the insolvent company's patrimony, and thus from the liquidator's grasp. In this context, the obligations required to have been fulfilled by the transferor by the beginning of liquidation, and the final step necessary by the transferee, differ depending upon the type of property involved. For heritable property, the disposition must already have been delivered and the (purported) transferee requires only to register. For corporeal moveable property, parties may agree when ownership is to pass for the sale of goods (under the Sale of Goods Act 1979 s 17) and what steps are required to bring this about.[90] Finally, for incorporeal property, an assignation is required, which will usually necessitate delivery of an assignation document, which the assignee must intimate (or complete an equivalent step).[91] (It would even be possible for a liquidator, administrator or receiver who had been (coincidentally) appointed over the *transferee's* property to complete this step on behalf of the transferee.)[92] At any earlier stage than those just described for each property-type, the liquidator (or equivalent) of the transferor could simply refuse to act or could abandon the relevant contract.[93]

6-43. Of course, floating charges attach upon the commencement of the chargor's liquidation. A floating charge attaches to the property then comprised in the company's property and undertaking. The enforcement of the floating charge, including realisation of the attached property and distribution of the sale proceeds, occurs through the medium of the liquidator.[94] What happens if, between attachment and the property vesting in, or being realised by, the liquidator, the property is transferred to another party by virtue of that party carrying out the final necessary step? On the basis of what was said above, the liquidator would be defeated by the transferee and could no longer realise the property so as to distribute proceeds to the chargeholder.[95] Consequently, it seems that, although the floating charge was attached to the property, it becomes unenforceable in the liquidation. Its enforceability is dependent upon the property remaining in the chargor's patrimony,

[90] See paras 8-04 ff below.

[91] Reid, *Property* para 659 n 3 tentatively suggests that a liquidator differs from a trustee in sequestration, who prevails against an unintimated but delivered assignation due to sequestration acting like a conveyance of incorporeal property. Reid proposes that in a liquidation the winner between intimation and s 145 vesting is likely to prevail. See also Wilson, *Debt* para 25.7, who is of the same view regarding the existence of an equivalent to the race to the register for this type of property.

[92] A floating charge granted by the transferee would have attached to the personal rights to obtain the property, which would subsequently be replaced by attachment to the transferred property (see paras 3-35ff above).

[93] For details of adoption and abandonment of contracts, see *Crown Estate Commissioners v Liquidators of Highland Engineering Ltd* 1975 SLT 58; St Clair and Drummond Young, *Corporate Insolvency* para 4-07; Wilson, *Debt* para 25.7. And see para 8-47 below.

[94] Halliday, *Conveyancing Law and Practice* para 2-128 recommends that the liquidator should obtain the consent of the chargeholder when selling attached property. This is presumably on the basis that the charge attaches "as if" it is a fixed security for the purposes of liquidation.

[95] Or to other parties ranking ahead of, or behind, the chargeholder.

including after attachment. It may even be said that the continuing attachment of property depends on it remaining in the chargor's patrimony, so that if it leaves that patrimony validly it is no longer attached.

6-44. Where property is validly transferred after liquidation, a floating charge could only remain enforceable if its attachment conferred a power upon the liquidator to recover the property. There is no obvious basis in the legislation for this. The fact that a floating charge attaches as if it were a fixed security[96] for the purposes of winding up provisions in the Insolvency Act 1986 does not assist. The existence of a fixed security does not allow a liquidator to recover property transferred out of the insolvent company's patrimony. If such a transfer occurred, a fixed security could still be independently enforced against the transferee, unlike the floating charge, which requires a representative of the chargor to do so. An attempt by the liquidator to interdict the registration by the transferee would also be ineffective. The purpose of an interdict is to stop a wrong from being committed; registration to obtain a real right in fulfilment of rights under contract cannot be so classified. In fact, if the transferee could not complete title, that would itself ordinarily be a wrong due to breach of warrandice.[97]

6-45. If the floating charge cannot be enforced despite attachment, this does not mean that the effect of attachment is redundant. In the vast majority of cases attachment will enable enforcement to take place. It is only in exceptional circumstances, where property can still be transferred from the insolvent company to another after the commencement of liquidation, that attachment will not lead directly to (potential) enforcement. Another similar example is where the floating charge attaches but, because it is not registered in the charges register, it is void against various parties.[98]

E. RECEIVERSHIP

(1) The receiver and property

6-46. Receivership is the enforcement process that is closest to self-enforcement by a chargeholder.[99] But it is, nevertheless, the receiver, rather than the chargeholder, who has the powers to realise the property subject to the security, and he does this

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[96] Under s 463(2) of the Companies Act 1985.

[97] These points regarding interdict would also apply to an interdict attempt by a receiver or an administrator.

[98] Companies Act 2006 s 859H(3).

[99] In Scotland, receivership was introduced as a means for enforcing floating charges without requiring liquidation, and cannot be used by other creditors. (However, allowing other creditors to apply to the court for the appointment of a receiver was considered by the Scottish Law Commission: see "Notes on Amendments to Memorandum No 10" dated 2 May 1969, and letter by J M Halliday to R Brodie dated 5 May 1969, in *Scottish Law Commission Papers*: L45/174/1.) Cf English law where receivers can be appointed in a wide variety of cases: see S Frisby and M Davis-White (eds), *Kerr and Hunter on Receivers and Administrators*, 19th edn (2010) chs 1-3.

without a real right in the property.[100] A receiver, like a liquidator, acts as an agent of the company as regards the company's property; however, unlike a liquidator, a receiver is only an agent with respect to property attached by the floating charge under which he was appointed.[101]

6-47. A chargeholder can appoint a receiver "of such part of the property of the company as is subject to the charge".[102] Upon appointment, the floating charge attaches to "the property then subject to the charge".[103] The Insolvency Act 1986 s 55(1) specifies that a receiver "has in relation to such part of the property of the company as is attached by the floating charge … the powers, if any, given to him by the instrument creating that charge". The relevant potential powers that can be given under a charge are wide in scope but, logically, can only extend to those that could be held by a chargor. These powers are limited to property which is: (i) the company's, and (ii) attached by the charge.[104] A chargor could not, for example, confer powers upon the receiver for property no longer belonging to the chargor.

6-48. In addition, s 55(2) of the 1986 Act gives the receiver the additional powers listed in Schedule 2, as regards the property mentioned in s 55(1). Schedule 2 para 1 provides that a receiver has: "Power to take possession of, collect and get in the property from the company or a liquidator thereof or any other person, and for that purpose, to take such proceedings as may seem to him expedient." The following paragraph (para 2) empowers the receiver "to sell, hire out or otherwise dispose of the property". It is important to establish the meaning of "the property" in this context. Does it mean any property attached by the floating charge, even if it is no longer the company's property, or is it limited to the company's property at any given time, and thus excludes validly transferred property? Section 55(1) can be read in both ways. It is possible to consider "such part of the property of the company" and "attached by the floating charge" as a single concept connecting attachment to the company's property when attachment occurs and allowing the exercise of powers thereafter irrespective of the ownership position. Alternatively, these parts of the term can be viewed as separate, meaning that property needs to be the company's *and* be attached by the charge in order for the receiver to have powers exercisable over such property at a given moment.

6-49. The alternative view appears to be supported by the receiver's agency in relation to *the company's* property. It stands to reason that the powers of a receiver over property correspond to the limits of his agency status. If the company's property can be validly transferred to another party after the appointment of the receiver, then clearly the receiver's status will not enable him to deal with that property. The fact

[100] See G L Gretton and K G C Reid, *Conveyancing*, 4th edn (2011) para 29.08; Paisley, *Land Law* paras 11.27 ff. But, as Paisley notes, the chargeholder has the right to require the cooperation of the receiver, including to dismantle the company for the chargeholder's benefit.
[101] Insolvency Act 1986 s 57(1); St Clair and Drummond Young, *Corporate Insolvency* para 6-46.
[102] Insolvency Act 1986 s 51(1). The equivalent for appointment by the court is s 51(2).
[103] Insolvency Act 1986 s 53(7). The equivalent for appointment by the court is s 54(6).
[104] There may be other limitations, such as a receiver not succeeding to powers which the chargor holds as a representative in relation to the property of another.

that the company, even if not in receivership, would have no powers over the transferred property also supports this view.

6-50. On what basis then could a receiver exercise powers over property belonging to a party other than the company? A receiver does act in the interests of the appointing chargeholder and a floating charge attaches "as if" it is a fixed security. Furthermore, receivership is "a procedure for the realisation of a security".[105] If the chargeholder had a fixed security and the receiver was its agent, the receiver could enforce against a third party. A receiver might also have such an ability if, as one commentator has suggested, he is "regarded as if he held a completed security (for behoof of the charge-holder) at the date of crystallisation", despite title remaining with the company.[106]

6-51. The statutory provisions do not, however, seem to support this position. The receiver is not formally the agent or representative of the chargeholder and does not hold any security over the property in question. Given the statutory nature of receivership in Scots law, one would expect such effects, if they existed, to be outlined in legislation. In addition, an attached charge does not confer the enforcement methods available to fixed-security holders; and its operation as a fixed security may even be limited to the context of receivership as a statutory regime, and to areas of law interacting with the receivership. Receivership is a specific vehicle for enforcement of the floating charge but its operation relies on the receiver acting for the company.[107] Therefore, the ability to enforce appears limited to the company's property as it changes during the receivership.

6-52. Where a company is in receivership, property which is not attached can be freely dealt with by the directors. But there is no "diarchy" with respect to attached property; the receiver supersedes the directors, who generally have no power over this property during the receivership.[108] As McKenzie Skene notes, the obvious implication of directors dealing with property without the necessary power is that such a transaction is void and the property may be recovered by a receiver.[109] If, for example, the directors delivered a disposition of heritable property after the appointment of a receiver, the disposition and subsequent registration would be void;

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[105] D A Bennett, "The Receiver in Scotland", in S Frisby and M Davis-White (eds), *Kerr and Hunter on Receivers and Administrators*, 19th edn (2010) para 27.4.

[106] *Palmer's Company Law* para 14.213.

[107] And see *Myles J Callaghan Ltd v City of Glasgow District Council* 1987 SC 171 at 179 f and 182 per Lord Ordinary (Prosser), who notes that, for the recovery of a *jus crediti*, it is "for the company to vindicate its rights", even if it is in receivership, and the receiver would therefore be required to raise an action in the name of the company and on its behalf.

[108] *Imperial Hotel (Aberdeen) Ltd v Vaux Breweries Ltd* 1978 SC 86; *Independent Pension Trustee Ltd v LAW Construction Co* 1997 SLT 1105. In the latter case, Lord Hamilton doubted *Shanks v Central Regional Council* 1987 SLT 410, insofar as Lord Weir in *Shanks* suggested that directors retain residual rights in some circumstances (Lord Weir did, however, support the general view that directors cannot exercise powers where receivers have the powers). McKenzie Skene, *Insolvency Law in Scotland* 174 n 20, doubts this too, and see also D W McKenzie and D O'Donnell, "Intervening Insolvency: How Can You Know?" (1996) SLPQ 173, 179 f.

[109] McKenzie Skene, *Insolvency Law in Scotland* 176; and see *Greene and Fletcher, Law and Practice of Receivership* paras 2.21 ff.

the directors would not have had the requisite power to deliver a valid disposition to enable ownership to transfer.[110] The property would therefore continue to belong to the debtor company and the floating charge would remain enforceable as regards that property.

6-53. If a transfer is completed during the receivership, the transferee may have registered,[111] intimated or otherwise publicised the transfer according to the relevant legal requirements. Indeed, they may have done so prior to the publication of any details regarding the charge's attachment and the appointment of a receiver. On what basis can a receiver interfere and prevail when confronted with such publicity and where the law regards the transfer as valid and completed? On what grounds could a receiver reduce the transfer? With reference to figure 5, it might be said that if X Ltd grants a floating charge to Y Ltd then, for example, corporeal moveable property will be attached as if Y Ltd's charge is a pledge. This would mean that if any such property is validly transferred from X Ltd to Z Ltd after the attachment of the charge, then Z Ltd takes the property subject to the security. This would enable Y Ltd to realise the property even though it is owned by Z Ltd. But there are objections to this. Y Ltd, as a chargeholder rather than a pledgee, cannot itself carry out enforcement.[112] And the receiver's enforcement abilities rely on him operating as an agent for X Ltd as regards that party's property. A pledge, and other (true) fixed securities, can cross patrimonial boundaries when the encumbered property transfers but a floating charge seemingly cannot.

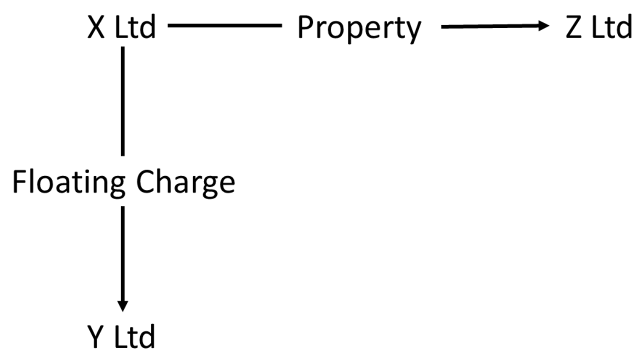

Figure 5

6-54. There are additional complications if Z Ltd quickly sells the property on to A Ltd (see figure 6). If Y Ltd can enforce when Z Ltd is owner, due to the pledge

[110] Land Registration etc (Scotland) Act 2012 s 50(2) requires registration of a valid disposition for ownership to be transferred. It would not be valid if there was no power to transfer. There could, however, have been complications under the "Midas touch" inherent within the Land Registration (Scotland) Act 1979 regime (now replaced by the 2012 Act).
[111] Or recorded in the Register of Sasines, as in *Sharp v Thomson* 1997 SC (HL) 66.
[112] And this also overlooks the fact that a pledgee requires a court order unless the pledgor grants an express power of sale: see Steven, *Pledge and Lien* (2008) paras 8-04 ff.

analogy, then this should transmit to facilitate enforcement in relation to A Ltd, and subsequent successor owners, as pledge would.[113] But a pledgee's right is compliant with the publicity principle by being identifiable from that party's possession of the property. The same would be true with respect to a standard security, which is registered against the property, and this information is readily available to prospective transferees. By contrast, the floating charge is non-possessory, and it is registered not against the property but against the person of *X Ltd* in the charges register.[114] Although one can expect Z Ltd to check the charges register for X Ltd, the party Z Ltd is transacting with, it is probably too burdensome for A Ltd (and A Ltd's successors) to do the same. Each step in the chain makes X Ltd's patrimony and Y Ltd's charge more remote.[115]

Figure 6

6-55. The *sui generis* attachment hypothesis[116] is even less supportive of the charge being enforceable against parties other than the chargor. The charge would attach as if it is a general security over property effective in the chargor company's winding up. This can be considered to imply that the property must be within the chargor's estate for the charge to be enforced against it, or it must be clearly recoverable by the liquidator or equivalent. There is scant statutory authority that would support enforcement of the charge beyond the chargor's patrimony.

(2) Uniformity with liquidation?

[113] Steven, *Pledge and Lien* para 8-01.
[114] Companies Act 2006 s 859C has no obvious application to floating charges: see A D J MacPherson, "Registration of Company Charges Revisited: New and Familiar Problems" (2019) 23 EdinLR 153, 173 f, for discussion of that section.
[115] This will be even more apparent if Z and A are not companies and there is no charges register for them. Also, see now Land Registration etc (Scotland) Act 2012 s 93, which provides that a good-faith acquirer of land is not affected by a floating charge granted by the disponer's predecessor in title.
[116] As to which see paras 5-18 ff above.

6-56. Another point in favour of separating attachment and enforceability in the case of receivership is to bring a significant degree of uniformity across the different methods of enforcement of floating charges. The position for liquidation seems relatively clear and there ought to be a presumption that it is applicable to receivership as well. Although receivership is principally a security-enforcement regime, aspects of the law of receivership are comparable to, and based upon, liquidation.[117] In addition, as noted by Goode in relation to English law, administrative receivership has a number of traits of an insolvency regime, like liquidation and administration, and is treated as such in various respects.[118] The same applies in Scots law.[119] It is certainly true that the "agency" (representative) status of a receiver, as regards the company's property, and the powers available to him, bear close similarity to those of a liquidator.

6-57. Liquidation, the original means by which the floating charge could be enforced in Scots law, seems to require that the property continues to belong to the insolvent party.[120] If there is a "default" law of floating charges it is the floating charge attaching on liquidation. Why, then, should the introduction of receivership in 1972 have fundamentally altered the law of floating charges, beyond being a special enforcement method outside formal liquidation? And why should the alternative method of enforcement allow wider scope for recovery than liquidation, without express statutory provision? The idea that a receiver ought not to have greater powers over property than a liquidator was a key consideration in *Sharp v Thomson*.[121] Lord Clyde preferred a narrow construction of the floating charge, noting the privilege a receiver would otherwise achieve, in comparison to a liquidator or trustee in sequestration, by being able to sell the property without recording title and without engaging in a race to the register against the transferee.[122] Separating attachment from enforcement was not, however, argued in the case. Lord Jauncey considered that the receivers had the power to take possession of the company's property and sell it,[123] but in deciding the property was not the

[117] *Palmer's Company Insolvency in Scotland* para 201 notes that the receiver's powers and duties and other receivership rules are "closely based upon" the rules for winding up and should be considered as part of corporate insolvency.
[118] See R M Goode, *Principles of Corporate Insolvency Law*, 3rd edn (2005) para 1-23; and see also *Goode on Principles of Corporate Insolvency Law* para 10-06. It should be noted too that the Insolvency Act s 247(1) states that "insolvency" in relation to the first Group of Parts of the Act includes the approval of a voluntary arrangement (under Pt 1) or the appointment of an administrator or administrative receiver (unless the context otherwise requires).
[119] Eg the receiver's duties to make sums available for preferential creditors and the prescribed part. Also, insolvency proceedings outlined in the Bankruptcy and Diligence etc (Scotland) Act 2007 ss 155(4) and 208(12) include receivership, and in Conveyancing and Feudal Reform (Scotland) Act 1970 Sch 3 para 9(2)(c) a proprietor is deemed to be insolvent if *inter alia* a receiver is appointed. However, a receiver can be appointed where the company is still solvent. This is also true of the appointment of an administrator by a floating charge holder and a company can be solvent and enter liquidation (members' voluntary liquidation).
[120] See paras 6-37 ff above.
[121] 1997 SC (HL) 66, eg at 77 per Lord Jauncey.
[122] 1997 SC (HL) 66 at 83 per Lord Clyde.
[123] Referring to the Insolvency Act 1986 s 55 and Sch 2.

company's under the legislation, he analysed the meaning of property upon attachment rather than at the time when enforcement was taking place.[124]

(3) "Separation" approach

6-58. It would have been possible to reach the same outcome as in *Sharp* by using the "separation" approach, and this could have avoided the property law difficulties arising from the case. On this approach, the property would be available to a receiver for realisation unless or until the property was validly removed from the company's patrimony. This would only be possible if the company did not require to take any further active steps after the receiver's appointment. For heritable property, this could only occur if, as in *Sharp*, the disposition had been delivered before the receiver was appointed, thus enabling subsequent registration.

6-59. Even if the approach in *Sharp* remains applicable for heritable property and receivership, a separation of attachment and enforcement could apply for other types of property and for non-receivership cases. For corporeal moveables, an earlier delivery of the property would be necessary for transfer at common law, while under the Sale of Goods Act 1979 the parties can agree when ownership will transfer.[125] For incorporeal property, an earlier delivery of an assignation deed would allow the assignee to complete the assignation by intimation (or equivalent) during the receivership or other insolvency process.

6-60. The fundamental point is that the transferee must be able to complete title without the assistance of the transferor. Thus, although the *outcome* in *Sharp* is supported by the analysis above, it could more appropriately have been decided on the basis of separating enforcement from attachment. Even though the charge had attached to the property, by the time that enforcement was to take place the property no longer belonged to the chargor and was therefore beyond the scope of the receiver's powers. In other words, attachment is not enough to enable a receiver to realise charged property and distribute to the chargeholder; it is necessary to give separate consideration as to whether the property is available for enforcement by remaining in the company's patrimony.

6-61. In the highly limited circumstances in which subordinate real rights could be obtained without the company's assistance, notwithstanding the receivership, then the position might differ from the transfer of ownership. The fixed-security effect of attachment may mean that subsequently created subordinate real rights (ie those created after the charge's attachment) are subject to the charge. The priority position between real security rights and other subordinate real rights is relatively undeveloped but the principle *prior tempore potior jure* may well apply. Enforcement of the floating charge *would* be possible due to the property remaining in the patrimony of the company. Thus the property might be realisable

[124] 1997 SC (HL) 66 at 76 per Lord Jauncey.
[125] Sale of Goods Act 1979 s 17. These could become challengeable transactions if the company entered insolvency, liquidation or administration and the transfer was not for full value.

unencumbered by the other real rights. These points also extend to an attached charge in liquidation and administration.

6-62. An alternative position is that a fixed security does not automatically prevail but, instead, only gives the creditor the right to reduce real rights granted in breach of the security conditions. The most obvious example is where a debtor grants a lease in breach of standard condition 6 without the permission of a standard-security holder.[126] The lease will seemingly exist unless or until the security holder reduces it.[127] It may be that other real rights created after the security, such as a proper liferent or a servitude, would not be challengeable by a creditor, as the debtor was permitted to deal with the property in this way. But if the standard conditions in a standard security are varied to include restrictions on such other real rights, this may allow for their reduction too.[128] If a fixed-security creditor could reduce a lease or other real right this would suggest that the holder of a floating charge can do so too. Yet there must be considerable doubts as to whether an attached charge so closely mirrors a standard security (for example) as to incorporate the statutory standard conditions, let alone variations of the conditions. Furthermore, a chargeholder needs to act through a receiver, administrator or liquidator, and these parties do not have any clear mechanism for reducing (valid) subordinate real rights.[129]

(4) Receivership and liquidation: points of divergence

6-63. If the "separation" analysis regarding transfer is applied to facts along the lines of *Sharp v Thomson*, a liquidator could be in a stronger position than a receiver.[130] This is because a receiver, apparently, cannot have property vested in him by virtue of a court application, nor can he register a notice of title, whereas a liquidator can do both.[131] It is also unlikely that a chargor can confer a vesting power upon a receiver in the charge instrument, albeit that this is an issue of some complexity. Nevertheless, a receiver can take certain steps to defeat a prospective transferee. If the receiver can be defeated by a party acquiring ownership after attachment, this emphasises the need to take control of property as soon as possible.

[126] See *Trade Development Bank v Warriner & Mason (Scotland) Ltd* 1980 SC 74 and the other sources at n 55 above.

[127] From the case of *Trade Development Bank v Warriner & Mason (Scotland) Ltd* 1980 SC 74, the precise position regarding voidability of such a lease is not clear.

[128] For variations of standard conditions, see Halliday, *Conveyancing Law and Practice* paras 53-07 ff. For some brief discussion of other property rights granted in breach of a standard security, see Scottish Law Commission, *Discussion Paper on Heritable Securities: Pre-default* (Scot Law Com DP No 168, 2019) paras 8.59 ff.

[129] There is the possibility that a liquidator could be involved in a race to complete title to property against another party that has been granted a subordinate real right (eg a standard security) but has not yet completed a formal step to obtain the right (eg by way of registration in the Land Register).

[130] But a receiver is in a better position in other ways: he has priority over a liquidator (*Manley Petr* 1985 SLT 42) and, in terms of control over enforcement, receivership is a more advantageous process for a chargeholder.

[131] See para 6-39 above for liquidation. The absence of express statutory provision seems to remove these possibilities for a receiver. There is also no express means by which an administrator could have property vested.

A receiver could transfer ownership to a new purchaser prior to, for example, a disponee registering or an assignee intimating. If property is sold and transferred by a receiver before another party acquires ownership, or obtains another real right, that other party does not acquire an interest in the proceeds and will be defeated. However, a new purchaser may be cautious about purchasing from a receiver, especially if it is aware that another party is in a position to complete title and thereby prevail.[132] That will be true even if those receiving title from a receiver in good faith are protected.[133] Such protection is unlikely to assist a purchaser where ownership has already passed from the company to another party that has speedily completed title.

6-64. There are also some situations in which a receiver, unlike a liquidator or administrator, lacks the ability to recover property transferred to another by the debtor company. As Bennett states, a "notable omission" regarding the receiver's powers is an express power to reduce gratuitous alienations, fraudulent or unfair preferences, and extortionate credit transactions; these can only be challenged in a liquidation or administration.[134] The omission is, however, appropriate as property recovered or payment received by the company following a successful challenge is for the benefit of the general body of creditors, not for the chargeholder in whose interests the receiver is acting.[135] As such, even if a receiver did have such a power there would be little value in exercising it, as the chargeholder would not directly benefit. Bennett correctly suggests, however, that, in practice, the threat of liquidation may allow a receiver to obtain repayment from a party alleged to have engaged with the company in a challengeable transaction.[136]

6-65. It might be wondered whether a floating charge could still be enforced where property is transferred to a third party by a receiver appointed by another chargeholder. Paisley suggests that, although floating charges "invariably" exist over the chargor's property, it is theoretically possible for land to be transferred to another party, after a charge's attachment, and yet remain subject to the charge.[137] He suggests that the circumstances required for enforcement against another's property would be "bizarre": a company grants two floating charges, a receiver is appointed under one but not the other, and the company is in liquidation, which causes the other charge to attach. The receiver would sell without the consent of the other chargeholder and without the court's sanction, leaving the other charge

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[132] But this is already even more the case due to *Sharp v Thomson* 1997 SC (HL) 66. It is also possible, but perhaps unlikely, that a transfer by a receiver could be challenged on the basis of the offside goals rule: eg if there is a pre-existing contract in favour of A to receive property X and then the receiver sells and transfers X to B. The suggestion in *Forth & Clyde Construction Co Ltd v Trinity Timber & Plywood Co Ltd* 1984 SC 1, that common law rules do not apply to the exercise of powers by a receiver, would suggest that the doctrine will not affect a receiver's acts.
[133] Insolvency Act 1986 s 55(4).
[134] *Palmer's Company Insolvency in Scotland* para 231; Insolvency Act 1986 ss 242-244. Related challenges are also available at common law in the context of insolvency.
[135] See paras 3-36 ff above for discussion.
[136] *Palmer's Company Insolvency in Scotland* para 231. But see paras 3-38 f above as to whether this property will be available to a chargeholder.
[137] Paisley, *Land Law* para 2.29.

"undischarged and attaching to the property".[138] But why would the other floating charge continue to affect the transferred property rather than provide a lower-ranking claim to the proceeds? And how could a liquidation, which is patrimonially limited to the debtor, extend to property validly sold? Without a satisfactory answer to this, the second charge could not be enforced against the transferred property.

6-66. To some degree, the different treatment given to charges attaching in receivership and liquidation means that, where possible, appointing a receiver was, and is, a means by which a chargeholder obtains self-protection.[139] Nevertheless, if an attached floating charge is a security under s 61(1)(a) of the Insolvency Act 1986, this could stop a receiver from selling property without the consent of a chargeholder, and s 61(2) might enable a court to give effect to the respective ranking preferences. Yet s 61 does not seem to prohibit a receiver from selling property even without consent; it just means that the property will remain encumbered by the security if consent (or the court's permission) is not obtained.[140] In strict legal terms, this continued encumbrance is unlikely to help a chargeholder due to the charge's apparent patrimonial restrictions; however, a receiver may, cautiously, seek consent.

6-67. If the floating charge that attached on liquidation in the scenario (at para 6-65 above) was lower-ranking than the other charge, the receivership distribution provisions allow for payment of proceeds to the liquidator to take account of this.[141] Where a higher-ranking chargeholder appoints an administrative receiver, and a lower-ranking chargeholder cannot, the latter will also not be able to appoint an administrator due to the existence of the administrative receiver. Consequently, the lower-ranking creditor may have to protect its interests by pushing the company into liquidation, which will cause its charge to attach.[142]

(5) Receivership and the enforcement of diligence

6-68. One potentially problematic aspect of separating attachment and enforcement for receivership relates to diligence. Unlike liquidation and administration, receivership itself may not limit the ability of creditors to execute or complete

[138] Paisley, *Land Law* para 2.29, n 95. And see n 130 above.
[139] Eg a higher-ranking chargeholder will only receive a distribution of moneys ahead of a lower-ranking chargeholder, that has appointed a receiver, if the former also appoints a receiver: Insolvency Act 1986 ss 56(1) and 60(1), (2).
[140] See McKenzie Skene, "Corporate Insolvency" para 161.
[141] As, after payment to the chargeholder that appointed the receiver, payment may be made to the liquidator: Insolvency Act 1986 s 60(2)(c).
[142] Insolvency Act 1986 s 122(2). Otherwise, the receiver would have no obligation to distribute to them as the charge would not have attached. But a fixed-security holder, ranking lower than the unattached charge, could receive a distribution: s 60(2)(b).

diligence.[143] Administration places a moratorium on enforcement of diligence.[144] For liquidation, parts of the estate arrested or attached within 60 days prior to liquidation or thereafter, or funds received under the Debtors (Scotland) Act 1987 s 73J(2), require to be handed over to the liquidator.[145]

6-69. In receivership there is no moratorium and no provision requiring payment of proceeds by diligence creditors to the receiver. Could a creditor therefore use an arrestment or attachment, or otherwise execute diligence, during the currency of receivership? Also, if a diligence has been executed, either before or during the receivership, could it be completed while the receivership is ongoing? The significance of this latter point has been minimised by the Inner House decision in *MacMillan v T Leith Developments Ltd*,[146] which provides that inhibition, arrestment, and probably any other commonly recognised form of diligence are effectually executed if they are not rendered ineffective by virtue of proximity to liquidation (as in eg the 60-day rule noted in the previous paragraph).[147]

6-70. Of course, the receiver can seek to take possession or control of property, or demand the payment of sums due from a debtor of the company, which might preclude the possibility of diligence being completed. Property can also be sold by the receiver and, depending on the circumstances, the acquirer either takes the property free of the diligence or encumbered by it. Given the wording of the Insolvency Act 1986 s 61(1), and the fact that a receiver's powers are subject to the rights of those with effectually executed diligence, it seems that the property will remain encumbered if the receiver sells without the consent of the diligence creditor or the court, under s 61. However, if the receiver sells with the court's permission, the property will be freed from the diligence, and the diligence creditor will be

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[143] In Scottish Law Commission, *Memorandum on Examination of the Companies (Floating Charges) (Scotland) Act 1961* (Scot Law Com Memorandum No 10, 1969), the draft Bill contained a clause (2(7)) providing that "no person shall have power to execute diligence on any such part of the property of the company as is attached by the floating charge…"; and see para 30. This provision was omitted from the subsequent report and later legislation.

[144] Without the consent of the administrator or the court: Insolvency Act 1986 Sch B1 para 43(6). But see MacPherson, "The Circle Squared?" 242 ff for difficulties involving diligence in the context of administration.

[145] Insolvency Act 1986 s 185(1)(a) applying Bankruptcy (Scotland) Act 2016 s 24(6), (7), with adjustments. See also the 2016 Act s 24(2), (3), the latter of which (combined with Insolvency Act 1986 s 185(1)(a)) provides a similar 60-day rule for the vesting of an inhibitor's rights of challenge in the liquidator.

[146] [2017] CSIH 23, 2017 SC 642.

[147] In *MacMillan* the five-judge First Division overturned *Lord Advocate v Royal Bank of Scotland* 1977 SC 155 and challenged the reasoning in *Iona Hotels Ltd (In Receivership) v Craig* 1990 SC 330. It should be noted, however, that *MacMillan* dealt with old law regarding inhibitions, and that the current relationship between floating charges and inhibitions is subject to the Bankruptcy and Diligence etc (Scotland) Act 2007 s 154, which provides that inhibition "does not confer any preference" in insolvency proceedings (including liquidation, administration and receivership) or any other ranking process: see MacPherson, "The Circle Squared?" 235 ff. See also Insolvency Act 1986 s 61(1A), which provides that an inhibition that takes effect after the creation of a floating charge is not effectual diligence in terms of s 61(1). S 61(1B) provides that arrestment is only an effectual diligence for s 61(1) where it is executed before the floating charge attaches, but this provision has not been brought into force.

entitled to a priority payment from the receiver. Separately, the threat of liquidation (or administration) could also be sufficient to stop a creditor from either executing or taking the final steps for completion of diligence.[148] But although these are obstacles, they do not mean that diligence is impossible in a receivership.

6-71. The powers of a receiver are subject to the rights of those who have effectually executed diligence on property prior to the receiver's appointment.[149] This probably means that creditors with such diligence can enforce despite the receivership.[150] If so, the same issues as for fixed securities (see paras 6-09 ff above) would apply regarding payment of the proceeds by such creditors to the chargeholder or the receiver. If the receiver realises the property instead, he is required to make payment to, *inter alia*, those with effectually executed diligence before paying the relevant chargeholder. This means that the diligence creditor will often suffer no disadvantage by letting the receiver enforce. Confusingly, however, the distribution provisions for receivers seem to provide that a diligence creditor (with effectually executed diligence) *would* lose out to a lower-ranked fixed-security holder, if both rank ahead of the floating charge.[151] This might serve as an incentive for self-enforcement by the diligence creditor.

6-72. It is assumed that only diligence executed prior to the appointment of a receiver could properly be "effectually executed diligence". The attachment of a floating charge as if it is a fixed security means that later diligence is subject to the attached charge; priority between fixed securities and diligence is determined according to timing. The effect is that, for example, any arrestment, attachment or adjudication laid on after the receiver's appointment would rank behind the floating charge. The precise effect of the diligence does, however, depend upon which attachment mechanism applies and the type of property involved. For instance, with money claims the prevailing approach to the effect of attachment would mean that the attached charge, as a deemed assignation in security, would cause a fictionalised transfer. Therefore, arrestment of the property by a creditor of the chargor would not be possible, as the *chargeholder* is not that creditor's debtor.[152] But it is unclear whether such diligence would just be unsuccessful for purposes of the floating charge or whether it would be completely ineffectual.[153] By contrast, a *sui generis*

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[148] This threat is well-recognised where the receiver learns that creditors have laid on diligence within 60 days: see D A Bennett, "The Receiver in Scotland", in S Frisby and M Davis-White (eds), *Kerr and Hunter on Receivers and Administrators*, 19th edn (2010) paras 27-29 and 27-32.
[149] Insolvency Act 1986 s 55(3)(a).
[150] The form of enforcement would depend upon the type of diligence. With adjudication, final enforcement requires an action of declarator of expiry of the legal, which can only take place from ten years after an adjudication is created: see Gretton, *Inhibition and Adjudication* 220 f. Given this timeframe, a chargeholder (and the adjudger) will usually be keen for the receiver to realise and distribute.
[151] Insolvency Act 1986 s 60(1). Unless the diligence creditor can somehow claim sums due from the "lower-ranking" secured creditor outside the receivership.
[152] See *Forth & Clyde Construction Co Ltd v Trinity Timber & Plywood Co Ltd* 1984 SC 1.
[153] Eg whether or not it would be effective over property were the property not sold by the receiver and the company subsequently exited receivership.

approach to attachment[154] would allow for the diligence to affect the property but it would rank behind the charge and have to be dealt with outside the receivership.[155]

6-73. It would be strange if the receivership distribution rules enabled diligence executed *after* the charge's attachment to have ranking priority by being "effectually executed diligence". Some doubt arises on this point, however, because the provision about the powers of the receiver being subject to the rights of those with effectually executed diligence specifically refers to such diligence executed "prior to the appointment of the receiver".[156] This could be read as implying that the establishment of effectually executed diligence after that appointment is possible but that the receiver's powers will not be subject to the rights of those with such diligence. There is no pre-receivership limitation upon effectually executed diligence in the provisions on distribution or disposal of the property, the latter requiring a receiver to obtain the consent of a creditor who has executed "effectual diligence", or the court's permission, before selling the property.[157]

6-74. It would be helpful to have statutory clarification that effectually executed diligence requires execution of diligence *prior to* attachment of a floating charge. The alternative view, that parties may obtain effectually executed diligence after the appointment of a receiver, would be highly inconvenient for a receiver's work. There could be a race among creditors to obtain diligence, and ranking priorities would be in a constant state of flux, which would hinder realisation and distribution. Instead, it is much preferable if s 60(1) represents a stable reflection of ranking priorities at the time when the charge attaches.

6-75. Even if a diligence is not deemed "effectually executed" (including by virtue of being executed after a receiver's appointment), might there be some sort of race between a receiver's realisation of the property and the debtor's completion of the diligence during the receivership process? For example, a party which had arrested property after the appointment of a receiver (and thus a floating charge's attachment) could attempt to proceed to furthcoming. If successful, this would transfer the property to the diligence creditor and thus, potentially, remove it from the reach of the receiver.[158] But it may not be possible if the charge's attachment has the deemed effect of an assignation in security and thus is perceived (fictionally) to remove the property from the company's patrimony.[159] In addition, the receiver can generally rely on the power to "take possession of, collect and get in the property" from any person and take proceedings for that purpose.[160] The property remains the

[154] As to which see paras 5-18 ff above.
[155] As there is no place for it in the distribution of proceeds by the receiver.
[156] Insolvency Act 1986 s 55(3)(a).
[157] If the property is to be sold unencumbered: Insolvency Act 1986 s 61(1)(b); and see s 61(2), (8). The equivalent provision for "security" rights (s 61(1)(a)) expressly refers to those which rank prior to, *pari passu* with, and postponed to, the relevant floating charge.
[158] If, however, corporeal moveables were being arrested, they would still need to be sold after furthcoming with proceeds to be paid to the arrester.
[159] See ch 5 above. This would not apply if corporeal moveables were being arrested or other forms of diligence were being used.
[160] Insolvency Act 1986 Sch 2 para 1.

company's until the diligence is completed. Also, the diligence creditor's rights are subject to the powers of the receiver, which would justify intervention in, for example, a furthcoming action (following arrestment) or would enable a receiver to stop a sale in implement of the diligence of attachment.[161] A court would no doubt decide against the low-ranking diligence creditor in competition with the receiver, bearing in mind the priority of the receiver's powers and that party's remit to distribute to various parties with higher ranking than the diligence creditor.

6-76. One particularly difficult issue is identifying what the receiver can do in opposition to the automatic release of funds after 14 weeks[162] where property has been arrested. Specific circumstances, outlined in the Debtors (Scotland) Act 1987 s 73L, can, however, prevent the release. These include the raising of a multiplepoinding action in relation to the arrested funds,[163] and also where an application is made by certain parties (including the debtor and a third party to whom the funds are due solely or in common with the debtor) to the sheriff for an order recalling or restricting the arrestment under s 73M.[164] The receiver could claim to be acting on the debtor's behalf, as agent, or as the party to whom the funds are due. There are only certain grounds of objection justifying an application to the sheriff, most pertinently here that the funds attached are due to the "third party" solely or in common with the debtor.[165] Alternatively, the automatic release provisions could be read as part of a diligence creditor's rights that are subject to the powers of a receiver. Nevertheless, it would be preferable if reliance upon such provisions was not necessary and that there was a clear legislative statement that diligence cannot be completed in a receivership, unless it is effectually executed prior to the receiver's appointment. The importance of this is, however, receding with the decline in the number of receiverships.

F. ADMINISTRATION

(1) Administrator's powers and limits

6-77. Generally, an administrator "must perform his functions in the interests of the company's creditors as a whole".[166] This is true even if he was appointed by the chargeholder, although in reality there is then often a close relationship between the chargeholder and the administrator.[167] Unlike for liquidation and receivership, the primary objective of administration is "rescuing the company as a going concern".[168] Only if the administrator thinks it is not reasonably practicable to meet

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161 For instance, *Lord Advocate v Royal Bank of Scotland* 1977 SC 155 involved a receiver participating in a furthcoming action raised by an arrester.
162 Under Debtors (Scotland) Act 1987 s 73J.
163 Debtors (Scotland) Act 1987 s 73L(1)(c).
164 Debtors (Scotland) Act 1987 s 73L(1)(a).
165 Debtors (Scotland) Act 1987 s 73M(4)(c).
166 Insolvency Act 1986 Sch B1 para 3(2).
167 See para 3-05 above. And see eg *Goode on Principles of Corporate Insolvency Law* paras 11-38 ff regarding pre-packaged administrations.
168 Insolvency Act 1986 Sch B1 para 3(1)(a), (3).

(i) that primary objective and (ii) the secondary objective of achieving a better result for the creditors as a whole than would be likely in a winding up,[169] will the objective of the administration be "realising property in order to make a distribution to one or more secured or preferential creditors".[170] Even then, the administrator must not "unnecessarily harm the interests of the creditors of the company as a whole".[171]

6-78. Nevertheless, whichever of the relevant objectives is being pursued, an administrator may deal with the company's property and can dispose of property and make distribututions to creditors to meet the objectives. In exercising his functions an administrator acts as the company's agent.[172] His powers are consequently powers that might be exercisable by the company (were it not in administration), but with special protections and additions.[173] An administrator "may do anything necessary or expedient for the management of the affairs, business and property of the company".[174] He is also required "to take custody or control of all the property to which he thinks the company is entitled".[175] He has the powers specified in Schedule 1 of the Insolvency Act 1986. These include powers relating to taking possession of, collecting and getting in "the property of the company", and selling, hiring out and otherwise disposing of such property.[176]

6-79. None of the administrator's powers allows for his reach to extend to property that has been validly transferred, and which therefore is no longer the company's property. (Express statutory provision would seem necessary for an administrator to deal with property not belonging to the company, as indeed there is for property possessed by the company on hire-purchase.[177]) Consequently, if property does not belong to the company when the administrator is exercising these powers,[178] the administrator has no power in relation to such property.[179] This poses the question of how can property be validly transferred (except by the administrator) when the company is in administration.

[169] Insolvency Act 1986 Sch B1 para 3(1)(b).
[170] Insolvency Act 1986 Sch B1 para 3(1)(c), (4).
[171] Insolvency Act 1986 Sch B1 para 3(4)(b).
[172] Insolvency Act 1986 Sch B1 para 69. However, the point above at n 68 regarding "representation" being a more strictly appropriate term than "agency" also applies here.
[173] Insolvency Act 1986 Sch B1 paras 59ff and Sch 1.
[174] Insolvency Act 1986 Sch B1 para 59(1); see also paras 1(1) and 68.
[175] Insolvency Act 1986 Sch B1 para 67.
[176] Insolvency Act 1986 Sch 1 paras 1ff. See also Sch B1 paras 70-71, and the discussion in St Clair and Drummond Young, *Corporate Insolvency* paras 5-79 ff regarding the administrator dealing with property charged by floating charges or encumbered by other securities.
[177] Insolvency Act 1986 Sch B1 paras 43(3), 72, and 114.
[178] But he would have powers over eg a contractual right to obtain property or a subordinate real right: that is because these rights are property that belong to the company.
[179] Parties in good faith transacting with the administrator do, however, have protection if the administrator is acting beyond his powers: Insolvency Act 1986 Sch B1 para 59(3). But this is unlikely to assist where the administrator is seeking to sell property owned by another.

