Floating Charges in Scotland: Lessons from a Mixed Legal System

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SUMMARY

1. Introduction

Floating charges can give rise to puzzlement and fascination in almost equal measure. For Civilian lawyers (in particular) they may be viewed as alien, shrouded in the fog of English equity.[1] Yet this type of security interest is not limited to the Common Law world. Scotland is a mixed legal system, and its property law is principally Civilian,[2] but floating charges were introduced into Scots law by legislation in 1961.[3] This change has been described as "the most important innovation in [Scots] commercial law in the [twentieth century]".[4] The relationship between floating charges and wider Scots law has, however, been a relatively difficult one. There have been significant challenges accommodating floating charges within the legal system, including with respect to how floating charges operate and their interactions with other rights. Despite these difficulties and related academic and judicial criticism, floating charges are widely used and popular among lenders and their representatives.[5]

Of course, many legal systems recognise the advantages of a form of non-possessory security over a changing class of property akin to a floating charge. For systems considering introducing a floating charge or functional equivalent, or reforming an existing floating security, Scots law can provide a useful case study for transposing a form of security that is commercially valuable while also offering a cautionary tale regarding the problems of integrating a novel security right into existing laws of property, debt and insolvency. This article identifies lessons that can be learnt from the Scottish experience and which can be usefully applied by parties in other systems.

Given that many readers of this journal may not be particularly familiar with the law of Scotland, the article first provides an overview of Scots law, highlighting its utility as a system of study when considering reform and legal transplants. The article then proceeds to examine floating charges in more detail and

1 Professor Sir Roy Goode has described the floating charge as "one of equity's most brilliant creations" – Goode (2006), p. 11. References in this article to England and English law and variations thereof include Wales too, as England and Wales constitute one system of law for most purposes.

2 Reid (1996), para 2.

3 By the Companies (Floating Charges) (Scotland) Act 1961.

4 Gretton (1984), p. 172. See also Jack (1987), p. 33.

5 For academic criticism of floating charges, see e.g. Gretton (1984); Gretton (2003); Cabrelli (2005), "The Case Against the Floating Charge in Scotland". For judicial criticism, see e.g. *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 *MacMillan v T Leith Developments Ltd* [2017] CSIH 23, 2017 SC 642 at paras 121-122 per Lord Drummond Young. For more positive appraisals, see e.g. Jack (1987); Lord Rodger of Earlsferry (2003), pp. 423 ff. For the popularity of floating charges in practice, see Scottish Law Commission (2017), para 20.8.

explains how they arrived in Scots law. The remainder of this contribution will focus on particular lessons provided by the story of floating charges in Scotland, with particular reference to: concepts and the use of terminology; creation of floating charges; "crystallisation"; the charge's relationship with property law; ranking in relation to other competing rights; and enforcement. It will become apparent that despite some advantageous aspects of the Scottish approach, it has been deficient in a number of ways, and taking account of particular issues would have enabled a smoother embrace of floating security.

2. Scots Law

Before considering floating charges in more detail, a brief outline of Scots law should be provided, with further explanation as to the value of examining it from a potential reform perspective. This will assist with understanding the utility of lessons from Scotland regarding floating charges for readers in systems which may be perceived as rather different from Scots law.

2.1. Background

It is uncontroversial to state that Scots law is a mixed legal system, combining elements of the Common Law and Civilian traditions. More controversial issues include the question of how and when precisely Scotland was shaped by the different traditions, as well as the extent to which it should accept influences from certain systems, especially English law, at present and in the future.[6] The following influences have, however, been particularly noteworthy in the development of Scots law. Feudalism, in its Anglo-Norman guise, took hold in Scotland from the twelfth century and persisted until its formal abolition in 2004, but by then it had become a mere shadow of what it was in earlier centuries.[7] In the later medieval period and into the early modern era, there was a significant reception of Roman law and canon law, with a considerable number of Scottish lawyers being educated at Continental universities.[8] In 1707 Scotland's status

6 See e.g. Whitty (1996); MacQueen (1997); Evans-Jones (1998); Sellar (2000). In the mid-twentieth century, Lord Cooper of Culross stated that "the Scottish lawyer has been first and foremost a comparative lawyer since the thirteenth century, and when he ceases to be a comparative lawyer Scots Law will die": Lord Cooper of Culross (1957), p. 159.

7 See e.g. MacQueen (1993; 2016); Reid (2018), pp. 209 ff. Section 1 of the Abolition of Feudal Tenure etc (Scotland) Act 2000 provides that "The feudal system of land tenure, that is to say the entire system whereby land is held by a vassal on perpetual tenure from a superior is, on [28 November 2004], abolished".

8 Cairns (2000); Reid (2018), pp. 209-210.

as an independent state was ended by the Union with England, and its parliament was dissolved, but the Treaty of Union preserved various aspects of its distinctive legal system.[9] Unsurprisingly, given the (growing) political, economic and social bonds between England and Scotland, the subsequent centuries witnessed increased convergence with English law, which was perhaps most pronounced between the early-to-mid nineteenth century and the early-to-mid twentieth century.[10]

Although there has long been recognition of Scots law's Civilian heritage, recent decades have witnessed a resurgent interest in this, as well as a growing engagement with comparative study among Scottish legal scholars.[11] English law also continues to be a frequent source of reference and inspiration. This is due to a number of reasons, not only economic and social connections but also the fact that the UK Supreme Court is at the apex of the civil (i.e. non-criminal) court structure in both England and Scotland.[12] However, given the ongoing debate about Scotland's constitutional position in the UK, as well as the UK's exit from the European Union, the future development of Scots law is particularly opaque at the present time.[13]

2.2. The Value of Examining Scots Law

Nevertheless, Scotland will remain a mixed legal system, along with other systems that have been heavily influenced by both the Common Law and Civil Law, such as Louisiana (USA), Quebec (Canada) and South Africa.[14] When

9 Articles 18 and 19. A number of pieces of legislation passed by the pre-Union Parliament of Scotland remain in force, including some from as far back as the fifteenth century. An example is the still-important Leases Act 1449, which gives tenants a subordinate real right in some circumstances.

10 The late nineteenth century, in particular, saw legislation which brought more uniformity between Scots law and English law. Major examples include the Bills of Exchange Act 1882, Partnership Act 1890 and the Sale of Goods Act 1893. The emergence of company law from the middle of the nineteenth century was also a significant development, as many of the provisions applied in England and Scotland in the same way (or with only minor variations). As may be expected, the influence of English law has been strongest in relation to commercial law.

11 For some of the most prominent examples, see: Evans-Jones (ed.) (1995); Carey Miller & Zimmermann (eds) (1997); Zimmermann, Visser and Reid (eds) (2005).

12 Albeit that these two court structures are technically separate from one another. Previously, the House of Lords (serving in its judicial capacity) was the apex court. This was changed by the Constitutional Reform Act 2005, Part 3.

13 Despite the Scottish public having voted against independence in a referendum in 2014, it remains a major issue in Scottish politics and the current pro-independence majority in the Scottish Parliament intends to press for another independence referendum in the next few years. For the 2021 Scottish Parliament election results, see Scottish Parliament (2021).

14 There are various other examples of such mixed legal systems, including Sri Lanka and, within the EU,

systems are referred to as "mixed", this is actually the aggregate of a number of different areas of law. It conceals the fact that a particular area within such a system may be mainly derived from one tradition or the other. As Professor Kenneth Reid notes in relation to property law both within Scotland and in other mixed legal systems, it is "largely civilian as to concepts and content but takes on some of the shape of the common law in respect of its practical workings."[15] Scots property law's status as principally Civilian is of particular relevance in the context of the present article.

