

THE FUTURE OF MOVEABLE SECURITY IN SCOTS LAW? COMMENTS ON THE SCOTTISH LAW COMMISSION'S REPORT ON MOVEABLE TRANSACTIONS

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Introduction

On 19 December 2017 the Scottish Law Commission (“SLC”) published its long-awaited Report on Moveable Transactions (“the Report”).¹ The Report is in three volumes: volume 1 focuses on the assignation of claims; volume 2 is primarily concerned with security over moveable property; and volume 3 contains a draft Moveable Transactions (Scotland) Bill (“draft Bill”).² Given the complexity of the subject matter, it is unsurprising that the Report is, by some measurements, the longest ever produced by the SLC. As such, the present commentary must necessarily be selective.³ It will principally focus on aspects of the law of security rights outlined in the Report. The SLC’s recommendations represent a marked improvement on the present regime of moveable security; they are focused upon improving access to finance but in a way that is compliant and coherent with wider Scots law. With respect to the latter point, it will be shown that the reforms compare favourably to the floating charge. Attention will also be given to certain other matters involving the content and intended operation of the SLC’s proposals.

General Comments

The SLC recommend a number of major changes to the law of moveable transactions, including:

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¹ This was preceded by a Discussion Paper on Moveable Transactions (DP 151) in June 2011, as well as a consultation following the publication of a draft Bill in July 2017.

² The Bill produced is for the Scottish Parliament. There are, however, also recommendations for wider reform.

³ Much more could be said regarding various elements of the Report and accompanying draft Bill, including technical details about the proposed new registers.

- The creation of a Register of Assignations (“RoA”)⁴ to allow for registration as an alternative to intimation for assignation of claims;
- The introduction of a new security right, a so-called “statutory pledge”, over corporeal moveable property (with some exceptions) and certain incorporeal moveable property (intellectual property and financial instruments),⁵ to be created by registration in a new Register of Statutory Pledges (“RSP”);⁶ and
- The clarification and modernisation of aspects of the law relating to assignation and possessory pledge (including, for possessory pledge, allowing for forms of delivery other than actual physical delivery).⁷

The SLC rightly suggests that moveable transactions law might be the area of Scottish commercial law “where reform is longest overdue and most needed”.⁸ It is described as “outmoded, inadequate and inflexible”.⁹ In recommending reforms, the SLC consequently emphasises the importance of removing barriers to the raising of finance by businesses and individuals. It is therefore notable that the SLC has received significant input and support from a number of practitioners working in the field of moveable transactions.¹⁰ The SLC is seeking to give effect to what is commercially suitable and what parties actually want from a transaction, rather than having to use workarounds with potential unintended consequences, and which may involve additional expenses and burdens.

As well as recommending reforms that would be useful in commercial practice, the SLC has worked hard to ensure that its prospective scheme would be doctrinally coherent with wider law, especially property law (and its Civilian heritage). This fusion can be contrasted with the floating charge which, although widely used and popular in practice,¹¹ has received much academic criticism. There is already a danger that the size of the Report and draft Bill could prove daunting when politicians are involved in the enactment of the reforms.

⁴ There are many rules for the RoA outlined in the Report and the draft Bill (Part 1 Ch 2, ss 19ff). In certain respects, the influence of the Land Registration etc (Scotland) Act 2012 is clear (e.g. the Keeper’s duty to correct manifest inaccuracies in the assignations record (draft Bill, s 28)).

⁵ See draft Bill, s 47, for the property that is included and excluded.

⁶ Details about the RSP can be found in Part 2 Ch 2 of the draft Bill, s 87 onwards. The introduction of two different registers, the RoA and RSP, is a departure from the Discussion Paper. This is justified on the basis of assignation being a single transfer event, whereas a security transaction (in the narrow sense of the term “security”) involves a subordinate right being created. As such, the registers would serve different purposes.

