The Law Commission

(LAW COM. No. 74)

CHARGING ORDERS

REPORT ON A REFERENCE UNDER SECTION 3(1)(*e*)
OF THE LAW COMMISSIONS ACT 1965

Presented to Parliament by the Lord High Chancellor
by Command of Her Majesty
March 1976

LONDON
HER MAJESTY'S STATIONERY OFFICE
85p net

Cmnd. 6412

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Commissioners are—

The Honourable Mr. Justice Cooke, *Chairman.*

Mr. Aubrey L. Diamond.

Mr. Stephen Edell.

Mr. Derek Hodgson, Q.C.

Mr. Norman S. Marsh, Q.C.

The Secretary of the Law Commission is Mr. J. M. Cartwright Sharp and its offices are at Conquest House, 37–38 John Street, Theobalds Road, London WC1N 2BQ.

CHARGING ORDERS

CONTENTS

	Paragraph	Page
I. INTRODUCTION		
The reference and our working paper	1 – 8	1
Charging orders on land	9 – 17	3
Charging orders on securities	18 – 21	5
II. CHARGING ORDERS AND PRIORITY		
Overseas Aviation	22 – 24	6
The effect of *Overseas Aviation:* charging orders on land	25 – 36	8
The effect of *Overseas Aviation:* charging orders on securities	37 – 39	11
Our recommendations	40 – 53	11
(i) Reversing the effect of *Overseas Aviation*	41 – 42	12
(ii) The court's discretion	43 – 44	12
(iii) Jurisdiction of the county court	45 – 51	13
(iv) Stop notices in the county court	52 – 53	15
III. THE SUBJECT MATTER OF CHARGING ORDERS		
A. LAND AND INTERESTS UNDER TRUSTS OF LAND		
Irani Finance	54	15
Trusts of land	55	16
Trustees and beneficiaries	56 – 57	16
The principle of execution	58	17
Trusts for sale of land: charging the legal estate	59 – 66	17
Trusts for sale of land: charging the beneficial interests	67 – 72	20
Other trusts of land	73 – 77	23

	Paragraph	*Page*
B. SECURITIES AND INTERESTS UNDER TRUSTS OF ALL ASSETS OTHER THAN LAND		
Background	78	24
Charging orders (and stop notices, etc.) on securities	79 – 88	25
(i) In what circumstances?	80 – 81	25
(ii) On what securities?	82 – 88	25
Charging orders on beneficial interests in trust assets other than land	89 – 95	28
IV. THE DISCHARGE OF CHARGING ORDERS	96 – 103	30
V. SUMMARY OF RECOMMENDATIONS	104	32
APPENDIX A: Individuals and organisations who commented on Working Paper No. 46		36
APPENDIX B: Draft Administration of Justice (Charging and Stop Orders) Bill with Explanatory Notes		37

THE LAW COMMISSION

CHARGING ORDERS

Report by the Law Commission on a Reference under section 3(1)(*e*) *of the Law Commissions Act* 1965

To the Right Honourable the Lord Elwyn-Jones,
Lord High Chancellor of Great Britain

I. INTRODUCTION

The reference and our working paper

1. In July 1971 the Bar Council and The Law Society submitted to the Lord Chancellor's Office a Joint Memorandum prepared by their Law Reform Committees and entitled "The Reform of Isolated Defects in the Law". That document set out by way of example a number of particular instances in which it was claimed that the law was defective, two of which related to the charging orders on land which are obtainable by judgment creditors under section 35 of the Administration of Justice Act 1956. Such orders create charges which "have the same effect" as equitable charges created by the judgment debtor under hand. At our invitation, these two points were formally referred to us under section 3(1)(*e*) of the Law Commissions Act 1965. We were also asked to consider a third point relating to section 35, to which attention had been drawn by a County Court Registrar.

2. In response to this reference we published, in December 1972, a working paper Charging Orders on Land[1] in which we discussed the problems posed by the three points in question and invited comment as to their possible solution. A number of organisations and individuals responded to this invitation and their comments, for which we are extremely grateful, have been of considerable help to us in the preparation of this report[2]. We would like also to record our gratitude to the Association of Managers of Unit Trusts, which we approached in connection with the extension of charging orders to the units of unit trusts[3] and which gave us much valuable information.

3. The scope of the working paper was a strictly limited one, confined as it was to the three particular points referred to us. These points were originally described as isolated defects in the law, and if this description was a valid one it seemed to follow that they should be capable of isolated remedy. One of the purposes of the working paper, therefore, was to test both the premise and the conclusion and in the result, as will later appear, neither emerged altogether unscathed from the consultation process (so far, at least, as the first two points were concerned).

---

[1] Working Paper No. 46.
[2] Their names appear in Appendix A to this report.
[3] See para. 84, below.

4. The three points which were referred to us may be summarised in the following way:

(i) A charging order on land does not, by itself, operate to give the judgment creditor any preference in the event of the bankruptcy (or winding-up) of the judgment debtor. In order to acquire preference over other creditors it is necessary for the judgment creditor to take at least one further step, often of a purely formal nature: *In re Overseas Aviation Engineering (G.B.) Ltd.*[4] ("*Overseas Aviation*"). This point is dealt with in Part II of this report.

(ii) A beneficial interest in land held on trust for sale is not, for the purposes of section 35 of the Administration of Justice Act 1956, an "interest in land", and such an interest cannot therefore be the subject of a charging order: *Irani Finance Ltd.* v. *Singh*[5] ("*Irani Finance*"). This point is discussed in Part III of this report.

(iii) There is doubt as to whether a judgment debtor can obtain, after satisfying the judgment, a court order formally discharging his land. This point forms the subject of Part IV of this report.

5. The comments made on the working paper were often wide-ranging. Besides making observations on the three points themselves and raising more general matters which, though they did not bear upon those points directly, were still extremely relevant and have played an important part in the formulation of this report, some of our correspondents made comments on other aspects of execution law. Interesting though these are, they are not within our present terms of reference and we do not comment on them here; nor indeed would we wish to do so without subjecting them to a further process of consultation.

6. In considering the original three points in the light of existing consultation, however, we have felt ourselves obliged to recommend changes in the law which extend beyond the boundaries originally envisaged. In particular, although the three points were all confined to charging orders on land (a fact which was reflected in the title of the working paper) we have felt it necessary in this report to deal with charging orders on securities, and on beneficial interests in securities, in much greater detail than we did in the working paper.

7. These points will, we hope, become clearer in the course of this report. Here we are concerned only to mark out in advance the area of law with which we shall be concerned. This area does not, of course, comprise the whole of the law on charging orders: there are certain types of charging order[6], available in particular circumstances, with which we do not deal.

---

[4] [1963] Ch. 24 (C.A.).

[5] [1971] Ch. 59 (C.A.).

[6] *i.e.*, charging orders in respect of the interest of a partner, under the Partnership Act 1890, s. 23; and charging orders to secure a solicitor's costs, under the Solicitors Act 1974, s. 73. The legislation we recommend does, however, extend to money in court, at present dealt with under R.S.C., O. 50, r. 8: see para. 84, below.

8. We think it appropriate to preface our main discussion with an outline of the history and modern law relating to charging orders of the two kinds already mentioned: charging orders on land, and charging orders on securities.

Charging orders on land

9. The history of charging orders on land is not unimportant, particularly as it played a large part in the argument in *Overseas Aviation* and, indeed, was crucial to the dissenting judgment of Russell L. J. in that case.

10. Before 1838 judgment creditors for sums of money had only one of two remedies against the land of the judgment debtor. What the appropriate remedy was in any particular case depended on the nature of the debtor's estate or interest in the land. If it were legal, the judgment creditor could issue execution process (usually in the form of a writ of elegit) and obtain from the Sheriff of the County possession of the land until the debt was paid. If, on the other hand, the debtor had an equitable interest only in the land, the judgment creditor could obtain only the appointment of a receiver by way of equitable execution.

11. The Judgments Act 1838 put further remedies into the hands of judgment creditors. By section 13, every judgment was made to operate as an equitable charge on all the landed interests, legal or equitable, of the judgment debtor. Proceedings to enforce the charge could not, however, be taken for the space of one year, nor did the judgment creditor obtain any preference over other creditors in the event of the debtor's bankruptcy within that period. Furthermore, the charge did not affect purchasers or mortgagees of the land, or other creditors of the judgment debtor, unless the judgment creditor registered his judgment in a special public register kept under section 19.

12. The system of registration was altered in 1900. Under section 2 of the Land Charges Act of that year the Court's register of judgments was closed and judgment creditors were required to register at the Land Registry Office writs or orders for the enforcement of their judgments (instead of the judgments themselves). Without such registration there was no statutory charge at all.

13. The 1838 and 1900 provisions were repealed in 1925, but they were reproduced in section 195 of the Law of Property Act 1925. No further change took place until 1956. It came to be recognised, however, that the alterations which had been made in 1900 were not altogether desirable. Before that date, the statutory charge and execution process were totally distinct: the judgment creditor could obtain a charge on the debtor's land without taking any steps in the nature of execution. After 1900, however, the obtaining of a charge was no longer an alternative to issuing execution process, because no statutory charge could exist unless such process had already been issued. The execution process normally resorted to for the purpose of establishing the charge—the writ of elegit—was itself far from satisfactory; but one of the consequences of obliging the judgment creditor to issue such a writ in order to obtain a charge was that if he chose, despite the cumbersomeness of the procedure, to enforce the judgment itself by proceeding with the writ, he avoided the twelve-month moratorium attached to the charge.

14. The *Report of the Committee on Supreme Court Practice and Procedure*[7] (the Evershed Committee) recommended the abolition of the writ of elegit[8], and an extension of receivership as a means of execution, to cover legal as well as equitable interests[9]. These recommendations were implemented by sections 34(1) and 36(1) of the Administration of Justice Act 1956. The Committee did not recommend any change in the nature of the charge arising under section 195 of the Law of Property Act, but they reverted to the older idea of registering the judgment itself[10], rather than a separate order for its enforcement (that is to say, an order appointing a receiver). That recommendation was not implemented by the 1956 Act because it did not fit in with the radical alteration in the charging scheme effected by section 35 of that Act.

15. So far as is material for present purposes, section 35 of the Administration of Justice Act 1956 reads as follows:

> (1) The High Court [and any county court[11]] may, for the purpose of enforcing a judgment or order of those courts respectively for the payment of money to a person, by order impose on any such land or interest in land of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order.
>
> (2) An order under subsection (1) of this section may be made either absolutely or subject to conditions as to notifying the debtor or as to the time when the charge is to become enforceable or as to other matters.
>
> (3) The Land Charges Act 1925[12] and the Land Registration Act 1925 shall apply in relation to orders under subsection (1) of this section as they apply in relation to other writs or orders affecting land issued or made for the purpose of enforcing judgments, but, save as aforesaid, a charge imposed under the said subsection (1) shall have the like effect and shall be enforceable in the same courts and in the same manner as an equitable charge created by the debtor by writing under his hand . . . ".

16. The features which distinguish section 35 from the charging system which it replaced may be summarised as follows. First, there is no general or "blanket" charge arising by operation of law: for the first time, the judgment creditor had to obtain a specific order relating to specified land. Secondly, registration is no longer a condition precedent to the existence of the charge although failure to register will have the normal consequences in relation to purchasers. Thirdly, what is registered is neither the underlying judgment nor a

---

[7] (1953) Cmd. 8878.

[8] *ibid.*, para. 413.

[9] *ibid.*, para. 416(*e*).

[10] *ibid.*, para. 416(*c*).

[11] These words were repealed by the County Courts Act 1959, but the section is reproduced, for county courts, in s. 141 of that Act. References in this report to s. 35 of the 1956 Act should be read (where appropriate) as including references to that section.

[12] This reference to the Land Charges Act 1925 is now to be read as a reference to the Land Charges Act 1972: see s. 18(6) of the latter Act.

traditional process of execution, but the charging order. Finally, the charge may be enforced at once.

17. In the High Court, a charging order on land is normally obtained in the first place on *ex parte* application to the master or the registrar, and is made absolute after notice has been given to the judgment debtor[13]. In the county court, the order is made by the judge on an application of which the debtor has notice[14]. The application in either case may be joined with an application for the appointment of a receiver[15].

Charging orders on securities

18. The history of charging orders on securities is more simple. Section 14 of the Judgments Act 1838 allowed a judgment creditor to obtain a charging order on "any government stock, funds or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in [the debtor's] name in his own right, or in the name of any person in trust for him . . . ". Section 15 of the same Act contained ancillary provisions.

19. Section 1 of the Judgments Act 1840 then provided that the provisions of section 14 of the 1838 Act "shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent, as well in any such stocks, funds, annuities, or shares as [are mentioned in section 14 of the 1838 Act], as also in the dividends, interest or annual produce of any such stock, funds, annuities, or shares . . . ".