6-80. While a company is in administration, neither the company nor its officers may exercise a management power without the administrator's consent.[180] Given that an administrator has power to deal with property, the implication is that the company and directors do not have such a power and, if they do attempt to transfer property, the transfer will be void.[181] Yet, as discussed above for liquidation and receivership, it would seem that so long as the debtor company fulfils its own part of the transfer process before administration, the transferee can complete the transfer afterwards. Although administration creates a moratorium in relation to, *inter alia*, enforcing security rights, the re-possession of certain goods in the company's possession, and the institution and continuation of legal processes (including legal proceedings and diligence) against the company or its property,[182] there is no identifiable restriction on a party completing a transfer by, for example, registration or intimation.

(2) Consistency with liquidation and receivership?

6-81. Consequently, as for liquidation and receivership, there is no legislative mechanism for the re-transfer of property from a third party that has validly acquired ownership after the commencement of administration. The attachment of a floating charge (even if deemed a fixed security) does not, by itself, stop property from being transferred. And, in administration, the charge is unlikely to have even attached when the transfer of the property occurs. Due to their status as "agents" (or representatives), administrators, like liquidators (and probably receivers), can only sell property which is owned by the debtor company at the time when the sale is to take place. If property is to be recovered, then this must be on the basis that the transferor, rather than the transferee, is owner, or that the transfer itself is voidable at the instance of the company (or its representative) and the transfer is reduced accordingly.

6-82. An approach to the floating charge that is as consistent as possible across the different enforcement methods is desirable. Using an analysis which combines the rules of property law and the inherent limitations of the enforcement processes of the floating charge allows for more doctrinally palatable and coherent outcomes and a more unified law of floating charges. The statutory provisions do, however, differ in certain respects, and this has contributed to the courts interpreting the operation of the floating charge in varying ways depending on the enforcement method used.[183] But the wider the perceived differences between the varying forms of enforcement,

[180] Insolvency Act 1986 Sch B1 para 64(1). "Management power" is defined in para 64(2)(a) as "a power which could be exercised so as to interfere with the exercise of the administrator's powers."
[181] See McKenzie Skene, *Insolvency Law in Scotland* (1999) 174; McKenzie Skene, "Corporate Insolvency" para 117; St Clair and Drummond Young, *Corporate Insolvency* para 5-61.
[182] Insolvency Act 1986 Sch B1 paras 42-43.
[183] Eg in relation to acquirenda: see paras 3-26 ff above. And see eg *Lord Advocate v Royal Bank of Scotland* 1977 SC 155, and *Taylor Petr* 1981 SC 408 at 413 f, for assertions of differences between receivership and liquidation.

the greater the fragmentation of floating charges and the more uncertainty there is for both the future development and the application of the law.

G. A REAL RIGHT?

(1) Real right indicators and patrimonial limitations

6-83. The foregoing discussion regarding enforcement of floating charges, which has identified limitations on the effectiveness of the charge with respect to transferred property, requires us to examine afresh the question of whether a floating charge is a real right. As mentioned in the previous chapter, a floating charge is widely considered to confer a real right upon attachment. Certainly, an attaching charge does have "real effect" in certain respects within the crucial enforcement context. The attached property is used for realisation and the proceeds are distributed to the chargeholder. In general terms, attachment also gives a ranking preference against ordinary unsecured creditors and later security rights, including subsequent diligences. The charge may also have priority over other real rights created after attachment. Furthermore, if there is a negative pledge, the charge ranks from its creation against any voluntary fixed-security rights or floating charges created thereafter.[184] Now certainly a right which prevails over the general body of creditors and subsequent secured creditors in an insolvency, by virtue of an interest in particular property, will often be considered a real right. The relatively favourable treatment given to the floating charge in this context bolsters its case for such labelling.

6-84. The charge's "realness" is, however, circumscribed in various respects involving enforcement, which tends to undermine the argument that it is a real right. This is demonstrated by considering a number of other indicators of a real right in security.[185] One such indicator is that such a right prevails, as regards the property, against unsecured creditors. For the floating charge, the picture here is mixed: the charge ranks ahead of unsecured creditors in general but behind preferential creditors (a special category of unsecured creditors); and, since the coming into force of the Enterprise Act 2002, a proportion of attached assets is ring-fenced for unsecured creditors and this "prescribed part" is given priority over a floating charge.[186]

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[184] But the negative pledge will not rank the floating charge from its creation against diligence or fixed securities arising by operation of law.

[185] For some discussion of real-right factors, see Scottish Law Commission*, Report on Diligence on the Dependence and Admiralty Arrestments* (Scot Law Com No 164, 1998) paras 9.6 ff; G L Gretton, "The Concept of Security", in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987). Note too that in *Forth & Clyde Construction Co Ltd v Trinity Timber & Plywood Co Ltd* 1984 SC 1 at 8 f per Lord President Emslie, the law of catholic and secondary creditors, that limits enforcement by secured creditors generally, was held not to affect the actions of a receiver (and may not apply to the enforcement of floating charges more broadly).

[186] For the prescribed part, see Insolvency Act 1986 s 176A (added by the Enterprise Act 2002 s 252), and Insolvency Act 1986 (Prescribed Part) Order 2003, SI 2003/2097. It has been held that a floating-charge creditor cannot claim in the prescribed part with respect to any unsecured balance: *Thorniley v HMRC* [2008] EWHC 124 (Ch); *Re Permacell Finesse Ltd* [2007] EWHC 3233 (Ch), [2008] 1 WLR 1516.

6-85. Another indicator is that a secured creditor can enforce the security against the property[187] – a particular manifestation of the general real-right characteristic of direct power over the object of the right.[188] This self-enforcement indicator, however, is only applicable to floating charges in the widest sense. As we have seen, true self-enforcement is not possible. Enforcement relies upon an administrator, liquidator or receiver, each of whom acts as an agent (representative) of the debtor company in relation to that company's property. And the appointment of an administrator may not even lead to the attachment of the charge.

6-86. A further indicator is that real rights affect third-party acquirers of property. An attached floating charge does generally have third-party effect for as long as the property remains in the chargor's patrimony. However, third parties who validly acquire property before attachment are unaffected by the charge and this may also be the case for post-attachment acquisition, even if the implications of *Sharp v Thomson*[189] are put to one side. If the charge is being enforced, this must be through the liquidator, receiver or administrator, and any property then transferred is released from the charge. In the other instances in which it is possible for valid transfer to take place after attachment, the patrimonial limitations of enforcement should mean that such property is also no longer affected.[190] Thus, even if a floating charge is a real right, the absence of enforcement rights except for property within the chargor's patrimony suggests that the charge cannot be considered a typical real right in security.[191]

6-87. The patrimonial limitations of the floating charge are also demonstrated in its relationship with trust property. The emerging consensus in Scots law is that trust property is held by the trustee in a special patrimony.[192] If property is held by a

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[187] This, however, is just an indicator. A system could be constructed in which security rights could only be enforced by diligence or through insolvency. See eg Steven, *Pledge and Lien* paras 8-04 ff regarding the historical enforcement of pledge using diligence. The landlord's hypothec was formerly principally enforced by the diligence of sequestration for rent. However, it has been suggested that the abolition of that diligence and accompanying changes (Bankruptcy and Diligence etc (Scotland) Act 2007 s 208) mean that the hypothec could now be merely a preference right: see eg A J M Steven, "Goodbye to Sequestration for Rent" 2006 SLT (News) 17, 17 f (writing prior to the Act's passing). See also W M Gloag and R C Henderson, *The Law of Scotland*, 14th edn by H L MacQueen and Lord Eassie (2017) para 36-04 for some general features of security rights.

[188] L van Vliet, *Transfer of Movables in German, French, English and Dutch Law* (2000) 27 f.

[189] 1997 SC (HL) 66.

[190] And under the current law it may not even attach to the property, if beneficial interest has already passed.

[191] But it could be argued that using these processes often negates any need for direct self-enforcement.

[192] See eg G L Gretton, "Trust and Patrimony", in H L MacQueen (ed), *Scots Law into the 21st Century: Essays in Honour of W A Wilson* (1996) 182; K G C Reid, "Patrimony Not Equity: The Trust in Scotland (2000) 8 ERPL 427, updated and republished in R Valsan (ed), *Trusts and Patrimonies* (Edinburgh Studies in Law vol 12, 2015) 110; G L Gretton, "Trusts without Equity" (2000) 49 ICLQ 599; G Gretton, "Up there in the *Begriffshimmel*?", in L Smith (ed), *The Worlds of the Trust* (2013). As Reid notes at 123 f, in Scotland "the central role of patrimony has been accepted by legal scholars, by the Scottish Law Commission, and, increasingly, by the courts, and can now be regarded as 'clearly established'."

chargor in trust, that property is apparently not attached by a floating charge granted over the whole of the chargor's property.[193] It is, therefore, logical to conclude that a floating charge only covers property in the chargor's private patrimony. Even if a charge could technically be granted over trust property, there are inherent patrimonial restrictions from an enforcement perspective. Trust property is excluded from the liquidation of a company, and the same applies to receivership and administration, as sequestration is the only recognised insolvency process for trust estates.[194] The latter is not a process in which the floating charge attaches or which allows for the charge's enforcement.

(2) Real right or preference right?

6-88. The overall picture, then, is of an interest that does not fit into the existing mould of real rights in security. It cannot be said that the absence of one or more of the above indicators renders a right non-real; however, the cumulative effect for the floating charge may have this effect.

6-89. The charge combines some elements of real security with a voluntary insolvency or patrimonial preference. Even the fact that the entitlement conferred by a floating charge relates to specific attached property, and distribution arises from the sale proceeds thereof, is not limited to real rights. Other systems allow for preference claims to exist for all property in the insolvent's estate (as is more familiar in Scots law) or with respect to specific property.[195] In the Netherlands, these are referred to respectively as general privileges and special privileges.[196] In that system, although the usual rule is that secured creditors have priority over preference claims, some of the latter rank ahead of real rights in security by specific provision.[197] As Goudy notes, Scots law has also allowed certain "privileged debts", including deathbed and funeral expenses and the wages of "farm servants", to prevail

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[193] *Tay Valley Joinery Ltd v C F Financial Services Ltd* 1987 SLT 207. See A D J MacPherson, "Floating Charges and Trust Property in Scots Law: A Tale of Two Patrimonies?" (2018) 22 EdinLR 1 for more detailed discussion of the relationship between floating charges and trust property.

[194] Bankruptcy (Scotland) Act 2016 s 6(3); *Turnbull v Liquidator of Scottish County Investment Co* 1939 SC 5; *Smith v Liquidator of James Birrell Ltd (No 2)* 1968 SLT 174; *Gibson v Hunter Home Designs Limited* 1976 SC 23. See also *Bank of Scotland v Liquidators of Hutchison, Main & Co Ltd* 1914 SC (HL) 1; St Clair and Drummond Young, *Corporate Insolvency* para 12-01. For recognition of the enforcement difficulties for a floating charge regarding trust property, see Scottish Law Commission, *Report on Registration of Rights in Security by Companies* (Scot Law Com No 197, 2004) paras 2.31 f.

[195] The South African general notarial bond, which gives a priority claim on the residual moveable estate of an insolvent party, is also of interest here. See G L Gretton, "Reception without Integration? Floating Charges and Mixed Systems" (2003) 78 Tulane LR 307, 329 for comparative discussion of the general notarial bond and the Scottish floating charge.

[196] Art 3:278(2) of the Dutch Civil Code. And see D Faber and N Vermunt, "National Report for the Netherlands", in D Faber et al (eds), *Ranking and Priority of Creditors* (2016) ch 12, especially at paras 12.07 and 12.68 ff.

[197] Art 3:279 Dutch Civil Code; and see Faber and Vermunt, "National Report for the Netherlands" para 12.70.

against real securities.[198] On this basis, a floating charge could be either a preference or a real-security right.

6-90. One might suggest that a difference between real rights and preference rights is that the former confer actions *in rem* (ie the rights are exercisable directly in relation to property), and are thereby enforceable against anyone, whereas the latter do not give this.[199] Preference rights are enforceable in the estate (or patrimony) of the debtor and against the party administering the debtor's estate. They usually only give a priority right to a creditor in an insolvency (or related) process.[200] In this respect, and because of what has been said in this chapter (and elsewhere), the floating charge, at least in practical terms, could be deemed a special kind of preference right rather than a real right.

6-91. Yet describing the floating charge as a mere preference right does not present the full picture and may not give appropriate regard to the weight of judicial authority referring to the charge as a real right.[201] The attachment effect does mean that the floating charge is deliberately cloaked as a real right, at least in particular contexts. In addition, unlike the present conception of preference rights in Scots law, a floating charge is granted voluntarily for security purposes, confers rights in relation to particular property (upon attachment), ranks against other rights as if it were a real right, and has an existence outside the insolvency context which gives its holder special powers to bring about enforcement processes.

6-92. For floating charges to be incorporated into the existing *numerus clausus* regarding real rights in security, however, would require an expansion or re-characterisation of that category. But the same is true of our current notion of preference rights. Alternatively, the attached floating charge may best be described as a *sui generis* hybrid or composite of real right and patrimonial preference.[202]

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[198] Goudy, *Bankruptcy* 539 ff. Goudy describes these as functioning "as regards moveable estate like a universal hypothec".
[199] See eg the position in Quebec: *Hull (Ville de) v Tsang* [1998] RDI 343 (Queb CM) at 345 (para 16); L Payette, *Les Sûretés Réelles dans le Code Civil du Québec*, 2nd edn (2001) para 209.
[200] But see eg Dutch law where privileges apparently apply wherever there is recourse by a creditor against a debtor, and not just in insolvency: Arts 3:278 ff Dutch Civil Code.
[201] Albeit that the precise extent of referring to the charge as a real right in each case can be debated.
[202] And see the discussion at paras 5-32 ff above.

PART B: SPECIAL PART

7 Heritable Property

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A. INTRODUCTION

7-01. Much of the attention given to the relationship between floating charges and property has focused upon heritable property.[1] In this context, heritable property principally means land, as a direct property object. Therefore, when reference is made to the floating charge attaching to heritable property, this should usually be understood as attachment to the ownership of land.[2] The present chapter will include consideration of when heritable property becomes attachable and unattachable by a

[1] G L Gretton, "Reception without Integration? Floating Charges and Mixed Systems" (2003) 78 Tulane LR 307, 319 states that the major difficulties involving the floating charge in Scots law have arisen "disproportionately" as regards heritable (immoveable) property.

[2] If the chargor instead held other heritable property, eg a standard security or a lease or rights arising from concluded missives, then attachment would be described as being to the standard security, lease or rights arising from the missives respectively. Some aspects of incorporeal heritable property will be dealt with in ch 9 below.

charge. The most notable and controversial of all floating-charge cases in Scots law, *Sharp v Thomson*,[3] concerned this issue and will be analysed in detail.

7-02. The other major component of this chapter will be an examination of the attachment of floating charges where property is subject to heritable security. Before the introduction of the standard security in 1970, it was possible to create different forms of heritable security, most notably the bond and disposition in security and the *ex facie* absolute disposition qualified by back letter or other agreement. The nature of these securities raises interesting issues about the intended operation of the floating charge and its interaction with property and heritable securities.

B. BACKGROUND

7-03. The Law Reform Committee for Scotland project that led to the introduction of the floating charge in 1961 was originally limited to the reform of security over moveable property.[4] However, this remit was later expanded to include consideration of not only whether a floating charge-type security should be introduced but also the types of property which ought to be chargeable. The Committee was particularly keen to examine whether floating charges should be made available over heritable property. Jack Halliday, the Professor of Conveyancing at Glasgow University, was therefore co-opted to the project sub-committee to give consideration to conveyancing difficulties that might arise.[5]

7-04. Some respondents to the Committee's consultation, such as the Society of Writers to Her Majesty's Signet and the Law Society of Scotland, proposed that heritable property (and certain other property) should not be included within the scope of the floating charge.[6] The other respondents, however, did not recommend restrictions and the Council of Scottish Chambers of Commerce expressly favoured following the scope of the floating charge in English law, thus allowing for coverage of all property types.[7] The Law Reform Committee accepted that all forms of property, including heritable property, should be chargeable.[8] They justified this by noting that if certain property was excluded, then proceeds from the sale of property subject to a floating charge could be invested in excluded property and this would diminish the value of floating charges. The Committee added that, in commercial law, "unless there is good reason to the contrary, it is desirable that the law of England and Scotland should be the same".[9] English law permitted, and continues to permit, a floating charge operating as a universal security over present and future property.[10]

[3] 1997 SC (HL) 66.
[4] Law Reform Committee for Scotland, *Eighth Report* para 1.
[5] NRS AD61/55 – Letter from W A Cook, Biggart, Lumsden & Co to J H Gibson, Lord Advocate's Chambers, dated 10 March 1959; Law Reform Committee for Scotland, *Eighth Report* ii.
[6] *Eighth Report* para 27.
[7] *Eighth Report* paras 28 f.
[8] *Eighth Report* para 30.
[9] *Eighth Report* para 30.
[10] See eg R Calnan, *Taking Security*, 3rd edn (2013) paras 4-01 ff.

7-05. The Companies (Floating Charges) (Scotland) Act 1961 therefore stated that a floating charge could be created by a company "over all or any of the property, heritable and moveable, which may from time to time be comprised in its property and undertaking".[11] In the Companies (Floating Charges and Receivers) (Scotland) Act 1972, the specific mentions of heritable and moveable property were removed, leaving the simple reference to property.[12] This is still the case in the current legislation.[13] The separate references to heritable and moveable property were no doubt considered superfluous.

7-06. The 1961 Act also allowed floating charges to be effective over heritable property without the necessity of recording in the General Register of Sasines (GRS).[14] This was radical, as the creation of existing security rights in heritable property (as well as the creation and transfer of certain other types of real right) required recording in the GRS, a public register. It is therefore not surprising that, during the Bill's parliamentary passage, the Keeper of the Registers of Scotland expressed concern.[15] The Keeper emphasised the importance of recording to create real rights in land and warned that creating security rights without recording would mean the public could no longer transact on the "faith of the records". Although he recognised the difficulties of recording floating charges in the GRS, he suggested a more acceptable course would be to complete a floating charge, in the case of heritable property, by recording a conveyance to trustees for the debenture holders.[16] The meaning of this proposal is not wholly clear, particularly in the absence of trustees acting for chargeholders. Further recording would seemingly be required whenever charged property was disposed of or new property was acquired and thereby fell within the charge's ambit.[17]

7-07. In the Law Reform Committee for Scotland's report, the following issues (that would arise if recording in the GRS was necessary) were given as reasons for rejecting recording: the requirement for examination of titles of all of a company's heritable properties, the need for descriptions of all the properties, and the necessity of registering further notices when the company acquired new property.[18]

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[11] Companies (Floating Charges) (Scotland) Act 1961 s 1(1). There were no separate references to corporeal and incorporeal property.
[12] See Companies (Floating Charges and Receivers) (Scotland) Act 1972 s 1(1).
[13] Companies Act 1985 s 462(1).
[14] Companies (Floating Charges) (Scotland) Act 1961 s 3.
[15] NRS HH41/1434 – Letter from G Black, Registers of Scotland to N E Sharp, Scottish Home Department, dated 11 January 1961.
[16] NRS HH41/1434 – Letter from G Black, Registers of Scotland to N E Sharp, Scottish Home Department, dated 11 January 1961.
[17] See NRS HH41/1434 – Letter from N J P Hutchison, Scottish Home Department to H H A Whitworth, Scottish Home Department, dated 25 January 1961.
[18] Law Reform Committee for Scotland, *Eighth Report* para 49. In Parliamentary Debates, House of Commons, Official Report, Scottish Standing Committee, 20 June 1961, cols 20 f, Forbes Hendry MP is recorded as noting the inherent difficulties in registering a floating charge against individual properties, especially if the charge were registered before property "came into the possession of the company". The use of "possession" is odd, as, in the same passage, Hendry seems to equate

7-08. In correspondence with the Keeper, more details were provided as to why there was to be no recording in the GRS. A company would be permitted to transact with its property prior to attachment and, until then, there would be no reason why the GRS should show a floating charge over any property.[19] A simple course was to be adopted, whereby the company should have as much proprietary liberty as possible. There was to be no requirement for complicated registrations involving changing assets, which might give the impression of an encumbrance which did not reflect the practical reality of a non-attached floating charge. The floating charge would only be effective upon attachment, ie when the company went into liquidation, and because the liquidation would operate like an adjudication[20] it was considered immaterial that there would be no reference to the charge in the record of the property in question. In addition, a search in the charges register would show whether or not a floating charge covered the company's property.[21]

7-09. A floating charge before attachment is in some ways comparable to an inhibition (but in other ways clearly dissimilar, such as in relation to a chargor's ability to deal freely with property in a manner that would be prohibited by inhibition). The charge can apply to all of a party's heritable property at a given time and, just as an inhibition is registered in the personal register, the Register of Inhibitions and Adjudications (RoI), a floating charge is registered against the chargor company in the company charges register. In the Law Reform Committee's report it was considered "practicable" to register a notice of a floating charge in the RoI; however, because a new notice would need to be registered every five years, there was a danger of this being overlooked and so the idea was rejected.[22] Therefore, registration in the charges register alone was the chosen option.

7-10. Since its inception in Scots law, the floating charge has been available over heritable property despite the absence of registration in the GRS, and later the Land

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possession with the company having the ability to sell the heritable property and the property falling into that company's winding up (both of which would depend upon ownership).

[19] NRS HH41/1434 – Letter from J H Gibson, Lord Advocate's Chambers to G Black, Registers of Scotland, dated 13 January 1961.

[20] It is possible to read the relevant wording as if the *charge* was to attach like an adjudication, but it is more likely that Gibson was referring to liquidation's effect, given the existence of (the then-applicable) Companies Act 1948 s 327(1)(b). For the current equivalent provision, see Insolvency Act 1986 s 185(1)(a) applying Bankruptcy (Scotland) Act 2016 s 24 with adjustments.

[21] NRS HH41/1434 – Letter from J H Gibson, Lord Advocate's Chambers to G Black, Registers of Scotland, dated 13 January 1961. Although there would still be the possibility of a blind period between the charge's creation and its disclosure on the register under the Companies (Floating Charges) (Scotland) Act 1961, the impact of this was less severe as s 5(2) provided that a floating charge with negative pledge ranked from its registration date (rather than "creation" date) against voluntary fixed-security rights.

[22] Law Reform Committee for Scotland, *Eighth Report* para 49. Interestingly, when the Scottish Law Commission were examining the possibility of introducing receivership to Scots law, consideration was given to requiring a receiver's appointment to be registered additionally in the RoI: Scottish Law Commission, *Memorandum on Examination of the Companies (Floating Charges) (Scotland) Act 1961* (Scot Law Com Memorandum No 10, 1969) para 27. This was rejected for a number of reasons: SLC, *Report on the Companies (Floating Charges) (Scotland) Act 1961* para 53.

Register.[23] Although specific consideration was given to heritable property during the floating charge's introduction, not least as a result of co-opting Professor Halliday to examine conveyancing matters, it might be queried if there was adequate consideration and also whether the interpretation of the background law of heritable property was correct. Professor Wilson rightly doubted whether the Companies (Floating Charges) (Scotland) Act 1961 took into account "all the complexities of the Scottish conveyancing system in general and of the form of security known as the *ex facie* absolute disposition in particular".[24] This will be considered further during the course of the present chapter.

C. ATTACHMENT AND HERITABLE PROPERTY: GENERAL

7-11. Heritable property is attachable when it enters and remains within the "property and undertaking" of the chargor and becomes non-attachable when it leaves and remains outside that company's "property and undertaking". The potential approaches to the meaning of the relevant statutory provisions have been discussed in detail in an earlier chapter.[25] An example will help to explain the implications of these approaches for heritable property:

> *Example 1.* A Ltd grants a floating charge over all the property in its property and undertaking to B Bank. Meanwhile, C Ltd grants a floating charge in the same terms to D Bank. Next, A Ltd wishes to sell land to C Ltd.[26]

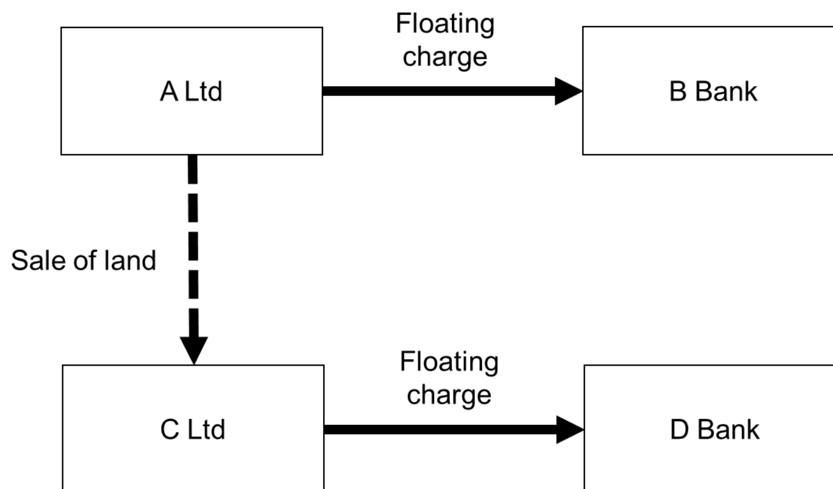

Figure 1

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[23] The current provision is Companies Act 1985 s 462(5). This was preceded by the Companies (Floating Charges and Receivers) (Scotland) Act 1972 s 3.

[24] W A Wilson, "The Companies (Floating Charges) (Scotland) Act 1961" [1962] JBL 65, 66. See also W A Wilson, "The Companies (Floating Charges) (Scotland) Act, 1961" (1962) 25 MLR 445, 448.

[25] See paras 4-39 ff above.

[26] This example will be used at various points throughout this chapter.

7-12. If, when B Bank's charge attaches, A Ltd has done no more than conclude missives with C Ltd, attachment will be to A Ltd's right of ownership and to personal rights it has against C Ltd.[27] If D Bank's charge also attaches at this stage it will do so to C Ltd's personal rights under the missives, including the right to obtain a disposition and warrandice rights relating to title. This is the position under a "full-ownership" approach to attachment discussed earlier, but also seems to apply under certain variations of the "limited-ownership" and "full-equitable" approaches.[28]

7-13. The most certain analysis, and the one which best accommodates the floating charge with property law,[29] is to tie the possibility of attachment to property owned by the chargor (which can be expressed as the rights, personal and real, held by that party). Under this full-ownership (rights-based) approach, B Bank's charge will attach to A Ltd's ownership (and any personal rights against C Ltd) up until the point at which ownership is transferred to C Ltd. This transfer will occur upon C Ltd registering a valid disposition in the Land Register.[30] Only from this point on can D Bank's charge attach to ownership of the land. If D Bank's charge attaches before registration of the disposition, it will only do so to personal rights held by C Ltd relating to such heritable property. This approach could be applied in a straightforward way to all types of heritable (and non-heritable) property.[31] It would avoid many of the difficulties inherent in alternative approaches. However, *Sharp v Thomson*[32] shows that this analysis is presently not applicable, at least for the sale of heritable property where the seller enters receivership. Consequently, ownership is not (always) the determinant as to whether attachment takes place. Instead, the House of Lords created much doubt as to when heritable (and other) property is attached by a floating charge; and the current law seems to support either a limited-ownership attachment or a full-equitable attachment approach. As discussed in chapter 4, there are major problems with both of these approaches.

D. *SHARP v THOMSON*

(1) The facts

7-14. Albyn Construction Ltd ("Albyn") granted a floating charge on 2 July 1984 "over the whole of the property … from time to time … comprised in [its] property and undertaking" and the charge was registered on 16 July 1984. Nearly five years later, a brother and sister (the Thomsons) concluded missives (dated March and May

[27] It is notable that the charge attaches to the heritable property being sold *and* to personal rights against the purchaser. However, ultimately, the land will be transferred and the charge will only attach to personal rights to payment or to the money paid.
[28] See paras 4-39 ff above for these approaches.
[29] By contrast, an alternative approach has led to the divergence between floating-charges law in *Sharp v Thomson* 1997 SC (HL) 66 and wider Scots law outlined in *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19.
[30] Land Registration etc (Scotland) Act 2012 s 50(2).
[31] As it would involve attachment to any rights, personal or real, held by the chargor.
[32] 1997 SC (HL) 66.

1989) to purchase a flat from Albyn. The date of entry was 14 April 1989. However, the disposition was not delivered until 9 August 1990. The following day receivers were appointed and the floating charge attached. The disposition was recorded in the GRS almost a fortnight later, on 21 August 1990. The identified key issue was whether or not the floating charge attached to the flat,[33] and, therefore, whether the receivers could realise the flat and distribute the proceeds.

(2) The decisions

(a) Outer House and Inner House

7-15. At first instance, the Lord Ordinary (Penrose) found in favour of the receivers.[34] The Inner House reached the same decision.[35] In both, the principal focus for counsel and judges was property law. It was held that: there was no form of intermediate right between a personal right and a real right; a party with an unrecorded disposition had only a personal right; Scots law had a principle of unititularity; and a floating charge was equated with fixed security in the event of attachment, and therefore functioned like a standard security for heritable property (and such a security could have been granted in the circumstances).[36] Consequently, the floating charge attached to Albyn's right of ownership in the flat upon the company entering receivership, and the purchasers' completed title was encumbered by the floating charge. The property was, therefore, subject to the joint receivers' powers.

7-16. The defenders' principal argument in the Outer House and Inner House was that upon delivery of a disposition there passed a "beneficial interest in the form of an inchoate or incomplete right of property to the disponee"[37]. Counsel contended too that there was a distinction between the term "property" in the floating charges legislation[38] and a completed feudal title. The defenders also argued in the Inner House that "property and undertaking" should be given a purposive commercial interpretation, limited to assets deployed for business activities in accordance with the stated objects in the company's memorandum.[39] Like the other arguments, this one was rejected by the court. Lord Hope suggested that the only conclusion from a purposive approach was that there was an intention to give Scottish companies the widest scope possible for creating a floating charge over their property. Reference was also made to the historical development of the floating charge in England and to the broad interpretation given to property and undertaking in *Re Panama, New*

[33] Under the Insolvency Act 1986 s 53(7).
[34] *Sharp v Thomson* 1994 SC 503.
[35] *Sharp v Thomson* 1995 SC 455.
[36] See *Sharp v Thomson* 1995 SC 455 at 460 ff per Lord President Hope, at 481 ff per Lord Sutherland, and at 486 ff per Lord Coulsfield. Lord Hope's opinion has been described as "the most important analysis of the principles of land transfer to be given in the [twentieth] century": K G C Reid, "Jam Today: *Sharp* in the House of Lords" 1997 SLT (News) 79, 84.
[37] 1995 SC 455 at 461 per Lord President Hope.
[38] In eg Companies Act 1985 s 462(1) and Insolvency Act 1986 s 53(7).
[39] See 1995 SC 455 at 475 f.

Zealand and Australian Royal Mail Co.[40] Lord Hope's reasoning was also consequentialist: he highlighted some of the complexities (for heritable and moveable property) that would arise from the defenders' arguments.[41]

7-17. In reaching his decision, Lord Hope referred to an article by Professor Wilson prophesying conveyancing problems involving the floating charge.[42] Wilson foresaw that the purchaser of heritable property would be affected by attachment of a floating charge granted by the seller if attachment occurred before the recording of the disposition. It was suggested that Wilson's observation was based on the assumption that property remained with the seller until the disposition was recorded.

7-18. The Inner House opinions, especially Lord Hope's, are in many respects well-reasoned, doctrinally acceptable, and fit the floating charge within wider Scots law. Even though Lord Hope noted the potential unfairness of the decision in policy terms, he expressed the view that it was for the legislature to make appropriate changes.[43]

(b) House of Lords

7-19. The House of Lords in *Sharp*, however, reversed the First Division's decision and held that the floating charge had not attached.[44] The substantive opinions were given by Lord Clyde and Lord Jauncey of Tullichettle. The other judges concurred with both, which is problematic given the differences in the two opinions.[45] The arguments of the defenders, at this stage, were more focused upon statutory construction than general property law and this seems to have contributed to their success (particularly with Lord Clyde).

7-20. Lord Jauncey relied upon non-floating charge authority to decide that for heritable property to be attached by a floating charge[46] the chargor must have beneficial interest in the property and not "bare title".[47] He asserted that "property"

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[40] (1869-70) LR 5 Ch App 318, where "undertaking" was interpreted to include future property of the company (see para 4-22 above): 1995 SC 455 at 477 per Lord President Hope.
[41] 1995 SC 455 at 477 f.
[42] 1995 SC 455 at 462 referring to W A Wilson, "Floating Charges" 1962 SLT (News) 53, 55. Wilson was a much-admired former teacher of Lord Hope's: see Lord Hope of Craighead, "The Strange Habits of the English", in H L MacQueen (ed), *Miscellany Six* (Stair Society vol 54, 2009) 309.
[43] 1995 SC 455 at 481 per Lord President Hope. For Lord Hope's reflections on the case at this stage and subsequently, see Lord Hope of Craighead, *Lord Hope's Diaries: Lord President 1989-1996* (2018) 128 f and 139 f; Lord Hope of Craighead, *Lord Hope's Diaries: House of Lords 1996-2009* (2018) 8, 22, 201-03 and 207. Lord Hope at 22 draws comparisons with *Heritable Reversionary Co v Millar* (1892) 19 R (HL) 43 a century earlier, noting that both decisions are "a clear demonstration of the risk of misguided decisions by the House of Lords on matters of Scots law which can be so difficult to put right".
[44] The appellants were the second defenders, the Woolwich Building Society, who had obtained a standard security from the purchasers.
[45] See eg K G C Reid, "Equity Triumphant: *Sharp v Thomson*" (1997) 1 EdinLR 464, 465.
[46] Under Insolvency Act 1986 s 53(7).
[47] 1997 SC (HL) 66 at 74.

is not a technical or defined expression and "property and undertaking" has to be construed in a "practical", "realistic", "commonsense" and contextual way.[48] In his view, the "ability to grant deeds in fraud of the disposition … did not amount to a right of property";[49] and there was nothing within the legislation which suggested a receiver was able to do what Albyn, without fraud, could not.[50] This, however, overlooks the fact that a receiver, although an "agent" as regards the company's property, is not necessarily bound by the company's personal obligations. Further, a charge attaches as if it were a "fixed security", and the existence of personal creditors does not override the priority of a secured creditor.

7-21. Lord Clyde, by contrast, suggested he was not challenging the First Division's analysis of basic property law principles.[51] While remarking upon the lower courts construing the floating charge against the background law of heritable securities and property, he himself adopted an analysis based upon the construction of the floating charge's terms and the echoed statutory wording.[52]

7-22. According to Lord Clyde, the intention to bring commercial benefits (available in England) to Scotland, by introducing the floating charge, must have meant that Parliament intended the charge's effect to coincide with its effect in England; and he considered that the English charge would not prevail in the circumstances of the case.[53] It is certainly correct that there was a desire for a security device which operated in an equivalent way to the English floating charge: a non-possessory security available over all the debtor's property (including future property), which allowed the debtor to continue to trade freely until attachment (crystallisation). However, there was also an awareness that this was to function against the different background of Scots law, so that, where possible, the terminology used in the legislation ought to be interpreted within its Scottish context. Notably, T B Smith, in his appendix to the Law Reform Committee for Scotland's report, emphasised the potential compatibility of the floating charge with Scots law's Civilian heritage and warned against any attempt "to import the technicalities of English Equity jurisprudence".[54] Although Lord Clyde considered the principles of the floating charge to sit "uneasily" within Scots law,[55] he, nevertheless, adopted an interpretation further at odds with that system, when more integrated approaches were available.

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[48] 1997 SC (HL) 66 at 76 f.
[49] 1997 SC (HL) 66 at 77.
[50] 1997 SC (HL) 66 at 77.
[51] 1997 SC (HL) 66 at 80.
[52] 1997 SC (HL) 66 at 79 f.
[53] 1997 SC (HL) 66 at 82. But see R Goode, "Commercial Law and the Scottish Parliament" 1999 SLPQ 81, 89 f.
[54] Law Reform Committee for Scotland, *Eighth Report* 14. In Smith, *Short Commentary* 474 f the content of his Historical Note is repeated, in substantially the same terms, and he notes that "no attempt was made to incorporate the technicalities of English equity jurisprudence" when the charge was introduced.
[55] Especially the charge's attachment without registration: 1997 SC (HL) 66 at 82.

7-23. Lords Clyde and Jauncey were both heavily influenced by the apparent unfairness of the factual situation: if the floating charge attached Albyn's flat, the receiver could use the "sold" subjects *and* the money already paid by the purchasers to help satisfy the debt due to the chargeholder.[56] Policy-based reasoning was therefore a major component in the decision. There is merit in preferring the disponee in policy terms, but it is possible to overstate the benefits otherwise accruing to a chargeholder, as the price paid by a disponee may have been dissipated by the time the floating charge attaches.[57] Furthermore, the circumstances in the case were unusual and contrary to normal conveyancing practice.[58] The floating charge was registered in the charges register and the purchasers knew they were buying property covered by a charge. Their solicitors failed to obtain a letter of non-crystallisation but proceeded with the transaction in spite of this.[59] Is the situation so much more unfair than where a purchaser is tardy in registering a disposition and therefore loses out to a trustee in sequestration or liquidator who obtains title? Also, as noted below at paras 7-38 ff, the court's decision only gives protection to the disponee in certain circumstances, and other means could have been used to achieve the same result.

(c) Burnett's Tr v Grainger

7-24. It is necessary to mention here the non-floating charge case of *Burnett's Tr v Grainger*.[60] The facts were similar to *Sharp*; a seller had delivered a disposition of a flat to the buyers, who had paid the price and taken entry. Months later, the seller, an individual, was sequestrated but the disposition in favour of the buyers had not been recorded in the Register of Sasines. The trustee in sequestration proceeded to record a notice of title and did so before the buyers recorded their disposition.

7-25. At first instance, the sheriff granted declarator in favour of the trustee in sequestration (this was prior to the House of Lords decision in *Sharp*). Upon appeal, however, the sheriff principal took himself to be bound by *Sharp* and allowed the defenders' appeal.[61] But the Inner House could not ascertain an obvious *ratio* from *Sharp* and therefore, interpreting it as narrowly as possible, distinguished it from the present facts and decided in favour of the trustee.[62] The House of Lords upheld the Inner House's decision and, although they did not overrule *Sharp*, they limited its

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[56] See eg per Lord Jauncey at 70 and per Lord Clyde at 82f.
[57] Regarding the depletion of assets in an estate, see eg *Gibson v Hunter Home Designs Limited* 1976 SC 23 at 30 per Lord Cameron.
[58] See eg Reid, "Equity Triumphant" 468; G L Gretton, "The Integrity of Property Law and of the Property Registers" 2001 SLT (News) 135, 135 f.
[59] See *Sharp v Thomson* 1997 SC (HL) 66 at 78 per Lord Clyde.
[60] [2004] UKHL 8, 2004 SC (HL) 19.
[61] 2000 SLT (Sh Ct) 116. See eg S C Styles, "Sharp Pains for Scots Property Law: The Case of *Burnett's Tr v Grainger*" 2000 SLT (News) 305; R Rennie, "To *Sharp v Thomson* – an Heir" 2000 SLT (News) 247. The sheriff principal had sisted the case to await the House of Lords decision in *Sharp*.
[62] 2002 SC 580.

ratio, principally to the law of floating charges.[63] *Burnett's Tr* reaffirmed the unititularity of property law in Scotland. The flat was held to be part of the "whole estate" of the bankrupt seller.[64] The case also confirmed the legitimacy of a race to the register between a trustee in sequestration and a purchaser who has not yet completed title.

7-26. It might be wondered why the House of Lords did not overturn *Sharp*, especially since Lord Hope sat as a judge in *Burnett's Tr*.[65] An obvious answer is that counsel for the respondent do not seem to have pressed for such an outcome. This was probably a tactical consideration, as suggesting that *Sharp* was wrong and should be overturned may have been unappealing to the judges as a whole. After all, *Sharp* was a recent, unanimous House of Lords decision, where the bench included three Scottish judges (Lords Clyde, Jauncey and Keith), and provided a solution that some parties considered acceptable. The more promising option was to sever the floating charge from general Scots law, thereby preserving *Sharp* as limited authority while allowing for a different decision to be reached in *Burnett's Tr*. The approach was also something of a mirror image of the appellants' tactics in *Sharp* in the House of Lords, where much of their argument involved carving away property law and focusing upon floating charges. In *Burnett's Tr*, Lord Rodger suggested that if *Sharp* could not be distinguished, the House of Lords should not follow it.[66] But the judges *did* consider it distinguishable: it dealt specifically with relatively new statutory wording introduced into Scots law with floating charges, which allowed for a greater degree of interpretive freedom.[67]

(3) Commentary

7-27. After each of its stages, *Sharp* provoked a flurry of commentary.[68] It has been said that the case produced a greater volume of academic debate than any other

[63] Although Lords Hoffmann and Hobhouse followed the Scottish judges, Lords Hope and Rodger (as well as Lord Bingham of Cornhill), they expressed dissatisfaction with the legal position (see n 89 below). G L Gretton, "Ownership and Insolvency: *Burnett's Trustee v Grainger*" (2004) 8 EdinLR 389 discusses the various theories regarding delivery of a disposition and notes, in light of *Burnett's Tr*, that Lord Jauncey's attempt to introduce an English idea of beneficial interest has failed. For discussion of the post-*Burnett's Tr* position for the transfer of ownership and insolvency law, see eg G L Gretton, "Insolvency Risk in Sale" 2005 JR 335.

[64] Under the then-applicable Bankruptcy (Scotland) Act 1985 s 31(1). The "whole estate" of the debtor vested in the trustee in sequestration at the date of sequestration. The current equivalent provision is the Bankruptcy (Scotland) Act 2016 s 78(1).

[65] Lord Hope was actually a member of the House of Lords (as a replacement for Lords Jauncey and Keith) when *Sharp v Thomson* 1997 SC (HL) 66 was heard but could not sit on an appeal from his own judgment: see K G C Reid, "Jam Today: *Sharp* in the House of Lords" 1997 SLT (News) 79.

[66] *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19 at para 78.

[67] [2004] UKHL 8 at para 84 per Lord Rodger.

[68] For literature on *Sharp v Thomson* 1997 SC (HL) 66 and *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19, see Scottish Law Commission, *Report on Sharp v Thomson* (Scot Law Com No 208, 2007) Appendix B. A more recent contribution is A R C Simpson, "An Introduction to Scottish Legal Culture", in S Koch, K E Skodvin and J O Sunde (eds), *Comparing Legal Cultures* (2017) 87, 103 ff.

property law case.[69] It brought into focus existing debates regarding property in Scots law, particularly what rights are acquired by the purchaser of heritable property when the disposition is delivered but before it is registered. *Sharp* can, in part, be seen as a consequence of the low ebb of Scots property law at that time. As D P Sellar notes, it was concerning that there was such great controversy about a concept as simple as the transfer of heritable property.[70]

7-28. Some academics and practitioners, with the support of certain judicial *dicta*, adopted the "delivery theory", whereby delivery of the disposition divested the seller of the substance, but not the formal title, of ownership (or they at least considered the matter to be uncertain).[71] Others, notably Professors Gretton and Reid, advocated a strict division between personal rights and real rights with ownership only transferring upon recording or registration.[72] Prior to this point, the purchaser would have no ownership of the property (substantive or otherwise). The floating charge thus became a proxy for a wider, extant issue in Scots property law, which can be characterised as revolving around the extent to which equitable principles were admitted. The two groups can broadly be termed "functionalists" and "formalists",[73] respectively.

