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Scottish Law Commission

(SCOT. LAW COM. No. 95)

Report on Diligence and Debtor Protection

Volume One

(*2 volumes not sold separately*)

Edinburgh
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Scottish Law Commission

(SCOT. LAW COM. No. 95)

REPORT ON DILIGENCE AND DEBTOR PROTECTION

Volume One

(2 volumes not sold separately)

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

The Honourable Lord Maxwell, *Chairman*,

Mr. R. D. D. Bertram, W.S.,

Dr. E. M. Clive,

Mr. J. Murray, Q.C.,

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SCOTTISH LAW COMMISSION

Items 8 and 6 of the Second Programme

REPORT ON DILIGENCE AND DEBTOR PROTECTION

To: The Right Honourable the Lord Cameron of Lochbroom, Q.C.,
Her Majesty's Advocate

We have the honour to submit our Report on Diligence and Debtor Protection.

(*Signed*) PETER MAXWELL, *Chairman*
R. D. D. BERTRAM
E. M. CLIVE
JOHN MURRAY
GORDON NICHOLSON

R. EADIE, *Secretary*
14 June 1985

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CHAPTER 1

INTRODUCTION

1.1 This is the first and main report to be submitted in pursuance of Item No. 8 of our Second Programme of Law Reform,[1] the reform of the law of Diligence.[2] In this report we are concerned with reform of the diligences most commonly used to enforce debts, namely poinding and sale and arrestment of earnings, and also with proposed new orders by which the courts would exercise discretionary control over the enforcement of debts by diligence. One of these new forms of discretionary control is a procedure to be called a debt arrangement scheme, which will be both a method of protecting debtors from diligence and an insolvency process. This report is therefore also submitted in pursuance of Item No. 6 of our Second Programme of Law Reform,[3] which item covers among other things personal insolvency, and is the second report to be so submitted.[4]

1.2 On 23 October 1980, we published the following five detailed consultative memoranda on the topics covered by this report, namely:

Consultative Memorandum No. 47: General Issues and Introduction;
Consultative Memorandum No. 48: Poindings and Warrant Sales;
Consultative Memorandum No. 49: Arrestment and Judicial Transfer of Earnings;
Consultative Memorandum No. 50: Debt Arrangement Schemes;
Consultative Memorandum No. 51: Administration of Diligence;

These memoranda were issued to a wide range of organisations and individuals. We received comments and criticisms on our provisional proposals over the ensuing two years from many persons and bodies, a list of whom appears in Appendix C to this report.

1.3 In preparing this series of Consultative Memoranda, we were greatly assisted by a programme of empirical research on the nature, scale and social aspects of diligence and debt recovery, which was planned by the Central Research Unit of the Scottish Office. The results of this research were embodied in eight reports. At about the same time as our Consultative Memoranda were issued these research reports were published, and were circulated or made available to those whom we consulted as well as to the wider public of those interested in debt recovery in Scotland. The scope of these reports is summarised in Appendix D to this report.

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[1]Scot. Law Com. No. 8 (1968).

[2]*Ibid.*, p. 6. "Diligence" is the legal term used to denote primarily the methods of enforcing unpaid debts due under decrees of the Scottish courts.

[3]Scot. Law Com. No. 8 (1968), p. 5.

[4]Our first report under Item 6 was our Report on *Bankruptcy and Related Aspects of Insolvency and Liquidation,* Scot. Law Com. No. 68 (1982), which is being implemented with modifications by the Bankruptcy (Scotland) Bill presently before Parliament.

Scope and arrangement of this report

1.4 In Chapter 2 of this report, we describe the existing system of diligence and debt recovery; we discuss the aims of reform and the main policy options for achieving these aims, including options put to us on consultation; and thereafter we summarise the main features of our proposals for reform. The ensuing chapters present recommendations in detail for the introduction of a system of "time to pay decrees" in court actions (in effect much enlarging the powers of the court to grant decrees for payment of debts by instalments, which are presently only available in sheriff court summary cause actions);[1] "time to pay orders" after decree constituting the debt has been granted;[2] debt arrangement schemes for the regular and orderly payment in whole, or by way of composition, of debts due by an individual with several debts ("a multiple debtor");[3] wide-ranging reforms of the diligence of poinding and warrant sale;[4] replacement of the existing diligence of arrestment and furthcoming of earnings in the hands of the debtor's employer by three new forms of continuous diligence against earnings, namely, "earnings arrestments" enforcing debts already due, "current maintenance arrestments" enforcing future maintenance (i.e. aliment and periodical allowance on divorce), and "conjoined arrestment orders" enforcing debts due to two or more creditors;[5] reforms relating to diligence enforcing rates, taxes and Crown debts including diligence under summary warrants for the recovery of rates and taxes;[6] reform of the organisation of messengers-at-arms and sheriff officers;[7] and a number of miscellaneous reforms designed to rationalise and modernise various aspects of the law on diligence.[8] Our main recommendations are embodied in a draft Bill which, with notes on clauses, forms Appendix A to this report and are summarised in Appendix B.

1.5 We believe that the reforms mentioned in the foregoing paragraph will enable most debtors who are unable rather than unwilling to pay a debt to obtain time to pay free from the immediate threat of diligence; in cases to which debt arrangement schemes apply, a multiple debtor may obtain a discharge outside sequestration on payment of a composition in accordance with the scheme; and in cases where poindings or arrestments of earnings unfortunately become necessary, these diligences will—it is thought—operate in a manner which, so far as practicable, would avoid undue hardship. These reforms are designed to meet the main criticisms which have been made in recent years of the operation of diligence against debtors, especially poindings and warrant sales. The reforms of arrestment of earnings are designed to make the procedure more effective and less cumbersome for creditors while at the same time not being unduly harsh on debtors.

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[1]Chapter 3.
[2]*Idem.*
[3]Chapter 4.
[4]Chapter 5.
[5]Chapter 6.
[6]Chapter 7.
[7]Chapter 8.
[8]Chapter 9.

Other diligence topics: collection and enforcement of periodical allowance on divorce and aliment

1.6 One topic which has traditionally been considered along with diligence is the machinery for the collection of periodical allowance on divorce and aliment. In this context, in the recent past, the concern has been not so much to protect default debtors but rather to assist a particular class of creditor, namely wives and unmarried mothers seeking to enforce decrees awarding aliment for themselves or their children, and ex-wives seeking to enforce periodical allowance for themselves and aliment for children after divorce. The problem of the collection of alimentary debt has been considered by a number of official reports which have argued the case for introducing official arrangements for the collection of private law maintenance debts in Scotland.[1] It was at one time our intention to issue a consultative memorandum on the collection and enforcement of periodical allowance and aliment,[2] which would have reconsidered the system of collecting officers proposed by the McKechnie Report in 1958 in the light of criticisms made of the English system of magistrates' court collecting officers by the Finer Report in 1974 and other developments.

1.7 As mentioned in paragraph 1.4 above, however, we recommend later in this report the introduction of a new form of diligence against earnings whereby current maintenance (aliment and periodical allowance) would be deducted and paid from earnings by the maintenance debtor's employer. This new form of diligence, called a current maintenance arrestment, is designed to recover so far as practicable maintenance as it falls due and thereby to prevent the accumulation of arrears of maintenance. If successful, it would meet the most serious criticisms of the present law in this area which are concerned more with the difficulties of *enforcement* against an unwilling debtor than with the difficulties of *collection* from a willing debtor. We therefore do not intend to issue a consultative memorandum on collection and enforcement of periodical allowance and aliment unless perhaps our proposals on current maintenance arrestments are rejected.

Other diligence topics: miscellaneous

1.8 In our Consultative Memorandum No. 47,[3] we drew attention to a number of other topics in the field of diligence which may require examination in due course with a view to reform. These topics include diligence (arrestment and inhibition) on the dependence of court actions; inhibitions; arrestment and sale of ships; sequestration for rent under the landlord's hypothec; decrees ordering specific implement of non-monetary obligations; civil imprisonment; adjudication for debt; and some other topics such as the equalisation of diligences outwith sequestration.[4] Apart from the fact that most of these diligences would be affected by the new discretionary orders for the control of diligence, these topics fall generally outwith the scope of our present enquiry, although we have found it convenient to deal with a few relatively

[1]Report of the Royal Commission on *Marriage and Divorce 1951–55* (1956) Cmd. 9678, paras. 980–984; McKechnie Report, paras. 258–298; Grant Report, para. 642.

[2]See our Annual Report for 1977–78 (Scot. Law Com. No. 55), para. 36, at head (5).

[3]*First Memorandum on Diligence: General Issues and Introduction*, paras. 5.6 to 5.19.

[4]Another topic identified at para. 3.40 below as requiring review in due course is the heritable creditor's diligence of poinding of the ground.

minor aspects in this report, including the abolition of civil imprisonment for non-payment of tax penalties and rates.

Acknowledgments

1.9 We are indebted to a large number of persons who have assisted in the work leading up to the submission of this report. Prior to our assumption in 1977 of direct responsibility for preparing consultative memoranda on diligence,[1] a Working Party had undertaken much work on the topic of diligence on our behalf. We would express our gratitude to the members of the Working Party and to those who submitted comments to them. After we had taken over responsibility for preparing the memoranda and reports, we continued to consult individual members of the former Working Party on particular problems. We benefited greatly from the expert advice of Mr. John G. Gray, S.S.C. and the late Mr. James Donald, Messenger-at-Arms and Sheriff Officer. We are especially grateful to Mr. John M. Bell, Messenger-at-Arms and Sheriff Officer, not only for the advice he furnished on particular topics but also for the help which he unstintedly gave to the Central Research Unit of the Scottish Office in preparing and implementing its programme of research into the nature, scale and social aspects of diligence.

1.10 We would express our thanks to the authors of the eight research reports on diligence and debt recovery—Mrs. Barbara Doig, Mrs. Anne Connor and Mrs. Ann R. Millar of the Central Research Unit of the Scottish Office; Mr. Michael Adler and Mr. Edward Wozniak of the Department of Social Administration, University of Edinburgh; and Mrs. Janet Gregory and Mrs. Janet Monk of the Social Survey Division of the Office of Population Censuses and Surveys.[2] We are particularly grateful to Mrs. Barbara Doig who not only researched and wrote three of the research reports (one as co-author), but also planned the whole research programme, organised and supervised its speedy implementation and provided assistance to us in countless ways. Her contribution has been indispensable.

1.11 We are grateful to the Society of Messengers-at-Arms and Sheriff Officers, both office-bearers and individual members, for the statistical and other information which they provided to the Commission and for the assistance and advice which they gave to the researchers on our behalf. Without their help and co-operation, many of the research projects on diligence could not have been implemented.

1.12 We are greatly indebted to Miss Anne Burns and Mr. Derek Fowler, past and present Chief Enforcement Officers of the Enforcement of Judgments Office, Northern Ireland, for their kind assistance in explaining to us the practical operation of that Office.

1.13 Finally our thanks are due to those bodies and individuals who commented on our consultative memoranda,[3] often in long, detailed and carefully considered submissions.

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[1]Twelfth Annual Report for 1976–77 (Scot. Law Com. No. 47), paras. 35 and 36.
[2]See Appendix D.
[3]See Appendix C.

1.14 We wish, however, to make it clear that none of those who assisted us bears any responsibility for any statements not directly attributed to him or her or for the formulation of the policy recommendations contained in this report.

References and abbreviations

1.15 We have sought to take account of two Bills presently before Parliament. References in the text of this report to the Bankruptcy (Scotland) Bill 1984 are references to the Bill as brought from the House of Lords to the House of Commons, and ordered to be printed, on 18 December 1984.[1] We have ventured to assume that this Government Bill, which has by and large received all-party support, will become law in roughly its present form and that it would be realistic and most convenient for all concerned to frame both the report and the draft Bill in Appendix A on that assumption.[2] References in the text of this report to the Family Law (Scotland) Bill 1984[3] are references to the Bill as amended by the First Scottish Standing Committee and ordered to be printed on 2 May 1985. A table of abbreviations of other sources cited in this report is at page xvii.

[1]House of Commons, Bill 48. At the time of the submission of this report, the Bill was beginning its Committee stage in the House of Commons.

[2]In the draft Bill, references are to the Bankruptcy (Scotland) Act 1985.

[3]House of Commons, Bill 140. This Bill is not referred to in the text of the draft Bill in Appendix A to this report.

CHAPTER 2

THE MAIN POLICY ISSUES

Section A. Preliminary remarks

2.1 In this Chapter we seek to identify the principal questions of policy involved in the reform of the important branches of the law of diligence and debt recovery covered by this report; we discuss, in the light of consultation and the research programme on diligence,[1] the main options for the reform of those branches of the law; and we explain our main recommendations for reform and the reasons underlying them.

2.2 Diligence primarily denotes the procedures by which creditors can enforce unpaid debts in Scotland. Though the term has a wider meaning,[2] we are mainly concerned in this report with the two most commonly used forms of diligence which are available to a creditor once the court has granted a decree for payment of the debt. These are the diligence of poinding (pronounced "pinding") and warrant sale (sometimes called charge, poinding and warrant sale); and the diligence of arrestment, in particular arrestment of earnings.

2.3 Poinding and warrant sale is the procedure whereby moveable goods (but not money) possessed by the debtor can be attached by the creditor but left in the debtor's possession until, under the sheriff's warrant of sale, the goods are sold by public auction or if not sold (because no bids above the values appraised at the poinding are made) delivered to the creditor in satisfaction of the debt. The diligence is carried out by an officer of court (messenger-at-arms or sheriff officer) and some of its procedures are supervised by the sheriff. There are special procedures for poindings under summary warrants for the recovery of rates and taxes; these are carried out by officers of court but are not supervised by the sheriff.

2.4 Arrestment is the procedure by which a creditor can attach, in the hands of a third party, any moveable property belonging to the debtor or any sum of money due by the third party to the debtor. In due course, by a procedure known as an action of furthcoming, the arrested property may be realised by the creditor by public auction, or the arrested sum of money paid to the creditor, in satisfaction of the debt. While the diligence has thus a wide scope, we are only concerned in this report with the reform of arrestments of earnings (and pensions, to which similar considerations apply) partly because, for reasons which we explain below, it is the use of arrestments against earnings which is in most urgent need of reform, partly because arrestments of earnings are in practice the main alternative to poindings and warrant sales, and partly

[1]See Appendix D.

[2]Diligence also includes the procedures used (1) to enforce the performance of non-monetary obligations under court decrees, such as the delivery of goods or removing from land, and (2) to attach, or prevent the alienation of, property (a) where the debtor is insolvent or likely to dispose of it (diligence in security of future or contingent debts) or (b) pending the disposal of an action so that the decree can be satisfied (diligence on the dependence). We are not concerned with the reform of such forms of diligence in this report.

because the issues raised by the reform of arrestments of earnings are different in scale and character from the reform of other arrestments.[1]

2.5 In recent years, the procedures for enforcing the payment of debts have increasingly become the target of criticism in Scotland and indeed in many other countries. At all stages in the debt recovery process, consumer debts are much more numerous than other classes of debt and therefore critical scrutiny has naturally focussed on the diligences by which consumer debts are usually enforced, namely the poinding and warrant sale of moveable goods (most often household goods) and the arrestment of earnings. These diligences, especially poindings and warrant sales, can have a very harsh impact on debtors and their families, not only in their effect on the debtor's financial position but also because they occasion personal strain and distress. Doubts have also been raised by some critics (but not by creditors) about their effectiveness. It has been repeatedly emphasised that debt, and therefore the reform of diligence, raises social problems as much as or more than legal problems. Yet until recently the only commentaries on diligence were to be found in technical and largely out-of-date treatises written primarily for lawyers. The resulting difficulties of planning reform were increased by the fact that diligence is not a separate self-contained activity but the culmination of a protracted process which, in consumer and commercial debt cases, commences with the extension of credit by the creditor to the debtor and the occurrence of default in payment and thereafter proceeds through the three stages of "informal" attempts at collection by the creditor or his agents; the raising of a court action for payment; and finally the enforcement of the court decree by either poinding and warrant sale or arrestment.

2.6 Because of the position which diligence occupies in the wider context of the system of debt recovery as a whole, any extensive reform of the main diligences examined in this report can have important repercussions on the earlier stages of debt recovery and conceivably on the granting of credit. Conversely, reforms of the earlier stages of debt recovery can have implications for planning reforms of diligence by, for example, making such reforms less necessary. Before proceeding, therefore, to discuss the defects in the system of diligence and the options for reform, we think it might be helpful to give a short factual description of the main features of the debt recovery system as a whole, using the results of the recent reports on the nature and scale of diligence commissioned by us.[2]

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[1]Arrestments of moveable goods and funds other than earnings work reasonably well, and the main problems concern competitions between arrestments and other diligences and rights (such as floating charges). Arrestments on the dependence of a court action cannot be used against earnings and the reform of that diligence is best treated in conjunction with the reform of inhibitions on the dependence.

[2]See Appendix D. The empirical research for these reports was largely conducted in 1978 and published at about the same time as our consultative memoranda in 1980 so that the comments thereon could be as informed as possible. Where practicable, we give more up-to-date information, and identify subsequent changes in the law. We think, however, that the broad picture which emerged from the research has not significantly changed since 1978.

Section B. Diligence and the system of debt recovery

Types of debt

2.7 Debts can be classified in various ways, and many refinements are possible, but the following classification may illustrate the relevant distinctions. The debt or obligation to pay a sum of money may:

(*a*) arise from the debtor's consent, viz. from a contract or agreement to pay (or less commonly a unilateral bond or promise) or from a failure to pay a sum due under a contract or promise; or

(*b*) be imposed by (i) operation of law such as a statute (e.g. imposing liability for rates or taxes) or (ii) a decree of court (e.g. imposing an obligation to pay periodical allowance on divorce, or transforming the "natural" obligation to aliment a spouse or children into an obligation to pay pecuniary aliment); or

(*c*) arise from some act or failure of the debtor, which amounts to a delict or civil wrong (such as personal injury or damage to property) giving rise to a claim for damages.

As this classification (which is not exhaustive) shows, debts have many different sources. Most debts fall within the first category and arise from contracts involving the extension of credit (e.g. loans and contracts for the supply of commercial or consumer goods and services).

2.8 Credit is an indispensable feature not only of trade and commerce but also of the economy of ordinary families. "Debt" in the broadest sense, is what one person owes another: in that sense, therefore, possibly most adult persons are in debt. A very large number (about half) of Scotland's households live in public sector housing where rent is generally paid one or several weeks in arrear. Most owner-occupiers finance the purchase of their homes by loans repayable over a long period out of income. Gas, electricity and telephone bills are mostly submitted in arrears. There are many different methods of financing the purchase of consumer goods and services, other than an instant cash transaction—e.g. hire purchase, conditional sale, credit sale, charge accounts or budget accounts with the seller, credit cards, vouchers, check trading arrangements and loans from banks, finance companies and other institutions.[1] In principle all these debts may on default be enforced by diligence, though in many cases other means of enforcement (calling up a security, repossession of goods on hire purchase or hire, disconnection of gas, electricity or telephone supplies) are available and may be preferred by the creditor.

Methods of obtaining warrants for diligence

2.9 "Debt" in the narrower and more usual sense, however, denotes "default debt". As a general rule, a default debt cannot be enforced by diligence until the court (Court of Session or sheriff court) has pronounced a decree "constituting" the debt, that is to say, finding that the defender in the action is liable to pay the debt and quantifying the amount payable. An extract (or authenticated copy) of the decree is issued containing a warrant authorising

[1]See e.g. Crowther Report, Part II.

the execution of the diligences of charge and poinding (a separate application for warrant of sale is needed) and of arrestment.

2.10 To this general rule, there are three main exceptions. First, the official collectors of rates and taxes may obtain from the courts, on production of a certificate as to the liability of the rates or tax defaulters, a summary warrant authorising the collector to instruct officers of court to execute diligence without the need for a prior court action.[1]

2.11 Second, certain documents of debt may be enforced by "summary diligence", namely bills of exchange and promissory notes,[2] bonds and contracts registered in the books of court for execution[3] and tribunal awards deemed to be enforceable as if so registered. In such cases, diligence may be executed without the necessity of an action to constitute the debt. The use of summary diligence against consumer debtors seems to be relatively infrequent.

2.12 Third, arrestments of goods and money (other than earnings) in the hands of a third party and inhibitions (prohibiting the sale of heritable property) can be used "on the dependence" of a court action for payment in order to obtain security for the debt. The modes of diligence—poindings and warrant sales and arrestments of earnings—with which we are here concerned cannot be used on the dependence of an action and accordingly the reform of diligence on the dependence is not considered in this report.

The three stages in debt recovery

2.13 We are mainly concerned with the recovery of debts, especially debts due by individuals, by the normal process of court action and diligence, which falls naturally into three stages:

(*a*) the stage at which the creditor or an agent acting on his behalf makes "informal" attempts at collection (referred to here as the pre-action stage);

(*b*) the stage of a court action for payment (referred to here as the court stage); and

(*c*) the stage when the court decree for payment is followed by further attempts at collection or the enforcement of the decree by diligence.

The various steps which may be taken at each of these three stages and the kind of time-scale involved are illustrated by the flow-chart at Figure 1. This shows that the formal stages of sheriff court summary cause proceedings (the most frequently used procedure in debt claims) and enforcement of the decree by diligence are somewhat complicated.

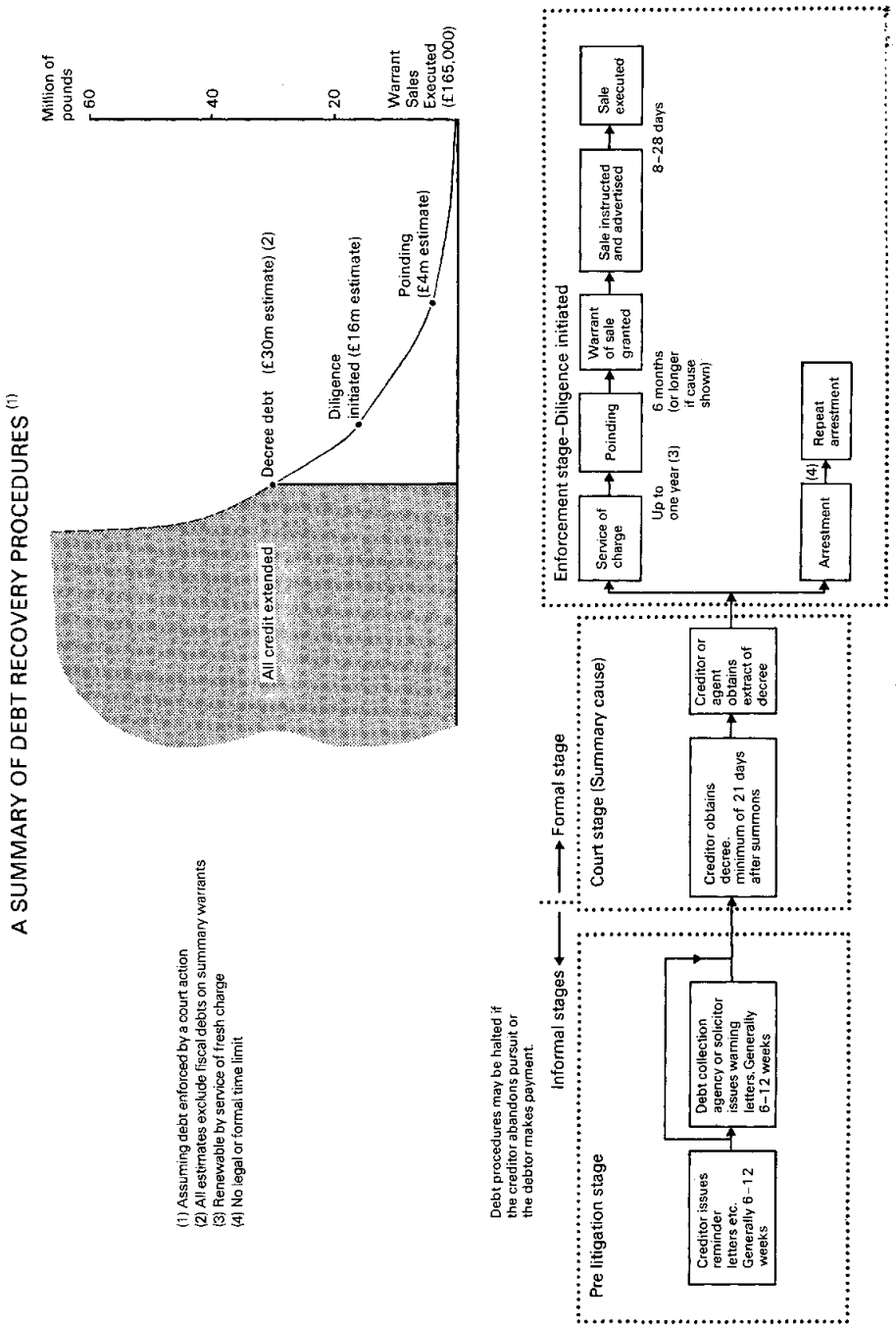
2.14 *The time-scale.* As the flow-chart at Figure 1 illustrates, the whole

[1]Summary warrant diligence is considered at paras. 2.38, 2.168 and Chapter 7 below. Poinding and sale procedures under summary warrants differ from the ordinary procedure of charge, poinding and warrant sale.

[2]Summary diligence is competent where the bill or note is dishonoured by non-acceptance or non-payment and after a procedure known as "protesting" the bill or note and registration of the protest in the Books of Council and Session or the books of a sheriff court.

[3]If such a contract is registered for preservation and execution in the Books of Council and Session or the books of a sheriff court, any sum due under the contract may on default be enforced by diligence.

Figure 1



Source: Consultative Memorandum No. 47, p. 132.

process of debt recovery is protracted. The time-scale varies at different stages. At the pre-action stage it depends on the policies and practices of the creditor, e.g. on the number of communications with the debtor. The C.R.U. Creditors Survey[1] found that there is generally a considerable delay, often as long as nine to twelve months, between the debtor's default and the commencement of a court action. The summary cause action is regulated by a strict time schedule as might be expected in court proceedings: the period involved is a minimum of three weeks until decree and a further two weeks before an extract of the decree is issued. Thereafter, often at least a month elapses before the creditor instructs his agent on enforcement by arrestment or charge and poinding. An arrestment of wages or salary, unless it is repeated, is a "quick" diligence in practice since it only attaches the earnings due at the next pay day and the arrested earnings are normally paid to the creditor then or soon after. By contrast, the diligence of charge, poinding and warrant sale is likely to take at least several months to complete since it is a multi-staged diligence and in most cases each stage is used as a spur to an instalment settlement.

2.15 *The "filter effect" of the debt-recovery process.* At each stage of the debt recovery process, there are fewer cases than at the previous stage. This diminution in numbers results from the settlement of the debt or the creditor's decision to abandon pursuit. Thus, the protracted process of debt recovery acts as a kind of filter so that only a very small proportion of default debts reach the stage of diligence, and in the case of charge, poinding and warrant sale only a tiny fraction reach the final stage of warrant sale. This is illustrated by the graph at Figure 1. The stages of debt recovery are inter-related: the early stages would be ineffective in eliciting payment if the later stages did not exist. If the early stages were ineffective, more cases would proceed to the later stages. This inter-relation between the stages and the filter effect are described more fully in the following paragraphs.

(a) *Pre-action stage: collection by creditor or agent*

2.16 The C.R.U. Creditors Survey yields information on the collection practices of 55 small, medium and large-sized creditor organisations and five debt collection agencies. When default in payment of a debt occurs, the creditor usually pursues its recovery by means of "informal" techniques such as reminders or letters threatening legal proceedings. In the early stages, the creditor normally has an interest in retaining the debtor as a customer and will usually be anxious not to dissipate goodwill, at least until more information becomes available on the nature of the default and the debtor's intentions or ability to pay. Creditors adopt different policies towards the pursuit of default debts: for example, in relation to the amount of debt incurred before positive steps are taken, the "tone" of letters and their frequency. Usually, at least two or three letters are issued commencing with a relatively gently worded reminder and increasing in severity to a letter threatening legal action. The C.R.U. Creditors Survey found that the scale of default which required some form of pursuit varied from 1 in 4 of all accounts to 1 in 10 of all accounts. All creditors said that while their aim was to secure as quick and inexpensive settlement as possible, they wish to retain customers, and they are sympathetic

[1]Paras. 1.10, 4.17 and 4.23.

to debtors' genuine problems, such as bereavement, illness and unemployment. All creditor organisations stressed how difficult it is for them to know the debtor's circumstances, and that the initiative lies with the debtor to inform the creditor of the reasons for default. All creditors said they were prepared to agree to alternative payment arrangements if the debtor was unable to pay at once.[1] After creditors had exhausted their own informal recovery procedures, about three-quarters of them passed over the details of the debt to a debt collection agency or solicitor. Debt collection agencies generally write further letters and also may visit the debtor before deciding whether a court action is worthwhile. The practices of creditors are illustrated by Figure 2.

2.17 These informal recovery procedures result in satisfactory arrangements for payment in the great majority of default debts: systematic, accurate information was lacking but the C.R.U. Creditors Survey estimated that in many organisations the proportion of default debt cases reaching the court stage was less than 1%.[2]

(b) *Court stage: the debt action*

2.18 Where the debtor continues to refuse or delays payment, and the creditor does not write off the debt, the next step is that the creditor raises an action for payment in the Court of Session, or more usually, the sheriff court.

2.19 The main sources of statistical information on this stage are the Civil Judicial Statistics for Scotland, and the C.R.U. Court Survey which studied sheriff court summary cause actions for payment, sheriff court ordinary actions for payment, actions for recovery of possession of heritable property and actions for delivery of goods in 1978.[3] Actions to recover heritable property are usually brought for non-payment of rent, and actions for delivery are usually brought where there has been default in payment of an instalment due under a hire purchase or hire agreement. These are possessory actions rather than debt actions, but usually they arise out of indebtedness. A decree for recovery of possession may be combined with a decree for payment of the debt and usually contains an award of the expenses of the court action which is enforceable by diligence as a debt.

2.20 The majority of debt actions are brought as summary causes, the upper jurisdictional limits of which are £1,000 of principal sum, excluding interest and expenses (£500 in 1978 at the time of the C.R.U. Court Survey). Actions for more than £1,000 are raised as ordinary actions in the sheriff court or in the Court of Session. The numbers of actions in 1978 are described in Table 2.A at page 14.

2.21 *Pursuers and defenders.* The C.R.U. Court Survey illustrates how far consumer debt preponderates in debt actions.[4] In 81% of summary cause payment actions the defenders sued were categorised as "personal" (i.e.

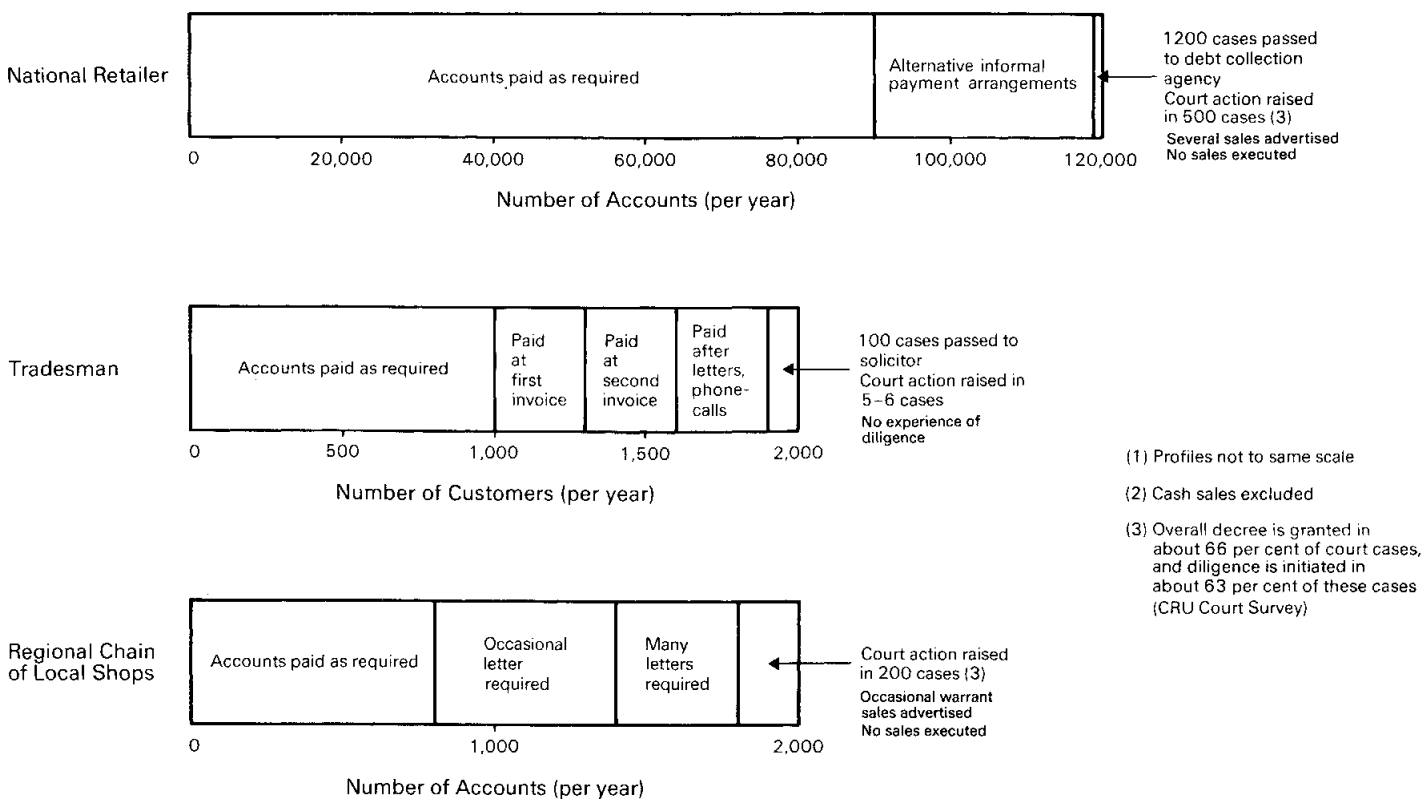
[1]See also C.R.U. Debt Counselling Survey, para. 5.11, which found that creditors "are generally willing to come to informal arrangements with debtors . . .".

[2]C.R.U. Creditors Survey, para. 1.12.

[3]In addition, the O.P.C.S. Defenders Survey gives information on the characteristics of defenders in these "debt-related" actions.

[4]C.R.U. Court Survey, paras. 3.2 to 3.4.

Figure 2 Debt recovery profiles[1] of selected creditors[2]



(1) Profiles not to same scale

(2) Cash sales excluded

(3) Overall decree is granted in about 66 per cent of court cases, and diligence is initiated in about 63 per cent of these cases (CRU Court Survey)

Source: C.R.U. Creditors Survey, Figure 4, p. 44.

TABLE 2.A

DECREES GRANTED IN ACTIONS AND DILIGENCE (POINDINGS AND WARRANT SALES AND ARRESTMENTS) EXECUTED IN 1978

	Total	Court of Session	Sh.Ct. ordinary action	Sh.Ct. summary cause
DECREES IN ACTIONS[1]				
Decrees in favour of pursuer				
Debt decrees	?	?[2]	9,582	72,885
Divorce, other matrimonial decrees and alimentary decrees	9,836	8,794[3]	1,042[4]	—[5]
Other decrees	?	?[2]	1,764	31,490[6]
Total	126,191	9,428	12,388	104,375
(Whereof in absence		698	9,410	100,715
in foro		8,730	2,978	3,660)
Decrees in favour of defender and otherwise disposed of				
Absolvitor, dismissal, sisted, "fallen asleep", remitted[7]	33,355	2,493	6,186	24,676
Total actions disposed of by final judgment	159,546	11,921	18,574	129,051
DILIGENCE[8]				
Decrees passed to officers for enforcement by poinding or arrestment	52,000			
Charge, poinding and warrant sale				
Charges	46,000	700	6,200	39,100
Poindings	20,000	200	2,500	17,300
Warrants of sale	6,200			
Advertisements of sale	3,000			
Sales executed	300			
Arrestments of earnings[9]				
First arrestments	6,000	700	1,300	4,000
Single repeat arrestments[10]	1,700			
Multiple repeat arrestments[10]	1,000			
Total arrestments of earnings	8,700			

Sources: *Civil Judicial Statistics Scotland 1978* (1980, Cmnd. 7762), Tables 3, 4(a) and (b), 6, 9, 10A.
C.R.U. Diligence Survey.

named individuals or married couples) and in 19% were commercial or trading organisations: only 4% of pursuers were "personal". By contrast, in ordinary court payment actions, about one half of the defenders were personal and one half commercial (52% and 48% respectively) and only 8% of pursuers were "personal".[1]

2.22 *Role of debt action.* The purpose of an action for payment is threefold: first, it gives a defender who has a defence an opportunity to dispute liability for the debt or its amount; second, in a summary cause action, it also gives him the opportunity to apply to the court for an instalment decree,[2] and, third, subject to these safeguards for the debtor, it enables the creditor to obtain a decree containing a warrant for enforcement of the debt by diligence. Except when considering whether to grant an instalment decree, the court is not concerned to assess whether the defender can afford to pay what he owes or what the effect will be on him if decree is granted and enforcement proceedings begin.

2.23 The court action itself can have a filter effect since the defender may respond to receipt of the summons by paying the debt. It is estimated that

NOTES TO TABLE 2.A

(1) The statistics include only actions in the narrow sense; they do not include other proceedings disposed of by final judgment in 1978; viz. Court of Session petitions (2,676) and sheriff court applications relating to miscellaneous and administrative business (31,416) among which are 4,934 summary warrants for recovery of rates and taxes. C.J.S. Tables 6 and 12A. In many of these cases, the final judgment may have granted warrant for diligence to enforce an award of the expenses of the proceedings or some other order for payment.

(2) This information is not available from the C.J.S. for 1978.

(3) These include 8,448 divorce decrees many of which contained awards of periodical allowance (6,176 were decrees to wives) or of aliment (in 4,448 divorce actions there were children of the marriage under 16 years of age) but the precise statistics are not available: C.J.S. Tables 4(a) and 4(b).

(4) These include decrees in actions of separation and aliment, adherence and aliment, other actions for aliment, other actions relating to marriage, and affiliation and aliment: C.J.S. Table 10A.

(5) Summary cause decrees of interim aliment are included in the miscellaneous group referred to in note (6).

(6) These decrees comprise recovery of possession of heritable property (27,994), damages (499), sequestration for rent (51), delivery of goods (1,406) and other decrees (1,540) (viz. furthcomings, multiple poindings, interim aliment and specific implement other than delivery): C.J.S., Table 11A.

(7) The great majority of these are decrees of absolvitor or dismissal in the defender's favour with or without an award of expenses enforceable by diligence.

(8) All the statistics on diligence are estimates derived from the C.R.U. Diligence Survey except for the statistics on warrants of sale (6,208) and sales executed (289): C.J.S. Tables 10A and 11A.

(9) The C.R.U. Diligence Survey, para. 3.6 estimates that in 1978 there were 900 arrestments of properties and funds other than earnings (excluding arrestments on the dependence).

(10) A "single repeat" arrestment is an arrestment of the debtor's wage or salary a second time by the same creditor: a "multiple repeat" arrestment is an arrestment against the debtor's wage or salary on a third or subsequent occasion by the same creditor.

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[1]C.R.U. Court Survey, para. 4.13.

[2]See paras. 2.26 and 2.27 below for a description of instalment decrees.

in 1978 about 30% of summary cause payment actions disposed of by the sheriff courts were dismissed, and in the majority of these cases the reason for dismissal was probably that payment arrangements had been made.[1] A further 7% of summary cause payment actions resulted in decrees being granted for expenses only, again suggesting that payment arrangements for the original debt had been made.[2]

2.24 In most cases the debtor admits liability for the debt. Only a very small proportion of cases go to proof (less than 1% [0·9%] of summary cause payment actions), or are continued for several callings (4% of summary cause payment actions continued at first calling)[3] thereby indicating some element of dispute about liability or delay in coming to an arrangement for payment for one reason or another. In 1978, 104,375 summary cause actions of all types were disposed of by decree in the pursuer's favour and of these 100,715 were decrees in absence (viz. undefended) and 3,660 decrees "in foro" (viz. defended).[4] (In 1983, the corresponding numbers were 86,432 of which 84,679 were undefended and 1,753 defended.[5])

2.25 The great majority of actions therefore are largely "administrative" in character. This is shown by the low proportion of defenders who appeared personally or were represented at a court hearing viz. 3% of defenders in summary cause payment actions,[6] and 11% of defenders in ordinary court payment actions.[7]

2.26 In summary cause payment actions, there is a procedure whereby the defender may obtain an instalment decree instead of an "open" decree requiring him to pay the whole debt in one lump sum.[8] The defender may attend court to make oral representations about payment.[9] Alternatively he may make a written offer of instalment payments by notice lodged in court.[10] The notice procedure is much more commonly used since the defender does not have to appear. The notice is in a standard form served on the debtor along with the summons. The pursuer may accept the offer by lodging a written minute in court,[11] but if he does not, the sheriff must consider the offer when the case comes before him.[12]

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[1]C.R.U. Court Survey, para. 3.10 and Table 3 F.

[2]*Idem.* In ordinary court payment actions, only 4% of the actions were dismissed; and in 5% of such actions decree for expenses only was granted: *ibid.*, para. 4.18.

[3]*Ibid.*, para. 3.10.

[4]Table 2.A at page 14 above. A higher proportion of ordinary actions are defended: see that Table.

[5]*Civil Judicial Statistics Scotland 1983*, Table 10 (information supplied by Scottish Courts Administration, pending publication).

[6]C.R.U. Court Survey, para. 3.23.

[7]*Ibid.*, para. 4.19.

[8]Sheriff Courts (Scotland) Act 1971, s. 36(4). If one instalment of such a decree is in arrears at the time when the next instalment falls due, the whole balance due under the decree becomes payable. A decree for payment in a lump sum cannot be changed by the court to an instalment decree, (although in practice the creditor often accepts payment by instalments) and an instalment decree cannot be varied.

[9]Summary Cause Rules, rule 51.

[10]*Ibid.*, rule 52, Form Q.

[11]*Ibid.*, rule 54.

[12]*Ibid.*, rule 55 (as amended).

2.27 It is estimated that offers to pay by instalments are made in summary cause payment actions by approximately one in seven defenders (16%) and in 1978 three-quarters of these were offers of £5 per week or less.[1] Approximately 70% of offers were accepted (and were more often accepted when the offer was over £3 per week and/or when the principal sum was under £50).[2] Overall instalment decrees account for one in five summary cause decrees for payment of money.[3]

(c) *Enforcement stage: the use of diligence*

2.28 After the issue of the extract decree for payment authorising diligence and perhaps following a further letter or letters requesting payment, the next step is that the creditor or his agent (solicitor or debt collection agency) sends the extract decree to the officer of court with instructions to enforce the decree by diligence. Table 2.A at page 14 above shows the numbers of decrees for payment granted in 1978, together with estimates of the number of cases in which diligence was executed. It will be seen that about 126,000 decrees were granted in favour of the pursuer. Of these about 82,000 were sheriff court debt decrees enforceable by diligence (i.e. ordinary action 9,582 plus summary cause, 72,885). An unknown but certainly large proportion of the remaining 44,000 decrees were for payment of sums enforceable by diligence.[4] It is estimated that in 1978, of these decrees about 52,000 decrees were passed to officers of court for enforcement by poinding or arrestment.

(i) *Scale of use of charge, poinding and warrant sale*

2.29 Before a poinding can be executed, the officer of court must serve a charge on the debtor (usually by hand service rather than postal service). The charge requires the debtor to pay the debt, within a specified period (14 days in summary causes), and warns him that, failing payment within that period, his goods may be poinded. It is estimated that in 1978 about 46,000 charges were served as the first step towards poinding and warrant sale. When serving the charge, the sheriff officer may have a chance to assess whether the debtor has poindable goods or may obtain information on the debtor's financial circumstances so that he can report to the creditor on the prospects of recovery. It is estimated that in 1978 20,000 poindings were executed, less than one-half of the number of charges which were served. This numerical decrease is not attributable entirely to payment of the debt: the creditor may decide to write-off the debt on the basis that further steps in the diligence would not elicit payment and that the expenses incurred relative to the amount of the debt would not justify further pursuit. But it appears likely that the service of a charge induces the majority of debtors to make payment arrangements.

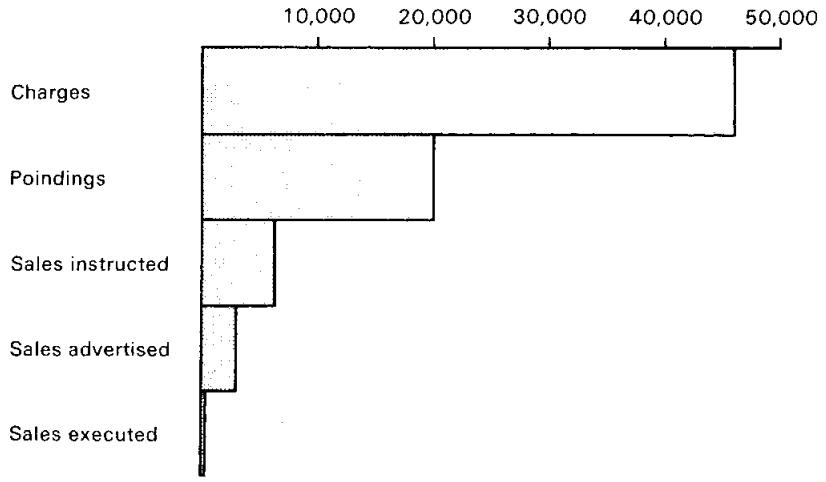
2.30 The warrant in a decree authorises a charge and poinding but not a

[1] C.R.U. Court Survey, paras. 3.27 to 33; para. 6.8.
[2] *Ibid.*, para. 6.9.
[3] *Idem.*
[4] E.g. sums not classified in the statistics as debts such as damages, aliment or periodical allowance on divorce; Court of Session debt decrees; decrees for non-monetary obligations but containing awards of expenses. Statistics for Court of Session debt decrees are only available from 1979: see Table 2.C below.

sale. Accordingly, once the poinding has been executed and reported to the sheriff, the next step is for application to be made to the sheriff for a warrant to sell the poinded goods. This application is not intimated to the debtor who has no opportunity to oppose the application. Until recently the warrant was granted automatically unless it appeared to the sheriff from the report of the poinding that the poinding had not been properly executed. Now the sheriff exercises a limited discretion to refuse warrant of sale.[1] A warrant to sell household goods normally provides for the sale to take place in the debtor's home with the effect that the statutory advertisement of the sale specifies the debtor's name and address. The warrant of sale is intimated to the debtor.

2.31 After a poinding, there is a marked decrease in the number of cases going on to the later stages of diligence as creditors obtain payment or abandon pursuit. Table 2.A shows that of 20,000 poindings in 1978, about 6,000 went on to the stage of grant of warrant of sale, about 3,000 reached the stage of advertisement of the sale and under 300 cases reached the final stage of the sale. This resulting filter effect is graphically illustrated by Figure 3. Published

Figure 3. Charge Poinding and Warrant Sale Procedures 1978



* I.e. cases where warrant of sale granted.

Source: C.R.U. Diligence Survey, Figure 1, p. 8.

[1]See para. 2.60.

statistics of poindings, warrants of sale and sales executed,[1] but not charges or advertisements of sale,[2] are available only from 1979 and are shown at Table 2.B for the period 1979 to 1983. The great majority of sales advertised do not take place either because payment is made or it is not financially worthwhile for it to be carried out. Thus, Table 2.B shows that the proportion of sales executed to poindings has fluctuated being roughly about 1 in 65 (1979); 1 in 91 (1980); 1 in 52 (1981);[3] 1 in 42 (1982); and 1 in 35 (1983), but remains very small. As Table 2.C shows, the proportion of sales executed to debt decrees containing warrant for diligence is even smaller and in the period

TABLE 2.B

POINDING AND WARRANT SALE PROCEDURES: 1979 TO 1983

2.B.1. The total number of poindings, warrants of sale and sales executed: 1979 to 1983

	Poinding	Warrant of sale	Sale executed
1979	14,515	3,838	226
1980	21,096	5,829	231
1981	14,926	4,634	287
1982	17,014	5,195	403
1983	16,478	4,886	477

2.B.2. The number of poindings, warrants of sale and sales executed on summary cause decrees: 1979 to 1983

	Poinding	Warrant of sale	Sale executed
1979	12,881	3,178	145
1980	18,806	4,712	151
1981	12,885	3,565	192
1982	15,168	4,174	282
1983	14,571	3,832	341

2.B.3. The number of poindings, warrants of sale and sales executed on other decrees: 1979 to 1983

	Poinding	Warrant of sale	Sale executed
1979	1,634	660	81
1980	2,290	1,117	80
1981	2,341	1,069	95
1982	1,846	1,021	121
1983	1,907	1,054	136

Source: *Civil Judicial Statistics Scotland,* Tables 3.10. (At the time of submission of this report, the statistics for 1983 had not yet been published and were made available to us by the Scottish Courts Administration.)

[1]I.e. reports of sale whether the goods were actually sold or delivered to the creditor because no bid above the upset price was made.

[2]These are not reported to the court.

[3]It is not clear what the effect of industrial action by court staff in 1981 had on diligence, e.g. by preventing the grant of warrant of sale.

1979 to 1983 has ranged from 1 sale: 170 debt decrees to 1 sale: 365 debt decrees. If account is taken of decrees enforceable by diligence other than debt decrees (the numbers of which are unknown), the proportions are smaller again.

(ii) *Scale of use of arrestments*

2.32 An arrestment only has the effect of bringing the arrested funds (or property) within the control of the court so that the funds cannot be paid (or the property delivered) to the debtor or otherwise disposed of. The arrestee therefore can safely pay (or deliver) the arrested funds (or property) to the arresting creditor only if the debtor authorises him to do so by a written or oral mandate. If, however, the debtor refuses to authorise payment, or the arrestee denies that he has any arrestable liability to account to the debtor, then the arresting creditor must raise an action of furthcoming to require the arrestee to pay him the arrested sum. Arrestment is thus often described as "an inchoate diligence", requiring a furthcoming for its completion. At first sight, therefore, it seems to be exceedingly cumbersome. In practice it is not in the debtor's interest to refuse to authorise the arrestee to pay the arrested funds to the creditor because normally the debtor admits liability for the debt and refusal to release the arrested funds to the creditor would merely render him liable for the much greater expense of an action of furthcoming. For this reason, actions of furthcoming are relatively rare.[1] In short, while in law an inchoate diligence, an arrestment in practice almost invariably operates as a completed diligence, especially when wages or salaries are arrested.

TABLE 2.C

WARRANT SALES EXECUTED AS A PROPORTION OF DEBT DECREES: 1979 TO 1983

	Debt decrees				Sales executed	Sales executed as a proportion of debt decrees
	Court of Session	Sh.Ct. ordinary cause	Sh.Ct. summary cause	Total debt decrees		
1979 ..	541	7,996	60,184	68,721	226	1:304
1980 ..	811	11,560	71,986	84,357	231	1:365
1981 ..	1,203	10,918	59,592	71,713	287	1:250
1982 ..	805	9,675	72,242	82,722	403	1:205
1983 ..	767	11,496	68,679	81,142	477	1:170

Source: *Civil Judicial Statistics Scotland,* Tables 3.10, 5, 9 and 10. (At the time of the submission of this report, the statistics for 1983 had not yet been published and were made available to us by the Scottish Courts Administration.)