20. By virtue of the Supreme Court of Judicature (Consolidation) Act 1925[16], these enactments could be repealed and replaced by rules of court, and in due course they were. The relevant powers are now contained (as to the High Court) in O. 50, r. 2, of the Rules of the Supreme Court (there are ancillary provisions in rr. 3–7) and (as to the county court) in O. 25, r. 6A, of the County Court Rules. The rules aim to reproduce the effect of the earlier enactments without any radical alterations. Order 50, r. 2, of the Rules of the Supreme Court reads as follows:

> "*Order imposing charge on securities*
> 2.—(1) The Court may for the purpose of enforcing a judgment or order for the payment of an ascertained sum of money to a person by order impose on any interest to which the judgment debtor is beneficially entitled in such of the securities to which this rule applies as may be specified in the order a charge for securing payment of the amount due under the judgment or order and interest thereon.
>
> (2) Any such order shall in the first instance be an order to show cause, specifying the time and place for further consideration of the matter and imposing the charge until that time in any event.

[13] R.S.C., O. 50, r. 1.
[14] C.C.R., O. 25, r. 7.
[15] As to the High Court, see O. 50, r. 9, which serves not only to authorise this joinder but to negative the decision in *Barclays Bank Ltd.* v. *Moore* [1967] 1 W.L.R. 1201 (in which it was held that the master had no power to appoint a receiver). As to county courts, no rule specifically authorises joinder but the County Court Practice 1975 expresses the view that joinder would be proper: pp. 163, 526.
[16] Sect. 99(1) (*f*) and (*g*) and Sched. 1.

(3) The securities to which this rule applies are:

(*a*) any government stock, and any stock of any company registered under any general Act of Parliament, including any such stock standing in the name of the Accountant General, and

(*b*) any dividend of or interest payable on such stock.

(4) In this Order "government stock" means any stock issued by Her Majesty's government in the United Kingdom or any funds of or annuity granted by that government, and "stock" includes shares, debentures and debenture stock".

And the corresponding part of O. 25, r. 6A, of the County Court Rules is as follows:

"6A.—(1) A charge for securing payment of an ascertained sum of money due or to become due under a judgment or order of a court may, by order of the judge or, with the leave of the judge, the registrar of that court, be imposed on any interest to which the judgment debtor is beneficially entitled in the following securities, namely—

(*a*) any government stock or any stock of any company registered under any general Act of Parliament, and

(*b*) any dividend of or interest payable on such stock.

In this paragraph "government stock" means any stock issued by Her Majesty's Government in the United Kingdom or any funds of or annuity granted by that government, and "stock" includes shares, debentures and debenture stock . . . ".

21. In the High Court a charging order on securities must be obtained in the first place on an *ex parte* application to the master or registrar and is made absolute after notice has been given to the judgment debtor[17]. Provision is made to prevent dealings with the securities in question between the original order to show cause and the making of the order absolute[18]. In the county court the order is made by the judge or, with the judge's leave, by the registrar, on an application of which the debtor has notice[19].

II. CHARGING ORDERS AND PRIORITY

Overseas Aviation

22. In *Overseas Aviation*[20] a creditor had obtained a money judgment against a company and an order under section 35 of the Administration of Justice Act 1956 charging the company's registered leasehold interest in certain land. A caution was duly lodged at the Land Registry. Shortly afterwards the company went into liquidation[21]. The judgment creditor (another company) claimed

[17] R.S.C., O. 50, rr. 2,3,4 and 6.
[18] R.S.C., O. 50, r. 5.
[19] C.C.R., O. 25, r. 6A.
[20] [1963] Ch. 24.
[21] For present purposes company liquidation is equated with the bankruptcy of an individual. In the paragraphs which follow, references to bankruptcy should be read (where appropriate) as including references to company liquidation.

that since its debt was secured by a statutory charge arising by virtue of the charging order it was a secured creditor and therefore ranked in priority to the general body of creditors in the liquidation. Reference was made to subsection (3) of section 35 (set out in paragraph 15 above) which provides that (with an exception irrelevant in the present context) a statutory charge "shall have the like effect and shall be enforceable in the same . . . manner as an equitable charge created by the debtor by writing under his hand". This seemed strongly to support the creditor's case because if it had in fact obtained "an equitable charge created by the debtor" it would undoubtedly have been a secured creditor and entitled to the priority it claimed[22].

23. But the liquidator argued that although the judgment creditor might seem to be a secured creditor it could not be so in fact because of the language of section 325 of the Companies Act 1948. This section, which corresponds in this respect to section 40 of the Bankruptcy Act 1914 (so that the position is the same whether the bankrupt is a company or a private individual), provides that a judgment creditor who has issued execution is not entitled to retain the benefit of it if bankruptcy ensues unless he has "completed" his execution before the bankruptcy commences; and that for this purpose—

> "an execution against goods shall be taken to be completed by seizure and sale, and an attachment of a debt shall be deemed to be completed by receipt of the debt, and an execution against land shall be deemed to be completed by seizure[23] [or[24]] by the appointment of a receiver".

It followed that if the creditor company had, by applying for the charging order, "issued execution", its position would be governed by these provisions and since the making of a charging order is not one of the steps deemed to constitute "completion" it would not be able to retain the benefit of it, and so would have no priority[25]. If it had obtained the appointment of a receiver it would clearly have enjoyed the priority it claimed because that is a step taken to constitute "completion" of the execution, but since it had not done this its only means of escape lay in arguing that its application for a charging order did not amount to "issuing execution" at all. The Court of Appeal, however, held by a majority that it did.

24. Russell L. J., in a dissenting judgment, examined the pre-1956 charging system and showed that a charge arising under that system would not have been treated as "execution"; and he saw no justification for holding that the 1956 Act had altered the position. Lord Denning M. R., on the other hand, regarded the history as irrelevant, on the ground that section 35 had introduced an entirely new scheme in relation to charges on land.

---

[22] Subject, however, since the debtor happened to be a limited company, to the charge being registered with the registrar of companies under s. 95 of the Companies Act 1948. This point was considered in *Overseas Aviation* but is not relevant to our present discussion.

[23] Under a writ of sequestration.

[24] The word "or" was substituted for a reference to equitable interests by the Administration of Justice Act 1956, s. 36(4).

[25] The court does have discretionary powers to vary this rule (as to companies, under the Companies Act 1948, s. 325(1), proviso (c); and, as to individuals, under the Companies Act 1947, s. 115(2)), but there was no question of their being invoked in this case.

He said:[26]

> "... I should have thought it plain that when a judgment creditor gets a charge on the debtor's property, it is a form of 'execution': for it is a means of enforcing the judgment. I do not think the case of *In re Hutchinson*[27] [which dealt with a charging order on shares] should be taken to decide the contrary. The reasoning is obscure. And in any event it must be read in the light of later cases. A charging order on shares has since been said to be 'in the nature of an execution', see *per* Pollock B. in *Finney* v. *Hinde*[28], *per* Lord Halsbury in *In re O'Shea's Settlement*[29]. And Lord Evershed M. R. has gone further and described a charging order on shares as an 'execution', see *In re Love*[30]. And that is what I think it is".

Lord Denning went on to point out that in section 35 the imposition of the charge is expressly stated to be "for the purpose of enforcing a judgment ... ". (The earlier legislation had not used this expression.) Harman L. J. agreed with Lord Denning; he considered that the writ of elegit (which was an undoubted form of execution) had been replaced in the 1956 Act not only by the extension of the scope of receivership (section 36(1)) but also by the charge procedure under section 35: "The new remedy given by section 35 is merely an alternative method of execution against the debtor's land"[31]. We would observe that a charge would often be more effective than the appointment of a receiver under section 36 because it would enable the creditor to apply for an order for sale.

The effect of *Overseas Aviation*: charging orders on land

25. The effect of *Overseas Aviation* is that a judgment creditor who wishes to ensure that his debt enjoys priority over those of unsecured creditors in the event of the debtor's bankruptcy cannot do so merely by obtaining a charging order on land. He must go on to obtain the appointment of a receiver as well. This presents no real difficulty to the initiated: soon after *Overseas Aviation*, the Rules of the Supreme Court were amended so as to permit the application for a charging order to be accompanied by a simultaneous application for the appointment of a receiver[32] and in practice the court accedes almost automatically to the latter application[33].

26. But although the desirability of coupling an application for a charging order with one for a receiver is clear to those who have mastered the law and procedure it may be said to constitute a trap for the unwary, and the fact that this trap can be avoided by the initiated is perhaps more an aggravation than a comfort to those less skilful creditors who fall victim to it. In any case, it is unsatisfactory that creditors should be obliged, for purely technical reasons, to

---

[26] [1963] Ch. at p. 40. With reference to the penultimate sentence of this extract, it would seem from the report that Lord Evershed M.R. was in fact referring to a charging order on the share of a partner in a business.

[27] (1885) 16 Q.B.D. 515.

[28] (1879) 4 Q.B.D. 102, 104.

[29] [1895] 1 Ch. 325, 329 (C.A.).

[30] [1952] Ch. 138, 152.

[31] [1963] Ch. at p. 46.

[32] See now O. 50, r. 9, and n. 15, above.

[33] In other words it is usually a mere formality, as was the issue of a writ of elegit under the old system: see the judgment of Russell L. J. in *Overseas Aviation* [1963] Ch. 24, 48.

apply for the appointment of a receiver in cases in which they would not otherwise do so. The appointment of a receiver may be a wholly inappropriate remedy—where, for example, the land in question is the debtor's own home or place of business and so produces no rent for a receiver to receive. Yet costs must still be incurred in securing his appointment, and these costs fall upon the debtor or (if bankruptcy ensues) upon the general body of unsecured creditors.

27. It is therefore argued that the effect of *Overseas Aviation* should be reversed, so that a charging order alone is sufficient to make the chargee a secured creditor with priority for his debt. This argument is supported not only by the factors mentioned in the preceding paragraph but by two other contentions.

28. First, it is said that a charging order ought of itself to give priority because bankruptcy law does give priority to a creditor whose debt is secured by a charge expressly created by the debtor and a statutory charge is strictly analogous. This point is strengthened by the fact that the priority which the existing law accords to express charges continues to apply (subject only to the rules about fraudulent preference) even if the express charge is given shortly before the bankruptcy and even if it is obtained under threat of bankruptcy proceedings. We said in the working paper that we could see no grounds for distinguishing between express charges acquired in these circumstances and statutory charges acquired through the court, and this remains our view.

29. Secondly, it is said that since, under the existing law, a creditor with a charging order can in fact secure priority by taking one further and largely formal step (albeit an inconvenient and usually inappropriate one)—namely, obtaining a receiver—the law might just as well give him priority from the outset.

30. Although these arguments are in our view very persuasive, both are based upon the provisions of existing bankruptcy law; and if existing bankruptcy law is wrong they must inevitably lose their force. Some of those who commented on our working paper consider that in the relevant respects the existing law of bankruptcy is indeed wrong, and it is for this reason that they rejected the proposal to reverse *Overseas Aviation*. The number of those who did reject it was very much smaller than the number of those who gave it their approval and support, but although those who rejected the proposal were in a minority we were impressed by their arguments.

31. The arguments of the minority did not come altogether as a surprise to us: we had indeed sketched out their nature beforehand in the working paper[34]. But consultation has convinced us that they should be given more weight. Briefly, they do suggest that even though a provision to reverse the effect of *Overseas Aviation* might fit happily into the framework of existing bankruptcy law it should still be resisted because that framework is itself unsatisfactory. It is urged that it is already too easy for one creditor to steal a march on the others by acquiring some special cachet (be it an express charge or the appointment of a receiver) which will give his debt priority in a bankruptcy. It would follow that

[34] Para. 16.

the Court in *Overseas Aviation*, by reducing (or by refusing to extend) the category of available cachets, has taken a step in the right direction, and that simply to reverse the effect of that decision would therefore be a retrograde step.

32. We are in considerable sympathy with this view. On the other hand, if what we need is a sensible barrier against "priority gaining" (a term which we use in no pejorative sense), no one could really argue that *Overseas Aviation* provides it. The barrier erected by that decision is, on the contrary, ineffective (since it can be circumvented), inefficient (since the circumvention wastes time and money), unfair (since the possibility of circumvention is open only to the more knowledgeable) and illogical (since circumvention forces the creditor to ask for something he does not want).

33. We therefore find ourselves with this problem: on the one hand, we have no doubt that *Overseas Aviation* has left the law in an anomalous state and that the decision, even judged solely as a barrier against priority gaining, is not satisfactory; on the other hand, we no longer think it would be right to deal with this situation simply by reversing the effect of the decision.

34. One solution might lie in a full-scale review and reform of the law of bankruptcy, in the course of which the whole problem of priority gaining would be considered and dealt with in its context. Thus, as we mentioned in the working paper[35], the Bankruptcy Law Amendment Committee (the Blagden Committee) in their report in 1957 recommended[36] a change providing (in the case of land, as indeed the existing law does provide in the case of goods) that a judgment creditor is entitled to retain the benefit of his execution to the extent only of what he has received before the debtor's bankruptcy supervenes[37]. We also referred in the working paper[38] to the possibility that some general change in our law might result from our membership of the European Economic Community.

35. It seems unlikely, however, that any wide-ranging changes in our law of bankruptcy will be enacted in the immediate future. We feel bound, therefore, to put forward recommendations designed to resolve the particular problem which results from *Overseas Aviation*. Our doing so does not, of course, in any way lessen the desirability of a full-scale review of the general law of bankruptcy being undertaken.