7-29. It has been suggested by Professor Gretton that in *Sharp* "the problems caused by the floating charge came within an ace of destroying Scottish property law".[74] However, although the floating charge via *Sharp* can be considered a conduit for the advance of the delivery theory, there was already a significant divergence of opinion on the property law matters involved.[75] The problem existed prior to the introduction of the floating charge. Only two of the cases referred to by Lords Clyde

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[69] G L Gretton and A J M Steven, *Property, Trusts and Succession*, 3rd edn (2017) para 4.23. SLC, *Report on Sharp v Thomson* para 1.9, states: "Few cases in Scottish legal history have generated so much academic debate as *Sharp*."

[70] D P Sellar, "Commercial Law Update: Securities and Insolvency" (1995) 40 JLSS 311.

[71] See eg: (a) Outer House stage: R Rennie, "Dead on Delivery" 1994 SLT (News) 183; A J McDonald, "Sharp v Thomson: Feudal Purism – But is it Justice?" (1995) 40 JLSS 7; I Doran, "Letter to the Editor" 1995 SLT (News) 101; (b) Inner House stage: A J McDonald, "*Sharp v Thomson*: What Now?" (1995) 40 JLSS 256; R Rennie, "Keeping the Price and the Property" 1996 JR 68; (c) House of Lords stage: R Rennie, "*Sharp v Thomson*: The Final Act" (1997) 42 JLSS 130.

[72] See eg: (a) Outer House stage: G L Gretton, "Sharp Cases Make Good Law" 1994 SLT (News) 313; (b) Inner House stage: K G C Reid, "*Sharp v Thomson*: A Civilian Perspective" 1995 SLT (News) 75; (c) House of Lords stage: Reid, "Equity Triumphant"; Reid, "Jam Today". See also the earlier debates between Reid and I Doran at 1982 SLT (News) 149 and 1985 SLT (News) 165 and 280; and G L Gretton "The Title of a Liquidator" (1984) 29 JLSS 357; A J McDonald, "Bankruptcy, Liquidation and Receivership and the Race to the Register" (1985) 30 JLSS 20; G L Gretton and K G C Reid "Insolvency and Title: A Reply" (1985) 30 JLSS 109; as well as Reid, *Property*, paras 640 ff. And see eg the recommendations by N R Whitty, "*Sharp v Thomson*: Identifying the Mischief" 1995 SLT (News) 79.

[73] The formalists can also be termed "traditionalists" or "purists".

[74] G L Gretton, "The Rational and the National", in E C Reid, D Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (2005) 41; and see Gretton, "Integrity of Property Law" 2001 SLT (News) 135.

[75] See the previous paragraphs. There is also some acknowledgment of the pre-existing uncertainty in G L Gretton, "Ownership and Insolvency: *Burnett's Trustee v Grainger*" (2004) 8 EdinLR 389, 389 ff.

and Jauncey in *Sharp* date from the floating charge era and only one of these relates to floating charges.[76] These were issues for which obtaining conclusive judicial authority was important for Scots law and the floating charge was an unintended vehicle for this: firstly through *Sharp* and then indirectly through *Burnett's Tr*, determined in *Sharp*'s shadow.

7-30. As was shown at the Outer House and Inner House stages in *Sharp*, it was perfectly possible to interpret the law of floating charges in accordance with a conception of property law which had no recourse to equity. Problems created by the floating charge, in policy terms or otherwise, such as an absence of publicity for attachment, could be resolved by legislation. Instead, it might reasonably be argued that the problem with *Sharp* was the interpretation given to the floating charge in the House of Lords.

7-31. Much of the commentary after the House of Lords stage considered the consequences of the decision and the extent of the *ratio*. Many of the criticisms levelled against the speeches by Lords Clyde and Jauncey remain forceful and apt. These include: the inconsistencies between the speeches; the suggestion that "property" is not a technical term; the reliance on controversial cases like *Heritable Reversionary Co v Millar*;[77] the fact that the necessity of acting in a fraudulent way to defeat the disponee would exist from the conclusion of missives; and the apparent application of English law to a Scottish matter (by Lord Jauncey especially), by seeking to expand the notion of beneficial interest.[78] In addition, it has been suggested that Lord Jauncey's acknowledgement that, after delivery of a disposition, it would still be possible for a disponer to grant valid standard securities conflicts with his recognition of a floating charge as a deemed standard security upon attachment.[79] However, the statutory hypothesis is the mechanism used to explain the operation of a floating charge *if* attachment takes place. It does not necessarily determine the property to which the floating charge attaches. Nevertheless, the ability to grant a standard security is an important point to demonstrate that the subjects are the grantor's "property" and therefore should be affected by a charge.[80]

7-32. As Gretton and Reid write, professional opinion was divided as to whether the narrower or wider interpretation was to be favoured – and the law was in flux with the prospect of change through further cases and legislation.[81] A wide

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[76] *National Commercial Bank of Scotland v Liquidators of Telford Grier Mackay & Co* 1969 SC 181.
[77] (1892) 19 R (HL) 43. The parallels between this case and *Sharp v Thomson* 1997 SC (HL) 66 are interesting. Gloag and Irvine, *Rights in Security* 153 note that *Heritable Reversionary* was decided upon "commercial rather than feudal principles". See also G L Gretton, "Integrity of Property Law" 136, and Lord Hope of Craighead, *Lord Hope's Diaries: House of Lords 1996-2009* (2018) 22, both noting parallels between the cases and their aftermaths.
[78] For such criticisms, see eg Reid, "Jam Today" 80; Reid, "Equity Triumphant" 466 ff.
[79] See eg Reid, "Equity Triumphant" 466.
[80] This ties in with Lord Sutherland's view in the Inner House (1995 SC 455 at 482) that it would be illogical if the subjects could be used for the purpose of creating fixed security but not a floating charge.
[81] G L Gretton and K G C Reid, *Conveyancing*, 2nd edn (1999) para 11.31. And see also eg G L Gretton, "Equitable Ownership in Scots Law?" (2001) 5 EdinLR 73.

interpretation of the *ratio* in *Sharp* was strongly resisted by certain academics and there was, apparently, general support amongst judges and academics for a narrow *ratio*, especially as the potential implications of the decision came to be realised.[82] In Professor Gretton's view, the narrow *ratio* of *Sharp* was "unsatisfactory but not disastrous", unlike the wide *ratio*.[83]

7-33. *Sharp* can be analysed through the lens of exceptionalism and integrationism. After the decision, there was uncertainty as to how exceptional or integrated the floating charge was considered to be as regards Scots law more broadly. These different perspectives corresponded to whether a narrow or wide *ratio* did, or should, emanate from *Sharp*. For on Lord Clyde's analysis, the floating charge was more clearly treated as exceptional, while Lord Jauncey seems to have considered his judgment to extend beyond floating charges and to involve beneficial interest applying across Scots property law. As Professor Gretton notes, there were elements of the wide and narrow *ratio* in both speeches, but in Lord Clyde's speech the latter was predominant while in Lord Jauncey's it was the former.[84] After *Sharp*, many traditionalists must have feared the potential for a wide integrated application, which might have affected other parts of property law.[85]

7-34. Due to the controversy surrounding *Sharp*, the Scottish Justice Minister, Jim Wallace, asked the Scottish Law Commission, in September 2000, to consider the case's implications and to make recommendations. The Commission's initial discussion paper[86] proposed various reforms such as overturning *Sharp* and providing that the floating charge would only attach upon registration of an attachment event. The Commission's plans were positive on two counts: firstly, by treating property within the context of floating charges in the same way as for the rest of property law and, secondly, by introducing a procedure which would allow the floating charge to cohere more satisfactorily with the publicity principle. However, due to *Burnett's Tr*, which determined that the exceptional approach (the narrow *ratio*) prevailed, the Scottish Law Commission abandoned plans to overturn *Sharp* by legislation. They did still produce a draft Bill containing provisions to introduce a requirement of registration for attachment of a floating charge under the Bankruptcy and Diligence etc (Scotland) Act 2007, but these proposals were not taken forward.[87]

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[82] Gretton, "Integrity of Property Law" 135 f. Cf K Swinton, "Is There a Need to Reverse *Sharp v Thomson*?" (2001) 69 SLG 156 at 159, who noted that the House of Lords' solution was "welcomed by practitioners as a sensible result which [they] would be loathe to lose". However, he acknowledged (at 156) that *Sharp v Thomson* 1997 SC (HL) 66 did not assist where receivership (or presumably liquidation) pre-dated the price being paid in exchange for the disposition.
[83] G L Gretton, "Scots Law in Shock: Real Rights and Equitable Interests" (1998) 6 ERPL 403, 406.
[84] Gretton, "Scots Law in Shock" 403.
[85] See G L Gretton, "Integrity of Property Law" 136.
[86] SLC, *Discussion Paper on Sharp v Thomson* (Scot Law Com DP No 114, 2001).
[87] See paras 3-20 ff above. The Bankruptcy and Diligence etc (Scotland) Act 2007 did, however, introduce certain recommended measures such as a trustee in sequestration, and parties obtaining title from them, not being able to complete title within 28 days (s 17(1) inserting s 31(1A), (1B) into the Bankruptcy (Scotland) Act 1985) – see now Bankruptcy (Scotland) Act 2016 s 78(3), (4). But, since this is limited to sequestration, it is not directly relevant to floating charges.

7-35. *Burnett's Tr* involved the "alien" floating charge being separated from wider law to help preserve a particular analysis of property law. Professor Reid, shortly after the House of Lords decision in *Sharp*, had suggested that the narrow *ratio* represented a "plausible compromise" with property law "preserved" and "justice … done".[88] The absence of subsequent changes to re-integrate the floating charge with the rest of Scots law is notable. In this respect, the order in which *Sharp* and *Burnett's Tr* were decided might have been crucial. If the non-floating charge case had been decided between 1994 and 1997, there would have been a real possibility of the purchasers winning. A number of the arguments and authorities used in *Sharp* would have been available and the House of Lords personnel may have been amenable to such a view.[89] It is, however, likely that remedial legislation would have been introduced if the case was decided in favour of the purchasers, but this may also have allowed for floating charges to be interpreted in line with wider law.[90]

E. *SHARP:* THE *RATIO'S* EXTENT

7-36. Despite a narrow *ratio* in *Sharp* ultimately prevailing, the precise extent of this *ratio* is still unclear. What can be said is that property owned by a selling company will leave that party's "property and undertaking" upon the occurrence of a certain event (or events) in the transaction.[91] Once the property is no longer within its "property and undertaking" then a floating charge granted by the selling company cannot attach to such property. It is worthwhile emphasising that, as the floating

[88] Reid, "Jam Today" 1997 SLT (News) 80. See also P Hodge, "Property Law, Fiduciary Obligations and the Constructive Trust", in F McCarthy, J Chalmers and S Bogle (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (2015) 97, where Lord Hodge, who acted as counsel in both *Sharp* and *Burnett's Tr*, provides some commentary on the significance of the cases for Scots property law.

[89] It is not unreasonable to believe that Lord Clyde alone would have favoured the trustee. In *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19, two of the non-Scottish judges (see Lord Hoffmann at paras 2 ff; and Lord Hobhouse at paras 52 ff) expressed dissatisfaction at the position of Scots law on the matter, but they essentially deferred to Lords Hope and Rodger. See A Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (2013) 187 and 242 who notes that initially Lords Hobhouse and Hoffmann wished to allow the appeal and Lord Rodger had some inclinations pointing in that direction too. See also Lord Hope of Craighead, *Lord Hope's Diaries: House of Lords 1996-2009* (2018) 201-03 and 207, who notes that a fortuitous day off for the court (for the state opening of Parlament) in the middle of the three-day hearing had enabled Lord Rodger to do some further research, which had convinced him that the appeal should not be allowed. Lord Bingham was (fortunately) unwilling to depart from a unanimous Court of Session and the Scottish Law Lords in the House of Lords. As Lord Hope suggests (at 203), other chairpersons, including Lord Browne-Wilkinson "who dominated discussion in *Sharp* where he was chairman", would have been very unlikely to do the same. The contingency of judicial decision-making here is highlighted by Lord Hope who states (at 203): "On such slender threads does the purity of Scots law hang when appeals come to London".

[90] Given the wider implications of a non-floating charge case, there would have been a greater likelihood of subsequent legislation.

[91] See eg SLC, *Report on Sharp v Thomson* paras 1.6ff and 2.2ff. The Scottish Law Commission acknowledges and (rightly) rejects an alternative view that *Sharp v Thomson* 1997 SC (HL) 66 was impliedly overruled. See also the views of the Inner House in *Burnett's Tr* 2002 SC 580.

charge will have *no effect* on the property, this is not strictly speaking a ranking question.[92]

7-37. As Professor Reid notes, the decision in *Sharp* is "severely functionalist" and this causes friction with property law, which is "severely, and unavoidably, formalistic".[93] However, attempts to identify the particular legal or practical steps that render a floating charge unattachable involve the use of form, and even Lords Jauncey and Clyde seem to utilise the particular stages in the transfer of property in this respect. It is therefore necessary to consider the *ratio*, including the term "property and undertaking" and the accompanying, ill-defined concept of "beneficial interest", with that in mind.

(1) The key stage(s)

7-38. The particular point at which property leaves the "property and undertaking" of the chargor remains uncertain. For heritable property, a sale transaction usually has three distinct stages: conclusion of contract by way of missives, delivery of the disposition, and registration (formerly recording) of the disposition in the Land Register.[94] These are generally supplemented by other agreed events, such as payment of the price and giving the purchasers entry (possession). However, the only point at which ownership passes is upon registration.[95] In *Sharp*, the purchasers had paid, been given possession, and received the disposition, all before attachment. Therefore, one or more of these steps is crucial for removing the property from the property and undertaking of the seller. The dominant view is that delivery of the disposition is the key point;[96] other voices, however, suggest that payment or the transfer of possession are crucial moments.[97] A strict interpretation of *Sharp* would require each of these three steps to take place. In addition, it might even be necessary for there to be no additional contractual, or other, impediments upon the purchaser

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[92] For more details of this distinction, see eg A D J MacPherson, "Floating Charges and Trust Property in Scots Law: A Tale of Two Patrimonies?" (2018) 22 EdinLR 1, 26.

[93] Reid, "Jam Today" 83.

[94] This was recognised in *Sharp v Thomson* 1997 SC (HL) 66: see eg Lord Jauncey at 70. "Recording" refers to registration in the old register, the Register of Sasines; today, all dispositions fall to be "registered" in the Land Register.

[95] Land Registration etc (Scotland) Act 2012 s 50(2), replaced Abolition of Feudal Tenure etc (Scotland) Act 2000 s 4, which was to the same effect. Previously, the Land Registration (Scotland) Act 1979 s 3(1)(a) conferred a real right of ownership upon the party being registered as owner in the Land Register, which would follow upon the Keeper's receipt of a valid disposition. Since 1617 recording or registration has been necessary to transfer ownership: see the Registration Act 1617. See also *Young v Leith* (1847) 9 D 932, which was referred to in *Sharp v Thomson* 1997 SC (HL) 66, eg at 75 per Lord Jauncey and at 80 per Lord Clyde. In *Sharp* the court seems to have overlooked the affirmation of the Inner House decision in *Young* by the House of Lords: *Young v Leith* (1848) 2 Ross LC 103.

[96] SLC, *Report on Sharp v Thomson* para 2.4; K G C Reid and G L Gretton, *Land Registration* (2017) para 12.19.

[97] See eg J MacLeod, "Non-Judicial Real Security", in I G MacNeil (ed), *Scots Commercial Law* (2014) para 11.74, who seems to suggest that payment of the price is the key stage. As noted in SLC, *Report on Sharp v Thomson* para 2.4, emphasis on the term "undertaking" may most obviously correspond to possession.

completing title, as this was also the position in *Sharp*. A more liberal approach would require only two or even one of the steps. The most liberal of all would suggest that any of the three steps would defeat attachment.

7-39. It is unlikely that the *order* of required steps has any significance, so long as the required steps occur before the attachment of the floating charge.[98] Likewise, the steps do not need to have been met for a particular period of time, in order for property to escape the charge.[99]

(a) Price (payment received)

7-40. An important point raised in *Sharp* was the apparent unfairness arising if the floating charge could attach to both the property being sold and the purchase money paid to the seller.[100] If this is the fundamental argument in favour of the decision, then payment of the price should be the *only* necessary stage for the property to evade the floating charge. The money paid replaces the property within the "property and undertaking" of the transferor. After all, if some other stage is also necessary, then it would be possible for a floating charge to attach to both the property and the money. At this point it is helpful to return to the example given earlier (at para 7-11):

> *Example 1.* A Ltd grants a floating charge over all the property in its property and undertaking to B Bank. Meanwhile, C Ltd grants a floating charge in the same terms to D Bank. Next, A Ltd wishes to sell land to C Ltd.

If, for instance, delivery of the disposition is also a key stage, then if C Ltd makes payment before receiving the disposition from A Ltd, B Bank's charge over A Ltd's property can, before delivery, attach to both the money received and the heritable property. Alternatively, if delivery of the disposition is the only key stage, and A Ltd delivers the disposition before receiving payment from C Ltd, then D Bank's charge over C Ltd's property might be able to attach to the money and the heritable property.[101] A Ltd would, of course, have a personal right to receive the price (which could be attached by B Bank's charge), but this may have little value if C Ltd is (or becomes) insolvent.

7-41. There is, however, uncertainty as to what constitutes the price and when it is considered paid.[102] If payment is to be made in instalments, does the full amount need to be paid for the charge by A Ltd to become unattachable? Indeed, in *Sharp* itself, there were two separate payments.[103] Whether the full price is needed or a

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[98] Eg why should it matter if the disposition is delivered before possession is entered into (if both elements are required)?
[99] In *Sharp v Thomson* 1997 SC (HL) 66 no weight was given to, for example, how long ago the disposition was delivered.
[100] See eg 1997 SC (HL) 66 at 70 per Lord Jauncey and at 82 per Lord Clyde.
[101] This may depend on registration of the disposition, unless a full equitable-attachment approach is adopted (see paras 4-41ff above).
[102] See eg Reid, "Jam Today" 82.
[103] See *Sharp v Thomson* 1997 SC (HL) 66 at 78 per Lord Clyde.

lesser amount, there is scope for unfairness. Extending the issue of "fairness" more widely, why should a paying purchaser receive special protection when there may be other creditors who have rendered services but remain unpaid by the seller company?[104]

(b) Disposition

7-42. As regards the potential key stages, Lords Clyde and Jauncey focused most closely on delivery of the disposition. They seemed to consider it an important point in stopping a floating charge attaching to heritable property and the money paid for it. This is understandable given that delivery is a recognised stage in the sale of heritable property and the disposition is usually delivered in exchange for payment of the purchase price. The (almost) simultaneity between the two, as well as judicial *dicta* apparently identifying property consequences of delivery, meant that the judges could use delivery of the disposition as a point from which the floating charge would not attach to both heritable property *and* the money received. To do this, they seem to have interpreted delivery of the disposition as causing "beneficial interest" to pass from seller to the purchaser, with the result that the property left the "property and undertaking" of the seller.[105] This in turn reflects the significance of delivery of a disposition in the transfer of ownership of land. The disposition must be delivered for ownership to be obtained by a purchaser or other acquirer. The same is not true for possession or payment of the price, which, unlike delivery of the disposition, can also occur in a variety of ways. For example, possession might be civil rather than natural, and the price might be payable in instalments, or deferred, or made in a form other than money.

7-43. From the moment that a valid disposition is delivered, the disponee has the power to obtain ownership without the disponer's further participation. Therefore, if a disposition is delivered, it is an objective indicator that the seller is willing to transfer ownership.[106] The seller will, or should, only deliver the disposition if the seller is content to lose ownership of the property. Consequently, the seller will usually want payment in return at this point. A purchaser, meanwhile, should only pay when receiving the disposition. As has been argued by others, the circumstances of *Sharp*, involving the delayed delivery (and thus registration) of a disposition after payment had been made, would enable purchasers to pursue their solicitors for professional negligence.[107]

7-44. There could also be situations in which the disposition is delivered, not when the price is paid, but before payment or after. This could allow attachment both to the money paid and to the heritable property. Thus, in the circumstances of *Sharp*, if

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[104] Eg N R Whitty, "*Sharp v Thomson*: Identifying the Mischief" 1995 SLT (News) 79, 80.
[105] 1997 SC (HL) 66 at 70 ff per Lord Jauncey and at 80 ff per Lord Clyde.
[106] It can be seen as an expression of will to transfer ownership without further conditions. If it was up to the parties alone, it would probably be at this point that they would ordinarily want ownership to transfer.
[107] See eg Reid, "Equity Triumphant" 468.

the disposition had been delivered only a few days later, and hence after attachment rather than before, then the charge seemingly *would* have attached to the property *and* to the price paid. The protection of the purchaser arising from the decision has therefore only limited application. It is easy to overstate its value in this regard.

7-45. As discussed at para 6-58 above, the same outcome as in *Sharp* (ie favouring the purchaser against the receiver) could have been reached by separating the initial attachment of the charge from its enforcement. There are similarities between the "separation" approach, and recognising delivery of the disposition as the key stage for non-attachability of a charge: the former would also require pre-attachment delivery by the chargor. However, the separation approach is more closely connected to the question of ownership; not only is delivery of the disposition necessary, but its recording or registration must precede the receiver successfully realising the property by transferring it to another. Only once ownership transfers to the purchaser would the charge become unenforceable. An attraction of the separation approach is that it integrates the floating charge into the rest of property and insolvency law and avoids much of the complexity and uncertainty involved in a *Sharp*-type solution. For greater conformity with *Sharp*, it may even be said that, where property has been transferred and is beyond the reach of a floating charge, then it is actually no longer attached by that charge. This may be preferable to the view that the charge remains attached to the property but can no longer be enforced, especially if we take the view that a floating charge attaches to the chargor's right of ownership and, if property has been transferred, the chargor no longer owns that property.

(c) Possession

7-46. Possession of the property is afforded no express significance within the opinions in *Sharp*.[108] The giving of possession and delivery of the disposition will usually be almost simultaneous, which might provide a false impression of the importance of possession in the context of floating charges. In *Sharp*, however, the purchaser's possession preceded delivery by a considerable period. Would B Bank's floating charge really fail to attach simply because A Ltd lets C Ltd occupy the property, prior to delivery of a disposition and the payment of the price? This seems unlikely. And, conversely, it is probably not the case that B Bank's floating charge would attach simply because A Ltd still has possession,[109] if A Ltd has delivered a disposition to C Ltd and C Ltd has paid the price to A Ltd. The only way in which possession could have significance is if attachment depends on property remaining a business asset and possession or use is a factor in this regard.[110]

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[108] Indeed, in *Gibson v Hunter Home Designs Limited* 1976 SC 23, which was relied on in *Sharp v Thomson* 1997 SC (HL) 66 (at 70, 74 and 84), the buyers were in possession of the property and had also paid the price, but Lord President Emslie (at 27) rejected the significance of these and seemed to place emphasis on the delivery of the disposition. This is also supported by the use in *Sharp* (at 73 and 80) of *Thomas v Lord Advocate* 1953 SC 151, an estate duty case, where delivery of a disposition, rather than later occupation of the property, provided the key date.
[109] Eg if the giving of entry was delayed for some reason.
[110] See paras 7-68 f below.

(2) Beyond receivership?

7-47. *Sharp* is probably a decision about the law of floating charges, not just attachment of a charge in receivership.[111] Although the case focused upon interpreting statutory provisions on receivership, there are substantively equivalent attachment provisions for liquidation and administration, and the creation provisions apply to all floating charges.[112] Yet, even though the charge will seemingly not attach in a liquidation or administration where the facts are equivalent to those in *Sharp*, applying *Burnett's Tr* by analogy means it is highly unlikely the *ratio* in *Sharp* extends to determining the property available in those processes more generally, for non-floating charge creditors.[113] There may, however, be slight doubt here due to the use of references to the company's "property" in the relevant corporate insolvency legislation.[114]

7-48. It appears possible, then, for property to be part of a chargor's "property" which is subject to liquidation or administration but outside its "property and undertaking". This may arise if delivery of the disposition is the key stage for non-attachment, and such delivery has taken place. As long as the disponee has not registered the disposition (whether through tardiness, the disposition having been lost, or otherwise), the property will be available to the liquidator or administrator of the disponer. These latter parties can therefore realise the property by selling it to others and receiving the proceeds. A quick sale may be particularly likely in the context of pre-pack administrations. Since a charge will apparently not attach to the sold property, it will also not attach to the money received by a liquidator or administrator in return for that property.[115]

7-49. Alternatively, a liquidator may obtain ownership by registration and the Keeper would then be expected to refuse an attempted registration by the

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[111] See also S Wortley, "Sharp Practice for Trusting Conveyancers" (1997) 65 SLG 113, 115, who notes that it is a case about "the law of floating charges, not insolvency".

[112] See eg paras 4-01 ff above.

[113] For discussion of this issue before *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19, see eg Reid, "Jam Today" 82 f. Cf J G Birrell, "*Sharp v Thomson*: The Impact on Banking and Insolvency Law" 1997 SLT (News) 151, 154, who considered that eg the language of Insolvency Act 1986 s 145 might mean a liquidator could not obtain vesting of the company's property if the company only had "bare title". He also suggested (at 154 f) that an administration order would not extend to sold heritable (or incorporeal moveable) property for which a disposition (or assignation) had been granted but was unrecorded (or unintimated).

[114] In *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19, Lord Rodger, at para 84, stated that the term "whole estate" (of the debtor), which fell to be interpreted in that case, was "rather different" from "property and undertaking". But it may be "undertaking" that creates this difference. As H Goudy, "Contingent Right in Bankruptcy" 1893 JR 212, 214 f, notes, under the Bankruptcy (Scotland) Act 1856 s 4, "estate" and "property" were expressed to have the same meaning which included "every kind of Property, Heritable or Moveable, wherever situated, and all Rights, Powers, and Interests therein capable of legal Alienation, or of being affected by Diligence or attached for Debt". Such equivalence may be implied for the modern meaning of a person's "estate" in the personal bankruptcy legislation, and a company's "property" in the corporate insolvency legislation.

[115] See paras 3-26 ff above.

disponee.[116] In *Sharp*, Lord Jauncey seems to have overlooked the potential "race to the register" between a disponee and a trustee in sequestration or liquidator, and assumed that a disponee would automatically prevail.[117] By contrast, Lord Clyde recognised the existence of such a race but noted it did not apply to receivers and therefore used this to support a narrow conception of attachment (in receivership).[118] Like a receiver, an administrator seemingly cannot acquire ownership but can attempt to transfer the property to another party before the disponee registers.

7-50. With reference to the example at para 7-40 above, if the property did fall to be dealt with in A Ltd's liquidation, C Ltd would only rank as an unsecured creditor. In addition, B Bank might reasonably query why its security was ineffective over the property in the liquidation, while lower-ranking secured creditors, and even unsecured creditors,[119] would stand to benefit.[120] Certainly, the automatic inequity arising from a direct competition between a chargeholder and a purchaser would be significantly diminished, as the purchaser would not get the property and would only be an unsecured creditor. The competition in *Sharp* was between a receiver, acting in the interests of a chargeholder, and purchasers (and the building society to whom they had granted a standard security). By contrast, liquidators and administrators act in the interests of all creditors.

7-51. Given that property is apparently no longer in the "property and undertaking" of a company when a disposition is delivered, how could a charge attach if liquidation or administration arises? Does the property return to the "property and undertaking" at some point? If so, when and how? This would also cause difficulties for a liquidator or administrator dealing with a company's property, as she would not know whether she had to factor in distribution to chargeholders. The courts might even disallow the chargeholder's claim on the policy basis that it would diminish the amount which a purchaser could expect to receive as an unsecured creditor.

7-52. The policy motivation in *Sharp* is notable and may reflect an effort to challenge the powerful position of chargeholders.[121] Their power, and the negative impact of this on unsecured creditors, came to be viewed as more unsatisfactory from the 1990s onwards.[122] The Enterprise Act 2002 introduced the prescribed part,

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[116] Land Registration etc (Scotland) Act 2012 ss 21(2), (3), 23(1)(b) and 26(1)(a).

[117] 1997 SC (HL) 66 at 77. And see eg Reid, "Equity Triumphant" 466.

[118] 1997 SC (HL) 66 at 83.

[119] In *Sharp v Thomson* 1997 SC (HL) 66 it would have been possible for a lower-ranking standard security granted by the seller to prevail over the floating charge, as the former would continue to encumber the property after the property left the "property and undertaking" of the seller.

[120] D P Sellar, "Commercial Law Update: Rights in Security and Insolvencies" (1997) 42 JLSS 181 queries why the purchasers of property would not also prevail in a liquidation and, if they did not, why unsecured creditors would have priority over the chargeholder. See also S Wortley, "Sharp Practice for Trusting Conveyancers" (1997) 65 SLG 113, 114 f.

[121] This is a point made by Wortley, "Sharp Practice for Trusting Conveyancers" 115.

[122] Until the early 1990s chargeholders seem to have had more success in litigation (largely due to the successful actions of receivers): see eg *National Commercial Bank of Scotland v Liquidators of Telford Grier Mackay & Co* 1969 SC 181; *Lord Advocate v Royal Bank of Scotland* 1977 SC 155; *Cumbernauld Development Corporation v Mustone Ltd* 1983 SLT (Sh Ct) 55; *Forth & Clyde Construction Co Ltd v Trinity Timber & Plywood Co Ltd* 1984 SC 1; *Ross v Taylor* 1985 SC 156. Cf

which provides unsecured creditors with a proportion of charged proceeds.[123] But this will not be paid if the charge does not attach, and these unsecured creditors will therefore lose out if there are prior-ranking creditors who would have ranked behind the charge had it attached.

7-53. The emphasis on statutory interpretation in *Sharp*, and the desirability of consistency across the law of floating charges and enforcement methods, suggest that the *ratio* in *Sharp* does apply to the attachment of charges in liquidation and administration.[124] Yet the fact that property could be available to a liquidator or administrator, and thus distributable to parties ranking below a chargeholder, but not to the chargeholder itself, is an odd result. This is especially so given that liquidators and administrators are parties through whom a charge is enforceable. It is another demonstration of why a preferable approach would be to (i) tie attachment to the company's property available in a liquidation (or equivalent), and (ii) separate attachment and enforcement. Instead, the current law leads to inconsistency as regards insolvency law, the rights of parties competing with a chargeholder, and the charge's attachment.

(3) Beyond heritable property?

7-54. Another uncertain issue is whether the *ratio* in *Sharp* is limited to heritable property, or is also applicable to corporeal moveables or incorporeal property. One point in favour of the former view is that Lord Clyde seemed to think that the decision would involve no implications for moveable property.[125] Also, Lord Clyde and Lord Jauncey's focus on heritable property and the delivery of a disposition, a deed not used for moveable property, suggests a limited view of the *ratio*.

7-55. Yet, as some commentators have suggested, there is an almost irresistible analogy between the stages for the transfer of heritable property and the transfer of incorporeal property.[126] Sellar rightly suggests that the failure to give proper consideration to incorporeal property in *Sharp* is symptomatic of Scots law's

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Iona Hotels Ltd (In Receivership) v Craig 1990 SC 330; *Scottish & Newcastle Breweries Plc v Ascot Inns Ltd (In Receivership)* 1994 SLT 1140; *Grampian R C v Drill Stem (Inspection Services) Ltd (In Receivership)* 1994 SCLR 36; *Sharp v Thomson* 1997 SC (HL) 66; and*MacMillan v T Leith Developments Ltd* [2017] CSIH 23, 2017 SC 642.

[123] See Insolvency Act 1986 s 176A (added by the Enterprise Act 2002 s 252), and Insolvency Act 1986 (Prescribed Part) Order 2003, SI 2003/2097. The power of chargeholders has also been diminished by the general replacement of administrative receivership by administration. See para 3-14 above for more details.

[124] Cf *Greene and Fletcher, Law and Practice of Receivership* para 2.40.

[125] 1997 SC (HL) 66 at 85 per Lord Clyde.

[126] See eg D Guild, "*Sharp v Thomson*: A Practitioner's View" (1997) 42 JLSS 274, 275; *Palmer's Company Law* para 13.208.1. See also SLC, *Report on Sharp v Thomson* para 2.6, where it is said that the *ratio* presumably applies to other types of property, referring expressly to assignation of book debts. For further discussion of *Sharp v Thomson* and incorporeal property, see paras 9-13 ff and para 9-73 f below.

"neglect" of that type of property.[127] The wider problems involving *Sharp*, as well as the focus on heritable property in the speeches, mean that the application of the *ratio* to incorporeal property should be resisted.

7-56. In the Inner House in *Sharp*, Lord President Hope identified a number of difficulties relating to corporeal moveables that might arise if property attached was given a meaning at odds with wider property law.[128] These remain valid points; but given the different processes for the transfer of corporeal moveable property, the *ratio* from the House of Lords decision either does not apply, or has little practical effect in that context.[129] Of course, in the unlikely event that possession is the key stage then clearly *Sharp* will have more obvious application to corporeal moveable property than incorporeal property.

(4) Beyond sale?

7-57. Similarly, it is not clear whether the ratio of *Sharp* extends to transactions beyond ordinary sale.[130] Although applying *Sharp* as narrowly as possible is desirable, it is not obvious why it cannot apply to transactions such as exchange (excambion). A gratuitous transfer, moreover, also involves the transferor losing "beneficial interest" in the property, raising the question as to whether policy reasons alone would justify a charge granted by the transferor attaching if a disposition had been delivered. Furthermore, even if *Sharp* only applies to sales, would this include sale for security purposes? The transfer of ownership as security is no longer possible for heritable property, but it was until 1970, and it remains relevant for other types of property interacting with the floating charge. There are no obvious answers to these questions.

(5) Beyond transfer of ownership?

7-58. *Sharp* involved transfer of ownership. However, could the case's *ratio* also apply to the creation of other types of real right? For example, a floating charge might attach between the chargor delivering a standard-security deed and the registration of that deed in the Land Register.[131] The prevailing view is that the *ratio* does not extend beyond the transfer of ownership.[132] That is justifiable on the basis that transfer involves property leaving the chargor's patrimony whereas, when other real rights are created, property remains in the chargor's patrimony, albeit encumbered by those other rights. Unlike property being transferred, it is not tenable

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[127] D P Sellar, "Commercial Law Update: Rights in Security and Insolvencies" (1997) 42 JLSS 181. This is true within the wider context of floating charges: see ch 9 below. More generally, work such as R G Anderson, *Assignation* (2008) has helped to remedy some of the "neglect".
[128] 1995 SC 455 at 477 f per Lord President Hope.
[129] See paras 8-11 ff below.
[130] However, see SLC, *Report on Sharp v Thomson* para 2.5.
[131] See *Halliday, Conveyancing Law and Practice* para 57-42.
[132] SLC, *Report on Sharp v Thomson* para 2.5.

to suggest that property intended to remain in the chargor's patrimony is no longer in its "property and undertaking". A competition between the charge and subordinate real rights depends upon the floating charge attaching to property, and the legislation provides details of ranking relationships between the floating charge and real security rights, including standard securities.[133]

7-59. Even with reference to "beneficial interest" it is hard to argue that such an interest transfers when a subordinate real right is created. The granting company has decided to retain ownership of the property, which means that the property has continued value for the company, as the property can still be used physically or utilised to raise finance, through sale or otherwise.[134]

(6) "Property and undertaking"

7-60. The *ratio* in *Sharp* rests upon the interpretation of the statutory wording, "property … comprised in [the company's] property and undertaking". Lord Clyde suggested that "property" is contextual and "not a technical term of Scots law".[135] He also indicated that it may not be "coextensive" with real right or feudal title. To suggest that "property" has no core legal meaning corresponding to property law seems illogical.[136] This is more apparent twenty years later when the feudal system has been abolished and feudal title replaced by the real right of ownership, which is, of course, firmly entrenched within a common legal understanding of "property".[137]

7-61. Lord Clyde also drew upon Lord Watson's attempt to define "property" in *Heritable Reversionary Co v Millar*.[138] He noted that the editor of the fourth edition of Goudy's *Bankruptcy*, T A Fyfe, suggested Lord Watson's definition seemed to "exclude the property sold by the bankrupt upon a delivered conveyance which has remained unrecorded".[139] Beyond this, Lord Clyde placed particular emphasis on the combination of "undertaking" with "property", in the floating-charges legislation. He considered that this:

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[133] See Companies Act 1985 s 464, and the definition of "fixed security" in s 486(1), which includes a reference to standard security (by referring to "a heritable security within the meaning of section 9(8) of the Conveyancing and Feudal Reform (Scotland) Act 1970").

[134] And see J G Birrell, "*Sharp v Thomson*: The Impact on Banking and Insolvency Law" 1997 SLT (News) 151, 153, who, on the basis of Lord Jauncey's comments, considers that a standard-security grantor's "right of redemption" distinguishes that situation from the delivery of a disposition.

[135] 1997 SC (HL) 66 at 80 per Lord Clyde.

[136] See eg comments of Reid, "Jam Today" 80.

[137] Land Registration etc (Scotland) Act 2012 s 50(2) (see n 95). And s 50(3) states: "An unregistered disposition does not transfer ownership."

[138] 1997 SC (HL) 66 at 81 per Lord Clyde. And see also Lord Jauncey at 71 f; *Heritable Reversionary Co v Millar* (1892) 19 R (HL) 43 at 49 f per Lord Watson.

[139] H Goudy, *A Treatise on the Law of Bankruptcy in Scotland*, 4th edn by T A Fyfe (1914) 251 n(c). (But Fyfe also notes that such property can be adjudged by the *seller's* creditors.) Cf the 2nd edition (1895), Goudy's last edition, where the equivalent footnote (265, n(c)) contains no mention of this, despite Goudy having appeared as counsel in *Heritable Reversionary Co v Millar* (1892) 19 R (HL) 43.

> seems to … take one away from any exclusive concentration on the word property, to look to the variations in the identity of the property which may occur during the continuing course of the company's business, and to invite a less strict construction which may take account not only of title but of beneficial interest.[140]

7-62. The above passage is notable in a number of respects. Firstly, it emphasises the effect of the term "undertaking". If the use of "undertaking" means that "beneficial interest" is a requirement for attachment, that is preferable to the word "property" alone having such effect. The approach protects general property law from unintended functionalism and gives less credence to reading beneficial interest into other legislation that refers to a party's "property". Lord Jauncey, however, places less emphasis on "undertaking", and therefore his judgment remains the more troubling for property law.[141]

7-63. Secondly, the reference to "undertaking" involving changes in the company's property corresponds to a well-recognised meaning of the term when it was used in the original floating-charges legislation.[142] Yet Lord Clyde is surely mistaken to consider that "undertaking" allows for the utilisation of beneficial interest when examining the relationship between the floating charge and property. It is as if, without the floating charge, beneficial interest is not perceptible in property law, except within the narrow confines of trusts, but when the lens of the floating charge is used, suddenly beneficial interest becomes visible to determine the property to which a charge attaches. Lord Clyde may have conflated English-derived terminology, and the transplanting of a security based on the English model, with wider equitable concepts that were never intended to be introduced. It seems far-fetched to assert that "property and undertaking" imported a system akin to English equity.[143]

7-64. Thirdly, the final part of Lord Clyde's *dictum* above suggests he favoured a limited-ownership attachment approach: ownership being necessary for attachment but with a further element, beneficial interest, also required.[144] (These two elements might correspond to "property" and "undertaking" respectively.) This approach is apparent too from Lord Clyde's comment that: "Even if the subjects must be in the legal ownership of the company for the charge to attach, it does not follow that everything over which it has a real right falls within its property and undertaking."[145]

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[140] *Sharp v Thomson* 1997 SC (HL) 66 at 82 per Lord Clyde.
[141] Lord Clyde also seems to give greater credence to the notion of the exceptionalism of the floating charge.
[142] See paras 4-16 ff above.
[143] Fitting the floating charge into wider Scots law was particularly sensible since the floating charge was an innovation, and a common law version of it had been rejected in *Ballachulish Slate Quarries Co v Bruce* (1908) 16 SLT 48 and *Carse v Coppen* 1951 SC 233.
[144] See paras 4-39 ff above for these approaches. This contrasts with the Outer House and Inner House where the judges all favoured a "full-ownership" attachment analysis.
[145] 1997 SC (HL) 66 at 82 per Lord Clyde. But see eg at 80 where his comments could be construed as supporting a full-equitable attachment approach.

7-65. Lord Jauncey's analysis of statutory provisions in *Sharp* was largely focused upon s 53(7) of the Insolvency Act 1986, which provides that:

> 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.

7-66. The reference to "then subject to the charge" limits "property" [146] to such property that, at the relevant time, was in the company's property and undertaking and was charged by the floating-charge instrument. Lord Jauncey considered that the reference to "property and undertaking" required to "be given the practical meaning of property which is available for the use of the company, in which it has a beneficial interest, and which it is in law entitled to dispone or subject to heritable security".[147] It is unclear from Lord Jauncey's words whether use by the company is a separate part of the attachment test from (i) beneficial interest, and (ii) entitlement to deal with the property, or whether rather it is comprised of (i) and (ii). It is not even certain if (i) and (ii) are (entirely) separate. By "entitled" Lord Jauncey means what a party is *allowed* to do rather than what that party has the *power* to do. A party is not "allowed" to undertake juridical acts that are contractually prohibited, such as transferring ownership to another party in breach of a pre-existing obligation. But if this were sufficient for property to leave the "property and undertaking" of the company, it would occur earlier, from the conclusion of the contract to transfer ownership. This cannot be right; Lord Jauncey himself noted the absence of property consequences arising from completion of missives, and stressed the importance of delivery of the disposition.[148]

7-67. Nevertheless, the entitlement "in law" to dispone or create heritable securities is (usually) predicated on a party having ownership of the property in question. If this is what is meant, then this indicates a limited-ownership attachment approach. However, other *dicta* suggest Lord Jauncey actually preferred a full-equitable attachment approach, focused around beneficial interest and related features and without direct reference to ownership.[149] This interpretation is far removed from ordinary Scots property law. If a floating charge could attach to more than a

[146] As per Companies Act 1985 s 462(1). See Lord Sutherland in the Inner House, 1995 SC 455 at 482, who looked at "property" and "property and undertaking" separately and considered that it was reasonable to suggest that the former meant "anything which could be annexed for the purposes of security".

[147] 1997 SC (HL) 66 at 77. It is not clear from Lord Jauncey's sentence noted above whether beneficial interest is commensurate with property being available for the company's use.

[148] 1997 SC (HL) 66 at 70, stating that at stage 1 (conclusion of missives) "the seller of heritage is divested of no part of his right of property in the subjects". He cites *Gibson v Hunter Home Designs Limited* 1976 SC 23 at 27 per Lord President Emslie in support. The offside goals rule, however, creates potential property consequences from the point of contract. Meanwhile, inhibition, which affects future voluntary acts, does not affect a transaction where the missives have already been concluded: see Gretton, *Inhibition and Adjudication* 98.