[1]The C.R.U. Court Survey identified [Table 2A, footnote (2) at p. 8] 13 actions of furthcoming disposed of in a sample of 5.5% of all actions disposed of in the sheriff courts in 1978: on this basis there may have been 236 actions of furthcoming in the sheriff courts, perhaps 250 in all, in 1978. In 1983, 179 decrees of furthcoming were granted to pursuers (Court of Session 4: sheriff ordinary cause 6; sheriff summary cause 169): information supplied by Scottish Courts Administration pending publication of *Civil Judicial Statistics Scotland 1983*, Tables 5, 9 and 10.

2.33 There are no published annual statistics on the use of arrestments[1] but the C.R.U. Diligence Survey gives uniquely valuable information on the topic. The Survey estimated that in 1978 there were 6,900 first arrestments of wages, salaries or other property or funds of which approximately 6,000 were first arrestments of wages or salaries and 900 were arrestments of other assets such as bank accounts and moveable goods: see Table 2.A. Of the 6,000 first arrestments of wages or salaries nearly 30% were repeated at least once.[2] Normally, a first arrestment will not clear the debt and the debtor will generally make arrangements to pay the balance by instalments over a period.

(iii) *Debtors and creditors involved in diligence*

2.34 The C.R.U. Diligence Survey gives information on the numbers of decrees for payment and other debt-related decrees (viz. for recovery of heritable property and for delivery of moveables) which were passed to officers of court for enforcement in 1978. It is estimated that 90% of such decrees in summary cause actions passed to officers of court for enforcement by poinding, arrestment of earnings, ejection, or recovery of goods were against "personal" defenders (i.e. named individuals or married couples) and only 10% against commercial debtors.[3] This is about the same ratio as for debtors against whom a summary cause decree was pronounced.[4]

2.35 The Survey also shows that the diligence of charge, poinding and warrant sale is most often used against "personal" debtors rather than commercial debtors. About 85% of charges were served against personal debtors and 15% against commercial debtors: at subsequent stages, the ratio fell slightly, except at the stage of advertisement of sale: 77% of warrant sales were against personal debtors.[5]

2.36 Nearly all of the arrestments were against personal debtors (97%) as compared with 85% of the cases in which a charge was served.

2.37 The relative importance of the different types of debt enforced by diligence, is illustrated by the analysis in the C.R.U. Diligence Survey of the pursuer groups involved in enforcing debt-related decrees (viz. payment, possession of heritable property and delivery of goods). The largest pursuer group was commercial organisations (19%) followed by national retailers (11%), finance houses (10%), local authorities (9%), Electricity Boards (9%) and Scottish Gas (6%).[6] Overall local authorities, public utilities and central government departments account for 33% of the decrees enforced by

[1]The courts do not possess information on arrestments because, except in the rare case where an arrestment on the dependence of an action is used prior to the serving of the summons, arrestments are never reported to the court.

[2]The total number of arrestments in execution in 1978 is estimated at about 10,000 made up of 6,000 first arrestments of wages or salaries, 1,700 single repeat arrestments, and 1,000 multiple repeat arrestments (in the survey period from 2–13, the majority being two) and 900 arrestments of property or funds other than earnings. It is thought that there may be about 1,000 arrestments on the dependence every year (estimate based on a survey of 5½-month period in 1974–75 being arrestments of assets other than earnings).

[3]C.R.U. Diligence Survey, para. 5.6.

[4]*Idem.*

[5]*Ibid.*, para 4.1 and Table 1. The ratios were poindings 83 personal: 17 commercial; sale instructed (viz. intimation of warrant of sale) 81:19; sale advertised 84:16; sale executed 77:23.

[6]C.R.U. Diligence Survey, paras. 5.5 and 5.8 and Annex D, Tables 12–14.

"ordinary" diligence.[1] Comparison with the C.R.U. Court Survey discloses that the only pursuer group to show a marked fall in importance between decree granted and diligence stages was local authorities (as a result of the non-enforcement of warrants for ejection); a few pursuer groups (i.e. national retailers, finance houses and mail order firms) instructed relatively more diligence.

Summary warrants for recovery of rates and taxes

2.38 Local rating authorities and the Boards of Inland Revenue and Customs and Excise may obtain from the sheriff court summary warrants for the recovery of rates and taxes without the need for a court action. These warrants are enforced by special poinding procedures which are simpler than the normal procedure of charge, poinding and warrant sale. A charge is not served prior to the poinding and the poinding procedure is not subject to the supervision of the sheriff in the same way as in an ordinary poinding. Rates warrants, but not tax warrants, are enforceable by arrestment.

2.39 Diligence under rates and tax warrants has a similar filter effect to diligence under court decrees. As Table 7.B in Chapter 7 shows, in 1978 summary warrants were granted in respect of almost 5,900 tax defaulters (Inland Revenue 2,127, VAT 3,745) but in the same year only four sales were executed under Inland Revenue warrants and less than 10 sales were executed under VAT warrants. There are no national statistics on rates defaulters but in 1980–81, summary warrants were granted in respect of almost 38,500 rates defaulters in Strathclyde region (containing about half of Scotland's population): as few as seven sales were executed: see Table 7.A in Chapter 7. Lothian exemplifies a similar pattern (*ibid.*).

Section C. The need for reform

The objectives of the system of enforcing debts by diligence

2.40 Our consultation elicited a wide range of different views on the scope and content of the reforms which are needed to the present system of enforcing debts by diligence. While therefore it may be too much to expect unanimity on the precise reforms required, we hope it may be possible to obtain general agreement on the objectives of a good system of enforcement of debt by diligence. We believe that a statement of those objectives, even in very broad terms, is helpful, and indeed necessary, in evaluating the present law and practice.

2.41 We see the general objectives of a good system of enforcing debts by diligence as follows. First, it should seek to provide effective machinery, in which creditors have confidence, whereby creditors can obtain payment of their debts. Second, within the constraints imposed by the need to maintain an effective system of enforcing debts, it should make available procedures which are designed to have proper regard to protecting those debtors who are subjected to diligence from undue economic hardship and personal distress. The extent to which the public have respect for the system depends

[1]To this must be added the rates and tax arrears enforced by summary warrant diligence: see para. 2.38 below.

largely on how far the system attains, and is seen to attain, a proper balance between the twin objectives of effective enforcement and debtor protection.

2.42 It will be seen from the above statement of objectives that we hold to the view that people who are able to pay their legally binding debts should be required to do so. This view was not challenged on consultation and, while there may be divergences of opinion as to what constitutes ability to pay, we believe that this view is generally accepted by public opinion in Scotland. If it were not so, there would be no stigma attached to newspaper advertisements of warrant sales. We are aware, however, that this view is not universally accepted since, for example, arguments have been advanced to the effect that wide classes of consumer debt ought not to be made legally binding at all.[1] These arguments are not considered in this report and were excluded from our consultation for to have admitted them would have required us to review very wide tracts of substantive law (including rules applicable throughout the United Kingdom, e.g. on consumer credit and consumer protection) many of which have only an indirect and even tenuous connection with the law of diligence.

2.43 An important yardstick for measuring the real worth of procedures designed to attain the foregoing objectives is the extent to which the procedures may properly be regarded as cost-effective. Somebody must pay for these procedures, and in the case of most of the procedures, that person can only be the Exchequer, the creditor or the debtor, or some combination of these.[2] Thus, the new or revised diligence procedures and procedures safeguarding debtors from diligence, if they are to be accepted by government and the legislature, must make the best and most economic use of public resources and cause as little expense to creditors and to debtors as is possible consistently with attaining the objectives of the system. Moreover, in the case of arrestments of earnings, the system necessarily places a considerable burden on the debtor's employer who, it may be assumed, bears no responsibility for the debt being incurred or for the debtor's default. Any reform of arrestments of earnings therefore must in fairness also cause as little trouble and expense to employers as is practicable consistently with attaining the objectives of the system.

First objective: effective enforcement

2.44 So far as the first general objective stated above is concerned, it emerged from our consultation and the research commissioned for us that creditors generally regarded the Scottish system of debt recovery and diligence as providing an effective means of recovering debt. Before summarising the evidence on this matter, two preliminary points may be made. First, firm and precise information on the amounts recovered at particular stages of debt recovery and diligence is lacking because creditors' records are (or were at

[1]See e.g. T. G. Ison, *Credit Marketing and Consumer Protection* (1979) who argues (at p. 288) that "debt as a cause of action should be abolished for the price of goods sold at retail".

[2]We are aware that suggestions have been made in the past that the cost of a reformed system of debt enforcement should be borne by a levy on creditors on the model of the Redundancy Fund levy on employers. It is not for us to make proposals on the financing of public expenditure on debt enforcement, but whatever the source of such expenditure, we assume that the need for cost-effectiveness would not be diminished.

the time of the research) generally not arranged by stage in debt recovery or diligence reached but in some other order,[1] and moreover, in the absence of any system of collection by the courts or some other public agency of debts due under decrees, there is no method whereby the recovery of decree debts can be monitored. We have therefore to rely on consultation and the various research reports which yield valuable information on this matter. Second, whether the system of diligence is effective depends to some extent on what criterion of effectiveness is employed, and on this opinions may differ. One approach to this problem is to say that in assessing the effectiveness of the diligence stage of debt recovery, it is necessary to have regard not only to that stage but also to the earlier stages of informal collection by creditors or their agents and to the court action stage. The justification for this is that the earlier stages would be less effective in eliciting payment if the later stages of diligence did not exist as a credible ultimate sanction. Creditors themselves believe that this is a correct approach.[2] Another approach is to look only at the debts which are enforced by poinding and arrestment procedures. On either approach, the evidence is that diligence is effective.

2.45 We have described above the "filter effect" of the debt recovery process whereby, at each stage of that process, fewer cases proceed to the next stage as payment arrangements are made or the creditor abandons pursuit. Only a small fraction (in many businesses under 1% and never more than 10%) of all default debts owed to a creditor proceed to a court action, generally because satisfactory arrangements for payment are made.[3]

2.46 Information on the effectiveness of the court stage in eliciting payment is provided indirectly by the C.R.U. Court Survey and directly by the O.P.C.S. Defenders Survey. The C.R.U. Court Survey[4] points out that the court plays an important constructive role in debt recovery by acting as a channel of, or spur to, communication between the debtor and creditor.

2.47 We referred at paragraphs 2.23 to 2.27 above to the C.R.U. Court Survey statistics of cases which were dismissed or resulted in decree for expenses only, and of cases in which decree was granted but the case was not passed to officers of court for enforcement. The C.R.U. Creditors Survey found that in the great majority of such cases, the reason why the case did not proceed further was that satisfactory payment arrangements were made rather than that the creditor abandoned pursuit and wrote off the debt.

2.48 The O.P.C.S. Defenders Survey found that 84% of defenders in debt or "debt-related" actions arranged to pay all or part of their debt before, during or after the court action: 59% had arranged payment by instalments and 26% outright payment.[5] Debtors who agreed outright payment were in almost every case able to pay off their debt. Of those arranging instalments, just under one quarter (23%) had paid off the debt by the time of the interview (about six months after decree); 59% were still making payments; in 5% of

[1] C.R.U. Creditors Survey, para. 7.5.
[2] C.R.U. Creditors Survey, para. 1.18 and 7.7 to 7.9.
[3] C.R.U. Creditors Survey, para. 1.10.
[4] Paras. 1.7 and 6.12.
[5] *Op. cit.*, p. 47.

cases, D.H.S.S. had taken over the debt; and in only 13% of cases had the debtor defaulted.

2.49 As regards the diligence stage of debt recovery, it is sometimes said that the diligence of poinding and warrant sale is an inefficient mode of debt recovery. This criticism is generally made by persons attacking the system from the standpoint of debtors and concerned to argue that the harsh or potentially harsh impact on debtors cannot be justified on grounds of economic benefit to creditors. The criticism would be justified if the final stage of a warrant sale could be taken in isolation from the earlier stages in the diligence and, indeed, the whole debt recovery process of which it forms part. Thus the C.R.U. Warrant Sales Survey showed that of 285 warrant sales against "personal" or non-business debtors executed in 1977, the sale recovered the relevant debt and legal and diligence expenses in only 3% of such sales.[1] We do not think, however, that the amounts recovered in warrant sales which actually take place provide an accurate measure of the economic efficiency of diligence against moveable goods. That efficiency has to be measured not by reference to the success or otherwise of the final stage in the diligence process, but by reference to the success of the diligence process *as a whole* in eliciting payment of debt in the far greater number of cases which do not proceed to that final stage. As the C.R.U. Creditors Survey[2] observed, any attempt to measure the efficiency of diligence by reference to the level of recovery under warrant sales "can be very misleading because it discounts the role of diligence as part of the wider system of debt recovery and its role as a spur to securing settlements before the final stage of executing a sale is reached".

2.50 The Edinburgh University Debtors Survey gives information on the debtors who made arrangements for payment in response to the stages of poinding and warrant sale from poinding onwards.[3] More than half the debtors entered into arrangements for payment by instalments after each step.[4] The Survey focussed on those who reached the later stages of diligence, in respect of whom payment arrangements had broken down, and does not give a reliable indication on the payments made in the greater number of cases where a charge was served but no poinding followed.[5] On the other hand the instalment arrangements often did not last very long and often went but a small way towards paying off the debt.

2.51 On consultation, only one body representing creditors (the Convention of Scottish Local Authorities) commented to us that the diligence of poinding and warrant sale is inefficient. The Convention represents local authorities which use the special forms of poindings under summary warrants for the recovery of rates (as well as diligence under court decrees). Such information

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[1]C.R.U. Warrant Sales Survey, para. 7. In 57% of sales, all expenses and part of the debt were paid and in 40% of sales only part of the expenses were paid.

[2]Para. 7.9.

[3]*Op. cit.*, paras. 7.42 to 7.44: see also para. 7.8 (charge); paras. 7.22 to 7.25 (intimation of warrant of sale); paras. 7.31 to 7.32 (advertisement of sale).

[4]The proportions were poinding 54%; intimation of warrant of sale 72%; advertisement of sale 60%.

[5]It will be remembered that 46,000 charges were followed by 20,000 poindings in 1978: see Table 2.A at page 14 above.

as we have been able to obtain, however, suggests that poindings under summary warrants for recovery of rates and taxes have a filter effect similar to poindings under court decrees and that the vast majority of rates and tax arrears are recovered without recourse to a warrant sale.[1]

2.52 On consultation, all other bodies representing creditors generally agreed that the diligence of poinding and warrant sale is an effective diligence from the standpoint of creditors. This view was corroborated by the C.R.U. Creditors Survey which observed[2] that the interviews with creditors and debt collection agencies showed that the majority of outstanding debt is paid in response to each stage of the debt recovery process, including the stage of diligence.

2.53 Arrestment of wages is a very effective method of recovery from many points of view. Indeed, a main problem is that an arrestment of earnings is too effective in so far as it leaves the debtor without sufficient funds with which to maintain himself and his dependants.[3] In one important respect, however, arrestments of earnings are not efficient. An arrestment of earnings only attaches earnings due at or before the first pay day following the service of the arrestment; it does not attach earnings due on subsequent pay days. (In cases where earnings are paid in advance, the earnings are not arrestable in the hands of the employer at all unless they are in arrears at the time when the arrestment was laid.) As we have seen,[4] about 30% of arrestments of earnings are followed by further arrestments of earnings. On consultation, there was almost universal agreement with our provisional view that a system of continuous diligence against earnings should be introduced.

2.54 Under the present system, the creditor and not the court instructs an officer of court to execute diligence. The creditor has freedom to decide whether and when to execute arrestments of earnings or other funds or poindings of moveable goods, and he may pursue two or more of these diligences concurrently or consecutively as circumstances when ascertained may require (subject to certain restraints e.g. on second poindings in the same premises which we note below) though normally only one is used at any one time. These characteristics of freedom and flexibility preserve the Scottish system from the kind of criticism which has been levelled[5] at a system requiring creditors to make separate applications to the court for each mode of enforcement and restricting concurrent enforcement.

2.55 The system whereby the creditor, and not the court, instructs an officer of court to execute diligence works well, from the creditor's point of view, because the majority of debt decrees are granted in favour of public utilities, retailers and other commercial organisations who have the necessary resources and information to instruct diligence and do not need the court's help in enforcement. Moreover, creditors who are not corporate bodies can obtain help through the legal aid or legal advice and assistance schemes if the criteria

[1]See paras. 2.38 and 2.39 above.
[2]Para. 7.7.
[3]See e.g. Edinburgh University Debtors Survey, paras. 6.3 *et seq*.
[4]Para. 2.33.
[5]See e.g. Payne Report, para. 295.

of eligibility are satisfied.[1] It is, of course, true that some creditors experience difficulties in enforcing decrees but these are generally difficulties (such as the debtor's insolvency or abscondence) which could not be overcome merely by transferring enforcement functions to the courts.

2.56 So far as we are aware, the main area where creditors are in need of help lies in the collection and enforcement of periodical allowance on divorce and aliment. We have therefore given special consideration to the problems which face such maintenance creditors and make recommendations which would enable them to recover current maintenance out of earnings in order to prevent maintenance arrears from arising.[2]

2.57 To sum up, first, we do not think that the effectiveness of the procedure of poinding and warrant sale can be measured by reference to the very small number of cases in which poinded goods are realised at a warrant sale, because account must be taken of its role, and the role of the court action, in operating as a spur to arrangements for outright payment or payment by instalments. Second, while the proportion of debt paid by such arrangements is not known, it is a substantial amount and is generally regarded as satisfactory by creditors and their agents. Third, the efficiency of diligence against earnings would be improved if a system of continuous diligence against future earnings were introduced.

Second objective: debtor protection

Existing safeguards for debtors

2.58 The achievement of the second objective which we set out above,[3] namely that diligence, though necessarily coercive, should have proper regard to protecting debtors from economic hardship and personal distress, depends at present partly upon immunities from diligence against the person (i.e. civil imprisonment) and upon the exemptions which the law has come to confer upon certain categories of assets and income; partly upon certain restraints on the use of poinding and warrant sale recently evolved by the courts; and partly upon the power of the court to grant instalment decrees in certain classes of case.

2.59 Thus, the common law of Scotland exempted from arrestment against personal earnings sufficient money for the subsistence of the debtor and his

[1] "Legal aid" in the present context denotes representation, on terms provided by the Legal Aid (Scotland) Act 1967 and subordinate legislation, by a solicitor and, so far as necessary by an advocate, in civil proceedings before a court or tribunal, and in taking steps preliminary or incidental to such proceedings. It includes the outlays as well as the fees incurred in such proceedings. Legal aid is available to persons whose disposable annual income or disposable capital do not exceed certain prescribed amounts. The legal aid scheme is supplemented by a statutory scheme providing for legal advice and assistance to be given at public expense under the Legal Advice and Assistance Act 1972 over the whole field of Scots law. Advice covers oral and written advice by a solicitor on any legal problem. Assistance covers negotiations by a solicitor on a client's behalf with a view to settlement of a claim by or against him, but generally stops short of actual representation before a court or tribunal. Eligibility depends on the disposable capital and income falling below prescribed upper limits.

[2] See para. 2.162.

[3] Para. 2.41.

dependants,[1] and it exempted ordinary clothing and tools of trade from poinding or arrestment.[2] These common law principles or rules are nowadays less important than the statutory provisions imposing fixed limits (half the balance above £4 per week) on the arrestment of wages;[3] exempting social security payments from arrestment;[4] exempting certain "necessary" household goods from poinding;[5] abolishing civil imprisonment as a general creditor's diligence[6] and restricting civil imprisonment to cases of wilful default in most of those few categories of debt (aliment, tax penalties and rates) where it remains competent.[7]

2.60 Until recently, it was difficult for an insolvent debtor to free himself from the threat of repeated poindings held over him by a determined creditor (unless the debtor was prepared to take the drastic step of petitioning for his own sequestration under bankruptcy legislation which few consumer debtors do). In recent years, however, some important restrictions on creditors' powers to use the diligence of poinding and warrant sale have been imposed by the courts and by statute including restrictions on the normal duration of poindings,[8] on repeated poindings[9] and on second warrants of sale.[10] Moreover, at one time, a creditor who had poinded goods could pursue his diligence to the final stage of warrant sale even though it was clear that the expenses of the advertisement and sale alone would exceed the proceeds of sale and that expenses would thereby be added to the debt without direct financial benefit to the creditor. Indeed, in small debt poindings, no application for warrant of sale was necessary.[11] With the replacement in 1976 of small debt procedure by summary cause procedure, however, creditors must now in all cases apply to the court for warrant of sale,[12] and the courts have recently developed the law by assuming powers to refuse warrant of sale on equitable grounds, and exercised the powers where the likely proceeds of sale would not cover the expenses of advertisement and sale.[13] These changes have had a considerable

[1]This principle (known as the *beneficium competentiae*) is now in practice only applied in connection with bankruptcy sequestrations, trust deeds for creditors, and "alimentary" liferents, annuities and pensions.

[2]See paras. 5.48 and 5.51.

[3]Wages Arrestment Limitation (Scotland) Act 1870 as amended: the exemption does not apply where the debt enforced by the arrestment is alimentary.

[4]See para. 2.141, footnote 1.

[5]Law Reform (Diligence) (Scotland) Act 1973.

[6]Debtors (Scotland) Act 1880.

[7]Civil Imprisonment (Scotland) Act 1882; Local Government (Scotland) Act 1947, s. 247(5). In the case of tax penalties, civil imprisonment is competent without an application to the sheriff but the procedure is never used in practice. See paras. 7.70 to 7.80 below.

[8]*New Day Furnishing Stores Ltd* v. *Curran* 1974 S.L.T. (Sh.Ct.) 20; Practice Notes of the sheriffs principal have been made limiting directly or indirectly the effective duration of poindings to 6 months. (See Chapter 5 below for a discussion of the cases and Practice Notes referred to in the footnotes to this paragraph.)

[9]*Idem*: the restriction prevents a second poinding (of *any* goods not merely the *same* goods) on the same premises for the same debt unless poindable goods have been brought on to the premises since the first poinding.

[10]*City Bakeries Ltd* v. *S. & S. Snack Bars & Restaurants Ltd.* 1979 S.L.T. (Sh.Ct.) 28.

[11]Small Debt (Scotland) Act 1837, s. 13.

[12]The procedure in poindings and warrant sales on all court decrees, including summary cause decrees, has since 1976 been regulated by the Debtors (Scotland) Act 1838, which formerly applied only to Court of Session and sheriff court ordinary action decrees and summary diligence.

[13]*South of Scotland Electricity Board* v. *Carlyle* 1980 S.L.T. (Sh.Ct.) 98.

impact: in the early 1970s, warrant sales under small debt procedure alone numbered between 931 and 1,861 *per annum*[1] whereas summary cause sales have recently ranged between 341 and 145 *per annum*.[2]

2.61 Another important power available to the court which has the effect of protecting debtors unable to pay from the immediate threat of diligence should also be mentioned. That is the power of the court to order payment of the debt by instalments rather than in one lump sum. This power was originally introduced in 1837 in small debt actions,[3] and when the small debt procedure was replaced by summary cause actions in 1976, a similar power was conferred on the court.[4] This power is subject to two limitations. First, it only applies in summary cause actions i.e. where the principal sum does not exceed £1,000. Second, it cannot be used following the grant of decree so as to convert an "open" decree for payment in a lump sum into a decree for payment by instalments.

2.62 In addition, instalment orders are, or will be, competent in certain special classes of debt. Thus, in relation to sums due under a moneylender's agreement, the court could make an instalment order at any time before payment (even after decree) under the Moneylenders Act 1927.[5] When that Act was replaced by the Consumer Credit Act 1974 on 19 May 1985,[6] the courts were empowered to grant "time orders" providing for payment by instalments of sums due under consumer credit and hire agreements which are "regulated" within the meaning of that Act and under related security agreements.[7]

The impact of diligence on debtors

2.63 The foregoing safeguards for debtors are not inconsiderable, but it appears both from our consultation and the research commissioned by us that debtors subjected to diligence, especially the later stages of poindings and warrant sales, are generally unable rather than unwilling to pay the debt outright and that diligence can have a very harsh impact on debtors and their families not only in their effect on the debtor's financial position, but also because they occasion personal strain and distress.

2.64 *Inability to pay*. The fact that debtors subjected to diligence are generally unable rather than unwilling to pay emerges strongly from the research into debtors' circumstances commissioned for this report. Ability to pay is a complex notion but continuity of employment and level of income are clearly important indexes. The O.P.C.S. Defenders Survey of defenders in debt or debt-related actions[8] found that at the time of the survey (1978), while 5% of

[1]The small debt sales executed between 1970 and 1975 were 1,431 (1970); 1,861 (1971); 1,175 (1972); 931 (1973); 1,775 (1974) and 1,753 (1975): *Civil Judicial Statistics Scotland* for 1970 to 1975, Tables 11.

[2]Table 2.B.1 at page 19 above.

[3]Small Debt (Scotland) Act 1837, s. 18.

[4]Sheriff Courts (Scotland) Act 1971, s. 36(4); Summary Cause Rules, Form U2.

[5]S. 18(*f*).

[6]Consumer Credit Act 1974 (Commencement No. 8) Order 1983, (S.I. 1983/1551).

[7]Consumer Credit Act 1974, s. 129(2)(*a*): see paras. 3.119 and 4.194 *et seq.* below.

[8]I.e. actions for payment, and summary warrants for recovery of rates, actions for recovery of goods or heritable property.

men in Scotland were unemployed and actively seeking work,[1] among debtors interviewed the proportion unemployed and actively seeking work[1] was as high as 20%; only 45% of debtors interviewed were in full-time employment at the time court action started.[2] It was also found that 41% of debtors were living in households where the main source of income was likely to be state benefits since neither they nor their spouse (if any) were in employment.[3] Nearly half the debtors who were unemployed or temporarily sick had been out of work or away from work for at least six months and over three-quarters for over three months. A clear picture emerged of debtors and their spouses as people on low incomes: over a third of debtors had a weekly income of not more than £30, well below the national average.[4] Ability to pay is clearly also affected by factors such as household size, the number of dependent children and the number of working adults; of particular importance is the relationship between the number of earners and the number of dependent children in the household. Again, debtors were more likely to live in households with dependent children than the population in Scotland generally. Over two-fifths of debtors with three or more dependent children were living in households where neither they nor their spouse were in full-time work.[5] While debtors were typically young (nearly half were aged under 35) married and with dependent children, and were more likely to be in manual occupations (if employed at all) and on a low income, rates debtors (normally pursued by summary warrant) were more likely to be older, in full-time employment and with a higher average income.

2.65 A similar picture of debtors as people on low incomes experiencing difficulty in paying debts emerged from the Edinburgh University Debtors Survey of the impact of diligence on 100 debtors.[6] That survey suggested that debtors subjected to diligence tended to be:

> "young people (mainly in their 30s); they had larger families than the general population, most of their children being of school age. The men were mainly in working class occupations with a particularly large number in unskilled and semi-skilled manual occupations. Unemployment was high and lasted for long periods while household incomes were low; very few wives in families with dependent children went out to work. Although many households were in poor financial circumstances when they took on their debts, many others subsequently experienced loss of employment and/or a drop in income and were in poor financial circumstances when they received the summons."

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[1]I.e. as opposed to retired persons, housewives and others not seeking work.

[2]Section 2.2: Table 2.4. A further 4% were working part-time. The remaining 31% of debtors who were not working included the retired, housewives, or others not seeking work.

[3]This percentage includes cases where the debtors and spouses were (a) unemployed and actively seeking work, or (b) retired persons, housewives, sick or disabled with no job to return to and others not seeking work.

[4]The average weekly earnings in Scotland in 1978 of manual employees over 21 was £81.40 (men) and £50.20 (women) and for non-manual employees was £99.80 (men) and £56.60 (women): *Scottish Abstract of Statistics* No. 10/1981, Table 10.2 (H.M.S.O.).

[5]Section 2.3.

[6]Part 2. For example, a quarter of the sample were unemployed when the credit was extended or debt contracted; over half (58) when the summons was served; and over a third at the time of interview (when a particular step in diligence had just taken place). Para. 2.4.

2.66 The research into debtors' circumstances (which was based on interviews with debtors) found little evidence of deliberate non-payment or delayed payment. The O.P.C.S. Defenders Survey[1] found that only 1% of debtors delayed settlement as a matter of principle; 9% refused to pay the original debt because of some dispute with the creditor; about two-thirds said they got into debt because they simply did not have the means to settle. For 13% the debt resulted from an oversight concerning payment. The Edinburgh University Debtors Survey[2] classifies the main reasons for default given by the 100 debtors interviewed as follows: unable to pay due to loss of income (37) or to increased commitments (16); unwilling to pay (17); marital difficulties (5); able and willing to pay but blamed themselves (8) or a third party (13) or attributed non-payment to misunderstanding with the creditor (4). Since diligence is the last stage in a process which, as we have seen, is very protracted, and gives debtors able to pay ample opportunity to do so, it is scarcely surprising that debtors who are subjected to diligence, particularly the later stages of diligence, are frequently unable rather than unwilling to pay the debt outright.

2.67 *Economic and social impact on debtors.* The Edinburgh University Debtors Survey (which was based on interviews with 100 debtors who had been subjected to arrestment or stages in the diligence of poinding and warrant sale) also provides evidence as to the harsh economic and social impact which these diligences can have on debtors and their families. The impact on debtors of arrestments of earnings and of poindings and warrant sales tend to be different. Arrestments of earnings (which attach half the weekly wages above £4 or, in the case of aliment, rates and taxes, the whole wages) have a more severe impact on the debtor's financial position than poindings and warrant sales. The Edinburgh University Debtors Survey[3] found that the amounts deducted by employers operating wages arrestments were considerably greater than the debtor could reasonably afford to pay: 14 of the 22 debtors' households for which complete information was available had their incomes reduced by arrestment beneath the household's entitlement to supplementary benefit, and of these nine were left with less than 80% of supplementary benefit levels and four with less than 50% of supplementary benefit levels. Most arrestments of earnings (70%) are not repeated and where the arrestment itself does not recover the debt, the arrestment may induce payment arrangements. The Edinburgh University Debtors Survey found that the economic impact of charge, poinding and warrant sale procedures was less than that of arrestments of earnings.[4] As we have seen, the diligence of poinding rarely proceeds to the stage of a warrant sale and the earlier steps in the diligence (the service of a charge, the execution of the poinding, the grant of warrant of sale and its intimation to the debtor, the advertisement of sale) or the threat of the next step, and the threat of the sale itself, are used to spur the debtors to make informal arrangements for payment by instalments out of income. Thus, pressure may be put on a debtor to agree to pay by instalments at a level

[1]Section 4.1.
[2]Paras. 4.1 and 4.2.
[3]Paras. 6.3 and 6.4.
[4]Para. 7.41.

which he cannot meet.[1] In strict law he is liable for the expenses of any new step in diligence executed as a result of his default in payment of the instalments, though in practice if the debtor fails to meet the instalments, the expenses, as well as the balance of the debt, are generally irrecoverable and the creditor abandons pursuit. After decree, as already mentioned, the debtor cannot apply to the court to have the diligence delayed or stopped or for time to pay for example by instalments of amounts which he can pay. Further, in a case where it is uncertain whether the likely proceeds of sale of poinded goods would justify the grant of warrant of sale, a low income debtor may be put under pressure to pay the debt, out of for example social security receipts, by threat of a sale for which the court could not in law competently grant warrant.[2] The debtor must await the creditor's application for warrant of sale and cannot have that threat removed by himself making an application for recall of the poinding.[3]

2.68 The Edinburgh University Debtors Survey concluded that the lesser economic impact of charge, poinding and warrant sale (as compared with wages arrestments) was more than offset by the very considerable social and psychological effects on debtors of poinding and warrant sale procedures, especially the later stages of the diligence.[4] It appears likely that debtors fear and resent newspaper advertisements of warrant sales in their home more than they dislike the sale itself.[5] The survey found that arrestments often had a very substantial adverse effect on the debtor's relationship with his or her spouse, probably due to the loss of income.[6] Poinding and warrant sale tended to have bad effects on the health of the debtor or the debtor's spouse probably due to anxiety associated with the humiliation of the later stages of diligence and this increased as diligence proceeded from poinding to advertisement of the sale (the "high-point" in the process).[7] Other features of the diligence resented by debtors include the execution of a poinding in the presence of friends or relatives of the debtor,[8]and the low valuations placed on household goods by officers when executing a poinding.[9]

2.69 The execution of diligence in inappropriate cases tends to exacerbate the effect of two other problems in diligence, namely diligence expenses and multiple debt.

2.70 *Diligence expenses*. Although the creditor must in the first instance pay the expenses of a debt action to his solicitor and diligence expenses to the officer of court, those expenses are in law recoverable by the creditor from the debtor, so that the burden of the original debt falling on the debtor may be increased by the further burden of the expenses of its enforcement. This burden of expenses may become considerable, whether it is measured by

[1]See e.g. Edinburgh University Debtors Survey, paras. 7.8, 7.20, 7.23, 7.25, 7.31, 7.43 and 7.44.
[2]Under the test laid down in *S.S.E.B.* v. *Carlyle* 1980 S.L.T. (Sh.Ct.) 98; see para. 2.60 above.
[3]See para. 2.155, head (7) below.
[4]Edinburgh University Debtors Survey, para. 7.41.
[5]*Ibid.*, paras. 7.20, 7.26, 7.28 and 8.6.
[6]*Ibid.*, para. 8.7.
[7]*Ibid.*, paras. 8.8 and 8.9.
[8]*Ibid.*, para. 7.11.
[9]*Ibid.*, paras. 7.14 and 7.15.

reference to the original debt or by reference to the value of the assets against which diligence is done. The amount of expenses involved depends, among other things, on the number of procedural stages through which diligence is required to pass and the most frequently used diligence of poinding and warrant sale has, as we have seen, several such stages. As a result the situation can, and does, arise in which the likely proceeds of sale of the goods to which the creditor has recourse may not only be less than the amount of the debt, but may be less than the aggregate expenses incurred in the diligence.[1]

2.71 *Multiple debt.* Where a debtor is subjected to diligence in respect of one debt, and is simultaneously in arrears with other debts, the execution of diligence may aggravate the problems arising from his multiple indebtedness. Such a "multiple debtor" may enter into arrangements for instalment payments with the creditor who has executed diligence and thereby increase the likelihood of his defaulting in his obligations to his other creditors. Alternatively, he may react passively by taking no action with regard to any of the debts with the consequence that he may ultimately become subject to diligences instructed by his creditors simultaneously. Scots law provides no machinery outside bankruptcy procedures whereby arrangements can be made for the orderly collection and payment of debts due by a multiple debtor to his several creditors.

The primary aim of reform

2.72 Summarising the foregoing analysis, we have concluded that the present system of diligence fulfils its first main objective of effective enforcement and is generally regarded by creditors as satisfactory. The diligence of charge, poinding and warrant sale is an effective method of recovery not as a direct means of realising the debtor's moveable goods in those very few cases which reach the ultimate stage of warrant sale but rather as a sanction inducing payment arrangements in the far greater number of cases which do not go beyond the earlier stages of that diligence and of the debt recovery process as a whole. Arrestments of earnings, which only affect wages or salary payable on one pay day, are effective only because too much is deducted from the debtor's earnings under an arrestment, and it is a considerable disadvantage of the diligence from the creditor's standpoint that it does not attach future earnings.

2.73 On the other hand, it emerged from consultation and the research commissioned by us that the system does not satisfactorily attain the second main objective of protecting debtors who are subjected to diligence from undue economic hardship and personal distress. The evidence suggests that most debtors subjected to diligence are unable rather than unwilling to pay the debt outright out of income or savings and can only pay by instalments. The fear of the later stages of the diligence of charge, poinding and warrant sale, especially the advertisements of sales in the debtors' homes, and other factors including the restricted time-scale of the diligence, induces debtors to agree to arrangements for payment by instalments at a level which they cannot meet. Moreover, diligence expenses increase the debt. Only a restricted use is made of the right to apply for a summary cause instalment decree and there

[1] See para. 2.49 above.

is no other means whereby debtors can obtain an extension of time to pay free from the immediate threat of diligence. Furthermore, arrestments of earnings leave debtors with insufficient funds for the support of themselves and their families. On consultation, it was generally agreed that the primary aim of reform should be to introduce new safeguards protecting debtors subject to or threatened by diligence from undue economic hardship and personal distress.

Section D. Discretionary control of diligence: possible options

2.74 While it was generally agreed on consultation that the primary aim of reform should be to introduce new legal safeguards protecting debtors who are subject to diligence, or the threat of diligence, from undue economic hardship and personal distress, our consultation also revealed that a broad range of different views exists on what form the safeguards should take.

2.75 The possible safeguards which could be employed include powers, conferred on a court or quasi-judicial body, to control enforcement by making orders preventing, restricting, stopping or delaying diligence. The power to make such orders might be supplemented by powers to make orders giving the debtor time to pay a particular debt or debts by instalments or otherwise, or orders making provision for the orderly and regular payment by a multiple debtor of all the debts due to his several creditors. The possible safeguards might include orders (such as are traditionally found only in bankruptcy procedures) which would go beyond the stoppage of diligence or extension of time to pay, and would give an insolvent debtor a discharge of a debt or debts normally on payment of a composition of less than 100p in the pound. Or the safeguards might consist of restrictions on enforcement imposed, not by orders of a court or other body, but by operation of law, such as exemptions of particular categories of property or of categories or levels of income from diligence, or immunity from diligence of particular classes of debtor. Each of these safeguards could take a variety of different forms. Where the safeguards involved discretionary powers conferred on a court or quasi-judicial body, the powers might be introduced at early or late stages of the process of debt recovery. Such powers might be exercisable by the court or other body of its own accord, or on the debtor's application, or in court actions or enforcement proceedings initiated by the creditor. Nearly all of the solutions discussed in our consultative memoranda or proposed to us on consultation involved different combinations or "packages" of these different forms of debtor protection.

2.76 In considering the various policy options, it seems helpful to make a somewhat rough distinction between two broad categories of reforms safeguarding debtors, namely, on the one hand, the introduction or revision of discretionary orders, made by a court or other independent body, authorising diligence or controlling diligence (i.e. preventing, restricting, stopping or delaying it) and, on the other hand, reforms of the manner in which the main diligences of poinding and sale and arrestment of earnings are carried out, of the legal rules on exemptions from those diligences, and of the specific conditions and safeguards built in to these diligences. These two categories of reforms are distinguished for ease of exposition though to some extent they overlap. In this Section and Section E of this Chapter, we consider what kind

of system of discretionary orders authorising or controlling diligence should be available leaving till Section F the question (which is just as important) of the specific reforms required to the diligences of poinding and sale and arrestment of earnings.

2.77 Our consultation revealed widespread support for the introduction of discretionary orders controlling diligence. There was, however, a measure of disagreement on the answers to five important questions of policy, namely:

What body should have jurisdiction in entertaining debt actions and in authorising and controlling diligence—the ordinary courts of law or a body specially created to exercise that jurisdiction?

Should a debtor's disclosure of his means to that body be a compulsory prelude to enforcement or alternatively a condition of a voluntary application by the debtor to that body for the control of diligence?

At what stage in the whole process of debt recovery should orders controlling diligence be available?

What types of order controlling diligence should be available (e.g. orders giving the debtor time to pay by instalments or otherwise; orders providing for the orderly and regular payment of debts due by a multiple debtor; summary bankruptcy procedures; or orders declaring individual debts to be wholly or partly unenforceable)?

What procedural or other reforms are needed to make the orders readily available to those debtors for whom they are designed?

In this Section and Section E we attempt to give reasoned answers to these questions.

2.78 Our research and consultation also suggested that a choice has to be made between the following different types of system, namely:

(1) a system whereby diligence enforcing a debt could not be used unless and until the court, or a newly created special tribunal or arbiter, in an application by the creditor for enforcement by diligence, decided on the basis of an enquiry into the debtor's means that enforcement by diligence was appropriate in the circumstances of the case (see paragraphs 2.79 to 2.110 below);

(2) a system which would allow a creditor to pursue his debt by court action and diligence as under the present law, but would confer on the debtor a new right, exercisable at early or late stages of the debt recovery process, to apply to a special tribunal or arbiter for an order controlling diligence (see paragraphs 2.111 and 2.112 below);

(3) a system whereby, after a charge had been served following on a decree, diligence was replaced by a summary bankruptcy procedure (see paragraphs 2.113 and 2.114 below); and

(4) a system on the lines of that described at head (2) above but with the important modification that the debtor would apply to the court, rather than a special tribunal or arbiter, for an order controlling diligence (see Section E below).

(1) One possible option: enforcement conditional on discretionary authorisation by court or special agency and on prior compulsory means enqury

2.79 Turning to the first of these options, we have considered three different schemes whereby enforcement by diligence would be conditional on discretionary authorisation and a prior means enquiry to which the debtor would be compelled to submit. The first of these is the setting up of a single centralised enforcement agency, called an Enforcement Office, such as has been recommended for England and Wales and established in Northern Ireland, which would authorise and control enforcement after the debt was constituted by a court decree. The second would require that the ordinary courts of law should grant or refuse authorisation of diligence on the basis of a means enquiry in all cases. The third would involve the transfer of jurisdiction in the "constitution" of admitted debts (i.e. debts in which liability was not disputed) from the courts to a body called a debt arbitration service which would also have powers to authorise or refuse to authorise enforcement, on the basis of a means enquiry, of all debts "constituted" in undefended cases by the debt arbitration service and in defended cases by the courts.

(a) *Centralised enforcement office (Payne Report and Enforcement of Judgments Office, Northern Ireland)*

2.80 In our Consultative Memorandum No. 47,[1] we sought views on the possibility that an Enforcement Office should be established in Scotland against the background that similar proposals had been made for England and Wales by the Payne Report,[2] that such an agency already existed in Northern Ireland [3] and in the light of suggestions by the Law Society of Scotland that the concept of an Enforcement Office might merit serious consideration.[4]

2.81 If an Enforcement Office system were to be introduced on the lines described in our Consultative Memorandum, the right to do diligence would cease to be a right available to a creditor, but would become the exclusive right of a new public agency, the Enforcement Office, to whom a creditor would require to apply if he wished to enforce a debt. The Enforcement Office would have both the executive function of carrying out the competent modes of diligence and the judicial function of granting warrant for and controlling diligence. The Office would be staffed by full-time, salaried civil servants of the Scottish Court Service. Certain of the more important orders controlling enforcement would be made by sheriffs attached to the Office and exercising its jurisdiction or "judicial officers" employed within the Office. Where a creditor applied for the enforcement of his debt, the Enforcement Office would decide whether enforcement should be permitted, or whether controls should be imposed on enforcement. Its decision would be made on the basis of a prior enquiry into the means and circumstances of the debtor. In the case of larger debts at least, before the creditor was put to the expense of making an application for enforcement, he would be entitled to apply for a compulsory means enquiry for a smaller fee than that exigible for an application for enforcement. In those cases where the Enforcement Office

[1]Paras. 1.82 to 1.86; Appendix C.

[2]Part III.

[3]Judgments (Enforcement) Act (Northern Ireland) 1969 which, with amending enactments, is now consolidated in the Judgments Enforcement (Northern Ireland) Order 1981 (S.I. 1981/226).

[4]Similar schemes have been recommended in other Commonwealth jurisdictions including Ontario and New Brunswick.

thought that diligence should be restricted or regulated in any way, it would, acting in its judicial capacity, make the appropriate orders controlling enforcement. In those cases where the Enforcement Office thought diligence was appropriate, it would be able to use any available modes of diligence to enforce the debt just as a creditor would at present. An Enforcement Office could also, if desired, be given responsibility for the collection of debts whose enforcement it authorised. The Enforcement of Judgments Office in Northern Ireland acts as a collecting agency in certain cases (e.g. attachment of debts or earnings),[1] and the Payne Committee considered that, if an Enforcement Office were introduced in England and Wales, it might collect debts due under decrees lodged for enforcement to enable the Office to control the course of enforcement and to distribute the proceeds among several judgment creditors.[2]

(b) *Compulsory means enquiry prior to authorisation of diligence by court*

2.82 The requirement of a compulsory means enquiry prior to diligence could be engrafted on to the present system of court action and diligence without establishing an Enforcement Office. In such a scheme, the court would grant decree for payment of a debt or expenses in an action but, in contrast to the present law, the decree would not contain a warrant for diligence. Instead, after obtaining decree, the creditor would be required to make a special application to the court for leave to enforce the decree by diligence. In such an application, the court would decide whether or not to grant leave on the basis of an enquiry into the debtor's means or ability to pay. Examples of means enquiries as a compulsory prelude to a *particular* method of enforcement can be found in other jurisdictions including England and Wales, where such enquiries are a prerequisite of attachment of earnings orders.[3] In the scheme now under consideration, however, a means enquiry would be necessary before *any* method of enforcement was used.[4] There is no exact Scottish precedent.[5] On consultation, a scheme on these lines outlined in our Consultative Memorandum No. 48[6] received some support though it was rejected by the majority of those who commented.

(c) *Debt arbitration service replacing court actions for debt and diligence*

2.83 The concept of a debt arbitration service, which has been developed by the Scottish Council of the Labour Party[7] among others,[8] would involve the

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[1]Judgments Enforcement (Northern Ireland) Order 1981, articles 70(1) and 73(2).

[2]Paras. 416–421.

[3]Attachment of Earnings Act 1971.

[4]Legislation requiring a means enquiry before the use of any method of enforcement has been enacted in the State of South Australia—Enforcement of Judgments Act 1978—but we understand that the legislation has not been brought into operation.

[5]The nearest analogue is the procedure in the Civil Imprisonment (Scotland) Act 1882, s. 4, for imprisonment of alimentary debtors for wilful failure to pay arrears of aliment within the days of charge. The onus is on the debtor to prove that his failure was not wilful. Warrant will not be granted if since default the debtor has not possessed, or been able to earn, the means of paying the arrears, and again the onus of proving this appears to rest on the debtor. There is no question of compelling the debtor to appear for a means enquiry by imposing a fine or an additional period of imprisonment.

[6]Paras. 1.20 to 1.26.

[7]Policy Statement on Warrant Sales presented to the 67th Scottish Conference of the Labour Party, March 1982.

[8]See e.g. Adler and Wozniak, "More and Less Coercive Ways of Settling Debts", *Scottish Government Yearbook 1980*, 161.

creation of a new public service or agency which would assume responsibility not only for the enforcement of debts but also for constituting the debtor's liability to pay undisputed debts. Unlike the two schemes just described, it would therefore affect the court action stage of debt recovery.

2.84 The arguments for such a scheme are based on the premise that the courts as such have no necessary or useful function in relation to undisputed debt. It is argued that in those cases (which constitute the overwhelming majority) where a debtor does not dispute his liability to pay, no need arises for any "adjudication" by a court. What is needed, it is said, is an investigation by an appropriate body into the question of how the debt can best be paid having regard to the individual debtor's circumstances. That body, it is argued, ought not to be the court but should be a new public agency staffed by salaried officials and supplemented by debt counsellors. The function of this "debt arbitration service" would be to assess each individual debtor's circumstances and its arbiters would have the power to make appropriate orders for payment of the debt in the light of that assessment.

2.85 The pursuit and recovery of debts under the proposed system of arbitration would, as we understand it, be likely to work in this way:

(1) Where there was default in payment of a debt and the creditor sought repayment, he would require to approach the debt arbitration service who would contact the debtor and would arrange for one of their debt counsellors to visit the debtor for the purpose of discussing a voluntary arrangement for payment.

(2) That discussion would proceed against the background that unless there was a dispute as to the existence of the debt (in which case the courts would require to be involved), the manner of its payment and the sanctions for non-payment would fall to be determined, failing agreement, by arbitration.[1]

(3) In those cases where the debt counsellor could not obtain a voluntary agreement between debtor and creditor and resort to arbitration became necessary, the arbitration itself would take the form of an informal hearing before an arbiter who would decide, in the light of information disclosed by the debtor and the creditor, on an equitable method of payment. The arbiter would be empowered to make orders for payment by periodic instalments or otherwise; on default, orders for deduction from wages at source; and orders declaring the debt unenforceable or reducing the sum payable. It would appear that poindings and warrant sales would not be permitted, though this is not entirely clear.[1]

(4) In those cases where the debt arbitration service did order debts to be enforced the service would also act as an agency for the collection of the debts in question.

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[1]In the case of a debtor who refused to co-operate in the proceedings, the Statement acknowledged that there is an argument for retaining the summary cause procedure.

Advantages of schemes based on compulsory means enquiries

2.86 There is little doubt that schemes on the lines which we have just described, assuming that they were practicable, would give substantial protection to debtors from the harsh effects of diligence and solve some of the problems of the present system (although, as we mention below, only at the cost of creating or aggravating other problems).

2.87 First, we have seen that creditors are usually willing to accept payment by instalments from debtors in genuine financial difficulties. Unfortunately, debtors who can only pay the debt by instalments or after a breathing space often fail to make contact with the creditor to explain their position and to negotiate payment arrangements. Thus the Scottish Association of Citizens Advice Bureaux (whose bureaux act among other things as debt counselling agencies and as "brokers" for informal payment arrangements[1]) observed to us: "The basic problem in CAB experience is getting the debtor to come forward at an early stage in the debt recovery process to state explicitly the circumstances which prevent timeous repayment of the debt". A procedure for making payment arrangements based on a compulsory means enquiry conducted by an independent body before diligence was begun would, in cases where the debtor submitted to the compulsion, bridge this communication gap. The creditor would be compelled to consider payment arrangements proposed by the debtor or independent body at a stage when, according to the evidence of debt counselling agencies,[2] creditors are more receptive to offers to pay by instalments or requests for time to pay than they are at the later stages of diligence.[3]

2.88 Second, a compulsory means enquiry conducted by an independent body before diligence was begun would enable that body to impose on the parties arrangements for payment by instalments of reasonable amounts and, if these arrangements were successful, both creditors and debtors would be relieved of the burden of diligence expenses. It would also in some cases prevent the execution of unproductive arrestments, charges or poindings.

2.89 Third, a compulsory means enquiry by an indepedent body would often enable that body to select the most appropriate mode of diligence in the circumstances. This may be a considerable benefit given that poindings are quite frequently used, even though the debtor has arrestable earnings, simply because the creditor does not know the name and address of the debtor's employer.

2.90 Fourth, a compulsory means enquiry system would make possible the introduction of a system of attachment of earnings orders, in which the levels of deductions are fixed by reference to the circumstances of the particular debtor, and which has therefore some advantages over a system of earnings arrestments, such as we recommend below, where deduction levels are fixed by legal rules.

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[1]See C.R.U. Debt Counselling Survey, Part 5.

[2]C.R.U. Debt Counselling Survey, para. 5.31.

[3]At the later stages of the diligence of poinding and warrant sale, there are and have to be limits on the duration of the poinding and these restrict the scope for negotiated settlements. We make proposals later for relaxing the time limits on the duration of poindings in order to encourage negotiated settlements of reasonable amounts.

Disadvantages of schemes based on compulsory means enquiries

2.91 Although a system of enforcement conditional on prior compulsory means enquiries would confer significant benefits, it would suffer from formidable disadvantages. The experience in criminal fines cases suggests that a compulsory means enquiry system would present difficult problems.[1] To have even a chance of being accurate, a means enquiry must involve a very complex process and even then a wholly accurate picture may not emerge. As the Scottish Council on Crime observed in relation to fines:

> "Even with time and manpower available for the purpose, it is not easy to establish an individual's means—his capital, income and commitments, necessary and less than necessary. This has, for instance, been the experience of the Supplementary Benefits Commission in assessing disposable income and disposable capital for the purpose of the civil legal aid scheme. The calculation is, by itself, quite complex and it requires exact information of a kind which is available only if the person being assessed will, and can, declare it accurately."[2]

If a complex task of this kind were to be attempted in all cases before enforcement, the price would be considerable delay in the enforcement of diligence in those cases which eventually proceed to diligence. Given that the time scale is protracted anyway, the delay may not matter in many cases, though in other cases it would. There are, however, more serious disadvantages than delay.