⁷ This would overturn *Hamilton v Western Bank* (1856) 19 D 152. See s 45 of the draft Bill and paras 25.2ff of the Report.

⁸ The Report, para 1.2.

⁹ The Report, para 1.5.

¹⁰ Especially those who have been members of the project’s advisory group, listed at vol 2, pp. 301-302.

¹¹ This is acknowledged in the Report, para 20.8.

The proposed new regime, including the granting of statutory pledges, generally applies to individuals as well as non-natural persons. This represents a departure from the floating charge, which can only be created by registered companies and certain other corporate entities.¹² The statutory pledge will therefore fill gaps in the existing system of secured lending. There would, however, be certain protections for individuals not acting in the course of business. For example, consumers would be unable to grant a statutory pledge over after-acquired assets unless they were granting the security to obtain funds to purchase the assets.¹³ They would also not be able to grant a statutory pledge over an asset worth less than a specified figure (currently suggested to be £1,000) and a court order would be necessary to enforce the security.¹⁴ It is likely that this area will receive political attention if the Scottish Government take forward the SLC's Report into the legislative arena. However, the SLC appears to have struck a reasonable balance between allowing individuals to access finance through the provision of security collateral, while offering safeguards to limit potential exploitation.

Assignment of Claims

The term "claims" is preferred by the SLC over related expressions such as "rights".¹⁵ In this context, "claims" mainly consist of incorporeal moveable property but also extend to monetary rights relating to land, such as the assignation of rents.¹⁶

Importantly, the reforms proposed for assignation apply not only to absolute assignation but also to assignation in security (expressly in security and *ex facie* absolute). The SLC considers them to be the same institution.¹⁷ The current consensus position in Scots law is that assignation in security involves a transfer of the claim to the assignee qualified only by a personal right of retrocession in

¹² This also means that trustees will be able to grant the statutory pledge over property that they hold in trust. Cf the position for floating charges: A.D.J. MacPherson, "Floating Charges and Trust Property in Scots Law: A Tale of Two Patrimonies?" (2018) 22 EdinLR 1.

¹³ Draft Bill, s 52; the Report, paras 19.38 and 19.47.

¹⁴ Draft Bill, ss 52, 70; the Report, paras 19.36ff.

¹⁵ The Report, para 4.10.

¹⁶ Draft Bill, s 42(2); the Report, paras 4.3 and 4.14. This would also include, for example, monetary rights arising from missives. Claims are limited to personal rights and, therefore, even some incorporeal moveable property, like intellectual property rights, are excluded (see the Report, para 4.12).

¹⁷ The Report, paras 13.44f and the Discussion Paper, for example, at para 7.6.

favour of the assignor (cedent).¹⁸ Although this view may not be wholly uncontested,¹⁹ the introduction of the SLC's recommendations would reinforce the apparent uniformity of absolute assignation and assignation in security. Yet even the SLC recognises that there might be some differences between them; for instance, where personal creditors of an assignee in security attempt to do diligence, the claim may be protected from them, whereas this would not be the case for personal creditors of an absolute assignee.²⁰ A further possible point of divergence, between an assignation (expressly) in security and an absolute assignation, arises from the fact that notice of the retrocession right for the former would be readily available upon the registration of the assignation in the RoA. In a situation where A assigned a claim expressly in security to B, which was registered in the RoA, and then B sought to transfer to C, without the right to do so, C could have actual or constructive knowledge of A's retrocession right due to the details on the register. This might enable A to reduce the transfer to C on the basis of the "offside goals" rule.²¹

One major advantage of allowing for the completion of assignations of claims by registration in the RoA is that it will enable an assignor to transfer claims that are not yet in existence. Such claims will automatically transfer to the assignee upon them coming into being, assuming they are held by the assignor.²² Registration also allows for the simple assignation of multiple claims and avoids the inconvenience of having to intimate to a potentially large number of debtors. In addition to these commercial advantages, registration in a public register better adheres to the publicity principle of property law than intimation to the debtor (which would, nevertheless, remain an alternative to registration).