[149] See 1997 SC (HL) 66 eg at 74 and 77. And see Conveyancing (Scotland) Act 1924 s 3; Conveyancing and Feudal Reform (Scotland) Act 1970 s 12; and Reid, *Property* para 644, for exceptions as to when a non-owner can grant heritable securities.

company owns, as this approach suggests, then there would be difficulties establishing how a liquidator, administrator or receiver would obtain control over such property, given that it would be within the patrimony of another party and therefore subject to that party's insolvency. For example, if beneficial interest had passed to C Ltd in the scenario at para 7-40 but ownership remained with A Ltd, and B Bank and D Bank's charges both attached, would property really be available to D Bank? And how would it be so available when the floating charge is enforced by a liquidator or equivalent acting as agent of C Ltd? There are substantial problems for floating charges when patrimonial boundaries are blurred.

7-68. Lord Jauncey's reference above to the company being able to "use" the property, in order for a charge to attach, is also of potential significance.[150] During the *Sharp* litigation, commentators similarly speculated on a possible practical, business-oriented meaning of "property and undertaking". Gretton and Wortley posited that, to be attachable, a thing might have to be both in the company's "property" *and* in its "undertaking", and the latter could require an asset to be something the company pursues its business with.[151] A business-oriented approach has also been suggested by others. Bennett and Roxburgh proposed an approach connected to accounting practice and commercial reality.[152] There are considerable factual and legal difficulties if this is the law, as was recognised by Lord Hope in the Inner House.[153] In any given case, how could a party know whether or not an item was a business asset? Heritable property can be used physically (by possession) or in a financial sense, by being leased or sold, or used as collateral in financing. There are a multitude of ways in which property could be a business asset, including in ways that breach other obligations.

7-69. Professor Rennie suggested that where a disposition was delivered in exchange for the price, the property could be considered to have left a company's undertaking by being disposed of in the ordinary course of business.[154] Although Rennie thought that the court's views did not align with this analysis, the proposed relationship between disposal in a business sense and the delivery of a disposition could actually be closer to the views of Lords Jauncey and Clyde: their apparent identification of delivery of the disposition as a key stage for non-attachability may reflect a realisation of the need for an objectively ascertainable point creating legal consequences. This was perhaps most clearly highlighted by Lord Clyde when stating that where a company has "sold a heritable subject and delivered a disposition of it to the purchaser so that the company only retains the bare title, has no right and obligation to do anything more as regards the subjects beyond the negative obligation of refraining from conveying them to anyone else, and indeed no longer

[150] See also 1997 SC (HL) 66 at 82 per Lord Clyde.
[151] G L Gretton, "Sharp Cases Make Good Law" 1994 SLT (News) 313, 314. This view is also adopted by A J M Steven and S Wortley, "The Perils of a Trusting Disposition" 1996 SLT (News) 365, 368, who state that trust property is not part of a company's business assets.
[152] D A Bennett and R Roxburgh, "Heritable Property Conveyed by a Company" (1994) 39 JLSS 356.
[153] 1995 SC 455 at 478.
[154] R Rennie, "Keeping the Price and the Property" 1996 JR 68, 70 f.

has the right of lawful disposal, I do not consider it correct to regard the subjects as part of the company's property and undertaking".[155]

(7) "Beneficial interest"

7-70. Even if Lord Jauncey's "attempt" to introduce an English-style concept of "beneficial interest" into wider Scots law has failed,[156] such interest appears to be a component of the *ratio* from *Sharp* and is therefore part of the law of floating charges. Yet it is a term which, until *Sharp*, was largely confined in Scots private law to trusts. The court in *Sharp* expressly rejected the notion that a constructive trust had been established in favour of the purchasers, and consequently trust cannot be used as a simple solution to explain the *ratio*.[157] Given that the existence of beneficial interest in wider Scots law was subsequently dismissed in *Burnett's Tr*, it may be questioned whether its status in the floating-charges context is tenable.[158] The following discussion proceeds with that major caveat in the background.

7-71. Beneficial interest is a feature of English equity.[159] Where parties intend to create a proprietary interest immediately, without further actions being required, this can cause beneficial interest to pass.[160] A purchaser of land may obtain an equitable proprietary interest as soon as the contract of sale is concluded.[161] Once this takes place, the seller "becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser".[162]

7-72. Lords Clyde and Jauncey did not accept that a constructive trust was created in *Sharp*. In addition, despite placing some importance on a transferor being able to grant deeds without committing fraud as an indicator of beneficial interest,[163] they did not consider conclusion of contract to be the determinative point for the passing

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[155] 1997 SC (HL) 66 at 82.

[156] G L Gretton, "Ownership and Insolvency: *Burnett's Trustee v Grainger*" (2004) 8 EdinLR 389.

[157] 1997 SC (HL) 66 at 85 per Lord Clyde. Cf Lord Hobhouse of Woodborough in *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19 at para 64, who seems to have interpreted the speeches of Lords Jauncey and Clyde in *Sharp v Thomson* to mean that a trust was created upon the delivery of the disposition. For discussion of the constructive trusts point in relation to *Sharp* and *Burnett's Tr*, see D J Carr, *Ideas of Equity* (Studies in Scots Law vol 5, 2017) paras 5-54 ff.

[158] Particularly due to the reliance on wider property law authorities in *Sharp v Thomson* 1997 SC (HL) 66.

[159] For discussion of when and why beneficial interest passes, see R Calnan, *Proprietary Rights and Insolvency* (2010) paras 5.54 ff.

[160] See eg *Holroyd v Marshall* (1862) 10 HLC 191; *Tailby v Official Receiver* (1888) 13 App Cas 523; Calnan, *Proprietary Rights and Insolvency* paras 5.60 f.

[161] See eg *Lysaght v Edwards* (1876) 2 Ch D 499; *Jerome v Kelly* [2004] UKHL 25, [2004] 1 WLR 1409.

[162] *Lysaght v Edwards* (1876) 2 Ch D 499 at 506 per Jessel MR. As noted by R Calnan, *Proprietary Rights and Insolvency* (2010) para 5.69, this applies even if the full price is not paid when the contract is concluded. The purchaser's equitable interest in the meantime secures the portion of the price already paid. This indicates non-unitary elements of such interest under English law.

[163] In Scots law the relevant stage for this would be conclusion of contract.

of beneficial interest. Thus, their Lordships adopted equitable notions, but fused with authorities supporting the importance of delivery of the disposition.

7-73. Although acknowledging that the holder of an unrecorded disposition has only a personal right, Lord Clyde stated that "he has personally acquired such rights as make it reasonable to use the language of ownership in relation to him".[164] He suggested that this had been acknowledged in various cases from *Earl of Fife v Duff*[165] to *Gibson v Hunter Home Designs Limited.*[166] Lord Jauncey referred to Professor Halliday's view that, as between the parties, the delivery of a disposition "transfers a right of ownership to the grantee",[167] interpreting this to mean that between the buyer and seller the latter has lost "any beneficial rights in the property".[168] Lord Jauncey noted that a party who has delivered a disposition, in return for the price, has "effectively disposed of [beneficial interest]".[169] He also relied on the *obiter* comments of Lord President Emslie in *Gibson* that a seller "is not, in a question with the purchaser, divested of any part of his right of property in the subjects of sale until … he delivers to the purchaser the appropriate disposition".[170] Lord Emslie had added that, until this moment, the buyer's right is limited under the missives to demanding performance of the seller's obligation to convey, even if the buyer has paid the price and obtained occupation. The fact that Lord Jauncey referred to this approvingly supports the view that price and possession were not the crucial factors in his judgment; the seller has (at least) the obligation of delivering the disposition incumbent upon them until that delivery takes place. Using this case and others, Lord Jauncey considered that heritable property attached by a floating charge is the beneficial interest in such property rather than "bare title".[171]

7-74. Nevertheless, even if the floating charge is exceptional in Scots law, beneficial interest in that context falls within ownership's field of gravity. Beneficial interest moves from the seller to the buyer and, like ownership, may be a unitary concept, although this is not certain.[172] In a sale, beneficial interest passes as the buyer is moving towards acquiring ownership and the seller is proceeding towards losing ownership. But the law gives effect to the intended function of the transaction at a prior point and provides, for the purposes of floating charges, that an effect akin to the loss of the seller's ownership takes place. From the speeches in *Sharp*, what seems to cause beneficial interest to pass is that the parties have reached a stage where the seller has nothing left to do in order to facilitate the transfer of the

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[164] 1997 SC (HL) 66 at 83 f.
[165] (1862) 24 D 936.
[166] 1976 SC 23.
[167] Halliday, *Conveyancing Law and Practice* para 1-13.
[168] 1997 SC (HL) 66 at 71.
[169] 1997 SC (HL) 66 at 72.
[170] 1976 SC 23 at 27, referred to by Lord Jauncey in 1997 SC (HL) 66 at 74.
[171] 1997 SC (HL) 66 at 74. See also Lord Jauncey's reference (at 75 f) to *Bank of Scotland v Liquidators of Hutchison, Main & Co Ltd* 1914 SC (HL) 1 at 15 per Lord Shaw of Dunfermline, who contrasted "apparent title" with "beneficial and real title".
[172] If it is not unitary, and if beneficial interest is the only necessary condition for attachment, then floating charges granted by the seller and the buyer (eg those of B Bank and D Bank) could both attach. And see Reid, "Jam Today" 82.

property. That is why the delivery of the disposition is crucial. Until then, the seller will always have at least one further positive obligation. Delivery indicates that the seller is willing to (or must) allow the purchaser to obtain ownership, and from this point onwards the purchaser has the power to do so unilaterally. In emphasising delivery of the disposition as the key stage, Lords Clyde and Jauncey arguably gave proprietary substance to the concept of *ius ad rem*, as regards the attachability of a floating charge.[173]

7-75. It is unclear, however, whether beneficial interest would pass if, after delivery of the disposition, there remained further obligations on either party relating to the purchaser's acquisition of ownership,.[174] On the one hand, the purchaser can use its power to register, despite any such obligations (although this may amount to breach of contract). Therefore, perhaps the seller can objectively be considered to have relinquished its "beneficial interest" in the property at this point. Delivery of the disposition is the last *necessary* step for a seller in *every* heritable sale transaction. It is therefore useful to give form to the transfer point of beneficial interest from seller to purchaser. On the other hand, the fact that further conditions were imposed would indicate an intention that no interest should transfer until their fulfilment, and the seller's ability to use its personal rights to stop the purchaser from obtaining ownership could be important. On this view, even if the purchaser did use its power to obtain ownership, despite the conditions, the seller would retain a beneficial interest. But this would still not enable attachment by eg B Bank's floating charge (in the example at para 7-40) unless a full-equitable attachment approach is correct. This is because the property will otherwise have (at least temporarily) left A Ltd's property and undertaking, on account of the loss of ownership. As a result, D Bank's charge will also not be able to attach, as C Ltd will only have ownership and not beneficial interest.[175]

7-76. Another relevant scenario would be where, for example, ownership is transferred from A Ltd to C Ltd but C Ltd is required, upon the fulfilment of conditions, to retransfer the property to A Ltd. It might be that beneficial interest either (i) does not pass, due to the qualifications existent from the outset, or (ii) does pass, and can only revert to A Ltd upon the fulfilment of the conditions. The re-transfer of beneficial interest under (ii) could also depend on A Ltd having an unimpeded route to acquiring title again, ie once it receives a disposition from C Ltd.

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[173] They may have considered that a *ius ad rem* differs in this context from a *ius crediti* and is acquired when the purchaser has the power to obtain ownership. On the potential difference, see *Edmond v Gordon* (1857) 3 Macq 116 at 122 ff per Lord Cranworth, cited by Lord Hope at 463f in the Inner House (1995 SC 455 at 463 f); and see per Lord Wensleydale at 129 f. Also compare the proprietary view in *Sharp v Thomson* with *Bell's Dictionary*, entries for "Jus in re-Jus ad rem" (621) and "Personal rights" (800).

[174] Eg if it was agreed that a further payment was to be made by purchasers before they could present the disposition for registration. See also D Guild, "*Sharp v Thomson*: A Practitioner's View" (1997) 42 JLSS 274, 275; Reid, "Jam Today" 82; J G Birrell, "*Sharp v Thomson*: The Impact on Banking and Insolvency Law" 1997 SLT (News) 151, 153.

[175] But D Bank's floating charge would be able to attach under a full-ownership attachment approach (see paras 4-39 ff above for further details).

7-77. The application of (i) above may have been more apparent if C Ltd had a recorded *ex facie* absolute disposition, qualified by back letter, and thus held title only in security or trust.[176] In Lord Jauncey's view, relying on *Heritable Reversionary Co v Millar*,[177] C Ltd would never have had any beneficial interest in the subjects.[178] This would presumably have remained with the disponer. If the full-equitable attachment approach is adopted, as indicated by Lord Jauncey's opinion, and beneficial interest is the only determinant as to whether or not a floating charge attaches, then it would have been possible for property disponed *ex facie* absolutely to be attached by B Bank's floating charge (with reference to the example at para 7-40). However, if ownership is a necessary condition for attachment then this would not be possible. Lord Jauncey's views on *ex facie* absolute dispositions correspond to a wider functionalist approach to these securities, which, as is noted at paras 7-84 ff below, has not prevailed.

7-78. Therefore, like so much else regarding *Sharp*, ascertaining the meaning and implications of "beneficial interest" is supremely difficult. As already discussed, *Sharp* is problematic for a variety of reasons: its poor fit with property law and insolvency law, contexts within which floating charges operate; the uncertainty regarding the content and extent of the *ratio*; the conceptual problem of identifying beneficial interest in a system which functions on the basis of a personal right and real right dichotomy; and because the "property and undertaking" terminology was never intended to have the meaning ascribed to it in *Sharp*. By contrast, requiring a purchaser to register a disposition in the Land Register in order to release property from the ambit of a floating charge granted by the seller would also provide welcome publicity to the floating-charge holder and others.

7-79. It is unlikely that *Sharp* will be challenged or overturned in the near future. But it is important to note that many problems arising from it could be appropriately addressed by adopting a full-ownership approach to attachment, and by separating the floating charge's attachment from its enforcement. This would also have met the policy concerns in *Sharp* by allowing for the same outcome in the particular circumstances of the case.

F. ATTACHMENT AND HERITABLE SECURITIES

(1) Standard security

7-80. Since the coming into force of the Conveyancing and Feudal Reform (Scotland) Act 1970, the standard security is the only heritable security that can be granted "over land or a real right in land".[179] Although it can of course affect such

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[176] These forms of security are now largely confined to the past but a few examples may still exist. For further details see paras 7-82 ff below.
[177] (1892) 19 R (HL) 43
[178] 1997 SC (HL) 66 at 72.
[179] Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(3). This was originally expressed in the legislation as the sole heritable security grantable "over an interest in land". It is therefore the only

property, a floating charge is not strictly speaking a heritable security under the legislation, as it cannot be recorded in the Sasine Register or registered in the Land Register.[180]

7-81. Where property is subject to a standard security, the position for floating charges is straightforward. The encumbered property remains in the chargor's patrimony, as the standard security is only a subordinate real right in security. The charge can therefore still attach, and the interrelationship with the standard security is determined by ranking rules.[181] (The standard security is a fixed security within the floating-charges legislation.)[182] This is true whether the standard security was granted before the floating charge's creation or afterwards, albeit that the order of granting could affect the precise ranking relationship between the security interests.

(2) Bond and disposition in security

7-82. Before the introduction of standard securities in 1970, it was possible to create other types of heritable security.[183] The most notable of these were the bond and disposition in security and the *ex facie* absolute disposition qualified by back letter or other agreement.[184] By the time the floating charge was introduced, in 1961, it was widely accepted that a bond and disposition in security was non-divestitive and amounted to a real right in security over the debtor's heritable property in favour

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heritable security available over eg long leases and standard securities, as well as over land itself (ie the ownership interest in land).

[180] Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(8)(a): "heritable security" means "any security capable of being constituted over any land or real right in land by disposition or assignation of that land or real right in security of any debt and of being registered in the Land Register of Scotland or recorded in the Register of Sasines". Under the Land Registration (Scotland) Act 1979 s 28(1), floating charges were overriding interests and could be noted in the charges section of the title sheet in terms of s 6(4). The concept of overriding interest does not appear in the now applicable Land Registration etc (Scotland) Act 2012 and there is no provision for registering floating charges or noting them on the title sheet (see s 49). In the 2012 Act, a floating charge is expressly not a "heritable security" (s 113(1)). A floating charge may also fail to meet the definition in s 9(8)(a) of the 1970 Act on the ground that it is unlikely to constitute a "disposition or assignation" of land (or a real right in land) in security of a debt.

[181] Companies Act 1985 s 464(1), (1A), (4)(a).

[182] Companies Act 1985 s 486(1); Insolvency Act 1986 s 70(1). These definitions include a heritable security in terms of the Conveyancing and Feudal Reform (Scotland) Act 1970.

[183] It is still technically possible for there to be an *ex facie* absolute disposition or bond and disposition in security in competition with a floating charge, if the security was created before the Conveyancing and Feudal Reform (Scotland) Act 1970 and continues to exist.

[184] For details of these securities, and others, see Gloag and Irvine, *Rights in Security* chs 2 ff; Halliday, *Conveyancing Law and Practice* chs 47ff; W M Gordon, *Scottish Land Law*, 2nd edn (1999) ch 20; Scottish Law Commission, *Discussion Paper on Heritable Securities: Pre-default* (Scot Law Com DP No 168, 2019) chs 2 and 12. The cash credit bond and disposition in security can be considered a variant of the bond and disposition in security (in terms of property law effects): see eg Gloag and Irvine, *Rights in Security* 69 f; Halliday, *Conveyancing Law and Practice* paras 48-72 ff; Gordon, *Scottish Land Law* paras 20-84 f. As such, it is included here within the discussion of the bond and disposition in security.

of the creditor.[185] Consequently, property subject to a bond and disposition in security could still be attached by a floating charge granted by the debtor.

7-83. As a real right in security over a company's property, effective in a liquidation, a bond and disposition in security was classifiable as a fixed security in the floating-charges legislation and this seems to have been intended in the Companies (Floating Charges) (Scotland) Act 1961 (see para 7-94 below). It would therefore rank against the floating charge according to this status.

(3) *Ex facie* absolute disposition in security

7-84. Far more problematic is the type of heritable security that was most common immediately before the Conveyancing and Feudal Reform (Scotland) Act 1970:[186] the *ex facie* absolute disposition qualified by back letter or other agreement. This was a disposition which, on the face of the deed, appeared to be an absolute transfer of title but a separate unregistered document disclosed the true purpose of the transaction.[187]

(a) Nature

7-85. When the floating charge was introduced, the nature of the *ex facie* absolute disposition had still not been definitively settled. The disponing debtor either (i) was fully divested of the property disponed in security, retaining only a personal right to have the subjects reconveyed upon satisfaction of the debt, or (ii) had a right directly in the property secured, often referred to as a "radical right".[188] Professor Gretton identifies three broad (historical) schools of thought regarding whether a debtor in a heritable security was divested.[189] The two polar positions were the "functionalists", who viewed all heritable securities as non-divestive of ownership for the debtor

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[185] See G L Gretton, "Radical Rights and Radical Wrongs: A Study in the Law of Trusts, Securities and Insolvency" 1986 JR 51, 54, and below. See also eg Gloag and Irvine, *Rights in Security* 66 ff, where they compare a bond and disposition in security to a pledge. Goudy, *Bankruptcy* 546 f notes that a creditor with a bond in disposition is an "incumbrancer merely" and that the creditor (with one partial exception for poinding of the ground) is not restricted in his usual remedies, if his debtor is in sequestration. The same would most probably have been considered to apply to liquidation too.
[186] Halliday, *Conveyancing Law and Practice* para 49-01. One of the reasons for its emergence was its ability to act as a security for debts of an uncertain amount and for future debts: see Gloag and Irvine, *Rights in Security* 142. Cf the position for the bond and disposition in security.
[187] If a back bond *was* registered, the creditor's interest would be treated more like an express security-right: Gloag and Irvine, *Rights in Security* 155ff. See also the Reversion Act 1469, which gave the reverser in a bond of reversion a real right, but which required to be registered for this effect after the Registration Act 1617; and see Reid, *Property* (Gretton) para 112. The 1469 Act was repealed by the Title Conditions (Scotland) Act 2003 s 89(1).
[188] There had even been earlier debates as to whether a *bond and disposition in security* involved divestiture of the debtor.
[189] Gretton, "Radical Rights and Radical Wrongs" 202 ff. See also G L Gretton, "*Ex Facie* Absolute Dispositions and their Discharge: Exhumation" (1979) 24 JLSS 462, and the reply by J M Halliday, "*Ex Facie* Absolute Dispositions and their Discharge: Post-Exhumation" (1980) 25 JLSS 54.

whatever their form (a full application of the radical right doctrine), and the "formalists", who considered the securities according to their form, so that the references to transfer within deeds should be given effect to even though the deed disclosed the purpose of the transfer. Finally, the "compromisers" adopted a middle ground by viewing transfers expressly in security (eg a bond and disposition in security) as non-divestitive of the debtor while transfers *ex facie* absolute were considered divestitive.

Approach	**Bond and Disposition in Security**		***Ex Facie* Absolute Disposition**	
	Debtor	**Creditor**	**Debtor**	**Creditor**
Functionalists	Ownership	Security Right	Ownership	Security Right
Formalists	Personal Right	Ownership	Personal Right	Ownership
Compromisers	Ownership	Security Right	Personal Right	Ownership

7-86. As Professor Gretton notes, the compromisers' position was eventually accepted. The formalist view was finally discarded in *Campbell v Bertram*,[190] with the court appearing to adopt the compromise perspective.[191] Earlier, in *Gardyne v Royal Bank of Scotland*,[192] it had been held that a disposition *ex facie* absolute *did* divest the grantor, a rejection of the functionalist position. This was followed by a number of cases adopting the same view, most notably *National Bank v Union Bank*.[193]

7-87. However, later *obiter dicta* from Lord Kinnear in *Ritchie v Scott*,[194] in which he stated that a disposition *ex facie* absolute did not divest the grantor, created some

[190] (1865) 4 M 23. Although, as Gretton, "Radical Rights and Radical Wrongs" 54 n 12 notes, there were, exceptionally, still some adherents of the formalist position much later: see Smith, *Short Commentary* 558 n 60, who states that in a bond and disposition in security "title is in the disponee alone".

[191] The compromise position was earlier supported by Stair II, 10, 1: see Gretton, "Radical Rights and Radical Wrongs" 203.

[192] (1851) 13 D 912. The decision was reversed by the House of Lords ((1853) 15 D (HL) 45) but on a different point. See also *Hamilton v Western Bank* (1856) 19 D 152 at 162 per Lord Ivory, where the divesting effect of such security was recognised and discussed in the context of equivalent security for other property types.

[193] (1885) 13 R 380. The House of Lords reversed the decision on another basis but confirmed the divesting effect of dispositions *ex facie* absolute ((1886) 14 R (HL) 1). For further authorities, see Gretton, "Radical Rights and Radical Wrongs" 204 n 38.

[194] (1899) 1 F 728 at 736.

uncertainty, particularly as there were subsequent cases in which this position was followed.[195] This created a dichotomy between the compromise approach and the functional approach, otherwise known as the "weak form" and "strong form" of the radical rights doctrine respectively.[196]

7-88. As Professor Gretton makes clear, however, Lord Kinnear's position was based upon an incorrect interpretation of trust law and is at odds with a considerable depth and range of authorities favouring the weak form of the radical rights doctrine. This was later to include the view of Lord Reid in a House of Lords case.[197] In addition, Gretton points out that Lord Kinnear reverted to the orthodox weak-form position in *Inglis v Wilson*.[198] This had, however, been overlooked in later cases where Lord Kinnear's earlier position was adopted instead. The ultimate success of the compromise view was highlighted in a decision in the Outer House from 2004: *Sexton v Coia*.[199]

7-89. Nevertheless, the functionalist position was still relatively widespread when the floating charge was introduced. Professor Halliday was an adherent of that position, due to Lord Kinnear's earlier *dicta* and certain subsequent authorities, despite disliking it.[200] Indeed, Halliday acknowledged that the Conveyancing and Feudal Reform (Scotland) Act 1970 was enacted against the background of the Lord Kinnear theory and the draftsman "undoubtedly assumed the validity" of that theory.[201] Of course, Halliday was also involved with the introduction of the floating charge, as he provided conveyancing expertise to the Law Reform Committee for Scotland.[202] The functionalist approach therefore almost certainly influenced Halliday and others when they were considering the relationship between the floating charge and security by *ex facie* absolute disposition.

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[195] See *Edinburgh Entertainments Ltd v Stevenson* 1926 SC 363 at 375 f per Lord Justice Clerk Alness; *Scobie v Wm Lind & Co* 1967 SLT 9.

[196] Gretton, "Radical Rights and Radical Wrongs" 54 f.

[197] *Aberdeen Trades Council v Shipconstructors and Shipwrights Association* 1949 SC (HL) 45 at 63 ff per Lord Reid; see Gretton, "Radical Rights and Radical Wrongs" 208.

[198] 1909 SC 1393 at 1402 f; Reid, *Property* (Gretton) para 112 n 15. And see J Burgoyne, "Heritable Securities", in *Stair Memorial Encyclopaedia* vol 20 (1992) para 133, who also conforms to the divestment approach.

[199] 2004 GWD 17-376 and 2004 GWD 38-781, in which Lord Kinnear's earlier view was expressly rejected by Lord Emslie. See also *MacKenzie Petr* 1979 SLT (Sh Ct) 68.

[200] See J M Halliday, "The *Ex Facie* Absolute Disposition" (1957) 1 Conv Rev 5; J M Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970*, 2nd edn (1977) para 6-29; J M Halliday, "*Ex Facie* Absolute Dispositions and their Discharge: Post-Exhumation" (1980) 25 JLSS 54. Halliday did, however, consider that there *would* be outright transfer if eg A sold to B but before B was infeft he disponed to his creditor C *ex facie* absolutely, or if the transfer was directly, and *ex facie* absolutely, from A to C, with the consent of B, but C held the property as B's creditor (see eg (1957) 1 Conv Rev 5 and *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 6-31).

[201] Halliday, "*Ex Facie* Absolute Dispositions and their Discharge: Post-Exhumation" 54. Of course, many of the recommendations of the *Halliday Report* (Scottish Home and Health Department, *Conveyancing Legislation and Practice* (Cmnd 3118, 1966) were implemented by the 1970 Act and Halliday also acted as a consultant to the Government in relation to the Bill that became the 1970 Act: see Scottish Law Commission, *Discussion Paper on Heritable Securities: Pre-default* (Scot Law Com DP No 168, 2019) paras 2.18 ff.

[202] See para 7-03 above.

7-90. The different theories also impact upon how property disponed *ex facie* absolutely is dealt with in insolvency. If the disponer is fully divested then it is difficult to justify property being dealt with as part of its insolvent estate. Under that approach, it is more plausible for the entirety of the disponed property to fall within the *disponee's* estate and therefore to be available to *its* creditors. However, in the insolvency context, a number of authorities seem to lean towards a functionalist position. *Heritable Reversionary Co v Millar*[203] led Goudy to conclude that a trustee in sequestration takes property, held in security on an *ex facie* absolute title, subject to the disponee's contract with the "true and radical owner, and with no larger rights than the bankrupt himself possessed".[204] This would only allow for priority in the property up to the value of the debt due to the disponee.[205] *Forbes's Trs v MacLeod*[206] also supports this analysis. A bond and disposition in security was assigned *ex facie* absolutely and recorded but a back letter revealing the security nature of the transaction was provided. The debt had been repaid when the assignee's sequestration occurred. Lord McLaren considered that the trustee in sequestration was bound to retransfer the property, noting that *Heritable Reversionary* applied to security titles in addition to trusts and that "even where the title is *ex facie* unqualified and enters the record as such, the creditors of the *ex facie* absolute proprietor can take no higher right than he himself possessed".[207]

7-91. Gloag and Irvine, meanwhile, identify the uncertainty regarding whether the sequestration of an *ex facie* absolute disponee would enable the trustee in sequestration to obtain the disponed subjects.[208] They consider that the disponee "has a real and beneficial interest in the property" for the debts secured, but suggest that the *ratio* of *Heritable Reversionary* would probably extend to a disponee *ex facie* absolute and mean that the property is not the "property of the debtor".[209] These same conclusions would probably have also been applied by the authors, and the court in *Forbes's Trs*, to liquidation. Such authorities do, however, derive from a

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[203] (1892) 19 R (HL) 43.

[204] Goudy, *Bankruptcy* 265. Also note his criticism (at 1891 JR 365) of the First Division's decision in *Heritable Reversionary* (1891) 18 R 1166, which was reversed by the House of Lords (Goudy having appeared as counsel for the appellants). Goudy pointed out (at 366) that the First Division's decision would mean that the whole security property would be available to the security holder's creditors as part of the bankrupt estate and the "true owner" would only rank as a personal creditor by virtue of the re-conveyance right.

[205] However, Goudy, *Bankruptcy* 265 also notes that it is necessary to distinguish cases where the bankrupt's right is the "real beneficial right of ownership" and where that party is only under some personal obligation, such as a *pactum de retrovendendo*.

[206] (1898) 25 R 1012. This case is briefly discussed by Lord Hope in *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19 at paras 41-43. He uses it to demonstrate that creditors of the assignee take the estate on the same terms as the assignee where the latter has a "qualified title". This involves applying the *tantum et tale* doctrine (see n 211 below) in favour of the "true owner". Nevertheless, Lord Hope's position on the nature of an *ex facie* absolute assignation (or disposition) is not clearly specified.

[207] (1898) 25 R 1012 at 1015. The case is also cited by Lord Jauncey in *Sharp v Thomson* 1997 SC (HL) 66 at 73.

[208] Gloag and Irvine, *Rights in Security* 152 f.

[209] Gloag and Irvine, *Rights in Security* 153.

period when English influence on property law in Scotland was at its height.[210] It seems plausible, and perhaps even likely, that a modern court would take a different view and one more in line with the divestment approach.[211]

(b) Definition: a fixed security?

7-92. It is now necessary to examine the extent to which the *ex facie* absolute disposition was incorporated into the statutory framework for floating charges. This helps us determine how that heritable security and the charge were expected to interact.

7-93. Since the Companies (Floating Charges and Receivers) (Scotland) Act 1972, the definition of "fixed security" in the floating charges legislation has referred to the Conveyancing and Feudal Reform (Scotland) Act 1970, under which the standard security is the only heritable security that may be created.[212] In the Companies (Floating Charges) (Scotland) Act 1961 the definition was the same as the current definition except in one respect. Instead of a reference to a heritable security within the meaning of s 9(8) of the 1970 Act, after the generality of the earlier part of the definition, it stated that the term "includes a security over … property created by way of an *ex facie* absolute disposition or assignation qualified by a back letter".[213] This definition was effective throughout the 1961 Act and therefore applied to: the floating charge being subject to, *inter alia*, a fixed security ranking ahead of it;[214] the provision regarding the effect of a floating charge upon attachment "as if" it were a fixed security over the property to which it attached;[215] and the provisions referring to the circumstances in which fixed securities ranked ahead of or behind the floating charge.[216] A security over property created by *ex facie* absolute disposition or assignation qualified by back letter therefore has relevance in each of these contexts.

[210] See eg Reid, "Equity Triumphant" 468.
[211] Reid, *Property* para 694. The related doctrine of *tantum et tale*, whereby particular claims relating to the debtor and his property can also be raised against that party's trustee in sequestration or diligence creditors, is much diminished in modern law: see *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19. For discussion, see J MacLeod, *Fraud and Voidable Transfer* (Studies in Scots Law vol 9, forthcoming) ch 8. In addition, there is authority that *tantum et tale* does not apply in the liquidation of a company as, unlike with a trustee in sequestration, property does not vest in the liquidator: *Bank of Scotland v Liquidators of Hutchison, Main & Co Ltd* 1914 SC (HL) 1 at 5 f per Lord Kinnear. See also R G Anderson, "Fraud on Transfer and on Insolvency: *Ta…Ta…Tantum et Tale*?" (2007) 11 EdinLR 187, 203 f, who notes the connection between the equitable and latent rights inherent in *tantum et tale* and the "beneficial interest" doctrine espoused in *Heritable Reversionary Co v Millar* (1892) 19 R (HL) 43 and suggests that "the only way to deal with the *Heritable Reversionary* doctrine is to extirpate it".
[212] Companies (Floating Charges and Receivers) (Scotland) Act 1972 s 31(1). And see above at para 7-80.
[213] Companies (Floating Charges) (Scotland) Act 1961 s 8(1)(c). It must be assumed that the reference to *ex facie* absolute disposition or assignation in the definition included a requirement for the recording, or equivalent, for these securities. The alternative would be absurd.
[214] 1961 Act s 1(2)(b).
[215] 1961 Act s 1(2).
[216] 1961 Act s 5(1), (2).

7-94. During the progress of the Bill that became the 1961 Act, Forbes Hendry MP stated that "fixed security" was "any security other than a floating charge" and then noted that the definition proceeded to "define in rather greater particularity certain types of heritable security about which there might be some doubts".[217] This recognised the uncertain status of the *ex facie* absolute disposition qualified by back letter. It was also an acknowledgement that the reference to assignation *ex facie* absolute qualified by back letter was principally to heritable property, such as for leases.[218] This was confirmed too by the Bill's promoter in the House of Lords, Viscount Colville of Culross, who specified that two means of security were available for heritable property: firstly "by way of an ex facie absolute disposition or assignation qualified by a back letter" and, alternatively, by a "bond of disposition for security [sic]".[219] The bond and disposition in security was so plainly a fixed security that it was not deemed necessary for it to be expressly included in the definition. Hendry referred to it (probably mistakenly) as the "commonest"[220] type of security over heritage and also noted that, where a bond and disposition in security had been granted over a factory, and the grantor then wished to create a floating charge, the former must have priority.[221] This priority of ranking would be realised by the bond and disposition in security being a fixed security. The absence of doubt about its status as such presumably stemmed from the fact the deed expressly stated that it was a security, while its accepted nature as a non-divestitive security right also created few difficulties on this front. The position in both respects was different for the *ex facie* absolute disposition.

7-95. The inclusion of *ex facie* absolute dispositions (and assignations) in the floating charges legislation seems to represent an adoption of the functionalist position. In relation to these securities, Forbes Hendry noted that, because the document stated it was an absolute disposition to the creditor, "the property appears to cease to be the property of its beneficial owner, and to become the property of the bank or other creditor".[222] If such securities had not been expressly included in the definition of fixed security, there would have been a risk that they would not have fallen under the definition, thus causing certain problems regarding their interaction with floating charges. In statutory interpretation, "include" may extend a term (such

[217] Parliamentary Debates, House of Commons, Official Report, Scottish Standing Committee, 20 June 1961, col 16.
[218] See also the mention of this type of security as a "charge on land" requiring registration in the Companies Act 1948 s 106A(2)(a), inserted by the Companies (Floating Charges) (Scotland) Act 1961 Sch 2. See also Gloag and Irvine, *Rights in Security* ch 6 for details of the assignation of leases in security.
[219] HL Deb, 5 July 1961, vol 232, cols 1434 f.
[220] This seems to have been true at the end of the previous century: Gloag and Irvine, *Rights in Security* 66. But it was apparently not the most commonly granted heritable security by 1961: see para 7-84 above.
[221] Parliamentary Debates, House of Commons, Official Report, Scottish Standing Committee, 20 June 1961, cols 10 and 12.
[222] Parliamentary Debates, House of Commons, Official Report, Scottish Standing Committee, 20 June 1961, col 33.

as fixed security) beyond the meaning it would naturally bear, so as to incorporate expressly mentioned items which would not, or might not, ordinarily be included.[223]

(c) Attachment problems

7-96. There seems to have been an assumption that the floating charge and *ex facie* absolute disposition would be able to rank against one another, due to the deemed non-divestitive effect of the latter. However, given that the compromise approach ultimately prevailed,[224] it is necessary to consider the relationship between the floating charge and the *ex facie* absolute disposition in that context. If we do so, it seems that the floating charge could not attach to property subject to such a disposition. For example, take the following sequence of events:

> *Example 2.* (i) A Ltd granted a floating charge over its whole property and undertaking to B Bank. (ii) A Ltd then disponed heritable property *ex facie* absolutely, but qualified by back letter, to C Bank and the disposition was recorded in the Register of Sasines. (iii) A Ltd entered liquidation and B Bank's floating charge attached.

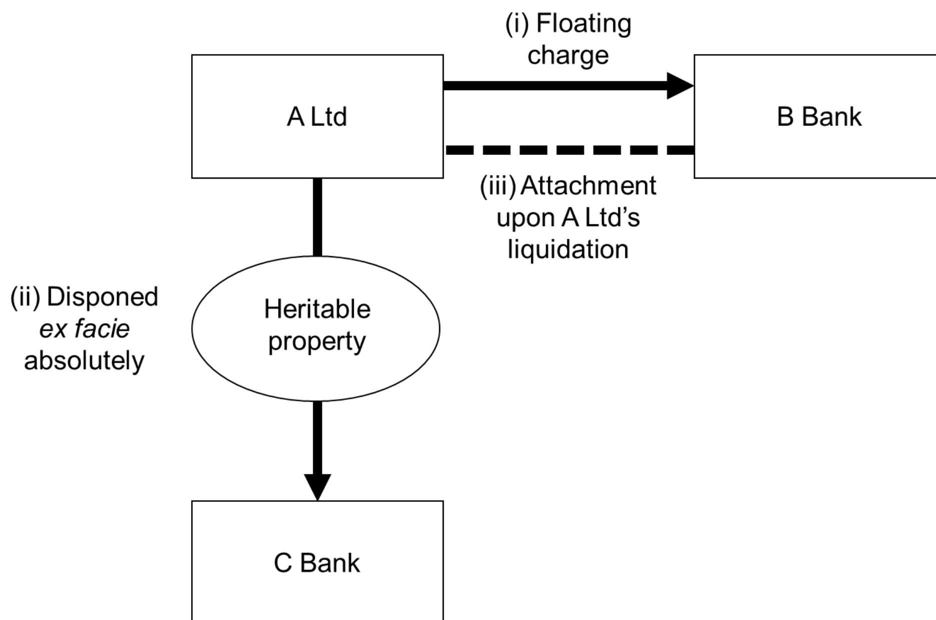

Figure 2

[223] See *Robinson v Barton-Eccles Local Board* (1883) 8 App Cas 798 at 801 per Selbourne LC; *Dilworth v Stamps Comrs* [1899] AC 99 at 105 f per Lord Watson; J F Wallace, "Interpretation of Statutes", in *Stair Memorial Encyclopaedia* vol 12 (1992) para 1140. This can be described as an "inclusive" and "enlarging" definition: D Bailey and L Norbury (eds), *Bennion on Statutory Interpretation: A Code*, 7th edn (2017) 471 ff.
[224] As to which see para 7-84 above.

7-97. A Ltd would have been divested at (ii) (unless an equitable approach is adopted to the meaning of "property and undertaking" and thus to the charge's attachment). Consequently, B Bank's charge would not have attached to the property (except if the property was reconveyed to A Ltd). The effect would be the same as if property was transferred outright to another party, except that where the property was disponed *ex facie* absolutely but qualified by back letter, the charge would attach to A Ltd's personal right to reconveyance under the back letter, which would be conditional upon satisfaction of the debt due to C Bank.

7-98. The potential difference in the effects of the transfer of ownership as a security and the creation of a real right in security highlights one of the key elements of a floating charge. The greater step of transfer of ownership renders a floating charge inoperable against the property, while the lesser step of granting a real security right does not.[225] This is different from, for example, a standard security, which continues to affect property if that property is sold by the debtor. The varying effects with respect to the floating charge demonstrate an issue for the charge's operation where parties have a choice of security rights, one of which transfers ownership and the other only creates a real security right.

7-99. The paradox involving the apparent non-attachment of the floating charge and its intended ranking relationship with an *ex facie* absolute disposition would have been less of a problem where the latter ranked ahead of the floating charge.[226] In that instance, the floating charge would attach to the disponer's reversionary right and the charge would be subject to the rights of the disponee anyway. The disponee could have realised the property and would need to return surplus proceeds to the company, which would have enabled the chargeholder to obtain its priority. The only problem might have been where the disponee became insolvent and its creditors claimed against the property.[227]

7-100. A more difficult case would have been where the floating-charge holder ranked ahead of the disponee, due to the charge being created first, the existence of a negative pledge clause, and the registration of the floating charge in the charges register prior to the creation of the fixed security.[228] How, practically, would the chargeholder have obtained its priority? How could the liquidator, acting for the chargeholder (and others), have realised the property if the property did not fall into the liquidation? This problem could have been solved by reading the prohibition on

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[225] However, the fixed security would rank ahead if the floating charge does not include a negative pledge.
[226] But note that ranking could only formally arise if the charge attached.
[227] In contrast to the likely position in current law, see the authorities above at paras 7-90 f suggesting any such claims against the disponed property would be limited to the debt due by the disponer to the disponee. See also Stewart, *Diligence* 606, who states that the estate can be adjudged by the creditors of the disponee, citing *Livingston v Lord Forrester's Heirs* (1664) Mor 10200, where creditors of a party holding land in trust (only in part for his own benefit) were granted an adjudication of the land by the court, but this was to be burdened by a back bond. Stewart (at 606) also notes that the creditors of a "beneficial owner" may attach *his* right by adjudication, whether that right is "absolute or merely reversionary" (and cites cases in support).
[228] Companies (Floating Charges) (Scotland) Act 1961 s 5(2).

the creation of prior- (or equal-)ranking fixed securities as invalidating the divestment effect of securities that were created after the charge's registration.[229] But this in turn would have created difficulties regarding transfers by the disponee and with respect to those who relied on that party's absolute title. It was also later clarified that a floating charge with negative pledge simply "confer[s] priority" over subsequently created (and prohibited) securities.[230] This suggests a ranking priority predicated on the floating charge attaching.