2.92 *Relevance of the "filter effect"*. A system making enforcement conditional on a means enquiry in every case where enforcement is sought might be realistic if most of the debt cases in which court actions are raised, or diligence is instructed, reached the harsh later stages of poinding and warrant sale. But in reality, the actual position is very different because of the filter effect on the debt recovery process which we have described above. It follows from this filter effect that the earlier in the debt recovery process a compulsory means enquiry is held, the greater will be the number of inappropriate cases (i.e. of debtors able to pay or not at risk of suffering the later stages of poinding and warrant sale procedures) which will be caught by it. The O.P.C.S. Defenders Survey discloses that most debtors involved in debt and debt-related actions arrange to settle their debt by payment before diligence is commenced and shows how debtors raise the money:[3] of debtors who made payment arrangements, about one-third (36%) made economies; just under one-third (29%) found the money through an improvement in their personal or household circumstances; 19% had always had the money; 18% borrowed money and 5% (4% of all debtors interviewed) ignored other bills.[4] When asked specifically, only 7% reported incurring further debt (apart from money

[1]The Second Report on *Criminal Procedure* Cmnd. 6218 (1975) (Chairman, The Hon. Lord Thomson) para. 60.16 remarked that of all the topics on which they received evidence, the means enquiry procedure in fines enforcement was subjected to the strongest criticism from their witnesses.

[2]Report on *Fines*, published by Scottish Home and Health Department, (October, 1974) para. 4.19.

[3]Part 8 on "Payment arrangements".

[4]Section 8.6 and Table 8.11. The remaining debtors found the money through a cash gift (5%) sold something (2%); or were unspecific as to how the money was paid (6%); or found the money in other ways (1%).

borrowed to settle the original debt) as a result of having to raise the money to make settlement.[1] This evidence does not suggest that "desperation borrowing" by debtors is widespread at the earlier stages of debt recovery before decree is granted or diligence commenced. Nor does this evidence suggest that a compulsory means enquiry should be held in every case at that stage, though it does suggest that debtors (e.g. those who require to borrow, or do without "essential" goods and services, in order to pay the debt) should have the right and the opportunity to apply for time to pay at the stage of a court action and *a fortiori* when diligence is imminent.

2.93 In our view, to hold a compulsory means enquiry in every case before any diligence has been commenced at all would be an extremely wasteful use of resources. For example, the Enforcement Office and court-based means enquiry solutions envisage that a means enquiry procedure would be held after decree for payment and before diligence was begun. This would mean that means enquiry procedures would be used in all cases in which officers of court were instructed to do diligence by charge, poinding or arrestment, perhaps about 50,000 cases a year (1978 figures). Yet less than half of these proceed to a poinding (20,000 cases in 1978), and less than 1% of such cases result in a warrant sale (300 in 1978).

2.94 The debt arbitration service scheme envisages that its procedures would be used in all cases of debts of up to £5,000. These procedures would usually involve visits by debt counsellors to the debtor in his home or a means enquiry by an arbiter or both. Recent statistics of court business suggest that these elaborate procedures would have to be used in about 110,000 cases a year in lieu of the corresponding number of debt actions.[2] Depending on the scope of the scheme, it might also have to be used in several tens of thousands of rates and tax arrears cases presently dealt with under summary warrant,[3] and, if rent arrears cases were included, a very large proportion of the present number of actions to recover heritable property.[4] This might entail a total of over 150,000 cases dealt with by debt counselling or means enquiry procedures.

2.95 It seems to us therefore that these solutions would dissipate public financial and manpower resources which might otherwise be concentrated on assisting the very much smaller number of debtors for whom protracted diligence is a real possibility. We have estimated, for example, that the Enforcement Office scheme would require a staff of between 300 and 400 full

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[1]Section 8.6, p. 49. The Edinburgh University Debtors Survey paras. 9.1 to 9.4 found that of 100 debtors subjected to diligence, 36 sought help from their family and friends who provided financial help in 24 cases. Debtors were reluctant to seek help in cash from people they knew. Very few of these debtors sought cash grants from public agencies (e.g. D.H.S.S.).

[2]In 1983, over 17,000 sheriff court ordinary cause actions for debt were initiated, some of which would have been for sums over £5,000: over 130,000 summary cause actions were initiated of which probably just over three quarters (say 100,000) were debt actions. Information supplied by Scottish Courts Administration prior to publication of the *Civil Judicial Statistics Scotland 1983*.

[3]See para. 2.38 above and Chapter 7 below.

[4]In 1983, over 15,000 summary cause actions for recovery of heritable property were disposed of and an even larger number were initiated: just under 2,000 ordinary cause actions were initiated. Information supplied by Scottish Courts Administration prior to publication of the *Civil Judicial Statistics Scotland 1983*.

time officials to deal with 50,000 cases every year. [1]A debt arbitration service, which would seem to involve twice that number of cases or more, would place an even heavier burden on the public purse.

2.96 *The unco-operative debtor.* In a system where there can be no enforcement without a prior means enquiry, there must be some sanction compelling the debtor to submit to a means enquiry. Otherwise debts would be payable only at the debtor's pleasure. We believe that schemes which depend on compulsory means enquiries seriously under-estimate, first, the extent to which the debtors would fail to co-operate satisfactorily or at all in disclosing their means, and second, the difficulty of the consequential requirement of devising a suitable sanction to compel disclosure. We think it undesirable that a debtor should be compelled to disclose his means, as opposed to making voluntary disclosure a condition of obtaining an order stopping or restricting diligence.

2.97 It is one thing to acknowledge that debtors subjected to diligence are normally willing but unable to pay their debt outright and quite another thing to deduce from that fact that debtors would willingly co-operate in compulsory means enquiries. There would, we think, be a significant number of cases in which the debtor would not comply with the duty of disclosure, especially if it involved attendance at the specialist tribunal or court for oral examination as to his means. One solution suggested was that debt counsellors connected with the specialist tribunal or the court could visit debtors in their homes. This would certainly help to reduce the problem, though it would be expensive to employ a field force to cater for these cases especially since counsellors would often experience difficulty in making personal contact with debtors. Moreover, even when such contact was made, we suspect that an enquiry by an official (whether he be called a debt counsellor or something else) into a debtor's means in his home would often be as much resented as the service of a charge or the execution of a poinding, if not indeed more so.

2.98 There remains the difficult problem of what sanctions should be imposed to compel the debtor to disclose his means. On consultation, those who favoured compulsory means enquiries did not go the length of supporting the imposition of fines or imprisonment as sanctions and we think such sanctions would find little support in Scotland. The number of cases in which such sanctions would have to be imposed might not be great,[2] but it is equally true that the number of warrant sales against household goods is also not great. Some of those who support a debt arbitration service suggested, somewhat inconsistently, that the summary cause procedure should be retained as a sanction against debtors who refused to co-operate. This in itself is not a sanction since a summary cause action does not compel a debtor to do anything. Moreover, this suggestion loses sight of the facts that a summary cause decree is enforceable by diligence and that it is the clear and avowed

[1]See Consultative Memorandum No. 47, Appendix C, para. 28.

[2]It is difficult to know how far the English experience with attachment of earnings orders can be relied on. In England and Wales in 1978 there were about 100,000 applications for attachment of earnings orders: 264 debtors were fined and 160 imprisoned for such offences as failure to attend court. In 1983, there were about 79,000 applications but relatively fewer debtors were fined (130) or imprisoned (55). *Judicial Statistics Annual Report* for 1978 Table F1(b) and for 1983, Table 7.19.

aim of a debt arbitration service, like the other schemes just mentioned, that there should be no enforcement without a prior enquiry into the debtor's means. If there is to be a *duty* of disclosure, as opposed to a *right* voluntarily exercised by the debtor (which is the solution we favour), then there must be some sanction other than diligence in order to give disclosure the character of a duty; we do not believe that a suitable sanction can be devised. Indeed, a system dependent on a compulsory means enquiry would arguably be more, not less, coercive than the present system of court actions and diligence.

2.99 *Prejudicing effectiveness of debt recovery system.* The effectiveness of the present system of diligence, and of debt recovery as a whole, could be adversely affected by a procedure controlling enforcement if that procedure gave real encouragement to those debtors who are able to pay and under the present system do pay their debts, to default in payment or to seek to defer payment. A debt arbitration system of the kind outlined above, for example, although it was not intended that it should benefit debtors who are willing and able to pay, might nevertheless, in practice, encourage such debtors to cease paying their debts promptly. They would no longer be subject to the present economic constraint of liability for the expenses of any court action or diligence occasioned by default in payment and they would have every incentive, especially when interest rates were high, to use the system so as to delay payment. Indeed, there is a real risk that debtors who under the present system pay their debts might be drawn into the debt arbitration scheme to such an extent that the scheme itself might become unworkable. A similar problem might arise under an Enforcement Office system depending on whether it was the policy of the Office to use enforcement against moveable goods as a spur to an instalment settlement, a practice adopted by creditors in Scotland, and (it appears) in England and Wales, but not by the Enforcement of Judgments Office in Northern Ireland.

2.100 *The appropriate forum.* It was a feature of the Enforcement Office and debt arbitration service schemes that they would confer the functions of controlling enforcement on a specialist agency rather than on the ordinary courts of law. In the case of an Enforcement Office, the reasons adduced by the Anderson Report[1] in Northern Ireland and the Payne Report[2] in England and Wales for this policy were not suspicion of the ordinary courts of law but rather administrative and technical considerations. In Northern Ireland, the former bailiffs were generally of low calibre (a criticism which cannot be made of Scottish sheriff officers) and a new public agency was needed. It was desired to have centralised and unified enforcement arrangements whereby all modes of enforcement against all judgment debtors would be controlled by one body. Centralised arrangements would be easier to administer in a small jurisdiction like Northern Ireland (which operates from one set of premises in Belfast) than in Scotland with its larger population and very much

[1]Report of the Joint Working Party on the *Enforcement of Judgments, Orders and Decrees of the Courts in Northern Ireland* (Chairman, A. E. Anderson) Belfast (1965) Parts I to III. The Working Party thought (para. 40) that the Enforcement Office should be responsible to the Head of the Judiciary and to the Parliament of Northern Ireland through the Minister of Home Affairs (now the United Kingdom Parliament and the Lord Chancellor).

[2]Paras. 2.93 *et seq.*

larger area. On consultation, there was little support for the establishment of an Enforcement Office in Scotland.

2.101 The debt arbitration service scheme rejected the courts as the appropriate forum for very different reasons. It seems to have been assumed, first, that the "adjudicatory" role of the courts becomes irrelevant if debts are undisputed; second, that the courts have inherent defects of formality and expense from which specialist tribunals or arbiters are exempt; and third, that courts could not be expected either to devise the particular kind of orders required to regulate or control diligence or to operate procedures which would enable debtors readily to obtain such orders.

2.102 As regards the first of these assumptions, we do not agree that the constitution of a debt by the court is redundant in cases where liability for the debt is not disputed. Some procedure must exist in order to establish whether liability for a debt is admitted or disputed, and since (as is agreed on all sides) the courts must necessarily be the forum for determining liability where a debt is disputed, it seems only sensible that the same forum should be used to establish the prior question whether the debt is indeed disputed or not.

2.103 Second, the assumption that any new powers to control debt enforcement should inevitably be allocated to tribunals rather than the ordinary courts of law (primarily the sheriff courts) is best answered by reference to the observations of the Hughes Report on the respective merits of courts and alternative tribunals.

2.104 Although the Hughes Report recognised that such alternative tribunals (or some of them) might have the characteristics of cheapness, speed and informality, it concluded: "The aim should be to develop in the civil courts themselves those same qualities of cheapness, speed and informality in so far as these are compatible with fair and respected judicial procedures".[1] That conclusion moreover was not reached through any dogmatic attachment to the established court system as such. It was reached rather on the very practical grounds that the court system offered facilities for the purpose which could be augmented, if necessary, at far less cost than would be incurred in providing a wholly new tribunal system. Commenting on small claims procedures, the Hughes Report observed:

> "The advantages of a tribunal are informality in proceedings, the possible appointment of specialist adjudicators, and easier provision for lay representation. On the other hand, we believe that the court system ought to offer similar advantages and that it has other advantages of its own. Only a court can satisfactorily settle matters of substantive law (subject to appeal if this is allowed). The court system offers an existing widespread structure of facilities and personnel that can be augmented, if necessary, at far less cost than would be incurred in providing a wholly new tribunal system."[2]

Significantly for present purposes, the Hughes Report thought that the new court procedure which they recommended for small claims (wherein consumers

[1] Hughes Report, para. 14.6.
[2] *Ibid.*, para. 11.19.

play the role of creditors or pursuers) should supplant the summary cause and thus:

> "also be the 'debt collecting' procedure for the great mass of actions, where there is no dispute about liability, raised, for example, by public utilities and large companies. We believe, however, that most cases of this kind will be settled on paper without an adjudication, as they are now in the summary cause. In any event cheaper procedures mean lower debts, and will be indirectly advantageous to defenders who have to pay expenses. Moreover, we do not want to exclude consumer defenders or small business defenders who at present may concede a strong case for fear of the expense of defending it."[1]

2.105 The practical considerations to which the Hughes Report adverted are particularly relevant in choosing between the courts and alternative tribunals as the appropriate forum for controlling enforcement. It should not be assumed that the debt arbitration service procedures described above would be less formal and therefore less expensive than any court procedure could be. It seems to us that, while arbitration procedures might be less formal than court procedures, they would be likely in practice to be more cumbersome and far more expensive than the very simple procedures which presently apply in undefended ordinary and summary cause actions for debt; and they would impose a new burden on creditors who often would be obliged to attend arbitration proceedings whether the debt was in dispute or not.

2.106 In any event, in relation to both the Enforcement Office and the debt arbitration service schemes, we do not think that, in the present economic situation, it would be realistic to recommend for Scotland a system which would place a heavy additional burden on public funds.

2.107 As regards the third assumption mentioned above, we do not believe that the courts would have any difficulty or hesitancy in making any orders devised for their use in giving time to pay or in relation to the control of enforcement if they had statutory powers to do so. Although the existing law affords only limited opportunities for orders controlling enforcement, the courts have been robust, and indeed innovative, in developing their existing "administrative" powers to grant or refuse warrants authorising the sale of poinded goods.[2] The courts also have wide experience in this domain. It has long been the policy of Parliament, sustained in recent statutes, to confer on the courts powers, exercisable in a wide variety of contexts, of fixing levels of periodical instalments of debts, of giving debtors time to pay, or of delaying or precluding enforcement of debt or repossession of property for that purpose or on social grounds; examples include instalment decrees for debts of small amount;[3] orders for payment by instalments of various consumer debts;[4] orders delaying repossession of goods on hire purchase,[5] or repossession of private or public sector dwellings,[6] to allow arrears to be paid; fixing levels of periodical

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[1] *Ibid.*, para. 11.24.
[2] *S.S.E.B.* v. *Carlyle* 1980 S.L.T. (Sh.Ct.) 98.
[3] Sheriff Courts (Scotland) Act 1971, s. 36(4); cf. Small Debt (Scotland) Act 1837, s. 18.
[4] Consumer Credit Act 1974, s. 129(2)(*a*); Moneylenders Act 1927, s. 18(*f*).
[5] Consumer Credit Act 1974, s. 129(2)(*b*); Hire Purchase (Scotland) Act 1965, s. 35(4).
[6] Rent (Scotland) Act 1984, s. 11(1); Tenants' Rights Etc. (Scotland) Act 1980, s. 15(1).

allowance on divorce and aliment;[1] fixing the amounts and instalments of criminal fines and compensation orders;[2] contribution orders reimbursing public authorities providing various social benefits;[3] fixing contributions by bankrupts out of current income to trustees in sequestration;[4] and discretionary powers to control civil imprisonment for failure to pay aliment or to perform other legal obligations.[5]

2.108 We have, however, been keenly aware that if the courts are to be entrusted with the responsibility for making orders giving debtors time to pay and controlling debt enforcement, the new justice which they will thus administer must, in the words we have quoted above from the Hughes Report, be "accessible justice" and be seen to be accessible in practice by those for whom it is designed. We have therefore carefully considered the measures which would be required to facilitate applications to the court by debtors who seek the protection afforded by the new jurisdiction which we propose. We revert to this aspect of our recommendations below.[6]

2.109 *Main problems of enforcement unsolved.* It should be emphasised that the introduction of a compulsory means enquiry would not solve the problem of what is to happen when a debtor defaults in the payment of sums ordered to be paid by the court or specialist tribunal or arbiter holding the means enquiry. It cannot be assumed that default would not frequently occur merely because the levels of instalments payable by the debtor had been fixed by an independent body following upon a means enquiry. Orders by a specialist tribunal or arbiter, like orders of a court, would still have to be enforced and the legislative choice of methods of enforcement would still be limited, by the lack of any alternative, to enforcement against the debtor's person or his property or income. For this reason, many of the most important problems involved in reforming diligence would not be eliminated but merely put a stage further back in the whole process of debt recovery.[7] In particular, the problems involved in the reform of enforcement against moveable goods would remain. For example, a means enquiry which depends on disclosure by the debtor of his attachable assets is not likely to yield reliable information as to the extent and saleworthiness of his poindable goods. Moreover, the introduction of extremely expensive procedures applying mainly to people who would not suffer poindings anyway, would leave unanswered the questions of whether, in what manner, and subject to what conditions and safeguards, moveable goods should be liable to be attached and sold to satisfy debts.

2.110 For these reasons, we conclude that the disadvantages of schemes making enforcement conditional upon a compulsory enquiry into a debtor's

[1]E.g. Divorce (Scotland) Act 1976, s. 5; Conjugal Rights (Scotland) Amendment Act 1861, s. 9.

[2]Criminal Procedure (Scotland) Act 1975, ss. 395 and 399; Criminal Justice (Scotland) Act 1980, s. 59(1).

[3]E.g. Social Work (Scotland) Act 1968 ss. 80 and 81; Guardianship Act 1973, s. 11(3); Supplementary Benefits Act 1976, ss. 18 and 19.

[4]Bankruptcy (Scotland) Act 1913, s. 98; *Caldwell* v. *Hamilton* 1919 S.C. (H.L.) 100.

[5]Civil Imprisonment (Scotland) Act 1882, s. 4; Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, s. 1.

[6]Para. 2.134.

[7]This point is made by G. Maher, "The Enforcement of Judgment Debts in Scotland" (1983) 2 Civil Justice Quarterly 244, 256.

means prior to enforcement would considerably outweigh the advantages of such schemes.

(2) Second possible option: debt arbitration on defender "opting out" of court actions and diligence

2.111 A rather different suggestion as to how special procedures for arbitration outside the courts might be used to control enforcement was made on consultation by the Scottish Consumer Council. They did not seek to create a system which would require the intervention of debt counsellors or debt arbiters in virtually every case (as a debt arbitration service would do) nor did they seek to supplant the role of the courts in relation to the constitution of undisputed debt. Instead, they suggested that a procedure should be introduced whereby a debtor would have an option, to be exercised on his own initiative, to refer the question of payment of his debt to a specialist debt arbiter. Debt arbitration in this sense would operate in parallel with the court system and resort could be made to arbitration at any stage in the debt recovery process whether before or after the grant of a court decree. The Council envisaged that a debt arbiter would be a social worker or a solicitor and that he would make his determination on the basis of disclosure by the debtor of the latter's circumstances after a hearing attended both by the debtor and the creditor. In the light of those circumstances, the arbiter would be empowered to make appropriate orders for payment by instalments or otherwise and regulating the execution of diligence.

2.112 We agree with the Scottish Consumer Council that orders restricting or controlling diligence should be dependent on a voluntary disclosure by the debtor of his means rather than on a compulsory disclosure. In two respects, however, we think that this solution does not make the best and most economic use of public manpower and financial resources. First, we think that voluntary applications for orders giving a debtor time to pay and restricting diligence should be confined to cases where a debt action has already been raised or, if a decree for payment has been granted, to cases where the risk of diligence being executed has become real and substantial, as where a charge has been served or diligence otherwise commenced.[1] Second, we think that the same considerations which led us to prefer the ordinary courts of law to debt arbitration in a compulsory means enquiry system[2] apply to debt arbitration in a voluntary scheme and that jurisdiction to make orders restricting or controlling diligence should be conferred on the ordinary courts of law.

(3) Third possible option: summary bankruptcy procedure replacing diligence

2.113 A proposal put to us by the Scottish Association of Citizens Advice Bureaux merits separate consideration: the proposal differed from the other proposals discussed above because (as we understand it) enforcement of debts would have been subsumed within a summary bankruptcy procedure in which a salaried court official would act as a "judicial trustee". It was envisaged that

[1]A charge is always served prior to a poinding and to give debtors an equivalent opportunity to obtain orders restricting diligence before their wages or salary is arrested, we recommend later that a charge should be served prior to an arrestment of earnings: see para. 2.122 and Chapter 6.

[2]See paras. 2.101 to 2.108 above.

where in a debt action the debtor had not entered appearance and was unemployed, "there should be a new step in the debt enforcement procedure after a charge is served whereby there is an obligation on the creditor to explain to the sheriff the debtor's situation". A new office, whose incumbent would be a salaried official called a "judicial trustee", would be created. The judicial trustee would "evaluate the debtor's resources and outgoings" and would also enforce debts in place of sheriff officers. It was envisaged that "enforcement should be subject to the control of the court but with a wider discretion than at present and should be carried out under a summary bankruptcy procedure". The creditor "should be required to approach the sheriff with information about the debtor's situation after the charge had been served but before the poinding". The sheriff would have power to authorise and restrict diligence.

2.114 The proposal understandably was put to us in very general terms and it may be that we have not understood it fully but, giving the proposal as fair consideration as we can, we have concluded that it would not be satisfactory or practicable. First, in the great majority of cases, the creditor would not be in a position to explain the debtor's situation. He would often not know if the debtor was employed and would almost certainly have no detailed knowledge of the debtor's resources or commitments. In almost all cases, only the debtor can explain his financial position to the sheriff. A compulsory means enquiry would therefore be essential, entailing all the disadvantages which we identified above. Second, as we explain in Chapter 4 when discussing debt arrangement schemes, bankruptcy procedures, involving among other things the vesting of assets in a trustee, are cumbersome, expensive and quite inappropriate for consumer debtors, most of whom do not have sufficient assets to make the procedure worthwhile.[1] They would often be particularly inappropriate where only one debt was being seriously pursued to the stage of decree and diligence which is in fact the usual case. Third, if, as seems likely, most consumer debtors would dislike the stigma of bankruptcy as much as the stigma of poinding and warrant sale, it is very doubtful whether the proposal would achieve its social policy aims. Fourth, in any event under the Bankruptcy (Scotland) Bill presently before Parliament, an insolvent debtor will be entitled to apply for his own sequestration with the concurrence of one qualified creditor.[2]

Section E. Our preferred option: discretionary control of diligence by ordinary courts of law on voluntary application by debtor

2.115 Although we have criticised various aspects of the schemes described above for the discretionary control of diligence, we agree with the proponents of these schemes that the primary aim of reform should be to make the operation of the system of debt enforcement more humane in its impact on debtors and their families while preserving the effectiveness of the system as

[1]The proposal seems to have contemplated "bankruptcy" in the sense of sequestration of assets because the proposal differentiated its bankruptcy procedures from our own proposals for debt arrangement schemes which would not involve vesting of assets in the administrator of the scheme.

[2]Bankruptcy (Scotland) Bill 1984, clause 5(2)(*a*) (see para. 1.15 above). Under the present law, an insolvent debtor can apply for his own summary sequestration.

a means of debt recovery: the debate concerns the means of achieving that aim rather than the aim itself.

2.116 If we are right in not accepting the foregoing schemes, then the correct path to reform must lie in evolving a system which would allow the creditor to pursue his debt by court action and diligence as under the present law but would permit the debtor to apply to the court for one or more orders controlling diligence. The courts would continue to have jurisdiction in entertaining debt actions and in authorising diligence when granting decree for payment. The courts, however, would also be given an important new jurisdiction to control diligence at appropriate stages of the debt recovery process. That process, with its filter effect, would remain, but subject to this new jurisdiction and to the reforms of the modes of diligence mentioned later. A debtor's disclosure of his means to the court would not be a compulsory prelude to enforcement by diligence but rather a condition of a voluntary application by the debtor to the court for the control of diligence.

2.117 We believe that it is possible to frame, on these lines, a system of discretionary control of diligence:

(*a*) which would make the best and most economic use of resources (for which the public or parties must pay) by using the existing court structure and by restricting court procedures to cases either where debt actions were pending or where the risk of diligence had become real and substantial;

(*b*) which would avoid any need to impose sanctions (such as the inappropriate penalties of fines or imprisonment) on unco-operative debtors other than liability for the expenses of diligence and would therefore be less coercive in important respects than a system of control based on compulsory means enquiries; and

(*c*) which would by and large preserve the effectiveness of the present system of debt recovery and diligence from the standpoint of creditors, (dependent as it is on the sanctions underlying the gradual evolution of a protracted debt recovery process giving debtors who can do so ample opportunity to pay), while giving debtors unable to pay a debt outright much greater opportunities and rights than under the present system to obtain an extension of time to pay and safeguards in appropriate cases from existing or threatened diligence procedures.

A number of important issues, however, remain including questions as to what types of order controlling diligence should be available; the precise stages in the debt recovery process at which debtors' applications for control of diligence should be permitted; and what procedural and other reforms are needed to make the orders controlling diligence readily available to those debtors for whose protection they are designed.

2.118 We consider these questions next. Although we believe that our proposals on discretionary orders and the reform of diligence would make a better use of resources than the proposals rejected in Section D, nevertheless we do not suggest that it would be possible to accommodate all our recommended reforms within the resources currently available to the courts. We would emphasise that some increase in resources would be required and

unless these extra resources were made available, some at least of our proposed reforms would in practice be unworkable.

New orders controlling diligence and giving time to pay

2.119 In the reformed system of debt enforcement which we recommend, debtors would look to the ordinary courts of law, generally the sheriff court, for protection from the rigours of diligence. This requires that important new powers should be conferred on the courts enabling them to give debtors the required degree of protection. At the heart of the reformed system, therefore, would be a range of new orders which the court in its discretion would be empowered to make in appropriate cases on the application of the debtor. We envisage that these orders would consist of the following:

(*a*) *Time to pay decrees,* which would provide for payment by instalments or a deferred lump sum and stop diligence during the period allowed for payment. Such decrees would be available in debt actions against individuals in the Court of Session and sheriff court where the sum payable under the decree does not exceed £10,000. These decrees would replace summary cause instalment decrees.[1]

(*b*) *Time to pay orders* which would convert "open" decrees (i.e. decrees for payment in a lump sum) into decrees having similar effects to time to pay decrees, would be introduced for the first time in Scots law. Whereas time to pay decrees would be available in court actions, time to pay orders would be available at the later stage when a charge to pay had been served on the open decree. They would also be available where a summary warrant for rates or taxes had been granted, or diligence (e.g. arrestment) had been used.

(*c*) *An order confirming a debt arrangement scheme* which would be a new insolvency process providing for (i) the orderly and regular payment by a multiple debtor of the debts due to his several creditors, (ii) the discharge of debts in appropriate cases on payment of a composition of less than 100p in the pound, and (iii) the prevention of diligence and bankruptcy proceedings against the debtor by creditors included in the scheme and all other creditors for civil debts while the scheme was in operation.

(*d*) *Orders in diligence processes:* the courts would be given powers to make new types of orders in poindings, earnings arrestments and summary warrant diligence including *orders recalling poindings* made, on the debtor's application, on certain equitable grounds.

In the following paragraphs, we briefly describe the main features of these new safeguards for debtors and thereafter we deal with the very important question of how such safeguards may be made readily accessible to debtors.

(a) *Time to pay decrees and time to pay orders (Chapter 3; draft Bill, Part I)*

2.120 The principles underlying time to pay decrees and time to pay orders, in particular the introduction of time to pay orders after charges are served or diligence executed in pursuance of decrees, were discussed in our

[1]See paras. 2.26 to 2.27 and 2.61 for the existing provisions on summary cause instalment decrees.

Consultative Memorandum No. 48 and all who commented on the topic agreed that such decrees and orders should be introduced in Scots law. We discuss the arguments and describe our proposals in more detail in Chapter 3.

2.121 We have emphasised that to hold a *compulsory* means enquiry in every case where at present an action for payment is raised or diligence instructed would be unrealistic since it would overload the courts with the function of investigating the means of too many debtors who are able to pay or whose cases would not in any event proceed to diligence. By contrast, a system of *voluntary* applications to the court for time to pay decrees and time to pay orders would, we envisage, normally involve a simple "paper procedure" whereby an offer to pay by instalments would be transmitted to the creditor and in making such an offer, the debtor could, but need not, disclose his means. Only if agreement was not reached as to whether a time to pay decree or order should be made, or as to its terms, would the court, if so advised, require a hearing in which the debtor would have to satisfy the court as to his inability to pay immediately in a lump sum. The courts would not be overloaded by unnecessary means enquiries and the need to invoke inappropriate sanctions, such as fines and imprisonment, would simply not arise.

2.122 We think it appropriate that time to pay decrees should be competent in court actions because the case is already before the court and it is reasonable that the court should be able to deal with the question of the debtor's ability to pay at that stage. Where court actions relating to the debt are not actually proceeding, we think that applications for time to pay and control of enforcement should not be possible until a stage is reached in the debt recovery process at which the risk of the creditor instructing diligence has become real and substantial: otherwise there would be a waste of resources. Accordingly, we propose that while time to pay decrees should be available in the court action, a time to pay order should be available at the later stage when the creditor has proceeded to the next formal step in debt recovery following the grant of decree. In the case of poinding and warrant sale procedures, this stage is the service of a charge by the officer of court which gives the debtor a period (which we think should be standardised at 14 days[1]) in which to settle the debt and warns him of the possibility of poinding in the event of non-payment. There is at present no comparable procedural stage in the case of arrestments of earnings (or indeed other arrestments). We have therefore recommended in Chapter 6 that the service of a charge should be a precondition of an earnings arrestment so that there will be an appropriate stage at which an employed debtor whose earnings are threatened by arrestment can apply for a time to pay order precluding such an earnings arrestment and, indeed, any other diligence for so long as he complies with the order. The service of a charge would also be an opportune time at which to notify the debtor of the availability of the new safeguards against diligence. In other cases an application would be competent where a diligence (e.g. an arrestment of funds other than earnings) was executed or begun, or where a summary warrant for recovery of rates or tax arrears was granted.

2.123 The privilege of extension of time to pay debts conferred by a time

[1]See Recommendation 5.2 (para. 5.12); Bill, clause 115(2).

to pay decree or time to pay order would be matched by restrictions on creditors' rights to commence new diligences or continue with existing diligences for so long as the time to pay provisions had not lapsed through the debtor's default[1] or been recalled on a change of circumstances. Thus it would generally not be lawful for the creditor to execute new diligences to enforce the debt. This restriction would apply to poindings, earnings arrestments and other arrestments and to adjudications of heritable property but not to inhibitions. Secured creditors' diligences and remedies (such as poinding of the ground or sequestration for rent or feuduty) would not be precluded. Practical considerations require that a time to pay order should not be competent when a particular diligence had reached an advanced stage (e.g. a poinding had been followed by a warrant of sale or an arrestment by decree of furthcoming) until that diligence was completed. Apart from that, time to pay decrees and orders would affect diligences already begun: the court would have a range of duties and powers to recall or restrict existing diligences and any existing diligence not recalled would be "frozen". Thus, when a time to pay order came into force, existing earnings arrestments would be recalled, and a poinding or arrestment of money, if not recalled by the court, could not be followed by warrant of sale or action of furthcoming (as the case may be) while the time to pay order was in force.

(b) *Debt arrangement schemes (Chapter 4; draft Bill, Part II)*

2.124 There is one problem in the field of debt recovery which we think could, and should, be mitigated by the introduction of a new legal procedure. This is the problem of multiple indebtedness. We have already noted that the normal pressures of diligence on a debtor may be aggravated where his several creditors enforce their debts by court actions and diligence simultaneously.[2] We have in view mainly consumer debtors and small traders. Such debtors rarely have sufficient assets to make sequestration under bankruptcy legislation worthwhile and in any event sequestration is a drastic remedy for an over-committed consumer debtor. Multiple indebtedness can also present problems for creditors despite the existing rules on equalisation of diligences outside sequestration[3] which are rarely invoked at any rate in cases of diligence against earnings or poindings of household goods. This may work to the disadvantage of the considerate creditor who gives the debtor time to pay. The main problem, however, is that there is no procedure which a multiple debtor can initiate for compelling his creditors to accept arrangements for the orderly and regular payment of his debts.

2.125 Although the research conducted for this report suggests that multiple debt problems may be less common than might be supposed (inasmuch as there appear to be relatively few cases in which two or more debts of a multiple debtor reach the diligence stage simultaneously),[4] we think the

[1]The provisions on automatic lapse by default are modelled on summary cause instalment decrees with modifications in the debtor's favour. Moreover, any default in payment of an instalment would not lead to the lapse of the right to pay by instalments unless the decree had been intimated to the debtor before the default occurred: see Chapter 3 at paras. 3.43 to 3.46.

[2]Para. 2.71 above.

[3]Bankruptcy (Scotland) Act 1913, s. 10 to be replaced by the Bankruptcy (Scotland) Bill 1984, Sched. 7, para. 10.

[4]See paras. 4.2 to 4.5 below.

problems are sufficiently acute to call for legislative intervention. In Chapter 4, therefore, we recommend the introduction in Scots law of a new insolvency process designed particularly for wage and salary earners and small traders in multiple debt, to be called a debt arrangement scheme. While provisional proposals to introduce such schemes in our Consultative Memorandum No. 50 evoked a mixed response on consultation, we think that there is a gap in Scots law which debt arrangement schemes would fill, and we are fortified in this view by a comparison with other countries where similar procedures have been introduced by legislation or recommended by official advisory bodies.[1]

2.126 We envisage that a debt arrangement scheme would have the following main features:

(*a*) The overall object of the scheme would be to allow a debtor an extension of time to pay his debts in reasonable instalments over a maximum prescribed period, normally three years with possible extension to five years in all, during which the debtor's compliance with the scheme would be supervised by an administrator appointed by the sheriff.

(*b*) All creditors in existing and future debts would be generally precluded from doing diligence or petitioning for sequestration while the scheme operated. Existing diligences would be recalled unless they had reached an advanced stage in which case the sums disbursed to the creditor would be reduced by an amount equal to the net proceeds of the diligence.

(*c*) The scheme containing the debtor's proposals for payment of all his civil debts would be submitted in draft to the creditors and would only come into operation on being confirmed by the sheriff after hearing any objections by creditors.

(*d*) During the currency of the scheme, the administrator (who would normally be the sheriff clerk or a member of his staff) would collect payments due by the debtor under the scheme and disburse them to the creditors who would all rank *pari passu* (rateably) on disbursements, with special provision being made for contingent and other creditors included later during the life of the scheme.

(*e*) The sheriff would have power to order deductions of appropriate amounts from the debtor's earnings to be made by the employer and paid to the administrator for disbursement to the creditors.

(*f*) The scheme would provide either for payment in full of the debts or in appropriate cases for a composition of less than 100p in the pound. The debtor would only obtain a discharge of debts at the end of the scheme if he had complied with it.

The main differences from sequestrations would be that the very complicated rules for ranking preferred and secured creditors in bankruptcy would not apply and that the debtor would not be divested of his assets, though he might be required by the scheme to sell specified assets, the proceeds of which would be distributed to the creditors by the administrator.

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[1]See para. 4.31 below.

2.127 Clearly such a process would require a full means enquiry and, in consonance with our view that compulsory means enquiries should not be required outside sequestration, a scheme should not be made except on the voluntary application of the debtor who would have to make a full disclosure of his means as a condition of obtaining a scheme. Debt arrangement schemes are clearly more suitable for wage or salary earners than for poor unemployed debtors. Difficult questions therefore arise as to whether multiple debtors who can afford to pay only very small amounts (e.g. unemployed debtors) should be entitled to apply or whether the availability of schemes should be restricted, at least until experience of the working of the schemes in practice has been obtained, to cases where the likely yield to creditors would justify the public expense and the work involved on the part of the court and the administrator. We think however that it would be unrealistic to recommend schemes which yield nothing or almost nothing for the creditors.

(c) *Other orders controlling diligence*

2.128 As we indicated above,[1] time to pay decrees, time to pay orders and debt arrangement schemes would be of wide and general application in their effect on diligences enforcing the debt or debts concerned, and indeed would affect diligences of all types with minor exceptions.[2] In addition to these general safeguards for debtors, specific reforms of the main modes of diligence—poinding and sale and arrestment of earnings—would be made, including the conferment of powers on the sheriff to make orders recalling, or releasing goods from, a poinding. One such power is of particular importance in the present context. This is the new power which we propose for the sheriffs to make an order (on the debtor's application) recalling a poinding on the same grounds as, under our recommendations, he could refuse to grant warrant of sale at the later stage when the creditor applies for such a warrant (broadly, undue harshness, low valuations or the likelihood that the proceeds of a warrant sale would not cover the expenses of applying for and executing the warrant).

Orders declaring debts unenforceable on ground of debtor's inability to pay?

2.129 In our Consultative Memorandum No. 48,[3] we sought views on whether the courts should be given a power to make an order declaring a particular debt to be unenforceable in whole or in part on the ground of the debtor's inability to pay. The order, we thought, should be capable of variation or recall on a change of circumstances. Such a declarator, we envisaged, would in most cases be an order rendering part of the debt unenforceable and would normally be combined with an order allowing the balance of the debt to be paid by instalments. Such an order has a parallel in the Northern Ireland certificates of unenforceability[4] and in the enforcement restriction orders

[1]See paras. 2.123 and 2.126(*b*).

[2]E.g. heritable creditors' diligences and diligences which had proceeded to an advanced stage, e.g. warrant of sale or decree of furthcoming, would not be affected, while the new diligence of current maintenance arrestment would be affected by debt arrangement schemes but not by time to pay decrees or orders.

[3]Para. 1.22 and Proposition 1 (para. 1.26).

[4]Judgments Enforcement (Northern Ireland) Order 1981, articles 18 and 19 (S.I. 1981/226).

recommended by the Cork Report for England and Wales.[1] This proposal evoked a mixed response on consultation and on reflection we think that it should be rejected. A combined unenforceability and instalment order would, in practical effect if not in theory, operate to allow a kind of discharge on payment only of a composition and, as the Law Society of Scotland observed to us, such a compulsory composition should not in principle be imposed on creditors outside insolvency proceedings. Compositions in debt arrangement schemes would apply to all creditors, whereas a composition of this kind would only apply to the creditor whose debt was affected by the unenforceability order. We think that this would be discriminatory and unjust to that creditor. Moreover, the appointment of an administrator can be justified in debt arrangement schemes (which would affect all debts), but could not be justified in unenforceability orders (since they would affect only one debt), which therefore could not be properly supervised.

2.130 We are aware that unless debt arrangement schemes are made available to debtors who can afford to pay only very small sums towards the satisfaction of their debts, the anomaly may arise that discharges on payment of a composition would be available to debtors who, though insolvent, have at least some income or assets, whereas such discharges would not be available to the poorest debtors, with no assets, dependent on social security. The poorest debtors, however, are at risk mainly from poindings of household goods and if they are conceded the right to apply for recall of a poinding, they will attain in substance the same protection as would have been afforded by a declarator of unenforceability having regard to the restrictions on second poindings in the same premises for the same debt.

2.131 Furthermore, while we think that an order extending time to pay may be appropriate even though the creditor has not ascertained the extent of the debtor's poindable assets, we do not see how a sheriff could feel justified in declaring a debt to be unenforceable if he had not had the opportunity of verifying the debtor's moveable goods by examining a report of a poinding (containing valuations by the officer of court which the debtor could challenge if so advised). In our view, therefore, a right conferred on a debtor to apply for recall of a poinding, exercisable after the poinding was executed, would have this great advantage over an application for a declarator of unenforceability that the inventory and valuations in the report of poinding would always be available to the court in applications of the former type but not in the latter. For these reasons, we recommend that declarators of unenforceability should not be introduced.

Orders declaring debts unenforceable on ground of creditor's fault in extending credit?

2.132 In our Consultative Memorandum No. 47, we referred to an argument that consumer debt should not be enforceable by diligence if the creditor can be said to have been at fault in extending credit to the debtor in the first place. We noted that representations had been made to the Payne Committee that "some curb should be placed upon creditors who enter into rash, speculative

[1]Paras. 309 and 310.

or irresponsible transactions with judgment debtors".[1] We sought views on whether the court should be empowered to make an order rendering a consumer debt unenforceable by diligence if, at the time of extending credit, the creditor had omitted to make enquiries as to whether the debtor was an undischarged bankrupt, or had a recent decree for payment pronounced against him, in order to establish the debtor's creditworthiness. This proposal received little support on consultation.

2.133 We have come to the conclusion, which is supported by the Payne and Crowther Reports,[2] that legislation on these lines would not be justifiable. It would in effect impose a burden upon creditors not only to make enquiries as to the creditworthiness of a debtor before extending credit, but also to keep a record of those enquiries. Thus, to take a simple example, a plumber who mended a tap for a customer on credit might be at risk unless he made appropriate enquiries as to the customer's credit standing and then kept a record of these enquiries. We think that the disruption which the consequent burden on creditors would cause to the credit system as a whole would be unacceptable. The enquiries might often be resented by the recipients of credit, the majority of whom are creditworthy and pay their debts. Moreover, such enquiries would have no relevance in those many cases where the debtor's default was attributable either to events arising after the original extension of credit or to circumstances which no enquiry into creditworthiness could have revealed. We do not therefore make any recommendation that diligence should be made conditional upon the prior making of enquiries into the creditworthiness of the debtor at the time when credit was extended.

(d) *Assisting debtors to obtain the protection of the court*

2.134 We have already observed that the new justice to be administered by the courts must be accessible justice and appear as such to those for whom it is designed. The formulation of procedural rules and other measures which would put the new safeguards within reach of debtors presents difficulties which must be solved if reform is to be successful. It was, of course, awareness of precisely these difficulties which inspired the proposals by some consultees to establish specialist tribunals or arbiters, but other consultees who envisaged that control of enforcement should remain with the courts also emphasised the need for such measures.[3]

2.135 The research into debtors' circumstances discloses that debtors often find it difficult to understand the terminology of legal documents, the nature of the procedure of court action and diligence and its possible impact on

[1]Payne Report, para. 849; also para. 56. The Crowther Report para. 6.4.1. remarked that "all too frequently, credit is extended to those who on subsequent inquiry have been found not to be worthy of credit and indeed who have previously defaulted on numerous credit transactions".

[2]Payne Report, para. 853; also Crowther Report which recognised (at para. 3.6.15) that credit grantors should be *encouraged* to make proper enquiries but did not propose that creditors should be penalised for failing to make such enquiries, and observed "that consumer insolvency in Britain has not at present become such a serious problem that we need to consider the desirability of controlling the availability of consumer credit to all in order to protect the minority of defaulters".

[3]For example, the General Council of the Scottish Trades Union Congress remarked that "the existing Court system and procedures do not encourage people to use the Courts to settle debt problems".

them.[1] Further, more debtors would benefit from instalment decrees than the small number (16% or thereby) of defenders who in fact apply for summary cause instalment decrees.[2] On the other hand in more recent times party litigant procedures have been and are successfully operated by the Scottish courts e.g. in the field of divorce[3] and the recent small claims experiment in Dundee.[4] Moreover, experience in certain court districts of the security of tenure provisions in the Tenants' Rights Etc. (Scotland) Act 1980, Part II, shows that rent defaulters under threat of ejection will come to court in large numbers in order to obtain a breathing space in which to pay off their rent arrears, if publicity is given to their rights to apply to the court and if they are encouraged to approach the court by social work departments, other helping agencies, and district councillors.[5] Furthermore, under our recommendations the debtor's application for control of diligence will be permitted not only, as under the present law, at the court action stage (when the prospect of diligence may seem remote) but also when diligence is imminent and even after it has begun. All these factors suggest that the reluctance of debtors to approach the courts for protection can to a great extent be overcome.

2.136 We envisage that the forms and procedures would be kept simple and that the procedure should be capable of being initiated and pursued with the help of the court by ordinary persons unfamiliar with court procedures, including persons of lower than average capacity in managing their affairs. Though legal advice and assistance should continue to be available, we think that debtors facing actions for debt and diligence would as at present generally not turn to solicitors for help.[6] We do not think that, as a general rule, legal aid should be available to ensure representation of debtors by solicitors; legal aid applications would unduly delay the execution of diligence and the issues involved in giving time to pay and controlling diligence can, we think, be generally resolved without involving the professional skills of solicitors at the expense of the public purse. Legal aid should therefore be restricted to a limited class of exceptional cases such as appeals on points of law and proceedings concernings breaches of poinding or the rights of third parties in poinded goods.

2.137 To assist unrepresented debtors in obtaining the protection of the court, our recommendations include a variety of measures:[7]

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[1]E.g. Edinburgh University Debtors Survey, paras. 5.1 to 5.9; O.P.C.S. Defenders Survey, para. 8.8.

[2]See para. 2.27.

[3]See Doig and Jones, *The Simplified Divorce Procedure* (1984) Scottish Office Central Research Unit Papers.

[4]See Connor and Doig, *A Research Based Evaluation of the Dundee Small Claims Experiment* (1983) Scottish Office Central Research Unit Papers.

[5]See Adler, Himsworth and Kerr, *Public Housing, Rent Arrears and the Sheriff Court* (1985) Scottish Office Central Research Unit Papers.

[6]The O.P.C.S. Defenders Survey (p.53) found that almost two thirds (63%) of defenders in debt or debt-related actions did not seek help or advice from any source. The remaining 37% sought advice from the following sources: friends or relatives (13%); solicitor or lawyer (9%); Social Work Department (9%); social security office (7%); Citizens Advice Bureau (3%); creditor (1%); other sources (3%).

[7]See paras. 9.27 to 9.31.

(1) The new powers of control of enforcement would as a general rule be exercised by the sheriff even where the decree being enforced had been granted by the Court of Session.[1]

(2) Debtors must not be deterred from lodging applications for time to pay and control of diligence by fear of incurring expenses of unforeseeable amounts. Accordingly, as the Law Society of Scotland suggested, court dues should not be exigible,[2] and in proceedings between the debtor and creditor not involving third parties, debtors should generally not be liable for the expenses of creditors (or vice versa) with the necessary exception that frivolous applications could, at the court's discretion, be penalised by an award of expenses not exceeding a prescribed sum.[3]

(3) It can be confidently predicted that court staff would give information to debtors who sought it as to the procedures for making applications, and in addition sheriff clerks should be under an express statutory duty to assist debtors in completing forms of application.[4]

(4) Once an application by a debtor for a time to pay order, or recall of a poinding, or other safeguard had been lodged, the service of forms on the creditor and any other parties would be effected by the sheriff clerk.[5] In debt arrangement schemes, the preparation of a draft scheme embodying the debtor's proposals for payment and the various procedural steps would be undertaken by the administrator.[6]

(5) Rules of court should be made allowing lay representation of debtors at any hearings before the sheriff.[7]

(6) Forms served on or used by debtors should be prescribed by rules of court and should be in simple and intelligible language.[8]

(7) At appropriate stages in diligence procedures, forms served on or delivered to debtors (such as charges or poinding schedules) should notify the debtor of his rights to apply for the new discretionary orders controlling diligence.[9]

2.138 We carefully considered an imaginative proposal put to us by the Law Society of Scotland for a new integrated procedure whereby the various orders safeguarding debtors would be made available in a single process initiated by the debtor lodging a simple form of application listing all his debts and seeking the exercise of the court's jurisdiction without specifying the type of order (e.g. time to pay, debt arrangement scheme, recall of poinding, etc.) which he wished the court to make. In other words, the debtor would simply emit a sort of "cry for help" leaving it to the sheriff to decide what type of order

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[1]See e.g. Bill, clauses 4 and 9 (time to pay orders); 14 (debt arrangement schemes); 49 (recall of poinding); 52 (warrant of sale); 78 (recall of earnings arrestment); 83 (recall of current maintenance arrestment); 92 (recall of conjoined arrestment orders).

[2]Recommendation 9.6(5) (para. 9.31), Bill, clause 121(1).

[3]Recommendation 9.8(1), Bill, clause 117 and Sched. 1, paras. 7–9; Sched. 6, paras. 28–30. Debtors would however be liable for the expenses of one application by a creditor for warrant of sale: Bill, Sched. 1, para. 1(1)(*g*).

[4]Recommendation 9.6(1) (para. 9.31); Bill, clauses 5(2) and 121(2).

[5]E.g. Bill, clauses 5(5), 6(4), 49(4) and (5).

[6]Bill, clauses 19–32.

[7]Recommendation 9.6(2) (para. 9.31); Bill, clause 122.

[8]Recommendation 9.6(4) (para. 9.31).

[9]Recommendation 9.6(3) (para. 9.31).

was appropriate in the circumstances. We were initially attracted by this proposal since it seemed to provide a solution to the problem of making the protection of the court readily available to debtors.

2.139 Having examined the practical implications of this proposal, however, we think it is open to serious objections. First, we think that the burden on court resources entailed by the integrated procedure would make it quite impractical. Since the information as to means and debts which forms of application would embody would be unverified and too brief to serve, by itself, as the basis of a decision choosing the appropriate form of order, it appears to have been envisaged—and would certainly seem an essential step in the procedure—that every case would involve an interview or hearing before the sheriff or an enquiry into the debtor's means. It appears therefore that every case, even single debt cases, no matter how simple, would have to pass through a procedure which would have many of the complications of an application by a multiple debtor for a debt arrangement scheme, even if the sheriff decided ultimately to treat the case as appropriate only for a time to pay order, or other order affecting a single debt. Second, it seems to us that this cumbersome procedure would be quite unnecessary in many cases where only one debt had reached the stage of court action and diligence and in all cases where the debtor knew what type of order he wanted. The number of such cases should not be under-estimated. We think that the solution under-estimates the ability of debtors to choose the order they seek from what will be a limited field of choice. Third, under our proposals, forms of application could be prescribed which set out the type of order sought, and there would be nothing to stop a debtor from applying for two or more such orders simultaneously. We have therefore come regretfully but nonetheless firmly to the conclusion that an integrated procedure on the lines suggested should not be adopted.

Section F. Reform of poindings and warrant sales, diligence against earnings, and summary warrant diligence

2.140 The new discretionary orders just discussed—time to pay decrees, time to pay orders and debt arrangement schemes—would provide very important safeguards for debtors unable to pay their debts outright. These orders would affect in principle all diligences enforcing unsecured debts. There remains, however, the problem of what is to happen in circumstances (which may frequently occur) where unfortunately a debtor defaults in payment under one of these orders or where a debtor in financial difficulties fails to obtain such an order, and enforcement by diligence becomes necessary. Since the impact of diligence on debtors—especially the later stages of poinding and warrant sale procedures—lies at the root of the public concern about diligence, the solution of this problem is clearly of central importance. Arrestments of earnings also require reform partly because of their severe financial impact on debtors and partly because their limitation to one pay packet makes them relatively inefficient from the standpoint of creditors. These problems are left unsolved by the introduction of discretionary orders stopping diligence pending payment arrangements. We consider therefore that reforms require to be made to these two modes of diligence and also the special forms of poinding authorised by summary warrants for the recovery of rates and taxes.