With respect to the specificity principle of property law, the SLC recommends that this is upheld by requiring a registered assignation document to identify the claim being assigned.²³ However, in the interests of commerce, a liberal form of identification would be allowed. If multiple claims

¹⁸ Assuming assignations in security are transfers that fully divest the assignor, there are various issues involving their relationship with floating charges: see MacPherson, *The Attachment of the Floating Charge in Scots Law* (PhD Thesis, University of Edinburgh, 2017), ch 9.

¹⁹ See, for example, the recent case of *Edinburgh Schools Partnership Ltd v Galliford Try Construction (UK) Ltd* [2017] CSOH 133, in which Lord Bannatyne, at para 120, considered that there is a "fundamental difference between an absolute assignation and an assignation in security" and that in an assignation in security the cedent "is not wholly divested of that which is being assigned". It is unclear how far his view extends beyond special issues of title to sue that featured in the case.

²⁰ The Report, paras 5.58-5.60. The SLC cites *Purnell v Shannon* (1894) 22 R 74 in support; however, there is uncertainty as to what precisely that case provides authority for.

²¹ For general discussion of the rule, see K.G.C. Reid, *The Law of Property in Scotland* (Edinburgh: LexisNexis/Butterworths, 1996), paras 695ff.

²² Draft Bill, ss 1(5) and 3(2)(a); the Report, paras 5.81ff. Currently, it is impractical to assign such property as there can be no intimation where there is no identifiable claim debtor.

²³ Draft Bill, s 1(3).

were to be assigned, identification could be by reference to an “identifiable class” of claims.²⁴ And a claim would not be transferred until it became identifiable. The precise meaning of “identifiable class” in this context is unclear. How far would it extend? In the note to section 1 of the draft Bill, it is stated that an example of identification would be “for a business to assign all invoices raised against a particular customer, or all invoices rendered in a period specified in the assignment document”.²⁵ But could a party assign all present and future claims against all other parties to an assignee? This description would perhaps enable any interested party to ascertain whether a given claim had been assigned, by simply identifying whether the assignor held the claim, and would provide a higher degree of specification than certain vaguer references to a more limited class. The precise identification requirements would require clarification from case law. Prior to that, it could be anticipated that parties would seek to meet the requirements of the provision by offering a considerable degree of specification in the assignment document.²⁶

Various other changes to the law of assignment are proposed by the SLC, including: a requirement for assignments to be in writing (including electronic writing);²⁷ confirming the possibility of a partial assignment of a claim;²⁸ protection of a debtor who performs in good faith to the assignor;²⁹ giving statutory form to the *assignatus utitur jure auctoris* rule (whereby a debtor may assert against the assignee any defence or right of compensation that the debtor has against the assignor);³⁰ and allowing an assignee to instruct the debtor to perform to the assignor (which will help give practical effect to what is often intended in an assignment in security, whereby the assignee will only enforce their right upon default by the assignor).³¹ Also, despite a current trend in other jurisdictions towards rendering anti-assignment clauses effective only between the debtor and original creditor, the SLC in response to the views of its consultees recommends that the law continues to give wider effect to these clauses.³²

²⁴ Draft Bill, s 1(4).

²⁵ The examples in the Report and draft Bill are generally a significant plus point.

²⁶ An individual would be able to assign claims in the same way as other parties, except for wages and salary claims (draft Bill, s 8). Subject to those exceptions, there could be a danger that an individual might try to assign all future claims, delictual, contractual or otherwise. The current law may allow a party to contractually agree to transfer all future claims but the assignment of such rights would be facilitated by registration. An argument could be made for taking a more paternalistic approach here.

²⁷ Draft Bill, s 1(1); and see also the Report, paras 4.19ff.

²⁸ Draft Bill, s 6.

²⁹ Draft Bill, s 11.