36. But before we turn to our positive recommendations we must retrace our steps for a moment and consider the possible effect of the *Overseas Aviation* decision in relation to charging orders on securities.

---

[35] Para. 16.

[36] (1957) Cmnd. 221, para. 101.

[37] In the working paper (para. 17) we pointed out one possible drawback to this proposal—namely that it might drive a creditor who would be content merely with security to resort to actual and speedy execution as his only means of protection, and thus perhaps to precipitate bankruptcies unnecessarily.

[38] Para. 18.

The effect of *Overseas Aviation*: charging orders on securities

37. The position in regard to charging orders on securities is summarised in the following extracts from the latest (1968) edition of *Williams on Bankruptcy*[39]:

> "The section [*i.e.*, section 40 of the Bankruptcy Act 1914 which applies to cases where execution has not been "completed"] does not apply to . . . an order nisi charging shares under the Judgments Act 1838, section 14[40], so that a creditor who has before the commencement of the bankruptcy obtained such an order is secured".

In support of this proposition *Williams* cites *Re Hutchinson*[41], but is obliged then to add: " . . . but see the observations of Lord Denning M.R. thereon in [*Overseas Aviation*]".

38. Until *Overseas Aviation, Re Hutchinson* was taken clearly to establish the proposition that a charging order on securities was not subject to section 40 of the Bankruptcy Act 1914[42], so that a judgment creditor who had obtained such an order enjoyed priority as a secured creditor on the debtor's subsequent bankruptcy. Indeed *Re Hutchinson* is still sometimes cited without qualification for this proposition. But the remarks of Lord Denning in *Overseas Aviation* (quoted in paragraph 24 above) must be said to cast some doubt on its present-day validity.

39. If the proposition thought to be established by *Re Hutchinson* is really no longer valid, it is not altogether clear what a judgment creditor with a charging order on securities can do, under the present law, to get priority. Certainly he cannot get it (as can a creditor with a charging order on land) by going on to obtain the appointment of a receiver, because under section 40 (and section 325 of the Companies Act) such an appointment constitutes completion of the execution only in the case of land. Probably his only course is to pursue his remedies to the point of obtaining actual monetary satisfaction. Since we see no reason why the position of a judgment creditor with a charging order should differ according to whether the order affects securities or land, we see in this discrepancy another reason for recommending reform. In the remainder of this part of this report, references to charging orders are intended to include both charging orders on land and those on securities.

Our recommendations

40. We have come to the conclusion that the problem stated in paragraph 33 above can be solved only through the reversal of the effect of *Overseas Aviation*, but that this reversal must be coupled with a number of other changes in the law which are designed to give some added protection both to the judgment debtor and to his other creditors.

---

[39] Page 358.

[40] Now R.S.C., O. 50, r. 2 and C.C.R., O. 25, r. 6A: see paras. 18–20, above.

[41] (1885) 16 Q.B.D. 515.

[42] The case was actually decided on s. 45 of the Bankruptcy Act 1883, but the relevant provisions of that section are reproduced in s. 40 of the Bankruptcy Act 1914 (and in s. 325 of the Companies Act 1948).

(i) *Reversing the effect of Overseas Aviation*

41. Our first recommendation, then, is that the decision in *Overseas Aviation* should, in effect, be reversed. We say "in effect" because we see no reason to interfere with the actual decision on the point at issue in that case—namely, that a charging order on land is "execution". Indeed we think consistency demands that the doubt mentioned above[43], as to whether a charging order made in relation to securities also amounts to execution, should be resolved by making it clear that it does. But we recommend that the making of a charging order should be added to the list of events which amount by themselves to the completion of an execution for the purposes of section 40 of the Bankruptcy Act 1914 and section 325 of the Companies Act 1948. It will follow, of course, that a judgment creditor obtains priority as a secured creditor simply by obtaining a charging order, and has no need to take any other step to attain this end.

42. We would make it clear that this recommendation applies, as logically it must, to charging orders generally, no matter what the property affected may be—land, securities, or the other assets which we later recommend should be brought within the ambit of the procedure.

(ii) *The court's discretion*

43. At present there is a tendency for the court to accede almost automatically to a judgment creditor's request for a charging order. We think that this should not be so—not only because it makes priority gaining too easy, but also because it may result in charging orders being made in cases where they are really unfair to the debtor. We therefore put forward two recommendations designed to alter this state of affairs. The first is that the new legislation empowering the court to grant charging orders should make it clear that the court has a full discretion in deciding whether or not to accede to an application. We consider, too, that it should be framed in such a way as to indicate that in exercising this discretion the court should take into account any evidence before it not only about the personal circumstances of the debtor but also about any other creditors of his who might be unfairly prejudiced if the charging order were granted. A recent case has to some extent anticipated the latter part of this recommendation. In *Rainbow* v. *Moorgate Properties Ltd.*[44] the Court of Appeal held that where the court was aware that the debtor was, or was likely to turn out to be, insolvent, it should hesitate to grant a charging order which would give one creditor an advantage over other unsecured creditors. But we think that this point should be given legislative emphasis.

44. In any event, however, neither the case just mentioned nor the emphasis we give it will serve by itself to solve the problem. The court cannot take account of facts unless they are available to it. This is why we contented ourselves with saying above that the court should take into account "any evidence before it": we recognise that it would be wrong as well as impractical to require the court to institute extensive enquiries of its own volition. In practice, therefore, the effective exercise of the discretion will largely depend

[43] Paras. 37–39, above.
[44] [1975] 2 All E.R. 821.

upon the judgment debtor being present at the hearing. This, in turn, may depend in part on the accessibility of the court dealing with the matter and that brings us to the second of the two recommendations mentioned above.

(iii) *Jurisdiction of the county court*

45. Under the present law the High Court has jurisdiction to make a charging order in respect of a debt of any amount and the county court has concurrent jurisdiction in respect of debts up to a limit of £1000[45]. We recommend that in future the High Court's jurisdiction should be limited to making charging orders in respect of High Court judgment debts exceeding £1000, and that the county court should have exclusive jurisdiction to make all other charging orders[46].

46. We regard this recommendation as an essential adjunct to the previous one. Without it, we think, the previous one would largely fail in its purpose. If the court's discretion is to be fully exercised, the debtor must be encouraged to attend the hearing. We understand that debtors hardly ever attend applications for charging orders in the High Court in London, and we think there is a much better chance of their attending a hearing at a local court. In making the recommendation we have also in mind the fact the county courts are in some respects more accustomed than the High Court to exercise a discretion of this kind. The county court is accustomed, as the High Court is not, to the idea of looking into a debtor's means and circumstances, and to the idea of denying the creditor access (if only temporarily) to the full armoury of his legal rights.

47. This recommendation might be unnecessary if creditors already made a practice of seeking charging orders in the county court, but in fact they do not. They tend strongly to favour High Court applications, even in cases within the financial limits of the county court. We suspect that this is precisely because, for the reasons already mentioned, such applications are embarrassed neither by the presence of the debtor nor by any great reluctance on the part of the court.

48. It could of course be argued, for these reasons, that the county court should have exclusive jurisdiction to make charging orders no matter what the amount of the debt, the High Court having none at all. Such an arrangement would not be wholly without precedent: when imprisonment for debt was abolished and the attachment of earnings extended by the Administration of Justice Act 1970, section 13 of that Act restricted the power to attach earnings for a judgment debt to the county courts. But we think it would be unnecessary, and wrong, to impose a total restriction of that kind in this instance. The cases in which we are anxious that the court should exercise a genuine discretion, and in which it does not normally do so at present, are those in which the debtor is a private individual who has incurred a private household or other non-business debt and in which, therefore, the debt itself is not likely to exceed £1000. Where the debtor is a company, or where the debt is a business debt, or even

[45] County Courts Act 1959, ss. 39 and 40, as amended by the County Courts Jurisdiction Order 1974, S.I. 1974 No. 1273.

[46] We think that the £1000 limit imposed for this purpose should be capable of variation in the same way as the corresponding limit of £1000 is variable now, and that s. 192 of the County Courts Act 1959 should be amended accordingly.

where the debt is simply of large amount, we see no compelling reason why High Court applications should be ruled out: indeed they might often be in the interest of both parties. We are satisfied that a restriction of the kind we recommend will in practice ensure that the vast majority of the applications we would wish to have heard in the county court will in fact be heard there.

49. In this connection we would refer to some figures provided by the Queen's Bench Masters' Secretary's Department, who were kind enough to assist us by keeping a record during one full month—July 1974—of the charging orders sought in the Queen's Bench Division at the Royal Courts of Justice. The record shows that, of the 88 orders sought during this period, 51 were in respect of debts of less than £1000. A very few of these may possibly have come to the High Court because the county court jurisdiction at the time was limited to £750. Even so, it seems safe to infer from the figures that the change we recommend would remove from the High Court more than half of the applications at present made there. (It does not follow, of course, that all of these would necessarily be made in the county court instead, for some of them might not be made at all.)

50. This recommendation will necessitate a further small amendment of the present law. In the unreported county court decision in *London Borough of Merton* v. *Sammon*[47] it was held that the county court has no power to make a charging order on land in respect of a judgment debt created by a judgment of the High Court. This situation, which we would consider undesirable in any event, is clearly quite inconsistent with the recommendation made above, because if it were preserved a creditor under a High Court judgment for £1000 or less would be unable to apply for a charging order at all. We therefore recommend that the county court should in future have power to grant a charging order in respect of a High Court judgment debt not exceeding £1000.

51. A word may be added about venue. Where the application is for a charging order to enforce a county court judgment debt it is at present made by interlocutory application in the proceedings in which the judgment was obtained and is therefore heard by the same court as gave the judgment. We regard this as satisfactory. Where the application is for a charging order to enforce in the county court a judgment of the High Court, we are inclined to think that it should be made to the court for the district in which the defendant, or one of the defendants, resides or carries on business. This is consistent with our desire to ensure that the hearing takes place in the local court of the judgment debtor. Such a rule would be made, not by legislation, but by the County Court Rule Committee, and in reaching a decision the Committee will no doubt take our view into account. We regard as satisfactory the present rules as to venue for proceedings for the *enforcing* of a charging order, namely that they shall be commenced in the court in which the order itself was made[48].

---

[47] The case was decided in the Croydon County Court in October 1972.

[48] C.C.R., O. 6, r. 2 (proviso), and r. 2A. The wording of these rules will need to be modified, however, if the recommendations made in this report are implemented.

(iv) *Stop notices in the county court*

52. Since our recommendations, if accepted, will lead to a greater number of charging order applications being heard in the county court, we feel that the opportunity should be taken to review the procedure in the county court and to remedy any shortcomings which it may have. The procedure in the county court does differ in several ways from that in the High Court, but in our view no changes are called for merely on that account. There is, however, one right enjoyed by the creditor under the High Court system which we consider it reasonable that he should have but which is not at present available to him in the county court. We refer to the right of a creditor with a charging order on securities to serve a "stop notice"[49] which ensures that he has warning of any intended disposition of the securities in question.

53. In the High Court the stop notice procedure is available to "any person claiming to be beneficially entitled to an interest in" the securities in question, so that it is not restricted to judgment creditors with a charging order. These, however, are the only people to whom we are now concerned to make it available in the county court. In the county court, therefore, we think there is no need to provide any distinct stop notice procedure. Accordingly, we recommend that the new legislation should authorise the making of rules to provide that if notice of a county court charging order is served upon the appropriate institution[50] this should of itself have the effect of a stop notice. (Later in this report[51] we recommend that a similar "short cut" procedure should be made available in the case of High Court charging orders.)

III. THE SUBJECT MATTER OF CHARGING ORDERS

A. LAND AND INTERESTS UNDER TRUSTS OF LAND

Irani Finance

54. Section 35 of the Administration of Justice Act 1956, set out above[52], provides that a charging order may be made in respect of "any such land or interest in land of the debtor as may be specified in the order". In *Irani Finance*[53] the Court of Appeal decided that the beneficial interest of a beneficiary under a trust for sale of land could not be made the subject of a charging order. The main ground for this decision was that since the interest of a beneficiary under such a trust is technically an interest in the proceeds of sale of the land, not in the land itself, it is not land nor even an "interest in land" for the purposes of the section.

---

[49] R.S.C., O. 50, rr. 11–14.

[50] Under R.S.C., O. 50, rr. 11–14, the appropriate institution is the Bank of England or the company whose securities are the subject of the order or, in the case of funds in court, the Accountant General. If the recommendations made in this report result in an extension of the list of securities in respect of which a charging order may be made, and a stop notice served (see paras. 82–88 below), the appropriate institutions will increase accordingly.

[51] Para. 87, below.

[52] Para. 15, above.

[53] [1971] Ch. 59.