2.141 Before outlining our approach to the reform of these diligences, a preliminary question arises concerning the scope of this report and the relationship between diligence and social security payments. At present, the wide range of social security benefits, pensions and allowances payable by the Department of Health and Social Security and unemployment benefit payable by the Department of Employment are exempted from diligence by statute[1] and probably also by the common law.[2] Partly as a result of these exemptions, the poinding of goods in the debtor's residence is sometimes used as a means of bringing pressure on a debtor to pay his debts out of social security receipts.[3] As a consequence, it has been suggested that the present system whereby diligence is used in this indirect way to elicit payment from social security receipts might be replaced by arrangements which would enable small amounts from social security to be attachable for debt on analogy with the arrangements whereby deductions from the weekly rate of supplementary benefit may be paid direct to a fuel authority or a local authority landlord. As we indicated in our Consultative Memorandum No. 47,[4] however, this proposal goes beyond the reform of diligence and relates mainly to the amendment of social security law[5] which could only be appropriately considered by an advisory body if it had United Kingdom terms of reference. We therefore proceed on the assumption that social security and other statutory benefits will continue to be exempt from diligence. We would add however that our recommended reforms should change the position: the widening of the exemptions from poinding to cover all necessary household goods should make it less necessary for debtors to seek social security exceptional needs payments to preserve such goods from poinding, and it would be for consideration whether the new orders giving an insolvent debtor time to pay and precluding diligence would in any event be preferable to the arrestment or diversion of his social security income to private sector creditors, albeit that payments under such orders would presumably come from social security income.

(a) Reform of poindings and warrant sales (Chapter 5: Bill, Part III)

(i) *Reform or abolition?*

2.142 Our consultation revealed widespread dissatisfaction with aspects of the present law and practice of poindings and warrant sales. We were strongly urged by some of our consultees that, on social grounds, abolition was required rather than reform. We would emphasise at the outset that we have no doubt that the diligence as it presently operates does indeed require very substantial reform; and we hope that our recommendations for modernisation and reform of the diligence will allay the concern of many who have argued for its abolition.

2.143 Some of the demands for abolition seem to have been based, at least

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[1]See e.g. Child Benefit Act 1975, s. 12; Social Security Pensions Act 1975, s. 48; Supplementary Benefits Act 1976, s. 16.

[2]*Sinton* v. *Sinton* 1976 S.L.T. (Sh. Ct.) 95.

[3]As might be expected, poindings against recipients of supplementary benefit and other forms of social security are common, but see para. 2.153, footnote.

[4]Paras. 3.7 to 3.10.

[5]For example, if new diversion arrangements for social security benefits were to be seriously considered, one option would be to make the benefits assignable by the claimant rather than arrestable by the claimant's creditor.

in part, on certain misunderstandings. For example, it is a mistake to assume that the diligence of poinding is an anachronistic survival from a harsher era simply because a vernacular Scots term of venerable age is used to denote that method of enforcement.[1] Moreover, there is no foundation at all for the belief that enforcement against moveable goods in the debtor's possession is somehow peculiar to Scotland: on the contrary, enforcement against moveable goods is permitted in every country of whose practice we are aware. Indeed, in England and Wales, execution against goods, including household goods in debtors' dwellings, is by far the most commonly used method of enforcing judgment debts,[2] and if one compares the numbers of county court warrants for execution with the sales executed, it appears that the English procedure has a filter effect not unlike that in Scotland.[3] Moreover, so far as the procedures allow comparisons to be made, the extent to which creditors rely on enforcement against goods as compared with enforcement against earnings is much greater in England and Wales than in Scotland.[4] Any cross-border differences in public attitudes to enforcement against goods, therefore, are probably explicable by reference to procedural differences: for example, in England sales are generally held in auction rooms, not as in Scotland in debtors' dwellings. Given that the Scottish procedures were last revised in 1838,[5] it would be surprising if some reforms were not now necessary. However, pejorative epithets sometimes used in public debate (such as "barbaric", "mediaeval" or "Dickensian") seem to us out of place when applied to the concept of enforcement against moveable goods as such, however much they may be justified in relation to specific aspects of the diligence procedure, such as sales in the debtor's home and the prior advertisement of such a sale.

2.144 Moreover, in considering whether a particular mode of enforcement has outlived its usefulness and is ripe for abolition, there is an important limiting factor which must be borne in mind. Every society which holds to the belief that people able to pay their debts should be required by law to do so must make available to creditors modes of enforcement from a field of choice which is limited by economic and social realities to diligence against the debtor's person (i.e. civil imprisonment for debt), or diligence against his heritable or moveable property or his income. All these modes of enforcement

[1] "Poinding" is simply the old Scots word for "impounding" (Scottish National Dictionary, vol. vii, s.v. "poind") though nowadays poinded goods are not impounded but left in the debtor's possession.

[2] In England and Wales, in 1983, over one million (1,148,001) county court warrants for execution against goods to enforce judgment debts were issued as compared with under 80,000 applications for attachment of earnings orders enforcing judgments (79,280) and under 43,000 attachment of earnings orders made (42,612): *Judicial Statistics Annual Report 1983* (Cmnd. 9370) Tables 7.18 and 7.19.

[3] In 1983, there were 1,148,001 county court warrants of execution against goods and as few as 3,633 sales made. In 1982, the corresponding figures were 1,059,590 warrants and 2,919 sales made: *ibid* Table 7.18.

[4] For example, in 1978 (the only year for which statistics on arrestments of earnings are available and comparisons can be made) for every attachment of earnings order there were about 20 warrants of execution against goods in England and Wales. By contrast, in Scotland for every "first" arrestment of earnings there were as few as seven or eight charges (the first step in diligence against goods).

[5] See the Debtors (Scotland) Act 1838, some of whose provisions had been enacted earlier in the Bankruptcy Act 1793 (c. 74) (otherwise known as the Payment of Creditors Act 1793), s. 5; and the Bankruptcy Act 1814 (c. 137) s. 4.

are necessarily coercive and in any given legal system at any given time it frequently happens that a particular mode of enforcement is especially unpopular. For example, in England in the 1960s, civil imprisonment for debt was much criticised and it was abolished in 1970 as a mode of enforcing ordinary judgment debts.[1] It was found, however, that abolition by itself would have left a gap in the enforcement procedures available to creditors under English law. Accordingly, attachment of earnings (which had been abolished in England a century earlier[2]) was re-introduced in its place.[3] In Scotland, for some decades prior to 1870, arrestments of wages were especially unpopular[4] until the reforms of that year.[5] Civil imprisonment, never widely used on this side of the border, was virtually abolished in Scotland as a general creditor's diligence in 1880 and in 1882 was made subject to judicial discretion in most of the few cases where it remained competent and was in practice used.[6]

2.145 In recent years, the diligence of poinding and warrant sale has become probably the most unpopular diligence in Scotland as well as being the most frequently used. It is tempting to conclude from this that the diligence can simply be abolished as a humanitarian reform equivalent to the virtual abolition of civil imprisonment and as the logical next step in the progressive development of the law. We think that this temptation should be resisted unless it can be demonstrated that an alternative mode of enforcement can be devised which would be as effective and more socially acceptable. Having considered the matter anxiously and at length, we believe that such an alternative cannot be devised.

2.146 On consultation, those who called for "abolition" of the diligence of poinding and warrant sale do not seem to have contemplated the complete abrogation of the diligence throughout its whole field of application: thus, various qualifications were made such as abolition "as far as the domestic sector is concerned" (Convention of Scottish Local Authorities) or abolition "in respect of domestic/individual debt cases" (Labour Party, Scottish Council). And it may be that a similar restriction was contemplated by the Scottish Association of Citizens Advice Bureaux when, as noted above,[7] they suggested that the diligence should be replaced by a summary bankruptcy procedure.

2.147 To focus the true issues, therefore, certain irrelevant considerations must be set aside. Thus we do not think that those who call for abolition of the diligence of poinding and warrant sale are seeking to argue for the abolition of diligence against all moveable goods as such. There has never, we think, been any controversy over the propriety of a creditor executing diligence against, say, commercial goods owned by a trader in order to recover

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[1]Administration of Justice Act 1970, s. 11.

[2]Wages Attachment Abolition Act 1870.

[3]Administration of Justice Act 1970, ss. 13–28, re-enacted in the Attachment of Earnings Act 1971.

[4]See McKechnie Report, paras. 66–76 for the history of limitation: see also D. Englendar, "Wage arrestment in Victorian Scotland" (1981) 60 Scottish Historical Review 68.

[5]Wages Arrestment Limitation (Scotland) Act 1870.

[6]Debtors (Scotland) Act 1880; Civil Imprisonment (Scotland) Act 1882.

[7]See para. 2.113.

debts from that trader.[1] Moreover, we do not think that an argument for abolition of diligence against moveable goods as a class could be sustained even if it were advanced. As the Hughes Report put it[2] "where the debtor has some resources at his disposal it is obviously important that our system of justice provides a reasonably efficient means for the creditor to gain possession of whatever proportion of them is needed to extinguish the debt". If such procedures were not available in relation to moveable goods, of whatever kind and however great the value, then it seems to us that great inequities would arise not only to creditors but also as between classes of debtors depending upon the character of the assets which they owned and there would be a wholly undesirable temptation to convert funds in bank accounts or other assets so far as possible into corporeal moveable goods (such as luxury goods or collectors' items) in order to put them beyond the reach of creditors.[3]

(ii) *Exemptions for all personal or consumer debts or all household goods?*

2.148 We think that the true issue in reform relates to the extent to which the diligence of poinding and warrant sale should be allowed to be executed against the goods of certain classes of debtor or against certain categories of household goods. Put another way, that issue is concerned with whether the existing exemptions from diligence against moveables (which broadly apply so as to exempt certain essential household goods) should be restated so as to confer exemption on whole categories of debtors (such as consumer debtors) or in respect of whole categories of moveable goods (such as household goods).

2.149 We do not think that a global exemption from diligence against moveables for the benefit of consumer or non-business debtors as a class would be equitable. A global exemption of such a kind would have the same undesirable consequences as exempting moveable goods as a whole from diligence. It would enable a debtor to retain, free from diligence by his creditors, goods of considerable value merely because of the irrelevant accident that his debt happened to be a "consumer" debt. Even a Rolls Royce car, for example, would cease to be poindable for a debt incurred by the owner as an individual or as consumer. A global exemption would also result in unacceptable inequities as between classes of debtor. A commercial debtor, in all cases, would remain subject to the full rigour of diligence in respect of all his goods, including his household goods, whereas a consumer debtor's moveable goods would be creditor-proof however much those goods might be excess to his needs.

2.150 Another legislative option is that all goods in a debtor's dwellinghouse ("household goods" for short) should be exempt from poinding and warrant sale. We do not accept this option. While a person's home may be his castle, we do not think that it should be turned into a sanctuary in which he can

[1]However, the present exemption of "tools of the trade" from diligence does indeed require reform.

[2]Para. 12.2.

[3]It is no answer to say that such goods would be attachable in sequestrations under bankruptcy legislation: exemptions from sequestration and diligence should be the same and it would be nonsensical to require a full sequestration of all assets where only moveable goods were sought to be attached.

collect moveable goods and place them out of the reach of his creditors. A good exemption law should not allow the unscrupulous to evade their creditors' lawful claims.

2.151 The point is sometimes made by those who argue for the exemption of household goods as such from diligence, that diligence against such goods can only be uneconomic from the creditor's point of view, given the likely low resale value of the goods in question. We do not think that this is a good argument for creating an exemption for household goods as a class. As we point out above,[1] the low level of debt recovery under the very small number of warrant sales which actually take place does not at all indicate that the diligence *as a whole* is economically ineffective. The level of recovery at warrant sales (on which the economic inefficiency argument is based) is not a true measure of the efficiency of the diligence. The true measure is the extent to which creditors are able, against the background of the potential threat of a warrant sale, to elicit payment of their debts in the vast majority of cases without recourse to such sales.

2.152 It might be assumed that, given that the final stage of warrant sale is (viewed in isolation) inefficient when applied to household goods but the earlier stages of the diligence relatively effective in eliciting payment, then in diligence against household goods, the final stage of warrant sale should be abolished leaving the earlier stages to operate. This argument, however, overlooks the fact that the earlier stages of a poinding process would be wholly ineffective, and indeed pointless, if the ultimate threat of an eventual sale was not present in the background as a possibility. The whole point of a poinding is to attach goods as a necessary prelude to their eventual compulsory sale if, in the meantime, the debt is not paid.

2.153 Another argument which has been advanced to support abolition of poindings of household goods is that it would put an end to the practice whereby poinding and warrant sale procedures are used to elicit payments from social security benefits which are not themselves liable to diligence in the hands of the department paying the benefit and are intended to be used for the subsistence and maintenance of the debtor and his dependants. We think, however, that the abolition of poindings of household goods in order to frustrate that practice would be an undiscriminating solution since the abolition would apply to all debtors who are at present subjected to poindings, many, perhaps the majority, of whom are not dependent on social security as their main source of income.[2]

(iii) *Outline of recommended reforms (Chapter 5; Bill, Part III)*

2.154 We have concluded therefore that the proper strategy for reforming dilligence against moveable goods is not to introduce undiscriminating

[1]Para. 2.49.

[2]Edinburgh University Debtors Survey, para. 2.4 found that of 100 debtors subjected to diligence who were interviewed, the number of debtors out of work at the time when credit was extended was 25; at the time of the summons in the court action 58; and at the time of the interview (soon after the execution of various steps in diligence) 37. For defenders in court actions, see para. 2.64 above: at the time of the debt or debt-related action, 55% of defenders were in full-time employment, and in 59% of defenders' households social security was *not* the main source of income.

legislation abolishing the diligence or exempting all consumer debtors or all household goods from its operation but rather to reform the diligence so that its impact on debtors is made as humane as is possible consistently with the need to retain the effectiveness of the diligence as a method of eliciting payment from debtors who can, but will not, pay their debts. In formulating detailed reforms, we have sought to strike a proper balance between the interests of debtors and creditors and while we concede that we have found that task to be extremely difficult, we are firmly of opinion that the strategy itself is right.

2.155 We propose that the main features of the reformed diligence would be as follows.

(1) The diligence would continue to take the form of an attachment followed by a sale arranged by an officer of court under the supervision of the sheriff and the main stages of the diligence (the charge, the poinding, the grant of warrant of sale on the creditor's application and the sale itself) would be retained. We envisage that the diligence would continue to have a filter effect such as we described above and indeed the additional safeguards suggested below would be likely to result in even fewer cases reaching the stage of warrant sale than the tiny percentage under the present law. Despite these safeguards, we think that the diligence would continue to be a credible sanction against debtors able to pay their debts.

(2) The charge would be retained as a means of notifying the debtor of the decree, of warning him that poinding may follow in default of payment and of informing him of his new rights to apply for a time to pay order or a debt arrangement scheme. We envisage that the service of a charge would continue to be a valuable catalyst for payment arrangements and a means of enabling sheriff officers to report to creditors on the prospects of recovery.
(Paragraph 5.9; clause 115(1)).

(3) We believe that creditors should continue to be entitled to ascertain the extent of the debtor's poindable goods and this necessarily implies that officers of court executing a poinding should retain their power of entry to the debtor's premises, by force if necessary. But officers of court should not be entitled to enter empty houses or houses with unattended children under 16 unless prior notice of intended entry had been given to the debtor and, in the case of unattended children, the director of social work or unless the sheriff's authorisation had been obtained.
(Paragraph 5.85; clause 45).

(4) The exemptions from poinding of household goods and certain other goods should be codified by statute, capable of amendment by statutory instrument, and the range of exempt goods should be extended to cover, among other things, all items reasonably required for the use of the debtor and the members of his household.
(Paragraphs 5.48, 5.51 and 5.57; clause 43(1) and (2)).

(5) As under the present law, poinded goods should normally remain in the debtor's possession unless and until, at a later stage in the

procedure, (which in the great majority of cases is not likely to be reached), the goods have to be removed for sale.
(Paragraph 5.95; Recommendation 5.19(1)(i); clause 46(1)(*g*)).

(6) After the poinding, the debtor would retain his existing right to apply to the sheriff for the release of exempt goods and have a new right to apply for the release of individual items on the ground of undue harshness.[1] He would have a much longer period than under the present law to redeem goods at their appraised values, and a second chance of redemption if the creditor applied for warrant of sale.
(Paragraphs 5.65, 5.95 and 5.150; clauses 43(4), 46(5), 48(1) and 53(2)).

(7) At any time after a poinding and before the creditor applied for warrant of sale, the debtor would have an important new right to apply to the sheriff for recall of the poinding on the ground that the eventual grant of warrant of sale would be unduly harsh; or that the valuations of the pointed goods made by the officer executing the poinding (which fix the minimum amounts credited to the debtor for the goods if they are sold or transferred to the creditor in default of sale) were substantially below the aggregate market values; or that the likely proceeds of sale would not be likely to cover the expenses incurred in applying for warrant of sale and in completing the diligence. We envisage that these would also be the grounds on which the sheriff could refuse to grant warrant of sale at the later stage when the creditor applies for such a warrant. Thus in cases where warrant of sale would not be granted, the debtor need not remain under the uncertain threat of a sale but could have the poinding recalled. Recall of the poinding would also be competent on the ground that the poinding was invalid or had ceased to have effect (e.g. if the debt had already been paid).
(Paragraphs 5.137 and 5.146; clauses 49(1) and (2) and 52(1) and (2)).

(8) The debtor would also have a new right to be informed of the creditor's application to the sheriff for warrant of sale, and an opportunity of intervening to oppose the application on any of the grounds mentioned above.
(Paragraph 5.146; clause 52(3) and (4)).

(9) The research discloses that debtors dislike and indeed fear newspaper advertisements of sales in the home even more than the sale itself, and the problem of low prices at warrant sales is well known. We therefore propose, on social grounds and to secure so far as possible better prices, that warrant sales of goods poinded in a debtor's or other person's dwelling should take place in an auction room rather than in the dwelling. Sales in a dwelling would be permitted only if the occupier, and if he is not the occupier, the debtor, had consented in writing. Public notices of warrant sales would not identify the debtor unless the sale was, with his consent, to be held in his premises. As a result of these important reforms, separate newspaper advertisements publicising sales of household goods and identifying the debtor would be virtually abolished and the sale itself would be a less painful

[1]The release of goods from a poinding would not bring the whole poinding to an end unless all the goods were released. Release is thus to be contrasted with recall of a poinding which always terminates the whole diligence.

experience for debtors.
(Paragraphs 5.161 and 5.166; clauses 54(2)–(4) and 56(5)).

(10) To ensure that debtors would not remain perpetually under threat of poinding for a particular debt, the present restriction on second poindings on the same premises for the same debt imposed by Practice Notes of the sheriffs principal would be enacted in statutory form.
(Paragraph 5.134; clause 50).

(11) To enable informal instalment arrangements secured by poinding to be made providing for smaller amounts than are possible under the present practice, a period of one year (instead of six months, as at present) between the poinding and the application for warrant of sale would be allowed, subject to extension by the sheriff on cause shown.
(Paragraph 5.130; clause 62(1) and (2)).

(12) Following the grant of warrant of sale, the creditor would be entitled to cancel arrangements for the sale and make an instalment arrangement secured by an extension of the poinding but, to prevent the diligence from continuing indefinitely, this would be possible on one occasion only and the extension would be limited in time.
(Paragraph 5.197; clause 58).

(13) Provision would be made to ensure that creditors to whom poinded goods are transferred in default of sale could not use the threat of uplifting them as a means of putting further pressure on debtors to pay.
(Paragraph 5.203; clause 59(5) and (6)).

We would again emphasise that the forms served on debtors should be in simple language prescribed by rules of court with a view to making them more informative and intelligible to ordinary people. We discuss these reforms in greater detail in Chapter 5 together with other amendments of the law which we have found it necessary to recommend.

2.156 We do not claim that our recommended reforms will meet all the criticisms which have been made of poinding and warrant sale procedures. Such reforms will not satisfy those who believe that a system of enforcing debts without coercion is practicable. Moreover, we concede that if insolvent debtors do not apply for the various orders safeguarding them from diligence, or do not comply with payment arrangements made in orders controlling diligence, then the burden of the original debt will often be increased by the additional burden of diligence expenses. In some cases this burden, already regarded as heavy relative to debts of small amount, will actually be increased by our recommendations, as where goods have to be removed to an auction room. We revert below to the problems of diligence expenses, some of which appear to be well nigh intractable. Only experience will tell precisely how far the abolition of sales in debtors' homes and the relative advertisements will lessen the effectiveness of the diligence from the standpoint of creditors, but the sanction of sale would still exist as a powerful inducement to payment.

2.157 Overall we believe that our recommended reforms of the diligence, taken together with the new discretionary orders controlling diligence described above, should meet the legitimate criticisms of the diligence while by and large preserving its effectiveness as a sanction inducing payment of debts.

(iv) *Restriction on poinding by arresting creditor?*

2.158 Before turning to summarise our main recommendations for introducing a system of continuous diligence against earnings, we would mention a suggestion put to us on consultation by the Tory Reform Group in Scotland that in cases where such a continuous diligence against earnings was in operation, a poinding and sale of "personal assets" of the debtor should not be permitted. After careful consideration, we think that this proposal should not be accepted. There may well be cases where a debtor, whose earnings have been arrested, also holds non-exempt household goods of high resale value, and we do not see why the laying of an earnings arrestment should debar the creditor from poinding those goods. An undiscriminating prohibition of that kind might confer an inappropriate benefit on undeserving debtors. Generally speaking, under the present law, a creditor who has ascertained the name and address of the debtor's employer will use a wages arrestment alone and will not have recourse to a poinding unless the creditor has good reason to do so.[1] We would expect that practice to continue, but in cases where a poinding is indeed executed while earnings were being arrested, the debtor would, we believe, be sufficiently protected by the reforms which we have already outlined.

(b) Reform of diligence against earnings (Chapter 6; Bill, Part IV)

2.159 Apart from poinding and warrant sale procedures, the other method of enforcing payment of debts considered in this report is the use of arrestments against an individual's earnings.[2] While arrestments of earnings have not in recent years attracted the same degree of public criticism and controversy as poindings and warrant sales, there was widespread agreement on consultation with the view stated in our Consultative Memorandum No. 49 that the diligence should be radically reformed. Our proposed reforms seek to improve the efficiency of arrestments of earnings from the creditor's point of view while at the same time ensuring so far as practicable that the amount to be deducted from the debtor's earnings is not such as to impose undue hardship on him.

2.160 An arrestment of earnings operates at present to attach a debtor's earnings only for the single pay period in which the arrestment is served, and

[1]See C.R.U. Creditors Survey, para. 1.15: "Creditors generally prefer to instruct the arrestment of a debtor's wages or salary rather than charge, poinding and warrant sale procedures because an arrestment secures at least some of the money due directly, rather than relying on the threat of a warrant sale securing payment indirectly": See also paras. 6.10 and 6.11. This is a traditional viewpoint. See the Hill Burton Report of 1854 which observed that poinding is "ever surrounded by unpleasant circumstances" and "is a much more protracted, expensive and cumbrous process than arrestment". Arrestment, according to the Report "is easy and systematic. It is a method of drawing off a portion of the workman's supplies ere they reach himself. It makes the creditor a participator in the income of the debtor; and in point of ease in operation between it and other methods of recovery, there is all the difference that there is between the interception of money before it comes into possession and its seizure after it has come into possession". Parliamentary Papers (1845) LXIX, p.41. Some debt collection agencies instruct a charge and then decide on whether to poind or arrest; C.R.U. Creditors Survey, para. 6.11

[2]For the reasons given at para. 2.4 above, we are not concerned in this report with the reform of arrestments used against moveable goods and funds other than earnings in the hands of the debtor's employer.

does not affect earnings for any subsequent pay period. This gives rise to two major defects in the operation of the diligence, namely:

(1) repeated arrestments (for the expenses of which the debtor will be liable) may be needed to clear a debt unless an instalment settlement can be reached or unless the creditor abandons recovery;

and

(2) the proportion of an individual's earnings in any pay period which are exempt from arrestment for an ordinary debt[1] (reflecting, as it does, the present inability of the creditor to arrest the earnings for more than a single pay period) is too low and leaves debtors with insufficient means on which to subsist. In the case of an arrestment enforcing maintenance, the whole earnings for the relevant pay period are attached leaving the debtor with nothing.

There was general agreement on consultation with our view that, in order to cure these defects, a system of continuous diligence against earnings should be introduced which would avoid or minimise the need for repeated arrestments but would leave the debtor with sufficient for subsistence. In Chapter 6, therefore, we advance detailed proposals for the introduction of such a system. In summary, the proposed system is as follows.

(i) *Earnings arrestments*

2.161 In our Consultative Memorandum No. 49, we sought views on whether the system of continuous diligence should take the form of an arrestment in which the deductions from earnings are fixed by legal rules which would be applied by the employer, or whether the system should follow the pattern of the English attachment of earnings orders in which the court has a discretionary power to fix the level of deductions after an enquiry into the debtor's means. The fact that arrestments can be used without the trouble and expense of a court application and a compulsory means enquiry is a great advantage, and probably explains why creditors in Scotland use enforcement against earnings instead of enforcement against moveable goods considerably more than creditors in England do.[2] For this reason, we recommend a system with deductions fixed by legal rules rather than judicial discretion. We envisage that the existing diligence of arrestment and furthcoming should no longer be used against the debtor's earnings in the hands of his employer. Instead, debts would be enforceable by new diligences against earnings. Where the debt was an ordinary debt (i.e. a debt other than current maintenance) the creditor could execute a new diligence called an "earnings arrestment".[3] This would, broadly speaking, require the employer to deduct on each pay day until the debt was cleared the appropriate weekly, monthly or other sum fixed by reference to a statutory table of deductions designed to be as easily operated by employers as is practicable. The deductions would be of relatively small amounts compared with the present law but the amounts would, we believe, be generally fair and would be on a sliding scale increasing with the amount of net earnings, but with a threshold of net earnings below which earnings would be wholly exempt from diligence. No actions of furthcoming

[1]I.e. a debt other than maintenance.
[2]See para. 2.143 above.
[3]See Chapter 6, Section C (paras. 6.31 to 6.130); Bill, clauses 75–78; and Scheds. 2 and 3.

would be necessary and the employer would be bound to deduct the appropriate sum on each pay day and pay it to the creditor forthwith.

(ii) *Current maintenance arrestments*

2.162 The reform of diligence against earnings enforcing maintenance (i.e. periodical allowance on divorce and aliment) presents somewhat different problems from the enforcement of other debts. As indicated above,[1] the focus of public concern has been directed not so much to the protection of defaulting debtors but rather to improving the machinery for the collection, as well as the enforcement, of maintenance. Maintenance creditors—normally separated or former wives, unmarried mothers, and children—are generally more in need of assistance in debt recovery than are most other creditors. On the other hand, arrestments can operate even more harshly against maintenance debtors than against other debtors because an arrestment enforcing maintenance attaches the whole earnings of a debtor on the relevant pay day without any exemption.

2.163 To cater for the special needs of maintenance creditors and the special characteristics of maintenance, we propose that a separate new diligence enforcing maintenance against earnings should be introduced to be called a "current maintenance arrestment".[2] Maintenance differs from other civil debts in so far as the obligation is a continuing one to pay periodic amounts which are fixed by the court at a level designed to reflect the debtor's ability to pay. And the award can be varied or recalled on a material change in circumstances. If the court's assessment of the debtor's ability to pay has been properly made, then—other circumstances remaining unchanged—it would seem right in principle for the whole of the maintenance instalments to be deducted from the maintenance debtor's earnings at source. The new diligence of current maintenance arrestment described in Chapter 6 is designed to achieve that aim, subject again to a threshold below which earnings would be exempt.

2.164 Another significant difference between maintenance and ordinary debts is that maintenance, whether it be periodical allowance or aliment, is designed for the current support or subsistence of the maintenance creditor. If maintenance is to achieve that objective, then, following default, maintenance should in principle be recoverable thereafter as each periodic amount falls due or as nearly thereto as is practicable. Under the existing law, only arrears of maintenance can be attached, and this is understandable given that a single wages arrestment attaches wages only on a single pay day. But if the principle of continuous diligence against earnings is introduced, then, having regard to the objective of maintenance, it seems to us better to prevent arrears arising by attaching current maintenance than to allow maintenance to fall into arrears and to provide for the recovery of the arrears after they have arisen. A current maintenance arrestment therefore, as its name implies, would attach in each pay period the maintenance due in respect of that pay period. We consider that a current maintenance arrestment should be competent once the maintenance debtor defaults, and that the maintenance creditor should be entitled to recover both future maintenance by a current

[1]Para. 1.6.

[2]See Chapter 6, Section D (paras. 6.131 to 6.217).

maintenance arrestment and arrears by an ordinary earnings arrestment operated concurrently or consecutively.

2.165 If current maintenance arrestments are introduced and operate successfully, they may largely solve the main problems of recovering maintenance which led the McKechnie Committee[1] to recommend the introduction of an official system of collection of maintenance in the sheriff courts.

(iii) *Competitions between arresting creditors; conjoined arrestment orders*

2.166 A system of continuous diligence against earnings must provide a solution to the problem of competitions between two or more creditors who use or seek to use earnings arrestments to operate simultaneously against the same debtor's pay. In the absence of such a solution, later creditors would be "shut out" by the first arresting creditor, in many cases for a considerable period, and might resort to poindings instead. A current maintenance arrestment would shut out later arrestments for very long or even indefinite periods, depending on the duration of the maintenance obligation being enforced. We discuss various policy options in Chapter 6. We argue there that, while an employer should be required to operate one earnings arrestment and one current maintenance arrestment simultaneously, in other cases of competitions between creditors, the second or subsequent creditor should apply to the sheriff for an order—which we call a "conjoined arrestment order"—requiring the employer to make deductions from earnings, computed in accordance with the rules on earnings arrestments and current maintenance arrestments as the case may be, and to pay them to the sheriff clerk who would disburse those sums to the competing creditors rateably in proportion to the amount of their debts.[2]

2.167 We concede that this solution would have some resource implications for the sheriff courts but we think it would be neither fair nor practicable to impose on employers, in addition to the burdens which continuous diligence against earnings would in any event entail, the further burden of making disbursements to creditors in proportion to their respective shares.

Diligences and priorities enforcing rates, taxes and Crown debts (Chapter 7; Bill, Part V, Schedules 5 and 6)

2.168 In this report we recommend reforms of diligence enforcing summary warrants for the recovery of rates and taxes, (though we do not consider the procedure for obtaining a summary warrant upon which we have not consulted and express no view). We also propose the abolition of (a) civil imprisonment for non-payment of tax penalties and rates and civil fines and penalties due to the Crown, with minor exceptions (e.g. fines for contempt of court); (b) Exchequer diligences and their concomitant Crown preferences; (c) the priorities of tax and rates arrears arising where moveable property is taken by diligence or assignation from rates or tax defaulters; and (d) the vestigial remains of *fugae* warrants.

2.169 Diligence under summary warrants for recovery of rates and taxes

[1]McKechnie Report, paras. 258–298.

[2]See Chapter 6, Section E (paras. 6.218 to 6.280); Bill, clauses 87–92 and Sched. 4.

differs from ordinary diligence in two main ways: first, there are special forms of poinding under summary warrants for the recovery of rates and taxes and second, tax summary warrants (unlike rates summary warrants) do not authorise arrestments. Summary warrant poindings are not under the automatic supervision of the sheriff and the procedure is therefore simpler than in ordinary poindings; there is no prior charge, no report of poinding, no application for warrant of sale, and no report of sale. In our Consultative Memorandum No. 48,[1] we suggested that the absence of supervision could be justified on the ground that creditors in summary warrant diligence are central or local government departments who ought to be trusted to use their powers of enforcement in a responsible manner and without oppression. On consultation there was no dissent from this view and, moreover, there was general agreement with our proposal[2] that the separate codes on poindings under rates and tax summary warrants should be replaced by a single uniform modern code and that tax summary warrants should authorise arrestments.

2.170 In Chapter 7, therefore, we advance recommendations to achieve those aims. The new uniform summary warrant poinding procedure would confer on rates and tax defaulters the main protections for debtors embodied in the new poinding procedure outlined at para. 2.155 above, including the new rules on exemptions,[3] rights to redeem the goods at appraised values,[4] the judicial powers to release individual items as exempt or on the ground of undue harshness,[5] and the judicial powers to recall the poinding in the case of undue harshness, low valuations or where the expense of a sale would not be justified by its proceeds.[6] New provisions would be introduced to prevent sales in dwellings without the consent of the debtor or occupier and advertisements of sales identifying the debtor unnecessarily.[7] As under the present law, however, the procedure would not be under the automatic supervision of the sheriff and thus there would be no report of poinding, no separate application for warrant of sale and no report of sale. Other useful related reforms include the abolition of the statutory fee (ten per cent of the tax arrears) payable to sheriff officers executing tax warrants which would be replaced by scale fees prescribed by rules of court.[8]

Section G. Officers of court (Chapter 8; Bill, Part VI)

2.171 Officers of court not only hold the public office of messenger-at-arms or sheriff officer but are also independent contractors who receive instructions to execute diligence in much the same way as commercial agents receive instructions from their principals. There are, however, important differences from commercial agents: for example, an officer of court has a duty to execute diligence when instructed and cannot pick and choose as between instructing creditors; his fees for executing diligence are prescribed in detail by rules of court; and as a sheriff officer he is subject to the disciplinary authority of the

[1]Para. 7.8.
[2]Consultative Memoranda No. 48, paras. 7.9 and 7.21 and No. 49, para. 4.18.
[3]Bill, Sched. 6, para. 1.
[4]Recommendation 7.6(1) and (2) (para. 7.30); Bill, Sched. 6, paras. 5(5) and 11(2).
[5]Recommendation 7.8 (para. 7.39); Bill, Sched. 6, para. 6.
[6]Recommendations 7.6(3) (para. 7.30) and 7.8 (para. 7.39); Bill, Sched. 6, para. 7(2).
[7]Bill, Sched. 6, paras. 10 and 12(4).
[8]Recommendation 7.14(1) (para. 7.61); Bill, Sched. 5, paras. 1, 2, 6 and 7.

sheriff principal (or of the Lyon King of Arms in the case of messengers-at-arms) for fault in the performance of his official functions.[1] This independent contractor status cannot be accurately regarded either as peculiarly Scottish or an anachronism; the enforcement officers of the French courts (the *huissiers*) and of the English High Court (the sheriff's officers) for example are also independent contractors.

2.172 On consultation most of those who expressed a view considered that the existing system of independent contractor officers should not be replaced by a system of salaried officers employed within the Scottish Court Service but rather that improvements should be made to the existing arrangements for the regulation, supervision and control of independent contractor officers. Our own view is that, while the existing system has its defects as any system would, it has also many merits and has served Scotland well. We think that independent contractors are likely to give a more efficient service at less cost than a system of salaried officers.

2.173 For these reasons, we conclude that the existing system of independent contractor officers should be reformed rather than abolished. In Chapter 8, therefore, we advance recommendations for improvement of the arrangements for the regulation, appointment, training, supervision, control and discipline of officers of court. We envisage that (as is broadly the present practice) each court or group of courts should appoint, supervise, discipline and control the officers who execute its decrees. Public confidence in the system demands that officers of court holding a public office and possessing powers of forcible entry should be, and should be seen to be, accountable to the courts. The reformed system therefore would not leave sheriffs principal merely to react to complaints against sheriff officers from debtors or other members of the public, but would enable sheriffs principal, of their own accord, to order the inspection of the work of officers.[2] In addition sheriffs principal would have new powers to initiate formal procedures for disciplining sheriff officers.[3] The Court of Session would have similar powers in relation to messengers-at-arms.

2.174 Following public concern as to the role of officers of court in debt collection and in the enforcement of debts due to bodies in which they have an interest, we advance recommendations, which were generally approved on consultation by those who commented, on these matters. The rule precluding an officer of court from enforcing a debt due to himself would be extended to enforcement on behalf of members of his family and business associates and of firms in which he or they have a controlling interest.[4] As regards collection of debts for remuneration, we think that the Court of Session should make rules prohibiting officers from purporting to act as such in collecting debts before decree,[5] and making collection after decree an official function guaranteed by the officer's bond of caution.[6] Whether collection of debts through a debt collection agency in which the officer enforcing the debt has an interest is incompatible with the officer's official functions will depend

[1]See generally Chapter 8 below.
[2]Recommendation 8.10 (para. 8.66); clause 104.
[3]Recommendation 8.12 (para. 8.84); clauses 105 and 106.
[4]Recommendations 8.16, 8.17 and 8.18 (paras. 8.96, 8.100 and 8.104); clause 109.
[5]Recommendation 8.20 (para. 8.113); clause 101(1).
[6]Recommendation 8.22 (para. 8.125); clause 101(1).

on the circumstances of each case. Flexible provision seems necessary and we envisage that this and other extra-official activities undertaken for remuneration could be regulated by rules made by the Court of Session and if not so regulated the sheriff principal's permission would be required in particular cases.[1]

Section H. Other reforms (Chapter 9; Bill, Parts VII and VIII)

2.175 In accordance with our statutory functions of simplification and modernisation of the law, we have taken the opportunity afforded by this report of making recommendations to modernise the law on the grant of warrants for diligence,[2] to abolish obsolete procedures (such as the grant of signeted letters of horning, poinding and caption),[3] to repeal most of the Debtors (Scotland) Act 1838 and many out-of-date pre-Union Acts;[4] and to complete the trend towards making warrants of concurrence for the execution of diligence unnecessary.[5]

Expenses of diligence

2.176 We referred above[6] to the fact that the burden of the original debt falling on a debtor may be considerably increased by the further burden of the court and diligence expenses incurred in its enforcement. Though we reviewed the system of charging fees in some detail in our Consultative Memorandum No. 47,[7] we received no evidence that the fees of officers of court are too high, viewed as remuneration for work done. There seems no scope for reducing the burden of diligence expenses falling on creditors and debtors by reducing the fees exigible for diligence, and any change in the basis of charging fees (e.g. with respect to mileage charges) would simply mean that some parts of the work (e.g. enforcement in populous areas) would subsidise other parts (e.g. enforcement in remote areas). The only alternative would be a public subsidy, an approach which we regard as falling outside the scope of this report and on which we express no view.[8]

2.177 We think that creditors must be entitled to recover the expenses of diligence from debtors, especially having regard to the fact that debtors will now have ample opportunity to obtain orders giving them time to pay by reasonable instalments before diligence expenses have ever been incurred. We think, however, that creditors should only be entitled to recover the expenses of a particular diligence[9] from the fruits of that diligence or from payments made by the debtor to the creditor while it is in operation: they should generally not be entitled to recover those expenses by means of another

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[1]Recommendations 8.19 and 8.21 (paras. 8.110 and 8.121); clause 101(1) to (3).
[2]Recommendations 9.1 (para. 9.7) and 9.2(2); clauses 112, 113 and Sched. 7, paras. 8 and 10.
[3]Recommendation 9.2(1); clause 114.
[4]Bill, Sched. 9.
[5]Recommendation 9.5 (para. 9.26); clause 116.
[6]See para. 2.70.
[7]Paras. 3.19 to 3.52.
[8]A public subsidy system for diligence in the remote areas was introduced by the Remote Areas Diligence Payments Scheme of 1959 which was a total failure. We did not receive much evidence that enforcement in the remote areas now presents especially difficult problems, perhaps because of improved means of transport.
[9]I.e. poinding and sale; earnings arrestment; application for the making of, or for inclusion in, a conjoined arrestment order; arrestment and furthcoming.

diligence under the same decree or (as under the present law) by means of a subsequent decree authorising further diligence to recover those expenses.[1] Thus, while a creditor should be allowed to ascertain the extent of his debtor's poindable effects, and to recover the expenses out of the proceeds of sale or an instalment arrangement, he will also take the risk that the diligence may be abortive. Debtors wishing to stop a diligence will have to tender diligence expenses so far incurred as well as the principal sum,[2] but will not be subjected to further proceedings for expenses after the diligence is terminated. We envisage that forms served on debtors should show the state of the debt and to facilitate the calculation of expenses chargeable against debtors, the legislation should so far as practicable specify the steps of diligence so chargeable in detail.[3] We think that these reforms would achieve a fair balance between the interests of creditors and debtors.

[1]Recommendation 9.9 (para. 9.58); clauses 118 and 119.
[2]Recommendation 9.9(4) (para. 9.58); clause 120.
[3]See Recommendation 9.7 (para. 9.36); clause 70 and Sched. 1; also Sched. 6, paras. 25–33.

CHAPTER 3

TIME TO PAY DECREES AND ORDERS

Preliminary

3.1 In Chapter 2, we set out the reasons of principle which led us to recommend the introduction of discretionary court orders giving debtors an extension of time for payment of their debts. In this Chapter we set out our detailed proposals on two of these types of order, namely, time to pay decrees which would be available when decree is granted in court proceedings and time to pay orders which would be granted by the court at a later stage in the debt recovery process.[1]

Section A. Time to pay decrees

Introduction of time to pay decrees

3.2 Under the present law, the defender in a sheriff court summary cause action may apply for what is generally known as an instalment decree allowing him time to pay the debt, or the expenses of the action, by instalments rather than an "open" decree requiring payment of the whole debt in one lump sum.[2] The creditor cannot execute diligence to enforce the debt or other sum unless the debtor allows an instalment to remain unpaid until the next falls due, i.e. default on two instalments.[3] On such default, the right to pay by instalments lapses automatically and the decree is converted into an open decree enforceable by diligence. We propose that this system of instalment decrees should be replaced by time to pay decrees which would be available in Court of Session actions and sheriff court ordinary cause actions, as well as sheriff court summary causes. While time to pay decrees would have many of the same characteristics as summary cause instalment decrees, (e.g. as to the principle of automatic lapse on default), there would be some significant differences which we describe below.

3.3 *Instalments and deferred lump sums.* The sheriff's power in summary causes appears to be limited to a power to direct payment of the debt by instalments.[4] In some cases, however, it may be appropriate that the debtor should pay the whole debt in a lump sum after a breathing space of such period as the court may fix in the decree, for example when it is known that the debtor will come into funds at a certain time in the future. We think that the restriction in the present law makes the power unnecessarily inflexible and that time to pay decrees for payment by a deferred lump sum should be possible.

3.4 We **recommend:**

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[1]The other main type of order—an order confirming a debt arrangement scheme—is discussed in Chapter 4.

[2]Sheriff Courts (Scotland) Act 1971, s. 36(4): see paras. 2.26 and 2.27 above.

[3]Summary Cause Rules, Form U2.

[4]Sheriff Courts (Scotland) Act 1971, s. 36(4). The sheriff may attach conditions, including presumably a condition delaying the commencement of the instalments though such a condition seems to be unusual.

The present jurisdiction of the courts to grant instalment decrees in summary cause actions should be replaced by a jurisdiction to grant decrees containing directions (called time to pay directions[1]) providing for payment of the debt by instalments or by a deferred lump sum.
(Recommendation 3.1; clause 1(1).)

Who may obtain a time to pay decree?

3.5 We envisage that the right to apply for a time to pay direction should be available to any individual who is a party to an action or other court proceeding and against whom a decree for payment of a sum of money is pronounced including for example a pursuer held liable in a counterclaim and a third party minuter.

3.6 Although the existing power in summary causes is not expressly confined to decrees against individuals (i.e. natural persons),[2] it seems likely that the power is rarely, if ever, exercised in favour of companies or other bodies corporate. On consultation,[3] it was generally agreed that title to apply should not extend to bodies corporate and we adhere to that view.

3.7 Clearly individuals who are personally liable for payment under the decree should have a title to apply for a time to pay direction. Where an individual is found liable by the decree in a representative or fiduciary capacity only, and not in a personal capacity (e.g. trustees under trust deeds, executors, trustees in bankruptcy sequestrations, or the office bearers or representatives of a club or other voluntary association, who are found liable as such), we think that, as a general rule, that individual should not have a title to apply, and that diligence should proceed against the assets of the trust, association or other body in the ordinary way. An exception should, however, be made in favour of persons held liable in a representative or fiduciary capacity as a tutor of a pupil child or of another individual,[4] a judicial factor *loco tutoris*, a curator *bonis* (i.e. a judicial factor managing the estate of a minor or of an adult incapable of managing his affairs) and a judicial factor *loco absentis* on the estate of a missing person. Here the tutor or judicial factor merely stands in the place of his ward. Judicial factors can be appointed in many other contexts,[5] which cannot be exhaustively defined, but the inclusion of further categories would either be inappropriate[6] or require over-elaborate statutory provision to cater for an insignificant number of cases.

3.8 An individual may be found liable under a decree either in a personal capacity or in a representative or fiduciary capacity or in both capacities. Normally the express terms of the decree will make it clear in what capacity

[1]For brevity, in this report we refer to a decree containing a time to pay direction as a time to pay decree.

[2]Sheriff Courts (Scotland) Act 1971, s. 36(4).

[3]Consultative Memorandum No. 48, Proposition 1(6)(*a*) (para. 1.26).

[4]It is still competent for a tutor-dative to be appointed to an adult incapax where it is clear that personal guardianship is required (see e.g. *Dick* v. *Douglas* 1924 S.C. 787) though such appointments are very unusual.

[5]E.g. on a bankrupt's estate under bankruptcy legislation, on a partnership estate, on a fund pending settlement of a dispute by litigation or agreement.

[6]E.g. in the case of judicial factors appointed under bankruptcy legislation or under the Solicitors (Scotland) Act 1980, s. 41.

the defender is found liable. There are special rules, however, applying to decrees against partnerships (which in Scotland have a species of legal personality separate from those of the individual partners) e.g. a firm with a social name[1] may be sued in that name without specifying the names of the individual partners and decree in the action is a warrant to charge either the firm or each of the partners individually,[2] and for diligence against the estate of the partnership and the estate of each individual partner. The rules regulating procedure in the sheriff court also provide that any person or persons carrying on business under a trading or descriptive name may sue or be sued in that trading or descriptive name alone and that an extract of a decree or registered document of debt is a valid warrant for diligence against that person or those persons.[3] This rule covers clubs and voluntary associations as well as partnerships. However, because of judicial dicta in an Inner House case,[4] the practice is to conjoin the names of individuals with the trading or descriptive name. In cases where an individual is liable under a decree of any of these kinds both in a personal and in a representative or fiduciary capacity, we propose that the court should be empowered to include in the decree a time to pay direction applying to the individual's personal obligation only.[5] The practical result would be that, during the period when the time to pay direction had effect, the extract decree would be a warrant for diligence only against the estate of the trust, partnership, association or other person or body for whom the individual acts and not against the individual's own income or assets; and a charge served in pursuance of the decree during that period would require payment to be made by the individual in his representative or fiduciary capacity only and not from his own pocket. Finally, we think it should be made clear by statute that a time to pay direction is personal to the debtor and that the privilege of time to pay would cease to have effect on the transmission *inter vivos* or *mortis causa* to a third party of the debtor's liability to pay the debt.

3.9 We **recommend:**

(1) Title to apply for a time to pay direction should be conferred on a debtor who is an individual and who is either (a) personally liable under the decree or (b) liable in a fiduciary or representative capacity as tutor of an individual or as judicial factor *loco tutoris*, curator *bonis* or judicial factor *loco absentis* on an individual's property.

(2) Where an individual is liable to make payments under a decree both in a personal capacity and in a fiduciary or representative capacity, (e.g. as a trustee, executor or office-bearer of a voluntary association) it should be competent for the court to include in the decree a time to pay direction applying to the individual's personal liability, but not to

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[1]A "social name" is a name using the name or names of persons (e.g. "Brown, Smith & Co") though not necessarily the names of the partners and is to be contrasted with a "descriptive name" which does not contain the names of persons (e.g. "Blackacre Hiring Co").

[2]Graham Stewart, pp. 296 *et seq.* In the case of a firm with a descriptive name, the names of at least three partners must be specified in the summons and decree.

[3]Ordinary Cause Rules, rule 14(1), applied to summary causes by Act of Sederunt (Summary Cause Rules, Sheriff Court) 1976, section 3(2) (as amended).

[4]*Aitchison* v. *McDonald* 1911 S.C. 174 in which it was observed (at p. 175) that "a decree against A is not warrant for a charge against B".

[5]Unless the individual is liable as tutor or judicial factor as mentioned in para. 3.7 above.

his liability in his other capacity unless that other capacity is one of those mentioned in paragraph (1)(b) above.

(3) A time to pay direction should cease to have effect on the debtor's death or on the *inter vivos* transmission of his obligation to pay the debt.
(Recommendation 3.2; clause 12.)

Actions for payment in Court of Session or sheriff court

3.10 The Sheriff Courts (Scotland) Act 1971, section 36(4) seems to have contemplated that instalment decrees would be competent in all types of summary cause action whether the main crave is for payment of a principal sum, or for performance of a non-monetary obligation (such as delivery or removing) in which the only monetary award in the decree is an award of expenses.[1] In practice, instalment decrees seem to be granted only in summary cause actions for payment of a principal sum, perhaps because it is only in such actions that the Summary Cause Rules provide a special procedure for offers to pay by instalments.[2] We propose that, subject to a monetary limit discussed below, the power to grant time to pay directions should be available whenever the court pronounces decree for a principal sum of money, whether the decree is granted in the Court of Session or the sheriff court. A proposal on these lines was generally approved on consultation by those who commented on it.[3] We revert later to awards of expenses in proceedings other than actions for payment of a principal sum.

3.11 We consider that awards of financial provision (capital sums or periodical allowance) on divorce (and on decree of declarator of nullity of marriage if financial provision becomes competent in such decrees[4]) and awards of aliment, whether in actions for divorce or aliment, should be excluded from the time to pay jurisdiction. These awards are in any event based on the court's assessment of the debtor's ability to pay and provisions for the variation and recall of such awards (other than capital sums) already exist: to superimpose a time to pay jurisdiction on these existing provisions would be both unnecessary and undesirable. Decrees for the recovery of the cost of supplementary benefit[5] and contribution orders against relatives liable to aliment a child maintained by a local authority under child care legislation[6] closely resemble awards of aliment and should also be excluded.[7]

3.12 Taxes, fines and penalties due to the Crown and, to a lesser extent local

[1]This seems to have been a deliberate departure from the former small debt procedure in which instalment decrees for payment of expenses were apparently not competent: see *Archer's Trs.* v. *Alexander and Sons* (1910) 27 Sh.Ct.Reps. 11. Section 36(4) of the 1971 Act expressly mentions expenses.

[2]See Summary Cause Rules, rules 52 and 54; see also Form Q introduced by rule 50A (service document).

[3]Consultative Memorandum No. 48, Proposition 1(7) (para. 1.26).

[4]See the recommendation to that effect in our *Report on Aliment and Financial Provision* (1981) (Scot. Law Com. No. 67), paras. 3.201 to 3.203, now proposed to be implemented by the Family Law (Scotland) Bill 1984 clause 17.

[5]Supplementary Benefits Act 1976, ss. 18 and 19.

[6]Social Work (Scotland) Act 1968, ss. 80 and 81; Guardianship Act 1973, s. 11(3).

[7]Such decrees and orders provide for periodic payments based on the liable relative's ability to pay and are subject to variation by the court.

rates, have traditionally been given a specially privileged position in the law of debt enforcement and bankruptcy e.g. as regards (1) civil imprisonment for debt;[1] (2) the special privileges accorded to Exchequer diligence in competitions with ordinary creditors' diligences;[2] (3) the priority for tax and rates arrears where an ordinary creditor executes diligence against moveables;[3] and (4) preferences in bankruptcy sequestration.[4] In this report we recommend the abolition of (1), (2) and (3).[5] Consistently with these recommendations and the recommendation made below[6] that time to pay orders should apply to rates and tax arrears being recovered by summary warrant diligence, we consider that the above categories of "public" debt should not be excluded from time to pay decrees.