³⁰ Draft Bill, s 14.

³¹ Draft Bill, s 17(1)(b).

³² Draft Bill, s 7. And see the Report, paras 13.2ff.

The aspect of the current law that is considered “most unsatisfactory” is intimation.³³ Therefore, it is recommended that intimation is limited to: (i) the assignor or assignee serving on the debtor written notice of assignation (including electronic notice); (ii) the debtor acknowledging to the assignee that the claim is assigned; and (iii) intimation in judicial proceedings.³⁴ The overall package of reforms for assignation would bring greater clarity to the law in an area that is marked by obscurity, and this ought to be widely welcomed.

Given that intimation and registration would be alternatives for completing the transfer of claims, there is a potential criticism that the register will be incomplete and therefore a third party could not rely upon it. This point has been made by the Secured Transactions Law Reform Project and others.³⁵ However, the SLC notes that the RoA will be complete so far as future claims are concerned and in other cases financial institutions would factor in the risks of an earlier assignation having taken place by intimation.³⁶ The SLC seeks to offer flexibility to parties regarding moveable transactions and considers that intimation may be more appropriate in certain contexts. (Provision is also made for Scottish Ministers to prescribe certain categories of claim that can only be transferred by registration.)³⁷ Of course, we cannot be sure how precisely registration of assignations might be used, especially where intimation remains an option, but it would certainly be interesting to monitor how practice develops as this could usefully inform future policy.

Real Security over Moveable Property

As far as real security is concerned, the SLC recommends the introduction of a new non-possessory security, the statutory pledge.³⁸ This would be created by registration of a constitutive document in the RSP.³⁹ The security would offer a number of advantages to debtors and creditors in comparison to a possessory pledge or assignation in security. Security providers would be able to continue to possess and use the secured property, they could utilise its full value by granting multiple security rights over it and they could transfer ownership to another (subject to the security right).⁴⁰ There would be greater opportunities for creditors to obtain collateral in secured finance

³³ The Report, para 3.16.

³⁴ Draft Bill, s 9(1). The Transmission of Moveable Property (Scotland) Act 1862 would be repealed by s 41.

³⁵ The Report, para 5.19f.

³⁶ The Report, para 5.19.

³⁷ Draft Bill, s 3(6).

³⁸ This will be a proper security right i.e. a subordinate real security right (the Report, para 16.5). Cf a “share pledge”, which is not strictly speaking a pledge in Scots law but rather the transfer of ownership of the share to the creditor.

³⁹ Draft Bill, ss 43(2)(b) and 48.

⁴⁰ See the Report, para 16.7.

transactions and this would reduce lending risk for such creditors. The statutory pledge could also be granted over future property but the security would only exist, as regards that property, when the property came into existence and was acquired by the provider.

If multiple items were to be pledged, there would be no need to identify each item separately but they would require to be part of an identifiable class.⁴¹ Similar issues arise as those discussed for assignment above and the SLC acknowledges that whether the test for identification is met would need to be “determined on a case by case basis”.⁴² It is not clear whether, for example, a party⁴³ could pledge all of their present and future corporeal moveables.⁴⁴ In any event, a real right would be created upon registration as long as property was identified as encumbered property at that time.⁴⁵ If it was not, the statutory pledge would be created over the property upon identification taking place. Thus there would be compliance, to an acceptable degree, with both the publicity and specificity principles.

A more radical reform to the law of moveable security rights, along the lines of the UCC-9 or PPSAs, has been rejected.⁴⁶ These systems involve, *inter alia*, a functional approach to security rights whereby transactions that operate as security (e.g. retention of title or the creation of a trust for security purposes) are dealt with as security rights and may be “recharacterised” to achieve this.⁴⁷ There was a lack of support amongst consultees for such an approach and there is a desire for commercial law in England and Scotland to be broadly similar, and England does not have a UCC-9/PPSA system. The SLC considers that the new statutory pledge will be a functional equivalent of the English fixed charge.⁴⁸ In light of the failure of previous reform attempts,⁴⁹ the SLC has opted for an approach that is relatively conservative in order to obtain sufficient support to make the law fit for purpose. Piecemeal reform is considered more likely to succeed than the wider reform that some may hope for.⁵⁰ And it is also more realistic and productive to seek certain useful reforms now than to await a promised PPSA security revolution in England that may never

⁴¹ Draft Bill, s 46(4).