Trusts of land

55. It is appropriate to note that trusts of land may take any one of three forms. They may be constituted as strict settlements under the Settled Land Act 1925; and there is no doubt that the interest of a beneficiary under a settlement of that kind is an "interest in land". Alternatively they may amount to what are usually known as bare trusts, where a trustee holds land upon trust for a single individual who has an absolute beneficial interest in it and who has usually set up the trust himself with the object of concealing its true ownership (so that the trustee may properly be called a nominee); and here again there is no doubt that the beneficiary's interest is an "interest in land". And finally they may take effect as trusts for sale. They will always be trusts for sale if the beneficial ownership of the land is vested in two or more people concurrently as joint tenants or tenants in common. A house bought by a husband and wife jointly will accordingly be held on trust for sale; and, indeed, in such a case the couple will almost always themselves be the trustees of the legal estate, as well as being the beneficiaries under the trust. Express trusts for sale are, moreover, frequently imposed on land held on trust for persons in succession, in order to keep the land away from the provisions of the Settled Land Act. In fact, the trust for sale is nowadays by far the most common type of trust on which land is held. But the interests of the beneficiaries under a trust for sale are usually regarded by the law as interests in the proceeds of sale (and therefore as interests in personalty rather than in land), and *Irani Finance* shows that they are so regarded for the purposes of section 35.

Trustees and beneficiaries

56. It is appropriate also to emphasise the vital if elementary distinction (applicable to trusts of all kinds) between the interests of the trustees in the trust property and those of the beneficiaries. Thus in the case of any trust of land, the legal estate will be owned by a trustee or trustees[54] but such ownership is not "beneficial" and the trustee or trustees may not deal with the land for his or their own benefit. In particular, a trustee cannot charge trust land for his own benefit, though he can do so for the benefit of all the beneficiaries provided that he acts in proper exercise of his powers as a trustee. The interest of a beneficiary, on the other hand, is one which he holds for his own benefit and with which he can normally deal (whether by charging or otherwise) for his own benefit, but it amounts only to an equitable interest and never to a full legal estate in the land. This distinction remains equally valid, and equally important in theory although it is sometimes blurred in practice, if a trustee happens also to be a beneficiary: in that case, although he may hold both a legal estate and an equitable interest, he will hold them in different capacities.

57. It is necessary to add, however, that in some cases a beneficiary, although he does not own the legal estate, has nonetheless an immediate and indefeasible right to deal with it for his own benefit. The most obvious example of this is afforded by the bare trust. Since there is, in this type of trust, only one beneficiary, and since he is entitled to the whole beneficial interest in the land, no one can gainsay him if he terminates the trust and demands the legal estate

[54] If the land is settled land, the legal estate is normally in the tenant for life, but he holds it in a fiduciary capacity.

from the trustee. He can thus procure that the legal estate is dealt with in any way he pleases. The same principle applies when the whole beneficial interest in the trust property is in the hands of two or more beneficiaries all of whom (being of age and under no legal disability) are in agreement.

The principle of execution

58. It is of course a fundamental principle of the law applicable to all types of execution that judgment creditors may lay hands upon no property but the debtor's own. (This is reflected in the words of section 35 which permit charging orders to be made in respect of land or an interest in land "of the debtor".) In a situation involving a trust of land it seems clear that the property, and the only property, which a debtor beneficiary can call his own for this purpose is property consisting of an interest in that land (or its proceeds) with which he can deal for his own benefit. Normally the only interest with which he can so deal is the beneficial interest which he owns in his capacity as beneficiary under the trust. But if, in the circumstances mentioned in the preceding paragraph, he has power to procure dealings with the legal estate for his own benefit then the legal estate itself should logically be treated as his own property for execution purposes[55].

Trusts for sale of land: charging the legal estate

59. With these points in mind we return to the specific problem of charging orders in relation to trusts for sale. To begin with, it would in our view have been clearly wrong for the judgment creditor in *Irani Finance* to have been granted a charging order in respect of the legal estate in the trust land. To take a simple illustration of the principle involved, suppose that Blackacre is vested in T_1 and T_2, who hold the legal estate as trustees on trust for B_1 and B_2, the beneficiaries, who are equitable tenants in common. X has obtained a money judgment against B_1. Although B_1 and B_2 are together capable of procuring the grant of a charge of the legal estate in Blackacre to secure the debt owed to X (because they are together entitled to the whole beneficial interest in Blackacre), B_1 by himself cannot do so: the co-operation of B_2 is essential because the charge would affect his position and he cannot be forced to give that co-operation. By the same token, the court has no power (and clearly ought to have no power) to impose such a charge over the head of B_2. In short, execution could not in these circumstances be levied against the legal estate in Blackacre because B_1 is the only debtor and he is not the only person with a beneficial interest. The facts could be varied in several ways without affecting this result. Thus it would make no difference if B_1 and B_2 were beneficial joint tenants instead of being beneficial tenants in common. Nor would it make any difference if the beneficial interests of B_1 and B_2 were successive rather than concurrent. (Indeed, it is if anything still more obvious that a reversioner's creditor should not obtain a charge on the legal estate over the head of the life tenant in possession of the land—or *vice versa*.) Again, it would not matter if T_1 and T_2 were in fact the same people as B_1 and B_2—as normally they would be if the land was owned by husband and wife. And finally—to come to the actual facts of *Irani Finance*—it would not matter if X happened to have judgments

[55] This accords with the principle known as the rule in *Saunders* v. *Vautier* (1841) 4 Beav. 115, affd. Cr. & Ph. 240.

for debts of different amounts, incurred in different transactions[56], against both B_1 and B_2. Even in this latter case the principle remains the same: neither B_1 nor B_2 ought to be called upon, in effect, to underwrite the separate debt of the other by submitting to the imposition of a charge on the legal estate.

60. But would it make a difference if the judgments against B_1 and B_2 were for the *same* debt? This question arose in the more recent case of *National Westminster Bank Ltd.* v. *Allen*[57] ("*National Westminster Bank*"). There, a husband and wife were joint owners (at law and beneficially) of a house, and they were jointly indebted to the bank in respect of their joint accounts which were overdrawn. The bank obtained a single judgment in proceedings in which the debtors were joint defendants and applied for an order imposing a charge on the legal estate in the house. Waller J. granted the order. The essential respect in which the facts differed from those in *Irani Finance* was what we will call the "unity of the debt", that is to say, the existence of a debt for which both parties were equally responsible. Although the debtors held the legal estate in the house as trustees, that legal estate was vulnerable, because neither of the debtors was in a position to plead (as trustees usually are) that the beneficial ownership was vested wholly or partly in some other person not equally responsible for the same debt. A charge on the legal title therefore constituted no breach of the principle of execution law. Moreover, as that principle gave them no protection in their *legal* capacity, the particular point which arose in *Irani Finance* (namely, that beneficial interests under trusts for sale are interests in personalty) was not in issue: in their capacity as legal owners the debtors undoubtedly had interests in land.

61. Suppose now that the facts of *National Westminster Bank* were varied, so that the legal estate in the house was held by trustees who were different persons from the beneficiaries. It is difficult to say whether the result would have been the same. If the creditor had sought a charging order in respect of the interests of the debtors themselves he would presumably have failed for the same reason that the creditor failed in *Irani Finance*, namely that the debtors' own interests were not "interests in land". But what if the creditor had sought his order in respect of the legal estate, calling in aid the fact that the debtors, who were jointly liable for the same debt, were also together the owners of the whole beneficial interest and could thus procure dealings with the legal estate? On principle, it is suggested, he should have been successful. Judged by the one criterion which really matters—the unity of the debt—the case would still be a *National Westminster Bank* case rather than an *Irani Finance* one.

62. There is in fact a case not unlike that which we have postulated in the preceding paragraph, relating to chattels. In *Stevens* v. *Hince*[58] certain chattels were held by trustees (with power of sale) on trust for a husband during the joint lives of himself and his wife and thereafter for the survivor absolutely. A creditor obtained judgment against the husband and wife on a joint promissory note (so that there was unity of debt) and it was held that the chattels could be

[56] The reports of *Irani Finance* do not indicate how the debts arose but it is to be presumed that they arose under distinct transactions.

[57] [1971] 2 Q.B. 718.

[58] (1914) 110 L.T. 935.

seized under a writ of *fieri facias*. Bailhache J. said:—[59]

> "[Counsel for the debtors] put his case upon this simple proposition, that a judgment creditor cannot ... seize goods which are at the equitable disposition only of the judgment debtor, and in this case the legal estate in the goods, if I may use the word 'legal estate' in reference to chattels, was in the trustees .... In my opinion, although that is true as a general proposition, it is not true where the whole of the equitable and beneficial interest in the chattels is vested in the ... judgment debtors .... I do not think that in this case the trust can be set up as any sort of defence to an execution. The judgment debtors can themselves deal with the property exactly as they please ... ".

We agree with the view which Bailhache J. expresses here in relation to chattels and we hope that the same view would prevail in the case of land—as we have already argued on general principles that it should[60]. And there seems to be no reason why it should not because the principle on which it is based[61] is equally applicable to trusts for sale of land[62]. If it were, the result would be that a charging order could be obtained in respect of the legal estate in any case where there was unity of the debt—that is, where all the beneficiaries under the trust were liable to the creditor for the same debt. In such a case there would be no question (as there would have been in *Irani Finance*) of forcing each beneficiary in effect to underwrite the separate debt of the other: the debt would be the same, and it would be the joint debt of all.

63. We have, in the three preceding paragraphs, been considering cases involving debts incurred by beneficiaries in their personal capacities, and the circumstances in which it would be proper for such debts, having become judgment debts, to be charged on the trustees' interest in the trust property. There is one further situation in which it would be proper for the trustees' interest to be the subject of a charging order—namely, where it is the trustees themselves who are indebted *as trustees* to the judgment creditor. The trustees' interest in property is not, of course, a beneficial one and so it could not be charged to secure any personal debt of theirs. They hold it on behalf of the trust. But if the debt is also incurred on behalf of the trust, and a judgment has been obtained against the trustees in that capacity, we think it clear that a charging order should be obtainable in respect of the trust assets.

64. Such, then, are the cases in which, we consider, a charging order should be available against a legal estate (or lesser interest[63]) vested in trustees. We may sum the matter up by saying that such an order should be possible if—

(1) the judgment is against the trustees in their representative capacity; or

(2) there being only one beneficiary absolutely entitled under the trust, that beneficiary is the debtor; or

---

[59] (1914) 110 L.T. 935, 937.

[60] Paras. 58 and 61, above.

[61] *i.e.*, the rule in *Saunders* v. *Vautier*: see n. 55, above.

[62] *Re Horsnaill* [1909] 1 Ch. 631, 635. See also Law of Property Act 1925, s. 26(3).

[63] If the trust property amounts to less than a legal estate, it should still be capable of charge. For example, the trust may be a sub-trust of an interest under a head trust, the legal estate being held by the trustees of the head trust.

(3) there being two or more beneficiaries together absolutely entitled under the trust, all the beneficiaries are debtors in respect of a single debt.

65. We think it necessary, however, to make particularly clear what we mean, in this context, by "absolutely entitled under the trust". We mean, in fact, that the beneficiary in question must hold the whole of his beneficial interest under the trust unencumbered and for his own benefit. A beneficiary may be regarded as absolutely entitled notwithstanding the existence of charges on the legal title (to which a statutory charge would be subject); but he must not be so regarded if his beneficial interest has been subjected to third party rights. A statutory charge on the legal title takes effect (indeed, is intended to take effect) in front of the beneficiaries' equitable interests, and so would take effect in priority to any interest carved out of an equitable interest in favour of a third party. Since a statutory charge on the legal title clearly depletes the value of the equitable interest in which a third party may have acquired rights, it would obviously be wrong to place such a charge on the legal title in any case in which such rights exist. It follows therefore that in any case in which third parties would be prejudiced by the imposition of a charge on the legal title, a judgment creditor would have to be satisfied with a charge on his debtor's equitable interest—a charge which would rank subsequent to any earlier encumbrance on that interest.

66. Indebtedness of two beneficiaries in respect of a single debt—unity of debt—most commonly exists where the beneficiaries operate a joint bank account, or are respectively principal debtor and guarantor. To a large extent this is only another way of saying that unity of debt exists most frequently when the beneficiaries are husband and wife. We understand, indeed, that institutional lenders have of late shown an increasing tendency to ensure that both spouses are liable from the outset in transactions in which they might previously have been satisfied with the liability of one alone, hoping in this way, if default occurs, to avoid the *Irani Finance* situation and bring themselves within the principle of *National Westminster Bank*.

Trusts for sale of land: charging the beneficial interests

67. But this still leaves those cases in which a charging order cannot properly be made in respect of the legal estate, and we must now consider whether, in such cases, it should be possible to make one in respect of a debtor's beneficial interest. We have already indicated[64] that such an interest should in principle be available for execution. And this indeed is recognised by the existing law, to the extent at least that the existing law permits such interests to be the subject of an order for the appointment of a receiver by way of equitable execution. The remedy of receivership by way of equitable execution is an ancient one but it is often wholly inappropriate to beneficial interests under trusts for sale. It carries with it no right to apply for an order for sale of the property to which it applies; and the right to receive the income, although it may be useful in cases where the beneficiary is not in occupation of the land, is of no benefit when he does occupy it, as in the overwhelming majority of cases he does.

[64] Para. 58, above.

68. We therefore consider that *Irani Finance* has revealed a genuine gap in the remedies available to a judgment creditor and we are of the opinion that this gap would be best filled by extending the availability of charging orders to cover cases in which the interest sought to be charged is a beneficial interest in the proceeds of sale of land. This conclusion is in line with the proposals put forward in the working paper; and it received the support of the great majority of our correspondents.