7-101. The compromise position also seems to undermine the view that the floating charge takes on the nature of particular types of security right when it attaches. The charge attaches "as if" it is a fixed security, yet both the *ex facie* absolute disposition qualified by back letter and the bond and disposition in security were fixed securities prior to 1970. The attached charge, in relation to heritable property, cannot simultaneously have had a deemed divestitive effect, like an *ex facie* absolute disposition, and a real-security effect, akin to a bond and disposition in security. This shows that the now-prevailing view of the statutory hypothesis would have been hardly sustainable at the time when the charge (and the hypothesis) were first introduced, and is thus a significant point in favour of the attachment mechanism being *sui generis*.[231]

7-102. As mentioned previously at para 7-10, Professor Wilson indicated that there might be problems involving the floating charge and dispositions *ex facie* absolute.[232] The above discussion shows that he was correct. The attempt to fit these securities together demonstrates the difficulties of introducing a new form of security which has to interact with existing security rights, the nature of which are themselves unclear and disputed. If a case had arisen concerning the attachment of a floating charge to property disponed *ex facie* absolutely, then it is likely that the statutory provision would have bolstered the functionalist argument, not only for floating charges but more widely.[233] This last point is supported by the fact that the definition of fixed security refers to security in relation to "property of a company" which would be "treated as an effective security over that property" upon the company's winding up.[234] Given this, and the potential impossibility of enforcement by a chargeholder if property is not deemed to fall into the chargor's liquidation, it is highly plausible that the property would have been considered to be within the chargor's liquidation to facilitate the express ranking rules.[235]

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[229] 1961 Act s 5(2)(c).
[230] See Companies Act 1985 s 464(1A), which was inserted by the Companies Act 1989 s 140(4). A reference to the prohibition of later prior- (or equal-) ranking floating charges (not just fixed securities) was included in the Companies (Floating Charges and Receivers) (Scotland) Act 1972 s 5(1), and see now Companies Act 1985 s 464(1)(a).
[231] See ch 5 above for more details.
[232] W A Wilson, "The Companies (Floating Charges) (Scotland) Act 1961" [1962] JBL 65, 66.
[233] This potentially remains true for assignation in security: see ch 9 below.
[234] Companies Act 1985 s 486(1); Insolvency Act 1986 s 70(1).
[235] The difficulties in accommodating and explaining *ex facie* absolute dispositions more widely in Scots law were identified in the Inner House in *Sharp v Thomson* 1995 SC 455 (at 485, 493 and 503 f).

7-103. If the compromise position is accepted for *ex facie* absolute dispositions generally, the floating charge is an example of an institution intended to interact with a misconstrued version of the existing law. Does this mean that the floating charge should have been interpreted according to a seemingly incorrect version of Scots property law, and therefore that a charge *could* have attached to property the chargor had disponed *ex facie* absolutely? Or should it be considered to respond to changing views as to the correct position, so that if the chargor disponed property *ex facie* absolutely, a charge could only attach to the personal reversionary right?

7-104. The two possible interpretations again relate to the issue of integrationism against exceptionalism for the floating charge and its relationship with Scots law. If the charge is not responsive, then, over time, it becomes more exceptional and the challenges to make it cohere with property law are intensified. It is possible to read the decision and implications of *Sharp* in this way.[236] However, if the alternative approach is taken, there can be unintended consequences for the charge-property dynamic, and the charge may lose its function in certain circumstances. For example, the charge would not be able to rank directly against an *ex facie* absolute disposition.

7-105. Nevertheless, integrationism seems more appropriate here; terms in legislation should be expected to alter, expand and contract in line with wider law. As Bennion states, Acts are usually "intended to develop in meaning with developing circumstances".[237] The presumption is that Parliament intends Acts to receive a construction which updates itself against background changes: "though necessarily embedded in its own time, [it] is nevertheless to be construed in accordance with the need to treat it as current law".[238] This could mean that property disponed by a chargor *ex facie* absolutely would not be within that company's "property and undertaking" and thus would not be attachable by the floating charge. But, again, the existence of *Sharp* throws this assertion into doubt, as a full-equitable attachment approach towards the *ratio* in that case *would* enable attachment to take place.

7-106. The issues regarding dispositions *ex facie* absolute are largely of historical interest in the context of corporeal heritable property. Yet they are also of relevance to the floating charge's interaction with security rights over other types of property under the current law. This will be addressed in the next two chapters, focusing on corporeal moveable property and incorporeal property respectively.

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[236] The case was decided against the background of some general uncertainty regarding the nature of transfer of ownership of heritable property. But, subsequently, the position has been clarified while the law of floating charges, due to *Sharp*, is different.
[237] F A R Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (2001) 57.
[238] Bennion, *Understanding Common Law Legislation* 57.

8 Corporeal Moveable Property

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A. INTRODUCTION

8-01. At common law the creation of a voluntary security right over corporeal moveable property requires, inconveniently, the delivery of the property to the grantee.[1] A search for alternatives that also comply with the publicity principle has been a challenge, although registration is used to create security over certain discrete types of property.[2] The floating charge was largely a response to the impracticalities of giving and taking security over corporeal moveables in Scots law. This is evidenced by the practical issues that led to the Law Reform Committee for Scotland's reform project and its recommendations, and by T B Smith's Historical Note appended to the Committee's report, which focused upon the history of non-possessory security rights over corporeal moveables.[3] It is, therefore, perhaps not

[1] The recognised subordinate real right is pledge (see paras 8-23 ff below). Limited exceptions to the delivery requirement are bonds of bottomry and respondentia (for maritime property), both now practically obsolete. For the history of real security over moveables in Scots law, see A J M Steven, "Rights in Security over Moveables", in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 1, ch 8.

[2] Eg ship and aircraft mortgages, which have to be registered: see Merchant Shipping Act 1995 s 16(1) and Sch 1 paras 7-13 (and formerly Merchant Shipping Act 1894 ss 31-46); Civil Aviation Act 1982 s 86; Mortgaging of Aircraft Order 1972, SI 1972/1268. These provide principally UK-wide regimes. International security interests over aircraft objects are now available under the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015, SI 2015/912. For discussion of relevant aspects of the law of ships, see G L Gretton, "Ships as a Branch of Property Law", in A R C Simpson et al (eds), *Continuity, Change and Pragmatism in the Law: Essays in Memory of Professor Angelo Forte* (2016) 394 ff. The Scottish Law Commission have proposed introducing a new Register of Statutory Pledges which would be used for, *inter alia*, the creation of security rights over moveable property (including corporeal moveables): see SLC, *Report on Moveable Transactions* especially paras 16.19 ff and chs 23 and 29-31.

[3] See eg Law Reform Committee for Scotland, *Eighth Report* paras 5 ff, and Appendix 1.

surprising that problems involving this category of property and the floating charge are less apparent than for other property types. There are still, however, some areas of uncertainty.

8-02. This chapter will examine when corporeal moveables leave the "property and undertaking" of a chargor and become unattachable. Within the context of transfer of ownership, attention will be given to the potential implications of *Sharp v Thomson*[4] for corporeal moveables as well as to Professor Wilson's analysis of when attachment is no longer possible. The final part of the chapter will consider attachment where the property is subject to other types of security: the voluntary real security of pledge, the functional securities of retention of title and transfer of ownership as a security device, and tacit securities.

8-03. There are few cases involving the attachment of the floating charge to corporeal moveable property and associated ranking issues. As such, it is necessary to draw upon general principles and extrapolate rules relevant to other property types, as well as to use the limited volume of secondary literature available on the relationship between floating charges and corporeal moveables.

B. ATTACHMENT AND TRANSFER

(1) General position

8-04. In general terms, when a party that has granted a floating charge owns corporeal moveable property, the charge can attach to that property as it is within the company's "property and undertaking". Conversely, if and when ownership is transferred to someone else, the floating charge can no longer attach.[5] At common law, delivery of corporeal moveables is necessary to transfer ownership. The precise form of delivery required is not entirely clear, but extends beyond actual delivery, in certain circumstances, to include symbolical and constructive delivery.[6] In addition, it is possible for parties to include further conditions (beyond the requirement of delivery) which must be fulfilled before ownership transfers.[7] The common law still applies to donation,[8] exchange and transactions in the form of a contract of sale which are intended to operate as security.[9]

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[4] 1997 SC (HL) 66.

[5] See further below. R Rennie, *Floating Charges: A Treatise from the Standpoint of Scots Law* (PhD Thesis, University of Glasgow, 1972) 25 f also appears to consider that the chargor's ownership of corporeal moveables is necessary for a floating charge granted by that party to attach.

[6] For detailed analysis see eg Carey Miller, *Corporeal Moveables* paras 8-12 ff. Cf C Anderson, *Possession of Corporeal Moveables* (Studies in Scots Law vol 3, 2015) ch 6.

[7] See eg *Michelin Tyre Co Ltd v Macfarlane (Glasgow) Ltd* 1917 2 SLT 205; Reid, *Property* (Gamble) para 638; A J Sim, "Rights in Security over Moveables", in *Stair Memorial Encyclopaedia* vol 20 (1992) paras 29 ff. And see n 86 below.

[8] This is possible but unlikely for a company and such transfers could be challenged as gratuitous alienations.

[9] Where the latter is the case, the Sale of Goods Act 1979 s 62(4) disapplies the provisions in that Act about contracts of sale: see paras 8-26 ff below.

8-05. Nevertheless, goods[10] are far more commonly transferred by a sale under the provisions of the Sale of Goods Act 1979 (formerly the Sale of Goods Act 1893). The traditional meaning of "sale" in Scots law was "a contract for transferring property in consideration of a price in money".[11] The 1893 Act, under the influence of English law, used "sale" to mean the transfer of ownership in exchange for a monetary price.[12] In relation to contracts of sale, a contrast was drawn between a sale, under which property (or ownership) transfers, and an agreement to sell, where "the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled".[13] The 1893 Act allowed for ownership of goods to transfer when the parties intended it to do so, even if delivery had not taken place.[14] All of this has been repeated within the Sale of Goods Act 1979.[15]

8-06. To determine when the parties intend ownership to pass, regard is to be had to the contractual terms, the parties' conduct, and the circumstances of the case.[16] This means that if A Ltd and C Ltd have agreed that the ownership of widgets will pass upon C Ltd paying the price, payment is when ownership will transfer.[17] If A Ltd and C Ltd have granted floating charges to B Bank and D Bank respectively, those charges will generally attach to the rights held by the corresponding chargor.

[10] Defined under s 62(1) of the Sale of Goods Act 1893 and, now, under the Sale of Goods Act 1979 s 61(1), as (in Scotland) "all corporeal moveables except money".
[11] Bell, *Commentaries* I, 434. See also R Brown, *Treatise on the Sale of Goods with Special Reference to the Law of Scotland*, 2nd edn (1911) xi-xii and 2 ff, who compares the traditional Scottish and English definitions of sale. The same distinction is also drawn in *Bell's Dictionary* 935.
[12] Sale of Goods Act 1893 s 1(1), (3), and now Sale of Goods Act 1979 s 2(1), (4); and see also Brown, *Treatise on the Sale of Goods* xi-xii and 2 ff.
[13] Sale of Goods Act 1893 s 1(3), and now Sale of Goods Act 1979 s 2(4), (5), where "thereafter" has been replaced by "later".
[14] Sale of Goods Act 1893 ss 16 ff. For discussion, see also Brown, *Treatise on the Sale of Goods* 2 ff and 112 ff. For a pre-Act treatise on sale, see M P Brown, *A Treatise on the Law of Sale* (1821). See also the Mercantile Law Amendment (Scotland) Act 1856, most of which is now repealed.
[15] For the Sale of Goods Act 1979 see ss 16 ff, especially s 17(1) for the general rule regarding intention. See also Reid, *Property* (Gamble) paras 624 ff; Carey Miller, *Corporeal Moveables* ch 9. To determine when ownership of goods is transferred in consumer contracts covered by the Consumer Rights Act 2015, s 4(2) of that Act provides that the Sale of Goods Act 1979 ss 16-20B should be referred to. For discussion of the 2015 Act, see W C H Ervine, *Consumer Law in Scotland*, 5th edn (2015).
[16] Sale of Goods Act 1979 s 17(2).
[17] Assuming the property is ascertained: see Sale of Goods Act 1979 s 16.

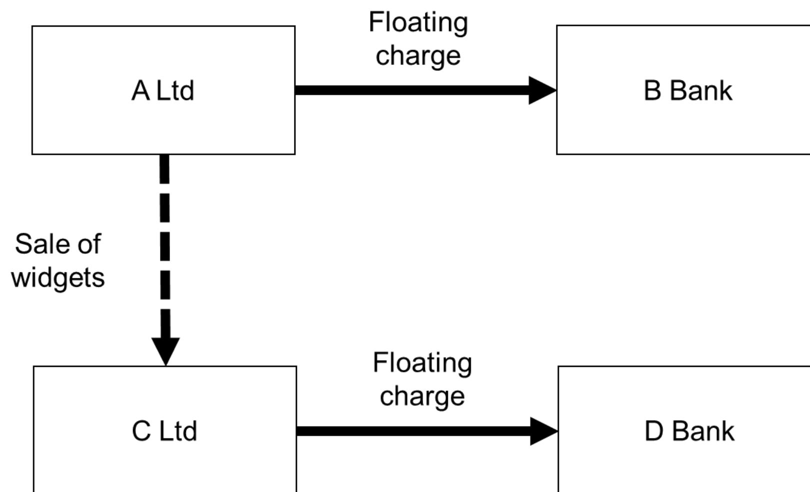

Figure 1

8-07. Therefore, until ownership transfers to C Ltd, B Bank's charge could attach to the widgets and any personal rights A Ltd has against C Ltd, and C Ltd's personal rights against A Ltd would likewise be attachable but by D Bank's charge. Once ownership of the widgets transfers, D Bank's charge could attach to C Ltd's ownership right.

8-08. The Sale of Goods Act 1979 also provides various default rules to determine the intention of the parties as to when ownership ("property") passes, where this is not apparent.[18] For example, the first rule in s 18 is that if there is "an unconditional contract for the sale of specific goods in a deliverable state" ownership passes when the contract is made.[19] It is irrelevant whether payment and/or delivery are delayed. In each case, property ceases to become attachable by a floating charge granted by the seller once ownership transfers.[20]

8-09. A chargor's ownership of property should, generally speaking, be considered a necessary and sufficient requirement for the attachment of the charge to corporeal moveable property (and other property).[21] (The possibility of *Sharp v Thomson*[22] representing an exception in certain transfer scenarios is discussed below at paras 8-11 ff.) This general position also seems to be supported by comments made in Parliament about the Bill that became the Companies (Floating Charges) (Scotland)

[18] Sale of Goods Act 1979 s 18.
[19] Regarding the meaning of "property", see the views expressed by T B Smith in "Property Problems in Sale: Three Footnotes" 1987 SLT (News) 241; cf T B Smith, *Property Problems in Sale* (1978) 49 ff.
[20] The situation of undivided shares in goods in a bulk is interesting. If payment is made by the buyer, the default rule is that the buyer becomes a co-owner of the bulk (Sale of Goods Act 1979 s 20A). This would mean that B Bank and D Bank's charges could both attach to the bulk, but only to their chargor's respective *pro indiviso* shares.
[21] This aligns with the full-ownership attachment approach: see paras 4-41 ff above.
[22] 1997 SC (HL) 66.

Act 1961. In the Scottish Standing Committee, the Lord Advocate[23] used the example of a sale of a red tie by a draper's shop that "had a floating charge" to explain the operation of such a security.[24] He stated that "once the tie was sold … it was [the buyer's] property and was not subject to the floating charge".[25]

8-10. Additional comments by the Lord Advocate do, however, raise doubts as to how he expected the floating charge to function. He said that if the tie "was left in the draper's shop and it had not been paid for, it would be subject to the floating charge" upon liquidation of the selling company. He also stated that if a drapery company granted a floating charge over its assets and a purchaser did not "take delivery of his tie" then "so long as it is in the shop it is subject to the floating charge".[26] While the absence of delivery at common law would have meant ownership remaining with the seller, this is not true under the Sale of Goods Act. There is also a possible contradiction between the first additional comment, where it is suggested that payment *and* delivery would prevent the charge from attaching, and the second, where perhaps only delivery would be required for non-attachability. It may be that the Lord Advocate had in mind situations in which the parties agreed that ownership would only pass upon payment and/or delivery, and such designated transfer points are indeed commonplace. The first comment could, alternatively, be an allusion to the seller's statutory lien,[27] but it would then be the lien right that a charge would attach, not the property (ownership). More generally, the requirement for the charge to be enforced in liquidation would suggest that the property would only be attachable for as long as ownership remained with the seller. If ownership had already passed to the buyer, the property would not be part of the seller's estate available to a liquidator. Given the opacity of the passage, though, it would be inappropriate to present firm conclusions as to what the Lord Advocate actually meant.[28]

(2) *Sharp v Thomson*

[23] William (later Lord) Grant (1909-1972). For brief biographical details see *The Times*, 21 November 1972, 17. Forbes Hendry was the promoter in the House of Commons but received assistance from the Lord Advocate.

[24] Parliamentary Debates, House of Commons, Official Report, Scottish Standing Committee, 20 June 1961, col 8. By saying the shop "had" a floating charge, the Lord Advocate surely meant the company that ran the shop had *granted* a floating charge; the shop is not a separate legal personality and the example would not make sense if the seller was the grantee of the charge. One MP in attendance (Bruce Millan, a future Secretary of State for Scotland) subsequently noted that some examples provided by the Lord Advocate and Forbes Hendry were possibly misleading as floating charges would only be grantable by companies (col 14).

[25] Parliamentary Debates, House of Commons, Official Report, Scottish Standing Committee, 20 June 1961, col 8.

[26] Parliamentary Debates, House of Commons, Official Report, Scottish Standing Committee, 20 June 1961, col 8. The use of "his tie" might mean that ownership was held by the purchaser, or it may just have been a more general reference to the property the "purchaser" was seeking to buy.

[27] Sale of Goods Act 1893 ss 39(1) and 41, now Sale of Goods Act 1979 ss 39(1) and 41.

[28] The absence of a clear statement by the promoter of the legislation would also preclude the use of the comments in court under the rule deriving from *Pepper v Hart* [1993] AC 593.

8-11. *Sharp v Thomson*[29] casts some doubt upon the applicability of the full-ownership attachment approach[30] to corporeal moveables. As regards the extent of the *ratio*, the Scottish Law Commission, in their *Report on Sharp v Thomson*, presume that it applies beyond heritable property.[31] If *Sharp* does have such a wide ambit, it may be that, while ownership by the chargor is necessary for a charge's attachment, there are also additional requirements. On a more extreme (and problematic) view, ownership by the chargor is *not* necessary for attachment at all.[32]

8-12. There has, however, been relatively little analysis of the implications of the decision for corporeal moveable property.[33] Birrell states that *Sharp* might mean that where goods are sold and delivered, but title is retained until payment, the "beneficial interest" is held by the purchaser not the seller.[34] The seller can only recover the goods if the purchaser does not pay the price and the purchaser will have the express or implied right to use the property. However, he thinks it is more likely that "beneficial interest" remains with the seller until the fulfilment of the relevant suspensive condition, whether that is payment or another obligation.[35] Birrell justifies this by referring to the "anomalies" that would otherwise be created, as well as because the seller has "taken a positive step to retain his entitlement" to the property under the sale contract. He also contends that goods differ from other property as they can be recovered "without the intervention of the court in the form of a decree of reduction".[36] The meaning of the final point is unclear, as a court order for repossessing goods is required (unless there is consent),[37] and there is no obvious reason why this should be treated differently from a decree of reduction in the context. The other points are more powerful ones.

8-13. As was pointed out in the previous chapter, a range of difficulties arise from *Sharp*. These include problems for corporeal moveables, as identified by Lord Hope in the Inner House.[38] He foresaw troublesome questions, such as how to deal with property that was sold and had been paid for but was undelivered and for which ownership had not yet transferred. If a floating charge was only to attach to property being used by the company, how would such usage be determined and how would unused property be dealt with? This would lead to delays and practical difficulties in conducting processes like receivership.

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[29] 1997 SC (HL) 66.
[30] For this and other possible approaches, see paras 4-41 ff above.
[31] SLC, *Report on Sharp v Thomson* para 2.6.
[32] See paras 4-39 ff above for more details regarding different approaches to attachment of the floating charge.
[33] But see eg *Greene and Fletcher, Law and Practice of Receivership* para 2.06, where it is suggested that the case applies to moveable property too.
[34] J G Birrell, "Sharp v Thomson: The Impact on Banking and Insolvency Law" 1997 SLT (News) 151, 153.
[35] Birrell, "Sharp v Thomson: The Impact on Banking and Insolvency Law" 153.
[36] Birrell, "Sharp v Thomson: The Impact on Banking and Insolvency Law" 153.
[37] See eg Reid, *Property* para 5.
[38] 1995 SC 455 at 477 f.

8-14. It can be argued that the *ratio* of *Sharp* is not applicable to corporeal moveables at all, on the basis that it represents a special exception for heritable property,[39] or for property which is transferred in a form that more closely resembles the transfer process for heritable property. The sale of heritable property is (usually) a three-stage process of contract, delivery of the disposition, and registration. For the transfer of corporeal moveables at common law there is (normally) a two-stage process of contract and delivery, while under the Sale of Goods Act 1979, ownership will often pass upon conclusion of contract, although the parties could instead agree that ownership passes upon the fulfilment of one or more of a multitude of possible conditions.[40]

8-15. The absence of a compulsory formal step, equivalent to delivery of a disposition, as well as the burdensome consequences of having to examine the particular circumstances of every case, are also arguments against applying *Sharp* to this type of property. For the transfer of corporeal moveables generally, there is not even a stage corresponding to delivery of a disposition. The delivery of corporeal moveables, unlike delivery of a disposition, ordinarily either transfers ownership (at common law)[41] or takes place after the transfer of ownership has already occurred (under the Sale of Goods Act 1979). It should be noted too that Lord Clyde in *Sharp* proceeded on the basis that there would be no implications for moveable property arising from the decision.[42] Furthermore, the reference in the Sale of Goods Act to the transferring of "property" in goods from the seller to the buyer should be interpreted consistently with property leaving the "property and undertaking" of the selling chargor. This would mean that, for sales of goods, transfer of ownership from the chargor to another party equates to property no longer being attachable by a floating charge granted by the seller.

8-16. Yet, even if *Sharp* does extend to corporeal moveables, the implications appear minimal if delivery of the disposition is the key stage for heritable property. Assuming that delivery of corporeal moveable property could be deemed the equivalent of delivery of a disposition, there will usually be simultaneity at common law between the property leaving the property and undertaking of the seller and ownership being transferred.[43] Meanwhile, under the Sale of Goods Act 1979 ownership will often pass even before delivery takes place, which apparently means that the property has already left the company's property and undertaking.

8-17. In addition, if delivery of a disposition is important both as an objective indicator that the seller wishes to, or must, transfer ownership, and also because the purchaser then has the power to obtain ownership by the final obligatory step of

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[39] Rather than being the general rule for all property. St Clair and Drummond Young, *Corporate Insolvency* paras 6-10 f suggest that "beneficial ownership" is necessary for attachment to heritable property but in the same context refer only to moveable property "owned" by a company.

[40] See eg D Guild, "Sharp v Thomson: A Practitioner's View" (1997) 42 JLSS 274, 275.

[41] And therefore more closely corresponds to the registration of heritable property. The delivery of corporeal moveables can also not be equated with the giving of possession of heritable property.

[42] 1997 SC (HL) 66 at 85.

[43] It is equivalent in effect to registration of a disposition of heritable property.

registration, the position is not the same for corporeal moveables. There the parties can decide precisely when ownership is to transfer, and may agree that it will not transfer until after delivery. If so, this reflects an intention for "beneficial interest" not to pass until fulfilment of the relevant conditions, as suggested by Birrell.[44] Until ownership passes to the transferee, it cannot be said that the transferor has no interest in the property, as this directly contradicts what the parties themselves have agreed.

(3) The Wilson analysis

8-18. Professor Wilson states that "[g]oods which have been sold but were still in the company's ownership and possession at the date of attachment are subject to the security of the holder of the floating charge even if the price has been paid".[45] In his view, the property (the widgets) in the example at para 8-06 above would seemingly be attachable by B Bank's charge if A Ltd had retained ownership *and* possession when attachment occurred.[46] But what is meant by "possession" here?[47] Wilson surely does not mean that in every case where A Ltd loses natural possession, but retains civil possession, B Bank's charge will not attach. If this were so, it would often exclude a large volume of goods belonging to a chargor, such as where that property is being transported or stored by another. Wilson does though seem to consider that the loss of natural possession by A Ltd during the course of a sale transaction, even a conditional sale or hire-purchase, means B Bank's charge cannot attach.[48] Separately, it is not obvious whether Wilson considers it necessary (including in the context of such transactions) for *C Ltd* to have ownership *and* possession before D Bank's charge could attach. It is certainly difficult to justify requiring both of these elements for the attachment of B Bank's charge but not for the attachment of D Bank's charge.

8-19. Assuming that Wilson considers ownership and natural possession to be necessary conditions for a charge to attach within a sale context, the difference between his position and the full-ownership attachment approach[49] applies only where either (i) A Ltd retains ownership but C Ltd has obtained natural possession, or (ii) ownership has transferred to C Ltd but natural possession remains with A Ltd. Yet why should possession determine whether or not a floating charge can attach? The floating charge is a security right that is not dependent upon the chargeholder possessing, whether naturally or civilly. It would seem strange to require the *chargor*

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[44] Birrell, "Sharp v Thomson: The Impact on Banking and Insolvency Law" 153. And see para 8-12 above. Also see the uncertainty expressed by Guild, "Sharp v Thomson: A Practitioner's View" 275 f as to when "beneficial interest" will be considered to have passed in retention of title scenarios.

[45] Wilson, *Debt* para 9.18. This was, of course, written prior to *Sharp*.

[46] This is supported by his further comments; these are outlined in the retention of title section below.

[47] For the meaning of possession more widely, see eg Reid, *Property* paras 119 ff; C Anderson, *Possession of Corporeal Moveables* (2015) paras 1-09 ff.

[48] The notion that Wilson is excluding civil possession is supported by his subsequent suggestion (also at para 9-18) that a floating charge will not attach where a hire-purchaser has acquired possession. There is no mention that the party retaining ownership would possess civilly through the hire-purchaser.

[49] See paras 4-41 ff above.

to possess, like a proxy for the chargeholder, in certain sitations (but not others) to enable a charge to attach.

8-20. Even limiting a requirement of natural possession to the context of sale would have significant consequences in many commercial situations.[50] For instance, unless retention of title arrangements were allowed as an exception, a charge created (earlier or later than the relevant sale) by the continuing owner could not attach to property dealt with in this way, where the owner had handed over possession of the property. Given that the chargor expressly retains ownership, and this right is what would be attached by the charge, to hold that there would be no attachment by the charge seems counter-intuitive. It would also raise questions as to when the charge could attach to the property again, if the conditions for transferring ownership remained unfulfilled.

8-21. A further implication is that, despite the apparent universality of floating charges, there could be points during transactions where the charges of neither B Bank nor D Bank could attach to property that A Ltd was transferring to C Ltd. This would occur where natural possession and ownership were split between the two parties. Attachment to personal rights would be possible, and could bridge the attachment divide, but this would not assist if the obliged party became insolvent. In addition, to have an approach that is at odds with the insolvency processes, in which the charge is enforced, is undesirable. In such processes, the debtor's ownership determines if property falls into the insolvent estate.[51]

8-22. Wilson does not fully explain his reasoning and it is therefore difficult to know exactly what he means. The issue of continued or lost possession is important in contexts such as whether the buyer or seller can validly sell the property to another party;[52] however, it is not clear why possession should be decisive for attachment. Due to the inherent uncertainty in Wilson's approach,[53] and the further problems outlined above, it should not be considered to represent the law.

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[50] It certainly does not apply where other secured creditors have natural possession. For example, a pledgee has natural possession yet a floating charge attaches to the ownership of pledged property and ranks against the pledgee's right.

[51] For the relationship between ownership and insolvency for corporeal moveables, see eg D L Carey Miller et al, "National Report on the Transfer of Movables in Scotland", in W Faber and B Lurger (eds), *National Reports on the Transfer of Movables in Europe* vol 2 (2009) para 7.2 and ch 9. At para 9.4.1 it is also stated that, where a transferor retains ownership, he can vindicate his right of ownership despite the transferee's insolvency. Possession does, however, give a rebuttable presumption that the possessor owns the property: see Carey Miller, *Corporeal Moveables* para 1.19 and the sources cited there.

[52] See para 8-44 below. And see Consumer Rights Act 2015 s 29, which makes the passing of risk dependent upon possession in consumer sales.

[53] Additional comments by Wilson also cast doubt upon what he means: see para 8-45 below.

C. ATTACHMENT AND SECURITY RIGHTS

(1) Pledge

8-23. Attachment of a floating charge is relatively straightforward where charged corporeal moveable property is encumbered by one or more subordinate real rights in security.[54] This is true whether such securities are created before or after the charge. Despite the grant of security, the property (ie the ownership of the object) remains in the chargor's patrimony and so is attachable. Ranking rules determine whether the floating charge or a subordinate real right in security (fixed security) has priority.[55] A few real security rights that are both voluntary and non-possessory are recognised in Scots law: eg bonds of bottomry and respondentia at common law, and aircraft and ship mortgages by statute. However, these are limited to particular sub-types of corporeal moveable property and are exceptions to the general rule that delivery and possession are required to constitute real security over corporeal moveables.

8-24. Pledge is the recognised form of voluntary security for corporeal moveables, as a general rule. It requires the delivery of the property to the pledgee and for that party to remain in possession.[56] Pledge is a subordinate real right in security and the pledgor retains ownership.[57] As a result, the pledgor continues to hold an attachable interest in the property, and that property stays within the pledgor's property and undertaking.

8-25. For corporeal moveable property, the prevailing interpretation of the attachment mechanism is that the floating charge attaches as if it were a pledge.[58] As Professor Wilson notes, this is so even though the creditor does not possess the property.[59] The consequence is that there are considered to be two subordinate real rights of pledge, following attachment of the charge. Given that possession by the pledgee is necessary at common law, attachment can lead to the unprecedented situation of multiple pledges competing.[60] The competition is resolved by the statutory ranking rules; however, if the charge has priority (due to earlier creation with a negative pledge), the effect of a deemed pledge will not extend to the chargeholder being considered to have possession at the expense of the pledgee. As a result, the prevailing statutory hypothesis adds little here. The alternative *sui generis*

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[54] These are rights in security in the strict, or narrow, sense identified by Gretton, "The Concept of Security".
[55] Companies Act 1985 s 464.
[56] As to the requisite forms of delivery and possession, see Steven, *Pledge and Lien* paras 6-07ff; SLC, *Report on Moveable Transactions* paras 17.17 f and 25.2 ff. To avoid any doubt about a pledge being legitimately created by other forms of delivery, the Scottish Law Commission propose that legislation should render ineffective the rule in *Hamilton v Western Bank* (1856) 19 D 152, which suggests that actual delivery is required to create a pledge. In the present work, we do not need to give consideration as to what is required to create a valid pledge, as references to pledge assume the pledge is validly constituted.
[57] See eg Steven, *Pledge and Lien* paras 2-01 and 7-01 ff.
[58] See paras 5-12 ff above. And see the discussion at paras 8-26 ff below regarding the transfer of ownership as security.
[59] Wilson, *Debt* para 9.18.
[60] See Steven, *Pledge and Lien* paras 6-52 ff.

approach would simply involve a pledge in competition with a generic security over the property,[61] the ranking provisions for which are outlined by the legislation.

(2) Transfer of ownership as security

(a) Method of transfer

8-26. Under the Sale of Goods Act 1979 s 17, ownership may be transferred at an agreed point of time without delivery.[62] However, the provisions of the 1979 Act regarding contracts of sale "do not apply to a transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security".[63] In other words, the Act is disapplied in favour of the common law where a sale contract is used for a security transaction. At common law a party may transfer property *ex facie* absolutely to a creditor where the intention is to create a security right, in the wide sense, in the creditor's favour.[64] But that law requires delivery to transfer ownership or to create a real security right.[65]

8-27. Due to the formalities of the common law requirements, attempts have long been made to utilise the statutory provisions on sale to create functional security, despite the contents of s 62(4) of the 1979 Act (and previously s 61(4) of the Sale of Goods Act 1893).[66] Many such attempts have been unsuccessful.[67] This has included a number of cases in which sales without delivery, followed by immediate "hiring" back to the seller, have been held invalid. The circumstances in which the legislative transfer provisions do not, and ought not to, apply to transfers in security have been discussed by others.[68] The debate need not be entered into here; we are simply concerned with the consequences where there are effective transfers for the purposes of security (by delivery under the common law or, if possible, through the Sale of Goods Act 1979 transfer provisions). This matter does, however, raise some larger questions as to what the law should consider pivotal when deciding the categorisation and effect of a transaction: for example, the parties' intentions, their motivations, the transaction's form or its substance.

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[61] See paras 5-18 ff above.
[62] This and the following points were also true of the Sale of Goods Act 1893.
[63] Sale of Goods Act 1979 s 62(4).
[64] See eg *Hamilton v Western Bank* (1856) 19 D 152. And see Bell, *Commentaries* II, 11. The transfer of ownership may be more favourable to the creditor than pledge as it provides more extensive rights to the creditor, including the conferral of all-sums security.
[65] See eg *Clark v West Calder Oil Co* (1882) 9 R 1017.
[66] See Carey Miller, *Corporeal Moveables* paras 11.13 f; Wilson, *Debt* para 7.3.
[67] Eg *Robertson v Hall's Tr* (1896) 24 R 120; *Jones & Co's Tr v Allan* (1901) 4 F 374; *Rennet v Mathieson* (1903) 5 F 591; *Hepburn v Law* 1914 SC 918; *Newbigging v Ritchie's Tr* 1930 SC 273; *Scottish Transit Trust v Scottish Land Cultivators* 1955 SC 254; *G & C Finance Corp Ltd v Brown* 1961 SLT 408; *Ladbroke Leasing (South West) Ltd v Reekie Plant Ltd* 1983 SLT 155.
[68] See Stewart, *Diligence* 150 f; Gretton, "The Concept of Security" 132 ff; S Styles, "Debtor-to-Creditor Sales and the Sale of Goods Act 1979" 1995 JR 365; Carey Miller, *Corporeal Moveables* paras 11.14 ff. Wilson, *Debt* para 7.3 suggests that "a genuine *pactum de retrovendendo* is not struck at": see *Gavin's Tr v Fraser* 1920 SC 674.

(b) The attachment problem

8-28. Gloag and Irvine's classic definition of "right in security" is wide and inclusive in its scope and extends beyond subordinate real rights in security: "any right which a creditor may hold for ensuring payment or satisfaction of his debt, in distinction from and in addition to his right of action and execution against the debtor".[69] It incorporates functional securities, such as the transfer of ownership for security purposes.[70]

8-29. With this type of "security", the creditor obtains ownership from the debtor while the debtor has a personal right against the creditor for ownership to be re-transferred upon satisfaction of the sums due.[71] Figure 2 is an example of the transfer of ownership of corporeal moveables for security purposes.

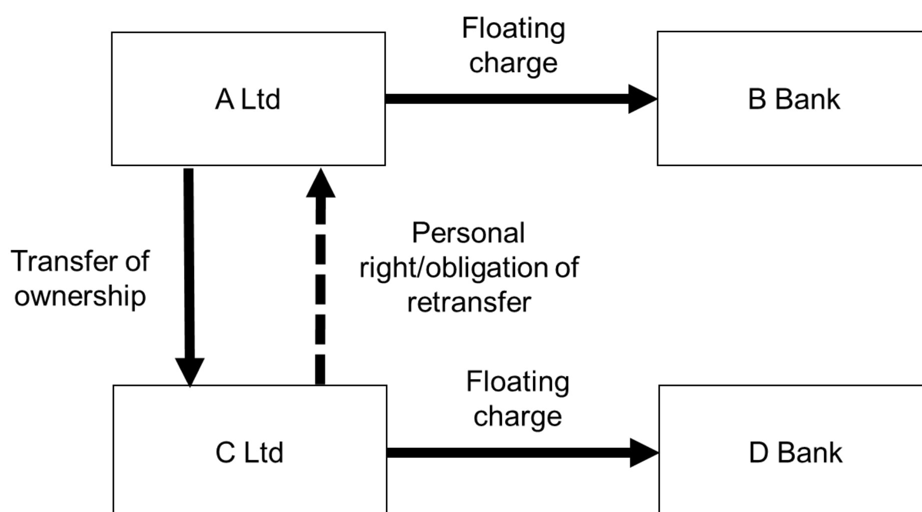

Figure 2

8-30. Of course, the transfer of ownership from A Ltd to C Ltd would ordinarily mean that B Bank's charge would not be able to attach to the property. Instead it could only attach to A Ltd's personal right of retransfer. By contrast, D Bank's charge may attach to the property while it is owned by C Ltd. There is, however, a conflict within the floating-charges legislation between property being transferred,

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[69] Gloag and Irvine, *Rights in Security* 1 f. See also W M Gloag, "Securities", in *Encyclopaedia of the Laws of Scotland* vol 13 (1932) paras 778f f. At eg paras 782 f it seems that Gloag identifies less of a distinction between ownership and subordinate real rights than is the case today (with more focus on form and function than concepts). There is a very similar entry by Gloag, also entitled "Securities", in the earlier *Green's Encyclopaedia of the Law of Scotland* vol 11 (1899), and 2nd edn, vol 10 (1913).

[70] See Gretton, "The Concept of Security". Wilson, *Debt* para 7.1 notes various meanings of the term "security". For a statutory definition, see eg Insolvency Act 1986 s 248(b)(ii) which refers to "any security (whether heritable or moveable), any floating charge and any right of lien or preference and any right of retention (other than a right of compensation or set off)".

[71] See eg *Hamilton v Western Bank* (1856) 19 D 152 at 166 per Lord Deas.

which removes it from the company's property and undertaking, and the recognition of functional securities as "fixed securities", which the charge can rank ahead of. But while *ex facie* absolute dispositions and assignations in security were expressly included as fixed securities under the Companies (Floating Charges) (Scotland) Act 1961, and assignation in security has been recognised as a fixed security in *Forth & Clyde Construction Co Ltd v Trinity Timber & Plywood Co Ltd*,[72] it is open to question whether the term also encompasses the transfer of ownership of corporeal moveables in security.

(c) A fixed security?

8-31. The general part of the definition is as follows: "'fixed security', in relation to any property of a company, means any security, other than a floating charge or a charge having the nature of a floating charge, which on the winding up of the company in Scotland would be treated as an effective security over that property…".[73] The term is limited to security rights relating to property, and thus excludes cautionary obligations. Given that a qualifying security requires to be effective over the property in a liquidation, this excludes personal rights generally. The definition does, however, seem predicated on any property being "property of [the] company"; and, although the property will be the company's before ownership is transferred for security purposes, the effect of such a "security" means it is no longer the company's property. This result also raises further doubts as to whether the charge could attach to this property; the charge attaches as if it were a fixed security, but a fixed security's meaning depends upon the property being the company's. It is true that the transfer to C Ltd would broadly constitute an "effective security" in A Ltd's winding up; but it is an effective security *because* it is not actually subject to the winding up.[74]

8-32. The issue will usually not be so apparent where the charge ranks behind the functional security. Even if B Bank's charge cannot attach to the property, C Ltd will be compelled to retransfer the property or hand over surplus proceeds to A Ltd if the debt due to C Ltd is satisfied. This will enable B Bank to claim its priority status via a liquidator, receiver or administrator of A Ltd.

8-33. There would, however, (once again) be a problem if C Ltd became insolvent. A Ltd would ordinarily only have a personal right against C Ltd, which would not enable B Bank's charge to have a ranking priority over creditors of C Ltd, including D Bank. It is even more problematic where B Bank's charge ranks ahead of C Ltd's "fixed security". Without attachment to the property, it is not obvious as to how this relative ranking could be given effect, whether or not C Ltd became insolvent. A further difficulty with C Ltd owning the property is that it has the power to sell and

[72] 1984 SC 1.
[73] See Companies Act 1985 s 486(1), and Insolvency Act 1986 s 70(1).
[74] In German legal terminology, this would be an *Aussonderungsrecht*: see paras 9-33 and 9-60 below.

transfer the property to another, and it seems even more doubtful that B Bank's charge could be enforced against that transferee or its singular successors.[75]

8-34. Professor Gow, writing a few years after the floating charge's introduction, recognises some of the difficulties involving the relationship between the floating charge and transfer of corporeal moveables for security purposes. After correctly noting that pledging a truck after the grant and registration of a floating charge, with negative pledge, would mean the charge would rank ahead, he queries what the position would be if the company instead sold the truck to a buyer who then hired it back to the company (with the company having a re-purchase option).[76] This type of "sale and leaseback" transaction is a relatively common form of functional security over corporeal moveables. Gow states that if the sale is *bona fide* then ownership would be transferred to the buyer.[77] Consequently, he asks whether the buyer would be "compelled to cede" the truck (if not already sold to another party) if the company entered winding up.

8-35. Gow suggests that if the legislation (in his case the Companies (Floating Charges) (Scotland) Act 1961) is to be read literally, it seems as if the buyer must give the truck over to the liquidator.[78] Gow is presumably searching here for a means by which the chargeholder can obtain its ranking priority if the sale and leaseback transaction is recognised as a fixed security. Yet Gow expresses doubt about this particular interpretation. He refers to what was then the definition of "fixed security" as including a security "created by way of an *ex facie* absolute disposition or assignation qualified by a back letter" and submits that this is "a misunderstanding of what the general law is, at least in respect of corporeal moveables, to which it may be that the definition does not apply".[79] And even if the definition was intended to apply to corporeal moveables, "if there is an absolute conveyance of the *dominium* the creditor has a security in the popular sense that he need not yield the property to the general creditor, but his right is as owner, and not as a charge or burden on the *dominium* of the debtor".[80]

8-36. In fact, the terms "disposition" and "assignation" in the definition of "fixed security" in the Companies (Floating Charges) (Scotland) Act 1961 should be read in the narrow technical sense applicable to heritable and incorporeal property rather

[75] Especially since these parties are not being granted "fixed securities" by the chargor. The floating charge would seemingly be unsuccessful in any competition with fixed security rights granted by a transferee or its singular successors, as a negative pledge accompanying the relevant floating charge will only affect security rights which the *chargor* has granted (see paras 2-29 ff above for details).
[76] Gow, *Mercantile Law* 282. The transaction would likely fall within the ambit of s 62(4) of the Sale of Goods Act 1979 (formerly s 61(4) of the Sale of Goods Act 1893) and thereby require delivery to transfer title. In practice, artificial and transient means are used to fulfil the delivery requirement: see J Hamilton et al, *Business Finance and Security over Moveable Property* (Scottish Executive Central Research Unit, 2002) paras 3.130 f. For discussion of what is required for valid delivery, see eg C Anderson, *Possession of Corporeal Moveables* (2015) paras 5-06 ff.
[77] Gow, *Mercantile Law* 282.
[78] Gow, *Mercantile Law* 282.
[79] Gow, *Mercantile Law* 282.
[80] Gow, *Mercantile Law* 282.

than in a wider sense also encompassing corporeal moveable property.[81] But there is still the possibility that the general part of the definition of "fixed security", in past and present legislation, extends to the transfer of ownership of corporeal moveables for security purposes, especially since it has been so accepted for the assignation in security of incorporeal moveables.[82]

8-37. Gow, however, seems to recognise difficulties in a floating charge defeating a competing "security" right if the property does not belong to the chargor. This stems from the apparent absence of attachment and is a potentially insurmountable problem for functional security rights where ownership is transferred. B Bank's floating charge (in figure 2, after para 8-29) will, however, attach to any sums received in return for the property, as well as to personal rights of retransfer held by A Ltd and any subordinate real rights A Ltd may acquire in the property.[83]

8-38. The ratio from *Sharp* does not assist B Bank's charge to attach to transferred property, unless a full-equitable approach is adopted.[84] (A limited-ownership attachment approach would require A Ltd to own the property as well as having eg "beneficial interest".) The numerous problems with such a full-equitable approach include the questions of what precisely is attached (if not ownership) and how enforcement would take place if the property is beyond the scope of the enforcement mechanisms of liquidation or equivalent.