⁴² The Report, para 23.8.

⁴³ This relates to a party other than a consumer. It is clear that a consumer could not do so. See nn 13 and 14 and accompanying text above.

⁴⁴ This could be considered the equivalent of a chargeable class of property for floating charges.

⁴⁵ Draft Bill, s 48.

⁴⁶ The Report, paras 18.44ff.

⁴⁷ Further details regarding these systems, including “notice filing” and the distinction between “attachment” and “perfection”, are provided in the Report, paras 18.5ff.

⁴⁸ The Report, para 18.71.

⁴⁹ The Report, paras 18.9ff.

⁵⁰ See the Report, para 18.52. See also the comments by Lord Drummond Young in *MacMillan* (n **Error! Bookmark not defined.**) at para 122.

arrive. Scotland currently lags behind other countries by not allowing for a fixed non-possessory security over corporeal moveables that is publicised by registration. The case for such a security “seems irrefutable”.⁵¹

The floating charge will not be abolished and will continue to be attractive to lenders due to the control and enforcement powers it confers and its universal coverage of property, including land and claims.⁵² The SLC recommends that the new security will be available for corporeal moveable property,⁵³ financial instruments and intellectual property. Nevertheless, the SLC recognises that the “optimum” position regarding the statutory pledge would be to allow all incorporeal moveable property to be encumbered (as was proposed in the Discussion Paper).⁵⁴ After much consideration, the SLC decided to make the security more limited in its coverage of incorporeal moveables than previously envisaged. Related to this, there is to be no floating version of the security, in contrast to the proposal in the Discussion Paper.⁵⁵ The SLC has endeavoured to make the statutory pledge a fixed security by, for example, seeking to impose relatively strict requirements on a secured creditor giving consent to a transfer in order for the property to be freed from the encumbrance.⁵⁶ One of the reasons why the statutory pledge would not include claims is because of the difficulties in making sure that a security will be treated as a fixed security over such property within corporate insolvency law (where much of the regime is UK-wide). The inherent problems of trying to imitate the uncertain English law rules on “control” of proceeds of claims (to make the security a fixed one) and the possibility that the English position could be reformed featured prominently in the SLC’s decision.⁵⁷ However, with the potential for future legal developments in mind, Scottish Ministers would be given powers to amend the statutory provisions on consent to transfer and to widen the classes of incorporeal property that could be pledged.⁵⁸ Consequently, the introduction of the statutory pledge can be considered a more easily digestible initial stage of reform that would provide foundations for expansion to include

⁵¹ The Report, para 21.3.

⁵² The SLC noted that a question about the non-abolition of the floating charge drew the “most passionate responses” in the entire Discussion Paper consultation (the Report, para 20.8). It seems unlikely that the floating charge in Scots law will disappear unless, perhaps, this also happens in England.

⁵³ Except for certain aircraft, aircraft objects and ships (see draft Bill, s 47(1)).

⁵⁴ The Report, para 22.62.

⁵⁵ The fact that the SLC has recognised that a fixed security can apply to future acquired property takes away some of the incentive of introducing a floating security (see the Report, para 20.15).

⁵⁶ Draft Bill, s 53. But note that a purchaser acquiring corporeal property in the ordinary course of the seller’s business would acquire the property unencumbered, despite the consent requirement, provided the purchaser was in good faith at the time of acquisition (s 54).

⁵⁷ The Report, paras 22.12ff. See also paras 22.7-22.11.

