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The Floating Charge, Alisdair D J MacPherson

Reviewed by: Jonathan Hardman

The floating charge is a controversial instrument under Scots law. Some commentators have decried its ill fit with Scots private law,¹ whilst others have defended it as an economic necessity.² However, there has always existed a lack of clarity as to what, exactly, “it” is. There is even greater need for clarity on this subject given proposed reform of security over moveable transactions³ - which may, ultimately, provide a functional equivalent to the floating charge.

*The Floating Charge*⁴ (a new text issued in the authoritative, respected and influential *Studies in Scots Law* series) is therefore as timely as it is impressive. This is the first work to attempt to fully conceptualise the floating charge under Scots law. To do so, it focuses on the attachment of the floating charge, and uses this to provide the first holistic analysis of the floating charge. The book takes a primarily doctrinal approach to the floating charge under Scots law, which is informatively supplemented with legal historical and comparative analysis, particularly contrasting English law (whilst always being cognisant to structural differences between the two jurisdictions).

The book is split into two parts, first the general part (chapters 2 – 6) and second the specific part (chapters 7 – 9). Chapter 2 explores the floating charge pre-attachment, and concludes that it does not constitute a real right, but instead a series of interconnected personal rights. Chapter 3 explores the events that attach the floating charge, and the legal effect of an attached floating charge on post-attachment acquirenda. Chapter 4 analyses the property and undertaking which is attached by a floating charge. As would be expected, this chapter is thorough, analytically precise and insightful. As a minor point, though, the limitations on the floating charge contained in the instrument, referred to as the second limit,⁵ could have been further explored. Most of the time, this will be irrelevant as a floating charge will be “all assets” and therefore not limited by the instrument – however, there is a theoretical space to explore this area further. Chapter 5 outlines the attachment hypothesis, and so takes the reviewer through the legislative history and adeptly navigates various theories as to attachment⁶ to emphasise issues arising under such theories. Chapter 6 reviews the enforcement of the floating charge – who can enforce it, when and how. Throughout this first part, the same important themes repeatedly appear: doubt as to whether the floating charge is a real right, and issues as to placing attachment within an existing legal taxonomy. As a result, the author’s characterisation of a floating charge as a patrimonial preference right with some incidences of a typical security right is persuasive and enduring. This first part is, then, best seen as an internal examination of the floating charge to try to form an understanding of its internal logic.

The second part then looks to the floating charge in the context of specific types of property. It can therefore be seen as an external dimension to the floating charge: exploring how the internal conception of the floating charge interacts with doctrinal property rules. Chapter 7 thus explores the interaction between the floating charge and heritable property. It provides a clear and strong analysis of *Sharp v Thomson*⁷, exploring the extent of the ratio in the case, and interaction between the floating charge and heritable

¹ G.L. Gretton, “What went wrong with the floating charge?” 1984 S.L.T. (News) 172; G.L. Gretton, “Should floating charges and receivership be abolished?” 1986 S.L.T. (News) 325; D Cabrelli “The Case against the Floating Charge in Scotland” (2005) 9 Edinburgh Law Review 407.

² R. Jack, “The coming of the floating charge to Scotland: An account and an assessment”, in D.J. Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J.M. Halliday* (Edinburgh: W Green, 1987), pp.45–46; J. Hardman, *A Practical Guide to Granting Corporate Security in Scotland* (Edinburgh: W Green, 2018) para 6-06.

³ Scottish Law Commission *Report on Moveable Transactions* (SL Com 249) (2017); J. Hardman, “Three Steps Forward, Two Steps Back: A View from Corporate Security Practice of the Moveable Transactions (Scotland) Bill” (2018) 22 Edinburgh Law Review 266; A.D.J. MacPherson “The Future of Moveable Security in Scots Law? Comments on the Scottish Law Commission’s Report on Moveable Transactions” 2018 Juridical Review 98.

⁴ ADJ MacPherson, *The Floating Charge* (Edinburgh: Edinburgh Legal Education Trust, 2020).

⁵ *Ibid*, para 4-01.

⁶ Including those advanced by Professor Wilson in WA Wilson, ‘The Nature of Receivership’ 1984 SLT (News) 105.

⁷ *Sharp v Thomson* 1997 SC (HL) 66.

securities. Chapter 8 analyses the interaction between the floating charge and corporeal moveable property, both in terms of a transfer of corporeal moveable property and interaction with fixed security over corporeal moveable property. Chapter 9 reviews the interaction between the floating charge and incorporeal property. Once more, it is split into the interaction of the floating charge with a transfer (an assignation) and a real right in security (and assignation in security). Here, we see a further example of the real value of this work: the work explores differences between assignations and assignations in security.⁸ This difference is becoming increasingly of practical significance,⁹ but is often ignored in key texts.¹⁰ Thus it is an exemplary example of this book starting by exploring how the floating charge fits into existing legal norms, and using this journey to chart new, important territory within doctrinal Scots property law. As such, this work will be of vital importance to all those operating within the wider field of rights in security, and indeed property law. Chapter 10 concludes.

The overall result is a text which grounds the floating charge fully in doctrinal property law, and in doing so furthers doctrinal analysis of property law more generally. If we see rights in security as a confluence of the law of property and the law of obligations,¹¹ then it could be argued that some further emphasis may have been helpful on the obligation side. However, this position is mostly specific to the reviewer,¹² and others would disagree with this minor change of emphasis.¹³ The floating charge itself is often difficult to clearly analyse because its nature seems to change at various points of its lifecycle. The author is able to create such an overview of the subject due to looking at these issues through the lens of attachment. This enables the author to analyse the issue clearly in a fully contextualised manner. It also means that the book has an inherently practical aspect to it. As well as being of interest to those researching Scots property law, all those who actually interact with the floating charge, or advise those that do, however obliquely this may be, will need a copy of this work for reference. It therefore is incredibly helpful that it is written in an accessible and engaging way, often providing clear insights into technical elements of theory¹⁴ in a practical manner. This is not an easy task and the author deserves credit for achieving it so successfully.

The reviewer frequently collaborates with the author,¹⁵ a conflict disclosed to, and ratified by, this journal. Based on the quality of this book, the reviewer fears there will be considerable competition for him to do so in the future.

⁸ MacPherson, n 4 above, paras 9-16 – 9-25.

⁹ E.g. *Edinburgh Schools Partnership Ltd v Galliford Try Construction (UK) Ltd* [2017] CSOH 133 where, somehow, a duly intimated assignation in security magically did not, in fact, assign all rights under the assigned contract.

¹⁰ E.g. The leading work on the subject (which is also in this brilliant book series) is R.G. Anderson, *Assignation* (Edinburgh: Edinburgh Legal Education Trust, 2008). This work does not treat assignations in security as being in any way different from assignations.

¹¹ See G.L. Gretton, “The Concept of Security” in D.J. Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J.M. Halliday* (Edinburgh: W Green, 1987), p.126.

¹² See Hardman, n 2 above, para 1-04.

¹³ E.g. A.J.M. Steven, *Pledge and Lien* (Edinburgh: Edinburgh Legal Educational Trust, 2008) para. 1–06. This is another subject-defining book in this book series.

¹⁴ For example, the reviewer was delighted to see reference to the private law theorist Hohfeld in MacPherson, n 4 above, para 2-21.

¹⁵ Both on the subject of the floating charge - see, forthcoming, J. Hardman and A.D.J. MacPherson (eds) *Floating Charges in Scotland: New Perspectives and Current Issues* (Edinburgh: Edinburgh University Press, 2021) – and on other subjects.