It is possible to view mixed legal systems, such as Scotland, as a bridge between the Common Law and Civilian worlds. A number of commentators have perceived them as models for harmonisation. In the early twentieth century, the French comparative lawyer Henri Lévy-Ullmann stated that "Scots law as it stands gives us a picture of what will be, some day (perhaps at the end of this century), the law of the civilised nations, namely, a combination between the Anglo-Saxon system and the continental system".[16] More recently, scholars such as Professor Reinhard Zimmermann have noted the value in studying mixed legal systems, including Scots law, in the context of the Europeanisation of private law.[17] There is, of course, a danger of overstating the importance of Scots law in this regard and underestimating the extent to which organic development and path dependence have produced its modern system of law. Furthermore, given the UK's departure from the EU, there is perhaps less impetus now for accommodating Common Law within a harmonised approach in the EU (albeit that Ireland remains a member, as do Cyprus and Malta which also have elements of Common Law in their systems). Nevertheless, there is truth in the notion that Scots law holds a position between the Common Law and Civilian traditions and is consequently a useful jurisdiction for comparative purposes.

In relation to property law and the law of rights in security, a Scottish lawyer is (generally) more likely to be easily conversant with a Civilian lawyer regarding terminology and concepts than a lawyer from a Common Law jurisdiction would be. In fact, in the property law domain, Scotland even adopts a stricter approach to the dichotomy of personal and real rights than certain Civilian systems, such as Germany.[18] Unlike English law, there is no system of equity in Scots law to

Malta and, arguably, Cyprus.

15 Reid (2018), p. 210.

16 Lévy-Ullmann (1925), p. 390.

17 See e.g. Zimmermann (2005), pp. 1 ff. See also Zweigert & Kötz (1998), pp. 202-204.

18 For instance, Scots law does not recognise an equivalent to the "Anwartschaftsrecht" of German law, which has been translated as an "equitable interest": McGuire (2011), pp. 28-29; see also Baur & Stürner (2009), pp. 30 ff. and 843 ff. The treatment of security transfers in German law is a further indication of a system that is not as rigid as Scots law as regards personal rights and real rights. See e.g. Brinkmann (2016) for discussion of the German position.

cloud the distinctive property rights available. Yet by virtue of Common Law influences on Scots law and connections with England, Scottish lawyers will often have familiarity with concepts and terminology of the Common Law too. All of this means that there is a greater degree of receptiveness from the different legal traditions than is generally the case in other systems, i.e. Scots law would (probably) be more amenable to a transplant from the Common Law tradition than, for example, Portuguese law would be and likewise would (in most instances) be more accepting of a transplant from a country in the Civilian tradition than English law.

Scots law and other mixed systems may be viewed as a staging post for the transmission of concepts, rules and institutions of law from the Common Law world to the Civilian world and vice versa. And, particularly within the area of property law, Scots law can also provide lessons on how Common Law concepts and rules can be integrated into a landscape that is broadly familiar to Civilian systems, at least in terms of substantive law. Meanwhile, those versed in Scots law have the ability to use Civilian vocabulary when communicating some of the challenges and difficulties encountered in doing so. This is true of the trust, which has long-existed as a key component of English equity but which has been reconceptualised in Scots law by utilising a dual patrimony analysis.[19] More pertinently for the present contribution, the floating charge arrived as a conscious transplant from English law (specifically equity) and can be instructive for those in Civilian systems or other mixed systems contemplating a similar approach.

3. Floating Charges

3.1. England

The origins of modern floating charges lie in England in the mid-nineteenth century.[20] Companies established by private Acts of the UK Parliament were able to create security over their "undertaking".[21] These entities were often railway companies or companies providing other types of infrastructure. Practitioners appear to have sought to replicate this in relation to registered companies, which

19 See Gretton (1996); Gretton (2000); Reid (2000; 2015).

20 Of course, security rights with certain characteristics of floating charges did exist at an earlier stage, including in Roman law (for which, see below).

21 There are still some companies of this type in existence and the legislation applicable to them still applies, but these companies are now very rare compared to registered companies.

became far more commonplace over time.[22] In the case of *Re Panama, New Zealand and Australian Royal Mail Co*,[23] a registered company had sought to charge its "undertaking". 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,[24] but which might afterwards become the property of the company".[25] He also stated that "under these debentures they have a charge upon all property of the company, past and future, by the term 'undertaking'".[26] While the term "floating charge" or even "floating security" was not used in the case, *Re Panama* has become known as the first case in which a floating charge was recognised.[27] The court accepted that an equitable security, a charge, could cover all of a party's property, as that property changed over time (i.e. it could include future property). A floating charge in English law can cover any type of property, whether the property is immovable or movable, corporeal or incorporeal, and this form of security frequently covers all of a company's property, of whatever type.[28]

Later cases confirmed the legitimacy of floating charges as a form of security interest and provided further clarity regarding what they are and how they function.[29] A commonly cited description of floating charges in English law is

22 For the origins of the English floating charge, see e.g. Pennington (1960); Armour (2004).

23 (1870) 5 Ch App 318.

24 The term "debenture" has since been defined judicially and in legislation. In *Levy v Abercorris State and Slab Co* (1887) 37 Ch D 260, Chitty J stated (at 264): "In my opinion a debenture means a document which either creates a debt or acknowledges it…". And the currently applicable Companies Act 2006, s 738, provides that: "'debenture' includes debenture stock, bonds and any other securities of a company, whether or not constituting a charge on the assets of a company".

25 (1870) 5 Ch App 318 at 322.

26 (1870) 5 Ch App 318 at 322.

27 See e.g. McKendrick (2020), para 25.03. The earlier case of *Holroyd v Marshall* (1862) 10 HL Cas 191 can be viewed as a stepping stone towards the acceptance of floating charges.

28 Broadly speaking, equivalent English law terms for immovable and movable property are "real property" and "personal property" respectively, and equivalent terms for corporeal and incorporeal property are "tangible property" and "intangible property" respectively. It should be noted that property in English law, particularly personal property, is broad in its scope and includes intangible (incorporeal) things – see e.g. Sheehan (2017), particularly ch 1. In Scots law, property also encompasses incorporeal things – see e.g. Reid (1996), para 11. This may be surprising for jurists in some Civilian jurisdictions, where property rights are limited to tangible things. For example, the German Civil Code states that: "Sachen im Sinne des Gesetzes sind nur körperliche Gegenstände" [Only corporeal objects are things as defined by law] (BGB § 90). For further discussion regarding the meaning of personal property in different systems, see e.g. Pretto-Sakmann (2005), especially chs 4-5, and the sources cited there.

29 As well as those referred to in the main text, see e.g. *Governments Stock and Other Securities Investment Co Ltd v Manila Railway Co Ltd* [1897] AC 81 at 86 per Lord Macnaghten; and *Illingworth v Houldsworth* [1904] AC 355 at 358 per Lord Macnaghten (this is actually the same case as *Yorkshire Woolcombers* but on appeal and reported under a different name).

provided by Romer LJ in *Re Yorkshire Woolcombers Association Ltd*,[30] who stated that a floating charge has three principal characteristics: (1) The charge is on a class of assets of a company present and future; (2) the class of assets changes in the ordinary course of the company's business; and (3) until a future event, the company can receive and deal with property in the ordinary course of business.[31] A major case over 100 years later, *Re Spectrum Plus Ltd*,[32] confirmed that point (3) is the key feature that distinguishes a floating charge from a fixed charge. In other words, where the party that has granted the security has freedom to deal with property until certain future events take place it is a floating charge, whereas if that party's freedom to deal is materially restricted then it is a fixed charge.[33] A charge is a form of equitable security in English law and there is no transfer of ownership (or title)[34] or possession to the grantee.[35] In some ways, it is functionally comparable to non-possessory real security in the Civilian sense whereby a grantor has ownership and the security holder has a subordinate real right.