3.13 We **recommend:**

(1) Subject to the monetary limit proposed in Recommendation 3.6 (para. 3.25), time to pay decrees should be competent not only in sheriff court summary cause actions for payment of a principal sum but also in other actions in the sheriff court or Court of Session for payment of a principal sum.

(2) Time to pay decrees should not be competent, however, where:

(*a*) the sum due under the decree consists of or includes an award of financial provision on divorce or aliment; or

(*b*) the decree provides for the recovery by periodic payments of the cost of supplementary benefit from a relative liable to maintain the recipient of the benefit or is a contribution order or similar order against the relative of a child in the care of a local authority.

(Recommendation 3.3; clause 1(1), (4)(*b*) and (*c*), and (7).)

Interest

3.14 Court of Session and sheriff court decrees for payment of a principal sum bearing interest normally require the debtor to pay the principal sum with interest at the specified rate from the date when the interest began to accrue until the debt is paid.[7] Interest accruing before decree is generally not quantified and specified in the decree. In summary cause instalment decrees, the same practice is adopted, the only difference being that the decree directs that payment of interest as well as the principal sum is to be made by instalments of specified amounts.[8] Interest accrues on a daily basis and, because of the complex calculations involved, most debtors are unable to compute it. There is no duty on creditors holding summary cause instalment decrees to intimate a claim for interest in time to ensure that the interest can be paid by the specified instalments. On the other hand, it seems likely that in practice

[1]Debtors (Scotland) Act 1880, s. 4; Civil Imprisonment (Scotland) Act 1882, s. 5; Local Government (Scotland) Act 1947, s. 247(5).

[2]Exchequer Court (Scotland) Act 1856, ss. 30 and 42.

[3]Local Government (Scotland) Act 1947, s. 248; Taxes Management Act 1970, s. 64.

[4]See our Report on Bankruptcy, Chapter 15, and para. 4.84 below.

[5]See Chapter 7.

[6]Para. 3.58.

[7]R.C. Form 2(1); Dobie, *Sheriff Court Styles* pp. 3, 357 and 358; Wilson, *The Law of Scotland Relating to Debt*, pp. 154–7.

[8]Summary Cause Rules, Form U2.

creditors holding summary cause instalment decrees frequently do not claim interest.

3.15 If, as we recommend, larger amounts become payable by instalments or deferred lump sum under time to pay decrees,[1] then more creditors would be likely to claim such interest. Further the interest claimed may amount to a significant sum which ought to be payable by instalments. Since in most cases the creditor would be better placed to calculate that sum than the debtor, we think that provision should be made requiring that a creditor seeking interest which had not been specified as a quantified sum in the decree should intimate its amount to the debtor timeously, failing which he would lose the right to claim interest.

3.16 We **recommend:**

A creditor in a time to pay decree should be entitled to claim interest not quantified in the decree only if he intimates the amount of interest claimed to the debtor not later than a date prescribed by act of sederunt occurring before the date when payment of the last instalment or of the deferred lump sum falls due.
(Recommendation 3.4; clause 1(5).)

Expenses

3.17 *Decrees for payment of principal sum.* In a sheriff court summary cause action, final decree disposing of the action is not granted until the liability of one party for another party's expenses has been determined and the amount of those expenses has been either agreed by the parties or fixed by the sheriff clerk and approved by the sheriff.[2] In the case of a summary cause instalment decree, the sheriff pronounces one decree containing an instalment direction applying both to the principal sum and expenses.

3.18 If, as we propose, however, time to pay directions become competent in actions for payment brought as ordinary causes (as well as summary causes) in the sheriff court and in Court of Session actions for payment, the problem arises that in a significant proportion of those actions a decree decerning for a principal sum and finding expenses due may be extracted some considerable time before the decree for payment of the expenses is extracted.[3] Thus, in the Court of Session, the court pronounces decree for payment of the principal sum together with a finding as to liability for expenses and at the same time,

[1]The summary cause limit is £1,000 of principal sum (exclusive of interest and expenses) whereas the time to pay decree limit which we recommended below is £10,000 (exclusive of interest and expenses).

[2]Summary Cause Rules, rules 87 and 88.

[3]In dealing with expenses, the court has to take two steps which are technically distinct and may be taken at the same time or on different occasions. First, if a party has applied for a decree for expenses, the court must make a finding as to liability for expenses (and this must be made in or before the final decree disposing of the proceedings unless any question of liability for expenses has been expressly reserved for subsequent determination by the court). Second, if expenses are found to be due, the court must grant decree for payment of those expenses. It is the decree (in the technical sense of a decerniture) for payment of expenses, not the finding as to liability, which is the operative part of the court's interlocutor, and it is the decree, not the finding, of which an extract bearing a warrant for diligence is issued. See Lees, *Notes on the Structure of Interlocutors* (1915) pp. 32 and 33.

unless special cause is shown for not doing so, decerns, in a separate interlocutor, for payment of the expenses as they will be taxed by the Auditor of Court.[1] The decree for expenses is not extracted, however, until the expenses have been taxed; the extract of the decree for expenses will then set out the taxed amount of expenses. In defended sheriff court ordinary causes, the court normally grants decree finding expenses due and only at a later stage grants a separate decree for payment of those expenses after the expenses have been taxed by the auditor of court.[2] Thus one action for payment often results in the issue at different times of two extract decrees for payment, one for the principal sum and one for expenses, each separately enforceable by diligence.

3.19 We think that the court should normally be required to exercise its discretion to make a time to pay direction on one occasion only during a court action for payment of a principal sum and accordingly it should only be entitled to grant a time to pay direction in respect of expenses at the time when it grants a decree making a finding of liability for expenses (whether or not that decree also decerns for payment of the expenses). The procedure for taxing expenses and obtaining or extracting a decree for payment of expenses should not be disrupted by an application for a time to pay direction which could have been made at the stage when the court found expenses due. In the great majority of cases where there is liability for both a principal sum and for expenses, this proposal would mean that a time to pay direction would deal with both at the same time. Where the court did not make a direction covering expenses (e.g. where the amount of expenses was difficult to forecast), we think that the debtor should be entitled to apply for a time to pay order (such as we recommend later) relating to those expenses, which would have been taxed and decerned for by the time such an order became competent.

3.20 *Decrees not decerning for principal sum.* We considered whether a time to pay direction should be permitted in those many cases of "non-monetary" decrees in which the only sum of money payable is an award of expenses: examples include decrees of declarator, interdict, ejection or removing, specific implement of a non-monetary obligation, or a "self-executing" decree changing a person's status (e.g. divorce) or making some appointment (e.g. of a judicial factor). We propose, however, that while a person held liable in expenses in such cases should be entitled to apply for a time to pay order such as we recommend later, he should not be entitled to obtain a time to pay direction in the action, petition, application or other proceedings in which the non-monetary decree finding expenses due was granted. In many of those proceedings, the expenses would not have been taxed at the time when the non-monetary decree was granted. It would be more satisfactory to allow the question of an extension of time to pay the expenses to be considered in an application for a time to pay order which would be made at a stage when the expenses had been quantified and where it would be possible for the court to apply the monetary limit recommended later. The practical difference between decrees for payment of a principal sum and other decrees is that in

[1]R.C. 348 (substituted by S.I. 1983/826).

[2]Ordinary Cause Rules, rules 97 and 98. In undefended ordinary cause actions expenses are normally not taxed but modified at a fixed amount and decerned for in the decree for the principal sum.

the former case it would be convenient to allow expenses to be dealt with in the application for a time to pay direction relating to the principal sum, whereas in the latter case there is no principal sum and the same considerations of practical convenience do not arise.

3.21 We **recommend:**

(1) In an action for payment of a principal sum, the court's power to make a time to pay direction relating to the expenses of the action should be exercisable only when it grants decree decerning for payment of the principal sum and either decerning for payment of the expenses or making a finding as to liability for the expenses; and accordingly where the expenses are taxed by the auditor of court at a later stage, a time to pay direction relating to those expenses should not be competent at that stage.

(2) Where the court grants a decree not decerning for payment of a principal sum but making a finding as to liability for expenses (whether or not the decree also decerns for payment of the expenses), it should not be competent for the court to make a time to pay direction relating to those expenses.
(Recommendation 3.5; clause 1(1) and (2).)

Monetary upper limit on debts subject to time to pay directions

3.22 We propose that there should be a monetary ceiling on the debts subject to time to pay directions, which we suggest should be fixed initially at £10,000 of principal sum exclusive of interest and expenses.[1] In the absence of such a ceiling, there would be a risk that applications for time to pay large sums would often be hotly contested and the resulting hearings or proofs would cause unacceptable additional delay and expense. We are primarily concerned in this report with the debts of consumers and small traders. To require the court to consider how and when very large debts should be paid would, in our view, encroach on an area which ought to be dealt with under the general law of sequestration and personal bankruptcy.

3.23 *Interest.* For practical reasons, interest accruing after decree must be excluded from the monetary limit since at the time of decree it would not yet be due, quantifiable or capable of even approximate estimation. For the purpose of the various monetary limits on jurisdiction, interest whenever accrued is generally disregarded and it seems appropriate to disregard interest, whenever accrued, when applying the monetary limit. As recommended above, however, interest should be subject to a time to pay direction to the extent that it is quantified in the decree or claimed by the procedure which we have proposed.

3.24 *Expenses.* We think that the expenses of the action for payment should be excluded from the monetary limit. We concede that the expenses might be a very large amount which could greatly exceed the principal sum. On the other hand, we noted above that in some cases, at the time when decree on the merits of an action is pronounced, the expenses of one party for which

[1]The present jurisdictional limit on summary cause actions for payment is £1,000 (exclusive of interest and expenses): Sheriff Courts (Scotland) Act 1971, s. 35(1)(*a*) as amended.

another party is liable have often not been precisely quantified, since at the time of decree they have yet to be taxed by the auditor of court. In such cases, it would be unsatisfactory to require the court to make an estimate of what the amount of the expenses might be after they have been taxed: those expenses might be impossible to estimate even approximately.

3.25 We **recommend:**

The court's power to make a time to pay direction should be exercisable only if the principal sum (i.e. disregarding interest and expenses) does not exceed a monetary limit fixed by statute at £10,000 initially but variable by statutory instrument.
(Recommendation 3.6; clause 1(4)(*a*) and (6).)

Effect of time to pay decree on diligence

3.26 The object of a time to pay decree is to give a debtor in financial difficulties a breathing space in which to settle his debt, by instalments or deferred lump sum, free from the threat of diligence or further diligence. The question arises of what modes of diligence should be precluded or otherwise affected by time to pay decrees. In answering this question, it is convenient to deal separately with the following categories:

(1) the diligences used for the enforcement of a court decree constituting an ordinary unsecured debt, namely: poinding and warrant sale; earnings arrestment (such as we recommend in Chapter 6); arrestment and action of furthcoming; arrestment and action of sale (of vessels); action of adjudication for debt; and inhibition;

(2) diligences used (a) while the court action in which the decree was pronounced was pending (i.e. arrestment or inhibition on the dependence), or (b) in security of future or contingent debts used before the court action was raised or while it was pending (i.e. arrestment, inhibition, or adjudication in security); and also (c) adjudications for payment of debts subsequently constituted by decree; and

(3) special forms of diligences used for the enforcement of particular categories of debt (i.e. sequestration for rent or feuduty under the landlord's or superior's hypothec; poinding of the ground; action of maills and duties).

We consider these categories in that sequence.

3.27 *Diligences in execution enforcing unsecured debt.* The characteristics of poinding and warrant sale, arrestment and furthcoming and the recommended new diligence of earnings arrestment, are described elsewhere in this report.[1] Though the hybrid diligence of arrestment and sale of a vessel has special features (it resembles a poinding more than an arrestment), it shares with poinding and arrestment of goods the common feature that it is a means of satisfying a debt out of the proceeds of sale of the debtor's property. To allow the debt to be enforced by any of the diligences mentioned in this paragraph while a time to pay decree was in operation would defeat the whole object of the time to pay decree.

[1]Chapters 2, 5 and 6.

3.28 An action of adjudication for debt is the diligence used for the recovery of debt from specific items of heritable property (land or buildings) of a debtor. A decree of adjudication for debt confers on the creditor a right over the adjudged lands in the nature of a heritable security redeemable on payment of the debt.[1] During the legal period of redemption (called "the legal", for short) of 10 years from the decree, the creditor may obtain a decree of maills and duties entitling him to enter into possession and to collect the rents (if any)[2] in satisfaction of his debt. At the expiry of the legal without full payment, the creditor can obtain an indefeasible title as full owner of the adjudged property by obtaining and recording a decree of declarator of expiry of the legal. The main features of this procedure were fixed in the seventeenth century[3] and vividly reflect the desire of a bygone age to preserve landed estates from being involuntarily alienated for debt. Despite its defects, the diligence is still used in a small number of cases annually[4] and we shall propose reforms in due course. In the meantime, the diligence has to be assessed in its present unsatisfactory form. Despite the fact that the diligence takes the form of an attachment coupled with a long period of possession (with or without receipt of rents) followed by ownership, rather than (as in the case of poindings and arrestments) taking the modern form of an attachment followed by the relatively speedy realisation of property to satisfy debts, we think that a time to pay decree should preclude an adjudication for debt while the time to pay direction in the decree is in operation. A time to pay decree would be of little use if the debtor could be ejected from his home by an adjudging creditor. Furthermore, if the adjudged property yielded rents, payment of these rents to the adjudging creditor would be inconsistent with the terms of the time to pay direction.

3.29 Different considerations, however, apply to inhibitions, the remaining diligence available for the enforcement of unsecured debts to be considered. Inhibitions, like adjudications, affect heritable property but are much more commonly used than adjudications.[5] We think that a time to pay decree should not preclude the registration of an inhibition enforcing the debt to which the decree relates. An inhibition is merely a prohibitory diligence whereby, once the inhibition is registered in the personal registers, (a) the debtor's heritable property is rendered "litigious" so that the debtor is restrained from granting any voluntary deed alienating or burdening it to the prejudice of the inhibiting creditor, and (b) the inhibiting creditor is given a preference, in any process of ranking over the debtor's heritable estate, in a competition with other creditors whose debts were created subsequent to the registration of the

[1]Title is completed by recording the extract decree in the Sasines or Land registers in the case of registrable interests in land and in the Register of Inhibitions and Adjudications in the case of non-registrable interests such as leases or other "personal" rights to land. The action is privative to the Court of Session.

[2]If the debt is satisfied from the rents or otherwise, the debtor may obtain a decree of declarator of redemption but payment by itself extinguishes the adjudication without the need for such a declarator.

[3]Diligence Act 1661; Adjudications Act 1672.

[4]We have been informed by the Deputy Principal Clerk of Session that during the six years 1979 to 1984, a total of 40 decrees of adjudication for debt were extracted, an average of almost seven *per annum*.

[5]In 1982, 5,720 inhibition documents (including inhibitions and notices of inhibition) were registered: *Civil Judicial Statistics Scotland,* Table 25.

inhibition. Thus the registration of an inhibition does not create a nexus over specific items of property, nor does it enable the inhibiting creditor to realise the property and to satisfy his debt out of the proceeds. In this respect it differs from poinding and sale and from arrestment and furthcoming or sale. Further an inhibition does not enable the creditor to possess, and to consume the fruits of, the debtor's property (as in the case of adjudications for debt) nor to acquire absolute ownership thereof (as in the case of adjudications for debt on which declarator of expiry of the legal has followed, and those poindings and arrestments in which the attached property is adjudged to belong to the poinding or arresting creditor in default of sale). In short, in contrast to these diligences, an inhibition would generally not be inconsistent with the provisions of a time to pay decree. Moreover, a consumer or small trader in financial difficulties is less likely to be adversely affected by an inhibition than by diligence against his moveable property and funds. In any event, in principle a debtor having the privilege of time to pay should not incur new debts prejudicing the creditor in the time to pay decree, and it therefore seems reasonable that that creditor should be entitled to register an inhibition giving him a preference over debts contracted after the inhibition in any process of ranking on the debtor's heritable property.[1]

3.30 *Diligence on the dependence.* No provision is made by the existing law as to the effect of a summary cause instalment decree on a pre-existing arrestment on the dependence (which is in effect for most purposes converted by the decree into an arrestment in execution[2]) or indeed a pre-existing inhibition on the dependence. (Though competent, the latter are probably very rare for procedural reasons.[3]) The matter will require explicit regulation however if, as we envisage, instalment decrees become available in all actions for payment, in some of which diligence on the dependence is used relatively frequently. Broadly the same considerations apply here as in the case of diligence in execution of decrees. Where an arrestment had been used on the dependence of an action in which a time to pay decree was granted, a furthcoming or a sale of the arrested funds or moveable property would be inconsistent with the terms of the time to pay decree. We think therefore that the court granting a time to pay decree should have power to recall or restrict an arrestment on the dependence and, if the arrestment was not recalled by the court, it should be, so to say, "frozen" so that it could not be followed by an action of furthcoming or sale while the time to pay direction in the

[1]By making arrestments and adjudications incompetent but inhibitions competent, our recommendations could lead to difficulties if the courts were to hold that where the property is sold by a heritable creditor, an inhibiting creditor has no title to claim payment from the free proceeds unless he had adjudged before the sale or arrested after it. This is not, however, the present practice of the courts: see *Halifax Building Society* v. *Smith* 1985 S.L.T. (Sh.Ct.) 25, 30: compare Gretton, "Inhibitions and Standard Securities" 1985 S.L.T. (News) 125.

[2]*Abercrombie* v. *Edgar and Crerar* 1923 S.L.T. 271.

[3]The former rule making inhibitions incompetent on the dependence of a sheriff court small debt action (see *Lamont* (1867) 6 M. 84 construing the Small Debt (Scotland) Act 1837, s. 13) does not appear to apply to summary causes, decrees in which are not enforced by special procedures. Warrant to inhibit on the dependence of sheriff court actions is obtained by an application to the Petition Department of the Court of Session for authority to obtain signeted letters of inhibition. In all other cases, warrant to arrest or inhibit on the dependence of a Court of Session action and to arrest on the dependence of a sheriff court action may be inserted in the summons or initial writ by which the action is commenced.

decree was in force.[1] On the other hand, an inhibition on the dependence should be treated in the same way as an inhibition in execution for the reasons just discussed, and accordingly should continue in force unaffected by the time to pay decree.

3.31 We appreciate that the power to recall or restrict an existing arrestment on the dependence represents a novel encroachment on rights already vested in the creditor and to that extent the position differs from the prohibition of future arrestments in execution. We argue later that the court should have power to recall or restrict arrestments in execution and to recall poindings when making a time to pay order after decree for payment has been granted[2] and the same considerations apply to arrestments used on the dependence. To mitigate so far as practicable the possible adverse consequences to creditors, we advance certain recommendations. First, we think that where the court is minded to recall an arrestment on the dependence, it should have power to impose such conditions as it thinks fit on the debtor which he must satisfy before the court will make a time to pay direction and an ancillary order recalling the arrestment.[3] In such a case, we propose that the court would defer pronouncing decree constituting the debt and continue the case for a period to allow time for the debtor to fulfil the conditions.[4] For example, the court might require the debtor to give the arrestee an irrevocable mandate for payment to the creditor of funds arrested on the dependence as a condition precedent to the grant of a time to pay direction for payment of the balance of the debt by instalments.[5] The court should retain its common law powers to recall or restrict an arrestment (and indeed an inhibition) on caution or consignation and on grounds that the diligence was "nimious" (i.e. excessive) and oppressive or incompetent.

3.32 Second, as an additional safeguard for creditors, we recommend later[6] that the recall of an arrestment on the dependence should not affect the rights which a creditor may have acquired through his arrestment to participate in other diligences which had been equalised with his arrestment by bankruptcy legislation.[7]

3.33 *Diligence in security.* It is competent to arrest and inhibit in security of a debt which is future (i.e. payable on a date certain to arrive but not yet

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[1]It should be noted that under the present law an arrestment of earnings and pensions is not competent on the dependence of an action: Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, s. 1, and under our recommendations the new diligence of earnings arrestment (which requires payment without the need for a furthcoming) would likewise not be competent on the dependence.

[2]See para. 3.89.

[3]The sheriff in a summary cause action has already power to attach conditions to an instalment decree under the Sheriff Courts (Scotland) Act 1971, s. 36(4), but we understand that the power is rarely, if ever, used.

[4]In this way, the same provisions on appeals would apply to the time to pay direction and to recall as to the principal provisions of the decree. The alternative of pronouncing decree constituting the debt and superseding extract pending fulfilment of the conditions would entail separate provisions on appeals.

[5]As the expense of an arrestment on the dependence is not chargeable against the debtor (Graham Stewart, p. 133), payment of those expenses should not be a condition of recall.

[6]See para. 3.102.

[7]Bankruptcy (Scotland) Bill 1984, Sched. 7, para. 10, re-enacting with minor modifications the Bankruptcy (Scotland) Act 1913, s. 10.

come) or contingent (i.e. payable on the happening of an event which may never occur)[1] if there are "special circumstances" justifying the court in granting warrant for such diligence.[2] There are authorities suggesting that warrant for diligence in security will be granted only when the future or contingent debt has been duly constituted by a bill of exchange, bond or decree.[3] However, this category overlaps with diligence on the dependence: indeed, most recent reported cases on diligence in security concern actions concluding for financial provision on divorce or aliment in which the warrant is granted both "in security" and "on the dependence", and where the debt has not yet been constituted.[4] While we have recommended that time to pay decrees should not be competent in respect of financial provision and aliment, these cases are cited here as showing that diligence in security is indeed in some circumstances competent before a debt has been constituted by a bill of exchange, bond or decree. There might be other circumstances as yet not identified in which warrant for diligence in security was granted otherwise than on the dependence of an action and was then followed by an action in which a time to pay decree was granted.[5] If such a case should arise, we propose that the arrestment, but not the inhibition, should be subject to recall or restriction by an order ancillary to the time to pay decree.

3.34 It appears that "adjudication in security may be used when the debt is future or contingent, and the debtor is *'vergens ad inopiam'*" (scil. verging on insolvency), "or when the claim is uncertain in amount".[6] The adjudication is only a security and does not become an irredeemable right after 10 years.[7] Such diligence appears to be unknown in modern practice since creditors can use inhibitions in security of future or contingent debts, and we do not think that, pending our proposed review of adjudications, specific legislation is required in connection with time to pay decrees.

3.35 Summarising the foregoing proposals, we **recommend:**

(1) A time to pay decree, while it is in operation, should render the debt unenforceable by a charge for payment and by the diligences used for enforcing payment of ordinary unsecured debts, namely, poinding and warrant sale, earnings arrestment (recommended below), arrestment and action of furthcoming, arrestment and action of sale (of vessels), and adjudication for debt, but should not prevent the registration of an inhibition based on the debt.

(2) On making a time to pay decree, the court should have a new discretionary power to make an ancillary order recalling or restricting an existing arrestment on the dependence of the action in which the decree was granted, or an existing arrestment in security of the debt

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[1]Graham Stewart, pp. 15 and 528.

[2]E.g. that the debtor was verging on insolvency, or contemplating abscondence or disposing of assets to the possible prejudice of the creditor: see *Wilson* v. *Wilson* 1981 S.L.T. 101.

[3]Graham Stewart, p. 15; *Mitchell* v. *Scott* (1881) 8 R. 875, 879.

[4]See e.g. *Gillanders* v. *Gillanders* 1966 S.C. 54; *Brash* v. *Brash* 1966 S.C. 56; *Tweedie* v. *Tweedie* 1966 S.L.T. (Notes) 89; *Wilson* v. *Wilson* 1981 S.L.T. 101.

[5]An example would be if the creditor in a bill of exchange or bond, instead of using summary diligence, sought for some reason to constitute his debt by court action.

[6]Graham Stewart, pp. 665–6.

[7]*Idem.*

to which the decree relates. This ancillary power should be additional to its common law powers to recall or restrict arrestments on the dependence or in security.

(3) The court should be empowered to impose on the debtor conditions which must be fulfilled before the making of the ancillary order, and to defer pronouncing decree to allow time for the debtor to fulfil the conditions.

(4) The foregoing ancillary power should not apply to inhibitions on the dependence or in security or adjudications in security.
(Recommendation 3.7; clause 2).

3.36 *Adjudications for debt.* It is competent to raise an action of adjudication for payment of a debt (as distinct from adjudication in security) if the debt is quantified in a liquid document of debt (such as a bond, bill of exchange or promissory note), even though the debt has not been constituted by decree, or the document of debt or a protest of the bill of exchange or promissory note has not been registered for execution in the books of court.[1] It is possible, therefore, that an adjudication for payment of a debt could be completed and the debt subsequently constituted by decree in an action for payment. It is necessary to consider what provision should be made for such a case (admittedly rare in modern practice): what should be the effect of a time to pay direction on the pre-existing adjudication, or indeed *vice versa*? Should a time to pay direction be competent while the adjudication subsists? Should the court extinguish the adjudication, or should the adjudication preclude the time to pay direction? What if the adjudication and payment actions were proceeding concurrently? This minor problem might well be solved satisfactorily by reforms made to adjudications,[2] but in the meantime, as an interim solution pending our review of adjudications, we think that any legislation introducing time to pay decrees should restrict actions of adjudication for debt to cases where the debt had already been constituted by decree or decree of registration.[3] This would have the merit of legislative simplicity and would only adversely affect creditors who wished to adjudge and who held a document of debt which was liquid but not registrable for execution.

3.37 We **recommend:**

It should not be competent for a creditor to raise an action of adjudication to enforce a debt payable under a liquid document of debt or a bill of exchange or promissory note unless:

(*a*) the debt has been constituted by a decree; or

(*b*) the document of debt, or a protest of the bill of exchange or the promissory note, as the case may be, has been registered for execution in the books of court.
(Recommendation 3.8; clause 126.)

3.38 *Special modes of diligence.* While a time to pay decree should affect the diligences used to enforce ordinary unsecured debts (other than inhibitions),

[1]Graham Stewart, p. 580.

[2]For example, if a warrant to charge and adjudge were granted in a decree for payment instead of in a separate action for adjudication.

[3]I.e. an extract registered document of debt: see para. 2.11.

we think that such decrees should not affect the special diligences used for the enforcement of particular categories of debt which are accorded special privileges or are available only to secured creditors: these are the diligences of sequestration for rent or feuduty under the landlord's or superior's hypothec; actions of poinding of the ground; and actions of maills and duties. We revert later to the effect of a time to pay decree on the remedies of a creditor other than diligence.[1]

3.39 Sequestration for rent is the diligence by which the landlord (of rural subjects of less than two acres and of urban subjects) enforces his hypothec, a species of right in security for rent[2] over the moveable goods which the tenant grows or produces on the land or brings on to it, including in certain circumstances the goods of third parties. The hypothec is imputed by law into the lease and is not created by agreement. It is an exception to the general rule of Scots law that there can be no security over goods without delivery of the goods to the creditor. The superior's hypothec for feuduty is similar. We propose to review this topic in due course with a view to determining whether the hypothec and the diligence of sequestration should be abolished or reformed. Meantime, the dilgence has to be assessed in the light of the theory that it enforces a real right in security and that sequestration for rent can be commenced without constituting the debt by decree. We think that, until the hypothec is reviewed in the light of consultation, it would be premature to propose that it should be affected by time to pay decrees.[3] Sequestrations for rent are not now frequently used.

3.40 An action of poinding of the ground is the diligence available to the creditor in what is called a *debitum fundi* (literally "a debt of the land"), namely, a feudal superior, a creditor in a ground annual or in a real burden for the payment of money and a creditor in a bond and disposition or assignation in security or in a standard security. The creditor can poind goods not only of the debtor but also of the debtor's tenants and of third parties even after the land has been alienated by the debtor. It is both a diligence and a species of real action designed to give effect to the creditor's security for his debt. The existence of this diligence (which is seldom used) prompts certain questions. For example, if there is a case for conferring rights to create securities over moveables without delivery, it seems doubtful whether it can in modern times be confined to the holders of *debita fundi.* And why should such a right be implied by law rather than created by agreement, or affect the goods of third parties? We propose to consult on the question whether this ancient mode of diligence should be reformed or abolished. Pending our review of the diligence, we propose that time to pay decrees should not affect actions of poinding of the ground. Meantime it may be observed that a poinding of the ground is executed in the same manner as a "personal"

[1]See para. 3.103 below.

[2]The hypothec covers only rent which is due or current but not arrears; it secures each year's rent successively and must be put in force within three months of the term of payment: *Encyclopaedia,* vol. 8, p. 6.

[3]As an interim reform, we recommend later that the exemptions from diligence which we recommend for poindings should apply also to sequestrations for rent or feuduty: Recommendation 5.51(4) (para. 5.244). We revert later to sequestrations for rent of moveables on dwellings subject to protected or statutory tenancies restricted by section 110 of the Rent (Scotland) Act 1984: see para. 3.111.

poinding[1] and would thus attract the safeguards for debtors which we recommend in Chapter 5 for personal poindings.[2]

3.41 An action of maills and duties is traditionally classified as a diligence[3] but is essentially a remedy available to a secured creditor whose security deed contains an assignation of rents. A decree of maills and duties gives the creditor a right to enter into possession and clothes the creditor with the debtor's rights as landlord so that the creditor may recover rents and exercise the landlord's hypothec. The action is the equivalent of the statutory right which a creditor in a standard security may obtain to enter into possession and recover the rents.[4] Since standard securities do not assign the rents, actions of maills and duties by heritable creditors (other than adjudgers) will eventually wither away, but meantime, like other rights of secured creditors,[5] they should not be affected by time to pay decrees.

3.42 We **recommend:**

> The diligences to be rendered unenforceable by a time to pay decree or subject to recall by an order ancillary to such a decree, should not include a sequestration for rent or feuduty under the landlord's or superior's hypothec, a poinding of the ground or an action of maills and duties. (Recommendation 3.9; clauses 2 and 11(1)(*a*).)

Intimation of time to pay decree and automatic lapse of time to pay direction on default

3.43 A direction for payment by instalments in a summary cause instalment decree lapses automatically, without the need for any recall by the court of the direction, if the debtor allows one instalment to remain unpaid until the next instalment falls due. Thus in a weekly instalment decree, if the debtor does not pay the first instalment within a week after the due date, he loses altogether his entitlement to pay by instalments. One of the main defects of summary cause instalment decrees is that, in the absence of any legal requirement for intimation to the debtor of the granting of the decree, the debtor may lose the right and opportunity to pay by instalments because he does not get to know about the instalment decree until after the instalment provisions of the decree have already lapsed.[6] In recent years, many sheriff clerks, following advice in circulars by the Scottish Courts Administration, now intimate instalment decrees to debtors but this practice, we understand, is still not adopted in all sheriff courts: it is not required by law.

3.44 We think that the principle of automatic lapse on default is a valuable one and should be retained since it avoids the expense and trouble involved in a creditor's application to the court for recall of the order on default.

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[1]There is however no prior charge in a poinding of the ground. A "personal" poinding is a poinding other than a poinding of the ground.

[2]Pending our review of poindings of the ground we have not sought to recommend provisions adapting poinding procedure for poinding of the ground.

[3]See e.g. Graham Stewart, Chapter 25; but cf. *Smith and Others* v. *Bruce* (1916) 1 S.L.T. 29.

[4]Conveyancing and Feudal Reform (Scotland) Act 1970, s. 11 and Sched. 3, standard condition 10(3); s. 24.

[5]See para. 3.118 below.

[6]See e.g. Edinburgh University Debtors Survey, para. 5.8.

Moreover, under a rule of automatic lapse on default, every one knows where they stand. We think, however, that the existing provision should be relaxed in the debtor's favour so that the privilege of time to pay lapses only if the debtor allows an instalment to remain unpaid for two instalment periods (instead of one, as at present): in other words, if the debtor is in arrears with the payment of two (not necessarily consecutive) instalments. On the date when the last instalment falls due, the debtor may be only one previous instalment in arrears or may not be in arrears at all. In such a case, the proposed rule that the direction will lapse only if two instalments remain unpaid when the next falls due would be inappropriate, partly because no further instalment is due on a later date, and partly because there may only be a single instalment remaining unpaid. The debtor should, however, be given a period in which to pay the unpaid instalment or instalments. We propose, therefore, in such a case a simple rule giving the debtor three weeks thereafter to pay the balance of the debt unpaid when the last instalment falls due whatever instalment period is laid down by the direction for previous instalments. Moreover, to cure the defect mentioned in the preceding paragraph, default on payment of any instalment should not be treated as default for the purposes of automatic lapse unless the creditor had already intimated an extract of the time to pay decree to the debtor. We propose that intimation should be made by the creditor rather than the court since creditors will almost always be legally represented and since the creditor will require to know the precise date of intimation in order to ascertain whether the debtor has defaulted and the direction has lapsed. Where a time to pay direction in a decree applies both to sums decerned for in that decree and to sums decerned for in a later decree for expenses, default in payment of sums due under either decree should terminate the privilege of time to pay sums due under both decrees.

3.45 We **recommend:**

(1) Sums due under a time to pay decree decerning for payment of a principal sum should become payable only after intimation by the creditor of the extract decree to the debtor.

(2) Where a court grants a time to pay direction relating to expenses in a decree which either:

(*a*) finds expenses due but does not decern for payment of them; or

(*b*) decerns for payment of the expenses as taxed by the auditor of court but does not specify the expenses as a quantified sum,

the expenses should be payable in terms of the direction only after intimation by the creditor to the debtor of an extract decree for expenses specifying their amount.

(3) The privilege of time to pay by instalments conferred by a time to pay decree should lapse automatically if, on the due date for payment of an instalment, the debtor is already two prior instalments in arrears. If the debtor is in arrears with one prior instalment on the date when the last instalment falls due, or if he is not in arrears but fails to pay that instalment on that date, the privilege should lapse if he had not paid the unpaid balance of the debt within three weeks after that date.

(4) A time to pay direction relating to a deferred lump sum should lapse 24 hours after the time for payment has arrived.

(5) Where the court makes a time to pay direction in a decree for payment of a principal sum and subsequently grants a decree for payment of the expenses of the action, the lapse of the direction through default in paying a sum or sums due under one of the decrees should terminate also the privilege of time to pay the sums due under the other decree. (Recommendation 3.10; clauses 1(1) and (3); and 3(1)–(4).)

Variation and recall of time to pay direction

3.46 At present, a summary cause instalment decree fixes the level of instalments once and for all and the court has no power to vary or recall the instalment provisions of the decree if a material change occurs in the debtor's circumstances. We think that the court should have a power to vary or recall a time to pay direction in a time to pay decree. Such a power might be particularly useful standing the fact that the monetary limit on time to pay decrees would be at a much higher level than under the present summary cause procedure. Thus a debtor should be entitled to apply for a downward variation of the level of instalments if he suffers a loss of income. Further, there is evidence that some debtors offer to pay instalments at a level which they cannot meet[1] and we think that the court should be empowered to vary the instalments if it made the order in ignorance of a material fact even though there has been no material change in the debtor's circumstances. The court should also have a power to recall or restrict an arrestment which had not been recalled when the time to pay decree was made, subject to the debtor fulfilling such conditions precedent (if any) to the recall or restriction as the court might impose.

3.47 Having regard to the serious consequences of default, and to the fact that if a time to pay direction for instalments had lapsed on default the debtor might, under our recommendations,[2] be debarred from obtaining a time to pay order such as we recommend later, we envisage that the form of intimation of an extract time to pay decree should be prescribed by act of sederunt and should notify the debtor of his right to apply for variation of the time to pay direction in the decree. Clearly creditors should also have the right to apply for a variation order or recall order, the grounds of which cannot be foreseen and defined exhaustively in legislation. Variation or recall would often be appropriate if for example the debtor's circumstances improved or it was discovered that he had substantial assets which had not been disclosed when the time to pay decree was made. Recall would or might be appropriate where the debtor granted unfair preferences to other creditors or gratuitous alienations to his family or business associates, to the prejudice of the creditor, or was about to remove assets from the jurisdiction to evade eventual diligence, or irresponsibly incurred new debts, or where a race of diligences by other creditors against his property developed.

3.48 We **recommend:**

[1]See Edinburgh University Debtors Survey, para. 5.6: such offers were made because the debtors felt that smaller payments would not be acceptable to creditors.

[2]See paras. 3.64 to 3.66.

(1) A court which has made a time to pay decree should be empowered to vary or recall the time to pay direction in the decree and, subject to such prior conditions as the court thinks fit, to recall or restrict any arrestment securing the debt, on a subsequent application by the debtor or creditor.

(2) Provision should be made by act of sederunt to ensure that the form of intimation of an extract time to pay decree should notify the debtor of his right to apply for a variation of the time to pay direction in the decree and for recall or restriction of an arrestment securing the debt. (Recommendation 3.11; clause 3(5), (6) and (7).)

Section B. Time to pay orders

Introduction of time to pay orders

3.49 Under the present law, whereas instalment decrees are available at the stage of a summary cause action, it is, as a general rule,[1] not possible for a debtor whose debt has been constituted by an "open" decree for payment to obtain the right to pay by instalments.[2] In our Consultative Memorandum No. 48, we sought views on whether the defender in an action for payment should have the right to apply, after an "open" decree had been granted, for an order substituting an instalment decree for the open decree.[3]

3.50 This suggestion was approved by all who commented and we have no doubt that the reform is needed. We have already noted that whereas a large number of debtors cannot pay outright or can do so only with great difficulty, only a small proportion apply for or obtain instalment decrees.[4] An even smaller proportion of instalment decrees actually operate as such because in some cases default occurs before the debtor even learns that the instalment decree has been granted.[5] If implemented, our recommendation for intimating time to pay instalment decrees[6] would go far towards solving this problem, but we think that the many debtors who do not obtain an instalment decree at the stage of the court action should nevertheless be entitled after decree for payment has been granted to apply for an order converting an open decree into an order (which we call a "time to pay order") similar to a time to pay decree. It would be unduly harsh to deny a debtor such a right on the ground that he should have applied for an instalment order in the court action and has only himself to blame if he did not take that opportunity. Quite apart

[1]As an exception to the general rule, the Moneylenders Act 1927, s. 18(*f*) enabled the court to make an instalment order at any time before payment in relation to sums due under a moneylender's agreement, and a time order under the Consumer Credit Act 1974, s. 129(1)(*b*), is also competent after decree.

[2]Under the present law, in the case of a decree in absence, provision is made for "reponing" debtors (i.e. allowing them to defend the action though decree has been pronounced) at the court's discretion in a sheriff court ordinary action (Ordinary Cause Rules, rules 28–32) or as of right in a sheriff court summary cause action (Summary Cause Rules, rule 19) (cf. R.C. 89(*f*)). But the procedure is designed to allow the debtor to put forward a defence and we understand that, in the case of summary cause actions, it is generally accepted that the reponing procedure cannot be used for the purpose of enabling the sheriff to substitute an instalment decree for an open decree.

[3]Paras. 1.20 to 21, Proposition 1(2) (para. 1.26).

[4]See paras. 2.26 to 2.27 above.

[5]Para. 3.43 above.

[6]Recommendation 3.10(1) and (2) (para. 3.45).

from cases in which the debtor's inability to pay arises only after decree is granted, e.g. through supervening illness or unemployment, very many debtors already pay decree debts by instalments under informal arrangements and one complaint about the present law is that the instalments are fixed by creditors at an unduly high level. Moreover, many debtors do not appreciate their predicament until some enforcement steps have been taken. Such debtors should have the opportunity to obtain a court order fixing the instalments at an appropriate level.

3.51 We note that the county courts in England and Wales possess general powers to stay enforcement proceedings on the ground of inability to pay and to substitute instalment orders.[1] The Payne Report observed that these powers constitute a "satisfactory code"[2] and that there is "at each stage power in the court to protect the debtor against the hardship of execution if he is genuinely unable to pay the debt or any instalments ordered".[3] And in Northern Ireland, after a court action, the Enforcement of Judgments Office can make an instalment order, in lieu of an enforcement order attaching property or income.[4] We think that debtors in Scotland should have a similar right to apply to the court for a time to pay order.

3.52 For the reasons given above, the court should also have power to order payment by a deferred lump sum rather than instalments,[5] and title to apply should be conferred on the categories of individuals entitled to apply for time to pay decrees.[6]

3.53 We **recommend:**

(1) A new jurisdiction should be conferred on the courts to make an order (to be called a time to pay order) whereby a debt which has already been constituted by decree would be payable by instalments or by a deferred lump sum.

(2) Time to pay orders should be available to the same categories of persons and subject to the same limitations as are time to pay directions in terms of Recommendation 3.2 above.[6]
(Recommendation 3.12; clauses 4(1) and (2) and 12.)

Debts subject to time to pay orders

3.54 The right to apply for a time to pay order should be available not only in respect of a decree pronounced in an action or other civil proceedings in a Scottish court but also in respect of a decree of registration on which summary diligence may be executed,[7] a "deemed" decree of registration,[8] a

[1]County Courts Act 1984, ss. 71, 86, 88.
[2]Para. 491.
[3]Para. 495.
[4]The Judgments Enforcement (Northern Ireland) Order 1981, article 30 (S.I. 1981/226).
[5]See paras. 3.3 and 3.4.
[6]See para. 3.9.
[7]See para. 2.11 above for an explanation of "decrees of registration" and summary diligence.
[8]I.e. orders rendered by statute enforceable in like manner as an extract registered decree arbitral bearing a warrant for execution issued by a sheriff court: such as the awards of an industrial tribunal under the Employment Protection (Consolidation) Act 1978, Sched. 9, para. 7(2) (as amended).

non-Scottish decree or decree-arbitral enforceable in Scotland on registration under statute[1] or on the granting of a decree-conform at common law, and authentic instruments and court settlements emanating from E.E.C. Member States and any other non-Scottish instruments which are enforceable by diligence in Scotland.[2] These are simply different ways of constituting a debt and obtaining warrant for diligence.

3.55 It is less self-evident that time to pay orders should be made available to rates and tax defaulters pursued by summary warrant.[3] There is a tendency for such debtors to withhold payment long after they would pay ordinary debts.[4] It is also said that the collectors of rates and taxes do not choose their debtors but that is also true of many other "involuntary" creditors, e.g. where the debt arises out of delict, unjust enrichment, aliment, or the supply by a public utility undertaking of gas or electricity to a person who has not previously defaulted. Some may consider that a time to pay order is inconsistent with the summary nature of the diligence procedure for recovering rates or taxes whereas others may think that the absence of any prior court action or opportunity to obtain a time to pay decree justifies this protection. A time to pay order would not be pronounced by the sheriff in an opposed application unless the debtor was genuinely unable to pay, and on balance we are of opinion that time to pay orders should apply to rates and tax arrears pursued by summary warrants.

3.56 We think that, as a general rule, taxes, fines and penalties due to the Crown which are constituted by decree in civil proceedings should also be subject to time to pay orders. This would be consistent with the general principle in the Crown Proceedings Act 1947[5] which declares that such decrees should be enforceable in the same manner as in actions between subjects and not otherwise. We would, however, recommend the express exclusion of fines or penalties for contempt of a civil court[6] or for breach of an order under section 91 of the Court of Session Act 1868 (orders for restoration of possession of goods or specific performance of statutory duties) and also civil fines or penalties for professional misconduct imposed under any enactment regulating the discipline of a specific profession or occupation, where the fine or penalty is payable to the Exchequer.[7]

3.57 Fines and other debts due under the orders of courts of criminal jurisdiction (e.g. sums due under compensation orders and caution for good behaviour), though enforceable by civil diligence,[8] should not be subject to the time to pay jurisdiction since recovery of the fine or other debt is governed

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[1]E.g. Administration of Justice Act 1920, Part II; Foreign Judgments (Reciprocal Enforcement) Act 1933, Part I; Civil Jurisdiction and Judgments Act 1982, ss. 4 and 18; Arbitration Act 1950, ss. 36(1) and 41(3); Arbitration Act 1975, s. 3(1)(*b*).

[2]E.g. Civil Jurisdiction and Judgments Act 1982, s. 13.

[3]For the special characteristics of summary warrants and diligence following thereon, see Chapter 7 below.

[4]See para. 7.19 below.

[5]S. 26(1).

[6]An order by a civil court imposing a sentence for contempt is now treated as a civil decree, subject for example to the civil avenues of appeal: *Cordiner, Petitioner* 1973 S.L.T. 125.

[7]See Solicitors (Scotland) Act 1980, ss. 53 and 55. We recommend below a similar enactment relating to messengers-at-arms and sheriff officers: see para. 8.84, Recommendation 8.12(4)(*c*).

[8]Criminal Procedure (Scotland) Act 1975, s. 411.

by a separate code[1] under which the court may *inter alia* allow payment by instalments.[2] Debts due under decrees awarding financial provision (capital sums and periodical allowance) on divorce[3] and aliment, and similar decrees enforcing public law obligations of maintenance, should be excluded from time to pay orders as in the case of time to pay decrees and for the same reason. Analogous debts under non-Scottish judgments and documents of debt enforceable in Scotland by diligence should also be excluded.

3.58 We **recommend:**

(1) A time to pay order should be competent where (a) the debt has been constituted by a decree or other document of debt bearing a warrant for diligence; or (b) the debt consists of or includes tax or rates arrears for the enforcement of which the sheriff has granted a summary warrant authorising diligence.

(2) Such an order, however, should not be competent where:

(*a*) the debt due under the decree consists of or includes financial provision on divorce, or aliment; or

(*b*) the decree provides for the recovery of the cost of supplementary benefit or is a contribution order as mentioned in Recommendation 3.3(*b*);[4] or

(*c*) the debt is due under a non-Scottish decree, analogous to those mentioned above, which is enforceable in Scotland; or

(*d*) the debt is a civil fine or penalty imposed for contempt of court in civil proceedings, or for breach of an order under section 91 of the Court of Session Act 1868, or for professional misconduct under any enactment; or

(*e*) the debt is a fine or other sum due under an order of a court in criminal proceedings.
(Recommendation 3.13; clause 4(1) and (7).)

Stage in debt recovery process when time to pay orders competent

3.59 As mentioned in Chapter 2, we think that the new time to pay jurisdiction should only be invoked where an action to constitute the debt is before the court or where a stage in the debt recovery process has been reached at which the risk of the creditor instructing diligence has become real and substantial: otherwise the resources of the courts would be wasted in dealing with cases which would not in any event proceed to diligence.

3.60 In our view, therefore, whereas time to pay decrees should be available in court actions, time to pay orders should only be available at the later stage when the creditor has proceeded to the next formal step in debt recovery following upon the grant of decree. In the case of poinding and warrant sale

[1]Criminal Procedure (Scotland) Act 1975, ss. 194 and 395–412; Criminal Justice (Scotland) Act 1980, s. 66.

[2]1975 Act, s. 399(1).

[3]When the Family Law (Scotland) Bill 1984, clause 17 takes effect, financial provision will also be competent on the grant of decree of declarator of nullity of marriage, and the same considerations will apply there as to financial provision on divorce.

[4]See para. 3.13 above.

procedures, this step is the service of a charge to pay. We recommend in Chapter 6 that a charge should be a necessary prelude to the service of an earnings arrestment such as we describe in that Chapter. We propose that the form of charge would be prescribed by act of sederunt and that the new prescribed form, in addition to warning the debtor of the legal consequences of non-payment within the days of charge, would also notify him of his entitlement to apply for a time to pay order.[1] In contrast to earnings arrestments, arrestments of moveable property and funds other than earnings in the hands of the debtor's employer should, as under the present law, continue to be competent without a prior charge since *inter alia* the charge might induce the debtor to move funds to defeat the arrestment whereas it is unlikely to induce the debtor to leave his job. In such cases, the debtor could apply for a time to pay order as soon as the arrestment had been laid. The procedure in the diligence of adjudication for debt takes the form of a court action[2] and an application for a time to pay order should be competent when such an action has been raised.

3.61 We envisage that a summary warrant for the recovery of rates and taxes should not be preceded by a charge and we propose that the right to apply for a time to pay order should arise as soon as the summary warrant was granted. In practice, the grant of such a warrant is, and probably would continue to be, intimated to rates or tax defaulters before diligence was commenced so that even without a charge, the defaulter would often have the opportunity to obtain a time to pay order before diligence was executed.

3.62 It would not be right to allow a diligence to be affected by a time to pay order where the diligence had reached such an advanced stage that the order would require relatively expensive diligence procedures already completed to be undone or that the debtor has had ample opportunity to obtain a time to pay order but has simply failed to do so. There ought to come a stage in a diligence when a creditor can know that he may in safety instruct the completion of the diligence. In our view, therefore, a time to pay order should not be competent where a warrant of sale of poinded goods, or a decree of furthcoming of arrested funds or moveables, or decree of sale of an arrested vessel, had been granted, or in the case of a summary warrant poinding, intimation of removal and sale, or of sale, had been made in accordance with the new procedure which we recommend later. Under our recommendations, it would still be possible after a warrant of sale of poinded goods for the creditor *voluntarily* to make an instalment arrangement with the debtor involving cancellation of the arrangements for sale,[3] but an order *imposing* payment arrangements at such a late stage would be unfair to the creditor. In the case of adjudication for debt, a time to pay order should not be competent if the creditor had obtained a decree of adjudication and either entered into possession of the adjudged property with the debtor's consent or acquiescence or obtained a decree of maills and duties or decree of removing or ejection of the debtor. Because of the archaic nature of the procedure one result of this solution would be that the debtor could not obtain a time to pay order relating to that debt for a period of up to 10 years,

[1]Recommendation 9.6(3) (para. 9.31).
[2]See para. 3.28 above.
[3]Recommendation 5.41 (para. 5.197).

the legal period of redemption of adjudged property. However, if (as we shall propose in due course) adjudications are modernised, it seems possible that "the legal" will be drastically reduced and this objection, such as it is, would then disappear.

3.63 We **recommend:**

(1) A time to pay order should only be competent where a charge to pay or arrestment in common form had been executed, an action of adjudication for debt had been raised, or a summary warrant granted, for recovery of the debt.

(2) A time to pay order should not be competent after a diligence enforcing the debt had proceeded to an advanced stage (viz. warrant of sale of poinded goods; intimation of the date of removal or impending sale of goods poinded under the recommended new summary warrant poinding procedure; decree of furthcoming or sale of arrested property; or entry into possession of adjudged property with the debtor's consent or acquiescence or a decree of maills and duties or of removing or ejection relating to such property) and until the date when the diligence had been completed or for any reason had ceased to have effect, after which date a time to pay order should again become competent. (Recommendation 3.14; clause 4(1) and (4).)

Other conditions of competence

3.64 We think that the monetary ceiling applicable to time to pay decrees[1] should apply also to time to pay orders with minor modifications. Thus, if the amount of the debt outstanding at the time when the application for a time to pay order is made (excluding interest but including the sums quantified in the extract decree—any principal sum or expenses of the action decerned for in the decree—and any sums for which the debtor had become liable subsequently, namely the expenses of a prior charge or other diligence so far as chargeable against the debtor) exceeded £10,000 or such other sum as might be prescribed by regulations, then the sheriff should be bound to refuse to make a time to pay order. To assist the court in applying this condition of competence the amount of the debt outstanding should be specified in the application.