69. The consequences of charging such an interest must now be examined[65]. To begin with, the creditor would be entitled, not only to collect the debtor's share of any income through the appointment of a receiver (which, as we have already mentioned, he could do even without a charging order), but also to apply to the court for an order for the sale of the beneficial interest charged. In very many cases, it must be admitted, these rights would be of no great benefit to the creditor. The beneficial interest might not be an interest in possession (it might not even be vested) so that it would not be producing income and might have no considerable market value. Even if it were a vested interest in possession, it might subsist in land of which the debtor was in occupation, and here again the beneficial interest would yield no income and its market value might be small because a purchaser would acquire no automatic right to vacant possession of the land itself. But the fact that the remedies would often be of limited practical use is not a reason for refusing them altogether. Sometimes they would be of considerable use. The power of sale would, for example, have been effective in *Irani Finance* because the creditor would have been entitled to sell both the beneficial interests, separately but simultaneously, to the same purchaser, and this would have been tantamount to the sale of the house itself and would have carried the right to vacant possession. In practice, moreover, the debtors in a case of this kind would appreciate that a better price would be obtained in a simple sale of the legal estate than in a double sale of the beneficial interests, and would accordingly be inclined to co-operate in making or procuring a sale of the legal estate.

70. At first sight it might seem reasonable to suggest that if a judgment creditor could in such circumstances procure what was for practical purposes (and might in fact be) a sale of the legal estate, he should be entitled to obtain a charging order in respect of that estate and so achieve the same result directly. We think, however, that to give him such a charge would often lead to serious complications (quite apart from its being contrary to the principle of execution law to which we have already referred). First, the charge on the legal estate would have to be cancelled if any of the judgment debtors satisfied the judgment against him before a sale took place. This could happen on the eve of a sale, and debtors would often make strenuous efforts to do it. To proceed with a sale in those circumstances would be to levy execution against a person who was no longer a debtor. Secondly, problems would arise if any of the judgment debts exceeded the value of that debtor's beneficial interest. Let it be supposed

[65] One consequence, to which we make no allusion in the text, is that if the debtor's beneficial interest is an interest as a joint tenant, the charge imposed will effect a severance of the joint tenancy, so making it a tenancy in common: *York* v. *Stone* (1709) 1 Salk. 158; *Re Pollard's Estate* (1863) 3 De G.J. and Sin. 541. The non-debtor beneficiary thus loses his right of accruer by survivorship. Since the loss of this right (which is in any case a precarious one) would result equally from the making of an express charge by the debtor we do not consider it objectionable.

that a house, worth £10,000, is owned beneficially by A and B in equal shares, and that X has judgments against them respectively for £8,000 and £1,000. In such a case, £3,000 of A's debt cannot be effectively secured by a charge and if X were able to sell the house he should retain £6,000 only, and hand £4,000 to B. He cannot look to B to discharge the balance of A's debt. We think that it is asking too much of a creditor to expect him to examine the interests of the beneficial owners as between themselves, in order to discover the limitations (if any) on his right to recover the debts in full out of the proceeds of sale. If the judgment creditor were to be placed in a position to sell the land itself, we think that it would be necessary to provide that the proceeds of sale should be paid into court; and that would add considerably to the costs of the execution. We admit that the alternative, namely, giving the creditor charges on the respective beneficial interests of the judgment debtors, constitutes a less certain security, because if the debtors carry out the trust for sale themselves the creditor immediately loses the benefit of charges on land (if and so far as they can be so described) and he may have to act swiftly to prevent the debtors disappearing with the proceeds. But this is a hazard inherent in the general principle that a purchaser of the land itself from trustees for sale takes free from equitable interests "behind the curtain" of the trust, and therefore free from any encumbrances on such interests.

71. A judgment creditor who has obtained a charging order in respect of a beneficial interest under a trust for sale would, it appears, be "a person interested" within the meaning of section 30 of the Law of Property Act 1925[66] and he would accordingly have the right (in common with the other beneficiaries under the trust) to apply to the court for an order directing the trustees to execute the trust by selling the trust property[67]. This right is quite different from that of a creditor who has a charge on the legal estate (which entitles the creditor himself to sell the land, with the court's leave), but it is a potentially valuable right because if such an order is obtained the creditor will be able to levy equitable execution on the debtor's share of the cash proceeds.

72. Of course the court's powers under section 30 are discretionary, and a creditor's application would not be granted automatically. We have in mind particularly the position of matrimonial homes. It is now firmly established that the court will not exercise its discretion under section 30 at the behest of a beneficiary if the effect of the order would be to defeat the purpose for which the trust was established[68]. A matrimonial home owned by the spouses jointly is the clearest, as well as the commonest, example of property which is held for a special purpose (namely, that of providing a joint home) notwithstanding that it is technically held on trust for sale; and so long as such a house remains in use

[66] As a judgment creditor who has merely obtained an order appointing a receiver of the debtor's interest is not: *Stevens* v. *Hutchinson* [1953] Ch. 299.

[67] In our working paper we suggested that this right should not be extended to a statutory chargee of an interest under a trust for sale, on the ground that a similar right was not available to a chargee of an interest arising under the Settled Land Act 1925; but we withdraw that suggestion in the light of consultation. The two systems are different in many respects and consistency within each should be preserved even if the practical distinctions are thereby emphasised.

[68] *Jones* v. *Challenger* [1961] 1 Q.B. 176; *In re Buchanan-Wollaston's Conveyance* [1939] Ch. 738; *In re Hyde's Conveyance* (1952) 102 L.J. 58; *Stevens* v. *Hutchinson* [1953] Ch. 299; *Bull* v *Bull* [1955] 1 Q.B. 234.

by both spouses as a matrimonial home, one of the spouses would not, save on quite exceptional facts, succeed in obtaining an order under section 30. The position may be otherwise if one spouse becomes bankrupt and his whole share passes to the trustee in bankruptcy, for in that event it seems that the trustee in bankruptcy's statutory duty to realise the bankrupt's assets will be given priority if he seeks an order under section 30[69]. An application by a chargee of one spouse's share is obviously not the same as an application by a single spouse or as one by the trustee in bankruptcy, though we think it should in principle be closer to the former than to the latter. The chargee owes no duty to the general body of creditors; and it must also be remembered that the charge, unlike the interest of the trustee in bankruptcy, is unlikely to exhaust the value of the spouse's share. It may be, indeed, that a chargee of the interest of one spouse would have no better right to defeat the underlying purpose of the trust than that spouse would have[70].

Other trusts of land

73. The foregoing paragraphs relate in terms to trusts for sale of land. Although the point referred to us was confined to trusts of this kind we think we must consider also the other trusts on which land may be held. As was mentioned in paragraph 55 above, such trusts may take either of two forms, and we see no reason why the situation in regard to either of these should differ from that in regard to trust for sale.

74. So far as the bare trust is concerned, our conclusions about this are really implicit in the preceding paragraphs. It follows from what we say there that a charging order should always be available in respect of the beneficial interest under a bare trust, and that where the beneficiary is absolutely entitled in the sense explained in paragraph 65 above (or where the judgment is against the trustees in their representative capacity) it should also be available in respect of the legal estate.

75. This leaves for consideration trusts constituted as strict settlements under the Settled Land Act 1925. Our views about the grant of charging orders in respect of the legal estate of land settled in this way are again implicit in the foregoing paragraphs. Such orders should be available in the circumstances set out in paragraphs 64 and 65 above.

76. But what of charging orders in respect of the beneficial interests arising under Settled Land Act settlements? It might seem clear at first sight that such charging orders can already be made under section 35 of the Administration of Justice Act 1956[71]. Certainly these interests are, as we have already mentioned[72], "interests in land" and so are not disqualified under the main ground for the decision in *Irani Finance*. There was, however, another element

[69] *Re Turner* [1974] 1 W.L.R. 1556. See also *Burke* v. *Burke* [1974] 1 W.L.R. 1063; *Re McCarthy* [1975] 1 W.L.R. 807; *Brown* v. *Brown* (1974) 119 Sol. J. 166; and *Re Densham* [1975] 1 W.L.R. 1519.

[70] Goff J.'s suggestion to the contrary in *Re Solomon* [1967] Ch. 573, 589 seems to be inconsistent with the view expressed by Upjohn J. in *Stevens* v. *Hutchinson* [1953] Ch. 299, 307, which was referred to with apparent approval in *Jones* v. *Challenger* [1961] 1 Q.B. 176, 182.

[71] Set out in para. 15, above.

[72] Para. 55, above.

in that decision to which we have not yet referred. The court considered that, in view of the opening words of subsection (3) of section 35, a charging order could not be made under the section unless the resulting charge would be capable of registration in the register of Land Charges or at the Land Registry. In the words of Cross L.J., who read the judgment of the court:

> "On this footing, under the Act of 1956 as under the Law of Property Act 1925, a charge cannot be created under section 35(1) which is not registrable under the Land Charges Act 1925[73], or the Land Registration Act 1925".

It is true that since the court could rest its judgment firmly on the finding that an interest under a trust for sale is not an "interest in land" in any case, it did not need to place much emphasis on this other point (and might indeed be said to have refrained from giving a definite decision upon it, though if this is so its view may nonetheless be said to have emerged clearly enough from the judgment). But this point needs to be emphasised when consideration is given to beneficial interests under Settled Land Act settlements[74]. Although a charge on such an interest would be a charge on an interest in land it would not be registrable as a writ or order affecting land under the Land Charges Act or the Land Registration Act because it would not be a charge on the legal estate. What seems really to emerge from *Irani Finance* (and it is a conclusion with which we agree) is that section 35 is designed to cover only those cases in which the legal estate itself can be charged.

77. It seems to us that a beneficial interest under a strict settlement should be just as capable of forming the subject matter of a charging order as an interest under a trust for sale, and we would adopt the same reasoning in relation to the one as to the other. We therefore recommend that the extension of section 35 which we advocate in paragraph 68 above should be such as to permit the making of charging orders on all beneficial interests under trusts of land (whether trusts for sale or settlements under the Settled Land Act).

B. SECURITIES AND INTERESTS UNDER TRUSTS OF ALL ASSETS OTHER THAN LAND

Background

78. We have already set out[75] a summary of the history and present law relating to charging orders on securities. Our references in the working paper to charging orders of this kind were brief, but consultation and our own further work have convinced us that we should give more detailed consideration to the subject. In the foregoing section of this report we dealt, in relation to land, with charging orders in respect of the legal estate, and with those in respect of beneficial interests under trusts of land. Similarly, in the present discussion, we

---

[73] This reference to the Land Charges Act 1925 is now to be read as a reference to the Land Charges Act 1972: see s. 18(6) of the latter Act.

[74] It is of course equally an objection to the making of a charging order in respect of a beneficial interest under a trust for sale so that even if our recommendations were confined to bringing an interest of the latter kind within the court's charging power we should have to advocate the reversal of both elements in the *Irani Finance* decision.

[75] Paras. 18–21, above.

shall deal with charging orders in respect of securities themselves and then with charging orders in respect of beneficial interests under trusts of all assets other than land (not merely of securities: the reason for this difference will shortly emerge).

Charging orders (and stop notices, etc.) on securities

79. Two main questions arise with regard to securities. First, in what circumstances should it be possible to obtain a charging order in respect of securities? And second, on what securities should such an order be available?

(i) *In what circumstances?*

80. Charging orders on securities—that is to say, on the securities themselves, not on some subsidiary interest in the securities—are analogous to charging orders on the legal estate in land. It goes almost without saying that they should be available when the securities are in the debtor's own name, and he is the sole beneficial owner of them—in other words, where there is no trust involved. But what if there is a trust? Our answer is that a charging order on trust securities should be available in the same circumstances as those in which, we recommend, a charging order should be available in respect of the legal estate[76] in land held upon trust. Those circumstances are set out in paragraphs 64 and 65 of this report, and we think that the reasoning which leads up to those paragraphs is equally applicable here.

81. It is not entirely clear to what extent a charging order would be available in these circumstances under the present law. It may well be that the implementation of the view stated in the preceding paragraph would not in fact involve any substantial departure from the present situation. But since our proposals as a whole will involve new legislation we consider that the opportunity should be taken to put the matter beyond doubt.

(ii) *On what securities?*

82. The second question is one which does not arise in relation to charging orders on land, because all types of land are clearly capable of being the subject of such an order. The same is obviously not true of assets other than land. The only assets other than land which may appropriately be the subject of a charging order are assets for which the best general description is "securities". But what exactly should fall under this heading for this purpose?

83. The list of securities in respect of which a charging order can now be made is contained (so far as the High Court is concerned) in O. 50, r. 2, of the Rules of the Supreme Court and (as regards the county court) in O. 25, r. 6A, of the County Court Rules—both of which are reproduced in paragraph 20 of this report. There is no real difference between the two so far as subject matter is concerned.

[76] In n. 63 we said that if the trust property itself amounts to an interest less than a legal estate it should still be capable of charge. The same principle applies here. And if the trust is a sub-trust, as mentioned in that footnote, it should be capable of charge whether or not the assets of the head trust fall within the list set out in para. 84, below: this follows from the reasoning of paras. 93–95, below.