As already noted, even after a floating charge is created, the chargor has freedom to deal with charged property. This will, however, cease upon the floating charge "crystallising". At this point its nature changes and it transforms into a security approximating a fixed charge over the charged property.[36] It is clear that upon crystallisation a floating charge provides its holder with an interest in the items of property covered by the security; however, the floating charge's nature prior to crystallisation is hotly disputed and remains elusive. There is debate as to the extent to which a floating charge before crystallisation shares characteristics with a fixed charge and also about whether it provides an immediate property interest in charged property and what form such an interest takes.[37] In any event, crystallisation and enforcement of floating charges are closely entwined. To enforce a floating charge and to receive priority payment, by virtue of the

30 [1903] 2 Ch 284.

31 [1903] 2 Ch 284 at 295 per Romer LJ.

32 [2005] UKHL 41.

33 In practice, the point at which restrictions reach the level of making the security fixed is difficult to ascertain. See e.g. Gullifer & Payne (2020), pp. 305 ff.

34 Even using the term "ownership" can be controversial or misleading in English law, this is in part due to the (potential) split between legal and equitable title.

35 See *Re Cosslett (Contractors) Ltd* [1998] Ch 495 at 508 per Millett LJ for the consensual forms of security in English law; and see Gullifer & Payne (2020), pp. 292 ff.

36 *Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979 at 999 per Buckley LJ. It is, however, still recognised as a floating charge for various purposes after crystallisation. The Insolvency Act 1986, s 251 provides that "floating charge" "means a charge which, as created, was a floating charge…".

37 For overviews of the various theories, see Gullifer & Payne (2020), pp. 301-302; Beale et al (2018), paras 6.69 ff.

charge, within an insolvency process (such as liquidation or administration)[38] or other ranking context, a floating charge will ordinarily need to have crystallised. In English law, crystallising events can be placed into three categories, as identified by Professors Goode and Gullifer: (1) events denoting cessation of trading as a going concern; (2) intervention by the chargeholder to take control of assets; and (3) other acts or events specified in the floating charge documentation as causing crystallisation.[39]

In English law then, a floating charge is an equitable security interest with identifiable features. It covers a class of property, as that property changes, and it can extend to all of the chargor's present and future property (of whatever type). It allows the chargor to deal with the property and to remove it from the ambit of the charge (without the chargeholder's permission) when dealing in the ordinary course of business. And this power persists until crystallisation, which takes place upon the occurrence of certain types of event.

Other countries in the Common Law world have received floating charges due to the influence of English law. However, some, such as Australia, Canada and New Zealand have adopted functional systems of security rights for personal property (i.e., movable property) in recent decades, derived ultimately from the model provided by the USA's Uniform Commercial Code, Art 9. This means that floating charges, narrowly defined, and other formal categories of security, have been superseded by a broader type of security interest (which does not rely on crystallisation) and can cover future property.[40] Yet many jurisdictions do continue to allow for floating charges based on the English law model.[41]

3.2. Scotland

Floating charges were not received into Scots law in the same way as English law.[42] The courts rejected attempts by Scottish companies to use floating

38 These are discussed further below.

39 Goode & Gullifer (2017), paras 4-32 ff.

40 This is also true for the USA, where it is often referred to as a "floating lien". For a Scots law perspective on this, see Scottish Law Commission (2011), para 13.37 and ch 22.

41 This is true for many African countries heavily influenced by the Common Law, like Ghana, Kenya and Nigeria, and also a number of Asian countries that have been similarly influenced, such as India, Pakistan and Singapore. See e.g. Dubovec & Gullifer (2019), especially at pp. 23-26 and 440-441; and Gullifer & Neo (2021).

42 It can be said that they were rejected at common law. Common law is being used here not to refer to the English legal tradition, but with reference to the law that derives from the courts in a system of precedent (and so not from legislation).

charges.[43] The most well-known statement of this is provided by Lord President Cooper in the case of *Carse v Coppen*[44] in 1951, when he declared that: "it is clear in principle and amply supported by authority that a floating charge is utterly repugnant to the principles of Scots law and is not recognised by us as creating a security at all. In Scotland the term 'equitable security' is meaningless."[45] A major reason for the rejection of floating charges was that Scots law generally requires certain formalities for the creation of security rights (to provide an element of publicity) and these are not adhered to in the creation of floating charges. With a floating charge on the English model, there is no delivery of possession of security property to the security holder and there is not a method of registration that brings a floating charge into existence (albeit that there is a registration requirement after creation).[46]

The existing requirements for the creation of security in Scots law did, however, come to be viewed as too cumbersome and restrictive for commerce. This was especially true when compared to the position in England, where security, including floating charges, could be created with relative ease. Commercial considerations created impetus for more uniformity with English law in this area and the Law Reform Committee for Scotland was tasked with reviewing the existing law and proposing reforms. They identified demand for the introduction of floating charges among the business and finance communities and this led to the arrival of floating charges to Scots law through the Companies (Floating Charges) (Scotland) Act 1961, a mere ten years after the judicial disdain for such security expressed in *Carse v Coppen*.[47] The relevant legislation dealing with floating charges in Scotland is now primarily a combination of the Companies Act 1985, Insolvency Act 1986 and the Companies Act 2006.

The fact that the floating charge of Scots law is a statutory creation means that it differs from the floating charge of English law.[48] Nevertheless, the Scottish version was adapted from the English floating charge and has many of the same characteristics. It can be created "over all or any part of the property… which may from time to time be comprised in [the company's] property and undertaking".[49] So it can cover all of the grantor's property or a particular part

43 See e.g. *Ballachulish Slate Quarries Co Ltd v Bruce* (1908) 16 SLT 48; and *Carse v Coppen* 1951 SC 233.

44 1951 SC 233.

45 *Carse v Coppen* 1951 SC 233 at 239 per Lord President Cooper. For discussion of the pre-existing law in this area, see MacPherson (Forthcoming), "The 'Pre-History' of Floating Charges in Scots Law".

46 See further below.

47 For more information, see MacPherson (Forthcoming), "The Genesis of the Scottish Floating Charge".

48 There are various consequences that stem from this, including in terms of how the security rights function in the two systems. See e.g. MacPherson (2020), paras 2-02, 2-08 and 3-11.