3.65 In fairness to creditors, and to encourage debtors either to observe the terms of time to pay decrees and orders or to apply timeously for their variation, a restriction should be placed on the number of times a debtor may obtain an extension of time to pay. So if a time to pay direction or a time to pay order had already been made for the same debt (whether or not it was still in operation or had lapsed through default or been recalled by the court), it should not be competent for the debtor to obtain a time to pay order. To ensure that the court could apply this condition of competence, we think that it should be provided by an act of sederunt that the debtor should include in his application for a time to pay order a statement that no time to pay direction or time to pay order relating to the debt had been made previously.

3.66 We **recommend:**

[1]See paras. 3.22 to 3.25 above.

(1) A time to pay order should be competent only where:

(*a*) the debt (exclusive of interest but including expenses decerned for as a quantified sum in the extract decree and diligence expenses) does not exceed a prescribed sum (fixed initially at £10,000 variable by statutory instrument); and

(*b*) a time to pay direction or time to pay order relating to the debt has not already been made.

(2) Provision should be made by act of sederunt requiring a debtor applying for a time to pay order to state in his application that no time to pay direction or order relating to the debt has been made.
(Recommendation 3.15; clause 4(3) and (6).)

The forum; local and international jurisdiction

3.67 *Forum.* In our view, jurisdiction (in the sense of adjudicatory competence) to make time to pay orders should be conferred on the sheriff court and not the Court of Session. The great majority of debt decrees emanate from the sheriff court and it seems essential that the sheriff court should have jurisdiction. The jurisdiction is one which is best exercised locally and, being of a summary character in which legal representation would not be required, it seems an inappropriate jurisdiction to confer on the supreme court. It would not apply to corporate bodies and is generally not appropriate for very large debts.

3.68 The best argument in favour of a two-tiered jurisdiction is perhaps that Court of Session decrees for payment should be subject to control by the Court of Session not the sheriff court. However, the sheriff court already supervises poindings on Court of Session decrees and may award sequestrations which have the effect of discharging debts constituted by Court of Session decrees. Moreover, the sheriff court is now responsible for the enforcement of criminal fines of whatever amount imposed by the High Court of Justiciary. The sheriff's jurisdiction in time to pay orders would not in any way imply disrespect towards the decrees of a superior court.

3.69 *International and local jurisdiction.* Since time to pay orders have a double aspect of precluding enforcement by the ordinary modes of diligence and making that preclusion conditional on payment by instalments or a deferred lump sum, it is not easy to characterise such orders for the purposes of the various sets of rules which now govern the assumption of jurisdiction by the Scottish courts. In relation to the European Judgments Convention, which determines jurisdiction between domiciliaries of member states of the European communities, time to pay order applications would be likely to be treated as proceedings concerned with the enforcement of judgments so that the courts of the State in which the judgment has been or is to be enforced would have exclusive jurisdiction irrespective of domicile.[1] On this view, the Scottish courts would have jurisdiction to make a time to pay order affecting diligences within Scotland enforcing a judgment of an E.E.C. Member State registered in Scotland for enforcement, and the jurisdiction of the local sheriff courts would be a matter to be determined by reference to the internal law

[1]European Judgments Convention, Article 16(5).

of the Contracting State, in this instance Scots law.[1] A similar rule applies for the allocation of jurisdiction within the different parts of the United Kingdom, under the Civil Jurisdiction and Judgments Act 1982.[2] The 1982 Act also enacts a similar rule for *inter alia* allocation of jurisdiction between the sheriff courts:[3] thus the court of the place where the judgment has been or is to be enforced has exclusive jurisdiction over these proceedings.

3.70 It will be seen that this criterion, while appropriate for example to the rules relating to applications for recall of a particular diligence executed in one place, or to an application for warrant of sale, is not appropriate in the case of a time to pay order stopping new diligences throughout Scotland, and recalling, restricting or freezing diligences already executed perhaps in several sheriffdoms or sheriff court districts. Obviously, not all of these courts can have exclusive jurisdiction to make a time to pay order. In these circumstances, we think that a different rule or rules should be adopted for the assumption of local jurisdiction within Scotland. Most debt decrees emanate from the sheriff court and for these we suggest a simple rule that the sheriff court which granted decree for the debt should alone have jurisdiction to make a time to pay order affecting the debt. This is a clear rule and in most cases will enable a debtor to go to the court of his domicile, though there will be cases where he has changed his domicile or where jurisdiction in the original action was founded on some jurisdictional ground other than the debtor's domicile. It may be helpful for the court to have regard to the process in the original action, and our proposed jurisdictional rule might facilitate this. We propose a similar rule for summary warrants granted by the sheriff. In other cases, such as Court of Session decrees, extract registered documents of debt, and external judgments enforceable in Scotland, we suggest that the debtor's "domicile" within the meaning of the 1982 Act, section 41, would be appropriate. In cases where the debtor was not domiciled within a sheriff court district in Scotland, jurisdiction should be allocated to the sheriff having jurisdiction over a place of business of the debtor or, if he had no place of business in Scotland, to a place where he had property (including income, such as a source or earnings or an arrestable liability of a third party to account to him) against which diligence might be done. The general effect would be that a debtor would normally be entitled to apply to his local sheriff court for a time to pay order. Moreover, transfer of applications between sheriff courts would be competent under general rules of court.[4]

3.71 We **recommend:**

(1) The sheriff courts should have exclusive jurisdiction to make time to pay orders.

(2) The sheriff court which granted the decree for payment or summary warrant for recovery of a debt should have jurisdiction to make a time to pay order affecting that debt. In all other cases, jurisdiction should be conferred on the sheriff court of the place where the debtor is

[1]See Anton, *Civil Jurisdiction in Scotland* (1984) p. 104 who observes that "the rules in Art. 16 specify merely the Contracting State whose courts have jurisdiction under it. It is left to the Contracting States themselves to specify which of their courts should exercise this jurisdiction".

[2]S. 16, and Sched. 4, Article 16(5).

[3]1982 Act, s. 20 and Sched. 8, para. 4(1)(*d*).

[4]Ordinary Cause Rules, rule 19.

domiciled or, if he is not domiciled in Scotland, a place where he carries on business, or if he has no domicile or place of business in Scotland, a place where he has property (or a source of income) liable to diligence.
(Recommendation 3.16; clause 4(2) and (7) (definition of "sheriff").)

Procedural aspects of applications for time to pay orders

3.72 An application for a time to pay order should attract the measures (discussed elsewhere in this report[1]) designed to facilitate "DIY applications" by unrepresented debtors. In general the legislation should set out the main features of the procedure leaving the details to be prescribed by act of sederunt with the possibility of modification being made from time to time in the light of practical experience. The debtor would complete an application in a prescribed form containing an offer to pay the debt by instalments or a deferred lump sum and lodge it in court. The sheriff clerk would be under a statutory duty to assist the debtor in completing the form if requested to do so. To preserve the sheriff clerk's impartiality, the legislation should make it clear that the form would contain the debtor's proposals for payment, not what the sheriff clerk thought that the debtor could or should pay. The sheriff clerk should, in our view, have immunity from actions for breach of this statutory duty.

3.73 In framing a time to pay order, the court would require to refer to particulars of the extract decree or other document of debt[2] whose provisions the order will qualify. One practical difficulty here is that the extract decree or other document will invariably be in the possession of the creditor not the debtor and, in the absence of special provision, would generally not be known to the sheriff and sheriff clerk dealing with the application. The debtor, however, should normally be able to obtain these particulars, e.g. from the form of charge or the poinding or arrestment schedule or intimation of earnings arrestment which preceded his application or perhaps even from the court granting the decree or from the creditor. An act of sederunt should provide that where possible the debtor should specify these particulars in his application and the form of charge and other diligence documents served on a debtor should warn him that this information will be required if he applies for a time to pay order. Where the debtor was unable to furnish these particulars to the court, the sheriff should have a power to order the creditor to furnish them, on pain of interdict against further diligence, or of recall of existing diligence, enforcing the debt.

3.74 If the application had been properly made and it appeared that the making of a time to pay order would be competent, the sheriff clerk would send a copy to the creditor, who would have 14 days within which to object to the granting of the application. It is envisaged that objections would normally be made by lodging a simple prescribed form. If no objections were made the sheriff would dispose of the application by granting a time to pay order giving binding legal effect to the debtor's proposals for payment. We

[1]See the summary at paras. 2.136 and 2.137 above, and paras. 9.27 to 9.31 below.

[2]Including a summary warrant and relative certificate of arrears by the collector of rates or taxes so far as applicable to the debtor in question.

envisage that an objection would take the form of either an outright objection to the making of any time to pay order or an objection to the terms proposed by the debtor, e.g. as to the amounts of, or intervals between, the instalments proposed. It would be for consideration whether intimation to the debtor of the objection should be made by the sheriff clerk or by the creditor (or his agent). The debtor would have an opportunity to make representations on the creditor's objections. Only if agreement was not reached as to whether a time to pay order should be made or as to its terms would a hearing be held. In this way, it is hoped that the procedure would normally be carried through on paper without the need for court hearings attended by the parties or their representatives.

3.75 The sheriff clerk would intimate the sheriff's decision to the parties. Since, under our recommendations, a time to pay order providing for instalments would only lapse if there were default in payments after the order had been intimated by the sheriff clerk to the debtor, the sheriff clerk would require to inform the creditor that he had intimated the order to the debtor on a particular date.

3.76 We **recommend:**

(1) The procedure should be as outlined at paras 3.72 to 3.75 above.

(2) So far as the procedure in an application for a time to pay order is not prescribed by clauses 5 and 6 of the Bill annexed to this report, it should be prescribed by act of sederunt. Provision should be made by act of sederunt to secure that where possible a debtor applying for a time to pay order should furnish particulars of the decree concerned to the sheriff and those particulars should be set out in the charge and other documents served on a debtor in the execution of diligence. (Recommendation 3.17; clauses 5 and 6.)

Time to pay orders and diligence

3.77 Since time to pay decrees and time to pay orders would share the same social and legal policy aims, it seems clear that they should preclude broadly the same modes of diligence. Accordingly, in line with our recommendations for time to pay decrees, we envisage that a time to pay order would prevent use of the diligences whereby ordinary unsecured debts are enforced, other than inhibitions. A major difference, however, flows from the fact that time to pay orders would be available at the later stage of debt recovery when diligence in execution of a decree had begun. Whereas time to pay decrees would generally not affect existing diligences other than arrestments used on the dependence or in security, time to pay orders would affect all existing poindings, arrestments, earnings arrestments and adjudications enforcing the debt due under the decree.

3.78 We have already recommended that the service of a charge or the commencement of a diligence or the grant of a summary warrant should be a condition of an application for a time to pay order, but that a time to pay order should be incompetent where a poinding, arrestment or adjudication enforcing the debt had proceeded to an advanced stage as defined above.[1] Two

[1]Para. 3.63; Recommendation 3.14(2).

key policy questions remain. First, how far (if at all) should a creditor be entitled to proceed with a diligence while an application for a time to pay order was being considered by the court? Second, where the sheriff decided to make a time to pay order, what effect should that order have on existing diligences already commenced by the creditor as well as new diligences not yet begun? We turn now to the first of these questions.

3.79 *Interim sist of diligence.* If time to pay orders are to achieve their object of delaying diligence pending the debtor's compliance with payment arrangements sanctioned by the court, then the creditor must be prevented from completing diligence or from taking steps (such as obtaining warrant of sale) which, under recommendations made above,[1] would render the making of a time to pay order incompetent. Accordingly, if an application has been properly made and it did not appear that the making of a time to pay order would be incompetent, the sheriff should be under a duty to make an interim order sisting diligence pending disposal of the application. The order would be intimated to the creditor concerned by the sheriff clerk (rather than the debtor).

3.80 Because the characteristics of specific forms of diligence enforcing unsecured debt vary somewhat, the interim order would require to have different effects on different diligences. In the case of those diligences which take the form of an "inchoate" attachment of property requiring to be completed either by a sale (poinding and sale under ordinary decrees or summary warrants, arrestment and furthcoming of moveable property, arrestment and sale of vessels) or by payment (arrestment and furthcoming of funds other than earnings), the creditor should be entitled to impose the attachment by executing the poinding or arrestment. Otherwise the creditor might fail to obtain the right to claim equalisation with other arrestments and poindings under bankruptcy legislation[2] or the debtor might use the time to pay order procedure to gain time to dispose of his funds and moveable goods. The interim sist should, however, prevent further procedure (such as an application for or the grant of warrant of sale in an ordinary poinding not being an order for the sale of perishable goods; intimation of the date fixed for the removal for sale, or the sale, of goods in a summary warrant poinding; the raising of an action of furthcoming or sale of arrested property or funds and the grant of decree in such an action). If the interim order was made while an application for warrant of sale was pending, that application would fall.

3.81 By contrast, an earnings arrestment such as we recommend in Chapter 6 is a completed, rather than an inchoate, diligence requiring the employer to pay arrested earnings to the creditor without a furthcoming. An interim sist should prevent the execution of a new earnings arrestment but should not affect an existing earnings arrestment: to require the employer to stop deductions and payments pending disposal of the application for a time to pay

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[1] *Idem.*

[2] Bankruptcy (Scotland) Act 1913, s. 10 re-enacted with minor modifications by the Bankruptcy (Scotland) Bill 1984, Sched. 7 para. 10. The creditor could claim a *pari passu* ranking on another arrestment or poinding on producing his decree but he might never become aware of the diligence if he has not himself executed an arrestment or poinding.

order, and to restart them if the application were refused, would be unsatisfactory. Moreover, a debtor would have at least two weeks (the days of charge) after a charge was served on him within which to pre-empt an earnings arrestment by application for time to pay and normally would only have himself to blame if he did not take that opportunity. If an earnings arrestment were in operation, the interim sist should not prevent a creditor from sharing in the debtor's earnings by applying for a conjoined arrestment order such as we recommend in Chapter 6, and the interim sist should not affect an existing conjoined arrestment order. Since we have recommended that aliment and periodical allowance on divorce should not be subject to a time to pay order,[1] a time to pay order would not affect the new diligence of current maintenance arrestment recommended in Chapter 6.

3.82 An interim sist of diligence should render incompetent the raising of an action of adjudication for debt.[2] Actions of adjudication for debt are so rare that there is little risk that an adjudging creditor would thereby lose his chance of a *pari passu* ranking by being prevented from adjudging within a year and day after a prior (the first effectual) adjudication in terms of the Adjudications Act 1672.[3] Where an action of adjudication for debt had already been raised, the creditor should be entitled to register a notice of litigiosity in the personal registers, to obtain his extract decree and to complete title by recording the extract in the property registers or an abbreviate in the personal registers. But no further steps (such as the raising of an action of maills and duties and entry into possession of the adjudged subjects, or ejecting the debtor, or collecting rents or the raising of an action of declarator of expiry of the legal) should be competent while the application for a time to pay order was pending. If the creditor had already entered into possession of adjudged subjects or obtained a decree of maills and duties or a decree for removing or ejection of the debtor, then a time to pay order would be incompetent,[4] the application should be refused and no interim sist should be granted.

3.83 We envisage that an interim sist would not preclude the execution of inhibitions or the special modes of diligence described above[5] (which would not be affected by time to pay orders) and it would not prevent the creditor from petitioning for the debtor's sequestration under bankruptcy legislation or applying for a debt arrangement scheme such as we recommend in Chapter 4.

3.84 An interim order sisting diligence should take effect when intimated to the creditor and remain in effect till the sheriff's order disposing of the application was intimated to the debtor and creditor. Certain time limits are, and if our recommendations are accepted will be, imposed on the effective

[1]Para. 3.58; Recommendation 3.13(2).

[2]The debtor's remedy would be an action of reduction in the Court of Session. Specific provisions for clearing the registers of ineffectual adjudication documents comparable to those proposed at paras. 4.119 to 4.124 below for debt arrangement schemes appear unnecessary.

[3]If adjudications were to be reformed and (it may be) the legal shortened, it would be for consideration whether an interim sist should have the same effect on adjudications as we recommend it should have on poindings and arrestments.

[4]Paras. 3.62 and 3.63; Recommendation 3.14(2).

[5]See paras. 3.38 to 3.42.

duration of diligences (such as the three-year period for the prescription of arrestments[1] or the limits recommended below on the duration of poindings[2]). For these purposes, the period of the interim sist should not run against the creditor.

3.85 We **recommend:**

(1) The sheriff should make an interim order sisting diligence by the creditor pending disposal of an application for a time to pay order.

(2) The interim order should not stop the execution of new poindings and arrestments. It should however stop poindings and arrestments from proceeding to warrant of sale or decree of furthcoming or, in a summary warrant poinding, intimation of either removal for sale or sale. It should stop new actions of adjudication for debt and, if such an action had been raised, it should stop the creditor from entering into possession of the adjudged property but it should not stop the registration of a notice of litigiosity in connection with the action, nor the obtaining and recording of an abbreviate or decree of adjudication.

(3) The period during which an interim sist of diligence is in force should be disregarded in computing the period during which by law a diligence subsists.

(Recommendation 3.18; clauses 5(3) and 7; Schedule 7, paragraph 2.)

3.86 *Effect of time to pay orders on diligence.* We propose that, as a means of regulating the legal effect of time to pay orders on diligence, the sheriff would have duties or powers to make ancillary orders recalling or restricting diligences or "freezing" them while the time to pay order was in operation. Again different provisions would have to be made for different modes of diligence because of the need to tailor those orders to suit the individual characteristics of each mode.

3.87 First, the new modes of continuous diligence against earnings enforcing "ordinary debts",[3] namely earnings arrestments and conjoined arrestment orders so far as enforcing ordinary debts, could not remain in effect while an instalment time to pay order was in operation because the level of deductions under these diligences[4] would often necessarily be different from the level of instalment payments under the decree, and because the times of deductions under these diligences[5] would often not coincide with the times of payment of instalments under the time to pay order. Moreover, a continuous diligence against earnings would be inappropriate where a time to pay order provided for a deferred lump sum. Accordingly the sheriff should have a duty (not merely a power) to recall any existing earnings arrestment and, if the debt was being enforced by a conjoined arrestment order, to exclude that debt

[1]Debtors (Scotland) Act 1838, s. 22, which we recommend later should not apply to diligence against earnings.

[2]See Recommendation 5.27 (para. 5.130).

[3]I.e. debts other than current maintenance: see Chapter 6.

[4]Which would be determined by applying a statutory sliding scale to the earnings payable on each pay day.

[5]Deductions would be made on pay days and these might, or might not, be at regular intervals, and might be altered subsequent to the time to pay order.

from that order, or to recall that order if the debt was the only one still being enforced by the order.[1]

3.88 In the case of the "inchoate" diligences of poindings and of arrestments in common form, we propose that the sheriff should possess a discretionary power to make ancillary orders recalling the poinding or recalling or restricting the arrestment, but if he did not recall the poinding or the arrestment as the case may be, he should be under a duty to make an order to the effect that no further steps (such as the making of an application for warrant of sale or the raising of an action of furthcoming or sale) should be taken in the diligence while the time to pay order was in operation. The last-mentioned type of ancillary order would "freeze" the diligence but preserve its effect as an attachment of, or nexus on, the funds or property.[2]

3.89 An ancillary order recalling a poinding or arrestment would be an important abridgement of the vested rights of diligence creditors and we carefully considered whether the lesser power to "freeze" the diligence would suffice or whether the power of recall should be restricted to (say) poindings of goods in debtors' residences and diligence against earnings, which are the main areas of public concern. Such limitations, however, would appear unduly arbitrary and would exclude other deserving cases. For example, it may be that if arrested trading debts or poinded or arrested stock-in-trade or an arrested fishing vessel, were made available to the debtor by a recall of an arrestment or poinding, the debtor could quickly use the released funds or goods to earn the sums needed to pay off the debt. Again, it might be that funds arrested in a bank account were personal earnings of small amount urgently needed for the maintenance of the debtor and his dependants. On balance, we have concluded that the power of recall should in principle apply to all arrestments and poindings.

3.90 As in the case of ancillary orders recalling arrestments on the dependence in connection with time to pay decrees, the sheriff should have power to impose on the debtor conditions precedent to the making of an ancillary order recalling or restricting diligence, and a creditor's right to claim a share in equalised poindings or arrestments would not be affected by the recall of the diligence.[3] We assume that in most cases the sheriff would impose a condition requiring the debtor to pay the expenses of the diligence before recalling it. Where such a condition was not imposed, those expenses should still be recoverable by the creditor from the debtor as an exception to the general rule proposed below[4] that the expenses of a diligence should only be recoverable from the proceeds of that diligence or from payments made before it ceased to have effect. The expenses would also be an element in the debt recoverable by the time to pay order.[5]

3.91 We propose that, on granting a time to pay order, the sheriff should

[1]If the conjoined arrestment order had been made in another sheriff court, a sheriff of that court would exclude the debt or recall the order.

[2]For this reason we have avoided the use of the word "sist" lest it be thought that the order would affect the attachment or nexus on the property or funds imposed by the diligence.

[3]See para. 3.101.

[4]Chapter 9.

[5]See the draft Bill annexed to this report, clause 4(7), definition of "debt".

not have power to extinguish an adjudication for debt, nor if the action of adjudication were pending, to prevent a creditor from registering a notice of litigiosity and obtaining and recording an extract decree or abbreviate of adjudication. However, as in the case of an interim sist,[1] the creditor would not be entitled to take any further steps in pursuing his diligence while the time to pay order was in force.

3.92 Clearly, if a time to pay order was made during the days of charge, the charge should lapse on the making of the order since it requires the debtor to make payment of the debt in full within the days of charge. In the more usual case where a charge had been served and the days of charge had expired before the time to pay order was made, then, unless it can be shown that the debtor was able to pay his debts, his "apparent insolvency" (in the new statutory sense of the term which replaces the concept of "notour bankruptcy" and has similar, though not identical, pre-conditions and effects) would already have been constituted by reason of the expiry of the charge without payment[2] and the time to pay order and its ancillary orders affecting diligence should not retroactively change the legal effect which the expired charge has in constituting the debtor's "apparent insolvency"[3] except that, as we propose below,[4] the debt would not found a petition for the debtor's sequestration for so long as the time to pay order was in operation.

3.93 We **recommend:**

(1) A time to pay order should preclude enforcement of the debt by any new charge, poinding (other than a poinding of the ground), earnings arrestment, arrestment in common form, or action of adjudication for debt.

(2) The sheriff should have:

(*a*) a duty to recall an existing earnings arrestment; to recall, or exclude the debt from, a conjoined arrestment order; and to prohibit further steps in an adjudication for debt other than the registration of a notice of litigiosity and the obtaining and recording of an abbreviate and decree of adjudication; and

(*b*) a power to recall or restrict an arrestment and to recall a poinding (other than a poinding of the ground), and if he does not recall the poinding or arrestment, he should make an order "freezing" the diligence by prohibiting the creditor from taking further steps in the diligence and rendering incompetent the grant of warrant of

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[1]See para. 3.82 above.

[2]Bankruptcy (Scotland) Bill 1984, clause 7(1).

[3]The main effects of "apparent insolvency" are that (1) it makes the debtor liable to sequestration: Bankruptcy (Scotland) Bill 1984, clause 5(2)(*b*); (2) it equalises arrestments and poindings, Bankruptcy (Scotland) Bill 1984, Sched. 7, para. 10; and (3) in the construction of contracts, it replaces "notour bankruptcy" which was and is frequently a condition of an irritancy or other clause in a contract terminating or changing the rights of parties under the contract: 1984 Bill, clause 69(6). With the repeal (by the 1984 Bill, Sched. 8) of the Bankruptcy Act 1696, apparent insolvency or notour bankruptcy is not of itself a pre-condition of the reduction of unfair preferences under statute, and, apart from common law challenges (which were not dependent on notour bankruptcy), unfair preferences are now challengeable if made within six months before sequestration or the granting of a "protected" trust deed for creditors (rather than six months before notour bankruptcy): 1984 Bill, clause 35.

[4]See para. 3.100.

sale or of decree of furthcoming or sale. This freezing order would not however prevent an officer of court from lodging a report of the poinding nor prevent an application for the disposal of perishable goods or for security of goods.

(3) The period during which a diligence is "frozen" by such an order should be ignored in reckoning the time limits on the duration of the diligence.

(4) A time to pay order and its ancillary orders should cause an unexpired charge to lapse but should not retrospectively annul the effect which an expired charge has had in creating "apparent insolvency" within the meaning of bankruptcy legislation.

(5) If the sheriff, being unaware of the existence of a diligence, omits to make an ancillary order recalling, restricting or freezing it as recommended above, the diligence should continue in operation, and further steps may be taken in it, unless and until it is recalled, restricted or "frozen" by a subsequent order.

(Recommendation 3.19; clause 8; Schedule 7, paragraph 2.)

Lapse, variation and recall of time to pay orders

3.94 We propose that the provisions on the automatic lapse of time to pay orders, the variation and recall of such orders, and the recall or restriction (subject to conditions) of unrecalled diligences (poindings or arrestments), securing the debt would closely resemble the corresponding provisions on time to pay decrees.[1] Some special provisions may be noted.

3.95 A sheriff may not have been informed about the existence of a diligence at the time when he made a time to pay order with the result that he did not recall a diligence (e.g. an earnings arrestment) which, under our proposals, he had a duty to recall. Or it may be that he would not have made the time to pay order if he had known of the diligence. In these circumstances, we think that the sheriff should have a power to recall the time to pay order, or to make any order recalling, restricting or "freezing" the diligence which he could have made when granting the time to pay order. The sheriff should be entitled to exercise this power of his own accord after allowing the parties an opportunity to be heard.

3.96 Moreover, we think that, where a poinding was recalled under a time to pay order which subsequently lapses so that the right to do diligence revives, then the creditor should be entitled to execute a second poinding in the same premises for the same debt notwithstanding the restriction on such poindings which we recommend later.[2] The creditor should also be entitled to recover the expenses of the recalled diligence by a subsequent diligence notwithstanding the general rule recommended below that the expenses of a diligence should only be recoverable by that diligence or by payments made before it terminated.[3]

3.97 We **recommend:**

The provisions on automatic lapse of time to pay orders, the variation and

[1]See paras. 3.43 to 3.48 above.
[2]See para. 5.134.
[3]See Recommendation 9.9(5) (para. 9.58).

recall of such orders, and the recall and restriction of existing diligences securing the debt should be similar to the corresponding provisions applying to time to pay decrees, but with minor modifications.
(Recommendation 3.20; clause 9.)

Section C. Recommendations applying to both time to pay decrees and time to pay orders

Sequestration and insolvency

3.98 Under the Bankruptcy (Scotland) Act 1913, a petition for sequestration could be at the instance, or with the concurrence, of any one or more creditors whose debt or debts together amounted to not less than a prescribed sum, whether such debt or debts were liquid or illiquid, provided they were not contingent.[1] Under that Act debts which were payable on a future date certain to arrive would found a petition for sequestration.[2] Under the Bankruptcy (Scotland) Bill 1984, however, such future debts, as well as contingent debts, will not found such a petition. Despite this change in the law, there might be doubt whether a debt to which a time to pay direction or order relates is "future" in the relevant sense. On the one hand, we have proposed that such a debt should be payable on a future date or dates with the effect that it could not be enforced by the ordinary modes of diligence while the direction or order was in operation. On the other hand, the debt, for other purposes such as set off and the enforcement of rights in security, would be treated as presently due and resting owing.[3] In these circumstances, we think that the legislation following on this report should make it clear that a debt to which a time to pay direction or time to pay order relates should not give the creditor the right to present, or to concur in, a petition for the debtor's sequestration while the direction or order is in force. We think that a creditor in a time to pay direction or order who seeks sequestration should first apply to the court for recall of the time to pay direction or order.

3.99 Where the debtor was nevertheless sequestrated by another creditor, it would be unfair to the creditor in the time to pay direction or time to pay order if the direction or order were to continue in effect after the date of sequestration with the possible effect of requiring that creditor to rank as if his debt were not yet due,[4] or to apply for recall of the time to pay direction or order. It should therefore be made clear by statute that the debtor's sequestration terminates a time to pay direction in a decree or a time to pay order. Where the debtor had granted a trust deed for creditors, or had entered into an extra-judicial composition contract with his creditors, or had applied for a debt arrangement scheme such as we recommend in Chapter 4 and a notice had been circulated to creditors requesting them to verify their debts, the debtor would be insolvent and it is likely that other creditors would be enforcing, or threatening to enforce, diligence against the debtor. In these circumstances, the creditor in a time to pay direction or order should be

[1]1913 Act, s. 12 as amended by the Insolvency Act 1976, Sched. 1.
[2]Goudy, p. 121; Bankruptcy Report, para. 5.31.
[3]See Recommendation 3.24 (para. 3.118).
[4]See Bankruptcy (Scotland) Bill 1984, Sched. 1, para. 1(2) replacing a provision in the Bankruptcy (Scotland) Act 1913, s. 48 as recommended by our Bankruptcy Report, para. 16.12: under both of these enactments, a creditor in a future debt is only entitled to vote and rank after deduction of interest from the date of sequestration until the due date of payment.

placed on a footing of equality with the other creditors by termination of the time to pay direction or order without the need to apply to the court to recall it.

3.100 **We recommend:**

(1) A debt to which a time to pay direction or time to pay order relates should not entitle the creditor to present, or concur in, a petition for the debtor's sequestration while the direction or order is in effect.

(2) A time to pay direction in a decree or a time to pay order should be terminated by an award of sequestration of the debtor's estate, a trust deed for his creditors, an extra-judicial composition contract with his creditors or the circulation of a notice requesting creditors to verify their debts in an application for a debt arrangement scheme such as we recommend in Chapter 4.
(Recommendation 3.21; clause 10.)

Rights acquired under legislation on equalisation of poindings and arrestments

3.101 We have recommended above that the court should have power to recall an arrestment on the dependence of an action in which a time to pay decree was granted or in security of the debt to which the action relates, and also power to recall an arrestment or poinding securing a debt subject to a time to pay order. These powers are designed to benefit the debtor and not to affect the rights of his creditors among themselves. It should be expressly provided therefore that the recall of an arrestment or poinding by an ancillary order in a time to pay decree or order, or any order made on an application to vary the decree or order, should not affect any right which the creditor may have acquired, by virtue of the arrestment or poinding, to share in the proceeds of other arrestments or poindings under bankruptcy legislation[1] which provides *inter alia* that arrestments and poindings executed within 60 days before and 4 months after the debtor's "apparent insolvency" rank *pari passu*[2] as if they all had been executed on the same date. In addition to equalising diligences, the bankruptcy legislation also contains a provision enabling a creditor to claim a share in the proceeds of arrestments and poindings used within the above-mentioned statutory period by producing, in judicial proceedings, a decree for payment or other liquid document of debt. In the absence of a saving clause such as we recommend, a creditor whose arrestment or poinding had been recalled after the expiry of the statutory period might not be able to rely on that provision since his claim might be time-barred. That provision would, however, ensure that if the debtor's apparent insolvency was constituted anew, (e.g. by the expiry without payment of a charge by another creditor), then the creditor in the time to pay decree or order could

[1]Bankruptcy (Scotland) Bill 1984, Sched. 7, para. 10 re-enacting with minor modifications the Bankruptcy (Scotland) Act 1913, s. 10. For the meaning of "apparent insolvency", see para. 3.92 above.

[2]"Pari passu" ranking on a fund involves the sharing of the fund among the creditors rateably according to the size of their debts: i.e. each creditor receives the same proportion of his debt.

participate in the proceeds of later arrestments and poindings by producing his decree within the new statutory period.[1]

3.102 We **recommend:**

The recall of an arrestment or poinding should not affect any right which the creditor had acquired through his arrestment or poinding to a *pro rata* share in the proceeds of other arrestments and poindings under bankruptcy legislation.
(Recommendation 3.22; clause 11(2).)

Preservation of creditors' rights and remedies other than rights to do diligence enforcing unsecured debts and to sequestrate

3.103 *General.* In many cases, the creditor has methods of enforcing his debt other than the ordinary modes of diligence, e.g. security rights; and rights of recourse against cautioners (guarantors). He may also have certain remedies which, though not given by law expressly for the purpose of enforcing debts, can be used for that purpose: notable examples include rights to repossess moveables under a hire purchase, conditional sale or hire agreement; the right of a landlord to remove a tenant for non-payment of rent; or the rights of the public utilities supplying gas or electricity to disconnect the supply for non-payment of gas and electricity charges. Although in theory the use of these special remedies might be regarded as inconsistent with a time to pay decree or order, we think that such decrees and orders must be allowed to apply to debts enforceable by these special remedies. The fact that such creditors have other and perhaps better means of enforcing their debts than the ordinary forms of diligence should not give them the further advantage of immunity from time to pay decrees and orders precluding use of the ordinary forms of diligence.

3.104 On the other hand, we consider that the right of time to pay conferred on a debtor by a time to pay decree or order should be regarded as in the nature of a privilege or, to use the language of the old small debt procedure, an "indulgence". Whereas such a decree or order should preclude the execution of the ordinary forms of diligence (other than inhibitions) used for the enforcement of unsecured debts, and petitions for sequestration, while the time to pay direction or order is in force, the debt should not be regarded for all purposes as a future debt. So, a time to pay decree or order should not affect the other rights and remedies of the creditor for the recovery of the debt such as rights of set off, retention or lien; rights of recourse against cautioners or co-obligants of the debtor (who themselves would be entitled to apply for a time to pay decree or order if they were individuals); or the exercise of security rights over heritable or moveable property of the debtor, or of a cautioner, securing the debtor's personal obligation of payment, such as rights to call up the security on default or to realise or take possession of the secured property to satisfy the debt.

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[1]The Bankruptcy (Scotland) Act 1913, s. 7 (reversing *Wood* v. *Cranston and Elliot* (1891) 18 R. 382) provided that a second or subsequent constitution of notour bankruptcy was available for the purpose of the equalisation of diligences, etc. under the 1913 Act, s. 10 and we understand that amendments will be moved to the Bankruptcy (Scotland) Bill 1984, designed to ensure that "apparent insolvency" may be constituted anew for the purposes of the equalisation of diligences under para. 10 of Sched. 7 to that Bill.

3.105 Two categories of debts enforceable by these additional methods of recovery merit fuller consideration here, namely rent arrears, and gas and electricity charges. (At the end of this Chapter, we deal with a third category—consumer credit agreements—to which rather different considerations apply.)

3.106 *Public sector tenancy rent arrears.* Any new system of time to pay decrees and orders must take account of the fact that public sector tenancy rent arrears are normally enforced by actions for recovery of possession followed by the threat of ejection rather than by actions for payment followed by the threat of poinding and arrestment, though some housing authority landlords, at least in the recent past, obtain or have obtained combined decrees for possession and payment, or for payment only.[1] The use of possession actions to recover rent arrears was in effect sanctioned by the Tenants' Rights Etc. (Scotland) Act 1980, Part II which gives the sheriff, in possessory actions by public sector landlords, a new statutory power to adjourn the proceedings for a period or periods "with or without imposing conditions as to payment of outstanding rent or other conditions".[2] Moreover, the sheriff can refuse decree not only if the landlord fails to establish non-payment of rent but also if it appears to him that it is not "reasonable to make the order".[3]

3.107 The courts grant adjournments only where the tenant or his representative comes to court and applies for an adjournment. Recent research[4] has disclosed that in many court districts, tenants or their representatives have been slow to do this and indeed of the sample of 10 sheriff courts studied, in only two (Edinburgh and Glasgow sheriff courts) were applications for adjournment made in significant numbers. Broadly speaking, the Act appears to be operated as follows. If the tenant makes an offer of weekly payments towards the arrears, the action will be adjourned for six to eight weeks to test his ability to keep to the arrangement. If at the end of that period, the tenant has indeed complied with the arrangement, the case will be sisted so that the arrangement can continue without the necessity of calling the case in court at regular intervals. If the tenant has not kept to the arrangement at the end of the period of adjournment but has some reasonable excuse for his failure (e.g. absence from work through illness), he may be allowed a further adjournment prior to the case being sisted. Where a case is sisted but the arrangement breaks down with no apparent likelihood of resumption, the landlord authority will apply to have the sist recalled and will move for decree.

3.108 Once the possessory decree is granted, the position of the tenant in strict law is the same as it was before the 1980 Act: the delaying power of the court under the 1980 Act is exercised before, and not after, decree. As regards

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[1]The O.P.C.S. Defenders Survey, p. 17, discloses that, in a representative sample interviewed in 1978, 63% of local authority actions were actions for recovery of possession without a crave for payment.

[2]1980 Act, s. 15(1).

[3]*Ibid.*, s. 15(2).

[4]Adler, Himsworth and Kerr, *Public Housing, Rent Arrears and the Sheriff Court* (1985) Scottish Office Central Research Unit Papers.

enforcement of the decree by ejection a recent Scottish Office Central Research Unit study observed:[1]

> "Given that most eviction procedures resulted in a payment arrangement, it seems more logical for authorities generally to pursue either joint actions,[2] or, where comprehensive responsibilities under the Housing (Homeless Persons) Act are accepted, actions for payment alone. Nevertheless there are disadvantages—the sum involved can bear no relation to the tenant's final arrears, given delays in court proceedings; the tenant's situation—unemployment or intermittent employment—may limit the suitability of arrestment procedures; while poinding and warrant sales are regarded by most authorities as undesirable and are seldom carried out."

The study recommended:[3]

> "Despite practical problems, authorities might consider whether their arrears can be controlled effectively by recourse to legal action for payment as an alternative or supplement to eviction procedures."

3.109 Under our proposals, the jurisdiction under Part II of the 1980 Act would co-exist with the new jurisdiction to make time to pay decrees and orders. Where the landlord authority brought a combined action for recovery of possession and for payment, the court could exercise its powers under the 1980 Act before granting decree and, in the light of that, would decide whether to grant a time to pay direction at the stage of pronouncing decree in the payment action. Clearly it would be difficult to combine the 1980 Act jurisdiction with the jurisdiction to make time to pay orders in one process since the former is exercisable before decree in a possessory action whereas the latter is exercisable after decree in a payment action. While ejection procedures might sometimes make it impossible for the debtor to comply with a time to pay decree or order, we think that the two jurisdictions can co-exist in a workable fashion and that the new jurisdiction in time to pay decrees and orders would complement the protection afforded to public sector tenants by the 1980 Act.

3.110 *Other rent arrears.* In our view, a similar solution should apply in relation to other types of tenancy, (e.g. private sector tenancies of dwellings; agricultural holdings, crofts and smallholdings): that is to say, rent arrears would be subject to time to pay decrees or orders which would affect the use of ordinary diligences to enforce those arrears but would not affect proceedings for recovery of possession of the subjects of the lease.

3.111 *Rent Act tenancies.* In the case of private sector dwellinghouses let on a protected tenancy or subject to a statutory tenancy under the Rent (Scotland) Act 1984, section 110 of that Act (re-enacting earlier legislation[4]) provides that no diligence shall be done without the leave of the sheriff. In an application for leave to do diligence for the recovery or in security of rent, the sheriff has

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[1]Wilkinson, *Rent Arrears in Public Authority Housing in Scotland* (1980) H.M.S.O. Edinburgh, para. 8.17.

[2]Scil. combined possessory and payment actions.

[3]Para. 8.17.

[4]Rent (Scotland) Act 1971, s. 129(1) which in turn re-enacted, so far as applicable to Scotland, the Increase of Rent and Mortgage Interest (Restrictions) Act 1920, s. 6.

the same wide powers of adjourning proceedings, sist and suspension of execution, as he possesses under the Act in proceedings for recovery of possession of the dwellinghouse.[1] So far as we are aware, applications for leave to enforce rent by diligence are rare. The section derives from a provision in a United Kingdom statute of 1920[2] restricting distress for rent in England and Wales (where a landlord could levy distress without a prior application to the court) with a Scottish application clause substituting "diligence" for "distress".[3] The section does not fit Scottish procedure well: for example, it is not clear whether the application for leave to do diligence should be made in an action for payment and leave granted in the decree authorising diligence, or whether it should be made after decree containing warrant for diligence has been granted but before diligence is commenced or whether the creditor can choose one or other of these alternatives. Moreover, its implications for arrestment on the dependence are obscure. Nor is it clear at what stage in an action of sequestration for rent the application must be made.

3.112 We propose that section 110 of the 1984 Act should be amended in the following ways. First, the restriction imposed by the section should be confined to actions of sequestration for payment of rent, or in security of rent, under the landlord's hypothec. Insofar as the section restricts the ordinary diligences enforcing unsecured debts, we think that it should be replaced by time to pay decrees and time to pay orders partly because these would give just as much protection to a tenant and partly because the co-existence of two different and overlapping protective regimes would be complex and unnecessary.

3.113 Second, since the landlord has to raise a court action of sequestration for rent before he executes the diligence of sale of the sequestrated goods, separate provision for leave to do the diligence is unnecessary and inappropriate. Instead, the sheriff should have a simple discretionary power to adjourn or sist an action of sequestration for rent to enable the debt to be paid. As already mentioned,[4] we propose to review the diligence of sequestration for rent in due course and meantime we think that any amendment of section 110 of the 1984 Act, so far as applicable to sequestration for rent, should make minimal changes. Under the existing law, the sheriff, in his first deliverance in an action of sequestration for rent, makes an order sequestrating the effects and grants warrant to inventory and secure them.[5] At a later stage, the sheriff, on an application by the landlord, grants warrant for sale of the sequestrated effects at the sight of an officer of court or other named person.[6] While we have not found any authority on the Rent Act restrictions, there are sheriff court cases[7] on the analogous restrictions imposed by the Courts (Emergency Powers) Act 1914 in which it was held that leave to enforce under that Act need not be sought before raising an action of sequestration

[1]1984 Act, s. 12.
[2]Cited above.
[3]1920 Act, s. 18.
[4]See para. 3.39.
[5]Ordinary Cause Rules, rule 100; Summary Cause Rules, Form D.
[6]Ordinary Cause Rules, rule 101; Summary Cause Rules, rule 74.
[7]*Jamieson* v. *Portobello Picture Palace Ltd.* (1916) 32 Sh.Ct.Reps. 263; *Marquis of Breadalbane* v. *Toberonochy Slate Quarry Co. Ltd.* (1917) 33 Sh.Ct.Reps. 154.

for rent or before executing the warrant to inventory or secure, or even before decree of sequestration containing warrant of sale was granted. The reason was that a process of sequestration for rent merely identifies and secures the moveable goods subject to the hypothec so as to enable the landlord subsequently to realise his security: diligence within the meaning of the Act was not done until the warrant of sale in the decree of sequestration for rent was executed. We accept this general approach but propose some minor modifications to it. We consider that the tenant should be entitled to apply for a sist or adjournment of the action at any stage from immediately after the time when the first deliverance sequestrating the tenant's effects has been granted to immediately before the grant of warrant of sale of the sequestrated effects. We do not think an application for a sist or adjournment should be competent before the first deliverance. That deliverance is granted before the initial writ has been served on the tenant.[1] To give the tenant an opportunity to oppose the grant of the first deliverance would invite the tenant to remove goods from the dwellinghouse and might greatly diminish the landlord's security. On the other hand, we do not think that a sist or adjournment should be competent after warrant of sale of the sequestrated effects has been granted. Once the proceedings have reached that late stage, the tenant would have had ample opportunity to apply to the sheriff for a sist or adjournment of the action, and the landlord should be able to make arrangements for sale safe in the knowledge that those arrangements will not be disrupted by the court. This solution would give a tenant almost the same protection as under the existing law while achieving a more equitable balance between the interests of the tenant and landlord.

3.114 We **recommend:**

The restriction on diligence enforcing rent imposed by the Rent (Scotland) Act 1984, section 110, should be limited to actions of sequestration for payment, or in security, of rent and should be amended to provide that the sheriff has powers to sist or adjourn the action to enable the rent to be paid by instalments or otherwise which are exercisable at any stage between the first deliverance and the grant of warrant of sale of the sequestrated goods and effects.
(Recommendation 3.23; Bill, Schedule 7, paragraph 34.)

3.115 *Fuel debts.* Unpaid charges for gas and electricity are recoverable as ordinary civil debts.[2] The rights of the fuel authorities to enforce these debts by court action and diligence are extensively used,[3] and these rights are, of course, supplemented by the powers of the fuel authorities to discontinue supplies in the event of non-payment of charges. In the case of default in payment of a charge for electricity, the Electricity Board may cut off the supply until the payment of the sums due together with the expenses of

[1]Dobie, *Sheriff Court Practice,* p. 423.

[2]Gaswork Clauses Act 1871, s. 40 as read with Electric Lighting Act 1882, s. 12; Gas Act 1972, Sched. 4, para. 13.

[3]C.R.U. Court Survey, Table 3A showed that, in 1978, 21% of summary cause payment actions were raised by the fuel boards. The C.R.U. Diligence Survey, Annex D, Table 10, showed that, in the same year, the fuel boards accounted for 15% of debt-related decrees (viz. for payment, possession of heritable property, or delivery of goods) which were enforced.

cutting off the supply.[1] In the case of gas, if within 28 days of a written demand the consumer has not made payment of the charges for the supply of gas, the Gas Corporation may, after seven days' notice, cut off the supply and recover the expense: the Corporation has no duty to restore the supply until payment of all sums due and the expenses of reconnection.[2] These powers were considered by the National Consumer Council,[3] and also by an unpublished report to the Secretary of State for Energy by Mr Gordon Oakes in 1976[4] on payment and collection methods for gas and electricity bills.

3.116 Following these reports and as a result of them, the disconnection powers of the fuel boards are now exercised in accordance with a code of practice in which the fuel authorities state among other things that they will not cut off supply if the defaulting customer agrees and keeps to a payment arrangement for his electricity or gas and pays off the debt by instalments in a reasonable period, or if there is real hardship and it is safe and practical to instal a slot meter.[5] The practice of disconnections and the operation of the Codes of Practice have been much discussed.[6]

3.117 Against this background, three points may be made. First, the question whether judicial or other restraints should be imposed on the powers and rights of the fuel boards to disconnect supplies is strictly speaking not one which falls within the reform of the law of enforcement of debts by diligence. It is nevertheless of considerable importance to debt enforcement. Since the fuel boards may and do use the threat of disconnection to compel or induce payment of arrears—a threat made more potent by their monopoly position and by the essential nature of the energy supplied for the standard of living of the consumer and his family—a case can be argued for introducing restraints on disconnection similar to the restraints on diligence which we are recommending. But the position of fuel debts differs from that of ordinary debts in a number of ways. Restraints on diligence do not require the creditor to continue to supply goods or services to the defaulting consumer in the future; restraints on disconnection, by contrast, necessarily imply that the fuel authority will supply the energy on credit for so long as the restraint lasts. Since the authority has a monopoly of the thing supplied whereas an ordinary creditor does not have such a monopoly, it can be, and has been, argued that a restraint on disconnection would be justified.[7] Nevertheless it will be apparent that the issues are very different from the ordinary private law issues of debt enforcement, and involve the special position, financing and functions of nationalised industries, and the question whether people should have a "right to fuel", topics which for the most part fall outwith our terms of reference

[1]Electric Lighting Act 1882, s. 21; Electric Lighting Act 1909 s. 18.

[2]Gas Act 1972, Sched. 4, para. 17.

[3]National Consumer Council, Report No. 2, *Paying for Fuel,* H.M.S.O., 1976.

[4]Assisted by Mr. Jack Ashley, M.P. and Mrs. Frances Morrell.

[5]Code of Practice for domestic customers issued by the Electricity and Gas Industries (revised July 1982).

[6]See e.g. Middleton, "Paying the Poor Man's Fuel Bill" [1977] *Scolag Bulletin* 166; Neillands, "Electricity Accounts and Metering" [1982] *Scolag Bulletin* 141; Grimes, "Electricity Boards and the Consumer" [1982] *Scolag Bulletin* 154.

[7]The People's Right to Fuel Bill 1983 [Bill 66] (introduced by Mr. Dennis Canavan, M.P. under the ten-minute rule procedure and ordered to be printed on 26 January 1983) made provision *inter alia* to prevent disconnection of electricity and gas in cases of hardship and to introduce a statutory code of practice to protect people threatened with such disconnection.

and expertise. We therefore make no recommendation on the matter. Second, and on the other hand, the right of the fuel boards to enforce debts due to them for the past supply of gas or electricity is, by contrast, far more clearly a question of private law. The charges are of the nature of private law debts and enforceable as such through the court and diligence systems. We cannot see any ground upon which such debts can be distinguished from other debts and accordingly we consider that they should be subject to time to pay decrees and orders. Third, it follows from the foregoing that restraints on ordinary diligence to enforce fuel debts would exist but would not extend under our proposals to restraints on the fuel boards' powers of disconnection.[1] Whether those restraints should be so extended, or whether other and different restraints should be introduced, is a matter for the Government and Parliament to decide and on that matter we express no opinion.

3.118 We **recommend:**

A time to pay decree and a time to pay order or interim order should not affect the right of a creditor to recover his debt by the exercise of any rights and remedies available to him (such as rights of set off, retention, lien, or recourse against cautioners; the exercise of security rights e.g. under standard securities or pledges; contractual rights to recover possession of heritable or moveable property, e.g. under hire-purchase agreements; and the rights of electricity or gas boards to disconnect supply) other than the diligences used to enforce unsecured debts and sequestration, and except as mentioned in Recommendation 3.25 below.[2]
(Recommendation 3.24; clause 11(1).)

Section D. Relationship between (a) time to pay decrees and orders and (b) time orders under the Consumer Credit Act 1974

3.119 With the coming into operation of Parts V to IX of the Consumer Credit Act 1974 on 19 May 1985,[3] new restrictions apply to creditors' rights to enforce regulated consumer credit and hire agreements, including discretionary control by the sheriff court of the creditor's enforcement proceedings.[4] The main mechanism of judicial control is a "time order" under section 129 of the 1974 Act. This may be an order giving the debtor time to remedy a non-monetary breach of the regulated agreement[5] or, what is more important for present purposes, an order under section 129(2)(*a*) providing for:

"the payment by the debtor or hirer or any surety of any sum owed under a regulated agreement or a security by such instalments, payable at such times, as the court, having regard to the means of the debtor or hirer and any surety, considers reasonable."[6]

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[1]The Oakes Report, *supra* recommended that a court order should be required before disconnection but this recommendation was rejected by the then Government.

[2]Para. 3.127.

[3]Consumer Credit Act 1974 (Commencement No. 8) Order 1983 (S.I. 1983/1551).

[4]The other forms of restriction are mandatory notice before default or other action by the creditor is taken (see footnote 4 on p. 119 below) and certain provisions to protect the debtor's family on his death.

[5]S. 129(2)(*b*), e.g. carrying out repairs or maintenance.

[6]A time order generally provides for payment of arrears due at the time when the order is made but, in the case of a hire purchase or conditional sale agreement, it may also deal with future payments due if the agreement continues in force: s. 130(2).

A time order may be made in three types of case.[1] First, where a creditor or owner in a regulated credit or hire agreement has infringed certain regulatory provisions of the 1974 Act,[2] the agreement is enforceable against the debtor or hirer on an order of the court only, (known as an enforcement order).[3] In an application for an enforcement order, the sheriff may make a time order. Second, the sheriff may make a time order on an application by a debtor or hirer *after* service on him by the creditor or owner of a default notice, a notice of termination of the agreement, or a notice of the creditor's intention during the currency of the agreement to demand earlier payment, recover possession of goods or land or treat any right of the debtor or hirer as terminated, restricted or deferred.[4] Third, the sheriff may also make a time order in an action brought by a creditor or owner to enforce a regulated agreement or any security, or recover possession of goods or land to which a regulated agreement relates. This will cover, for example, actions by a creditor for payment or actions for delivery of goods on hire or hire-purchase.