8-39. As implied above, the definition of "fixed security" (past and present) should not be considered to extend to the transfer of ownership of corporeal moveables as security or to functional securities more generally. Even if functional securities are recognised as fixed securities, a charge granted by the transferor could seemingly not attach and, if it could, there is no identifiable means of enforcement against such property.

8-40. It may be that functional securities over corporeal moveables are not "fixed securities" at all due to the existence of the subordinate real right of pledge, which is the fixed security generally applicable. This may distinguish corporeal moveables from those property-types for which there is no subordinate real right in security. But this seems an arbitrary way of determining the meaning of "fixed security", even if it reaches the appropriate result for corporeal moveables. It also fails to tackle some of the inherent difficulties with such an approach, particularly for incorporeal property.[85]

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[81] McBryde, *Contract* para 12-20 notes within earlier sources a "perplexing tendency to refer to assignation of corporeal moveables". See also eg Goudy, *Bankruptcy* 551, who contrasts the proprietary effect of pledge with the "assignation" of moveables in security; and Stewart, *Diligence* 151, 154 and 157, who refers to the "assignation" of corporeal moveables.

[82] *Forth & Clyde Construction Co Ltd v Trinity Timber & Plywood Co Ltd* 1984 SC 1.

[83] If the position regarding (non-)attachment to the transferred property were otherwise, then B Bank's floating charge could apparently attach to: (i) the property transferred; (ii) the money received for the property; (iii) any personal right the company has for the return of the property; and (iv) any rights created in the property, such as lien. This would be illogical.

[84] For further details about the approaches on this issue, see paras 4-41 ff above.

[85] This will be addressed further in the next chapter.

(3) Retention of title

(a) General

8-41. The previous section examined the transfer of ownership as security. By contrast, this section deals with another functional security, the retention (reservation) of title (ownership) of corporeal moveable property by a seller. It is often used to secure payment of the price for a sale or to secure all sums due by a buyer to a seller. The validity of retention of title is long-established at common law in Scotland and is also allowed by the Sale of Goods Act 1979.[86] In *Armour v Thyssen Edelstahlwerke AG*[87] it was held that retention of title for all sums due by the debtor to the creditor is valid.

8-42. In the scenario represented in the diagram below, A Ltd is using its ownership of goods to secure the fulfilment of C Ltd's obligations. As A Ltd retains ownership, C Ltd will not have title to transfer to others. By retaining title, A Ltd also protects itself in the event of C Ltd's insolvency.[88] Rather than simply being an unsecured creditor, A Ltd would have the ultimate priority, as the property would not form part of C Ltd's insolvent estate.

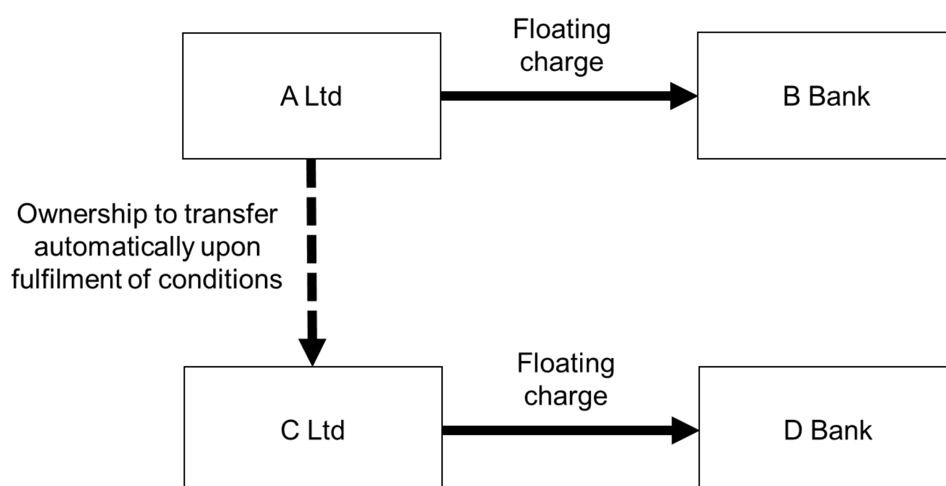

Figure 3

[86] See Stair I, 14, 4; Carey Miller, *Corporeal Moveables* paras 12.02 ff; D L Carey Miller et al, "National Report on the Transfer of Movables in Scotland", in W Faber and B Lurger (eds), *National Reports on the Transfer of Movables in Europe* vol 2 (2009) paras 15.2 ff. As regards the Sale of Goods Act 1979, see ss 17 ff, and especially s 19(1). Problems regarding retention of title and s 62(4) of the Sale of Goods Act 1979 might arise but in the case of *Armour v Thyssen Edelstahlwerke AG* 1990 SLT 891, their applicability was rejected in the circumstances of the case.
[87] 1990 SLT 891.
[88] See eg McKenzie Skene, *Insolvency Law in Scotland* (1999). For an illustration of this, see S Wheeler, *Reservation of Title Clauses: Impact and Implications* (1991) 19.

8-43. If A Ltd reserves title when selling property to C Ltd then B Bank's charge can apparently attach to the property, as well as to A Ltd's personal rights against C Ltd. D Bank's charge can attach to C Ltd's right to obtain ownership, which is conditional upon fulfilment of the agreed conditions.[89] Thus, it seems that where title is retained this will limit the corporeal moveable property secured by D Bank's charge.[90] Once the conditions are satisfied, however, the property will automatically transfer to C Ltd (unless in the meantime A Ltd has sold the property to another). Upon A Ltd losing ownership, B Bank's charge can no longer attach to the property, but the transfer to C Ltd will enable D Bank's charge to do so. As stated above, even if *Sharp* applies to corporeal moveables, it cannot, surely, be said that A Ltd has no "beneficial interest": on the contrary, the parties' very agreement indicates that A Ltd wishes to preserve an interest in the property.

8-44. It should be noted that, despite A Ltd's retention of title, if C Ltd is in possession of the goods it can transfer them by sale (or pledge them) to a good-faith acquirer (or pledgee) who does not have notice of A Ltd's right in the property. Such a transaction has effect as if C Ltd was possessing the property as A Ltd's mercantile agent.[91] B Bank's charge could therefore no longer attach to the property if another party acquired ownership in this way, but could attach to any claim held by A Ltd against C Ltd.[92]

(b) Exceptions?

8-45. Contrary to the above, Professor Wilson suggests that (at least) some retention of title transactions cause B Bank's charge to become unattachable to the relevant property:

> Goods which are on conditional sale or hire-purchase and which were still in the company's property but which are in the possession of the acquirer are not, it is

[89] D Bank's charge could also attach to any other personal rights C Ltd has against A Ltd.

[90] Indeed, it has been stated that: "the comprehensive nature of the floating charge … caused suppliers of goods to resort increasingly to a clause of reservation of title": R B Jack, "The Coming of the Floating Charge to Scotland: An Account and an Assessment", in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987) 42. And see Wheeler, *Reservation of Title Clauses* 19. At 37, Wheeler notes that parties reserving title under English law sometimes create a floating charge accidentally, which is rendered ineffective by the lack of registration. L Gullifer, "'Sales' on Retention of Title Terms: is the English Law Analysis Broken?" (2017) 133 LQR 245, at 264 ff has also suggested that if a retention of title clause is viewed functionally, it can be recharacterised as a floating charge in English law. In Scots law there is no fall-back common law floating charge and retention of title cannot be recharacterised as such a charge.

[91] Sale of Goods Act 1979 s 25(1). There is an equivalent provision (s 24) where ownership has transferred but the seller remains in possession. For discussion of these sections, see Reid, *Property* (Gamble) paras 681 f. Section 25 does not apply to buyers under "conditional sale agreement[s]" (s 25(2)), which, in this context, are limited to consumer credit agreements in terms of the Consumer Credit Act 1974. See also Hire-Purchase Act 1964 s 27(3).

[92] If, instead, the property was pledged by C Ltd and the pledgee was in good faith, the pledge of A Ltd's property would be valid and the floating charge could attach. Given that C Ltd would be deemed to be A Ltd's mercantile agent in this context, a negative pledge may enable B Bank's floating charge to rank ahead of the pledge. However, the matter is not free from doubt.

> thought, affected by the attachment of the charge. The floating charge creditor should not be in this respect in a better position than a liquidator; the acquirer has a right of retention over the goods which, being a security arising by operation of law, prevails over the floating charge.[93]

8-46. There are contradictory ideas here: Wilson implies that the floating charge does not attach, yet argues that the "acquirer's" right ranks ahead of the floating charge, which presupposes attachment. And why should a chargeholder not be "in a better position than a liquidator"? It is true that a chargeholder relies upon a liquidator (or equivalent) to enforce the charge but the attachment effect gives the chargeholder a stronger priority right than the liquidator and unsecured creditors. Nevertheless, Wilson raises an interesting wider question; how could a liquidator or equivalent obtain control of property in the possession of a party such as a hire-purchaser[94] to enable realisation and distribution to a chargeholder?

8-47. A liquidator (or receiver or administrator) would have the ability to sell the property, even if it was possessed by a third party, but that party's possession might limit the property's value. As regards possession, a liquidator is under a duty to "take into his custody or under his control" all of the property "to which the company is or appears to be entitled".[95] Also, the court may require any person who has in his possession or control any property "to which the company appears to be entitled" to deliver that property to the liquidator.[96] It is not wholly clear whether "entitled" excludes property that another party has a valid right to possess, such as a hire-purchaser. But if this were the case, it would be contrary to the general ambit of liquidation, which enables the liquidator to control and realise all of the company's property, subject only to real rights. The view must therefore be dismissed. In addition, a hire-purchaser's possession depends upon a contractual agreement with the owner. Yet, as Wilson notes, the liquidator is able to adopt or abandon contracts made by the company.[97] Administrators and receivers can also decide whether to decline performance of a pre-existing contract and, if they do, the company will be in breach of contract.[98]

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[93] Wilson, *Debt* para 9.18.
[94] For a highly critical view of hire-purchase in Scots law, see Gow, *Mercantile Law* 249 ff.
[95] Insolvency Act 1986 s 144(1). See also Insolvency (Scotland) (Receivership and Winding up) Rules 2018, SSI 2018/347, r 5.36(1)(a)(ii), which requires the liquidator "as soon as reasonably practicable after the liquidator's appointment" to "take possession of (i) the whole assets of the company; and (ii) any property, books, papers or records in the possession or control of the company or to which the company appears to be entitled".
[96] Insolvency Act 1986 s 234(2); see also s 237.
[97] Wilson, *Debt* para 25.7. See also R G Anderson, "Corporate Insolvency and Dissolution", in I G MacNeil (ed), *Scots Commercial Law* (2014) paras 14.72 ff, noting that adoption only applies to liabilities. "Abandonment" could be more accurately termed non-adoption, as the liabilities still remain with the company; they are simply not adopted by the liquidator.
[98] It is not the practice of the Scottish courts to order specific implement to compel a liquidator, administrator or receiver to perform a pre-existing contract of the company: see eg *MacLeod v Alexander Sutherland Ltd* 1977 SLT (Notes) 44 (receivership). For discussion of when administrators (as well as liquidators and receivers) are entitled to refuse to perform a contract, see eg *Joint Administrators of Rangers Football Club Plc, Noters* [2012] CSOH 55, 2012 SLT 599 at paras 46 ff per Lord Hodge. Lord Hodge expresses doubt regarding the validity of an administrator repudiating a contract where the company is not actually insolvent (para 52).

8-48. If a contract is abandoned by the liquidator, the other party can claim damages for breach as an ordinary unsecured creditor in the liquidation (or other process).[99] This remedy would apply to a hire-purchaser dispossessed by a liquidator following abandonment of a hire-purchase contract. Furthermore, there may be particular contractual provisions which would allow the company, and potentially the liquidator (or equivalent), on the company's behalf, to terminate the hire-purchase or conditional sale contract.[100]

8-49. In case of any doubt regarding his powers in relation to the property, the liquidator could also apply to the court to have all or any part of the company's property vested in him.[101] If he did so, he could use proprietary remedies to recover the property, and the hire-purchaser's rights against the company would be of minimal value. The vesting of the property in the liquidator would also stop the hire-purchaser from subsequently acquiring ownership.

8-50. A receiver, meanwhile, has the express power to "take possession of, collect and get in the property from the company or a liquidator thereof or any other person, and for that purpose, to take such proceedings as may seem to him expedient", which would seemingly permit him to obtain possession from the hire-purchaser.[102] There is an almost identical provision for administration.[103] A court can also order other parties to transfer possession to the administrator or receiver.[104]

8-51. Of course, the practical problems and cost involved in recovering possession, in comparison to the value of the property, may dissuade a liquidator, receiver or administrator from trying to do so, or it might cause such a party to seek a compromise with a hire-purchaser.[105] A party dispossessed against its wishes by a liquidator, receiver or administrator would almost certainly have a claim for breach of contract but would only be an unsecured creditor in the insolvency of the party from whom they obtained the property.

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[99] See *Asphaltic Limestone Concrete Co Ltd v Glasgow Corp* 1907 SC 463; *Clyde Marine Insurance Co v Renwick* 1924 SC 113; *Crown Estate Commissioners v Liquidators of Highland Engineering Ltd* 1975 SLT 58; *Joint Administrators of Rangers Football Club Plc, Noters* [2012] CSOH 55, 2012 SLT 599 at paras 46 ff per Lord Hodge; *Joint Liquidators of Scottish Coal Co Ltd v Scottish Environment Protection Agency* [2013] CSIH 108, 2014 SC 372; McKenzie Skene, "Corporate Insolvency" para 306. Also see para 6-42 above.

[100] Where the Consumer Credit Act 1974 s 98 applies, the creditor or owner must give not less than seven days' notice of termination to the debtor or hirer, where the latter is not in default. There is also a statutory provision (Insolvency Act 1986 s 186(1)) which allows the court to rescind contracts between the company and another party on such terms as it thinks fit, but this is only available upon the application of that other party.

[101] Insolvency Act 1986 s 145(1).

[102] Insolvency Act 1986 Sch 2 para 1. See also *Palmer's Company Law* para 14.215.1. A receiver could be dissuaded from this by the possibility of incurring personal liability; however, it is difficult to see on what basis such liability might arise.

[103] Insolvency Act 1986 Sch 1 para 1.

[104] Insolvency Act 1986 s 234(1), (2).

[105] Liquidators have powers to compromise (Insolvency Act 1986 Sch 4 para 2 and 3(b)), as do administrators (Sch 1 para 18), and receivers (Sch 2 para 16).

8-52. Wilson himself notes that the ownership of a hire-purchase item does not transfer to the hire-purchaser until final payment is made.[106] This means the property would not pass to that party's trustee in sequestration, if sequestration occurred at an earlier point.[107] By extension, such property would also not fall within a corporate hire-purchaser's liquidation, receivership or administration.[108] With reference to figure 3 (at para 8-42 above), if the property is not considered part of C Ltd's estate or property upon its insolvency, but would instead fall within A Ltd's estate, it seems illogical for it not to be attachable by B Bank's charge.

8-53. Another issue to consider is what the outcome would be if the relevant condition for transfer of a corporeal moveable is satisfied after the attachment of the charge. For example, C Ltd makes the final payment necessary for transfer *following* the commencement of A Ltd's liquidation, receivership or administration, and after B Bank's charge has attached. Wilson suggests that a trustee in sequestration cannot prevent a hire-purchaser obtaining ownership of the goods, and this is also Gow's position.[109] This would apply all the more to a liquidator, receiver or administrator due to the absence of automatic vesting in those parties. Although the chargeholder would have been deemed to hold a fixed security over the property, the valid transfer of that property would seemingly render the charge unenforceable against it. The result would apparently be the same where a possessor obtains ownership by original acquisition, such as accession;[110] however, this may give rise to a claim for breach of contract against that possessor.

8-54. Fundamentally, a hire-purchaser or other party seeking special protection in the liquidation, receivership or administration of the owner of property must have a basis beyond possession and personal rights. This could be by virtue of the acquisition of ownership, or by a subordinate real right. As regards the latter, perhaps Wilson's reference to a conditional purchaser or hire-purchaser having a "right of retention" (see para 8-45 above) refers to a real right of lien.[111] Indeed, Wilson writes elsewhere that: "A right of retention or special lien arises wherever property comes into the possession of someone other than the proprietor under a contract which creates rights *hinc inde*".[112] Wilson states that this right is based upon mutuality of obligations.

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[106] Wilson, *Debt* para 2.6.
[107] *McLaren's Tr v Argylls Ltd* 1915 2 SLT 241.
[108] However, see below for special rules relating to administration.
[109] Wilson, *Debt* para 21.7; J J Gow, *The Law of Hire-Purchase in Scotland*, 2nd edn (1968) 223.
[110] See eg R B Wood, "Leasing and Hire of Moveables", in *Stair Memorial Encyclopaedia*, Reissue (2001) para 81, who notes that leased property will not usually be attached by a floating charge, but will be if it is affixed to heritable property covered by the charge.
[111] See eg A J Sim, "Rights in Security over Moveables", in *Stair Memorial Encyclopaedia* vol 20 (1992) para 66, where it is noted, with reference to "retention" and "lien", that "[a] distinction in meaning between the two terms is not always maintained". As Steven, *Pledge and Lien* para 14.16, states, retention (in the property sense) and lien can be distinguished as the former consists of the creditor retaining ownership, whereas lien involves a creditor acquiring a subordinate real right based on possession (see also para 9.03). Cf Gloag and Irvine, *Rights in Security* ch 10.
[112] Wilson, *Debt* para 7.8. And see: Bell, *Principles* § 1419; *Moore's Universal Carving Machine Co Ltd v Austin* (1896) 4 SLT 38, where a right of "implied lien" enabled the defender to maintain

8-55. As will be seen below (at paras 8-58 ff), a lien would constitute a fixed security arising by operation of law, whereas a contractual right of retention would not. "Retention" based on ownership is not possible as the hire-purchaser is not owner. A lien can seemingly be acquired over property on hire-purchase, if the owner gives authority for the hire-purchaser to, for example, have repairs carried out and thereby subject the property to a lien.[113] However, this lien would be a right held by the repairing third party and it is difficult to see how the *hire-purchaser* can acquire a lien by virtue of the hire-purchase contract alone. Unlike a lienholder, the hire-purchaser can use the property. More significantly, what are the mutual obligations upon which a lien right would be based? This is a major obstacle although, as Professor Steven notes, there are cases in which a special lien for damages has been accepted.[114] Such an outcome could have relevance to a hire-purchase situation; however, a claim for damages due to dispossession may only arise after the dispossession has taken place, in which case the possibility of a lien will have been lost. Yet perhaps a damages claim may result from *any* interference with a hire-purchaser's "quiet possession",[115] even if this occurs prior to formal dispossession. If so, a hire-purchaser would have a special lien, and ranking rules would determine the lien's priority position against an attached floating charge.

8-56. Possession itself is sometimes referred to as a real right, as it "confers the right not to be dispossessed except by consent or by the order of a court".[116] Nonetheless, the provisions for hire-purchase and conditional sale agreements, whereby a party may not recover goods without a court order if the debtor (who is in breach of the agreement) has paid one-third or more of the price, are of limited significance.[117] This is because, if the statutory requirement were to be contravened, the result would simply be for the agreement to be terminated and the debtor released from all liability under it, with an entitlement to recover all sums already paid to the creditor.[118] But this would apparently mean that the debtor could only claim as an

possession despite an official receiver (of an English company) suing for delivery; and *Paton's Trs v Finlayson* 1923 SC 872, where a statutory lien and common law lien enabled creditors to keep possession against the debtor's trustee in sequestration until sums due were paid.

[113] See Steven, *Pledge and Lien* paras 13-37 ff. The owner's authority is apparently necessary. See also J J Gow, *The Law of Hire-Purchase in Scotland*, 2nd edn (1968) 162 ff.

[114] Steven, *Pledge and Lien* paras 16-20 ff and the cases cited there.

[115] There is an implied term in "relevant hire-purchase agreements" (those to which ch 2 of Pt 1 of the Consumer Rights Act 2015 does not apply: Supply of Goods (Implied Terms) Act 1973 s 15(1)) that the hire-purchaser "will enjoy quiet possession of the goods": 1973 Act s 8(1)(b)(ii). If such a term is breached, the hire-purchaser can claim damages (1973 Act s 12A(1)(a)). There is also an equivalent implied term for consumer contracts involving the supply of goods, including hire-purchase agreements, which provides that "the consumer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known": Consumer Rights Act 2015 s 17(2)(c); for relevant consumer remedies (including a damages claim), see s 19(9)-(11).

[116] Reid, *Property* para 5.

[117] Consumer Credit Act 1974 s 90(1). See also s 92(1), which states that "[e]xcept under an order of the court, the creditor or owner shall not be entitled to enter any premises to take possession of goods subject to a regulated hire-purchase agreement, regulated conditional sale agreement or regulated consumer hire agreement".

[118] Consumer Credit Act 1974 s 91.

unsecured creditor in the insolvency of the owner. Under certain circumstances, and in return for some benefit, a hire-purchaser might decide to give up possession voluntarily to a liquidator or equivalent without a court order.[119]

8-57. There are certain contexts in which hire-purchase *is* given special protection, but this requires particular statutory provision. If the hire-purchaser goes into administration, there is a moratorium on taking steps to repossess the goods in the company's possession, without the consent of the administrator or the court.[120] There is also provision for an administrator obtaining the court's consent for disposing of the goods.[121] Proceeds received are to be used to discharge sums due under the hire-purchase agreement. In these contexts, "hire-purchase agreement" includes a conditional sale agreement as well as a retention of title agreement.[122] There are also equivalent provisions where directors propose a voluntary arrangement.[123] But all of these special rules apply where it is the hire-purchaser, not the owner, who enters into a voluntary arrangement or administration.

(4) Tacit security

8-58. Tacit security is a form of security that arises automatically in certain circumstances; it is not voluntarily created by the debtor. Along with voluntary security and judicial security (diligence), it can be considered one of the three main types of security in Scots law.[124] There are a number of examples of such security rights, including all types of lien (statutory and at common law) and the landlord's hypothec. These are principally security rights over corporeal moveable property and it is therefore appropriate to treat them here.[125] It seems as if each form of tacit security can be characterised as a real right in security.[126] Therefore ownership remains with the debtor. As a result, B Bank's floating charge can attach to A Ltd's

[119] See Consumer Credit Act 1974 s 173(3).
[120] Insolvency Act 1986 Sch B1 para 43(3).
[121] Insolvency Act 1986 Sch B1 paras 72 and 114.
[122] Insolvency Act 1986 Sch B1 para 111(1). As stated in s 436(1), the terms "conditional sale agreement" and "hire-purchase agreement" have the same meanings as under the Consumer Credit Act 1974.
[123] See Insolvency Act 1986 Sch A1 para 1 (for the definition), para 12(1)(g) (for the moratorium), and paras 20 ff (for disposal rights).
[124] According to one taxonomical structure. Bell, *Commentaries* II, 10, uses this three-fold classification for security over moveable property but refers to tacit securities as "securities resulting from possession". And see Gretton, "The Concept of Security" 140 f; cf G L Gretton and A J M Steven, *Property, Trusts and Succession*, 3rd edn (2017) paras 21-32 and 20-57, who categorise rights in security as either voluntary or involuntary and then divide the latter into: tacit securities, judicial securities, and charging orders (the last of these being "securities which can be constituted by public bodies over the heritable property of a person who owes them money").
[125] Yet it also appears possible to have a lien over corporeal heritable property: see Steven, *Pledge and Lien* paras 12-02 ff.
[126] Even if some are not truly real rights in security, they are non-divestitive. See para 2-28 above for more details on the landlord's hypothec. For discussion as to whether lien is a real right, see Steven, *Pledge and Lien* ch 14.

property (where A Ltd is the chargor) even if another party has a tacit security over that property.

8-59. Alternatively, if A Ltd held the tacit security, B Bank's charge could attach to that security right. The charge would attach as if it were a fixed security, which, according to the prevailing approach, would be an assignation in security, as the property is incorporeal moveable property. Therefore, the right of lien will be deemed to have transferred to the first-ranking chargeholder, even though that party would not hold the possession necessary to constitute a lien. Again, however, a *sui generis* approach to attachment's effect (see paras 5-18 ff above) may be more appropriate in this context. In any event, it is important to note that a floating charge seems to be effective against non-transferable property, such as a lien right.[127] This is because, in reality, that property remains with the lienholder, and a sale of the corporeal moveable that is subject to the lien would be by a party acting as a representative of the lienholder (ie a liquidator, receiver or administrator). Proceeds could then be paid to the chargeholder.

8-60. Tacit securities are fixed securities and arise by operation of law.[128] Where a floating charge is in competition with a tacit security, the ranking rules specify which security prevails. The Companies Act 1985 s 464(2) provides that: "Where all or any part of the property of a company is subject both to a floating charge and to a fixed security arising by operation of law, the fixed security has priority over the floating charge." Unlike for voluntary fixed securities, this default ranking rule cannot be displaced by a negative pledge in a floating charge, as s 464(1) (which allows for a negative pledge) is subject to s 464(2).[129] A tacit security is also not created by voluntary grant and so could not be prohibited by a negative pledge.

8-61. In *Cumbernauld Development Corporation v Mustone*,[130] it was held that a landlord's hypothec was not a fixed security.[131] The sheriff seemingly adopted the defenders' submission that a landlord's hypothec is "a charge having the nature of a floating charge". The pursuer had already conceded that the hypothec was not a fixed security "converted into a real right" before the receiver's appointment.[132] The concession and the judgment were clearly wrong, and this was recognised in *Grampian Regional Council v Drill Stem (Inspection Services) Ltd*.[133] The sheriff in that case cited a number of writers who considered a landlord's hypothec to be a fixed security arising by operation of law and many of whom criticised the decision

[127] See Steven, *Pledge and Lien* para 14-17 regarding the non-transferability of liens. For further details of the effectiveness of the floating charge against non-transferable property, see paras 9-09 ff below.
[128] Indeed, the terms "tacit", "legal" and "by operation of law" are interchangeable in this context: see Gretton, "The Concept of Security" 141.
[129] It is, however, unclear if a tacit security created after the charge's attachment would rank ahead of the charge.
[130] 1983 SLT (Sh Ct) 55.
[131] Under the Companies (Floating Charges and Receivers) (Scotland) Act 1972 s 31(1).
[132] 1983 SLT (Sh Ct) 55 at 57.
[133] 1994 SCLR 36.

in *Cumbernauld Development*.[134] He explained that the landlord's hypothec is a real right in security, and a fixed security arising by operation of law,[135] which sequestration for rent "merely seeks to enforce".[136] Despite the subsequent abolition of sequestration for rent, the landlord's hypothec retains its ranking preference over a floating charge[137] and would receive priority over a chargeholder acting through a liquidator, receiver or administrator.

8-62. The recognition of the landlord's hypothec as a fixed security arising by operation of law corresponds to what was intended when the floating charge and the relevant statutory wording were first introduced. In the report of the Law Reform Committee for Scotland it was proposed that, if any assets were subject to a floating charge and also a landlord's hypothec or a fixed security, then the hypothec or fixed security should, by default, have priority.[138] At this stage, there was no reference to other tacit securities. The Companies (Floating Charges) (Scotland) Act 1961 retained the general rule specified in the report but modified it. The reference to landlord's hypothec was replaced with the wider term "fixed security arising by operation of law".[139] In the Scottish Standing Committee, Forbes Hendry specified that the term principally meant the landlord's hypothec but also included the solicitor's hypothec and the repairer's lien.[140] Viscount Colville, in the House of Lords, similarly referred to the landlord's hypothec but also mentioned maritime hypothecs (liens) as falling within the term's scope.[141] The term was therefore wide-ranging and inclusive of various tacit security rights.

8-63. In addition to those particular security rights mentioned, the term also seems to extend to other forms of lien. All forms of lien are securities that arise by operation of law[142] and are subordinate real rights.[143] Furthermore, in Parliament no distinction was drawn between general liens and special liens, and the statutory term

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[134] Eg G L Gretton, "Receivership and Sequestration for Rent" 1983 SLT (News) 277; J M Halliday, *Conveyancing Law and Practice in Scotland*, 1st edn, vol 1 (1985) para 2-114 and vol 3 (1987) para 41-24; Wilson, *Debt* para 9.11 n 68.
[135] Under Companies Act 1985 s 486(1), and Insolvency Act 1986 s 70(1), as it is treated as an effective security in the winding up of a company.
[136] 1994 SCLR 36 at 39, where he cited cases in support.
[137] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(1), (2).
[138] Law Reform Committee for Scotland, *Eighth Report* Appendix II, para 4. The charge would, however, have priority over the fixed security if there was a negative pledge and the fixed security holder had actual notice of that prohibition. (Registration in the charges register was to constitute actual notice (para 5).) This rule was not to apply to the landlord's hypothec.
[139] Companies (Floating Charges) (Scotland) Act 1961 s 5(1).
[140] Parliamentary Debates, House of Commons, Official Report, Scottish Standing Committee, 20 June 1961, cols 24 f. In the past, the solicitor's lien (a separate security right) was commonly referred to as the solicitor's hypothec: see Steven, *Pledge and Lien* para 14-09.
[141] HL Deb, 5 July 1961, vol 232, col 1439.
[142] However, there can be situations in which a lien or landlord's hypothec is purportedly granted expressly. In the case of lien, it may then be difficult to distinguish the security from one of pledge: see Steven, *Pledge and Lien* paras 18-02 ff. For the landlord's hypothec, it seems unlikely that express provision would negate its status as a tacit security but the matter is not entirely free from doubt. I am grateful to Andrew Sweeney, who is carrying out research in this area, for raising this point with me.
[143] On the last point, see the reasons given by Steven, *Pledge and Lien* ch 14.

apparently encompasses both types.[144] Statutory liens, such as the lien of a seller in possession, which arises "by implication of law" under s 39(1)(a) of the Sale of Goods Act 1979, are most probably included as well.[145] All of this, in combination with the legislative ranking provisions for (voluntary) fixed securities and (effectually executed) diligence, indicates the intended comprehensive nature of the ranking provisions for floating charges, at least as regards subordinate real rights in security.

[144] For details of special lien, see Steven, *Pledge and Lien* ch 16. And see ch 17 for details of general lien. It seems to generally be assumed that the term "fixed security arising by operation of law" includes all liens: see eg Wilson, *Debt* para 9.10, who simply states that lien falls within the meaning.
[145] See Sale of Goods Act 1979 s 41 for the lien's scope. This lien may also follow on from the seller re-acquiring possession following the right of stoppage in transit: ss 39(1)(b) and 44 ff.

9 Incorporeal Property

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A. INTRODUCTION

9-01. This chapter examines the relationship between floating charges and incorporeal property. It considers rights which are transferred by assignation and for which assignation in security is currently the only form of voluntary security available (excluding floating charges). The chapter therefore covers personal rights, heritable and moveable.[1] The discussion and conclusions regarding the transfer of incorporeal property and the floating charge also apply to many real rights, but not to the ownership of corporeal moveable and corporeal heritable property. In addition, the material relating to assignation in security excludes standard securities and other

[1] Eg contractual rights relating to land, such as claims arising from missives, as well as contractual and other claims unrelated to land, like book debts. Paisley, *Land Law* para 1.22 suggests that for incorporeal property it is often more appropriate to distinguish between personal and real rights rather than incorporeal heritable and incorporeal moveable property.

real rights in land requiring registration, as security over these requires to be in the form of a standard security.[2]

9-02. The main focus of the chapter is thus those personal rights for which transfer, absolutely or in security, is completed by intimation of the assignation to the (claim) debtor.[3] The question of whether personal rights can be "owned" or made subject to subordinate "real rights" is controversial and complex.[4] For the sake of consistency with the standard approach in Scots law, references will be made to the "ownership" of incorporeal property, and to other "real rights" in such property.

9-03. The present chapter specifically considers when incorporeal property becomes attachable and unattachable by a floating charge at a time when it is being transferred by assignation. As well as examining the general legal position, it is necessary to consider the implications of *Sharp v Thomson*[5] for incorporeal property. It will then be shown that there is a significant problem involving the relationship between the floating charge and property assigned in security, within the context of the attachment and ranking of the floating charge. Finally, potential solutions to this problem will be considered.

B. ATTACHMENT AND ASSIGNATION

(1) General

(a) Attachment: the standard case

9-04. Incorporeal property falls within the general scheme of property law in Scotland.[6] The term "property" in the floating charges legislation is all-

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[2] See Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(2), (3), (8)(b). Non-registrable real rights in heritable property, such as short leases, are exceptions but security over these is taken by assignation and possession (which, like intimation, transfers the relevant rights). Much of the discussion in this chapter regarding assignation in security can apply to short leases too. It is possible to have a system with alternative security options of assignation in security *and* a subordinate right in security: see eg the recommendations in SLC, *Report on Moveable Transactions*, especially chs 2 and 5, for a "statutory pledge" being available over property including intellectual property and financial instruments. As far as incorporeal property is concerned, the Scottish Law Commission's recommendations in the *Report* are not as extensive as the proposals under the preceding *Discussion Paper on Moveable Transactions* (Scot Law Com DP No 151, 2011), especially chs 3 and 18-19, where it was suggested that a new security right should be made available over incorporeal property generally including claim rights. For discussion, see A MacPherson, "The Future of Moveable Security in Scots Law? Comments on the Scottish Law Commission's *Report on Moveable Transactions*" 2018 JR 98, 104 f.

[3] Assignations of real rights, where possible, are completed by an alternative to intimation, such as the giving of possession or registration in the Land Register. The assignation of registered property such as shares and patents also requires to be completed by registration in the relevant register.

[4] See, in particular, G L Gretton, "Ownership and its Objects" (2007) 71 Rabels Zeitschrift 802, who answers this in the negative. Cf Reid, *Property* para 16. See also R G Anderson, *Assignation* (2008) para 1-09.

[5] 1997 SC (HL) 66.

[6] Reid, *Property* para 1.

encompassing and there are no provisions that exclude particular property-types. A floating charge may, therefore, be granted over all or part of a company's incorporeal property and the charge, in principle, can attach to such property.

9-05. Anderson, however, suggests that a case can be made for floating charges not attaching to incorporeal moveable property such as money claims.[7] A floating charge attaches "as if" it is the relevant form of "fixed security" for the property in question, and for money claims there is no right in security in the strict sense. The particular security for that property is assignation in security, which is widely considered to be a functional security.[8] Yet it is difficult to accept that such property will not be subject to the charge. Firstly, there is much judicial authority, including the First Division decisions in *Iona Hotels Ltd (In Receivership) v Craig*,[9] *Forth & Clyde Construction Co Ltd v Trinity Timber & Plywood Co Ltd*,[10] and *Lord Advocate v Royal Bank of Scotland*,[11] in which floating charges have been held to attach to incorporeal moveable property. Secondly, in cases such as *Iona Hotels* and *Forth & Clyde*, the definition of "fixed security" has been considered wide enough, and functionalist enough, to enable a floating charge to attach "as if" it is an assignation in security. Alternatively, if the charge was thought to attach as a *sui generis* security effective in a liquidation,[12] the charge would almost certainly attach to incorporeal property. Thirdly, and related to the last point, the fact that the *effect* of attachment may not fit with the nature of security available for incorporeal property more appropriately raises doubts about the currently prevailing statutory hypothesis rather than about whether the property is attached in the first place. The attachment mechanism relies on the general concept of an effective security in the company's liquidation, and the point made by Anderson strengthens the view that the charge attaches as a *sui generis* security. Finally, the original legislation on floating charges was intended to enable the charge to attach to incorporeal property and all other property-types.[13] There is nothing to suggest that this has been departed from in later legislation.

9-06. Incorporeal property is part of a unitary law of property and its transfer is analogous to transfer for other property-types.[14] Consequently, much of what has been written in other chapters of this book about the general attachability and non-attachability of a charge during the transfer process also applies to incorporeal property. Attachment ordinarily depends upon the chargor owning the relevant property. This ought to be the key determinant throughout the transfer process (but see the discussion of *Sharp v Thomson's* possible application at paras 9-13 ff below). For example:

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[7] Anderson, *Assignation* para 7-36.
[8] See paras 9-16 ff below.
[9] 1990 SC 330.
[10] 1984 SC 1.
[11] 1977 SC 155.
[12] As to which see paras 5-12 ff above.
[13] See eg Law Reform Committee for Scotland, *Eighth Report* para 30, preceding the Companies (Floating Charges) (Scotland) Act 1961.
[14] See eg Anderson, *Assignation* para 1-07.

A Ltd grants a floating charge to B Bank. A Ltd is due £50,000 from a customer, X Ltd. As a result of cash flow issues, A Ltd seeks immediate funds from C Ltd (a debt-factoring company). C Ltd had earlier granted a floating charge to D Bank. In return for £40,000, A Ltd assigns the claim against X Ltd to C Ltd.

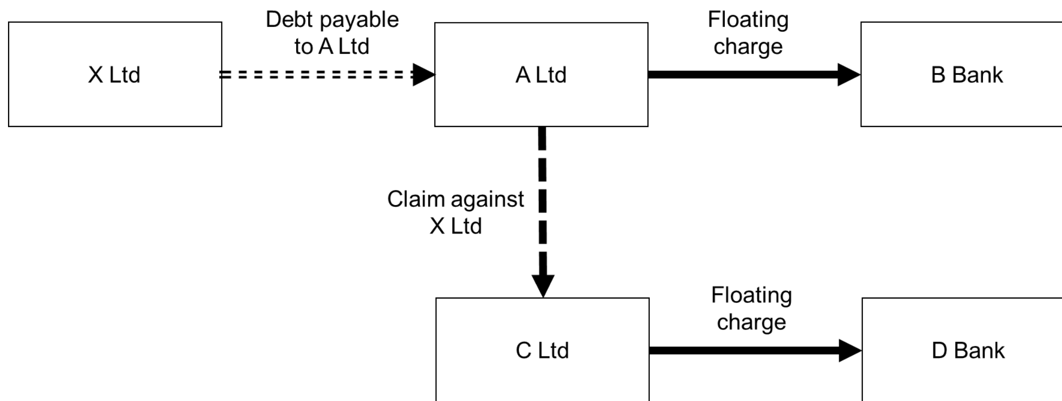

Figure 1

9-07. For as long as the property (ie the claim against X Ltd) belongs to A Ltd, it is potentially attachable by B Bank's charge. After it is transferred to C Ltd, it falls within the ambit of D Bank's charge. Of course, the charges can also attach to any personal rights that the relevant chargor has against the other party involved in the transaction. The claim against X Ltd transfers when a deed of assignation is executed, delivered, and intimated to X Ltd.[15] At the moment of intimation, it leaves A Ltd's patrimony and enters C Ltd's. Meanwhile, the sum paid by C Ltd leaves that party's patrimony and enters A Ltd's patrimony when the payment is made.

9-08. Thus, where an assignation is in competition with a floating charge it is not strictly a ranking question but, rather, an attachment one. If incorporeal property is transferred prior to the charge's attachment, the charge will not attach to it. This means that, for instance, the "circle of priority" involving a floating charge, intimated assignation and arrestment, that allegedly arose from the interpretation of "effectually executed diligence" in *Lord Advocate v Royal Bank of Scotland*,[16] could not occur.[17] The floating charge would not attach to the assigned property and therefore the competition would only be between the arrestment and the

[15] See Anderson, *Assignation* paras 6-01 ff, and the sources cited there. In that chapter and the following one, Anderson discusses the requirements for successful intimation. See also Gloag and Irvine, *Rights in Security* 476 ff.

[16] 1977 SC 155.

[17] For the circle of priority, see A J Sim, "The Receiver and Effectually Executed Diligence" 1984 SLT (News) 25; Wilson, *Debt* para 17.14; S Wortley, "Squaring the Circle: Revisiting the Receiver and 'Effectually Executed Diligence'" 2000 JR 325. For discussion of the current legal position, see A D J MacPherson, "The Circle Squared? Floating Charges and Diligence after *MacMillan v T Leith Developments Ltd*" 2018 JR 230.

assignation.[18] In any event, the later decision in *MacMillan v T Leith Developments Ltd*[19] apparently means that such a "circle" could no longer appear.[20]

(b) Attachment: prohibition of assignation

9-09. Another point to consider at this stage is that there are a number of situations in which personal rights are non-transferable: if they involve *delectus personae*, such as where assignation is prohibited expressly by contract or in statute. Professor Reid notes that, in these instances, the purported transfer would be void.[21] Therefore, if the agreement between A Ltd and X Ltd expressly stated that A Ltd's claim for payment was non-assignable, the attempted transfer to C Ltd would be ineffective.

9-10. A related issue is whether such non-assignability would preclude B Bank's charge from attaching to the property. If the charge attaches as if it is an assignation in security, then there is force in the view that attachment is ineffective. Yet it depends on how far this hypothesis is taken. Clearly there has been no actual assignation, and realisation is dependent upon a party acting as agent of the company in relation to *the company's* property. Unlike in sequestration, there is no automatic vesting effect, equivalent to assignation, for receivership, liquidation or administration, and this further undermines the view that a charge's attachment will be rendered invalid by a prohibition on assignation. Admittedly, a liquidator, receiver or administrator would apparently be unable to realise the claims by selling and transferring them to a third party; however, they could simply wait for a claim debtor to perform to the chargor and then distribute received sums to the chargeholder. There would be no obvious prejudice to the debtor in such circumstances. Even if vesting in a liquidator took place under the Insolvency Act 1986 s 145, the charge could probably still be enforced through the liquidator; Anderson convincingly argues that a *pactum de non cedendo* in the underlying

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[18] The position may be different where the assignation is in security (see paras 9-16 ff below), and certainly would be different if a real security right was available and was granted instead. It should also be noted that an assignation in breach of an arrestment may be ineffective against (i) the arrester alone or (ii) absolutely. However, if there is an absolute assignation in breach of an arrestment, the circle will still not arise: in relation to (i) because the charge will not attach, and in (ii) because the assignee will not enter the ranking contest.

[19] [2017] CSIH 23, 2017 SC 642.

[20] As a bare arrestment will rank ahead of a floating charge as effectually executed diligence. It will, however, be rendered ineffectual if executed within 60 days of the chargor's liquidation: Insolvency Act 1986 s 185(1)(a) applying Bankruptcy (Scotland) Act 2016 s 24(6), (7) with adjustments.

[21] Reid, *Property* para 652. See also *James Scott Ltd v Apollo Engineering Ltd* 2000 SC 228; McBryde, *Contract* paras 12-47 f. For discussion of anti-assignation clauses in the context of the Scottish Law Commission's "Moveable Transactions" project, see SLC, *Report on Moveable Transactions* paras 2.19, 3.14, and 13.2 ff. The Small Business, Enterprise and Employment Act 2015 ss 1 and 2 allow for regulations that would make anti-assignation clauses in certain contracts ineffective. For English law, the Business Contract Terms (Assignment of Receivables) Regulations 2018, SI 2018/1254, reg 2 provides that an anti-assignment clause for receivables will now have no effect (subject to regs 3 and 4).

contract (eg the agreement between A Ltd and X Ltd) “cannot have any effect on involuntary assignations”.[22]

9-11. If the charge attaches as a *sui generis* security, then there is an even weaker argument for the attachment being ineffective for non-assignable property, as there would be no assignation, deemed or otherwise. Whichever view of the charge’s attachment mechanism is adopted, a specific prohibition on charging, or otherwise using the property for security purposes, seems more likely than a prohibition on assignation to render a floating charge unattachable to the property. Such unattachability would seem to be based on the property not being part of the chargor’s “property and undertaking”, as regards floating charges.