49 Companies Act 1985, s 462(1).

of that property (i.e. a class of property), as that property changes from time to time. The chargor has freedom to deal with the property without the permission of the chargeholder until crystallisation, technically referred to as "attachment"[50] in Scots law, takes place. The circumstances in which crystallisation occurs in Scots law are more limited than in English law, as a consequence of the need for statutory provision of such crystallisation events, but crystallisation is similarly closely connected with enforcement of the charge.[51]

As mentioned already, there have been difficulties involving the floating charge and wider Scots law. These will be addressed in more detail below. Some of them have, however, resulted from the attempt to transmit an equitable creation of English law, into a system without equity and which has components that are largely Civilian. Yet a security with characteristics of a floating charge is not unknown in the Civilian tradition. Roman law itself had a general hypothec that covered changing property, such as items in a shop.[52] That form of security has even been referred to by some commentators as a floating charge.[53] We must, however, be careful about using such labels, as the Roman system was markedly different to the one in which the modern English floating charge emerged. With reference specifically to Scotland, the Law Reform Committee for Scotland's recommendation to introduce floating charges at the beginning of the 1960s was supported by a published note (written by Professor Sir T B Smith),[54] which stated that Scots law's Civilian heritage would support the recognition of floating charges, so long as there was no attempt "to import the technicalities of English Equity jurisprudence".[55] There was consequently an awareness about the potential difficulties that could be caused by the importation of floating charges, but the warning about applying aspects of English equity has not always been heeded.

In introducing the floating charge to Scots law, there was a justifiable desire to emulate the commercial advantages of English companies who were able to more readily grant security, including floating charges, and there was a relatively widespread wish for greater convergence in commercial law with England. Yet, as shall now be seen, various aspects of floating charges have since caused difficulty in Scotland.

50 See Companies Act 1985, ss 463(1)-(2), 464(4)(a); Insolvency Act 1986, ss 53(7), 54(6) and Sch B1, para 115.

51 This is discussed further below.

52 See especially D.20.1.34.pr (Scaevola).

53 E.g. Buckland (1963), p. 478; Verhagen (2014), pp. 135 ff.

54 T B Smith (1915-1988) is an important but controversial figure in modern Scots law scholarship. For discussion of Smith and his legacy, see e.g. Reid & Carey Miller (2005).

55 Law Reform Committee for Scotland (1960), Appendix I.

4. Lessons from Scots Law

This section outlines lessons that can be learnt from the Scottish experience with floating charges. In addition, the discussion should also help with understanding the various facets of this form of security, and what type of approach and rules may be more suitable for a Civilian system. The fact that the floating charge is a statutory creation in Scots law may mean that this section is of particular interest to those who wish to use legislation to introduce floating security or reform an existing security of this type in their own jurisdiction. In this regard, floating charges in Scotland can provide a useful case study, with both positive and negative components.

4.1. Concepts and Terminology

The arrival of the floating charge in 1961 introduced a new concept to Scots law as well as novel terminology. Scots law did not have an existing concept of "floating" security and the counterpoint of "fixed security" was also relatively ill-defined. The legislation provided (and provides) a definition of fixed security, yet it is not clear whether certain types of security are included in the term.[56] Furthermore, it is not wholly obvious what the consequences are of the floating charge "attaching" (crystallising) to the property "as if the charge were a fixed security".[57] For instance, to what extent does the charge transform into a fixed security and how far does it take on the characteristics of particular types of security, such as a pledge (for corporeal moveables),[58] or assignation in security (for incorporeal property) or a "standard security"[59] (for immoveable property)?[60]

There is no particular definition of a floating charge in past or present legislation but the provision enabling the creation of a floating charge, in combination with those for its "attachment" (see below), give some indication as to its nature and how it operates. It is a form of security that creates a security "over all or any part of the property… which may from time to time be comprised in [the granting

56 For the statutory definitions of fixed security, see Companies Act 1985, s 486(1); Insolvency Act 1986, s 70(1). For discussion of whether certain forms of security are encompassed by the term, see MacPherson (2020), paras 8-26 ff. and 9-26 ff.

57 For the statutory provisions, see Companies Act 1985, s 463(2); Insolvency Act 1986, ss 53(7), 54(6) and Sch B1, para 115(4).

58 It should be noted that the spelling of "movables" in Scots law is "moveables".

59 In Scots law, a "standard security" is the only voluntary security available over most land and real rights in land – see Conveyancing and Feudal Reform (Scotland) Act 1970, s 9.

60 See MacPherson (2020), ch 5 for discussion.

company's] property and undertaking".[61] This means that it covers a class of property even though the property in that class is changing, through disposals and acquisitions by the chargor. Only upon "attachment" does it create an interest in particular items of property. The nature of the floating charge prior to attachment is not certain in Scots law but, in a system with a largely clear dichotomy between personal rights and real rights, does not appear to create a real interest until attachment takes place.[62] Even then, it can be disputed whether a floating charge actually creates a real right in Scots law, particularly in a narrow sense of the term.[63] The difficulties in ascertaining what a floating charge is are also apparent in English law but the rules of equity there allow for approaches that are not available in Scotland.

The concept of a "charge" and indeed the term itself were (almost) unknown in Scots law before the floating charge was introduced.[64] Consequently, there has been an absence of existing law to fall back upon for interpretive purposes. "Charge" was adopted as it was used in English law and the concept of the floating charge was being adapted from the English model. Using the term "floating security" rather than "floating charge" would have been more consistent with existing Scots law terminology and perhaps could have avoided some tendencies towards perceiving the floating charge to have brought with it equitable concepts from English law; however, it would have provided little assistance in dealing with many issues encountered.[65] Much of the difficulty stems from the "floating" element of the security, rather than it being called a "charge".

When a new form of security is being introduced, there is a strong argument in favour of a clear legislative exposition of what the security is, how exactly it changes (if appropriate) and the type of interest it creates in property (at various points). Utilising terminology that is already familiar to the legal system in question, as far as that is possible, can help achieve these objectives and better allows for the utilisation of existing authorities to answer unforeseen questions. Scots law has not fared particularly well on these fronts in relation to floating charges. The legislative provisions are unclear and fairly "light-touch" in a number of ways and there has been much uncertainty as a result.

61 Companies Act 1985, s 462(1).

62 *National Commercial Bank of Scotland v Liquidators of Telford Grier Mackay & Co* 1969 SC 181. For discussion, see Styles (1999); MacPherson (2020), ch 2.

63 MacPherson (2020), paras 6-83 ff.

64 An exception is the agricultural charge, which was introduced to Scots law by the Agricultural Credits (Scotland) Act 1929, Part 2.

65 For discussion of terminological issues involving floating charges in Scots law, see Gretton (2003); cf Lord Rodger of Earlsferry (2003), pp. 423 ff.

4.2. Creation

It is important to consider how floating charges are created and who should be able to create them.[66] The creation of a security can affect third parties, especially other existing or future creditors of the grantor. As a result, many would contend that the publicity principle of property law should be adhered to and the creation of the security should require a publicity step.[67] Scots law has traditionally been a strong adherent of this approach. However, floating charges do not fully comply with the publicity principle, as shall be detailed below. Connected to this, a complicating factor in relation to publicity is that no real right is conferred upon a floating charge's creation. Yet the potential for the holder to obtain a real interest via attachment and the fact that the floating charge can provide a ranking advantage from the time of its creation seem to justify the application of the publicity principle.

After the introduction of floating charges to Scots law, they were deemed created upon the execution (valid signing) of the charge instrument. Since reforms in 2013 the position seems to be that the creation date is now the date when the charge instrument has been executed and delivered to the chargee but that is not entirely certain.[68] It is true that some publicity accompanies floating charges; however, this is not a *constitutive* step and only occurs *after* the charge's creation. Under Scots law (and English law), a floating charge needs to be registered[69] within a 21-day period from the day after the charge's creation.[70] This means that there is a potential "blind" period between the creation of the charge and a third party being able to find out about the charge from the Companies Register.[71] There are statutory provisions which stipulate that floating charges are only created upon their registration (in a new Register of Floating Charges) but they have never been brought into force.[72] This attempt to make floating charges conform better with Scots law and the publicity principle has been ultimately defeated by lobbying from the banks, who feared having to register both in the Companies Register and the Register of Floating Charges if

66 Specific rules could also be devised regarding who can receive a floating charge (as is the case for agricultural charges, which can only be granted to banks – Agricultural Credits (Scotland) Act 1929, ss 5(1) and 9(2)) but this is less important and there do not seem to be obvious reasons as to why the chargee should be so restricted.