84. Suggestions have been made in the past, and in consultation on our working paper, that this list is unnecessarily restricted, and our considered view is that it should in future comprise the following:–

(*a*) *Government stock.* Such stock is of course included in the present list.

(*b*) *Stock of any body (other than a building society) incorporated within England and Wales.* This category extends the present list so as to include local authority stock and stock of nationalised industries. It was suggested that Building Society holdings should also be included, but this was opposed by the Building Societies themselves and on the whole we do not think that their inclusion would be appropriate. Although the making of a deposit with a Building Society may make the depositor a shareholder, he realises his asset, not through any dealing with his shares as such, but simply by withdrawing his deposit. We therefore feel that if it is desired to make this asset more readily amenable to execution process (a point on which we express no view), it might be better to do so by bringing the account within the scope of a garnishee order (even though the relationship between the Building Society and its depositor-members may not strictly be one of debtor and creditor).

(*c*) *Stock of any body incorporated outside England and Wales or of any state or territory outside the United Kingdom, being stock registered in a register kept within England and Wales.* This category is wholly new; but we see no reason why foreign stock should not be the subject of a charging order if it is registered within England and Wales.

(*d*) *Units of any unit trust in respect of which a register of unit holders is kept within England and Wales.* It was suggested to us that unit trust units should be included in the list and we are satisfied that such inclusion is right. There is, we think, no distinction of principle to be drawn for this purpose between these units and shares held in a company. We understand that charging orders made in respect of units may cause some administrative inconvenience, and this we regret, but we suspect that if unit trusts had been as well established when the original list was drawn up as they are today they would unquestionably have been included.

(*e*) *Money in court.* Although this is an addition to the list in O. 50, r. 2, of the Rules of the Supreme Court and O. 25, r. 6A, of the County Court Rules, it is not an addition to the assets in respect of which charging orders can now be made. A charging order may be made in the High Court in respect of money in court under a special provision: O. 50, r. 8. Since the procedure is much the same, we think it can conveniently appear in the main list, and we see no reason why such charging orders should not be made in the county court as well as the High Court.

We recommend, then, that the list set out above should replace the existing list for the purposes of both High Court and county court jurisdiction. We would make three further comments with regard to this list.

85. First, we recommend the retention of the provision, already made in the High Court rules, whereby securities in the list can still be charged notwithstanding that they stand in the name of the Accountant General. Secondly, we have considered how to treat interest and dividends payable in respect of listed securities. The present rules include such interest and dividends as a distinct head of property, thus giving the impression that a charging order may (at least in theory) be made in respect of interest and dividends alone. We understand that this is never done in practice, and we think it would be undesirable and inappropriate. We therefore recommend a slightly different provision: that if a charge is imposed upon an asset within the list, the court may provide that it extends also to interest or dividends payable in respect of that asset.

86. Thirdly, we are conscious that no list is likely to remain appropriate for ever. The inclusion in the new list of units of unit trusts serves as a reminder, if one be needed, of the way in which totally new kinds of "security" may develop. We therefore recommend that the enactment of the new list should be accompanied by a power to extend it further from time to time if circumstances should warrant its extension. We think this power should be exercisable by the Lord Chancellor and subject to annulment by Parliament.

87. We have had occasion earlier in this report to refer to the use of stop notices to reinforce charging orders on securities[77]. In the High Court the present list of securities for charging order purposes serves also as a list of securities in respect of which a stop notice may be served under O. 50, rr. 11–14, of the Rules of the Supreme Court. There is at present no stop notice procedure in the county court and in paragraph 53 of this report we therefore recommend that, when a charging order is made in the county court, the service of notice of the order upon the appropriate institution should of itself have the effect of a stop notice. We now recommend that a High Court charging order, if notice is similarly served, should have the same automatic affect. At present the stop notice provisions applicable to the High Court apply whenever a person claims to be beneficially interested in the securities in question, and they require the filing of affidavit evidence to establish his interest. But when a charging order has been made that in itself is sufficient, in our view, to establish the interest of the chargee, and a special "short cut" procedure is therefore justified.

88. Although we have no wish, in this report, to venture outside the field of charging orders, the twofold recommendation mentioned in the preceding paragraph compels us to do so in two respects.

(i) Since we intend that stop notices of this "automatic" kind should be available whenever a charging order has been obtained, it would be illogical to leave the original list of securities to apply unamended for stop notice purposes (particularly since it is thought to be just as inadequate for those purposes as it is for the purposes of charging orders).

(ii) So far we have not mentioned stop *orders*. They too are available to anyone with a beneficial interest, but they are more draconian than

[77] Paras. 52 and 53, above.

stop notices, in that they amount to a total prohibition on dealings. They are available only in the High Court (under O. 50, r. 15, of the Rules of the Supreme Court) and have nothing essentially to do with charging orders. But the list of securities in respect of which they are available, though it is in fact slightly different from the one applicable to charging orders and stop notices, is essentially similar in purpose.

We therefore recommend that the legislation should embody a provision to allow the existing lists for stop notice and stop order purposes to be amended by rule (so that they can be brought into line with our new list if desired), and to allow for future variations (so that if the charging order list is varied, similar variations can be made, if desired, for these purposes).

Charging orders on beneficial interests in trust assets other than land

89. We turn now to a consideration of charging orders on beneficial interests under trusts of assets other than land. These, of course, are dealt with by the same rules as provide for charging orders to be made on the assets themselves[78] and we shall have occasion to return to this point in a moment. Before doing so, however, we must pause to discuss one doubt about the present law.

90. In our working paper[79], having shown that *Irani Finance* prevented a charging order being made on an interest arising under a trust for sale of land and having suggested that such an order should in future be obtainable, we said that we should welcome comments "on whether beneficial interests under trusts for sale of other forms of property (for example, stocks and shares) might be brought within the same principle".

91. As has already been noted[80], the present High Court and county court rules replace the Judgments Act 1838, sections 14 and 15, and the Judgments Act 1840, section 1. Cases decided under these earlier enactments leave in some doubt the question whether a charging order may be made in respect of a beneficial interest under a trust of securities if the trust is a trust for sale[81]. In *Cragg* v. *Taylor*[82] a charging order was in fact granted in respect of a beneficial interest under a trust for sale but the authority of that case is weakened by the fact that the question now at issue—namely, whether the existence of the trust for sale prevented the beneficiary's interest from being an "interest in" the trust securities—was not canvassed at all. The argument in *Dixon* v. *Wrench*[83] came, perhaps, closer to the point. There, it was held on the facts that the existence of a trust for sale did take the beneficiary's interest out of the statutory provisions, with the consequence that no charging order could be made, but that case was an altogether exceptional one because the trust arose under a will whereby the trustees held the assets not merely upon trust for sale

[78] *i.e.*, R.S.C., O. 50, r. 2 and C.C.R., O. 25, r. 6A: see para. 20, above.
[79] Para. 38.
[80] Paras. 18–20, above.
[81] They leave no doubt that such an order may be made in respect of a beneficial interest under a trust which is not a trust for sale (*i.e.*, a trust which is analogous to a Settled Land Act settlement of land), so that there is, under the existing law, an anomalous distinction in this respect between trusts of personalty and trusts of land.
[82] (1867) L.R. 2 Exch. 131.
[83] (1869) L.R. 4 Exch. 154.

but under an imperative obligation to sell within twelve months of the death of the testatrix, and the interest of the beneficiary was held to arise only after the sale had taken place. These exceptional features were emphasised in *Bolland* v. *Young*[84], where the Court of Appeal made a charging order in respect of a beneficial interest under a personalty trust, though in that case there was really no trust for sale involved; and in *Ideal Bedding Co. Ltd.* v. *Holland*[85], where Kekewich J., quoting the words of Stirling L.J. in *Bolland* v. *Young*, made a charging order in respect of a beneficial interest under a trust which, though not an "imperative" trust for sale, was certainly a trust for sale in the normal sense. In the latter case, indeed, Kekewich J. said that he ventured to doubt whether *Dixon* v. *Wrench* could still be relied on as an authority. All of these cases were of course decided before *Irani Finance* and it may be that a court considering the matter today would feel bound, in the light of that case, to treat a beneficial interest under any trust for sale of personalty as not being an "interest in" the trust assets and so as incapable of being the subject matter of a charging order.

92. At all events there is clearly some room for doubt on this point and we recommend that this doubt should be dispelled in such a way as to show clearly that a charging order may be made in respect of a beneficial interest under a personalty trust even though the trust is a trust for sale.

93. The question we have now to consider is whether, with that clarification, the court's existing powers in relation to charging orders of this kind are adequate. Because charging orders on beneficial interests under trusts of personalty are dealt with by the same rules as charging orders on the securities themselves, the same list of securities applies to both. In other words, a charging order may be made in respect of a beneficial interest arising under a trust only in so far as the beneficial interest subsists in trust assets falling within the list of securities on which a direct charging order may be made.

94. We think this is unsatisfactory; and we think it would still be unsatisfactory if the list were to be extended in the way recommended above[86]. It has been suggested to us, and we agree, that there is no reason why a charging order which relates merely to a beneficial interest under a trust should not be available no matter what the trust assets may be. The practical difficulties which clearly stand in the way of permitting a statutory charge on assets of certain kinds do not stand in the way of permitting such a charge on a beneficial interest in (or in the proceeds of sale of) such assets. Indeed, the present situation seems to be beset with more difficulties than the change we are considering. If in fact a trust fund consisted in part of "listed" securities and in part of other assets the charging order would have to be made on a beneficiary's interest only in so far as it was an interest in the former but not in so far as it was an interest in the latter. Furthermore, if the trustees were to sell the "listed" securities (which they could freely do because the charge attaches to the beneficiary's interest therein, and not to the securities themselves) the charge would, it appears, vanish because the beneficiary's interest would cease altogether to be an interest in "listed" securities. Indeed it is hard to see why the power to grant

[84] [1904] 2 K.B. 824, 831.
[85] [1907] 2 Ch. 157, 168.
[86] Para. 84.

charging orders on beneficial interests was ever restricted by reference to the nature of the trust assets, and we suspect that the only reason is a historical one. Section 14 of the Judgments Act 1838[87], which originally contained the restriction, seems to have contemplated the making of a charging order only on the assets themselves. It was section 1 of the Judgments Act 1840[88] which permitted charging orders to be made on beneficial interests, but it did so merely by deeming the earlier provisions to extend to such interests and not by making separate provision for them and so the original restriction was perpetuated.

95. Our conclusion, therefore, is that the court should have power to make a charging order in respect of any beneficial interest of the judgment debtor under a trust, no matter what the trust assets may be.

IV. THE DISCHARGE OF CHARGING ORDERS

96. In our working paper we pointed out that section 35 of the Administration of Justice Act 1956, dealing with charging orders on land, in contrast with the corresponding provisions dealing with charging orders on securities and beneficial interests therein[89], contains no power for the court to discharge the order and so terminate the charge. We leave open for the moment the question whether such a power may be derived from any other source.

97. We also pointed out in the working paper that the practical effects of this deficiency, if such it was, were mitigated by the rules relating to registration. In the case of unregistered land the relevant provisions are those of sections 1(6), 6(4) and 8 of the Land Charges Act 1972[90]. By virtue of section 6(4) a charging order is void against a purchaser (or mortgagee) of the land unless it is for the time being registered; section 1(6) authorises the court to make an order vacating the registration; and section 8 provides that the registration ceases in any event to have effect five years after it is made. As to registered land, the Land Registration Act 1925 and the rules made thereunder contain provisions corresponding with sections 1(6) and 6(4) (though not with section 8). So far as purchasers and mortgagees are concerned, therefore, an order vacating the register (or, where the land is unregistered, the lapse of five years) is as effective as the discharge of the charging order itself.

98. We added, however, that these provisions by themselves might not be considered entirely satisfactory. It is after all the charge which constitutes the substance of the matter and the entry on the register may be regarded merely as its shadow. If the money secured by the charge has in fact been paid it may be thought illogical for the law to provide a means of abolishing the shadow but none of demonstrating the disappearance of the substance itself. This might indeed be a source of grievance to the debtor. Again, although the removal of the entry from the register enables a purchaser or mortgagee to take free of the charge, it affords no protection to a volunteer and cases might arise in which

[87] See para. 18, above.
[88] See para. 19, above.
[89] R.S.C., O. 50, r. 7; C.C.R., O. 25, r. 6A(6).
[90] Formerly s. 6(5), 7(1) and 6(3) respectively of the Land Charges Act 1925.

this was significant. Finally, it had been represented to us that even a purchaser or mortgagee might not, if he knew of the charge, be satisfied merely by its absence from the register; and we said that although such dissatisfaction might be groundless it was perhaps understandable.

99. A charging order on land takes effect as an equitable mortgage under hand[91], so that a receipt given by the judgment creditor would operate to provide sufficient evidence of its discharge; but the creditor may not always be alive, accessible and willing to co-operate when the time comes, and even if he is it is doubtful whether the entry at the Land Charges Registry or the Land Registry would be vacated merely on the strength of such a receipt.