⁵⁸ Draft Bill, s 47(2)(d) and 53(5); the Report, paras 20.44f and 22.62.

additional incorporeal moveables in future. Extending the classes of property that can be pledged should be an ongoing objective.

The SLC specifies that the new security would be subject to the general law of rights in security, except where the legislation provides otherwise.⁵⁹ This is a useful statement and would assist with integrating the new security right into wider Scots law. It is in marked contrast to the floating charge, for which general aspects of the law of security rights, such as the doctrine of catholic and secondary creditors,⁶⁰ apparently do not apply.⁶¹ In many respects the statutory pledge would compare favourably to the floating charge in doctrinal compatibility terms. Its nature would be clearer, it would conform to the personal and real rights distinction that lies at the heart of Scots property law, it would be created upon publicity being provided through registration and it would have real effect from this point.⁶² There would be no blind period between creation and registration of the security, and there would be no gap between the security having real effect and publicity of this fact being given to third parties via registration. The suggested enforcement processes are also more clearly defined than those for the floating charge.⁶³

By including the new security within the genus of pledge,⁶⁴ and making the law consistent for the statutory pledge and possessory pledge in various respects,⁶⁵ such as for ranking and elements of enforcement,⁶⁶ this again helps to fit the statutory pledge into Scots law. It means that the general law of pledge could be drawn upon if issues arise that are not expressly dealt with in the legislation. As far as ranking is concerned, the principal rule is that pledges (statutory or possessory) would

⁵⁹ The Report, para 16.13.

⁶⁰ The application of this doctrine may become more commonplace across different types of property if the statutory pledge is introduced, as creditors will often hold moveable and heritable securities over a debtor's property.

⁶¹ See *Forth and Clyde Construction Co Ltd v Trinity Timber & Plywood Co Ltd* 1984 SC 1.

⁶² For an overview of some of the criticisms of the floating charge in Scots law, see A.J.M. Steven, "George Gretton and the Scots Law of Security Rights" in A.J.M. Steven, R.G. Anderson and J. MacLeod (eds), *Nothing so Practical as a Good Theory: Festschrift for George L Gretton* (Edinburgh: Avizandum Publishing, 2017), pp.246ff.

⁶³ See draft Bill, ss 68ff. However, there may be some issues regarding what should be done with proceeds where there is enforcement of a fixed security through sale, the debtor is in an insolvency process and the fixed security is in competition with a floating charge, see MacPherson, *The Attachment of the Floating Charge in Scots Law* (PhD Thesis, University of Edinburgh, 2017), ch 6.

⁶⁴ The draft Bill refers to pledge in a general sense and then distinguishes the pledges on the basis of how they are created (s 43).

⁶⁵ There will, however, be some differences: e.g. possessory pledge requires possession by the creditor and can only affect corporeal moveables, whereas statutory pledge would not require possession, would be created by registration and could also cover certain incorporeal moveable property. Also, if a statutory pledge was granted by a company, it would need to be registered as a charge at Companies House, unlike a possessory pledge (the Report, para 36.9). Double registration of statutory pledges would therefore be required, but the SLC consider that the possibility of an information-sharing order under the Companies Act 2006, s 893, should be kept under review (the Report, para 36.28).

⁶⁶ There is a largely unitary approach to the enforcement of possessory and statutory pledges; however, there could be practical differences arising from fact that the latter could include incorporeal property.

rank against other rights in security (including pledges) according to when they are created, *prior tempore potior jure*.⁶⁷ And with reference to property that is only acquired by the security provider after the grant and registration of statutory pledges, two statutory pledges would rank against each other according to their order of registration.⁶⁸ Once again, these ranking rules are clear and compatible with Scots property law; the ranking is connected to the real effect of the security and depends upon publicity through registration. For ranking agreements involving a secured creditor with a pledge, these are not registrable and only have effect between parties to the agreement and their successors.⁶⁹ In relation to securities arising by operation of law, such as liens and the landlord's hypothec, the statutory pledge, like the floating charge, would rank behind such securities.⁷⁰ The position differs for diligence: unlike a floating charge, which is subject to "effectually executed diligence" even if that diligence is executed after the charge's creation, a statutory pledge would only rank behind diligence if the diligence was executed before the pledge was created.⁷¹