67 See Gretton & Steven (2021), paras 4.19 ff. and 21.8-21.9.

68 Companies Act 2006, s 859E. See MacPherson (2019), pp. 165 ff.

69 Or more accurately, documentation needs to be delivered to the registrar of companies for registration.

70 Companies Act 2006, s 859A. The period can be extended with the permission of the court – s 859F.

71 Registered charges can be searched using the Companies House website: https://find-and-update.company-information.service.gov.uk/.

72 Bankruptcy and Diligence etc (Scotland) Act 2007, ss 37-38.

there were charged assets in Scotland and the rest of the UK.[73] It demonstrates the difficulties in making restrictive changes to a security right once it is introduced, especially if those changes are perceived to be unfavourable to powerful creditors and particularly if the jurisdiction in question is closely intertwined with another, larger jurisdiction. Thus, the form that the security right takes upon its introduction is often of great significance, as it provides the new starting point for any further consideration of reform.

Given that floating charges cover changing property, it is difficult to utilise a register that relates principally to property rather than to the chargor as a person. For the registration of charges, Scots law and English law use the Companies Register, which is organised by companies as legal persons (rather than by property held). This means that a search of the register using the name or company number of a relevant company will show the floating charges (and certain other charges) that have been created, subject to the invisibility periods already noted. Another approach would be to introduce a particular register of floating charges but again this would work best if searchable by person. Moving the register beyond the boundaries of company law would, however, enable non-companies to register their security in the same register.

Floating charges in Scots law may be criticised for not being registrable in the land register where the security covers land (in contrast to other securities over such property which require to be registered).[74] However, this would be difficult to facilitate as any land covered by a floating charge can be freely transferred by the chargor, with new property being acquired in its place. As such, inclusion of a floating charge against particular land (rather than noted against the chargor as a legal person) would be of limited value, especially given the existence of the Companies Register.

Returning to the law as it stands, if registration does not take place, the charge is not wholly invalidated but is rendered ineffective against a liquidator, administrator and creditors of the company.[75] Scots law is less comfortable with such a model in comparison to an approach where security rights are fully effective or ineffective.[76] The partial effectiveness approach shares some characteristics with the functional security systems, including the UCC Art-9, and their distinctions between "attachment" and "perfection".[77] Attachment in the

73 For discussion, see Patrick & Steven (2016), pp. 262-263.

74 The standard security only creates a real right once registered in the Land Register of Scotland: Conveyancing and Feudal Reform (Scotland) Act 1970, s 11(1).

75 Companies Act 2006, s 859H.

76 See e.g. *Bank of Scotland v Liquidators of Hutchison Main & Co* 1914 SC (HL) 1.

77 For consideration of these concepts from a Scottish perspective, see Scottish Law Commission (2017), paras 16.12, 18.7, 18.37, 18.45, 20.8 and 32.25.

Scottish floating charges context of course has a different meaning. In addition, the precise consequences of the partial ineffectiveness of unregistered charges are uncertain and one cannot be sure as to all of the parties against whom an unregistered charge will be effective or not.[78]

Since their introduction into Scots law, floating charges can be created by companies. Over time, other entities have also been given the power to create them: limited liability partnerships (LLPs), co-operative societies and community benefit societies (formerly known as industrial and provident societies), European economic interest groupings, UK economic interest groupings and building societies.[79] Yet floating charges have never been available to individuals or partnerships, despite some suggestions that this should be facilitated.[80] Consequently, the issue of who has the ability to create floating charges incentivises the corporate form from a finance perspective. It is possible to devise a system in which sole traders and partnerships could create floating security over business assets but there would be some practical difficulties to overcome, as there is no register for these parties, in contrast to incorporated entities. Allowing individuals to create floating security over non-business assets would raise further issues, including from a consumer protection perspective.

4.3. "Crystallisation"

Floating charges in Scots law differ from other security rights in that their nature changes upon certain events taking place, at which point they take on some of the characteristics of fixed security rights.[81] The English term "crystallisation" is often used in practice to describe this. However, the legislation applicable in Scotland uses the term "attachment" of floating charges. As noted above, there are problems regarding the precise effects of a floating charge attaching as if it were a fixed security; this transformation has been referred to by Professor Bill Wilson as a "statutory hypothesis".[82]

78 This is also true for other registrable charges. See MacPherson (2019), pp. 168 ff.

79 Limited Liability Partnerships (Scotland) Regulations 2001, SSI 2001/128, reg 3; European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 18 and Sch 4; Co-operative and Community Benefit Societies Act 2014 s 62; Financial Services (Banking Reform) Act 2013 (Commencement (No 8) and Consequential Provisions) Order 2015, SI 2015/428, art 4 and Sch 1.

80 This was a recommendation of the Department of Trade and Industry (1994) (known as the "Murray Report").

81 This reflects the English law position, which was mentioned above.

82 See Wilson (1982); Wilson (1991), para 9.18.

Case law stipulates that a floating charge upon attachment takes on the characteristics of specific security rights for particular types of property attached.[83] This means that a floating charge is reminiscent of a pledge for corporeal moveables, an assignation in security for incorporeal property and a standard security for (most) immoveable property. Yet the extent to which it assumes the characteristics of those security rights is uncertain and, despite its attachment, it still remains a floating charge for various purposes.[84] There are other difficulties with the approach, including identifying which form of fixed security a floating charge partially transforms into where there is more than one voluntary fixed security available for the property in question.[85] The original and subsequent legislation could have averted some of the difficulties by more lucidly and expansively outlining the effects of attachment.

Given the encountered issues with the transforming nature of a floating charge, there is much to be said for an approach that simplifies the nature of floating security. A Civilian system wishing to introduce this form of security could instead provide that it creates a real right in property from its creation but the grantor has freedom to deal with security property and third parties acquire that property unencumbered. This position would only change upon later events enabling enforcement, at which point the grantor's freedom to deal and the third parties' ability to obtain the property unencumbered would cease. This would produce a functional equivalent of the floating charge but could avoid some of the conceptual problems that can bleed into operational and practical matters.

In Scotland, the events which give rise to crystallisation are clearly stipulated. This arises from the floating charge's status as a statutory creation in Scots law: the events which cause crystallisation must be specified in the legislation. The relevant events are as follows: (i) the company going into liquidation;[86] (ii) the appointment of a receiver by the chargeholder,[87] or by the court upon the chargeholder's application;[88] (iii) a court consenting to a distribution by an administrator to a party other than a secured creditor or preferential creditor;[89] and (iv) the delivery of a notice by an administrator to the registrar of companies

83 *Forth & Clyde Construction Co Ltd v Trinity Timber & Plywood Co Ltd* 1984 SC 1. See also *Sharp v Thomson* 1995 SC 455 especially at 488 per Lord Coulsfield. This was a point that was not departed from by the House of Lords on appeal in *Sharp v Thomson* 1997 SC (HL) 66, despite the overturning of the decision of the lower court more broadly.