(c) Post-attachment assignation

9-12. A further relevant issue, depending upon the effect of attachment, is whether or not it is possible for property to be assigned after attachment takes place. The interpretation in *Forth & Clyde*,[23] that a charge attaches as if it is an assignation in security, seems to mean that an assignation of property completed after the attachment will be ineffective due to the *nemo plus* rule (if *Sharp v Thomson* does not apply); the chargeholder, and not the granting company, would have become the deemed owner of such property. If, however, the charge attaches as a right in security *sui generis*, and there is no deemed transfer, then it would be possible for the property to pass to an assignee after attachment. But, as noted at paras 6-37 ff above, a post-attachment transfer would only be valid if the assignee had the power to obtain ownership without the participation of the cedent.

(2) *Sharp v Thomson*

9-13. As discussed previously, there is uncertainty as to whether the *ratio* from *Sharp* extends to the transfer of incorporeal property. As for corporeal heritable property, there are usually three distinct stages where property is transferred by assignation: contract, delivery of the written deed of assignation, and intimation to the original debtor (or an equivalent). This has led some commentators to argue that for property transferable by assignation, or other three-stage processes, applying *Sharp’s ratio* is inescapable.[24] Certainly, there is some comparability between

[22] Anderson, *Assignation* para 11-42 (albeit that this is mentioned when he is discussing sequestration).
[23] 1984 SC 1 at 10 f per Lord President Emslie.
[24] See para 7-55 above and eg J G Birrell, “Sharp v Thomson: The Impact on Banking and Insolvency Law” 1997 SLT (News) 151 at 152 f; R B Wood, “Special Considerations for Scotland”, in *Salinger on Factoring*, 4th edn by N Ruddy et al (2006) para 7.47. In the most recent edition of *Salinger on Factoring* (5th edn by S Mills et al (2017)), Wood, at para 7.48, also states that a factor would prevail against a receiver even without intimating an assignation.

delivery of a disposition and delivery of an assignation: each gives the recipient the power to become owner of the property by completing the final transfer step.[25]

9-14. Yet in view of the difficulties created by *Sharp*, there is much to be said for taking a tightly confined view of the case's *ratio*. A number of problems arising from applying *Sharp* to assignation are noted by Anderson.[26] He identifies, *inter alia*, the possibility of a verbal assignation, without intimation, causing an assignee to be preferred over a chargeholder, as well as "whimsical" rules of competition for creditors. In addition, there is an apparent inconsistency between the non-attachment of a floating charge granted by the cedent, if payment is made and a deed of assignation is delivered, and the fact that an assignee would not prevail against a liquidator unless intimation had taken place.[27] The absence of automatic vesting for corporate insolvency processes does, however, raise the possibility that an assignee could intimate and thereby obtain the property before realisation by the liquidator or equivalent.[28] On one view, this would also defeat a charge, whether or not *Sharp* is correct. Nevertheless, the tension between non-attachment, based on *Sharp*, and the assignee's minimal entitlement in the cedent's insolvency (in the absence of intimation) is noteworthy, especially since the charge is enforced in liquidation and related processes. Anderson suggests that, under the current law, if an assignation is paid for and the deed has been delivered, the relevant claim will not be subject to the charge, as beneficial interest has passed. However, he states that, with respect to assignees with unintimated assignations in competition with chargeholders, there is "little to support their position in principle".[29] This is certainly true, and raises the question of why *Sharp* should be considered to apply to incorporeal property.

9-15. It might be possible to limit *Sharp* to (corporeal) heritable property on the basis that the decision is anomalous and reflects case law describing the effects of delivery of a disposition for heritable property, and the consequent meaning of the statutory term "property and undertaking" in this context. There is less authority for delivery of an assignation (or verbal assignation) having an equivalent proprietary effect for incorporeal property[30] and, due to the problems emanating from *Sharp*, the case's ambit ought to be circumscribed. The *ratio* should not be extended beyond heritable property unless there is good reason to; and such good reason is absent for incorporeal property. This view is admittedly controversial; but it is irrational to extend the *ratio* of a flawed case to new situations where (i) it does not fit

[25] The Requirements of Writing (Scotland) Act 1995 s 11(3)(a) disapplied any rule of law whereby the assignation of incorporeal moveables required to be in writing. For discussion of this and the seeming inconsistency with the writing requirement for intimation, see Anderson, *Assignation* paras 6-35 n 121, 7-17 and 7-33. However, the Land Registration etc (Scotland) Act 2012 Sch 3 para 18, has repealed s 11 of the 1995 Act. The current position regarding the necessity of writing for assignation is unclear.

[26] Anderson, *Assignation* paras 7-33 ff.

[27] As the assignee would only have a personal right against the company. This would probably be of little value in the company's insolvency.

[28] See eg Wilson, *Debt* para 25.7.

[29] Anderson, *Assignation* para 7-37.

[30] The position where an assignation has been delivered but is unintimated is not, however, entirely straightforward: see Anderson, *Assignation* paras 7-25 ff.

doctrinally, (ii) it raises a plethora of practical problems, and (iii) its policy justifications are questionable and limited in scope.

C. ATTACHMENT AND ASSIGNATION IN SECURITY

(1) Nature of assignation in security

(a) Assignations in security and absolute assignations

9-16. The prevailing view is that an assignation in security has the same effect as an absolute assignation: the cedent is divested and the property transfers to the assignee.[31] The cedent, however, has a personal right, and the assignee a corresponding obligation, for the property to be retrocessed (retransferred) upon the fulfilment of the secured obligation(s). This is not a subordinate right in security but, rather, a security by *fiducia cum creditore*.[32] Apart from the floating charge, it is the only voluntary security available over many types of incorporeal property.[33] It may be added that a floating charge has certain advantages over an assignation in security, including the fact that it can be an effective security over future property where intimation is impossible or impractical.[34]

9-17. The Scottish Law Commission have stated that:

> since an assignation in security is an assignation, the general law of assignation applies … Assignation in security is not a distinct institution from assignation. It is the identical institution. What distinguishes assignation in security from outright assignation is purpose.[35]

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[31] See eg Gretton, "The Concept of Security" 130; A J Sim, "Rights in Security over Moveables", in *Stair Memorial Encyclopaedia*, vol 20 (1992) para 46; Anderson, *Assignation* para 7-36; W M Gloag and R C Henderson, *The Law of Scotland*, 14th edn by H L MacQueen and Lord Eassie (2017) para 36.28; Hardman, *Practical Guide to Granting Corporate Security* para 7-20. See also Wilson, *Debt* para 8.1, who states: "A security over incorporeal moveables is effected by assignation followed by intimation". There is, however, some modern judicial authority that can be interpreted as departing from the prevailing position: *Edinburgh Schools Partnership Ltd v Galliford Try Construction (UK) Ltd* [2017] CSOH 133, 2017 GWD 35-540. See further at paras 9-20 and 9-64 below.
[32] See Anderson, *Assignation* para 7-36, who refers to assignation in security as the converse of retention of title in the sale of corporeal moveables.
[33] See eg *Re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680 at paras 51 and 54 per Lord Hope, who states that the only way a "fixed charge" can be created over book debts in Scots law is by assignation in security of the right to receive payment, followed by intimation to the claim debtor.
[34] For discussion of the difficulties of assigning future property under the current law, see SLC, *Report on Moveable Transactions* paras 5.81 ff. The Commission's proposal to allow for registration in a Register of Assignations as an alternative to intimation would, however, facilitate the assignation of future property for security purposes. Another possible advantage of a floating charge is that it may be an effective security over non-assignable property: see paras 9-09 ff above for discussion.
[35] Scottish Law Commission, *Discussion Paper on Moveable Transactions* (Scot Law Com DP No 151, 2011) para 7.6. Treatments of assignation in security tend to consider various aspects of assignation, supplemented by rules particular to assignation in security: see eg Gloag and Irvine, *Rights in Security* ch 14; A J Sim, "Rights in Security over Moveables", in *Stair Memorial*

9-18. While an absolute assignation is usually intended as a permanent transfer,[36] assignation in security provides security for an obligation (or obligations) and, therefore, it is anticipated that the property will eventually be retrocessed. The retrocession, as itself a form of assignation, will also have to comply with general requirements for that type of transfer, including intimation.[37]

9-19. Even if there is no patrimonial or property distinction between an absolute assignation and an assignation in security, differences in accompanying obligations, particularly the requirement in the latter to retrocess, can lead to varying outcomes.[38] Other relevant obligations include the requirement for an assignee in security to account to the cedent with sums received from a claim debtor after satisfaction of the debt due to the assignee. If this obligation is not expressly stated in the assignation it will be implied, due to the security nature of the transaction.

9-20. There also appears to be a distinction with respect to title to sue. As far as an assignation in security is concerned, it has been held that a cedent retains sufficient interest to have title to sue the claim debtor.[39] This is not the case where there has been an absolute assignation.

9-21. A further difference between absolute assignations and assignations in security, as regards cedent companies, is that the latter require to be registered in the company charges register to be effective against creditors, while the former do not.[40] The registration may have significant implications in certain respects, such as for the application of the offside goals rule.[41] A party dealing with the assignee could become aware of the secured nature of the assignation, and thus the retrocession (reversionary) right, by examining the charges register for the cedent, or the

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Encyclopaedia vol 20 (1992) paras 46 ff. See eg *Campbell's Trs v Whyte* (1884) 11 R 1078 for a competition between an absolute assignation and an assignation in security.

[36] There could, however, be an option for the cedent to repurchase.

[37] See *Microwave Systems (Scotland) Ltd v Electro-Physiological Instruments Ltd* 1971 SC 140; A M Bell, *Lectures on Conveyancing*, 3rd edn (1882) vol 1, 335; J Craigie, *Scottish Law of Conveyancing: Moveable Rights*, 2nd edn (1894) 263; McBryde, *Contract* para 12-104 and n 387. And see *Craig v Edgar* (1674) Mor 838. The Transmission of Moveable Property (Scotland) Act 1862 s 4 includes retrocessions and translations within the term "assignation".

[38] *Compagnie Commerciale Andre SA v Artibell Shipping Co Ltd* 2001 SC 653; McBryde, *Contract* para 12-07. See also R G Anderson and J Biemans, "Reform of Assignation in Security: Lessons from the Netherlands" (2012) 16 EdinLR 25, 28 and n 15.

[39] See eg *Edinburgh Schools Partnership Ltd v Galliford Try Construction (UK) Ltd* [2017] CSOH 133, 2017 GWD 35-540 and the authorities cited in that case. There are certain other aspects of the law of assignation where authorities treat title to sue as a special issue: see eg Anderson, *Assignation* paras 7-21 f regarding intimation.

[40] Companies Act 2006 s 859A(7) includes assignations in security within the term "charge". There is no distinction drawn between assignations expressly in security and those which are *ex facie* absolute; the definition presumably includes both. See A D J MacPherson, "Registration of Company Charges Revisited: New and Familiar Problems" (2019) 23 EdinLR 154.

[41] In addition, failure to register timeously will mean the assignation in security is void against creditors and a liquidator or administrator. However, it will seemingly be valid to obtain payment from a claim debtor. See MacPherson, "Registration of Company Charges Revisited" 172. Cf G L Gretton, "Registration of Company Charges" (2002) 6 EdinLR 146, 168.

assignation deed itself might disclose this.[42] Such information would probably impose a duty of inquiry upon the prospective transferee to determine whether the original assignee remained subject to an obligation not to transfer.[43] Yet the precise extent of the offside goals rule is unclear, including whether it would extend to protect a retrocession right that was still conditional upon the debtor satisfying the secured debt.

(b) Assignations ex facie *absolute and assignations expressly in security*

9-22. Assignations in security may be in one of two general forms: (i) expressly in security; or (ii) *ex facie* absolute qualified by back letter or agreement. The former disclose within the assignation deed that their purpose is one of security, while the latter appear, from the deed, to be (non-security) absolute transfers. The following diagram is a simple illustration of the sub-categorisation of assignation to include assignation in security. Retrocession is an absolute assignation.

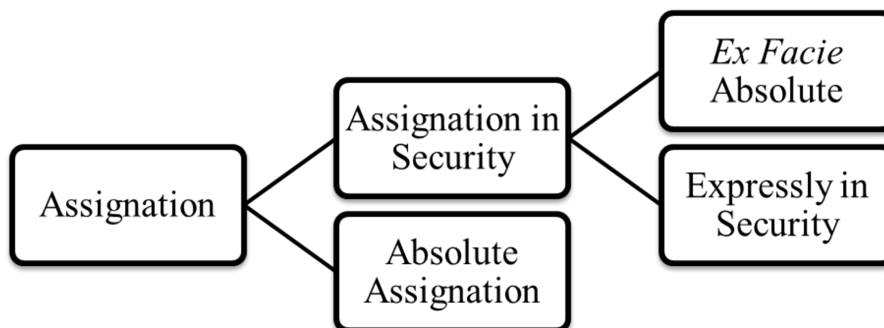

Figure 2

9-23. There are a number of potential consequences arising from the distinction in form between assignations *ex facie* absolute and those expressly in security. One difference relates to the amount of debt which the particular assignation is presumed to provide security for. Assignations expressly in security are presumed to be limited to the present and future sums for which the security was specifically granted.[44] The presumption can, however, be overcome where the deed states that the security is for all sums due and to become due.[45] It can also be overturned where further advances by the creditor are made expressly in reliance upon the security.[46] Assignations *ex*

[42] Such checks would usually be expected within a commercial context.
[43] See eg *Rodger (Builders) Ltd v Fawdry* 1950 SC 483; Reid, *Property* paras 695 ff.
[44] *National Bank of Scotland v Forbes* (1858) 21 D 79; Gloag and Irvine, *Rights in Security* 491; Stewart, *Diligence* 151 ff; A J Sim, "Rights in Security over Moveables", in *Stair Memorial Encyclopaedia* vol 20 (1992) para 53.
[45] See eg R G Anderson and J Biemans, "Reform of Assignation in Security: Lessons from the Netherlands" (2012) 16 EdinLR 25, 27f.
[46] *Clyne v Dunnet* (1833) 11 S 791 aff'd (1839) MacL & R 28; *National Bank of Scotland v Forbes* (1858) 21 D 79 at 83 per Lord Ordinary's Note; Gloag and Irvine, *Rights in Security* 491; Stewart, *Diligence* 153 f.

facie absolute ordinarily entitle the assignee to hold the property until all outstanding sums have been paid (ie for all sums due and to become due); however, a separate agreement could provide that the property is only to be held for a specific sum.[47]

9-24. In any event, the extent of any assignation in security is restricted to the amount outstanding, or already agreed to become due later, when (i) an assignation of the cedent's retrocession right is intimated to the assignee in security,[48] (ii) there is an arrestment in the assignee's hands,[49] or (iii) the cedent enters bankruptcy (or equivalent).[50] Assigned property beyond the secured amount is available to the cedent's creditors, on the basis of the cedent's retrocession right.[51]

9-25. At various points in time, certain other points of contrast between the two forms of assignation in security have been suggested. Insofar as these relate to the proprietary effect of assignations, they are now thought to be incorrect; the position is, however, discussed in more detail at paras 9-37 ff below. On a similar note, it has also been contended that assignation expressly in security does not give the assignee the power to transfer the property (at least until breach of the cedent's obligations), as the title is qualified.[52] The position is contrasted with assignation *ex facie* absolute, where there is such a power. This, however, seems to mistake a power of transfer with the right to do so. A transfer will breach the contractual obligation to the original cedent[53] but the transfer itself will be valid,[54] though potentially challengeable under the offside goals rule if the transferee was in bad faith or a donee. Only the debtor and creditor in the underlying claim would be able to place restrictions on the transferability of the claim, by limiting the property itself through those conditions.[55]

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[47] See eg *Robertson's Tr v Union Bank of Scotland* 1917 SC 549; *National Bank of Scotland v Dickie's Trustee* (1895) 22 R 740 at 753 per Lord McLaren; Gloag and Irvine, *Rights in Security* 491 f; Stewart, *Diligence* 151; A J Sim, "Rights in Security over Moveables", in *Stair Memorial Encyclopaedia* vol 20 (1992) para 53. And see, more generally, *Hamilton v Western Bank* (1856) 19 D 152. See also Anderson and Biemans, "Reform of Assignation in Security" 27 f, who note that for *ex facie* absolute assignations granted by a company or LLP, where the sum contained in the back-bond is increased, the increase creates an additional charge and requires further registration with Companies House.
[48] *National Bank of Scotland v Union Bank of Scotland* (1886) 14 R (HL) 1; Gloag and Irvine, *Rights in Security* 492.
[49] *Bank of Scotland v Macdonell* (1826) 4 S 804; Stewart, *Diligence* 151. See also *Clyne v Dunnet* (1833) 11 S 791 aff'd (1839) MacL & R 28.
[50] Gloag and Irvine, *Rights in Security* 492. See also W M Gloag, *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland*, 2nd edn (1929) 640 ff.
[51] See Stewart, *Diligence* 154.
[52] Unless a power of disposal is expressly conferred: Gloag and Irvine, *Rights in Security* 492. This is also discussed by Gow, *Mercantile Law* 285 f (and see para 9-57 below).
[53] As there will be an express or implied condition not to transfer and the retrocession obligation can no longer be fulfilled.
[54] Before the transfer takes place, the cedent could use interdict to stop it.
[55] See paras 9-09 ff above. The distinction between conditions *in corpore juris* and *extra corpus juris* is especially relevant here. For these concepts, see Bell, *Commentaries* I, 284 ff; Reid, *Property* para 660.

(2) Attachment and ranking paradox

9-26. With reference to figure 3 below, if the proprietary effects of assignation in security and absolute assignation are the same, then property successfully assigned in security by A Ltd to C Ltd is no longer attachable by B Bank's floating charge. The charge could only attach A Ltd's retrocession right. D Bank's charge could apparently attach to the transferred property, and would be able to do so unless and until retrocession took place.

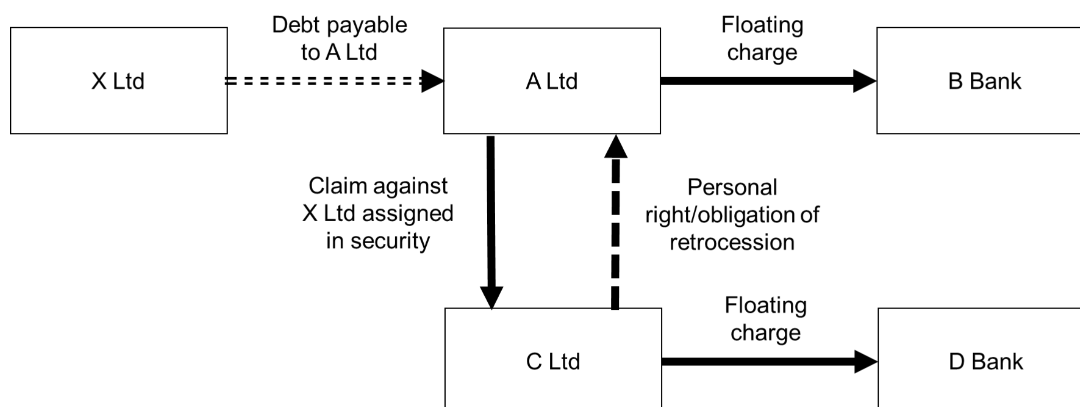

Figure 3

9-27. A serious problem emerges, however, if we examine this situation alongside the statutory ranking provisions. If the floating-charge instrument contains a negative pledge prohibiting the creation of later fixed securities, the charge will have priority over any such fixed security subsequently created.[56] If there is no negative pledge, a fixed security has priority of ranking over a floating charge where the fixed security "has been constituted as a real right before a floating charge has attached to all or any part of the property of the company".[57] Conversely, where the fixed security is not constituted as a real right prior to the attachment of the floating charge, the latter has priority.

9-28. If an assignation in security is a "fixed security" then these provisions foresee that a floating charge can rank ahead of an assignation in security, where the floating charge attaches prior to the assignation in security being constituted as a "real right".[58] There is no specification as to the type of real right, ie whether it must be a subordinate real right or if it can also be a transfer of ownership in security. The

[56] Under the Companies Act 1985 s 464(1)(a), (1A).
[57] Companies Act 1985 s 464(4)(a).
[58] It could be argued that the constitution of a fixed security as a "real right" means the provision is inapplicable to securities over personal rights because these, on one analysis, cannot be the subject of real rights. For this analysis, generally, see G L Gretton, "Ownership and its Objects" (2007) 71 Rabels Zeitschrift 802. It can be assumed that the provisions were introduced on the basis of the traditional property analysis, for which see eg Reid, *Property* para 16.

reference to “the property of the company” in the relevant ranking provision indicates that the floating charge’s attachment to the property is a necessary condition for the charge entering the ranking contest.

9-29. More significantly in practice, the ranking provisions seem to provide that an assignation in security granted in breach of a negative pledge will be postponed in ranking to the earlier-created floating charge. Yet the assignee will have the property, so that the charge will only attach the personal right of retrocession. There is thus an inconsistency, or paradox, as the ranking provisions suggest a charge ought to be able to prevail against an assignation in security but this is at odds with the attachment rules.

9-30. If instead the assignation in security ranks ahead of the charge, then it will often be of little consequence whether or not the charge formally attaches to the property. C Ltd (in figure 3) will be required to give any surplus proceeds to A Ltd, or to retrocess the property, when the secured debt is satisfied. If B Bank’s charge has not yet attached when such proceeds are received by A Ltd or when assigned property is returned, these things will become potentially attachable. And where B Bank’s charge has already attached to the retrocession right, or right to receive surplus proceeds, then the re-transferred property will replace this property and itself be attached.[59] But if C Ltd becomes insolvent the property would be expected to be part of its insolvent estate and A Ltd’s rights against C Ltd are only personal. Therefore, B Bank’s charge would only attach such personal rights and would not confer a priority over the claims of C Ltd’s creditors as regards the assigned property.

(3) Fixed security?

9-31. The paradox involving attachment and ranking is dependent upon assignation in security being a fixed security. If it is not, then the assignation in security will be treated like a “normal” transfer and the assigned property will be unattachable. The definition of “fixed security” refers to security rights that would be effective in a winding up of the company, and, therefore, is apparently intended to integrate the term within the wider law of security rights. In this context, it is true that the terms “security” and “security rights” in Scots law often include functional securities, as well as real rights in security.[60] It has been judicially recognised that an assignation in security is the only form of “effective security” for certain incorporeal property, eg book debts, and therefore is the only “fixed security” for such property.[61]

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[59] See paras 3-35 ff above.
[60] But there can sometimes be confusion as to the distinctions between “security rights”, “real rights in security” and “fixed securities”. In W M Gloag and R C Henderson, *The Law of Scotland*, 14th edn by H L MacQueen and Lord Eassie (2017) para 36.05, it is stated that: “A fixed security is a subordinate real right in security over some specific property.” Under the current law, fixed securities are, however, deemed to extend to (certain) functional securities.
[61] *Forth & Clyde Construction Co Ltd v Trinity Timber & Plywood Co Ltd* 1984 SC 1 at 10 f per Lord President Emslie; *Iona Hotels Ltd (In Receivership) v Craig* 1990 SC 330 at 336 per Lord President

Commentators such as Professor Wilson also state that an intimated assignation in security is a fixed security and becomes a real right (in favour of the assignee) by virtue of its intimation.[62]

9-32. If "fixed security" is given such a functionalist meaning, it would seem that assignations expressly in security *and* assignations *ex facie* absolute but truly in security, both fall within its ambit due to their common purpose.[63] This also enables these security rights to be distinguished from absolute assignation, which does not purport to provide security and therefore is not a "fixed security".

9-33. On the other hand, it is possible to interpret the definition of "fixed security" as only applying to property that actually belongs to the chargor company. Assignation in security is an effective security in the company's liquidation; however, this is because it removes the property from the company's patrimony. In the terms used by German law, it gives the assignee an *Aussonderungsrecht*, a right that allows for property to be separated from the insolvent estate. This contrasts with an *Absonderungsrecht*, which is a right relating to property that falls within the insolvent's estate, but which, depending on the security in question, might enable realisation by the security holder.[64]

9-34. In determining whether assignation in security is a "fixed security", it is also instructive to consider the term's legislative history. As noted at para 7-93 above, the original definition of the term in the Companies (Floating Charges) (Scotland) Act 1961 expressly referred to *ex facie* absolute assignation qualified by back letter.[65] But, from the Companies (Floating Charges and Receivers) (Scotland) Act 1972 onwards, that was replaced by reference to security in terms of the Conveyancing and Feudal Reform (Scotland) Act 1970. This suggests that the reference to assignation was (largely) focused upon the assignation of real rights in heritable property, such as long leases.[66] However, comments made by Forbes Hendry (the

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Hope. See also *Re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680 at paras 51 and 54 per Lord Hope.

[62] W A W(ilson), "Effectively Executed Diligence" 1978 JR 253, 255.

[63] In *Forth & Clyde Construction Co Ltd v Trinity Timber & Plywood Co Ltd* 1984 SC 1, counsel for the reclaimers argued (at 7) that attachment did not cause a floating charge to take the form of an assignation in security, and noted that there are differences in the rights conferred by assignation expressly in security and assignation *ex facie* absolute qualified by back letter. However, the court decided that the charge attached as an assignation in security, without further specification as to its form.

[64] See InsO § 47 ff and 165 ff. And see C G Paulus and M Berberich, "National Report for Germany"", in D Faber et al (eds), *Ranking and Priority of Creditors* (2016) paras 10.15 f and 10.46 f, who refer to *Aussonderungsrechte* as "rights to separation of assets from the estate" and *Absonderungsrechte* as "rights to claim privileged distribution of the proceeds". Interestingly, however, the right held by a party with the German equivalent of an assignation in security is treated like an *Absonderungsrecht* (see para 9-60 below).

[65] Companies (Floating Charges) (Scotland) Act 1961 s 8(1)(c).

[66] Forbes Hendry stated that a disposition "technically" could only relate to "heritage" and anything that was not heritage, which in his view included a long lease, required to be transferred by an assignation: Parliamentary Debates, House of Commons, Official Report, Scottish Standing Committee, 20 June 1961, col 34. The distinction between incorporeal heritable property and corporeal heritable property appears to have been overlooked.

MP who sponsored the Bill which became the 1961 Act) suggest that "fixed security" was also (originally) intended to include the assignation of personal rights in security. He referred to an insurance policy with a surrender value on the life of a managing director of a company which might be assigned to a creditor by "assignation of security" [sic], and in relation to which a back letter would be issued.[67] The possibility of such assignations also being made expressly in security was not mentioned. But if assignation *ex facie* absolute is generally included within the meaning of "fixed security" then, *a priori*, assignation expressly in security ought to be too. Hendry also suggested that the proposed new s 106A of the Companies Act 1948, outlining "charges" requiring registration in the charges register to be fully effective, provided a "fairly comprehensive list" of potential fixed securities.[68] These included a "charge on land" and "security over incorporeal moveable property", which he stated was difficult to define but included security over book debts and intellectual property.[69] It should be noted that the list is not truly comprehensive because other securities, such as pledge, which do not require to be registered, are undoubtedly also fixed securities.[70]

9-35. Despite Hendry's comments, the specific inclusion of *ex facie* absolute assignation in the Companies (Floating Charges) (Scotland) Act 1961 was presumably because of uncertainty as to whether it would meet the definition of "fixed security", given that it involved an ostensible transfer to the creditor. Consequently, the apparent reason for its inclusion and its subsequent removal cast doubt upon whether it is a form of security now encompassed by the definition.

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[67] Parliamentary Debates, House of Commons, Official Report, Scottish Standing Committee, 20 June 1961, col 34. However, Hendry, at col 44 (in the context of registration of charges), noted that companies have no life to insure. The Lord Advocate (at col 48) instead referred to insurance over stocks, in the context of discussing the liquidation of a company. It is true that a company does not have an insurable life but it could hold the interest in the relevant policy as an assignee or the policy could be a key man policy.

[68] Parliamentary Debates, House of Commons, Official Report, Scottish Standing Committee, 20 June 1961, cols 16 f. The list appeared in the Companies Act 1948 s 106A(2), which was inserted by Companies (Floating Charges) (Scotland) Act 1961 Sch 2. Companies Act 1948 s 106A(2)(a) referred to a "charge on land" and specified that this included "a charge created by a bond and disposition or assignation in security or by an ex facie absolute disposition or assignation qualified by a back letter…"; s 106A(2)(c) separately referred to "a security over incorporeal moveable property" for certain categories of such property. The amended version of s 106A(2)(a), inserted by the Schedule to the Companies (Floating Charges and Receivers) (Scotland) Act 1972, referred instead to a charge created by a heritable security within the meaning of s 9(8) of the Conveyancing and Feudal Reform (Scotland) Act 1970. The general form of s 106A(2)(c) persisted in the Companies (Floating Charges and Receivers) (Scotland) Act 1972 and in later equivalent legislation: Companies Act 1985 s 410(4)(c) and Companies Act 2006 s 878(7)(b). The format of the current regime is, however, different: Companies Act 2006 ss 859A ff. See MacPherson, "Registration of Company Charges Revisited" for discussion of the present system.

[69] Parliamentary Debates, House of Commons, Official Report, Scottish Standing Committee, 20 June 1961, cols 16 f.

[70] The transfer of corporeal moveables in security is also not included: see paras 8-26 ff above. Hendry himself also noted that security over certain types of incorporeal moveables had been omitted: Parliamentary Debates, House of Commons, Official Report, Scottish Standing Committee, 20 June 1961, cols 43-45.

Furthermore, as assignation expressly in security also seemingly has the same divesting effect, there may also be doubts as to whether it too is included.

9-36. Even if assignation in security was intended to be a fixed security, there has been no real consideration within Parliament or otherwise as to how its patrimonial consequences would affect attachment or ranking. In relation to the charge's introduction, there may have been an assumed equivalence between assignation in security and heritable securities. The latter, however, included the bond and disposition in security, which was indisputably a subordinate real right, and an *ex facie* absolute disposition which, at the time, was also widely believed to be non-divestitive.[71] The distinctive position of assignation in security was overlooked when the Companies (Floating Charges and Receivers) (Scotland) Act 1972 was passed and reference to the Conveyancing and Feudal Reform (Scotland) Act 1970 was inserted in place of the existing references. The current legislation has therefore inherited significant problems involving assignation in security.

D. ATTACHMENT AND ASSIGNATION IN SECURITY: SOLUTIONS?

(1) A subordinate right?

9-37. The difficulty regarding the relationship between assignation in security and the floating charge arises because the former is considered to involve transfer of property and the latter does not (usually) attach to property previously transferred by the chargor. Therefore, it would be resolved if assignation in security is not, after all, fully divestitive.[72] If the property itself is attached by the charge, the competing claims of the chargeholder and the assignee can be ranked and preference given to one or the other.

9-38. Despite the current dominance of the full-divestiture interpretation, Professor Gretton himself has noted that authority for the proposition is "sparse".[73] That is true, but it is possible to find authorities which favour both this view and the alternative. A court faced with a competition between an assignation in security and a floating charge could draw upon such sources.

(a) Institutional writers

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[71] See paras 7-85ff above.

[72] It might be thought that if the cedent's retrocession right has real effect this would resolve the problem. Such effect would enable the right to be enforceable against third-party acquirers from the assignee; however, attachment to the assigned property seems necessary for the charge to prevail against the assignation in security. In any event, real status for the retrocession right is unlikely without statutory provision, as was required for heritable rights of reversion (see para 7-84 n 187 above).

[73] Gretton, "The Concept of Security" n 21. Anderson, *Assignation* refers to assignation in security, eg at para 7-36, but does not consider it in detail.

9-39. There is scant support for a non-divestiture approach in the institutional writings. In fact, the institutional writers generally provide little in the way of separate treatment of assignation in security. It does though seem to be impliedly incorporated within some of their discussions of absolute assignation.

9-40. Stair states that an intimated assignation is a "full and complete transmission of the right assigned … and thereby the right of the cedent ceaseth, and the assignee becomes creditor".[74] In this context and elsewhere in his wide-ranging treatment of assignation, he does not expressly consider assignation in security. However, he does specify that the meaning of assignation is intended to include retrocession, which he describes as "the returning back of the right assigned", and this suggests a divestitive transfer both to and from the original assignee.[75] Bankton's treatment of the subject is in similar terms to Stair.[76]

9-41. Erskine follows the earlier writers with respect to retrocession and the transference effect of intimation. However, unlike them, he directly refers to assignation in security (along with assignation in satisfaction of a debt).[77] There is no detailed consideration of the nature and effect of assignation in security, but Erskine's wording suggests that the assignee creditor receives and holds the property right and upon satisfaction would be obliged to return it to the cedent debtor.[78]

9-42. Of all the institutional writers, Bell's consideration of assignation in security is the most detailed, and seems to reflect the development of a more discrete law of security rights. He discusses assignation in security within the context of security over moveable property.[79] In that section on security, Bell states that "ordinary

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[74] Stair III, 1, 43.

[75] Stair III, 1, 3. Retrocessions are most commonly used within the context of assignation in security in modern law: see eg McBryde, *Contract* para 12-104. This was the case in the late-nineteenth century too: A M Bell, *Lectures on Conveyancing*, 3rd edn (1882) vol 1, 335. The use of retrocessions in relation to assignations in security would also have been familiar in Stair's time: eg *Gordon v Skein and Crawford* (1676) Mor 7167 is cited by Stair III, 1, 21 as authority for an assignee's back bond to an *ex facie* absolute assignation of an apprising (or comprising) being found effectual against his successors by translation. The apprising was to be retrocessed upon satisfaction of the relevant debt. The case apparently divided the presiding judges but it was decided that intimation of the back bond was not necessary in order for it to affect singular successors. The dissenting views of a number of the judges are outlined in Dirleton's report of the case (see Mor 7171 f). These views are well-reasoned and involve drawing a distinction between those qualifications that are *in corpore juris* and those that are *extra corpus juris* (see also n 55 above). As the back bond in the case was only *extra corpus juris*, the singular successors should not have been bound, according to the dissenting judges. The extent to which the decision remains significant and applies beyond the context of apprisings is open to debate.

[76] Bankton III, 1, 6-11. He cites *Craig v Edgar* (1674) Mor 838. Mackenzie, *Institutions* III, V, in his brief treatment of assignation, does not mention assignation in security or retrocession.

[77] Erskine III, 5, 1 and 8. See also eg *Purnell v Shannon* (1894) 22 R 74 in which the First Division considered whether a particular assignation was an assignation in security or an assignation in satisfaction of a debt.

[78] Erskine III, 5, 8.

[79] Bell, *Commentaries* II, 11 (for "assignation and disposition of moveables in security") and 16 ff (for "transference of debts"). The material is contained within Book V, II "Of Voluntary Securities over Moveables", which itself is located in Book V "Of Real Securities over the Moveable Estate". Bell's "real securities" is a broader category than subordinate real rights in security and extends to

debts", and incorporeal property generally, are "transferred by written deed of conveyance".[80] Here, he draws no distinction between the nature or consequences of absolute assignation and assignation in security.[81]

9-43. Assignation in security is, however, also dealt with by Bell within his analysis of the "pledge of debts".[82] He specifies that debts (money claims) and other incorporeal property may be assigned in security and "such assignation sufficiently answers all the purposes of commerce, while it may, in one sense, be called a pledge".[83] Yet he correctly states that it is corporeal moveables that are the "proper subjects of pledge", due to the requirements of delivery and possession. Consequently, there is a general "legal impracticability" in the pledging of incorporeal rights, such as debts.[84] His statements should be interpreted to mean that an assignee would have the right to retain incorporeal property, and not retrocede, until satisfaction of the secured debt; however, it would be possible to use his comments as a launching point for the view that assignation in security can create a subordinate pledge-style right.

(b) Judicial authority contrary to full divestiture

9-44. There are cases, particularly from the post-institutional period between the mid-nineteenth century and early twentieth century, but also before and after, in which it is possible to discern judicial support for an analysis contrary to the full-divestiture thesis. For example, courts have stated: (i) that property assigned *ex facie* absolutely, but qualified by back letter, "still belonged to" the cedent;[85] (ii) that the assignation of a claim in security was not "totally and absolutely" divestitive, without regard to whether the secured debt had been paid;[86] (iii) that the effect of an assignation expressly in security "like that of any other conveyance in security, is not to divest the cedent absolutely, but merely to burden the cedent's right, and thus … create a sort of hypothec";[87] and (iv) that assignation expressly in security is non-

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the transferring of ownership for security purposes. See also Book IV "Of Preferences by Securities, Voluntary or Judicial over the Heritable Estate".

[80] Bell, *Commentaries* II, 11. There is a slight change from the 4th edition (1821) II, 16, in which Bell refers to such property being transferred "whether in sale or in security".

[81] Bell, *Commentaries* II, 16 ff.

[82] Bell, *Commentaries* II, 23.

[83] Bell, *Commentaries* II, 23. He continues by stating that pledge is a "real right of detention merely, not of property".

[84] Bell, *Commentaries* II, 23. Bell notes exceptions "when the debt is inseparable from the voucher, as in bills and notes".

[85] *Monteith v Douglas and Leckie* (1710) Mor 10191.

[86] *Clyne v Dunnet* (1839) MacL & R 28 per Lord Ordinary's Note at 34, and see 30 f. See also *Robertson v Exley* (1832) 11 S 91, where an assignation in security was held not to preclude the cedent from pursuing, against the debtor, the recovery of sums beyond those required to satisfy the assignee. But it is notable that there was no objection from the assignee.

[87] *Fraser v Dunbar* (1839) 1 D 882 at 84 per Lord Ordinary's Note, and see his interlocutor at 884. Lord Fullerton (who was previously the Lord Ordinary) decided, along with his First Division colleagues, that his interlocutor should be altered to enable the assignee to join the cedent in the action and provided that the action could not proceed without the assignee joining. However, he stated that

divestitive, confers "truly only a limited right", and can be equated with pledge and heritable security (presumably a bond and disposition in security).[88]

9-45. Each of these statements can, however, be criticised or interpreted in a different way. Taking them in turn: (i) may be viewed as the application of a now-superseded view of the law of trusts, whereby the beneficiary is taken to own the property;[89] for (ii), the statement (by the Lord Ordinary) appears contrary to views expressed by the Lord Chancellor in the House of Lords, who considered the assignation to transfer the claim for payment, which meant that the debtors were only obliged to pay the assignee;[90] for (iii), the statement is vague, the case involved special circumstances in the context of title to sue, and the First Division altered the Lord Ordinary's interlocutor to require the assignee to join the action;[91] and, finally, the reasoning of (iv) was based upon the historical mandatory (procuratory) interpretation of an assignation's status, but this analysis has been convincingly challenged and certainly does not reflect the nature of modern assignation.[92]

9-46. Yet there are also insolvency cases which may undermine a full-divestiture analysis. In *Cleland Trs v Dalrymple's Tr*[93] it was held that the bankrupt's whole estate vested in the trustee in sequestration and that assignations expressly in security with intimation did not remove the property from the estate. Lord President Kinross referred to the importance of the construction of s 102 of the Bankruptcy (Scotland) Act 1856, particularly the reference to the trustee's right being subject to "preferable securities".[94] This analysis was supplemented by the Lord President's view of the "policy and effect" of the legislation, which was to vest the bankrupt's whole estate in the trustee and for the trustee to consider claims made. This would avoid the "great inconvenience and cost" that would arise if all questions of creditors' rights and preferences had to be decided by the court.[95]

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the decision was due to the "very special circumstances" of the case, and insisted that there was a "very material" difference between absolute conveyances and those "merely in security" (at 885).

[88] *National Bank of Scotland v Forbes* (1858) 21 D 79 at 82 ff per Lord Ordinary's Note. Lord Justice-Clerk Inglis (at 85) agreed with the Lord Ordinary's interlocutor and the grounds of judgment outlined in the Note. And see Lord Cowan at 87, who suggested the assignee only had the property for the special purpose of effecting a "limited security" and "to every other effect it belonged" to the cedent. See also *Gordon's Creditors v Innes* (1740) Kilkerran 39, where a distinction was suggested between the effect of arrestment of debts in the hands of (i) a transferee, and (ii) "one who has a right in security".

[89] Forbes' report of the case refers to the assignation being in trust, except for the sum due to the assignee: (1710) Mor 10192.

[90] *Clyne v Dunnet* (1839) MacL & R 28 at 50 f per Cottenham LC. This was despite the House of Lords affirming the interlocutors from the Court of Session.

[91] See n 87 above.

[92] See Anderson, *Assignation* (2008) paras 5-13 ff.

[93] (1903) 6 F 262. Additional details about the case, and the arguments made, are available from the Session Papers, 1903-1904, vol 839, No 42. The case is referred to in Goudy, *Bankruptcy*, 4th edn by T A Fyfe (1914) 248 as authority for the proposition that creditors must make their claims to preferable ranking via the sequestration process.

[94] (1903) 6 F 262 at 267.

[95] (1903) 6 F 262 at 267 f.

9-47. There is certainly a policy argument in favour of the trustee (or equivalent) adjudicating all claims against the insolvent party's estate. However, the key point is that where the insolvent party has been divested by assignation, the party's estate does not contain the assigned property. Under the 1856 Act s 102, the moveable estate "so far as attachable for debt" was vested in the trustee.[96] But the bankrupt's property "attachable for debt" would be the retrocession right to the assigned property. That is why arrestment in the hands of the *assignee* would be necessary (he being the debtor in the retrocession right), and intimation to that party would therefore also be required if the trustee sought to transfer the right vested in him.

9-48. The earlier Inner House cases of *Gordon v Millar*,[97] *Littlejohn v Black*[98] and *Carter v McIntosh*[99] were referred to and relied upon by the Lord President (and, previously, by the Lord Ordinary) in *Cleland Trs*.[100] In *Gordon* and *Carter*, the view taken seems to have been that assignations in security were not fully divestitive, and therefore that property assigned in security would be part of the bankrupt cedent's estate for the purposes of the relevant legislative provisions.[101] The courts drew a distinction with the position of absolute assignation, where the property would not fall into the estate due to ownership having transferred. It is not clear how assignation *ex facie* absolute would have been treated. But *Heritable Reversionary*

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[96] In more recent legislative iterations the reference to attachability has been removed but the principle remains. In *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19 at para 51, Lord Rodger stated: "In my opinion the context in which the words 'the whole estate of the debtor' appear in the statute [the Bankruptcy (Scotland) Act 1985] shows that they must be given a meaning which gives effect to the rights which creditors are able to exercise against the debtor's property to secure payment of their debts." If claims assigned in security are subject to diligence by the cedent's creditors then those creditors should be able to arrest in the hands of the claim debtor. However, this does not seem to be possible.