100. But we must now return to the question left open in paragraph 94 above. Granted that section 35 gives the court no power to discharge the land affected by a charging order, is such a power to be derived from any other source? Consultation on the working paper has shown that, at least in the High Court, a properly substantiated application for such a discharge would in practice be granted[92]. References were made in this connection to the inherent jurisdiction of the Court and, more particularly, to O. 45, r. 11, of the Rules of the Supreme Court. This replaces the writ *audita querela* and enables the High Court to accede to an application "for a stay of execution of [a] judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order"—the words "or other relief" being considered by some to be wide enough to embrace the discharge of a statutory charge. So far as the county courts are concerned, the matter is a little more complicated. The corresponding provision of the County Court Rules, O. 25, r. 8, gives power to "suspend or stay any judgment or order" but contains no reference to "other relief". It may be that the rule is in effect widened to include "other relief" by section 103 of the County Courts Act 1959 which provides: "In any case not expressly provided for . . . the general principles of practice in the High Court may be adopted and applied to proceedings in a county court". But this cannot be regarded as certain[93]. The consensus of opinion expressed to us was that in this regard the situation in the county courts was less clear than that in the High Court. It was generally agreed that even the High Court powers would benefit from clarification and that if any new provision were to be made in regard to county courts the opportunity should be taken to deal also with the High Court.

101. Accordingly we now recommend the course suggested in the working paper—namely, that both the High Court and county courts should be given express power to make an order discharging the land subject to a charging order; and that such an order should be sufficient of itself to secure the removal of any entry on the register which may still subsist in respect of the original order.

---

[91] Administration of Justice Act 1956, s. 35(3), set out in para. 15, above.

[92] It has indeed been pointed out to us that the common form for enforcement of a charging order in the Chancery Division contains a provision that if the debtor pays the debt (with interest and costs) within one month after the master's certificate the creditor will forthwith apply for the discharge of the charging order.

[93] Sect. 103 received a somewhat restrictive interpretation in *R.* v. *Bloomsbury and Marylebone County Court, ex p. Villerwest Ltd.* [1975] 1 W.L.R. 1175.

102. We would make a further point. In paragraph 53 above we recommend that if a charging order on securities made by a county court is served on the company (or other appropriate institution) in question it should have the effect of a stop notice. In paragraph 87 we make a similar recommendation in respect of High Court charging orders. Both these recommendations will fall to be implemented by rules of court. It seems to us logical that if the order discharging the securities is served in the same way, such service should similarly be sufficient of itself to effect the cancellation of the stop notice; and we suggest that consideration be given to this idea when the rules come to be made.

103. We would mention that several of those who were kind enough to comment on the working paper put forward other suggestions (for example, that the statutory charge arising under a charging order should from the outset have only a limited life) which, though not concerned with the discharge point as such, had some relevance to the general subject of discharge. Inasmuch, however, as the discharge point itself was the one which we undertook to consider, and the only matter on which we have had any general consultation, we have confined our comments in this part of the report to that point.

V. SUMMARY OF RECOMMENDATIONS

104. The following is a summary of our recommendations. References to paragraphs are to paragraphs of this report (unless otherwise stated) and references to clauses are to the clauses of the draft Bill annexed at Appendix B. To the extent that our recommendations are not directly implemented by the draft Bill we would envisage that they would be given effect by Rules of Court.

Charging orders and priority

(1) The making of a charging order should constitute execution for the purposes of the Bankruptcy Act 1914, section 40, and the Companies Act 1948, section 325, and should amount to completion of the execution for those purposes. The effect of this recommendation is that a creditor with a charging order will rank as a secured creditor in the subsequent bankruptcy or liquidation of the debtor.

(Paragraphs 41–42 and clause 4).

(2) It should be made clear that the court has a full discretion whether or not to accede to an application for a charging order; and that in exercising this discretion the court should take into account any evidence before it not only about the personal circumstances of the debtor but also about any other creditors of his who might be unfairly prejudiced if the charging order were granted.

(Paragraphs 43 and 44, and clause 1(3)).

(3) (*a*) The jurisdiction of the High Court to make charging orders should in future be limited to High Court judgment debts exceeding £1,000 in amount, and the county court should have exclusive jurisdiction to make all other charging orders.
(Paragraph 45, and clause 1(1)).

(*b*) The unreported decision in *London Borough of Merton* v. *Sammon*, which decided that the county court could not make a charging order on land in respect of a High Court judgment debt, should be negatived.
(Paragraph 50, and clause 1(1)).

(*c*) We regard the existing rules as to venue in the county court as satisfactory, but suggest that an application for a charging order in respect of a High Court judgment debt should in all cases be made in the court for the district in which the defendant, or one of the defendants, resides or carries on business.
(Paragraph 51).

(4) The new legislation should authorise the making of rules to provide that if notice of a county court charging order is served upon the company (or other appropriate institution) this should of itself have the effect of a stop notice.
(Paragraph 53, and clause 5(3)).

The subject matter of charging orders

A. Land and interests under trusts of land

(5) The court should have power to make a charging order in respect of a legal estate (or lesser interest) in land vested in trustees (whether the trust is a bare trust, a trust for sale, or a settlement under the Settled Land Act 1925) if—

(*a*) the judgment is against the trustees in their representative capacity; or

(*b*) there being only one beneficiary absolutely entitled under the trust, that beneficiary is the debtor; or

(*c*) there being two or more beneficiaries together absolutely entitled under the trust, all the beneficiaries are debtors in respect of a single debt;

and to be "absolutely entitled" for this purpose a beneficiary must hold the whole of his beneficial interest unencumbered and for his own benefit.
(Paragraphs 64, 65, 74 and 75, and clause 2(1)(*b*)).

(6) The court should have power in all circumstances to make a charging order in respect of a beneficial interest of the debtor arising under a trust of land (whether the trust is a bare trust, a trust for sale, or a settlement under the Settled Land Act 1925).
(Paragraphs 68, 74 and 77, and clause 2(1)).

B. Securities and interests under trusts of assets other than land

(7) The court's power to charge a trustee's interest in securities should correspond with its power to charge a trustee's interest in land.
(Paragraph 80 and clause 2(1)(*b*)).

(8) (*a*) The list of securities etc., in respect of which a charging order can be directly made should be extended to comprise—

(i) government stock;

(ii) stock of any body (other than a building society) incorporated within England and Wales;

(iii) stock of any body incorporated outside England and Wales or of any state or territory outside the United Kingdom, being stock registered in a register kept within England and Wales;

(iv) units of any unit trust in respect of which a register of unit holders is kept within England and Wales;

(v) money in court.
(Paragraph 84, and clause 2(2)).

(*b*) Securities in this list should be capable of charge notwithstanding that they stand in the name of the Accountant General.
(Paragraph 85, and clause 6(3)).

(*c*) If a charge is imposed on securities in the list, the court should have power to provide that it extends also to interest or dividends payable in respect of the securities.
(Paragraph 85, and clause 2(3)).

(9) The Lord Chancellor should have power to vary the list set out above from time to time.
(Paragraph 86, and clause 3(6)).

(10) As in the case of a county court charging order (see paragraph (4) of this summary), the new legislation should authorise the making of rules to provide that if notice of a High Court charging order is served upon the company (or other appropriate institution) this should of itself have the effect of a stop notice.
(Paragraph 87, and clause 5).

(11) The new legislation should embody a provision allowing the existing lists of securities in respect of which stop notices and stop orders can be made in other cases to be amended by rule, and to allow for future variations.
(Paragraph 88, and clause 5).

(12) The court should have power in all circumstances to make a charging order in respect of a beneficial interest of the debtor arising under a trust of assets other than land, whether or not the trust is a trust for sale and no matter what the trust assets may be.
(Paragraphs 92 and 95, and clause 2(1)).

The discharge of charging orders

(13) (*a*) The court should have express power to make an order discharging the property subject to a charging order.
(Paragraph 101, and clause 3(4)).

(*b*) In the case of land, the discharging order should be sufficient of itself to secure the removal of any entry which may have been made on the register under the Land Charges Act 1972 or the Land Registration Act 1925 in respect of the charging order.
(Paragraph 101, and clause 2(5)).

(*c*) In the case of securities, we suggest that a provision might be included in future rules of court (made under the powers given by the new legislation) to the effect that service of the discharging order should be sufficient of itself to secure the cancellation of any stop notice arising from the charging order.
(Paragraph 102, and (as to rule-making powers) clause 5).

(*Signed*) SAMUEL COOKE, *Chairman.*
AUBREY L. DIAMOND.
STEPHEN EDELL.
DEREK HODGSON.
NORMAN S. MARSH.

J. M. CARTWRIGHT SHARP, *Secretary.*

16 *January* 1976.

APPENDIX A

Individuals and organisations who commented on Working Paper No. 46

Mr. D. N. Cheetham

Professor J. F. Garner
Professor A. M. Prichard
Mr. F. S. Hopkins
Mrs. J. V. Shrubsall — Joint memorandum

Mr. R. L. Harris
Mr. G. L. Leigh
Mr. P. C. F. Pettit
Mr. Alec Samuels
Mr. Frank C. Shepherd
Professor L. A. Sheridan
Mr. B. Smythe
Mr. Arthur B. S. Weir

Master Ball, M.B.E.
Master Jacob

Master Bickford Smith, T.D.
Master Dyson
Master Elton
Master Ritchie, M.B.E.

Mr. Registrar Berkeley
Mr. Registrar Newton, C.B.

Senior Official Receiver

Bankruptcy Department, Department of Trade
Building Societies Association
Committee of London Clearing Bankers
Finance Houses Association
General Council of the Bar
Solicitor's Office, Inland Revenue
H.M. Land Registry
The Law Society
Messrs. Edward Lloyd & Co.
Lord Chancellor's Office
Office of the Director of Law Reform, Northern Ireland
Parliamentary Draftsmen, Northern Ireland
Registrars of the Companies Court

APPENDIX B

Draft Administration of Justice (Charging and Stop Orders) Bill

ARRANGEMENT OF CLAUSES

Charging orders

Clause

1. Charging orders.
2. Property which may be charged.
3. Provisions supplementing sections 1 and 2.
4. Completion of execution.

Stop orders and notices

5. Stop orders and notices.

Supplemental

6. Interpretation.
7. Short title, etc.

DRAFT

OF A

BILL

TO

MAKE provision for imposing charges to secure payment of money due, or to become due, under judgments or orders of court; to provide for restraining and prohibiting dealings with, and the making of payments in respect of, certain securities; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Charging Orders

Charging orders.

1.—(1) Where, under a judgment or order of the High Court or a county court, a person (the "debtor") is required to pay a sum of money to another person (the "creditor") then, for the purpose of enforcing that judgment or order—

(*a*) the High Court, in the case of a judgment or order of the High Court for a sum exceeding £1,000, and

(*b*) the county court, in any other case,

may make an order in accordance with the provisions of this Act imposing on any such property of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order.

(2) An order under subsection (1) above is referred to in this Act as a "charging order".

(3) In deciding whether to make a charging order the court shall consider all the circumstances of the case and, in particular, any evidence before it as to—

(*a*) the personal circumstances of the debtor, and

(*b*) whether any other creditor of the debtor would be likely to be unduly prejudiced by the making of the order.

Clause 1

Subsection (1) establishes the jurisdiction of the court to make charging orders for the purpose of enforcing money judgments or orders, replacing the present grant of jurisdiction conferred by section 35(1) of the Administration of Justice Act 1956, section 141(1) of the County Courts Act 1959, Order 52, rule 2, of the Rules of the Supreme Court and Order 25, rule 6A, of the County Court Rules.

The jurisdiction of the High Court to make charging orders is limited to the cases mentioned in (*a*). Applications for orders in respect of judgment debts of £1,000 or less will have to be made to the appropriate county court, no matter where the judgment was obtained: see paragraphs 45 to 50 of the report. Provision is made in Clause 7 for ensuring that the figure of £1,000 is kept in line with the limit imposed from time to time on the county court's jurisdiction in contract and tort cases.

Subsection (3) is designed to emphasise the discretionary nature of the jurisdiction: see paragraphs 43 and 44 of the report. Bearing in mind that a charging order will make a judgment creditor a secured creditor, so that he will have priority over unsecured creditors in the event of the debtor becoming bankrupt (or being wound up), the court is directed to consider, among other things, whether it would be unfair to other creditors to give the applicant this degree of security pending satisfaction of the judgment.

Property which may be charged.

2.—(1) Subject to subsection (3) below, a charge may be imposed by a charging order only on—

(*a*) any interest held by the debtor beneficially—

(i) in any asset of a kind mentioned in subsection (2) below, or

(ii) under any trust; or

(*b*) any interest in such an asset, or under any trust, held by any person as trustee of a trust ("the trust") if—

(i) the judgment or order in respect of which a charge is to be imposed was made against that person as trustee of the trust, or

(ii) the whole beneficial interest under the trust is held by the debtor unencumbered and for his own benefit, or

(iii) in a case where there are two or more debtors all of whom are liable to the creditor for the same debt, they together hold the whole beneficial interest under the trust unencumbered and for their own benefit.

Clause 2

This clause, which implements most of the recommendations contained in Part III of the report, delimits the property capable of being charged by a charging order. The two principal considerations are these: first, that a charge cannot, as a general rule, properly be placed on an asset (or on the legal title thereto) if the debtor's interest in the asset is less than absolute; and second, that it is fruitless to impose an equitable charge on an asset in the absolute ownership of a debtor if the asset is one which the debtor can sell without the purchaser obtaining notice of the charge. Such a purchaser would not be bound by the charge.