84 Including for various ranking and insolvency purposes, e.g. in terms of the Companies Act 1985, s 464, and Insolvency Act 1986, s 60, and Sch B1, para 116.

85 For this and other problems, see MacPherson (2020), paras 5-21 ff.

86 Companies Act 1985, s 463(1).

87 Insolvency Act 1986, s 53(7).

88 Insolvency Act 1986, s 54(6).

89 Insolvency Act 1986, Sch B1, para 115(1A)–(1B) in combination with para 65(3)(b).

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", discussed further below).[90] It will be apparent that the attachment position for administration (a rescue mechanism for companies) is more complicated than is the case for receivership (an enforcement mechanism for floating charges) and liquidation (the winding up of a company).[91] There have been some calls for the commencement of administration to bring about attachment but this has not led to a change in the law.[92]

While there is some comparability between the attachment events under Scots law and the English law position, there is not a precise overlap. In addition, English law recognises contractually agreed automatic crystallisation and crystallisation where notice is given by the chargeholder in accordance with the charge agreement (sometimes known as "semi-automatic" crystallisation).[93] Some have identified advantages of Scots law adopting the English law approach to automatic crystallisation from an efficiency perspective;[94] however, the private nature of these crystallisation events would be problematic for other parties and would be at odds with Scots law's general adherence to the publicity principle.

In relation to attachment more broadly, there is a notable publicity deficit. It is true that elements of publicity surround the attachment of a floating charge in Scots law. However, a publicity step is not a pre-requisite for a floating charge attaching and will often take place after attachment.[95] In the meantime, parties dealing with the chargor may be unaware that a floating charge has already attached, which is a potentially serious issue given that attachment has real effect in relation to charged property. Often workaround solutions are adopted, including the purchasers of land seeking a letter of non-crystallisation from the floating charge holder, to provide confirmation that the floating charge has not attached and to obtain the chargeholder's express consent to the sale.[96] An attempt to introduce a "no attachment without registration" approach across all types of enforcement mechanism by way of legislation has not been enacted.[97] For certainty and reliability, the point at which a floating security becomes

90 Insolvency Act 1986, Sch B1, para 115(2), (3).

91 These processes will be discussed further below.

92 See Cabrelli (2005), "The Curious Case of the 'Unreal' Floating Charge".

93 *Re Brightlife Ltd* [1987] Ch 200; Goode & Gullifer (2020), paras 4-51 ff.

94 Hardman (2017), pp. 49-50.

95 For details of the requirements, see MacPherson (2020), paras 3-16 ff.

96 See e.g. Gretton & Reid (2018), para 29-09; Hardman (2018), para 10-39; MacPherson (2020), para 3-22.

97 Scottish Law Commission (2007), paras 5.2 ff.

enforceable should require publicity, most appropriately in the form of registration, so that potentially affected third parties have an awareness of this and can make decisions on the basis of the prevailing circumstances.

4.4. Relationship with Property Law

Certain aspects of the relationship between floating charges and property law have already been mentioned above, including with respect to crystallisation. Yet it is important to address the relationship in more detail here as it has been one of the most problematic elements involving floating charges in Scots law. In the push for introducing a commercially attractive security device, the value of fitting it with property law must not be overlooked.

A fundamental question regarding floating security in any system is: which property will the security cover? Scots law, following English law, allows a floating charge to cover all types of property. This includes corporeal and incorporeal property and moveable and immoveable property. Of course, it is possible for a system to have a floating security that is not universal and only encompasses movable property.[98] Such an approach would simplify the operation of the security and would avoid difficulties that can exist where the usual rules for security over immovable property, such as registration in a land register, do not apply due to the practical difficulties of utilising this for floating security. However, there can be challenges with a floating security that is limited to movable property where such property is replaced by immovable property in a company's patrimony.[99] For example, goods may be sold by a company and the funds received in payment could be used to help purchase land. Applicable legislation would need to be clear as to the consequences of this scenario, e.g. if the property disposed of would be released from the security and/or whether the security holder would be entitled to particular remedies.

A floating charge enables a chargor company to grant the security over all of its property. Yet the property that is covered by an all-assets floating charge does not fully align with the property that is actually owned by a company under general Scots property law. This is the result of *Sharp v Thomson*,[100] a House of Lords case. In *Sharp* a company granted a floating charge "over the whole

98 An even narrower approach would be to limit floating security to only cover corporeal movable property, or even just specific types of such property.

99 This was a consideration of the Law Reform Committee for Scotland in their recommendation that the floating charge should be able to cover all property of a company: Law Reform Committee for Scotland (1960), paras 27 ff.

100 1997 SC (HL) 66.

of the property" in its "property and undertaking". Almost five years later, purchasers agreed to purchase a flat (apartment) from the company. The price was paid, entry to the property was taken and the disposition (the title transfer document) was delivered to the purchasers. However, before registration (recording) of the disposition in the land register,[101] the company entered receivership and the floating charge attached. The key issue was whether the floating charge attached to the flat and gave its holder a security right in the property or whether the purchasers obtained the property unencumbered by the floating charge. Despite the fact that the property still belonged to the seller company under general property law when the charge attached, the House of Lords held that it was not within the company's "property and undertaking". This decision was highly controversial and more than two decades on still poses questions as to when property can be considered to have left the property and undertaking of a company for floating charge purposes.[102] For a time, there were fears among a number of commentators that the decision in *Sharp*, and floating charges more broadly, were a vehicle for the wider introduction of English law concepts of equity into Scots law.[103] While one can understand the court's desire to avoid the unfairness of a purchaser having paid the price and also losing the flat itself to a floating charge holder, there are also negative consequences that arise from the incoherence and uncertainty of dividing floating charges from normal rules of property law. Systems utilising floating security should devise a regime that integrates such security into the wider law as far as possible. If measures to mitigate potential unfairness to certain parties are considered desirable in policy terms, they can be clearly delineated.

The specificity principle of property law usually requires that property is specifically identified as being subject to a security right in order for it to be covered.[104] However, Scots law allows for a floating charge to cover property with only general reference to the property that is affected; floating charges are normally stated to be created over all of the company's property. It is possible for a company to grant a floating charge over a narrower class of assets, such as all of its claim rights or all of its corporeal moveables, but this is less commonly done, and the description used is still rather general. In any event, a system utilising floating security must decide the level of specificity required in order for

101 The General Register of Sasines. Registration of a disposition would now take place in the Land Register of Scotland.

102 For literature on *Sharp v Thomson*, see Scottish Law Commission (2007), Appendix B. The Report states at para 1.9: "Few cases in Scottish legal history have generated so much academic debate as *Sharp*."

103 The case of *Burnett's Trustee v Grainger* 2004 SC (HL) 19 allayed many of these fears. For an overview of the debates surrounding *Sharp v Thomson*, see MacPherson (2020), paras 7-27 ff.

104 See Gretton & Steven (2021), paras 4.14-4.16 for general details of the specificity principle.

the security to cover property. Given that floating securities must cover a range of items of property, as that property changes over time, general descriptions that enable relevant property to be identified at the point when the security is to be enforced are advisable. In addition, if the classes of property over which the security can be granted are narrow, this may mean that certain special types of property, including new forms like digital assets, are either not covered by a floating security or it will be unclear whether they are covered. This is not a risk if all property can be encompassed by a floating security, as is the case in Scots law and English law.