Given that statutory pledges and floating charges could both encumber the same property, the latter's ranking problems could prove contagious. For instance, imagine if property is subject to a floating charge with a negative pledge, then a statutory pledge is granted and registered, followed by the execution of diligence (most likely the diligence of attachment, but certain pledged property could be arrested). A priority circle would apparently arise if the floating charge attached: the floating charge would rank ahead of the statutory pledge due to the negative pledge,⁷² the pledge would rank ahead of the diligence due to it being created first,⁷³ and the diligence would rank ahead of the floating charge as "effectually executed diligence".⁷⁴ This priority circle involving a floating charge with negative pledge, a fixed security and diligence already exists in Scots law⁷⁵ and is an unfortunate product of the floating charge ranking rules.⁷⁶ As such, it should not be considered an

⁶⁷ Draft Bill, s 64(1).

⁶⁸ Draft Bill, s 64(2) and (3).

⁶⁹ Draft Bill, s 64(6) and (7).

⁷⁰ Draft Bill, s 64(4). Unlike with the equivalent floating charge provision (Companies Act 1985, s 464(2)) there is no mention of "fixed" security arising by operation of law.

⁷¹ Draft Bill, s 66. There is also an exception for advances made after the diligence is executed.

⁷² Draft Bill, s 65, which seeks to amend the definitions of fixed security in Companies Act 1985, s 486(1) and Insolvency Act 1986, s 70(1) to include a statutory pledge; and Companies Act 1985, s 464(1)(a) and (1A).

⁷³ Draft Bill, s 66(1) and (2).

⁷⁴ See Companies Act 1985, s 463(1)(a); Insolvency Act 1986, s 60(1); and *MacMillan* (n **Error! Bookmark not defined.**).

⁷⁵ It would, for example, arise for heritable property where there is a floating charge with negative pledge, followed by the grant and registration of a standard security, then a registered adjudication for debt.

⁷⁶ It should be noted that the priority circle mentioned here differs from the one discussed in S. Wortley, "Squaring the Circle: Revisiting the Receiver and 'Effectually Executed Diligence'" 2000 Jur. Rev. 325. That circle will no longer be possible due to the decision in *MacMillan* (n **Error! Bookmark not defined.**).

obstacle to the introduction of the statutory pledge in the manner proposed, but again demonstrates some of the deficiencies of the law of floating charges, especially in comparison to the statutory pledge.

Conclusion

There is much to commend within the SLC's Report and the accompanying draft Bill. The enactment of the SLC's recommendations would be a hugely important development in Scots commercial law. Reforming the law of assignation and possessory pledge and introducing the statutory pledge would involve significant advances for the law of secured credit in Scotland. Not only would there be greater clarity and certainty than under the current law, but enabling all categories of person to grant a non-possessory fixed security over moveables will almost certainly widen access to secured credit. The reforms proposed do not, however, involve sacrificing respect for the background law in a rush to facilitate business. The SLC's recommendations point to a future security right that would have a less turbulent existence than the floating charge, which (along with its compatibility problems) dominated the story of moveable security in Scots law in the second half of the twentieth century. The statutory pledge would also be a fitting reflection of the revival of Scots property law scholarship in recent decades.

The Scottish Government is urged to take forward the recommendations and make the Scots law of moveable security more suitable for twenty-first century finance. This is especially desirable and pressing given previous failed reform attempts. Yet even if the recommendations are introduced by legislation, this should not be considered the end of the story. Rather, the foundations will be laid for further reform that would make the Scots law of security fit for the future.