The assets listed in *subsection* (2) are all ones in relation to which a creditor chargee can ensure (by registration of his charge, or in some other way) that a purchaser from the debtor will have notice of the charge. Similarly, if the debtor's asset is an interest under a trust, the creditor chargee can protect his charge against a disposition by the debtor of his interest by giving the trustees notice of the charge.

Subsection (1)(*a*) accordingly provides that a charge may be imposed on the *debtor's* beneficial interest (whether legal or absolute, or not) in any of the appropriate assets listed in subsection (2), or on his interest (necessarily equitable) under a trust. In the latter case it matters not what the trust assets themselves are. This provision implements recommendations in paragraphs 68, 74, 77, 92 and 95 of the report.

Subsection (1)(*b*) covers those cases in which charging orders may be made on interests held by *trustees*. Paragraph (i) applies where the trustees as such are the judgment debtors (see paragraph 63 of the report). Paragraph (ii) applies where the judgment debtor is the sole beneficiary; and paragraph (iii) applies where the sole beneficiaries are joint judgment debtors. In the latter cases it is permissible to charge the trustees' interest because no person other than the debtor or debtors would be prejudiced thereby. The matter is discussed in paragraphs 59–66 of the report (and is reverted to in paragraphs 74, 75 and 80). The provision is so worded as to apply where the debtor's interest is held under a sub-trust as well as where it is under a direct trust of assets within subsection (2).

(2) The assets referred to in subsection (1) above are—

(*a*) land,

(*b*) securities of any of the following kinds—

(i) government stock,

(ii) stock of any body (other than a building society) incorporated within England and Wales,

(iii) stock of any body incorporated outside England and Wales or of any state or territory outside the United Kingdom, being stock registered in a register kept at any place within England and Wales,

(iv) units of any unit trust in respect of which a register of the unit holders is kept at any place within England and Wales, or

(*c*) money in court.

(3) In any case where a charge is imposed by a charging order on any interest in an asset of a kind mentioned in paragraph (*b*) or (*c*) of subsection (2) above, the court making the order may provide for the charge to extend to any interest or dividend payable in respect of the asset.

Clause 2 *(continued)*

Subsection (2)(*b*) is much wider in scope than the present list of chargeable securities contained in R.S.C., O. 25, r. 2 and C.C.R., O. 25, r. 6A (set out in paragraph 20 of the report). Item (ii) includes, for example, local authority stock; and items (iii) and (iv) are new. The exclusion of building society shares from item (ii) is explained in paragraph 84 of the report and the provision implements the recommendation made in that paragraph.

Subsection (3), coupled with the absence of any reference to interest or dividends in subsection (2), makes it clear that a charge cannot be imposed on income *alone*. It is not expected that resort will often be had to this subsection: a creditor expecting his judgment to be satisfied wholly or in part out of the income from the debtor's assets will apply not for an order charging the income, but for the appointment of a receiver. This provision implements the recommendation in paragraph 85 of the report.

Provisions supplementing sections 1 and 2.

1972 c. 61.
1925 c. 21.

3.—(1) A charging order may be made either absolutely or subject to conditions as to notifying the debtor or as to the time when the charge is to become enforceable, or as to other matters.

(2) The Land Charges Act 1972 and the Land Registration Act 1925 shall apply in relation to charging orders affecting any land as they apply in relation to other writs or orders affecting land issued or made for the purpose of enforcing judgments.

(3) Subject to the provisions of this Act, a charge imposed by a charging order shall have the like effect and shall be enforceable in the same courts and in the same manner as an equitable charge created by the debtor by writing under his hand.

(4) The court by which a charging order was made may at any time, on the application of the debtor or of any person interested in any property to which the order relates, make an order discharging or varying the charging order.

(5) Where (by virtue of subsection (2) above) a charging order has been protected under the Land Charges Act 1972 or the Land Registration Act 1925, the relevant entry in the register shall be vacated in pursuance of an order under subsection (4) above discharging the charging order.

(6) The Lord Chancellor may by order amend section 2(2) of this Act by adding to, or removing from, the kinds of asset for the time being referred to there, any asset of a kind which in his opinion ought to be so added or removed.

(7) Any order under subsection (6) above shall be contained in a statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Clause 3

Subsections (1), (2) and (3) reproduce existing law in relation to charging orders on land. The provisions of subsections (1) and (3) are equally appropriate to orders affecting interests in securities, in money in court, or under trusts.

Subsection (4) implements the main recommendation contained in paragraph 101 of the report by generalising the existing power to discharge or vary charging orders on securities, contained in R.S.C., O. 50, r. 7 and C.C.R., O. 25, r. 6A(6). *Subsection* (5) is an ancillary provision, implementing the second recommendation made in paragraph 101 of the report.

Subsections (6) *and* (7) are designed to enable the list of assets in section 2(2) to be kept up to date. The future may bring forth new forms of securities which might appropriately be added. See paragraph 86 of the report.

Completion of execution.
1914 c. 59.
1948 c. 38.

4. In section 40 of the Bankruptcy Act 1914 and in section 325 of the Companies Act 1948 (which restrict the rights of creditors under execution or attachment) there shall be substituted, in each case for subsection (2), the following subsection:—

"(2) For the purposes of this Act—

(*a*) an execution against goods is completed by seizure and sale or by the making of a charging order under section 1 of the Administration of Justice (Charging and Stop Orders) Act 1976;

(*b*) an attachment of a debt is completed by the receipt of the debt; and

(*c*) an execution against land is completed by seizure, by the appointment of a receiver, or by the making of a charging order under the said section 1".

Clause 4

This clause implements the recommendation in paragraphs 41 and 42 of the report. Securities are "goods" within the meaning of paragraph (*a*) of the substituted subsection. A charging order is a process of execution and the amendments of the Bankruptcy and Companies Acts ensure that a judgment creditor having such an order will retain the benefit of his charge in the event of the debtor subsequently going bankrupt (or being wound up).

If, on an application for a charging order, it appears to the court that the bankruptcy (or winding up) of the debtor is imminent, so that the only practical effect of making the order would be to give the applicant priority over other unsecured creditors in the bankruptcy (or winding up), the circumstances may well be such that the court should, in the exercise of its discretion, decline to make the order: see Clause 1(3)(*b*).

Stop orders and notices

Stop orders and notices.

5.—(1) In this section—

"stop order" means an order of the court prohibiting the taking, in respect of any of the securities specified in the order, of any of the steps mentioned in subsection (5) below;

"stop notice" means a notice requiring any person or body on whom it is duly served to refrain from taking, in respect of any of the securities specified in the notice, any of those steps without first notifying the person by whom, or on whose behalf, the notice was served; and

"prescribed securities" means securities (including funds in court) of a kind prescribed by rules of court made under this section.

(2) The power to make rules of court under section 99 of the
1925 c. 49. Supreme Court of Judicature (Consolidation) Act 1925 shall include power by any such rules to make provision—

(*a*) for the court to make a stop order on the application of any person claiming to be entitled to an interest in prescribed securities;

(*b*) for the service of a stop notice by any person claiming to be entitled to an interest in prescribed securities.

(3) The power to make rules of court under section 102 of the
1959 c. 22. County Courts Act 1959 shall include power by any such rules to make provision for the service of a stop notice by any person claiming to be entitled to an interest in any securities by virtue of a charging order made by a county court.

(4) Rules of court made by virtue of subsection (2) or (3) above shall prescribe the person or body on whom a copy of any stop order or a stop notice is to be served.

(5) The steps mentioned in subsection (1) above are—

(*a*) the registration of any transfer of the securities;

(*b*) in the case of funds in court, the transfer, sale, delivery out, payment or other dealing with the funds, or of the income thereon;

(*c*) the making of any payment by way of dividend, interest or otherwise in respect of the securities; and

(*d*) in the case of units of a unit trust, any acquisition of or other dealing with the units by any person or body exercising functions under the trust.

Clause 5

This clause refurbishes the existing rule-making powers in relation to stop orders and stop notices affecting securities (and funds in court). It provides statutory authority (now lacking) for revision by the Supreme Court Rule Committee of the types of securities to which the two procedures apply (as recommended in paragraph 88 of the report); and, by *subsection* (3) the stop notice procedure will become directly applicable to securities charged by a charging order made by a county court (as recommended in paragraph 53 of the report).

In the High Court, both procedures are available to any person interested in the securities or funds in question: they are not confined to cases where the applicant's interest is founded on a charging order. Stop notices are, however, of special importance in the context of charging orders because it is by means of such a notice that a judgment debtor is prevented from selling shares affected by a charging order to a purchaser without notice (and so causing the creditor to lose the benefit of his charge). It is essential, therefore, that the types of securities to which the stop notice procedure applies should always include all those comprised from time to time within Clause 2(2)(*b*).

As indicated in paragraph 87 of the report it is anticipated that the High Court procedure in relation to stop notices founded on charging orders will be different from that applying in other cases; it may, moreover, be necessary for the rules to accommodate differences between, for example, ordinary companies and unit trusts. Power to make different provision in relation to different cases is to be found in *subsection* (6).

(6) Any rules of court made by virtue of this section may include such incidental, supplemental and consequential provisions as the authority making them consider necessary or expedient, and may make different provision in relation to different cases or classes of case.

Supplemental

Interpretation.
1962 c. 37.

6.—(1) In this Act—

"building society" has the same meaning as in the Building Societies Act 1962;

"charging order" means an order made under section 1(1) of this Act;

"dividend" includes any distribution in respect of any unit of a unit trust;

"government stock" means any stock issued by Her Majesty's Government in the United Kingdom or any funds of, or annuity granted by, that government;

"stock" includes shares, debentures and any securities of the body concerned, whether or not constituting a charge on the assets of that body;

"unit trust" means any trust established for the purpose, or having the effect, of providing, for persons having funds available for investment, facilities for the participation by them, as beneficiaries under the trust, in any profits or income arising from the acquisition, holding, management or disposal of any property whatsoever.

(2) For the purposes of section 1 above references to a judgment or order of the High Court or county court shall be taken to include references to a judgment, order, decree or award (however called) of any court or arbitrator (including any foreign court or arbitrator) which is or has become enforceable (whether wholly or to a limited extent) as if it were a judgment or order of the High Court or county court.

(3) References in section 2 of this Act to any securities include references to any such securities standing in the name of the Accountant General.

Clause 6

Subsection (2). By virtue of the Judgments Extension Act 1868, Orders in Council under the Administration of Justice Act 1920, the Foreign Judgments (Reciprocal Enforcement) Act 1933 and the Arbitration Act 1950, certain judgments etc. are enforceable as if they were High Court or county court judgments; and by this provision the power to make charging orders is extended to them. The subsection reproduces existing law.

Subsection (3) reproduces existing law, as recommended in paragraph 85 of the report.

Short title, etc.

7.—(1) This Act may be cited as the Administration of Justice (Charging and Stop Orders) Act 1976.

1959 c. 22.
1969 c. 58.

(2) In section 192 of the County Courts Act 1959 (power to raise limits of jurisdiction) subsection (2) (as substituted by section 10 of the Administration of Justice Act 1969) shall be amended by omitting the word "and" from the end of paragraph (*b*) and by inserting, at the end of paragraph (*c*)—

"; and

(*d*) section 1(1)(*a*) of the Administration of Justice (Charging and Stop Orders) Act 1976".

1956 c. 46.

(3) Section 35 of the Administration of Justice Act 1956 and section 141 of the County Courts Act 1959 (which relate to the powers of courts to make charging orders) are repealed.

(4) Any order made or notice given under any enactment repealed by this Act or under any rules of court revoked by rules of court made under this Act (the "new rules") shall, if still in force when the provisions of this Act or, as the case may be, the new rules come into force, continue to have effect as if made under this Act or, as the case may be, under the new rules.

(5) This Act shall come into force on such day as the Lord Chancellor may appoint by order made by statutory instrument.

(6) This Act does not extend to Scotland or Northern Ireland.

Clause 7

Subsection (2): see the note to Clause 1(1).

Subsection (3) repeals the existing statutory provisions relating to charging orders on land. (The existing law in relation to orders affecting securities is contained in rules of court only.)

Subsection (4) preserves the effect of existing charging orders, stop orders and stop notices.

Subsection (5). This provides time for the Rules of the Supreme Court and the County Court Rules to be reviewed in the light of the Bill when passed, so that the Act and new rules may come into force simultaneously.

Printed in England for Her Majesty's Stationery Office
by J. W. Arrowsmith Ltd., Bristol BS3 2NT
Dd 251795 K20 3/76

HER MAJESTY'S STATIONERY OFFICE

Government Bookshops

49 High Holborn, London WC1V 6HB
13a Castle Street, Edinburgh EH2 3AR
41 The Hayes, Cardiff CF1 1JW
Brazennose Street, Manchester M60 8AS
Southey House, Wine Street, Bristol BS1 2BQ
258 Broad Street, Birmingham B1 2HE
80 Chichester Street, Belfast BT1 4JY

Government publications are also available through booksellers

ISBN 0 10 164120 6