Attention must also be given as to how trust property is to be dealt with. While the trust is viewed as a Common Law institution, it is a concept that is also found in systems where property law is Civilian too, including Scotland. Where a company holds property in trust, such property is excluded from the ambit of a floating charge under Scots law.[105] This appears to be the case even if it is expressly stated that a floating charge covers trust property.[106] For the purpose of facilitating the raising of finance by corporate trustees, reforming Scots law to enable the creation of floating charges over trust assets would be appealing. If a system seeking to introduce floating charges has trust property or an equivalent form of holding property, then it must be decided whether a floating charge should be able to cover this property and how this should be executed, e.g. whether a single security can only cover "ordinary" property *or* trust property or whether one security can cover both (automatically or by express provision).

4.5. Ranking

Security rights give a creditor priority in the repayment of debts, by providing an interest in relevant security asset(s). In order to determine whether a secured creditor will receive payment, it is necessary to consider their relative priority position. Consequently, attention must be given to the ranking position of floating charges in comparison to other rights. The ranking position for floating charges in Scots law is complicated as they cover all types of property and must therefore interact with all types of security interest. In addition, the wide scope of floating charges, and the potential for unfairness to other parties, means that certain rights are given priority over floating charges for policy reasons.

Ordinarily, security rights in Scots law rank in accordance with the point at which they are created (i.e. when they are constituted as real rights).[107] As

105 *Tay Valley Joinery Ltd v C F Financial Services Ltd* 1987 SLT 207.

106 See MacPherson (2018), "Floating Charges and Trust Property in Scots Law".

107 The term "*prior tempore potior jure*" (earlier by time, stronger by right) is often used to describe this.

floating charges only become real upon attachment in Scots law, it is logical that the default rule is that they rank from the date of attachment against voluntary fixed security rights.[108] Yet ranking agreements are possible.[109] And, in any event, the default ranking is almost always departed from in practice by the use of a "negative pledge", which prohibits the chargor from granting security rights that will rank ahead of or equally with the floating charge.[110] The legislation provides that this changes the ranking position and causes a floating charge to rank from the date of its creation against subsequent voluntary fixed security rights and floating charges.[111] (The default rule for floating charges is that they rank against one another according to dates of registration in the companies register.)[112] Negative pledges are also used in English law and operate in a comparable but not identical way.[113]

Negative pledges only, however, limit the ranking priorities of voluntary securities, i.e. securities granted by the chargor. Other types of security are not affected. This is true of fixed securities arising by operation of law, such as liens and a security for landlords in Scots law (over tenants' goods in commercial premises), which is known as the landlord's hypothec.[114] These security rights have priority over a floating charge notwithstanding the existence of a negative pledge.[115]

In utilising floating security, care must also be taken as to how the security will rank against a range of other rights. Scotland has struggled to deal with the relationship between floating charges and the property rights that arise as a result of debt enforcement processes, known in Scots law as "diligences".[116] There are various types of diligence in Scots law, including "arrestments", "attachments" (not to be confused with attachment in the floating charges sense), "inhibitions" and "adjudications for debt".[117] The legislation provides that an attached floating charge is subject to the rights of any person who has "effectually executed" diligence on the attached property.[118] Unfortunately, the terminology

108 Companies Act 1985, s 464(4)(a).

109 Companies Act 1985, s 464(1)(b).

110 Companies Act 1985, s 464(1)(a).

111 Companies Act 1985, s 464(1A).

112 Companies Act 1985, s 464(4)(b).

113 See e.g. Gullifer & Payne (2020), pp. 209 ff. and 331 ff.

114 See Steven (2008), chs 9-18 (for lien) and Sweeney (2021) (for the landlord's hypothec).

115 Companies Act 1985, s 464(2).

116 The broadly equivalent rights in English law (held by execution creditors) have a lower ranking priority against floating charges than their Scottish counterparts. See e.g. Gullifer & Payne (2020), pp. 335-336 for brief details of the relevant English law.

117 For details of diligence generally and the specific diligences mentioned here, see Macgregor et al (2020), ch 9.

118 Companies Act 1985, s 463(1)(a); Insolvency Act 1986, s 60(1)(b).

caused difficulties for the Scottish courts in determining what stage diligence must have reached in order to be "effectually executed".[119] In 2017, the Inner House of the Court of Session (an appeal court) overturned earlier authority and held that diligence only needs to have been established over the property to meet the test, and does not need to be "completed" in order to have priority.[120]

A further problem in relation to floating securities is how they interact with functional forms of security. Since the floating security will ordinarily require the grantor to own property to enable the security to affect that property, if ownership is either validly reserved by a third party or the chargor has transferred ownership to another for security purposes, the floating security holder will ordinarily be defeated.[121] This would appear to be the case in Scots law for floating charges but has not been properly tested.[122] The use of assignation in security (for incorporeal property) to confer security on an assignee is considered to be an outright transfer in Scots law (i.e. it does not provide the assignee with merely a subordinate right).[123] Consequently, the same issues apply to that type of security, albeit that there are other complicating factors which make its status in competition with a floating charge even more uncertain.[124]

In recognition of the wide scope of floating charges and the powers exercisable by their holders, certain other parties have been given priority over them in both English law and Scots law. Preferential creditors rank behind fixed security holders but ahead of floating charge holders.[125] This category includes employees of a chargor company for wage claims of a limited amount,[126] as well as the recently partially reinstated Crown preference, which gives the UK's state tax authority (Her Majesty's Revenue and Customs) priority status for some tax

119 *Lord Advocate v Royal Bank of Scotland* 1977 SC 155; *Iona Hotels Ltd (In Receivership) v Craig* 1990 SC 330. For criticism of the law as it previously stood, see Wortley (2000).

120 *MacMillan v T Leith Developments Ltd* [2017] CSIH 23, 2017 SC 642. For discussion, see MacPherson (2018), "The Circle Squared?".

121 For the validity of retention of title (ownership) under Scots law, see Sale of Goods Act 1979, especially s 19(1). Scots law even allows retention of title for all sums due to the creditor: *Armour v Thyssen Edelstahlwerke AG* 1990 SLT 891. The transfer of ownership for security purposes could be in the form of a sale and leaseback transaction, where the debtor has the option to repurchase the property. The Sale of Goods Act 1979, s 62(4), can create some difficulties for functional securities involving corporeal moveables but it does not preclude them.

122 MacPherson (2020), paras 8-26 ff.

123 See e.g. Anderson (2008), para 7-36; Scottish Law Commission (2011), para 7.6.

124 MacPherson (2020), paras 9-16 ff.

125 Companies Act 1985, ss 463(3) and 464(6); and Insolvency Act 1986, ss 60(1), 175(2)(b) and Sch B1, para 116.

126 For a period of four months prior to the relevant date but limited to £800 – see Insolvency Act 1986, Sch 6, para 9; and Insolvency Proceedings (Monetary Limits) Order 1986, SI 1986/1996.

debts.[127] Ordinary unsecured creditors, meanwhile, rank behind floating charges, except for what is known as the "prescribed part" (introduced by the Enterprise Act 2002):[128] a formula is used to determine a proportion of assets (that would otherwise go to a floating charge holder), which are instead ringfenced for the unsecured creditors.[129]

Any attempt to introduce floating security requires contending with an array of ranking issues. On the one hand, attempting to fit floating security within normal rules of ranking does not give full regard to its coverage of property and the related power of the holder as regards the grantor and its property. Yet creating a collection of different rules and enacting ranking exceptions to give effect to policy concerns is liable to create ranking problems and conflict scenarios that can be difficult to untangle.[130] What definitely needs to be considered is the hierarchy of security rights and related claims that a system wishes to allow, and how and where floating security is to feature within that framework.