[97] (1842) 4 D 352. The First Division considered that under the Bankruptcy (Scotland) Act 1839 s 78 the *universitas* of the bankrupt's moveable estate transferred to the trustee in sequestration, subject to preferable securities. The relevant Session Papers (1841-1842, vol 369, No 76) reveal that as well as holding an arrestment, the creditor was claiming a preference by virtue of an assignation in security, albeit that there was a dispute regarding what precisely was assigned, and whether the assignation was intimated.

[98] (1855) 18 D 207.

[99] (1862) 24 D 925. Two claimants with assignations in security withdrew their claims, reserving their rights to claim in the sequestration.

[100] (1903) 6 F 262.

[101] Session Papers for *Gordon* (1841-1842, vol 369, No 76) show that the effect of assignation in security was the subject of argument and the trustee in sequestration contended that it differed from an absolute assignation as the former was only a preferable security under the statute, whereas the latter would mean the property would not vest in the trustee. The Inner House's decision appears to support this position. In *Carter*, the Lord Ordinary (see his Note at 930 ff) gave consideration to *Gordon* and, in doing so, supplemented the "somewhat meagre" case report with reference to the Session Papers. On the basis of *Gordon*, the Lord Ordinary approved of the assignees in security withdrawing from the action, and reserving their rights to claim in the sequestration. He contrasted assignations in security, where the "radical right" remains with the cedent, with absolute assignations, which divest the bankrupt, and noted that the statute would not apply "if the ownership was not in the bankrupt". The Second Division in *Carter* appears to have approved of this: see Lord Justice-Clerk Inglis at 933, who noted that if the remaining claimants were "merely creditors", like those who had withdrawn, then the sequestration would be the correct forum for determining priorities, but if they were (absolute) assignees then the property would not be subject to the sequestration.

Co v Millar[102] could be used to support the view that if the "radical right" or "beneficial interest" remains with the cedent, then the assigned property will be within his estate (but subject to the assignee's security) and will not fall into the estate of the assignee. On this point, *Heritable Reversionary*, which involved a disposition *ex facie* absolute but where the disponee actually held the property in trust for another, could be extended by analogy to assignations *ex facie* absolute.

9-49. *Littlejohn* is a complicated and unusual case featuring, *inter alia*, an *ex facie* absolute assignation of a reversionary interest in heritable property.[103] A back bond revealed that the assignation was only in security. The trustee in sequestration was preferred over the whole fund at issue but only on the basis that preference was to be given to the assignees.[104] However, this seems to have been a pragmatic solution given that the assignations were held for conditional cautionary obligations of a then-indeterminate amount, and there were contingencies arising from the application of the doctrine of catholic and secondary creditors.[105] This, and some apparent support for a divestiture view of assignation in the case,[106] suggest its value as a source for a non-divestiture thesis is highly qualified.

9-50. A party could, nevertheless, use the above authorities to support the argument that assignation in security, especially expressly in security, is not fully divestitive and that property so assigned remains in the (insolvent) cedent's estate. This might be persuasive if it were framed as necessary to give effect to the ranking provisions of s 464 of the Companies Act 1985, which require attachment of the floating charge. It could also be contended that, in policy terms, a liquidator, receiver or administrator, like a trustee in sequestration, ought to manage the property and distribute based on ranking preferences, which would be a mechanism for giving the chargeholder priority. Yet such an approach would bring manifold problems and undermine contrary authority and the modern prevailing view of assignation in security.

(c) Judicial authority supporting full divestiture

9-51. There are also a number of cases in which the court has considered or assumed that assignation in security involves full divestiture and in which the assignation is treated like an absolute assignation. This includes the House of Lords case of *Redfearn v Sommervail*,[107] which involved an assignation in security in breach of a latent trust, and where Lord Redesdale stated that an intimated

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[102] (1892) 19 R (HL) 43.
[103] For details beyond those provided in the case report, see Session Papers, 1855, vol 493, No 40.
[104] (1855) 18 D 207 at 229 (interlocutor).
[105] (1855) 18 D 207 at 212 f and 216 f per Lord President McNeill, and see the interlocutor at 229.
[106] (1855) 18 D 207 at 217 per Lord Ivory. Lord Ivory considered that the effect of the assignation of the reversionary right was to "divest the bankrupt of every thing connected with the heritable subjects". After the assignation, the bankrupt only held a right for the reversionary right to be retrocessed, upon satisfaction of the relevant secured debt.
[107] (1813) 5 Pat 707.

assignation "denudes the assignor of all right in him to the thing assigned".[108] In a later House of Lords case, *Bank of Scotland v Liquidators of Hutchison, Main & Co Ltd*,[109] assignation in security was again seen as being akin to any other assignation, there were references to assignation's divestitive effect, and it was considered that a creditor had to hold a "jus in re" to have "an effectual security".[110] However, their Lordships' discussion of "beneficial interest" in property raises questions as to how precisely they would have understood the nature of the assignation in security which was successfully created in the case.[111]

9-52. In *Whittall v Christie*[112] the Inner House held that where an insurance policy was assigned in security the cedent's whole interest had been transferred and therefore an arrestment by creditors of the *cedent* in the hands of the insurance company (the policy-claim debtor) was ineffectual. The arresters had sought to argue that the cedent's "large reversionary interest" in the property rendered the arrestment effective but this was rejected. Lord Justice-Clerk Macdonald stated that the assignees in security "might be liable to account for any sum which was held to be part of the [cedent's] estate in a competent process"; however, the sum was "arrested in the hands of the [insurance] company, who have no right to pay it to anyone but the [assignees in security]".[113]

9-53. Although only an Outer House case, *Ayton v Romanes*[114] is strong on principle. The cedent had granted an *ex facie* absolute assignation, actually in security, followed by two further assignations of his interest. He then entered sequestration. The court held that the first assignation transferred the relevant right to the assignee, but with the obligation for that party to retrocess upon payment of the debt due by the cedent. The subsequent assignations were of the reversionary right available after the satisfaction of the previous assignee(s). Therefore, the debtor of each reversionary right was the immediately preceding assignee.[115] The Second Division case of *Nelson v National Bank of Scotland*[116] provides similar authority. In that case shares were assigned in security and the cedent held a reversionary right which she also proceeded to assign in security, this second assignation being intimated to the first assignee. The result was to leave the cedent with only a further, personal reversionary right exercisable against the second assignee. The latter party

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[108] Per Lord Redesdale at 713f.
[109] 1914 SC (HL) 1.
[110] 1914 SC (HL) 1 at 4 per Lord Kinnear, at 10 f per Lord Atkinson, and at 12 ff per Lord Shaw of Dunfermline.
[111] 1914 SC (HL) 1 eg at 10 f per Lord Atkinson and at 15 ff per Lord Shaw of Dunfermline.
[112] (1894) 22 R 91.
[113] (1894) 22 R 91 at 94.
[114] (1895) 3 SLT 203.
[115] The case demonstrates that it is possible for there to be multiple-ranking functional securities where property is assigned in security. Eg if A, B and C receive assignations of an interest in property in turn, A receives the property, B gets a reversionary right against A, and C receives a reversionary right enforceable against B. Accretion will apparently operate when the property is returned to the cedent. See Anderson, *Assignation* paras 11-46 ff for discussion of accretion and assignation. However, given that the rights of B and C are only personal until they receive the property, they would lose out if the previous assignee(s) became insolvent in the meantime.
[116] 1936 SC 570.

had a duty to protect the "ultimate reversionary right" of the cedent and, in the circumstances of the case, had failed to do so.[117]

(d) Late nineteenth-century commentary

9-54. Given the high status of the commentators who were writing at the end of the nineteenth century – Gloag and Irvine, Goudy, and Stewart – and given too the conflicting authority on assignation in security by that point, it is especially useful to consider their views. Gloag and Irvine appear to support the full-divestiture thesis, stating that the effect of assignation in security, upon intimation, is that "all right in the cedent is evacuated" with the assignee being "fully vested in the debt".[118] Their treatment largely consists of analysing the general rules of assignation, supplemented by additional elements specific to assignation in security.[119] It is true that some of the language they use could cause confusion; for example, they refer to the cedent as the "real owner", but they do so in the context of the assignee in security having a "personal obligation to restore [the property] to the real owner".[120] More problematic is the suggestion that assignations expressly in security do not give the assignee powers of disposal, in contrast to assignations *ex facie* absolute.[121] A direct comparison is also drawn between the rights of debtor and creditor in an assignation *ex facie* absolute and in an *ex facie* absolute disposition.[122] The deemed equivalence between security over heritable property and security over incorporeal property may have also influenced Gloag and Irvine's view of assignation expressly in security.[123] Furthermore, they argue that diligence by creditors of the assignee is subject to the rights of the cedent, on the basis of the *tantum et tale* doctrine.[124] This conclusion is, however, unlikely to meet favour in current law as the scope of *tantum et tale* has been significantly curtailed in modern times.[125]

9-55. Goudy's treatment of assignation in security is limited. He does, however, consider it to involve a transfer (in security) and distinguishes it from the real right

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[117] As they did not promptly demand a transfer of the property (shares) remaining after the discharge of the first assignee's claim: see eg 1936 SC 570 at 584 f per Lord Justice-Clerk Aitchison.
[118] Gloag and Irvine, *Rights in Security* 478; see also eg 440 and 469.
[119] See Gloag and Irvine, *Rights in Security* 490 ff.
[120] Gloag and Irvine, *Rights in Security* 491.
[121] See eg Gloag and Irvine, *Rights in Security* 492. They may have been influenced by cases such as *National Bank of Scotland v Forbes* (1858) 21 D 79, which they cite, and in which assignation expressly in security was viewed as something less than the transfer of ownership.
[122] Gloag and Irvine, *Rights in Security* 490 n 5, and see 151 and 163.
[123] For the identification of such equivalence, see also W M Gloag, "Securities", in *Green's Encyclopaedia of the Law of Scotland* vol 11 (1899) 143 ff; repeated in the second edition, vol 10 (1913) 621 ff, and in Viscount Dunedin et al (eds), *Encyclopaedia of the Law of Scotland* vol 13 (1932) paras 790 ff. And see W M Gloag, *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland*, 2nd edn (1929) 640.
[124] Gloag and Irvine, *Rights in Security* 493f.
[125] See *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19; Reid, *Property* para 694; R G Anderson, "Fraud on Transfer and on Insolvency: Ta…Ta…Tantum et Tale?" (2007) 11 EdinLR 187; J MacLeod, *Fraud and Voidable Transfer* (Studies in Scots Law vol 9, forthcoming) ch 8.

of pledge.[126] But when discussing the Bankruptcy (Scotland) Act 1856 he states that, on the basis of *Heritable Reversionary Co v Millar*,[127] a trustee in sequestration of the creditor takes property held in security on an *ex facie* absolute title "subject to the contract with the true and radical owner".[128] This is contrasted with cases where the bankrupt holds a right of ownership[129] subject merely to a personal obligation, and the creditor then only has a right to rank personally on the sequestrated estate.[130] It appears that Goudy considered his views regarding *ex facie* absolute security within sequestration to apply across property law, and therefore to extend also to a security in the form of an assignation *ex facie* absolute.[131] Due to the overt status as a security of assignation expressly in security, it is likely that Goudy saw such an assignation to have an even more limited effect in an insolvency context.[132] Yet, given current views, it is likely that in the present-day law the assignee would be deemed to hold ownership subject only to a personal reversionary obligation, and the cedent's trustee or equivalent would only have a right of retrocession available to them.

9-56. It is more difficult to discern the views of Stewart, the third of the commentators, regarding the nature of assignation in security. He notes differences between assignation *ex facie* absolute and expressly in security and considers the extent to which the reversionary right arising from an assignation in security is attachable by arrestment.[133] Stewart mentions the ability of the cedent's creditors to arrest property in the hands of the assignee, in particular the balance beyond the amount secured by the assignation in security.[134] This does not, however, imply that a creditor of the cedent can arrest the assigned property and that, consequently, an assignation does not fully divest the cedent. The fact that the arrestment is in the *assignee's* hands indicates that the assignee is the debtor and that the arrested

[126] Goudy, *Bankruptcy* 550 ff.
[127] (1892) 19 R (HL) 43.
[128] Goudy, *Bankruptcy* 265. However, see W M Gloag, "Securities", in *Green's Encyclopaedia of the Law of Scotland* vol 11 (1899) 160 f (and see 2nd edn, vol 10 (1913) 646 f, and Viscount Dunedin et al, *Encyclopaedia of the Law of Scotland* vol 13 (1932) paras 844 f), where it is stated that in considering whether secured property is part of a bankrupt estate "regard is to be had to the nominal title, rather than to the beneficial ownership". Cf Gloag and Irvine, *Rights in Security* 152 f, regarding the likely effect of *Heritable Reversionary Co v Millar* (1892) 19 R (HL) 43.
[129] He uses the term "real beneficial right of ownership".
[130] Goudy, *Bankruptcy* 265; *Wylie v Duncan* (1803) Mor 10269; *Heritable Reversionary Co v Millar* (1891) 18 R 1166 at 1173 f per Lord McLaren, and (1892) 19 R (HL) 43 at 46 ff per Lord Watson.
[131] Goudy, *Bankruptcy* 265.
[132] Perhaps with the property remaining in the cedent's estate but subject to the assignee's security interest. Goudy, *Bankruptcy* 265 f refers to the effect of vesting where there are preferable securities and distinguishes between those that create a "nexus" over the property in the bankrupt's possession (eg arrestment and adjudication) and those which confer possession on the creditor (eg lien and pledge). Regarding the former, the trustee takes the "attached" property and gives preference to the creditor's ranking preference, while in the latter the trustee can only recover the property by paying the debt. It is not clear how he considers assignation expressly in security to fit in with this analysis, especially given the references to possession.
[133] Stewart, *Diligence* 151 ff.
[134] Stewart, *Diligence* 151 and 154.

property is the cedent's right of reversion rather than the assigned property itself.[135] This in turn presupposes that the property assigned in security is transferred to the assignee, which is consistent with a divestiture thesis.

(e) The position upon introduction of the floating charge

9-57. By the early twentieth century, then, the authorities were contradictory and rather unclear in certain respects. But there was little additional case law or commentary to clarify the issues in the period leading up to the introduction of the floating charge in 1961. In the most recent edition of Gloag and Henderson's *Introduction to the Law of Scotland* it was simply stated that: "a debt of any kind … may be transferred in security by a written assignation, followed by intimation to the debtor".[136] The year after the floating charge's arrival, T B Smith made an almost identical comment on assignation in security in his *Short Commentary*.[137] In *Mercantile Law*, published a few years later, Gow suggests that an assignation in security involves transfer of "dominium", and discusses the legal basis for Gloag and Irvine's assertion that an assignee expressly in security does not have automatic powers of disposal of the assigned property.[138] As regards the latter, he rejects Gloag and Irvine's view, arguing instead that the issue is whether an assignee can give title to the property free from the cedent's "power of redemption".[139] He seems to consider that the title of a party acquiring from an assignee *can* be qualified by the redemption power, but identifies problems with various underlying justifications for such a rule.[140]

(f) South Africa

9-58. On the basis of the earlier authorities, it would have been possible for a more functionalist or non-divestitive view of assignation in security to have prevailed in Scots law. Consideration of the South African position makes this apparent. In the midst of competing interpretations, the landmark case of *National Bank of South Africa v Cohen's Tr* in 1911[141] determined that a cession *in securitatem debiti* is equivalent to a pledge and that "dominium" remains with the cedent.[142] As well as doctrinal reasons for the decision, the court provided policy ones, which included

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[135] If, instead, the assigned property was being arrested then the arrestment would need to be in the hands of the claim debtor.

[136] W M Gloag and R C Henderson, *Introduction to the Law of Scotland*, 6th edn by A D Gibb and N M L Walker (1956) 195.

[137] Smith, *Short Commentary* 477.

[138] Gow, *Mercantile Law* 284 ff.

[139] Gow, *Mercantile Law* 286.

[140] The analysis is interesting but will not be discussed in more detail here. It may be that the offside goals rule can apply in the context.

[141] 1911 AD 235.

[142] For comparison of the Scots law and South African law on this issue, see P Nienaber and G Gretton, "Assignation/Cession", in R Zimmermann et al (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2005) 814 ff.

that the trustee in bankruptcy should determine preferences and distribute, rather than the creditors having powers to do so.[143]

9-59. Ever since *Cohen's Tr*, there has been debate and disagreement in South African literature and case law as to whether the case was correctly decided and what the nature of cession in security is, including whether it is an outright transfer or only a pledge, or whether both are available.[144] The uncertainty and controversy was, and is, notable. The current position is provided by the Supreme Court of Appeal case of *Grobler v Oosthuizen*,[145] where Brand JA (on behalf of the court) stated that, "primarily for pragmatic reasons", the doctrinal debate had been "settled in favour of the pledge theory".[146] However, although the pledge construction is the default position, *dicta* in *Grobler* suggest that parties could, if they chose, create a cession in security expressly in the form of a *fiducia cum creditore*.[147] There is still, however, a lack of clarity as to when such a security will be recognised and there is doubt regarding the precise implications of the pledge construction.[148]

(g) Germany

9-60. German law demonstrates an alternative course that Scots law could have adopted. The BGB expressly allows for the "pledge" of claims,[149] but such a pledge is only effective where notice is given to the claim debtor.[150] The deemed impracticality of this notice requirement (and other formalities) led the German courts to allow and develop the transfer of claims in security (*Sicherungsabtretung* or *Sicherungszession*).[151] This form of security involves formal divestiture but is dealt with under German legislation as a limited security right in insolvency law.[152] Thus, in apparent contrast to current Scots law, a transfer of a claim in security is

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[143] 1911 AD 235 at 248 per De Villiers CJ. This is similar to the reasoning in *Cleland Trs v Dalrymple's Tr* (1903) 6 F 262: see paras 9-46 ff above.
[144] For a summarys, see S Scott, "One Hundred Years of Security Cession" 2013 SA Mercantile Law Journal 513. See also the discussion in *Grobler v Oosthuizen* (2009) (5) SA 500 (SCA), especially at paras 15 ff per Brand JA.
[145] (2009) (5) SA 500 (SCA).
[146] (2009) (5) SA 500 (SCA) at para 17.
[147] (2009) (5) SA 500 (SCA) at paras 23 f.
[148] See eg Scott, "One Hundred Years of Security Cession" 530 ff.
[149] BGB § 1279 "Pfandrecht an einer Forderung".
[150] BGB § 1280.
[151] BGB § 398, which allows for the transfer of claims by contract, and without publicity, is the doctrinal basis for the institution. For commentary, see G H Roth and E-M Kieninger, "Abtretung", in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 8th edn (2019) § 398, especially paras 100 ff. There is also an equivalent for corporeal moveables: BGB § 1205 requires delivery to create a pledge, but transfer of ownership as a security (*Sicherungsübereignung*) has been accepted (using BGB § 929 and § 930 as the legal basis). Security transfers were recognised before, and then a short time after, the introduction of the BGB in 1900: see the cases cited by M Brinkmann, "The Peculiar Approach of German Law in the Field of Secured Transactions and Why It Has Worked (So Far)", in L Gullifer and O Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (2016) 341.
[152] See InsO § 51 and § 166(2).

treated in German law as giving the assignee an *Absonderungsrecht* in the assignor's insolvency, rather than an *Aussonderungsrecht*.[153]

9-61. The German position is doctrinally questionable, as a strict reading of the BGB precludes security over claims otherwise than by pledge. It is interesting to note that the German legal position, including criticisms of the absence of publicity, was communicated to the Law Reform Committee for Scotland during its law reform project by Ernst von Caemmerer, a consulted expert.[154] Despite its dubious doctrinal foundations and lack of publicity, the present legal position is widely accepted in Germany as it is considered to provide a pragmatic and commercial result.[155]

(h) Current position and the floating charge

9-62. Returning to Scots law, the absence of authority since the early twentieth century has facilitated the success of a formalist vision that is simpler and more doctrinally anchored than the German and South African approaches. Reliance on previously used equitable concepts such as "radical rights" and "beneficial interest" to determine the nature of assignation in security would be fraught with difficulty.[156] As Professor Gretton writes regarding radical rights more widely: "the doctrine is on the whole a bad one. It is often obscure, often incoherent. It does not harmonise with the generality of property law."[157] Perhaps most notably, it is contrary to Scots property law's clear delineation between personal rights and a (largely) fixed list of real rights. As Lord Hope states in *Burnett's Tr v Grainger*, Scots law "does not recognise" a right between a personal right and a real right, and this notion is at the "very centre of the law relating to rights in security, the law of diligence and the law of bankruptcy".[158] It should also be at the heart of corporate insolvency law.

9-63. The fully divestitive nature of assignation in security has been recognised in the context of floating charges. In *Forth & Clyde Construction Co Ltd v Trinity Timber & Plywood Co Ltd*[159] it was held that a floating charge attached as if it were

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[153] See n 64 above. See also Brinkmann, "The Peculiar Approach of German Law in the Field of Secured Transactions" 341 f. In the insolvency of the assignee, however, the right of the cedent to the assigned claim beyond the secured element of the claim (which is available to the assignee's creditors in the insolvency) is treated as more akin to an *Aussonderungsrecht* in the cedent's favour (under InsO § 47): see G H Roth and E-M Kieninger, "Abtretung", in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 8th edn (2019) § 398, paras 113-116, for further discussion.

[154] See NRS AD61/55 – letter from E von Caemmerer, Freiburg University, to T B Smith, Edinburgh University, dated 17 December 1958 (transl by I Vair-Turnbull, Foreign Office). See also A D J MacPherson, "T B Smith and Max Rheinstein: Letters from America" (2016) 20 EdinLR 42, 54 f. And see Smith's comments on German law in Law Reform Committee for Scotland, *Eighth Report* 13 f.

[155] Brinkmann, "The Peculiar Approach of German Law in the Field of Secured Transactions" 343 ff.

[156] The cases in which such terminology is used reflect a period of heavy English influence on Scots law.

[157] G L Gretton, "Radical Rights and Radical Wrongs: A Study in the Law of Trusts, Securities and Insolvency" 1986 JR 51, 56.

[158] [2004] UKHL 8, 2004 SC (HL) 19 at para 19. Also see Bell, *Commentaries* I, 279.

[159] 1984 SC 1.

an intimated assignation in security in favour of the chargeholder and, because of the deemed divestitive effect, creditors of the (cedent) company could no longer arrest the attached property.[160] But Lord President Hope seems to have presented an alternative view in *Iona Hotels Ltd (In Receivership) v Craig*,[161] another floating-charges case. There he stated that "property which is the subject of an assignation in security *remains the property of the company* subject to the rights of the assignee".[162] This appears to reflect a non-divestitive perspective.

9-64. Beyond floating-charge cases, there is recent judicial authority which challenges the view that assignation in security involves full divestiture. In the Outer House case of *Edinburgh Schools Partnership Ltd v Galliford Try Construction (UK) Ltd*,[163] Lord Bannatyne considered there to be a "fundamental difference between an absolute assignation and an assignation in security".[164] He also stated that, with an assignation in security, the cedent "is not wholly divested of that which is being assigned".[165] It is uncertain how far his expressed views extend beyond the special issues of title to sue that featured in the case. Indeed, a narrow view of Lord Bannatyne's judgment can be supported by his statement that:

> What I have said regarding the assignation and the pursuer having title to sue in no way affects (i) the position that there is a valid present assignation of the … contract and (ii) that in a competition between creditors it is as valid and effectual as an absolute assignation.[166]

9-65. To overturn the prevailing view more broadly would be highly problematic and at odds with aspects of the current law. To characterise assignation in security as a subordinate real right is inconsistent with the existence of a retrocession right, which indicates divestiture has taken place (as otherwise no re-transfer would be needed).[167] In addition, it is necessary to use the right to retrocession as collateral for creating further security involving the assigned property, which does not fit with assignation in security as a subordinate right (as that would allow for multiple security rights to be created in the same property). An assignee can also apparently transfer the assigned property to a third party.[168] If the assignee only held a limited right, it would only be able to transfer that right, not the assigned property itself. A further difficulty is that, if the property is the right to receive payment from a debtor,

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160 1984 SC 1 at 10-12 per Lord President Emslie. But the effect of the statutory hypothesis meant that the property itself remained with the company, unlike in a "normal" assignation in security. And see *Myles J Callaghan Ltd v City of Glasgow District Council* 1987 SC 171 at 181 per Lord Ordinary (Prosser).

161 1990 SC 330

162 1990 SC 330 at 336 (emphasis added).

163 [2017] CSOH 133, 2017 GWD 35-540.

164 [2017] CSOH 133 at para 120.

165 [2017] CSOH 133 at para 120.

166 [2017] CSOH 133 at para 147.

167 Rather than the assignee's right simply being extinguished upon satisfaction of the underlying debt-obligation of the cedent. For extinction of a security right more generally, see A J M Steven, "Accessoriness and Security over Land" (2009) 13 EdinLR 388.

168 The offside goals rule might cause a subsequent acquirer in bad faith, or a donee, to be bound by the retrocession right, but this is consistent with the retrocession right being a personal right.

it will not be clear to that party when the cedent's debt to the assignee is fulfilled and therefore when the debtor should instead pay the cedent. Intimation following retrocession therefore appears necessary.

9-66. A non-divestitive interpretation would raise many questions about the precise nature of the security interest: how it differs in practical and theoretical terms from absolute assignation, what the lesser right of assignation in security is a right to, whether an assignation *ex facie* absolute qualified by back letter has a different nature from assignation expressly in security, and so on. South Africa, a larger jurisdiction with a greater volume of legal commentary and case law, has struggled to answer many of these questions and serves as a somewhat cautionary tale. To re-direct Scots law in this area simply to enable floating charges to attach would be regrettable. A general real security right in incorporeal property could be facilitated in Scots law, and might even be desirable, but such a change would be most appropriate through legislative reform, after careful consideration and analysis.[169]

(2) Trust

9-67. If an assignee holds assigned property, or proceeds arising from that property, in trust for the cedent (the beneficiary), then the property is protected from the assignee's insolvency. Were the cedent to become insolvent, its personal rights in relation to the assignee's trust patrimony would be included within its own insolvent estate. There is some authority for the view that an assignee in security holds surplus property and proceeds in trust on behalf of the cedent.[170] *Purnell v Shannon*[171] revolved around the question of whether an assignee was required to retransfer assigned property to the cedent after satisfaction of a debt. The First Division held that the assignation was *ex facie* absolute and that any "understanding" that it was actually in security was an averment of trust, which was not proved in the circumstances of the case. This has been interpreted by Professor Gretton to mean that assignation *ex facie* absolute creates a trust, with the assignee holding trust property partly for its own benefit and partly for the cedent's benefit.[172] The decision can certainly be read in this way, but there is little detail to the statements in *Purnell* regarding trusts. The relevant *dicta* also do not necessarily exclude the

[169] See SLC, *Report on Moveable Transactions,* and n 2 above regarding the application of the proposed "statutory pledge" to some types of incorporeal property (not including claims at the present time).
[170] Ie assigned property, or proceeds of such property, remaining after satisfaction of the secured amount.
[171] (1894) 22 R 74.
[172] G L Gretton, "Radical Rights and Radical Wrongs: A Study in the Law of Trusts, Securities and Insolvency" 1986 JR 192, 201 n 32; P Nienaber and G Gretton, "Assignation/Cession", in R Zimmermann et al (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2005) 815. See also SLC, *Report on Moveable Transactions* paras 5.60 and 17.13 for references to the possible implications of the case.

possibility that creating a trust is an alternative to an assignation in security proper.[173]

9-68. The particular wording of an assignation in security or back letter could be crucial as far as the creation of a trust is concerned. It is also unclear whether any trust would be a constructive trust, arising from the nature of the security relationship,[174] or if the transaction would be deemed to create an implied trust reflecting the intention of the parties. Whatever the nature of such a trust, if one is created by assignation *ex facie* absolute qualified by back letter, there is an even stronger case for its creation by an assignation expressly in security.

9-69. In any event, the possible trust mentioned above may not enable the chargeholder to rank ahead of the assignee in security. It would apparently only allow the chargeholder to have an insolvency-proof priority right to the surplus property or proceeds, through the cedent's rights as trust beneficiary.[175] For the chargeholder to realise a ranking preference over the assignee, all of the property, or at least enough of it to satisfy the chargeholder's claim, would need to be held in trust for the benefit of the cedent (or chargeholder), and this would need to be the case from (at least) the point at which the charge attaches. Before that time, the assignee could be entitled to the property and any proceeds obtained. An obvious practical problem is how the assignee is to know the amount of the chargeholder's claim and whether or not the assigned property is needed to satisfy it?[176] The absence of publicity to the assignee (and the claim debtor) upon attachment militates against this analysis. In addition, if the assignee was required to transfer property to a liquidator, receiver or administrator, he could lose any ranking preference (whether lower or higher than a chargeholder), as his basis for a priority right to the property as assignee may disappear with the transfer. Beyond these difficulties, the imposition of a trust would be highly artificial and the extent of the trust necessary to enable a chargeholder to have priority is without guidance in existing authorities.

(3) Grant in breach of negative pledge is non-divestitive?

9-70. Another possibility is that, even if ordinarily an assignation in security is fully divestitive, there is a specific exception where the assignation is in competition with a prior-ranking floating charge. The operation and effect of a negative pledge clause could provide this result. However, this argument has become more difficult to advance in the light of s 464(1A) of the Companies Act 1985, which states that the

[173] See eg *Monteith v Douglas and Leckie* (1710) Mor 10191 for an apparent example of assigned property being held in trust (rather than formally in security).
[174] As already noted, an assignation in security is a security right in the form of a *fiducia cum creditore*. It could therefore be argued that the assignee acts in a fiduciary capacity as far as the (surplus) assigned property is concerned and, as noted by G L Gretton and A J M Steven, *Property, Trusts and Succession*, 3rd edn (2017) para 23.46, the "strongest candidate" for the recognition of a constructive trust in Scots law "is where a fiduciary … holds title to assets".
[175] As the assignee has priority to the claim, ahead of the cedent, to the extent of the debt obligation secured by the assignation in security.
[176] Or if other property subject to the charge would be sufficient.

effect of a negative pledge is to "confer priority on the floating charge over any fixed security or floating charge created after the date of the instrument".[177] The simplest meaning is that this refers to a ranking priority where the charge attaches, and is inapplicable as regards property no longer belonging to the company, perhaps including property assigned in security. But, if "confer priority" is interpreted widely, it could mean that an assignation in security in breach of the negative pledge is ineffective in any competition with a chargeholder, or is challengeable by a chargeholder,[178] as priority can only be given to the chargeholder in this way. Yet, given that the charge is enforced through liquidation, receivership or administration, the assignation in security would also apparently need to fall within the chargor cedent's estate in these processes to enable the insolvency practitioner to deal with the property.

9-71. To suggest, however, that an assignation in security is non-divestitive when it is in breach of a negative pledge would be rather awkward both in theory and in practice. It would represent an extension of the currently accepted ranking effect of s 464(1A).[179] Furthermore, it is contrary to: (i) the continued ability of an assignee to transfer the property; (ii) the property's susceptibility to the diligence of the assignee's creditors;[180] and (iii) the likelihood that the property would be deemed to be within an insolvent assignee's estate. Given that the assignee apparently owns the property, there is also a policy argument against penalising parties acquiring an interest through the assignee in good faith. There could, perhaps, be exceptions giving effect to the negative pledge against these parties if they have notice of it, but formulating appropriate rules would be a challenge. And if the property is a claim, the debtor will have been informed to make payment to the assignee, again supporting the notion that the assignation ought to be effective.

9-72. It would be more straightforward if: (i) an assignation is only rendered ineffective from the attachment of the charge (or from when the assignee has notice of this); (ii) the assignee has powers to deal with the property before attachment; and (iii) the ineffectiveness does not affect successors of the assignee (voluntary and

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[177] Companies Act 1985 s 464(1A). This was added by the Companies Act 1989 s 140(4), which came into effect on 3 July 1995. See Companies Act 1985 s 464(1)(a) for the provision giving effect to negative pledges and see the discussion at paras 2-29 ff above.
[178] See Halliday, *Conveyancing Law and Practice* para 56-23, which refers to the prohibition in a negative pledge enabling the chargeholder to "challenge" any subsequent fixed security or floating charge created in breach of the negative pledge. However, the anticipated implications of this are unclear. See also D J Cusine (ed), *The Conveyancing Opinions of Professor J M Halliday* (1992) 306, where it is suggested that an assignation in security or any other form of security "would be reducible as being in contravention of the floating charge" if granted in breach of a negative pledge clause. But this opinion is from 1976 and therefore pre-dates the Companies Act 1985 s 464(1A), a provision which indicates the issue is one of priority rather than challenging the subsequent security.
[179] See eg Hardman, *Practical Guide to Granting Corporate Security* para 9-11. It is worthwhile to note the English position here, whereby a further security granted in breach of a negative pledge accompanying a floating charge is similarly dealt with as a ranking priority question: see eg *SAW (SW) 2010 Ltd v Wilson* [2017] EWCA Civ 1001.
[180] As Professor Gretton notes, "diligence is available against all property owned by the debtor but against no property owned by a third party": see G L Gretton, "Diligence", in *The Laws of Scotland: Stair Memorial Encyclopedia* vol 8 (1992) para 107.

involuntary). But this means that if A Ltd transfers incorporeal property to C Ltd, the latter could grant security over the property, including a floating charge to D Bank. If D Bank's charge attached before, or even after, B Bank's charge, would D Bank be defeated by an automatic (deemed) reversion of the property to A Ltd, upon B Bank's charge attaching? In addition, what would be the liabilities and entitlements if the debtor made a (further) payment to C Ltd? If the two charges were in competition, there is no clear answer as to how enforcement would work or which charge would have priority. Would they rank according to first registration or creation? If either of these applies, D Bank could lose out even if not blameworthy. For instance, if C Ltd's charge to D Bank was created later than B Bank's charge from A Ltd, there would be no indication on the charges register for C Ltd that its property was subject to B Bank's charge. Rather, B Bank's charge is shown on *A Ltd's* entry. This highlights a particular difficulty where a company transfers property in security, as the security is registered in the charges register against the transferor, not the transferee (nor against the property itself). Due to all of the above, there would be much to resolve with an approach which held a negative pledge to render an assignation in security ineffective, whether in whole or in part.

(4) Wide application of *Sharp v Thomson*

9-73. A further solution is provided by a wide reading of *Sharp v Thomson*.[181] But this is only true if the *ratio* applies to incorporeal property *and* if property not owned by the company can still be within its property and undertaking. The latter requires that *Sharp's* ratio involves a full-equitable attachment approach.[182] If property is assigned in security and "beneficial interest" remains with the cedent, the property could still be attached by a floating charge granted by the cedent.

9-74. Yet, as noted earlier,[183] there are considerable problems with the full-equitable attachment approach, and these problems are particularly apparent within the context of assignation in security. The debtor in a claim has been ordered to make payment to the assignee, by intimation, but the cedent is considered to have the beneficial interest. What mechanism would there be for the cedent's liquidator or equivalent to obtain the property or proceeds from the assignee or the debtor? And if the assignee transfers the property to a further party before or after the attachment of the charge, does the property remain in the original cedent's property and undertaking? If so, how is the charge enforced against successor parties? Again, there are a multitude of questions casting doubt upon the validity and appeal of the option.

(5) Non-attachment

[181] 1997 SC (HL) 66.
[182] See paras 4-41 ff above.
[183] See especially paras 4-43 ff above.

9-75. Given the complexity involved in the above solutions, a simple alternative is attractive. The most obvious is for a charge not to attach to property assigned in security. After all, property transferred by a chargor in the normal way is no longer attachable by a chargor-granted floating charge; treating assignation in security in the same way as the wider law is coherent. If assignation in security is not a fixed security, then there is no inherent contradiction with the ranking provisions in such an approach. Even if it is a fixed security, the floating charge cannot compete with it due to the absence of attachment, which is a pre-requisite for ranking. (In other words, the charge must be in the race before we can determine in what place it finishes.) The charge would, however, attach to the chargor's personal right of reversion and could attach to the assigned property itself if it were retrocessed.

9-76. It might be argued that, if the previous paragraph is correct, parties would use assignation in security as a way of defeating a pre-existing floating charge. However, the charge would attach to any loan sums received from the assignee and, if the sum received was lower than the value of the assigned property, the assignee may not ultimately benefit as the transaction could be challengeable. In addition, there are already various ways in which a floating charge can be defeated: by absolute assignations, eg in debt factoring; by transfers of corporeal property; and by retention of title, where ownership has not yet transferred to the chargor.

(6) Legislative reform

9-77. The current uncertainty as to the law in this area means that a legislative solution would be welcome. Such a solution could come in a number of forms. The most complicated and significant change would be to introduce a subordinate security right for incorporeal property and to prohibit assignation in security (along the lines of the position for (corporeal) heritable property). The Scottish Law Commission have recommended the introduction of a new subordinate real right in security, a statutory pledge, but it would not be available over most incorporeal property, including claims, and would not replace assignation in security.[184]

9-78. A simpler change would be to provide that, if a floating charge ranks ahead of an assignation in security, then the charge attaches to the property despite the earlier divestiture, and the assignee is obliged, upon attachment of the charge, to transfer the property back to the company for realisation and distribution of proceeds. The assignee's priority interest could also be expressly protected despite the re-transfer. A number of issues, such as when the assignee has notice of the attachment, whether the property could fall into the assignee's insolvency and how much protection third-party acquirers from the assignee should be given, would all require careful consideration.

[184] See SLC, *Report on Moveable Transactions*.

10 Conclusion

10-01. This book seeks to show that floating charges can be analysed in a way that is more coherent with Scots property law and insolvency law than is sometimes suggested. The floating charge is anomalous in our system, no doubt, but that does not mean it cannot be better integrated and synthesised with the background law. The charge's patrimonial nature has been repeatedly emphasised in the present work. Perhaps most importantly in this respect, enforcement of the charge, even after attachment, appears limited to property within the chargor's patrimony at any given time. A liquidator, administrator or receiver acts as an agent of the *chargor* as regards that party's property. Given that a chargeholder relies on these parties for enforcement, if property validly leaves the chargor's (private) patrimony, either before or after attachment, then it seems that such property can no longer be affected by the floating charge.

10-02. The floating charge's true nature is, however, elusive. Before attachment, it is difficult to contend that it is a real right. At that time, the charge confers only a conditional real interest and no direct powers over the property; only powers to replace the management of the chargor and to bring about attachment. Upon attachment, the charge has some real effect: particular property is affected and can be realised to pay the chargeholder, and the charge has a ranking priority against ordinary unsecured creditors generally and against certain subsequent real security rights. But other features, such as the non-availability of direct enforcement by a chargeholder, postponed aspects of its ranking, and patrimonial limitations, suggest it may be best regarded as a *sui generis* right combining elements of a real right and an insolvency preference.

10-03. There are a number of ways in which the floating charge does not accord with the principles of Scots property law, such as its limited compliance with the publicity principle. In certain respects, this has become worse over time; the removal of registration as a necessary condition for a floating charge to rank ahead of a subsequent fixed security remains objectionable. It would be preferable if a floating charge's effectiveness, including the priority it confers, was dependent upon registration. Remedying the publicity deficit as regards the charge's creation and attachment would be highly desirable from a doctrinal perspective.[1]

10-04. Yet this book has demonstrated that uncertainty and obscurity in areas of law interacting with the floating charge also contribute to difficulties integrating the charge into wider Scots law.[2] This was true for the old *ex facie* absolute disposition qualified by back letter and arguably remains true for the assignation in security of

[1] The provisions in Bankruptcy and Diligence etc (Scotland) Act 2007 Pt 2 would have largely remedied the publicity deficit for the floating charge but it now appears as if these will never be brought into force.

[2] This is true for the law of diligence: see A D J MacPherson, "The Circle Squared? Floating Charges and Diligence after *MacMillan v T Leith Developments Ltd*" 2018 JR 230.

incorporeal property. The eventual acceptance of a divestiture analysis for each of these means it is unclear whether, and how, a floating charge could attach to property subject to such forms of security. These matters could have been given greater attention at the time when the charge was introduced or by those involved in subsequent legislation on floating charges. However, resolving the problems would be difficult without more expansive reform dealing with the law beyond floating charges.

10-05. The judiciary have also often struggled to deal appropriately with the floating charge. This is exemplified by *Sharp v Thomson*.[3] That case, and related commentary, show that there was existing debate and conflicting sources regarding when (heritable) "property" transfers in Scots law. But the opinions in *Sharp* are flawed and depend upon a functionalist view of property in its interaction with the floating charge. As a result, there is now a divergence between the charge's attachment and property law generally, as in relation to the latter a formalist approach has prevailed. *Sharp* therefore perpetuates the status of the charge as an "alien"[4] concept and its *ratio* should be confined as narrowly as possible. Instead, an approach to attachment focused on whether the chargor owns the property would be much simpler and in conformity with property law. When paired with patrimonial limitations on the charge's enforcement, it would also help address the policy concerns that underlay the decision in *Sharp*.

10-06. Interpreting the floating charge in a way that fits with the rest of the law does not mean that it would necessarily lose its status as an exceptional institution. Indeed, it seems that the currently prevailing view of the statutory hypothesis for attachment's effect is incorrect. The charge does not need to take on the characteristics of existing securities to function effectively. Rather, it is more appropriate for the charge to be considered a *sui generis* security upon attachment – a security which corresponds with the general concept of a fixed security and which is effective over property in the company's winding up.

10-07. The floating charge arrived in Scots law, as a modified transplant from English equity, prior to the renaissance in the study of property law which has taken place in recent decades. If a security over fluctuating property was to be introduced afresh today, its commercial purposes would undoubtedly be met in a way that works better with the present state of private law.[5] Nevertheless, this book has

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[3] 1997 SC (HL) 66. It has also been true in relation to diligence, as evidenced by *Lord Advocate v Royal Bank of Scotland* 1977 SC 155 and subsequent case law. The more recent case of *MacMillan v T Leith Developments Ltd* [2017] CSIH 23, 2017 SC 642 has resolved some of the difficulties involving floating charges and diligence, but by no means all of them: see MacPherson, "The Circle Squared?".

[4] This label has frequently been applied to the floating charge in Scotland: see eg *National Commercial Bank of Scotland v Liquidators of Telford Grier Mackay & Co* 1969 SC 181 at 184 per Lord Ordinary (Fraser); *Sharp v Thomson* 1995 SC 455 at 481 per Lord President Hope; *Sharp v Thomson* 1997 SC (HL) 66 at 82 per Lord Clyde.

[5] The "statutory pledge" proposed by SLC, *Report on Moveable Transactions* would be a fixed security but could cover certain identified future property and would undoubtedly fit better with the underlying Scots law than the floating charge.

demonstrated that, in certain respects, even the floating charge can be interpreted as a doctrinally palatable institution. Approaching attachment issues in the manner suggested in these pages would be of considerable assistance in that respect. The current calls for the reform of secured transactions in English law, which could lead to the abolition of the English floating charge,[6] may raise questions about the future of the Scottish equivalent. However, whatever course reform may take in England, the Scottish floating charge will be with us for some time yet. And even if a new security was ultimately to replace the floating charge, the story of the latter in Scots law would be highly instructive for the introduction and development of the new form of security.

[6] Differing visions of reform have been proposed, most notably by the City of London Law Society and the Secured Transactions Law Reform Project: for an overview, see Sheehan, *Principles of Personal Property Law*.