3.120 The Consumer Credit Act 1974 affects a wider range of cases in which diligence is or may be used than was regulated by the Hire Purchase (Scotland) Act 1965 and the Moneylenders Acts 1900 to 1927 which it replaces. Formerly, the main method of judicial control of the enforcement of hire purchase and conditional sale agreements was the postponed order for specific delivery, in which the sheriff could suspend the order for delivery to give time for payment by instalments and could (but need not) require the creditor to obtain the leave of the court before instructing diligence to recover unpaid instalments.[5] Formerly, the number of sheriff court delivery actions of all types (not merely for recovery of goods on hire purchase or conditional sale) disposed of annually did not exceed about 1,500 as compared with about 90,000 debt actions.[6] The 1974 Act applies to a much larger number of payment actions than were covered by the Moneylenders Acts, (the numbers of which in the Scottish courts are not recorded[7]). The Consumer Credit Act 1974 seems to apply to most actions to enforce instalment credit agreements below the monetary ceiling (£15,000).[8] It applies to "running account credit" (e.g. bank overdraft, shop budget accounts, credit cards and option accounts) and "fixed sum credit" (e.g. hire purchase, conditional sale, credit sale, personal loans, bank loans, pawnbrokers' loans and check and voucher trading). But there are some very important exemptions.[9] Thus debtor-creditor-supplier agreements for fixed-sum credit are generally exempt if the number of payments

[1]S. 129(1).

[2]By entering into an improperly executed agreement or security agreement, or by failing to serve a copy notice on a surety, or by taking a negotiable instrument as security: ss. 65(1); 105(7)(*a*), (*b*); 111(2); 124(1), (2).

[3]Ss. 127, 189(1).

[4]See s. 87 (default notices); s. 98(1) (notice of termination of regulated agreement); s. 76 (notice of creditor's intention to take certain steps during currency of agreement).

[5]Hire-Purchase (Scotland) Act 1965, s. 38(4).

[6]*Civil Judicial Statistics Scotland 1982* Tables 3.4, 3.7, 9 and 10.

[7]In England and Wales, in 1983, the number of moneylenders' claims (except under a mortgage) numbered 32,680. *Judicial Statistics 1983* Table 7.3.

[8]1974 Act, s. 8(2) (consumer credit agreements); Consumer Credit (Increase of Monetary Limits) Order 1983 (S.I. 1983/1878). The Act also applies to regulated consumer hire agreements where the payments do not exceed £15,000: 1974 Act, s. 15(1).

[9]1974 Act, s. 16: Consumer Credit (Exempt Agreements) Order 1980 (S.I. 1980/52) as amended.

to be made does not exceed four.[1] This exempts the normal credit arrangements given by department stores e.g. budget accounts when the debtor is sent a monthly statement and must settle the debit balance by a single payment. A running account credit agreement providing for payment in relation to specified periods is exempt if it requires that the number of payments to be made in repayment of the credit provided in each period shall not exceed one.[2] This exempts for example gas, electricity and telephone accounts, and such normal monthly and weekly accounts as milkman's and newsagent's accounts. So, too, the ordinary case where a tradesman or professional person does work and bills the customer or client later is also exempt. The very large volume of public sector debt, which recently accounted for about half of all debt cases in which the debt was enforced by ordinary and summary warrant diligence, (i.e. adding together decrees in favour of the gas and electricity boards, the Post Office-Scottish Telecommunications Board, public sector landlords recovering rent arrears, and regional councils recovering rates arrears[3]) is excluded from the 1974 Act. Of the remaining volume of "decree debt", a very substantial but unquantifiable proportion is also excluded.

3.121 The coexistence of the 1974 Act system of time orders on the one hand and the system of time to pay decrees and orders on the other hand raises certain issues. First, in cases where actions are brought to enforce regulated agreements or related securities (e.g. cautionary obligations) within the meaning of the 1974 Act, the courts will have power to make a time order under section 129(2)(*a*) of that Act and a different power to make a time to pay decree under our recommendations. The availability of two different types of order may confuse defenders in debt actions enforcing regulated agreements and related securities,[4] and we considered whether the general power to make time to pay decrees in court actions for payment should apply only in cases where time orders under the 1974 Act are not competent. Such a solution however, would unnecessarily cause even worse problems, e.g. if the debtor mistakenly applied for the wrong type of order. We propose therefore that in such actions it should be competent for the debtor to apply either for a time order under the 1974 Act or a time to pay decree.

3.122 Second, it appears to be possible for a creditor to raise an action to constitute a debt due under a regulated agreement or related security after the debtor has already obtained a time order under the 1974 Act, e.g. in a prior application by the creditor for an enforcement order under the 1974 Act[5] or on a prior application by the debtor for a time order.[6] It is also possible that the debtor might apply for a time to pay order when he had already obtained a time order under the 1974 Act. Conversely, where the debtor had obtained a time to pay decree or order, he might also apply subsequently for a time order under the 1974 Act. Since time orders or ancillary orders under the 1974 Act can stop enforcement of debts by repossession of property,

[1] 1980 Order, article 3(1)(*a*)(i).

[2] 1980 Order, article 3(1)(*a*)(ii).

[3] See the O.P.C.S. Defenders Survey, p. 17, Table 3.3; cf. the C.R.U. Court Survey, para. 1.2 (which does not cover summary warrant diligence).

[4] This is not a problem created by our recommendations but already exists given the overlap of summary cause instalment decrees and time orders.

[5] 1974 Act, ss. 127, 128, 129(1)(*a*).

[6] 1974 Act, s. 129(1)(*b*).

realisation of secured property, recourse against cautioners and the like as well as enforcement by the ordinary modes of diligence, the debtor must clearly have the option of applying for such orders.

3.123 These possibilities create the risk that payment of the debt could be regulated simultaneously by different and inconsistent orders. Clearly therefore it should be incompetent to grant a time to pay decree or order while a time order is in force, and *vice versa*. Apart from double regulation, however, there is a risk that a debtor might seek to rely successively on time to pay decrees or orders and also on time orders whether in that sequence or the reverse sequence. This, we think, would be unfair to creditors. Partly for this reason and partly to avoid double regulation of the same debt by inconsistent orders, we propose that where a debtor had obtained a time order under the 1974 Act, then, whether or not the time order was still in force, it should not be competent thereafter for the sheriff to grant a time to pay decree or order for the same debt under our recommended legislation. Conversely, it should be incompetent to grant a time order where a time to pay decree or order had been granted relating to the same debt. To assist the court in applying these requirements, we think that provision should be made by act of sederunt to ensure that the applicant for a time order should inform the court that no previous time to pay direction or order had been made; that an applicant for a time to pay order should inform the court that no prior time order had been made; and that a creditor or owner pursuing an action to enforce a regulated agreement or related security should lodge in court a copy of any previous time order relating to the debt. We note that in a case where the sheriff may make a time order both for arrears and for future payments under a regulated hire purchase or conditional sale agreement,[1] a time to pay decree or order may already have been made for the arrears or a proportion thereof. The future payments are in effect new debts and we think that a time order should be competent in relation to them.[2]

3.124 Third, for no very clear reason (except perhaps the circumstance that the Act of 1974 was largely framed against the background of a different system of law), the system of judicial control through time orders and enforcement orders under the Consumer Credit Act 1974 does not make express provision for the case where the regulated agreement or related security agreement has been registered in the books of court for preservation and execution and accordingly where the creditor has a warrant for summary diligence, i.e. can execute diligence without constituting his debt in a court action. It seems likely that, in such a case, the debtor may lose the opportunity to apply for a time order because there will be no court action and therefore no summons which might alert him to the need to apply for a time order.[3] If diligence had been commenced, it is not at all clear that the court could grant a time order under the 1974 Act sisting diligence.

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[1]1974 Act, s. 130(2).

[2]This, we think, would be the effect of the new subsection (3) to be inserted in section 129 of the Consumer Credit Act 1974 by para. 20(*b*) of Schedule 7 to the Bill annexed to this report.

[3]Provision however is not at present made by act of sederunt requiring that the summons in an action to enforce a regulated agreement or related security should inform the defender of his right to apply for a time order in contrast to the rules in summary cause actions for payment providing for simple forms of application for an instalment decree.

3.125 To avoid these unfortunate results, we suggest that summary diligence should be made incompetent as a means of enforcing payment under a consumer credit or consumer hire agreement or related "security" (e.g. a cautionary obligation). Under older legislation, summary diligence was incompetent in the case of moneylenders' agreements.[1] Under the 1974 Act, summary diligence on negotiable instruments will not occur since a creditor or owner cannot take such an instrument (other than a cheque or bank note) in payment of a sum due under a regulated consumer credit or hire agreement by the debtor, hirer or any surety.[2] It would be a logical extension of this protection to prohibit summary diligence on all regulated agreements and related securities.

3.126 Fourth, we note that the 1974 Act does not make provision to deal with the problems arising where applications for time orders are made after diligence has commenced. It is for consideration whether the 1974 Act should be amended to make it clear that in Scotland, where diligence has reached the advanced stage at which a time to pay order would not be competent as recommended above,[3] then the court should not be entitled to make a time order until the diligence has been completed or has otherwise ceased to have effect. It is also for consideration whether when a time order is made after diligence has commenced, the court should have the same powers and duties to make orders recalling, restricting or "freezing" existing diligences as, under our recommendations,[4] it would possess in the case of time to pay orders. We have not included provisions on these lines in the Bill annexed to this report but we think that the competent authorities should consider the matter with a view to legislation.

3.127 We **recommend:**

(1) Where a time order has been made under the Consumer Credit Act 1974, it should not be competent thereafter to make a time to pay direction or time to pay order under our recommended legislation for the same debt whether or not the time order is still in operation.

(2) Conversely, where a time to pay decree or order has been granted under our recommended legislation, it should not be competent thereafter to grant a time order under the 1974 Act for the same debt whether or not the time to pay decree or order is still in operation.

(3) Provision should be made by act of sederunt requiring—

(*a*) the creditor or owner in an action brought to enforce a regulated agreement or any related security within the meaning of the 1974 Act to lodge a copy of any existing or previous time order relating to the debt;

(*b*) a debtor applying for a time to pay order to state in his application that no time order under the 1974 Act relating to the debt has been made; and

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[1]The Moneylenders Act 1927, s. 18(*h*) prohibited summary diligence on any bill of exchange, promissory note, bond or obligation granted to or held by a moneylender.

[2]S. 123.

[3]Para. 3.63; Recommendation 3.14(2).

[4]Paras. 3.85 and 3.93.

(*c*) a debtor applying for a time order under the 1974 Act to state in his application that no time to pay direction or order relating to the debt has been made under our recommended legislation.

(4) Summary diligence should be incompetent to enforce payment of a sum owed under a regulated agreement or any related security within the meaning of the 1974 Act.
(Recommendation 3.25; clause 13; Schedule 7, paragraphs 19 and 20.)

CHAPTER 4

DEBT ARRANGEMENT SCHEMES

Section A. Introduction of debt arrangement schemes

4.1 In this Chapter we advance recommendations for the introduction in the law of Scotland of a new procedure, to be called a debt arrangement scheme, designed primarily to assist a wage or salary earner or a small trader owing multiple debts to make orderly and regular payment of his debts to his several creditors. The recommendations complement our proposals in Chapter 3 for the introduction of time to pay decrees and time to pay orders which were designed to deal with single debts. Whereas time to pay decrees and orders would give a debtor an extension of time to pay, a debt arrangement scheme on the lines we recommend would give a debtor not only an extension of time to pay but also in appropriate cases a discharge of debts on payment of a composition of less than their full amounts. A debt arrangement scheme is thus not merely a "diligence-stopper" but is also in the nature of an insolvency process resembling, in this respect at least, a sequestration under bankruptcy legislation. The recommendations in this Chapter are also designed to complement the recommendations for the reform of sequestrations submitted in our Report on *Bankruptcy and Related Aspects of Insolvency and Liquidation*[1] which is being implemented with modifications by the Bankruptcy (Scotland) Bill 1984 presently before Parliament.[2] Debt arrangement schemes would differ from sequestrations in significant respects discussed later.[3]

The problem of multiple indebtedness

4.2 Every year in Scotland many thousands of ordinary wage or salary earners or small traders are or become insolvent, that is to say, unable to pay their debts as and when they fall due. Statistical measurements of the incidence of insolvency in this sense are not available but the research commissioned for this report gives helpful information on the topic. The C.R.U. Debt Counselling Survey remarked:[4]

> "Multiple debt problems (defined as difficulties with more than one bill) occur when a number of creditors are in active pursuit simultaneously. This of course does not mean that all debts have reached the same stage in recovery procedures. About 10% of debtors who come to the voluntary organisations in the survey for assistance have multiple debt problems . . .
>
> "The majority of multiple debt problems consist of two debts (60%). The incidence of cases with three debt problems is 25% of the total; those cases with four and five debt problems are 8% and 2% respectively and the remaining proportion of cases have over five debts. The sums of money involved in these multiple debts are most frequently for amounts between

[1]Scot. Law Com. No. 68 (1982).

[2]References to the Bankruptcy (Scotland) Bill 1984 are references to the Bill as brought from the House of Lords to the House of Commons, and ordered to be printed, on 18 December 1984: House of Commons, Bill 48 (1984–85).

[3]Para. 4.13.

[4]Paras. 4.10 and 4.11.

£100–400 (70%). Fifteen per cent of cases are under £100, 5% of cases between £400–500 and 10% over £500 . . . Rent-and-rates and fuel are the two types of debt occurring most frequently together."

(These sums do not reflect present levels of debts since the time of the survey was 1979.)

4.3 The O.P.C.S. Defenders Survey[1] shows that, as regards defenders in debt or debt-related actions, 69% gave as their main reason for default a simple inability to pay: of these, nearly three-quarters (74%) were having difficulty with other bills. However, as few as 15% said that court action was being taken, or was likely to be taken, over at least one. The other bills most often mentioned were electricity bills (54%), gas bills (16%), rent or mortgage payments (19%), and bills or instalment payments for goods (19%).

4.4 The Edinburgh University Debtors Survey[2] found that 49 of the 100 debtors interviewed against whom diligence had been done under a decree were in arrears for other debts. Of these 31 debtors had decrees against them for other debts; 18 were subject to one other decree; nine to two other decrees; two to three other decrees; and two to four other decrees. This finding, however, does not yield a statistical inference for all debtors subject to diligence.[3]

4.5 It seems likely that those debtors who reach the stage of diligence for one debt are more likely to be in arrears with other bills than those at the earlier stages of the debt recovery process but the O.P.C.S. Defenders Survey suggests that relatively few debtors have more than one decree operative against them at any one time. It also appears likely that, even in the case of debtors who are subjected to diligence, for a substantial number, insolvency is an isolated problem rather than a symptom of chronic indebtedness.

4.6 The research suggests that procedures are needed to enable multiple debtors to gain time to pay their debts free from the threat of diligence. The plight of a debtor subjected to diligence by one creditor may be bad enough but may be considerably worsened if he is pressed on all sides by several creditors. In Chapter 2, we saw that particular steps in diligence frequently operate as a catalyst for an instalment settlement. Where the debtor has defaulted on debts due to several creditors, he may find it difficult to enter into payment arrangements with all his creditors. Frequently, for any of a variety of possible reasons, he may not respond to invitations by his creditors to make an instalment settlement. If he simply does nothing, then his total indebtedness may be increased considerably since his several creditors may initiate separate court actions, and instruct separate diligences, for the expenses of which the debtor will ultimately be liable.

4.7 The research into debtors' circumstances commissioned for this report also throws much light on the causes of debt of ordinary wage-earners. This research suggests that in most cases of consumer insolvency or multiple debt,

[1]Section 4.2.

[2]Paras. 2.11 and 2.12.

[3]The sample of debtors was small, and was not random but was designed to focus on debtors who had experienced the final stages of diligence.

default is attributable to inability rather than unwillingness to pay: in most cases, the debtor has been unfortunate or unwise, but in no sense fraudulent or dishonest.[1] Moreover, the debtor will sometimes be unable to handle the financial crisis on his own. Most self-employed small traders and shopkeepers and others in small businesses who become insolvent are also likely to have been unfortunate or unwise, rather than dishonest, and to experience difficulty in coming to terms with their several creditors.

4.8 Moreover, multiple debt can be unfair to creditors since it can lead to an unco-ordinated race of diligences in which the practical rule of priority among competing creditors is "first come, first served". The considerate creditor, who wishes to allow the debtor time to pay, risks being shut out by the prior diligences of competing creditors.

The orderly and regular payment of debts under debt arrangement schemes

4.9 In the light of these considerations, we invited comments in our Consultative Memorandum No. 50 on detailed proposals to introduce debt arrangement schemes designed to assist insolvent wage-earners, and possibly other small debtors, in multiple indebtedness to achieve the orderly and regular payment of their debts over a reasonable period. As indicated in Chapter 2,[2] debt arrangement schemes, in the form which we now recommend, would have the following main features:

(1) an extension of time to pay all debts (in full or by way of composition) over three years with possible extension to five years;

(2) the stoppage of diligence and of petitions for sequestration by all creditors in civil debts during the life of the scheme;

(3) control by the sheriff of the making of schemes with provision for objections by creditors;

(4) the receipt and disbursement of sums due under the scheme by an "administrator" (normally the sheriff clerk) appointed by the sheriff;

(5) the ranking of all creditors' claims rateably in proportion to the amounts of their debts and the disapplication by law of the preferences applied in bankruptcy sequestrations;

(6) the possibility of court orders intercepting appropriate amounts of the debtor's earnings at source to ensure payment of the sums due to the administrator for disbursement under the scheme;

(7) no vesting of the debtor's assets in a trustee for creditors but the possibility of the debtor realising specific assets and paying the proceeds under the scheme; and

(8) in schemes providing for a composition, a discharge on payment of the composition.

We believe that debt arrangement schemes on these lines would go far to meet problems which are not adequately covered by existing procedures and arrangements or by the procedures proposed in other parts of this report. A

[1] See paras. 2.64 to 2.66 above.
[2] Para. 2.126.

brief summary of the main steps in debt arrangement scheme proceedings is set out at Table 4.A below.

Advantages of debt arrangement schemes over other existing and proposed procedures and arrangements

4.10 The other existing and proposed procedures and arrangements take the form of court procedures, or extra-judicial legal transactions, or informal voluntary arrangements.

Court procedures

4.11 There are no court procedures in Scots law which cater adequately for the small insolvent debtor in multiple debt.

4.12 *Instalment decrees.* The existing summary cause instalment decrees, and the time to pay decrees and orders which we recommended in Chapter 3 should replace them, would provide for an extension of time to pay a single debt due to a particular creditor but they cannot be readily adapted to deal

TABLE 4.A

MAIN STAGES IN DEBT ARRANGEMENT SCHEME PROCEDURE

1. Debtor lodges application (containing statement of affairs) for debt arrangement scheme in sheriff court.

2. Court checks whether application *prima facie* competent.

3. Sheriff makes (a) an order appointing administrator to prepare draft scheme and (b) an interim order sisting diligence which is served by the administrator on known creditors.

4. Administrator serves on known creditors whose debts are eligible for inclusion notices requiring them (a) to verify the amounts of their debts as at the date of service of the first of these notices ("the first notice date") and (b) to state whether interest up to that date is claimed.

5. Administrator prepares draft scheme in consultation with the debtor and serves on all known creditors and co-obligants who may acquire a right of relief against the debtor a copy of (i) the scheme application, (ii) the draft scheme, (iii) a full statement of the debtor's affairs prepared or revised by the administrator and signed by the debtor, and (iv) a notice giving the creditors and co-obligants 3 weeks within which to object.

6. If no objections are made, the sheriff must confirm the scheme. If objections are made, the sheriff must give the creditors and co-obligants an opportunity to make representations and, if agreement is not reached as to confirmation of the scheme or as to its terms, an opportunity to be heard. The sheriff then either makes an order confirming the scheme with or without modifications, or refuses the scheme application and recalls the interim sist of diligence. The scheme comes into force on the expiry of the appeal days or the disposal of an appeal upholding the confirmation of the scheme.

7. If the scheme is confirmed, the debtor makes payment to the administrator of the amounts due under the scheme, normally periodic instalments over a period of 3 years (with possible extension to 5 years in all by the sheriff on confirming or varying the scheme). The sheriff may make a pay deduction order requiring the debtor's employer to deduct from earnings and pay to the administrator all or a part of the sums due by the debtor under the scheme. The administrator makes periodic disbursements to creditors in terms of the scheme.

8. The sheriff has powers to vary or revoke a scheme on cause shown, and may vary a scheme to include new debts.

9. At the end of a successful scheme, the administrator or debtor applies for a discharge of debts, and at the same time creditors are given an opportunity to object to the discharge and, in a scheme providing for payment in full, to claim interest accrued since the first notice date. The sheriff will grant decree for payment of the interest (with or without a time to pay direction) and also grant a special type of time to pay decree relating to the unpaid balance of debts included "late" during the life of the scheme.

with debts due by a multiple debtor to his several creditors. The procedure should remain relatively simple, and uncomplicated by special provisions for ranking several creditors, for compositions, and for the collection and disbursement of payments to the creditors.

4.13 *Sequestration under bankruptcy legislation.* Under the Bankruptcy (Scotland) Act 1913, one solution for a multiple debtor whose assets did not exceed £4,000 in value was to petition for his own summary sequestration.[1] Summary sequestration provided a very effective method of defeating the claims of creditors. A petition for summary sequestration (which attracted legal aid) did not require the concurrence of creditors.[2] Creditors often did not think it worthwhile attempting to appoint a trustee in the sequestration and, in the absence of sufficient assets to provide a fee, there was no inducement for anyone to accept office as trustee. Accordingly the procedure was often abortive from the standpoint of creditors.[3] But the debtor remained immune from arrestments and poindings.[4]

4.14 To meet these and other criticisms, the Bankruptcy (Scotland) Bill 1984 (following recommendations in our report on Bankruptcy) abolishes summary sequestration, and all sequestrations follow broadly the same procedure.[5] In every sequestration, an interim trustee will be appointed (remunerated where necessary by the State)[6] and in every case the debtor will receive a discharge after three years.[7] Every petition by a debtor for his own sequestration will require the concurrence of a creditor,[8] which provides a kind of safeguard (albeit an imperfect one) against a debtor petitioning for sequestration simply to avoid diligence. We hope that these reforms will prevent abortive sequestrations and the abuse of the procedure by debtors. But these reforms mean that a debtor, who has insufficient assets to make sequestration worthwhile for his creditors, now has no court procedure which he can voluntarily initiate, without the concurrence of at least one creditor, to achieve the orderly and regular payment of his debts and a discharge on payment of a composition over a reasonable period. Debt arrangement schemes would fill that gap. We propose that a debtor would be entitled to apply for such a scheme without the concurrence of a creditor and indeed that a creditor would have no title to present such an application.

4.15 These changes in sequestration law increase the need for introducing debt arrangement schemes but, in our view, that need would still exist apart from these changes. Sequestration is an inherently expensive and complicated process which is usually not appropriate for a small debtor's insolvency. Some expense and complexity is unavoidable in any insolvency process, as our

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[1] 1913 Act, s. 174.

[2] *Ibid.*, s. 175(1).

[3] McKechnie Report, para. 304; Bankruptcy Report, para. 2.34.

[4] 1913 Act, s. 104; except arrestments and poindings used to enforce debts incurred after the date of sequestration against property or income acquired after that date.

[5] Except that there is a simplified "small assets" procedure for use where it is unlikely that the debtor's assets will be sufficient to pay any dividend to creditors of any class: Bankruptcy (Scotland) Bill 1984 clauses 20(1), 23(4) and Sched. 2: Bankruptcy Report, paras. 3.53; 7.33 to 7.36.

[6] 1984 Bill, clause 13: Bankruptcy Report, paras. 4.8 to 4.10; 7.18 to 7.28.

[7] 1984 Bill, clause 51(1): Bankruptcy Report, paras. 19.13 to 19.22.

[8] 1984 Bill, clause 5(2)(*a*); Bankruptcy Report, paras. 5.22 to 5.24.

recommendations in this Chapter indicate, but we believe that, in the normal case, a debt arrangement scheme would be a cheaper and simpler procedure than sequestration. Such a scheme would not directly interfere with property rights of the debtor, nor directly affect the property rights of third parties. There would be no meetings of creditors; no appointment of a trustee and commissioners; no vesting in the trustee of the debtor's estate; no measures to recover the debtor's property in the hands of third parties, including wrongfully alienated property; no valuation of secured, future or contingent debts; and no ranking of creditors in accordance with the rules on preferences in bankruptcy. We think that most of the complexities which would inevitably exist under our proposed debt arrangement schemes—such as the ascertainment and verification of claims; the stoppage of diligence; the disbursement of payments to creditors; the possibility of attachment of part of the debtor's earnings during the process; a procedure for the debtor's discharge—have their counterparts in sequestrations but many of the complications of sequestration would be avoided.

4.16 From the standpoint of a debtor, sequestration is a drastic remedy. If he owns his own house, he is likely to be deprived of it. He may also be deprived, subject to certain restrictions, of his household goods and effects which have become part of his daily life and which may be sold at a fraction of their use-value to him. Whether a debt arrangement scheme would avoid these consequences would depend on the terms of the scheme, but it is primarily designed to enable debts to be paid out of future income. The debtor in a sequestration may also be subjected to certain civic disabilities which a debt arrangement scheme would avoid.

4.17 The main disadvantage of a debt arrangement scheme from the debtor's standpoint is that in such a scheme he would only obtain a discharge of his debts if he completed payments under the scheme whereas, in a sequestration, the bankrupt would as of right obtain a discharge automatically after three years. The reason and justification for this difference is that a scheme is primarily designed to provide for payment out of future income, with sale of assets normally playing a small or non-existent role, whereas the rules in sequestration presuppose that the debtor has surrendered all his assets to his creditors and, in return for this surrender, is entitled to a discharge after a short period of years.

4.18 Equally from the standpoint of creditors, especially unsecured creditors who enjoy no preferences, sequestration is often a futile remedy. It is designed essentially for cases where the debtor, while possibly having considerable debts, has assets whose proceeds on sale may be divided among the creditors. But in Scotland, where most people do not own their homes, there are many insolvent small debtors who have income but no assets of any consequence available for distribution. Moreover, the lengthy procedures of sequestration are liable to diminish significantly the fund available to creditors.

4.19 In short, a debt arrangement scheme would have considerable advantages over sequestration in the case of insolvent wage-earners and small traders. It would avoid the disproportion, evident in sequestrations, between the considerable and necessary complexity and expense of the procedure and the low value of the debtor's assets.

Extra-judicial legal procedures

4.20 Scots law permits a debtor (i) to enter into a composition contract with his creditors; (ii) to grant a trust deed for his creditors; and (iii) to enter into a contract with a debt-adjuster (whereby the latter takes over liability for the debts). None of these extra-judicial arrangements are satisfactory in the case of an insolvent debtor with small assets faced with multiple debts.

4.21 *Composition contracts.*[1] Under a composition contract between a debtor and his creditors, the creditors agree to forego further diligence and to discharge their debts in consideration of the debtor paying-off, usually by instalments, a proportion of those debts. If the debtor is in business, he will usually agree to a measure of supervision of his business activities. The debtor is not divested of his whole estate (though sometimes certain assets may be conveyed in trust to a person for the benefit of the creditors).

4.22 In some limited respects, composition contracts are an ideal solution to the problems of the small multiple debtor since they embody the main principles of extension (of time to pay), composition (i.e. rateable diminution of the debts by agreed amounts), and the debtor's ultimate discharge and rehabilitation. Their great disadvantages, however, are that (even if the vast majority of creditors enter into a reasonable composition contract) no creditor can be compelled to accede to the contract, and a non-acceding creditor can continue to have diligence executed notwithstanding the contract. Recourse to composition contracts is relatively infrequent in Scotland nowadays[2] and, while we think such contracts should remain an option, their voluntary basis and unstable qualities seem to make them a quite inadequate solution to the problems of most insolvent wage-earners.

4.23 *Trust deed for creditors.* Voluntary trust deeds for creditors differ from composition contracts insofar as a trust deed involves a formal conveyance by the debtor to a trustee of his property—usually the whole of it—for the benefit of the creditors.[3] While trust deeds are popular, flexible and useful instruments when the debtor has substantial assets, they are arguably even less appropriate than composition contracts to the case of the insolvent wage-earner with few assets. As in the case of composition contracts, non-acceding creditors may frustrate the objects of the trust deed by instructing diligence[4] and a discharge of the debtor under the trust deed will not protect the debtor from diligence by non-acceding creditors. In the case of a "protected trust deed" such as will be competent under the Bankruptcy (Scotland) Bill 1984,[5] non-acceding creditors will have no higher right than acceding creditors to execute diligence during or after the subsistence of the trust deed. However,

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[1]See our Bankruptcy Report, para. 2.10 which recommended against statutory intervention applying to extra-judicial composition contracts, an approach adopted in the Bankruptcy (Scotland) Bill 1984.

[2]This may be partly because it does not bind non-acceding creditors. It is understood that, in practice, the larger companies and nationalised industries tend to stand aloof from composition contracts.

[3]Usually the purposes of the trust are simply the realisation of the debtor's estate and its proportional division among the creditors. The trust is established by a private contract between the debtor and his creditors and, for this reason, it does not bind non-acceding creditors.

[4]In relation to assets conveyed by the trust deed, diligence would require to be executed before the trustee had completed title to the property conveyed by the deed.

[5]Clause 56; Sched. 5, paras. 5–8; Bankruptcy Report, paras. 24.22 to 24.33.

a trust deed for creditors, whether it is "protected" or not, is (like sequestration) designed primarily to enable the assets of the debtor to be realised, and (again, like sequestration) where the debtor has few assets of appreciable resale value, this may operate to the serious disadvantage of the debtor without commensurate benefit to his creditors.

4.24 *Contracts with debt adjusters.* We do not know whether "debt adjustment agencies" operate in Scotland to any significant extent[1] but they certainly do not provide a widespread "private enterprise" service for insolvent consumers or wage-earners and there is no reason to suppose that they ever will.

Debt counselling and voluntary arrangements

4.25 Instead of relying on one of the foregoing legal processes, an insolvent wage-earner may turn for help to a debt counselling agency. Debt counselling can play an important role in assisting a small multiple debtor to overcome his difficulties and in selecting the most appropriate course of action available to him.[2] But arrangements for payment made as a result of debt counselling are voluntary. They presuppose the existence both of a willing debtor and willing creditors. A creditor has no assurance that the debtor will continue to pay the instalments which he has agreed to pay and refrain in the meantime from incurring further indebtedness. Further, by giving the debtor an extension of time, the creditor may find that another creditor secures payment in full by diligence. Likewise, the debtor has no assurance that one of his creditors will not terminate the informal arrangements and proceed to do diligence against his income or assets. In our view, arrangements of a mandatory character are needed such as a system of debt arrangement schemes would provide.

Consultation

4.26 There was a mixed reaction on consultation to our provisional proposals in Consultative Memorandum No. 50 to introduce debt arrangement schemes. This division of opinion stemmed in part from differing diagnoses of the scale and nature of the problem of multiple debt. In consumer debt cases, creditors do not generally perceive multiple debt as presenting problems in enforcement whereas advisers in debt counselling agencies take an opposite view.

4.27 In commenting on our Consultative Memorandum No. 50, some creditors' interests supported the introduction of debt arrangement schemes whereas the Scottish Association of Citizens Advice Bureaux, the main "generalist" debt counselling agency, while accepting that debt arrangement schemes were good in principle, expressed serious doubts about their value: the Law Society of Scotland supported the proposal while the Scottish Law Agents Society opposed it. The Society of Messengers-at-Arms and Sheriff Officers suggested that, if such schemes were to be introduced, they should be operated by officers of court under a simpler procedure.

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[1]Debt adjustment (or "pro-rating") occurs *inter alia* where a debt adjuster takes over liability for an individual's debts in return for payments from him and can be attractive to the multiple debtor since his liabilities are converted into a single debt due to the debt adjuster: see the Crowther Report para. 6.12.14. Such agencies must be licensed under the Consumer Credit Act 1974.

[2]See C.R.U. Debt Counselling Survey.

4.28 The Scottish Law Agents Society doubted whether the social considerations underlying the proposals for debt arrangement schemes would justify the introduction of such schemes. They conceded that there would be advantages in a limited number of cases. They thought there would only be a very small number of successfully completed schemes at disproportionate cost, viz:

(*a*) the cost of setting up a nationwide system of administrators suitably trained and remunerated with the necessary staff and equipment;

(*b*) a large number of detailed changes in the law and practice of bankruptcy and diligence making these matters still more complicated and introducing new possibilities for delay and expense where schemes are proposed but fail for one reason or another;

(*c*) the occupying of more court staff's and sheriff's time when already these are under severe pressure in many areas.

On consultation we had pointed that if the annual number of scheme applications were about one-tenth of the applications for County Court Act administration orders in England and Wales, there would be no more than 200 per annum.[1] If there were only a small number of applications and, of these, only a proportion were successful, then in the view of the Scottish Law Agents Society, "the proposals are not worth introducing taking everything into account and the improvements to diligence procedure discussed in other Memoranda would be adequate to deal with the general situation".

4.29 Another body whom we consulted, however, thought that the estimate of about 200 scheme applications per annum was unrealistic and that if the proposed system of debt arrangement schemes was sufficiently simple in its procedure, accessible to debtors, effective in recovering debts, and seen by consumer debtors as affording real protection from diligence, it would be widely used. We propose later certain restrictions on the competence of applications (e.g. at least one debt must have proceeded to the stage of a charge or other diligence, and the estimated product of the scheme must not fall below a minimum sum). Given that officers of court are instructed to execute diligence in about 50,000 cases annually, we believe that the foregoing estimate may indeed be unrealistically low. On the whole, we think that the advantages of debt arrangement schemes mentioned earlier outweigh the disadvantages described in the previous paragraph.

4.30 One debt collection agency, while conceding that debt arrangement schemes were "admirable" in theory, observed that in practice they would not resolve the multiple debt problem. This view was based expressly on their experience in administering a debt pooling scheme (called a "multiple account scheme") for the Scottish Retail Credit Association which apparently foundered largely because the debtors did not maintain the arrangements established under the auspices of the scheme. In our view, however, if (as we propose later) the administrator of a debt arrangement scheme can attach the debtor's earnings at source, then the likelihood of default may be much diminished.

[1] In 1978 only 1,958 applications for administration orders were made and only 1,619 orders were granted (Cmnd. 7627, Table F.1(*c*)). The numbers have recently risen. There were 3,775 administration orders granted in 1983 compared with 2,907 in 1982, an increase of 30%: Cmnd. 9370, Table 7.20.

Other legal systems

4.31 Despite the difficulties just described, we are firmly of opinion that, in principle, provision for the orderly and regular payment of debts outside bankruptcy proceedings should be available to multiple debtors, however few, who genuinely wish to meet their creditors' claims and have the means to do so within a reasonable time. Administration orders have been available in England and Wales since 1883[1] and were introduced in Northern Ireland in 1979.[2] "Summary instalment orders" closely modelled on administration orders have been introduced in New Zealand.[3] In response to the depression of the 1930s, "wage-earner plans" were introduced in the federal law of the United States of America in 1938,[4] and there have been recent law reform proposals to introduce similar legislation in the federal law of Canada[5] and Australia.[6]

4.32 Moreover, in England and Wales, the Cork Report observed that while many of their proposals were urgently needed, they had "no doubt that the most urgent need of all is for the introduction of a simple, accessible and inexpensive procedure for dealing with the ordinary consumer debtor, whose conduct does not require investigation, and who has no significant realisable assets, but who has a reasonable prospect of being able to discharge all or part of his liabilities out of future earnings surplus to his essential requirements".[7] The Cork Report recommended the introduction of a new system of debt arrangement orders (similar to our proposed debt arrangement schemes) which would replace the present County Court administration orders.[8]

4.33 Thus a study of other legal systems fortifies us in our conclusion that debt arrangement schemes would fill a gap in the provision made by Scots law for helping ordinary consumer debtors and small traders to arrange for the orderly payment of debts.

Recommendation for introduction of debt arrangement schemes

4.34 We **recommend:**

A new legal process, to be known as a debt arrangement scheme, providing

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[1]Bankruptcy Act 1883, s. 122; see now County Courts Act 1984, ss. 112–117; Administration of Justice Act 1965, s. 20; Attachment of Earnings Act 1971 ss. 4 and 5; Insolvency Act 1976, ss. 11–13; County Court Rules 1981 Order 39: see also Payne Report, paras. 737–854.

[2]Judgments Enforcement and Debts Recovery (Northern Ireland) Order 1979 (S.I. 1979/296): see now Judgments Enforcement (Northern Ireland) Order 1981 (S.I. 1981/226), articles 80 to 87.

[3]Insolvency Act 1967 (New Zealand), Part XVI.

[4]U.S. Bankruptcy Act, Chapter XIII, enacted by the Chandler Act 1938.

[5]Report of the Study Committee on *Bankruptcy and Insolvency Legislation in Canada* (the Tassé Report) (1970) Part III, Chapter 1: Ontario Law Reform Commission, Report on *The Enforcement of Judgment Debts and Related Matters* (1981) Part I, Chapter 2 on "The Orderly Payment of Debts and Instalment Payment Plans".

[6]Law Reform Commission of Australia, Report No. 6 on *Insolvency: the Regular Payment of Debts* (1977).

[7]Para. 272.

[8]Chapter 6. These proposals are not implemented by the Insolvency Bill 1984 [H.L.] (introduced on 10 December 1984) but that Bill does contain provisions, replacing deeds of arrangement, to encourage the greater use of voluntary arrangements with creditors, implementing the White Paper, *A Revised Framework for Insolvency Law* (1984) Cmnd. 9175, paras. 136–139.

for the orderly and regular payment by an individual debtor of the debts due to his several creditors should be introduced in Scots law. (Recommendation 4.1: clause 14(1).)

Section B. Content and nature of debt arrangement schemes

4.35 A debt arrangement scheme would set out the debtor's proposals for paying his creditors and would have to comply with certain statutory requirements.

Extension of time and composition

4.36 In making proposals for payment to his creditors in a debt arrangement scheme, the debtor would have three options, namely:

(*a*) an extension of time to pay his debts;
(*b*) payment of debts only to the extent of a composition, expressed as so many pence in the pound; or
(*c*) a combination of both of the above types of proposal.

4.37 A scheme providing for an extension of time for payment (with or without a composition) might, and we think normally would, provide for payment of the debt by instalments, but there would be nothing to stop a scheme providing for payment of the debts by a lump sum after a period, e.g. where the scheme required the debtor to realise specific assets and pay the proceeds to the administrator.

4.38 We think that limits should be imposed on the extension of time for payment and that in the normal case, the maximum period should be three years. We note that in England and Wales, it was at one time provided that no administration order should be made under which the payment of instalments, if kept up without default, would extend over a period of more than 10 (formerly six) years from the date of the order. Following a recommendation in the Payne Report,[1] however, the maximum duration of an administration order is now unlimited.[2] The Payne Committee argued:

> "The period of instalments payable under an administration order should, in our view, depend on the amount of the debt and the assets, means and circumstances of the debtor, and we do not think it justifiable that a debtor in comparatively modest circumstances should be refused an administration order and left at the mercy of his creditors indefinitely, whereas a man who is a proper subject for bankruptcy proceedings should be able to obtain his final discharge in due course."[3]

We do not think, however, that it is realistic to expect a scheme to have effect indefinitely or for a long period of years. We note that three years is the limit prescribed for a summary instalment order in New Zealand;[4] that it is the

[1]Para. 791.
[2]The limitation was contained in the County Court Rules 1936, Order 22, Rule 9(8) which was revoked in 1977: see now County Court Rules 1981, Order 39.
[3]Para. 791.
[4]The Insolvency Act 1967 (N.Z.) s. 146(12) provides: "No summary instalment order shall be made under which the payment of instalments if kept up without default would extend over a period of more than three years from the date of the order".

normal limit in the United States;[1] that it was accepted by the Tassé Report in Canada (who observed that "this period of time is as long as one can reasonably expect most debtors and their families to accept the discipline of the financial restrictions imposed by an arrangement")[2] and by the Australian Law Reform Commission (who remarked that "this period is believed to be an appropriate time limit if the necessary will and self-discipline of the debtor are to be maintained").[3] The Cork Report[4] observed that "the maximum duration of a [debt arrangement order] should normally be three years, but the court will have power to extend the period up to a maximum of five years, having regard to the liabilities or following a review". Moreover, we believe that in a scheme providing for a composition, a limit on the duration of the scheme would be particularly useful in assessing what level of composition would be regarded as reasonable.

4.39 On consultation, there was a mixed reaction to our proposal that a debt arrangement scheme should normally last for three years.[5] Some bodies agreed with it. One body suggested that the sheriff should be empowered to extend the recommended period and that many debtors may wish to "clear their name" even though it might take much longer than three years. One body representing creditors suggested that the period should be five years. We think, however, that the period of three years is more appropriate as the normal maximum but that the sheriff should have power to extend it for a period, but not exceeding five years in aggregate.

4.40 The possibility of discharge of debts on payment only of a composition is available in other systems which we have examined[6] and would, in our view, be essential in a system of debt arrangement schemes, especially since under the Bankruptcy (Scotland) Bill 1984 bankrupts will automatically obtain a discharge in a sequestration after three years no matter what level of composition is paid. In the case of a composition, the scheme should specify what proportion of each creditor's debt would be paid to him under the scheme.[7] It should also state the total amount payable by the debtor to all his creditors under the scheme.[8]

4.41 We **recommend:**

(1) A debt arrangement scheme should provide for:

(a) an extension of time for payment of debts; or

(b) payment of debts only to the extent of a composition; or

(c) a combination of the two foregoing types of proposal for payment.

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[1]U.S. Bankruptcy Report, p. 160.

[2]*Supra*, p. 93.

[3]A.L.R.C. Report No. 6, para. 56.

[4]Para. 313.

[5]Consultative Memorandum No. 50, Proposition 26 (para. 2.74).

[6]E.g. County Courts Act 1984, s. 112(6) (administration orders in England and Wales); Insolvency Act 1967 (New Zealand) s. 146(4) (summary instalment orders).

[7]In relation to a debt included "late", payment under the scheme means payment partly by disbursements by the administrator and partly by payments under a decree of the type proposed in Recommendation 4.17(3) (para. 4.143).

[8]*Idem*.

(2) The maximum period allowed by a debt arrangement scheme for the payment by the debtor of instalments should normally be three years from the coming into force of the scheme (when the sheriff's order confirming the scheme takes effect on the expiry of the appeal days or the disposal of an appeal).

(3) The sheriff however should have power to extend that period to be a period not exceeding five years in all. This power should be exercisable either on confirming the scheme or in an application for variation of the scheme after it has been confirmed.

(4) A scheme providing for a composition should state the proportion of each debt which the creditor in that debt would be paid, and the total amount to be paid to all creditors under the scheme.
(Recommendation 4.2; clauses 14(2), (3) and (9); 24(6) and (10); and 28(6).)

Payment of debts through administrator

4.42 We propose that a debt arrangement scheme should provide for payments to be made to the administrator (whose appointment and functions we describe later[1]) for disbursement by him to the creditors included in the scheme. The scheme would also regulate the method and times for the making of in-payments to the administrator (e.g. by instalments or deferred lump sum, whether in weekly, fortnightly or monthly periods linked perhaps to pay days; whether by the debtor himself or by his employer under the debtor's mandate; and possibly whether by bank standing order, cheque, Girocheque, cash "over the counter" or otherwise, depending on the degree of detail desired) and for disbursement by the administrator (e.g. providing for the same or different payment frequencies depending on the amounts and number of creditors involved and on possible fluctuations in the level of in-payments).

4.43 We recommend later[2] that, on or after confirming a scheme, the sheriff should be empowered to make an order requiring an employer to deduct appropriate amounts from the debtor's earnings and pay them to the administrator in order to secure so far as practicable the debtor's compliance with the scheme. To ensure that the debtor is fully apprised of this possibility, every scheme should include a statement that a pay deduction order of this type may be made. This is especially important since the amounts deducted might exceed the amounts which could be deducted by earnings arrestments or conjoined arrestment orders such as we recommend in Chapter 6.

4.44 We **recommend:**

(1) A debt arrangement scheme should provide for payment of debts through an administrator and should regulate the method and times of in-payments and disbursements.

(2) Every scheme should state expressly that a pay deduction order may be made.
(Recommendation 4.3; clause 14(4) and (7).)

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[1]Para. 4.217.
[2]Paras. 4.268 to 270.

Appropriation of specific funds and realisation of assets

4.45 A debt arrangement scheme is primarily designed to allow the debtor to pay his debts out of future income and, differing from sequestrations or voluntary trust deeds for creditors, a scheme would not by itself vest any of his property in a trustee for the benefit of the creditors. There may, however, be cases where it would be useful if the scheme were to include a provision requiring the debtor to pay specific funds, or to realise specific items of property and pay the proceeds of sale, to the administrator for disbursement to creditors under the scheme. Such a provision might be subject to conditions, for example, requiring the debtor to grant a mandate to the holder of the funds requiring him to pay them to the administrator or a mandate to a third party enabling him to uplift and realise items of the debtor's property and pay the net proceeds of sale to the administrator. A debtor should, however, be entitled to keep property which is exempt from diligence and the provision would not apply to such property.

4.46 A provision on these lines would reduce the amounts payable out of future earnings, give flexibility to schemes, and might increase their attractions to creditors who might, in the absence of such a provision, be tempted to petition for sequestration. On consultation,[1] most commentators accepted the need for such a provision, though one body opposed it on the ground that it would allow the reintroduction of warrant sales "by the back door". This objection was, however, misconceived because the scheme would not be confirmed unless the debtor agreed to it and moreover the sale would be effected informally by the debtor, or a person authorised by him, not by diligence executed by a sheriff officer or messenger-at-arms. The Cork Report proposed that a debt arrangement order such as they recommended could be made conditional on the realisation of specified assets by the debtor himself and the payment to the administrator of the net proceeds.[2] We agree with this approach, and, in consonance with the Cork Report,[3] we think that any assets to be realised should not come under the control of the administrator but that the administrator should be responsible for ensuring that the debtor complied with the provision and make a report thereon to the sheriff. If the sheriff was satisfied that the debtor had failed to comply with the provision, he would revoke the scheme.

4.47 We **recommend:**

(1) It should be competent to include in a debt arrangement scheme a provision requiring the payment to the administrator of specified funds belonging to the debtor, or the realisation of items of the debtor's property and payment of their net proceeds, to the administrator for disbursement to creditors under the scheme. The scheme could include

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[1]In our Consultative Memorandum No. 50, Proposition 27 (para. 2.79) we sought views on the question whether the court should be given power to order the sale by the administrator or the debtor of specified assets.

[2]Para. 311: at para. 275 the Report observed that though its "proposals are intended to meet the requirements of the debtor who has no substantial realisable assets, they will also be appropriate for the debtor who has assets of some value which could be realised and the proceeds paid over for the benefit of the creditors".

[3]Para. 337.

conditions designed to secure compliance with the provision e.g. by third parties acting under the debtor's mandate.

(2) The administrator should report to the sheriff on the debtor's compliance with the provision and the sheriff should be under a duty to revoke the scheme, after giving the debtor an opportunity to be heard, if he found that the debtor had not so complied.
(Recommendation 4.4; clauses 14(5) and 30(4) and (5).)

Restriction on debtor obtaining credit

4.48 Since (as we recommend later) diligence could not be competently executed during the life of a debt arrangement scheme even by a creditor whose debt had not (or not yet) been included in the scheme, the further obtaining of credit might often be unfair to the person supplying that credit in ignorance of the existence of the scheme. Bankruptcy legislation makes it an offence for an undischarged bankrupt to obtain credit above a prescribed amount without disclosing to the supplier of credit that he is an undischarged bankrupt.[1] This provision is enacted for the benefit of potential suppliers of new credit. In the case of debt arrangement schemes, however, the interests of the creditors included in the scheme as well as the suppliers of new credit have to be protected since the obtaining of further credit might endanger the success of the scheme which primarily depends on the surrender to creditors of the debtor's future free income rather than, as in sequestration, his assets. For this reason, we think that it should be possible to restrict the obtaining of credit even from a person to whom the existence of the scheme has been disclosed. We propose that it should be competent to include in a scheme a condition that the debtor should not be entitled to obtain credit above a specified amount while the scheme was in force with exceptions for any credit obtained for rent, or electricity or gas charges, for the debtor's residence and any other exceptions from the restriction (e.g. telephone bills) specified in the scheme. So far as possible we have sought to exclude criminal sanctions for breach of duties imposed in connection with debt arrangement schemes and we think that in this case the sanction for breach of the restriction should be revocation of the scheme.

4.49 We **recommend:**

(1) It should be competent to include in a scheme a restriction on the debtor obtaining credit exceeding an amount specified in the scheme but with exemptions for credit to pay rent and gas and electricity charges for the debtor's residence and any other items so specified.

(2) On the debtor's breach of the restriction, the sheriff should have power to revoke the scheme.
(Recommendation 4.5; clauses 14(6) and 30(1).)

Voluntary nature of scheme: title to apply

4.50 We propose that the debtor, but not a creditor, should have a title to apply for a debt arrangement scheme. Since a debt arrangement scheme would provide for the orderly and regular payment of debts and for fair

[1]Bankruptcy (Scotland) Bill 1984, clause 64(8) replacing Bankruptcy (Scotland) Act 1913, s. 182.

sharing of income (and in appropriate cases funds or proceeds of sale) between creditors, and would prevent diligence from being an unregulated free-for-all between competing creditors, creditors should benefit from a scheme and we considered whether creditors should have a title to apply. We think, however, that a scheme would require the full co-operation of the debtor in preparing the scheme and in operating it when it is in force. The debtor must make a full disclosure of his means and liabilities and we consider that the compulsory disclosure of means under threat of fines or imprisonment should not be permitted except in the ultimate remedy of sequestration. Moreover, once a debt arrangement scheme is made, the source of payments to creditors will normally be the debtor's earnings or other income. It is true that, as we recommend later, in-payments may be secured by a pay deduction order, but such an order would be ancillary to a scheme which the debtor had voluntarily sought. The success of a pay deduction order, like the scheme itself, would depend on whether the debtor is prepared to remain in employment and work for his creditors over an extended period. To impose a scheme on him against his will would be likely to induce him to give up his employment or leave the area where he resides.

4.51 We note that in the case of county court administration orders in England and Wales,[1] wage-earner plans in the U.S.A., and the proposed reforms of the federal law of Australia and Canada, only the debtor possesses a title to apply. The U.S. Federal Bankruptcy Commission observed that "forced participation by a debtor in a plan requiring contribution out of future income has . . . little prospect of success" and that a wage-earner's plan "requires not merely a debtor's consent but a positive determination by him and his family to live within the constraints imposed by the plan during its entire term and a will to persevere with a plan to the end".[2]

4.52 On consultation, we sought views on whether a creditor should have a title to initiate an application for a scheme with the qualification that the debtor's consent must be obtained at an early stage.[3] While this proposal did not evoke dissent, we think on reflection that it is an unnecessary complication and that few debtors who were not prepared to apply for a scheme would give their consent.

4.53 To emphasise the voluntary nature of a scheme application, the legislation should provide expressly that a debtor may withdraw his application at any stage before the sheriff has formally confirmed the draft scheme.

4.54 We **recommend:**

A debtor, but not a creditor, should have a title to apply for a debt arrangement scheme, and it should be expressly provided by statute that the debtor may withdraw his application at any time before the scheme is confirmed.

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[1]County Courts Act 1984, s. 112(1); the Payne Report's recommendation (para. 781) that a judgment creditor should have title to apply has not been implemented. (The court may however make an administration order in a creditor's application for an attachment of earnings order.) In New Zealand, creditors may apply for instalment orders.