4.6. Enforcement

A key feature of floating charges in Scots law (and English law) is their close connection with corporate insolvency law. Their enforcement relies upon the insolvency processes of liquidation (the winding up of a company leading to its dissolution) and administration (a corporate rescue process but which also allows for distributions to creditors) and the quasi-insolvency process of receivership (in Scots law this is only available to enforce floating charges). There is no self-enforcement mechanism in Scots law for floating charges as there is for other security rights, e.g. there is no ability for a holder to sell assets either of its own accord or with the court's permission.[131] Instead, the floating charge holder requires a liquidator, administrator or receiver to realise assets and distribute to the holder.

Originally, floating charges in Scots law could only be enforced in the context of liquidation. This, however, was considered undesirable as it could mean that a viable company might be placed into liquidation simply to enforce a floating charge. As a result, receivership was introduced by the Companies (Floating

127 Insolvency Act 1986, Sch 6, para 15D, as inserted by Finance Act 2020 s 98; and see s 99 of the 2020 Act and The Insolvency Act 1986 (HMRC Debts: Priority on Insolvency) Regulations 2020, SI 2020/983.

128 Insolvency Act 1986, s 176A.

129 Insolvency Act 1986 (Prescribed Part) Order 2003, SI 2003/2097.

130 See Hardman & MacPherson (Forthcoming).

131 See MacPherson (2020), paras 6-04 ff.

Charges and Receivers) (Scotland) Act 1972. Unlike in England, which had long had receivership, including for the enforcement of security other than floating charges, receivership was previously unknown to Scots law. The following decades caused substantial difficulties in fitting this new process into the wider system. Although receivership is used for the enforcement of floating charges, the fact that the security can cover all of the chargor's property means that the receiver's ambit can extend to all of that property too and so is reminiscent of an insolvency process, particularly once realisation and distribution are taken into account.

Over time, receivership for floating charges in Scotland and England became increasingly controversial. The receiver principally acted in the interests of the floating charge holder and receivership would sometimes mean that businesses would fail when a process focused on rescue might instead have enabled them to continue.[132] Floating charges therefore featured heavily in the substantial reforms under the Enterprise Act 2002. As a result of that legislation, administrative receivership is now generally no longer possible and has been largely replaced by administration.[133] Administrative receivership occurs where the property covered by the attaching charge is the whole or substantially the whole of the chargor's property. There are, however, some exceptions to the prohibition on administrative receivership, and non-administrative receivership for limited assets floating charges is available.[134] In addition, some pre-Enterprise Act floating charges continue to exist and can be enforced by the appointment of an administrative receiver. Broadly speaking though, the principal approach now for enforcing a floating charge is to appoint an administrator. Floating charge holders have the unique ability amongst creditors to place a company into administration out of court and do not need to show that the company is insolvent.[135] This special power can be viewed as consolation for the loss of the general right to appoint an administrative receiver. In contrast to receivers, administrators act in the interests of all creditors, not just the floating charge holder.[136] The role of the administrator also means that a charge holder may not receive a distribution, and, in fact, a floating charge may not even attach during the administration.

When considering the enforcement of floating security in a given system, the Scottish story is a helpful one. If a floating security is relatively wide-ranging in its coverage, then self-enforcement may be difficult to manage, and it is preferable

132 For a critical perspective on administrative receivership, see Mokal (2005), pp. 208 ff.

133 Insolvency Act 1986, s 72A and Sch B1.

134 Insolvency Act 1986, ss 72B-72H. And, for non-administrative receivership, see the combination of the Insolvency Act 1986, ss 51, 72A(3), 251 and Sch B1, para 14.

135 Insolvency Act 1986, Sch B1, para 14.

136 For the purpose(s) of administration, see Insolvency Act 1986, Sch B1, para 3.

from the perspective of creditors as a whole for a third party to deal with the assets and distribute proceeds. This is especially true if there is a broader concern with allowing the business to continue. An enforcing creditor may not have the expertise in running an ailing business that an insolvency practitioner will have. And a creditor may have little interest in saving the business if they are managing the process and there is enough for them to get repaid (but not enough to pay others). By extension, a third party acting in the interests of all of the creditors, rather than merely or primarily for the floating security holder is preferable from a business rescue perspective, which is often a key concern in a modern corporate insolvency context.

5. Conclusion

It must be acknowledged that Scotland's experience of floating charges is a product of its particular circumstances. Significantly, the fact that Scotland is heavily intertwined with England economically, politically and culturally means that there is often pressure, particularly from the commercial sector, to reform Scots law to make it more aligned with English law. This led to the identification of the English floating charge as a suitable model for transposition to Scots law, with some adaptations, and the subsequent arrival of the Scottish floating charge. Scotland's status as a mixed legal system also means that it is receptive to aspects of English law in the commercial domain but its Civilian heritage in property law has led to difficulties in integrating the floating charge into broader Scots law.

Despite the circumstances that are specific to Scotland, the lessons outlined above pay careful attention for anyone from a system which is seeking to reform its law of security rights to introduce a floating charge or functional equivalent, or to amend aspects of an existing form of floating security. It has been shown that even a system that has considerable similarities with English law in a number of ways has struggled to deal with floating charges in various respects. There is, however, little likelihood of floating charges being abolished in Scotland in the near future given their popularity in practice. The floating charge is a powerful form of security that is appealing to major lenders, and floating security no doubt has a similar appeal in other jurisdictions too.

Consequently, if there is significant commercial demand for floating security, the law should seek to facilitate this in as coherent a manner as possible. Unfortunately, this has not always been true in Scots law. Nevertheless, much can be learnt from the Scottish story. If it is considered necessary to use unfamiliar concepts and terminology there should be adequate (legislative) explanation as

to their meaning and consequences. The nature of the security should be specified or at least be readily identifiable and of such a type that can be suitably accommodated within the system. The rules regarding creation should be clearly outlined and made to fit with wider law, including with reference to the rules for other security rights and the publicity principle. It can be queried whether "crystallisation" is necessary as a concept, with enforcement equivalents being a valid substitute, without requiring the nature of the security to change. In any event, the circumstances in which "crystallisation" or equivalent occur ought to be stipulated, with publicity to third parties a highly desirable requirement. The vital relationship between floating charges and property law should be given a high degree of attention to determine how the security should interact with property, including which property the security should and should not cover and when property leaves the ambit of the security.

There also ought to be a focus on how the floating security is to rank against each type of right that it might be in competition with, and attention should be given to the policy factors that may suggest an answer for ranking conflicts. Care must be taken, however, to ensure that these rules do not become overly complex, inconsistent and potentially contradictory. Finally, what enforcement mechanisms are to be used for the floating security? If the security is particularly wide in its coverage of property, there is a strong case for enforcement taking place through a third party, and this can be in the context of a company or business rescue procedure, where the party in control of the process has a duty to all creditors (not just the floating security holder).

Of course, each jurisdiction will have its own circumstances and path dependencies that are likely to be of considerable weight when considering floating security. As such, what has happened in Scotland may be of limited significance. Yet this article has hopefully shown that there is some value in looking to a mixed legal system that has had a sometimes-painful experience with floating charges. It can be viewed as an example of how floating charges can be transposed from a Common Law system to a largely Civilian system of property law by legislation while also demonstrating the difficulties and dangers inherent in such an approach.

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