[2]U.S. Bankruptcy Report, p. 159.

[3]Consultative Memorandum No. 50, Proposition 5 (para. 2.17).

(Recommendation 4.6; clause 14(10).)

Section C. Forum and conditions of competence of scheme applications

Forum

4.55 We propose that original jurisdiction to entertain applications for debt arrangement schemes, and to confirm, vary and revoke such schemes, should be conferred on the sheriff and that the Court of Session's role should be limited to that of a court of appeal.[1] At present, while the Court of Session has original jurisdiction in sequestration petitions concurrently with the sheriff,[2] the Court invariably remits such a petition to a sheriff.[3] We propose later that the competence of applications for debt arrangement schemes should be restricted by an upper limit (fixed initially at £10,000) on the applicant's indebtedness, and the procedure is primarily designed to be used by consumer debtors and small traders without representation by a solicitor, still less an advocate. Moreover, there is a need to ensure that the court and administrator are easily accessible to debtors, and that debtors are readily subject to supervision by the administrator. All these factors strongly suggest that jurisdiction should be exercised locally. This conclusion was approved on consultation.[4]

4.56 We **recommend:**

The sheriff court should have exclusive jurisdiction to entertain applications for debt arrangement schemes and to confirm, vary and recall such schemes (subject to appeals on questions of law to the Court of Session as recommended in Chapter 9).
(Recommendation 4.7; clauses 14(1), 19, 24, 28, 30.)

Jurisdictional competence

4.57 The European Judgments Convention expressly excludes bankruptcy and similar proceedings from its scope.[5] Likewise the Civil Jurisdiction and Judgments Act 1982 expressly provides that the rules which it enacts for the assumption of jurisdiction in Scotland[6] do not apply to "proceedings in respect of sequestration in bankruptcy; or the winding up of a company or other legal person; or proceedings in respect of a judicial arrangement or judicial composition with creditors".[7] Instead jurisdiction in sequestration petitions is regulated by the Bankruptcy (Scotland) Bill 1984, which *inter alia* gives the sheriff jurisdiction in respect of the sequestration of a debtor if he had an established place of business in the sheriffdom or was habitually resident

[1]Restricted to questions of law as recommended in Chapter 9.
[2]Bankruptcy (Scotland) Bill 1984, clause 9 replacing Bankruptcy (Scotland) Act 1913, ss. 11, 16.
[3]See now 1984 Bill, clause 15(1) and (2); cf. 1913 Act, s. 17; Bankruptcy Report, paras. 5.34 and 5.35.
[4]Consultative Memorandum No. 50, Proposition 3(2) (para. 2.5).
[5]Article 1(2) providing that the Convention shall not apply to "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings".
[6]1982 Act, Sched. 8.
[7]1982 Act, Sched. 9, para. 4.

there at any time in the year immediately preceding the presentation of the petition.[1]

4.58 We propose that the sheriff should have jurisdiction to entertain a scheme application if the debtor was "domiciled" or had an established place of business at a place within the sheriff's territorial jurisdiction. By "domiciled" we mean domiciled within the meaning of the Civil Jurisdiction and Judgments Act 1982, section 41. We prefer "domicile" to the analogous concept of "habitual residence" since, once the 1982 Act comes into operation, domicile in that sense rather than habitual residence will be the connecting factor adopted in the rules for the assumption of jurisdiction in most other Scottish proceedings.[2]

4.59 Where the debtor has no domicile or established place of business in Scotland, we think that no sheriff court should have jurisdiction. In such a case, the debtor's connection with Scotland appears too tenuous for a Scottish court to make an order affecting all his debts. In these circumstances, the insolvent debtor should initiate bankruptcy or analogous proceedings elsewhere. In this respect, the jurisdictional rules would differ from those governing applications for time to pay orders, where the existence of assets in Scotland would suffice[3] since such orders affect only one debt.

4.60 We **recommend:**

> Jurisdiction in debt arrangement schemes should be exercisable by the sheriff having jurisdiction over the debtor's domicile within the meaning of the Civil Jurisdiction and Judgments Act 1982, s.41, or, in the absence of a Scottish domicile, the debtor's established place of business. (Recommendation 4.8; clause 42(1), definition of "sheriff".)

Other conditions of competence and restrictions on making of schemes

4.61 Apart from rules of jurisdiction, other limits have to be set on the availability of debt arrangement schemes to protect the interests of creditors and the public purse, to avoid abuses of the procedure and to ensure that a scheme application is not made in cases where a petition for sequestration under bankruptcy legislation would be more appropriate. The limits to be discussed relate to:

(*a*) the type of applicant, e.g. whether he is an individual, or body corporate or voluntary association;

(*b*) the insolvency and number of debts of the applicant and the stage in the debt recovery process which such a debt or debts have reached;

(*c*) an upper limit on indebtedness and the possible exclusion of business debts;

(*d*) a minimum product threshold, (i.e. whether the likely product of a scheme would justify the expense and trouble in obtaining and operating the scheme);

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[1]Clause 9(1), (4) and (5): replacing 1913 Act, ss. 11 and 16 as amended.
[2]1982 Act, Sched. 8.
[3]See Recommendation 3.16(2) (para. 3.71).

(*e*) the existence of a prior sequestration petition or award; a subsisting trust deed for creditors; or a prior debt arrangement scheme or scheme application.

These limits would take the form of conditions of competence, or restrictions of a more discretionary character, which would have to be complied with *prima facie* before the merits of the application could be considered. We now consider the first four of these limits leaving till later[1] consideration of the relationship between debt arrangement schemes and other insolvency proceedings.

4.62 *Applicant to be an individual.* A debt arrangement scheme is designed to provide for the orderly and regular payment of debts of individuals (i.e. natural persons) and not trusts, bodies corporate, partnerships, or clubs or other voluntary associations. While sequestration will in future be available for such bodies (other than registered companies),[2] there is so far as we are aware no need or at least no demand for such bodies to be allowed to keep their assets and pay debts out of future income. The inclusion of such bodies would unduly complicate the legislation. We propose also that only debts for which a debtor is personally liable should be included in schemes and accordingly a scheme would not be made in respect of trusts, executries, judicial factories and the like.

4.63 *Insolvency and related requirements.* We think it should be a condition of the debtor's application that he cannot pay his debts as they fall due. This requirement was accepted on consultation. The debtor would state this fact in the prescribed form of application. Any creditor would be entitled to challenge this statement and the administrator might also challenge it if, after enquiries, it appeared to him not to be true.

4.64 In our Consultative Memorandum No. 50,[3] we suggested that an application should be competent though neither a charge to pay nor diligence had been executed and even though no decree against the debtor had been granted. The argument was that, if the debt was admitted, it would be pointless to require the debtor to await decree in an action for payment and a charge or other diligence thereon, with the concomitant expenses for which he would be liable. On reflection, however, we think it important that at least one of the debts in question should have reached the stage where diligence was imminent or had begun, i.e. (a) the debt had been constituted by a decree (or decree of registration) bearing a warrant for diligence and a charge had been served or an arrestment executed or an adjudication action raised, or else (b) a summary warrant had been granted for the recovery of rates or taxes. In the absence of such a requirement, it is likely that court resources would be expended in dealing with applications where there was no real and substantial risk of diligence: this would not make the best and most economic use of resources. We propose that the debtor must have at least three debts of which at least one debt had proceeded to the stage just mentioned. A minimum requirement of three debts, though slightly artificial or arbitrary, is desirable to give formal recognition to the fact that debt arrangement

[1]See paras. 4.299 *et seq.*
[2]Bankruptcy (Scotland) Bill 1984, clause 6.
[3]Para. 2.6.

schemes are designed for multiple debtors. Debtors having only two debts may apply for time to pay directions or orders.

4.65 We consider that the new statutory concept of apparent insolvency,[1] though it is a pre-condition of a petition for sequestration, should be neither a necessary condition, nor even a sufficient condition, of an application for a debt arrangement scheme. It should not be a necessary condition since a debtor whose funds had been arrested without a prior charge would not satisfy the requirement. Nor should it be a sufficient condition. The new statutory concept of apparent insolvency differs from notour bankruptcy insofar as apparent insolvency may be constituted not only by practical insolvency concurring with the expiry of a charge or with diligence (as in the case of notour bankruptcy[2]) but also by three other events (apart from non-Scottish insolvency proceedings). One of these events is the grant of a trust deed for creditors (concurring with practical insolvency),[3] but such a trust deed should, we think, preclude an application for a debt arrangement scheme,[4] and should therefore not be a pre-condition of an application for such a scheme. The other two events[5] do not necessarily imply that diligence is imminent and, though they may found a petition by a creditor, or by the debtor with a creditor's concurrence, for the debtor's sequestration, we do not think they should found an application by the debtor for a debt arrangement scheme.

4.66 *Upper limit on indebtedness.* We propose that debt arrangement schemes should be largely confined to consumer debtors and small traders by imposing an upper limit on the total amount of debts owed by an applicant for a scheme. In our Consultative Memorandum No. 50,[6] issued in October 1980, we proposed that the upper limit (excluding heritably secured debts) should be fixed initially at £3,000. Reaction was mixed. Some bodies (e.g. the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers) thought there should be no upper limit, while the Scottish Committee of Clearing Bankers suggested a limit of £5,000. In England and Wales, the upper limit on administration orders is £5,000 (including secured debts).[7] In 1983 the Cork Report recommended an upper limit of £10,000 (of unsecured debts) for debt arrangement orders (which would replace administration orders) with some exceptions. We suggest that a limit of £10,000 (excluding heritably secured debts) would be appropriate with a power to alter the limit by statutory instrument to keep pace with inflation. Unless heritably secured debts were disregarded when applying the limit, many owner-occupiers would be debarred from even applying for a scheme.

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[1]Bankruptcy (Scotland) Bill 1984, clause 7.

[2]Bankruptcy (Scotland) Act 1913, s. 5.

[3]1984 Bill, clause 7(1)(*c*)(i).

[4]See para. 4.302 and Recommendation 4.46(2) (para. 4.311).

[5]Namely, written notice by the debtor to his creditors that he has ceased to pay his debts in the ordinary course of business (*ibid.*, clause 7(1)(*b*)) and a creditor's demand for payment of a debt of £750 or more coupled with the debtor's failure to pay, or to deny liability, within three weeks of the demand (*ibid.*, clause 7(1)(*d*)).

[6]Proposition 4(*c*) (para. 2.13).

[7]County Courts Act 1984, s. 112; County Courts (Administration Order Jurisdiction) Order 1981 (S.I. 1981/1122).

4.67 In the absence of special provision, difficulties could arise if the upper monetary limit had to be applied rigidly with the possibility that schemes would be treated as invalid where debts had been omitted or computed erroneously. We propose that a scheme should be incompetent only if it appeared to the sheriff that the limit had been exceeded. Once an administrator had been appointed, and the error came to light, a scheme application would be refused only if the upper monetary limit had been exceeded "to a substantial extent".

4.68 *Business debts.* In our Consultative Memorandum No. 50,[1] we sought views on whether a debt arrangement scheme should be incompetent if the debts consisted of or included "business debts" (i.e. debts incurred in the course of a profession, trade or business). The Scottish Committee of Clearing Bankers thought that it would not be practical to distinguish between business debts and other debts in this context. The Law Society of Scotland also thought that business debts should be included since many debtors, who get into financial difficulties through the running of a business, run such businesses part-time while in salaried or wage-earning employment. We accept these comments. A fairly low limit on indebtedness would have the effect of excluding many business debtors. It seems unlikely that the inclusion of business debts would induce wholesalers and others to restrict credit to small businesses; sequestration would still be available in appropriate cases, and if our recommendations were accepted, business creditors would not be postponed to preferred creditors. We propose therefore that applications should be competent in the case of business debts.

4.69 *Minimum product threshold.* As a safeguard against the unnecessary or uneconomical use of the time of court officials, we think that a lower monetary limit should be set on the competence of applications for debt arrangement schemes. There is a lower limit of £750 on the amount of the debts which qualify a creditor to petition for sequestration[2] and the Cork Report[3] proposed a similar limit in the case of their proposed debt arrangement orders, citing figures which showed that in England and Wales in 1978 only 3% of applicants for administration orders owed debts amounting to less than the then lower limit (of £200 of indebtedness) for bankruptcy petitions. We think however that this lower limit should have reference, not to the amount of the debts, but to the estimated product which the scheme would be likely to yield for creditors over the proposed statutory period of three years. Although the scheme's product would be more difficult to assess than the amount of the debts, it is not the amount of the debts, but the product, which would determine whether the scheme was worthwhile.

4.70 The product of the scheme would be determined by the debtor's free income (i.e. after meeting liabilities in respect of his daily needs) over the statutory period and his other available resources. A realistic budget for the statutory period would have to be framed and this would normally involve broad estimates of the likely surplus income and other assets. The test should

[1]Proposition 4(*d*) (para. 2.13).

[2]Bankruptcy (Scotland) Bill 1984, clause 5(4), replacing Bankruptcy (Scotland) Act 1913, s. 12 as amended by the Insolvency Act 1976, Sched. 1 (lower limit of £200).

[3]Paras. 285–288.

therefore not be a rigid criterion but should depend rather on whether it appeared to the sheriff that the debtor's resources, after meeting his daily needs, would produce at least a prescribed sum. The sum would necessarily be arbitrary but we suggest that £600 (i.e. £200 per annum in a three year scheme) would be appropriate. If while the application proceeded it became apparent that the scheme's product would be likely to fall short of this sum, the scheme application should be refused only if it appeared to the sheriff to be likely that the short-fall would be substantial.

4.71 As mentioned in Chapter 2,[1] it must be conceded that a minimum product threshold would create the anomaly that a discharge on payment of a composition would be available through a debt arrangement scheme to debtors who, though insolvent, have at least some income or assets while such discharges would not be available to the poorest debtors with very small assets living on very low wages or social security. The latter would be as much, if not more, in need. We think, however, that, given the scarcity of court resources, it would be unrealistic to recommend schemes which produced nothing or a negligible amount for creditors. Moreover, the important reforms of poindings, especially of household goods, and of earnings arrestments recommended later, as well as time to pay directions or orders, would give very substantial protection to the poorest debtors.

4.72 We **recommend:**

(1) Only persons who are individuals (not bodies corporate or unincorporate) should have a title to apply for a debt arrangement scheme.

(2) Only debts for which the debtor is personally liable should be included in a scheme.

(3) Debtors who are self-employed, as well as other debtors, should be entitled to apply for a scheme and debts incurred in the course of the debtor's present and previous profession, trade or business, if any, should be included in a scheme.

(4) A scheme application should be competent only if:

  (*a*) the debtor is unable to pay his debts as they fall due;

  (*b*) he owes not less than three debts;

  (*c*) at least one of the debts has been constituted by decree and a charge to pay or arrestment has been executed or an action of adjudication has been raised, or a summary warrant for recovery of rates or taxes has been granted.

(5) A scheme application should be entertained only if it appears to the sheriff that:

  (*a*) the total debts (exclusive of interest and expenses and disregarding a heritably secured debt) do not exceed a prescribed sum fixed initially at, say, £10,000 but variable by statutory instrument; and

  (*b*) the product of the scheme is likely to reach a minimum prescribed sum (fixed initially at £600 but variable by statutory instrument) over three years.

  (Recommendation 4.9; clauses 14(1) and (8), 17(1) and (3) to (5).)

[1] See paras. 2.127 and 2.130.

Section D. Inclusion and ranking of debts, stoppage of diligence, effect of scheme on creditors' other rights and remedies, and payments outside scheme

4.73 In this Section we discuss the inter-related rules on:

(*a*) the inclusion and ranking of debts in debt arrangement schemes;

(*b*) the stoppage of diligence against the debtor's property and income while a scheme application is pending or a scheme is in force;

(*c*) the payment of debts outside debt arrangement schemes;

(*d*) the effect of a scheme on creditors' rights and remedies other than diligence; and

(*e*) the rights and liabilities of co-obligants liable along with the debtor to pay debts.

The aim of these rules is to balance equitably the interests of the debtor and his several creditors, and also the interests of the creditors as between themselves, while at the same time paying due regard to the interests of co-obligants. We revert later to the relationship between schemes and other bankruptcy processes.[1]

4.74 The main features of our proposals may be summarised as follows.

(1) *Debts initially eligible for inclusion.* Generally debts which are presently due and payable, undisputed, and unsecured by contractual securities, at the date when creditors are first invited to verify the amount of their claims ("the first notice date") would be included in the scheme circulated to creditors in draft and confirmed by the sheriff. Such debts would be subject to the discharge of debts at the end of a successful scheme (whether by full payment or by payment of a composition if the scheme provided for a composition).

(2) *Interest* accrued after the first notice date would not be included in a scheme initially though in a scheme providing for full payment it could be claimed later by a procedure at the end of the scheme, excepted from the scheme's discharge of debts, and constituted by decree (with or without a time to pay direction such as we recommend in Chapter 3).

(3) *Debts identified, incurred or becoming eligible for inclusion between first notice date and confirmation.* Debts which became eligible for inclusion in the period between the first notice date and the sheriff's confirmation of the scheme would normally be included, (as where, during that period, the time for payment of a future or contingent debt had arrived, or a disputed debt was admitted by the debtor or constituted by court decree, or a debt challenged as due under an extortionate credit agreement was upheld by the court in whole or in part, or a debt formerly secured by a contractual security ceased to be so secured). Debts which had been overlooked but were identified, and debts which were incurred, during that period would normally also be included in the scheme as confirmed. Inclusion, however, would not be allowed if the application for the scheme had attained such an advanced stage that, in the sheriff's opinion, inclusion would

[1]Para. 4.299.

be more conveniently considered in a later application to the sheriff, after confirmation of the scheme, to vary the scheme by including the debt. The amount of the debt included between the first notice date and confirmation would be fixed by reference to the date when the administrator ascertained that the debt existed and was eligible for inclusion.

(4) *Pari passu ranking*. Creditors initially included in a scheme would all rank *pari passu* (rateably), i.e. in a composition scheme, each creditor would receive the same proportion of his debt as every other creditor. Creditors would also rank *pari passu* on each disbursement under the scheme.

(5) *No categories of preferential or postponed debts*. It follows that, unlike sequestrations under bankruptcy legislation, there would be no categories of preferred or postponed creditors.

(6) *Inclusion of debts by variation of confirmed scheme*. While a scheme was in force, the sheriff would have a discretionary power, on a creditor's application, to vary a scheme by including a debt which had been omitted from the scheme in error, or had been a future, contingent, disputed or secured debt at the first notice date which subsequently became payable, undisputed, or unsecured, or was a newly incurred debt. The effect would be that once the circumstances requiring or causing the exclusion of the omitted debt no longer obtained, the creditor would have the options of applying for late inclusion, or staying out of the scheme and enforcing his debt in full after its termination. In extreme cases, the sheriff might revoke the scheme on an application by an omitted creditor.

(7) *Ranking of debts included by variation*. Where a debt was included late by variation order while a scheme was in force, the creditor would rank on particular disbursements *pari passu* with the other creditors included from the beginning. The amounts of those other creditors' debts would generally be fixed by reference to the first notice date and the "late" creditor's debt by reference to the date of application for inclusion. Since he would receive fewer disbursements than other creditors, there would be an unpaid balance due to him at the end of the scheme which would be excepted from the scheme's discharge of debts and would be constituted by decree with a time to pay direction. In a scheme providing for a composition, the time to pay direction in the decree would provide for the unpaid balance of the composition (not the whole debt) to be payable by instalments or deferred lump sum which, if complied with, would discharge the debt; but if the time to pay direction lapsed on default, the unpaid balance of the whole debt would become payable.

(8) *Interim order "sisting" diligence*. At an early stage of a scheme application, the sheriff would make an interim order preventing the execution of earnings arrestments, and further procedure in a poinding (if not already followed by warrant of sale before the first notice date) and in an ordinary arrestment (if not followed by decree of furthcoming or sale before that date) pending disposal of the application. Earnings

arrestments and conjoined arrestment orders[1] would not be affected by the interim sist.

(9) *Effect of scheme on diligence.* While a scheme was in operation, it would be incompetent for any creditor, whether or not he was included in the scheme, to execute any of the ordinary diligences for the enforcement of unsecured debts. The confirmation of a scheme would have the effect of rendering ineffectual existing ordinary diligences other than (a) adjudications, and (b) any poindings and arrestments not affected by the interim order (because at the first notice date a warrant of sale or decree of furthcoming or sale had already been granted). After confirmation of a scheme, the net sums recovered after the first notice date by ordinary diligence (poinding and sale, arrestment and furthcoming or sale, earnings arrestment or conjoined arrestment order) would be treated as payments to account of the amount due to the creditor under the scheme, and any excess over that amount so recovered by the creditor would be payable by him to the administrator for disbursement to creditors under the scheme.

(10) *Secured debts.* A debt secured by a contractual security over the debtor's property (e.g. a heritable security or pledge) would not be included in a scheme unless and until the debt ceased to be secured: i.e. the creditor discharged his security, or realised the security subjects, or acquired them in partial satisfaction of the debt.

(11) *"Security diligences" and adjudications.* Debts enforceable by the "security diligences" of sequestration for rent or feuduty or of poinding of the ground, and (for different reasons) debts secured by adjudications, would be treated in much the same way as debts secured by contractual securities.

(12) Arrears of *maintenance* (aliment and periodical allowance on divorce) accrued before the first notice date would be included but arrears of maintenance accruing thereafter would not be included. While a scheme was in force, maintenance would not be enforceable by a current maintenance arrestment or other diligence.

(13) *Debts due under court orders in criminal proceedings* (including fines and compensation orders) would continue to be enforceable outside the scheme.

(14) *A co-obligant of the debtor*, including a cautioner (guarantor), who by a partial payment of the debt had acquired a right of relief against the debtor before the first notice date would be included in the scheme as a creditor in his own right. Where payment of the balance of the whole debt (not the composition) was made, and the right of relief acquired, subsequently, the co-obligant could be subrogated for the original creditor by a simple procedure so that double ranking by the original creditor and co-obligant for the same debt would be avoided.

(15) A scheme would not generally affect the exercise of the *rights and remedies other than diligence available to a creditor*, such as rights of set-off; retention; lien; recourse against co-obligants; security rights;

[1]See Chapter 6.

contractual rights to recover possession of heritable property (e.g. under tenancy agreements) or moveable property (e.g. under hire purchase agreements); or the rights of the electricity and gas boards to discontinue supply. Hire purchase debts would generally not be included until the hire purchase agreement was terminated.

(16) Provision would be made regulating the relationship between *orders under the Consumer Credit Act 1974, Part IX* and debt arrangement schemes, e.g. to avoid dual and inconsistent regulation by such orders and schemes of the debtor's obligations of payment.

(17) Creditors would be safeguarded by *suspension of the running of the short and long statutory periods of prescription* of the debtor's obligation to pay debts while a scheme application or scheme subsists.

(1) Inclusion of ordinary unsecured debts

4.75 *The "first notice date".* We propose that, so far as practicable, the amount of the debts initially included in a debt arrangement scheme should be fixed by reference to a single known date which would be the same for all of those debts. In a composition scheme, such a rule would promote equality as between the included creditors. It would be unfair if an included creditor could keep 100p in the pound of a payment made to him outside the scheme, while the other included creditors received only a dividend under the scheme. Moreover, it would unduly disrupt the procedure in a scheme application and the operation of a scheme to require adjustments of a draft scheme, or variation of a confirmed scheme, on every occasion when a payment to account of an included debt was made outside the scheme direct to the creditor. Before circulating a draft scheme to creditors, the administrator would be under a duty to serve on each of the known creditors whose debt was eligible for inclusion in the scheme a notice giving him the opportunity to verify the amount of his debt as at the date of service (by posting or otherwise) of the first of these notices served by the administrator in pursuance of this duty on a creditor. This date we have called "the first notice date". The respective shares of creditors[1] in the product of a scheme, whether it provided for payment in full or a composition, would be fixed by reference to the amounts of their debts so far as outstanding at the first notice date. Payments to account of a debt made after that date by the debtor or a third party (such as a co-obligant, relative or friend of the debtor) would not affect the amount of the debt or composition to which the creditor was entitled in terms of the scheme, though the sums actually payable by the administrator to the creditor under the scheme would be reduced by an amount equivalent to the sums paid to the creditor after the first notice date outside the scheme. For this purpose, sums recovered by a creditor by diligence after the first notice date would be treated in the same way as sums paid to the creditor outside the scheme.

4.76 A co-obligant of the debtor who, by a prior payment of the debt, had acquired a right of relief against the debtor before the first notice date would be included in the scheme as a creditor in his own right. A co-obligant acquiring a right of relief after that date would be subrogated to the creditor in the scheme by a procedure to be noted later. Only debts presently payable

[1]Other than certain creditors included "late" as described below.

(not future or contingent) and undisputed at the first notice date would be initially eligible for inclusion.[1]

4.77 *Interest.* Interest accrued on an interest-bearing unsecured debt before the first notice date would be included in the scheme but only if the interest were specifically claimed by the creditor.[2] Interest is calculated on a day-by-day basis and, especially if payments to account of a debt had been made at different times, the calculation would often be too difficult for debtors to undertake. Often creditors themselves do not seek interest on consumer debts. We propose therefore that the creditors should be given the right and opportunity to claim any interest due to them which has accrued before the first notice date at the same time as they verify the amount of their debts; the debtor should not be required to include such interest in his statement of affairs. In our Consultative Memorandum No. 50,[3] we suggested that interest accruing while the scheme application or scheme was continuing should not be payable. This suggestion met with a mixed reaction and, on reflection, we propose that, while interest should not be payable in a composition scheme, it should be payable in a scheme which provided for payment of debts in full. It should be for the creditor to claim interest accrued after the first notice date (if otherwise due by law) and we propose that each creditor should be given the opportunity to make such a claim in the procedure for discharge of debts near the end of a successful scheme providing for payment in full.[4] Interest not so claimed would be discharged by the discharge of the principal sum.

4.78 *Expenses of court actions.* As indicated in Chapter 3,[5] the procedures for obtaining and extracting decrees for court expenses vary in different courts and types of proceedings, and often a decree for expenses may be extracted a considerable time after the extract of the decree for the principal sum. We propose that court expenses should be initially included in a scheme only if a decree for expenses had been extracted, or the amount of expenses had been agreed by the debtor, before the first notice date: thus expenses found due or decerned for but not yet taxed as a quantified sum, or taxed but subject to modification on appeal, would be treated as a future, contingent or disputed debt and could be included "late" as mentioned below. We propose however that a creditor who had raised an action for payment of a principal sum against the debtor while a scheme application or scheme subsisted should only be entitled to rank in the scheme for the expenses of the action if either (*a*) the creditor was unaware of the existence of the scheme application or scheme when the action was raised, or (*b*) the creditor was so aware but the debt was disputed and required to be constituted by decree. While we believe that a scheme application or scheme should not prevent a creditor from constituting his debt by decree (against the possibility that the application or scheme might be unsuccessful and that diligence might then become necessary), we think that since for the purpose of the scheme the action was unnecessary, the creditor should bear the expenses of such an action if the application and scheme were successful. We propose therefore that where, under the foregoing

[1] As to "late" inclusion of debts becoming eligible for inclusion, see para. 4.127 *et seq.*
[2] For secured debts, see para. 4.173.
[3] Proposition 11 (para. 2.40).
[4] See para. 4.291; Recommendation 4.44(1) (para. 4.294).
[5] Paras. 3.17 to 3.21.

rule, court expenses were excluded from a scheme because the creditor was aware of the scheme proceedings or the action related to an undisputed debt, any discharge of debts at the termination of the successful scheme should have the effect of discharging the debtor's liability for those expenses, whether or not the principal sum was discharged.[1]

4.79 *Diligence expenses.* As a general rule, the expenses of most diligences (poinding and sale, arrestment in common form, earnings arrestment, conjoined arrestment order and inhibition) incurred before the first notice date and chargeable against the debtor would be included in the debt for which the creditor ranked, unless the expenses were disputed by the debtor. Such expenses would normally be immediately quantifiable by the officer or creditor's agent. In the case of diligences which take the form of a court action, (action of furthcoming, or of adjudication[2]), only expenses agreed by the debtor, or specified as a quantified sum in an extract decree, before the first notice date would be initially included in a scheme. We discuss below[3] expenses in diligences commenced or continued after the first notice date.

4.80 We **recommend:**

(1) For the purpose of calculating the amount due to a creditor in terms of a scheme and of ranking creditors on each of the disbursements under a scheme, the amount of the debts initially included in a scheme should so far as practicable be fixed by reference to a single date occurring at an early stage of a scheme application: the proposed date is the date when the first statutory notice is served on a creditor by an administrator in the procedure recommended below for requiring creditors to verify the amounts of their debts ("the first notice date").

(2) Only debts (including interest and legal expenses) presently payable and undisputed at the first notice date would be initially eligible for inclusion in a scheme.

(3) Interest payable between the first notice date and the end of a successful scheme on an interest-bearing unsecured debt should be recoverable by the creditor only if (*a*) the scheme provided for payment of debts in full and (*b*) the interest was claimed in the procedure for discharge of debts at the end of a successful scheme as proposed below (para. 4.291).

(4) The expenses of court proceedings due by the debtor should be initially included in a scheme only if a decree for expenses had been extracted, or the amount of expenses agreed by the parties, before the first notice date.

(5) The expenses of an action for payment of a principal sum against the debtor raised while a scheme application or scheme subsisted should be included only if either (*a*) the creditor was not aware of the application or scheme when he raised the action or (*b*) the action was necessary to resolve a dispute as to liability or quantum. Where the expenses of

[1]The principal sum may not have been affected by the discharge either because it was never included in the scheme or because it was included late and, instead of being discharged, a decree was granted for the unpaid balance as proposed in Recommendation 4.17(3) (para. 4.143).

[2]An adjudging creditor would rank in a scheme only if he had discharged the adjudication.

[3]Para. 4.154.

an action were excluded in terms of this rule, and the principal sum was included in the scheme, any discharge of debts at the termination of the scheme should operate to discharge the debtor's liability for those expenses.

(6) Diligence expenses chargeable against the debtor and incurred before the first notice date should be included unless disputed by the debtor, except that the expenses of a diligence taking the form of a court action would be subject to the rule in para. (4) above.
(Recommendation 4.10; clauses 15(1)–(4), 16(2)(*a*), 29 and 39.)

(2) Ranking of creditors

4.81 *All creditors to rank* pari passu. In accordance with the rule in bankruptcy sequestrations for the ranking of creditors of the same class, we propose that creditors included in a debt arrangement scheme should rank *pari passu*, i.e. rateably according to the amount of their respective debts. In a scheme providing only for an extension of time without composition, each creditor would receive payment of his whole debt; in a scheme providing for a composition, each creditor would receive the same proportion of his debt as every other creditor. Moreover, in each disbursement to creditors under any scheme, each creditor would also rank rateably, receiving the same proportion of his debt as every other creditor.

4.82 *Debts for the supply of necessaries.* In Consultative Memorandum No. 50,[1] we sought views on whether priority should be given in debt arrangement schemes to claims for arrears due in respect of the debtor's accommodation and essential goods and services (viz. rent, secured loan interest, fuel debts and arrears of hire or hire purchase instalments of household goods required by the debtor) in order to prevent the loss of the accommodation, goods or services. This suggestion was rejected by all who commented and we agree.

4.83 We considered whether there should be categories of preferred or postponed creditors such as are provided for in sequestrations under bankruptcy legislation and in liquidations.

4.84 *No category of preferential debts.* In our Consultative Memorandum No. 50,[2] we briefly discussed the question whether debts which have a preferential status in sequestrations under bankruptcy legislation should have that status in debt arrangement schemes. This suggestion met with a divided response from consultees. Those who opposed it did not favour the principle of conceding preferential status to fiscal and other debts in insolvency proceedings but argued that the preferences in schemes should be the same as in sequestrations.

4.85 Since that time the question of preferential debts in personal and company insolvency proceedings in the United Kingdom has been widely debated. The recommendations in our Bankruptcy Report to abolish all rates and fiscal preferences in sequestrations[3] and the recommendations of the Cork

[1]Proposition 15 (para. 2.44).
[2]Para. 2.43.
[3]Chapter 15, especially paras. 15.6 to 15.24.

Report to abolish many Crown preferences in insolvency proceedings,[1] were originally rejected by the present Government[2] but following on criticisms of preferential debts made in debates in the House of Lords on the Bankruptcy (Scotland) Bill[3] and the Insolvency Bill[4] presently before Parliament, the Government stated their intention of seeking to amend those Bills so that the claims for local government rates and Inland Revenue assessed taxes (income tax, capital gains tax and development land tax) would rank as ordinary debts and so far as relevant[5] only the following debts would have preferential status,[6] viz.:

(1) *PAYE deductions* (including deductions on account of tax to certain independent contractors especially in the construction industry) which were or ought to have been made over a statutory period by the insolvent employer for the Crown under the employer's statutory duty.

(2) *Taxes and duties payable to the Board of Customs and Excise* including value added tax and car tax, and sums due in respect of general betting duty, gaming licence duty or bingo duty, for a statutory period or periods.

(3) *Social Security contributions* (viz. for financing social security benefits, the national health service and the redundancy fund) including Class 1 contributions due by employers, Class 2 by self-employed earners and Class 4 in respect of profits of a trade, profession or vocation.[7]

(4) *Occupational pension scheme contributions*: preference will be accorded to sums owed by the bankrupt to which Schedule 3 to the Social Security Pensions Act 1975 (contributions to occupational pension schemes and state scheme premiums) applies.

(5) *Wages, salaries and other benefits to employees*, i.e. pay for an amount not exceeding a sum prescribed by statutory instrument to each employee in respect of service or services rendered to the bankrupt in the four months preceding sequestration and all accrued holiday remuneration of employees.

4.86 *Employees' unpaid wages.* We think that, in some respects, the preferential status of debts due to employees has the strongest claim to recognition in debt arrangement schemes.[8] We received few comments relevant to this matter following on Consultative Memorandum No. 50 since in that Memorandum, we had proposed that schemes should only be available where the debtor was himself a wage or salary earner. Having now recommended the inclusion of business debts,[9] however, a solution must be found to the

[1]Chapter 32; especially para. 1450.

[2]White Paper, *A Revised Framework for Insolvency Law* (1984) Cmnd. 9175, para. 27.

[3]Hansard, H.L.Debs., 4 December 1984, cols. 1247–1256; 18 December 1984, cols. 539–542.

[4]Hansard, H.L.Debs., 7 February 1985, cols. 1243–1254.

[5]Since debt arrangement schemes would be competent only for living debtors, the preference for deathbed and funeral expenses in sequestrations can be ignored.

[6]At the time of writing these paragraphs, the relevant amendments had not been made to the Bankruptcy (Scotland) Bill 1984.

[7]Social Security Act 1975. The preference for Class 4 contributions is limited to a statutory period.

[8]We recommend the retention of the employee's preference in sequestrations: Bankruptcy Report, paras. 15.17 to 15.20.

[9]Recommendation 4.9(3) (para. 4.72).

problem of employees' preferential debts. As the Cork Report showed,[1] the employee's preference for unpaid wages was introduced in the early days of the Bankruptcy Acts as a social measure designed to protect a relatively poor and defenceless section of the community at a time when there was no welfare state: since then, the position of wage-earners has been greatly improved by the introduction of unemployment pay and earnings-related benefits, severance and redundancy payments, and other social security benefits. The hardship arising from delays in the payment of employees' preferential claims has been alleviated by the Employment Protection Acts under which, according to the Cork Report[2] "a substantial part, and in the majority of cases probably the whole, of each employee's claim is paid by the Secretary of State immediately out of the redundancy fund":[3] the employees' rights and remedies for recovery of the sums paid then transmit to the Secretary of State by statutory subrogation.[4] Unfortunately, the preferential debts of an employee in a sequestration are not the same as the debts which the Secretary of State is required to meet: the employee may obtain advantages from a sequestration which he would not obtain from the Secretary of State and *vice versa*.[5] We would expect that (unlike liquidations and many sequestrations), in most debt arrangement schemes, the debtor would not be an employer, and we consider that the concession of a special preferential status for employees would unduly complicate schemes without corresponding benefit. In our view, the employee should be entitled to apply for his employer's sequestration but, if he did not do so and a scheme was confirmed, the employee should rank for unpaid wages *pari passu* with other creditors. The Cork Report[6] claimed that it was unnecessarily complicated that there should be different financial and other limits on employees' preferential claims for wages in sequestrations and on rights to benefits from the redundancy fund. In the long term the solution may lie in harmonising the two codes or, as the Cork Report proposed, in the repeal of the employee's preferential status in bankruptcy coupled with an extension of the protection under the Employment Protection Acts so that no employee is worse off as a result of the repeal.[7]

4.87 Meanwhile, if we are right in thinking that a special case cannot be made for giving preferential status to unpaid wages in debt arrangement schemes, the next question is whether generally all debts having preferential status in sequestrations should be accorded that status in such schemes.

4.88 *Options on preferential debts in debt arrangement schemes.* We have considered four possible ways of dealing with preferential debts namely:

(*a*) that the preferred creditors should be excluded from debt arrangement schemes either altogether or in respect of their preferential debts and

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[1]Para. 1428.
[2]Para. 1429.
[3]Employment Protection (Consolidation) Act 1978, s. 122.
[4]*Ibid.*, s. 125.
[5]See our Bankruptcy Report, para. 15.19. In the case of the employees' preferential claim in respect of contributions to occupational pension schemes, the Employment Protection (Consolidation) Act 1978, s. 123 provides for payment of those contributions where non-payment has resulted from insolvency.
[6]Para. 1431.
[7]Paras. 1431–1433.

should be entitled to enforce their excluded debts by diligence during the currency of the scheme; or

(*b*) that the preferences should apply in debt arrangement schemes; or

(*c*) that the preferred creditors should participate in a debt arrangement scheme and should rank equally with ordinary unsecured creditors but the discharge of the debts on the termination of a successful scheme would not discharge the unpaid balance of the preferential debts; or

(*d*) that the preferred creditors should rank equally with ordinary unsecured creditors in debt arrangement schemes so that debts having a preferential status in sequestrations would not have that status in debt arrangement schemes.

4.89 The first option appears to us to be the least satisfactory. It would prejudice the operation of those debt arrangement schemes where there were preferred creditors and it would not always be satisfactory for the preferred creditors themselves, since they might compete with each other in a race of diligences in a situation which requires regulation and control of enforcement to achieve the regular and orderly payment of debts.

4.90 The second option would require that provision should be made in a debt arrangement scheme for the preferred creditors to be paid in full first and, on these debts being paid, the remaining funds, if any, would be shared between the ordinary creditors amounting either to payment in full or more probably a dividend. On consultation, this option was supported by the Law Society of Scotland, who observed that there are very few bankruptcy sequestrations in which the greater part of the assets are not ultimately distributed to secured and preferred creditors, and took the view that similar considerations would apply in debt arrangement schemes. They therefore argued that it should be possible for a debt arrangement scheme to provide for payment in full to preferred creditors out of the monies payable to the administrator, and a dividend, or as the case may be, payment in full, to ordinary creditors thereafter. In the Society's view, a failure so to provide would be likely to produce a situation where a debt arrangement scheme would proceed in only a limited number of cases since preferred creditors would always object to schemes or petition for sequestration.

4.91 The main disadvantage of the Law Society's proposal is that the concession of bankruptcy preferences would complicate the framing and administration of debt arrangement schemes which ought to be kept relatively simple. The Law Society had envisaged that such a scheme would be prepared and operated by professional chartered accountants but, in our view, it is doubtful whether funds for that purpose could be found, except in a limited number of cases.

4.92 Under the third option, the preferential debts would be included in a scheme but the unpaid balance of any preferential debt at the termination of a successful scheme would not be covered by the discharge of debts at that time. We reject this solution because it is inconsistent with the basic policy of giving debtors so far as practicable an opportunity to pay off all their debts within the time scale of a debt arrangement scheme.

4.93 *Our recommended solution*. The fourth option, inclusion of preferentia debts on a basis of equality with other included debts, is in our view the leas unsatisfactory solution. The Cork Committee recommended[1] that, in order tc keep the proceedings in debt arrangement orders simple and to avoic complications inherent in decisions relating to such orders, there should be no preferences and all unsecured debts should rank *pari passu*. This is the current position in administration orders under the County Court Acts ir England and Wales[2] and in New Zealand summary instalment orders[3] and was accepted in the Australian[4] federal legislative proposals on regular payment plans. If a debt arrangement scheme provided for payment in full, the preferred creditors would not, in our view, have strong grounds to object. Even if the scheme provided only for a composition, we think that, since debt arrangement schemes would be confined to consumer debtors and small traders and exclude bodies corporate or unincorporate, the loss to the Exchequer in foregoing their preferred status would not be great. It would, we think, be a small price to pay for the successful operation of legislation designed to assist honest consumer and small business debtors to pay their debts. While we propose that, if a preferred creditor so desired, he would be entitled to apply for the debtor's sequestration, we would hope and expect that the preferred creditors would not exercise this right frequently so as tc defeat debt arrangement scheme proceedings and render the legislation inoperative. We think therefore that as a general rule the preferential debts should be treated on a basis of equality with ordinary debts.

4.94 We consider later[5] the relationship between debt arrangement schemes and sequestrations. During a scheme application, we think that any creditor should have a right, if he obtained the leave of the sheriff, to petition for the debtor's sequestration, and generally a preferred creditor would be granted leave to petition since we propose that the sheriff would be required to grant leave if a scheme would be unduly prejudicial to a creditor or class of creditors. The sheriff would, however, be required to disregard any objection to the scheme application made by the preferred creditor on the ground that he would not obtain the benefit of his preference in the scheme. Moreover, once a scheme came into force, a petition for sequestration would not be competent and any creditor would require to apply first to the sheriff for revocation of the scheme: in such an application, the sheriff would again be required tc disregard any contention by the preferred creditor that in the scheme, he did not or would not have the benefit of his preference. In short, the preferred creditor would be entitled to protect his preference by petitioning (with the sheriff's leave) for sequestration before the scheme is confirmed but not by objecting to a scheme nor by applying for its revocation.

4.95 An amendment would be required to Part VII of the Employment Protection (Consolidation) Act 1978 which, as indicated above, makes provision for the payment by the Secretary of State out of the redundancy

[1]Para. 324.

[2]County Court Rules 1981, Order 39, rule 18 (except that "subsequent" creditors are deferred to pre-order creditors).

[3]Insolvency Act 1967, Part XVI (New Zealand).

[4]A.L.R.C. Report, No. 6, para. 58.

[5]See para. 4.299.

fund of certain debts (including specified arrears of pay and holiday pay) owed by an employer to an employee when the employer has become insolvent, and for the transfer to the Secretary of State of the rights and remedies of the employee in respect of money paid to the employee under Part VII. We propose that Part VII should be extended to cases where an insolvent employer obtains a debt arrangement scheme. This is a necessary safeguard for the debtor's employees. It is also necessary to avoid the risk that an employee might defeat a debt arrangement scheme by applying for his employer's sequestration, not in order to obtain his preferences under bankruptcy legislation out of his employer's estate, but rather to qualify for benefits under the 1978 Act. The Secretary of State, on providing benefits under Part VII of the 1978 Act to the employee, would become entitled to be included in the debt arrangement scheme in subrogation for the employee.

4.96 We **recommend:**

(1) In debt arrangement schemes, all included creditors should rank *pari passu* on the product of a scheme and on each disbursement by the administrator to creditors under the scheme.

(2) There should be no category of preferred creditors. In particular, no preference should be given to creditors supplying accommodation or essential goods and services to the debtor, nor to creditors having a preferential status in sequestrations under bankruptcy legislation.

(3) The sheriff should disregard any objection to an application for confirmation, or any contention in an application for revocation of a scheme, made by a creditor, who would have a preference in sequestration, to the effect that he would not obtain that preference in the scheme, but pending a scheme application such a creditor should be entitled to apply for the sheriff's leave to petition for sequestration as recommended below.[1]

(4) Part VII of the Employment Protection (Consolidation) Act 1978 (payment by Secretary of State from redundancy fund of benefits to employees of insolvent person) should apply to a debtor subject to a debt arrangement scheme, with subrogation of the Secretary of State, following payment of benefits, to the employee's ranking in the scheme. (Recommendation 4.11; clauses 16(1), 25, 30(2), Sched. 7, para. 26.)

4.97 *No category of postponed debts.* In sequestrations under bankruptcy legislation, certain creditors rank only on such estate of the bankrupt as may remain after the claims of other creditors have been satisfied. The inclusion of business creditors in debt arrangement schemes raises the question whether the claims of persons participating in the debtor's business who would be postponed in sequestration should rank after the claims of other creditors are satisfied.[2] Moreover, the spouse of a bankrupt is a postponed creditor in a sequestration in relation to a loan made by him or her to the bankrupt and in respect of his or her property inmixed with the bankrupt's property and

[1]Recommendation 4.46(4) (para. 4.311).

[2]These are creditors who have sold the goodwill of a business, or lent to a business, in consideration of a share of it or at a rate of interest varying with its profits: Partnership Act 1890, s. 3; Bankruptcy (Scotland) Bill 1984, clause 48(3)(c).

vesting in the trustee.[1] While the views of consultees on this matter were divided,[2] we think that, for the sake of simplicity, there should be no category of postponed creditors.

4.98 We **recommend:**

Business creditors and married persons who would be postponed creditors in a sequestration should rank in a debt arrangement scheme equally with ordinary unsecured creditors.
(Recommendation 4.12; clause 16(1).)

(3) Inclusion and ranking of debts enforced by diligence and stoppage of diligence

4.99 The rules on the stoppage of diligence, and on the ranking of debts secured by diligence, in debt arrangement schemes would necessarily differ from the corresponding rules in sequestrations. A sequestration process is both a combination of diligences against the bankrupt's property and an "action" vesting the bankrupt's property (including after-acquired property) in the trustee, all for the benefit of the general body of creditors according to their respective entitlements.[3] A debt arrangement scheme, by contrast, is primarily designed to enable debts to be paid out of the debtor's future free income and (except in relation to earnings recoverable by a pay deduction order mentioned below) should not operate as a diligence against the debtor's property nor vest that property in the administrator. Since a debt arrangement scheme would not itself operate as a diligence, it should not be treated as such for the purpose of the statutory rules equalising poindings and arrestments executed within a statutory period of the constitution of "apparent insolvency".[4] Nor do we think it desirable to replicate in debt arrangement schemes the statutory rules for the reduction of prior poindings and arrestments executed within 60 days before sequestration.[5] These are designed to secure equality among the creditors sharing the bankrupt's sequestrated property: they do not seem apt for a more simple process primarily designed for sharing the debtor's future free income among his creditors.

4.100 The rules on the stoppage of diligences by debt arrangement schemes must be so framed as to ensure, so far as possible, that creditors' diligences are not adversely affected by scheme applications which, though made by the debtor in good faith, are unsuccessful, or which are made, by a debtor having no intention of paying his debts through a scheme, merely to wreck or delay his creditors' diligences. For this reason, the rules on the stoppage of diligence by sequestration under bankruptcy legislation form an inappropriate model.

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[1]Bankruptcy (Scotland) Bill 1984, clause 48(3)(*b*) replacing Married Women's Property (Scotland) Act 1881, s. 1(4) (which applied only where the bankrupt was the husband).

[2]Consultative Memorandum No. 50, Proposition 14 (para. 2.43).

[3]Bankruptcy (Scotland) Bill 1984, clauses 30–32 and 36; cf. Bankruptcy (Scotland) Act 1913, ss. 97, 98, 103 and 104: Goudy, p. 111.

[4]1984 Bill, Sched. 7, para. 10; 1913 Act, s. 10. Similarly a debt arrangement scheme should not operate as an adjudication for the purpose of the rules on equalisation of adjudications under the Diligence Act 1661 and the Adjudications Act 1672.

[5]1984 Bill, clause 36(4); 1913 Act, s. 104.

A sequestration is normally sought by creditors rather than the debtor[1] and an award of sequestration, which is granted quickly to a creditor as of right if the debtor is "apparently insolvent" in the statutory sense, cuts down all existing diligences whatever stage they have reached and renders future diligences incompetent. By contrast, only debtors would apply for debt arrangement schemes and the confirmation of a scheme would ultimately be within the discretion of the sheriff, not granted as of right. If a scheme application had the same immediate, automatic and comprehensive effect on diligences as an award of sequestration has, creditors' diligences would frequently be wrecked or prevented by scheme applications which were unsuccessful or made in bad faith.

4.101 We propose therefore that in debt arrangement schemes the stoppage of diligence should proceed in two phases. First, the sheriff would grant an interim order having strictly defined and limited effects on diligences pending disposal of the scheme application. Second, if the application were successful, the sheriff's confirmation of the scheme would preclude all new diligences and, with a few exceptions, cut down all existing diligences. We now discuss these proposals in more detail.

(a) *Interim sist of diligence*

4.102 We propose that, on appointing an administrator, the sheriff would make an interim order sisting diligence against the debtor. As soon as practicable thereafter, the administrator would intimate a copy of the interim order to each of the known creditors (including future and contingent creditors and other creditors whose debts were not or not yet eligible for inclusion in the scheme). The order would bind the creditor from the time of intimation.

4.103 The effect of the interim order would vary according to the different types of diligences and the stages which diligences had reached. In the case of the "inchoate" diligences requiring completion by sale (poinding and sale under ordinary decrees or summary warrants, arrestment and furthcoming of moveable property, arrestment and sale of ships and other vessels) or by payment (arrestment and furthcoming of funds other than earnings), we propose that the interim order should have the same effect as an interim order in an application for a time to pay order for the same reasons.[2] The creditor would be entitled to execute the poinding or arrestment but further procedure (such as an application for, or grant of, warrant of sale; intimation of removal or sale in summary warrant poindings; a summons or decree in an action of furthcoming or sale of arrested property) would not be competent.

4.104 The new modes of continuous diligences against earnings recommended in Chapter 6 take the form of "completed" rather than "inchoate" diligences (since they require the employer to pay without decree of furthcoming) and would therefore be affected by an interim order in a different way from arrestments in common form. The interim order should render incompetent the execution of a new earnings arrestment since sums attached by the earnings

[1]Under the Bankruptcy (Scotland) Bill 1984, clause 5, a petition for sequestration by the debtor without the concurrence of a creditor will be incompetent; petitions by debtors for summary sequestration will be abolished.

[2]See para. 3.80 above.

arrestment after the first notice date would affect the amount of the disbursements payable to the creditor under the scheme. The interim order should not, however, affect an existing earnings arrestment because it would be unsatisfactory to require an employer to stop deductions and payments pending disposal of a scheme application and re-start them if the application were refused. There seems no reason why a creditor having a decree for aliment or periodical allowance on divorce should not be entitled to execute a new current maintenance arrestment, or continue to recover payments under an existing current maintenance arrestment, pending disposal of a scheme application.[1] Any advantage which the maintenance creditor would enjoy as compared with an ordinary creditor would be temporary.[2] If an earnings arrestment or current maintenance arrestment were in operation, the interim order should not prevent a creditor from applying for a new conjoined arrestment order nor affect an existing conjoined arrestment order.

4.105 The interim order should render incompetent the raising of an action of adjudication for debt.[3] We propose later that an adjudging creditor should not be included in a scheme unless and until he discharged the adjudication or the diligence is completed and there is a case for imposing no restraints on adjudication processes already commenced. We think, however, that there should be a breathing space for the debtor during which the adjudging creditor may do everything necessary to give him a title and preference in competition with other creditors, but should be restrained from entry into possession or from ejecting the debtor while he (the creditor) considers the terms of the draft scheme. We propose therefore that where an action of adjudication for debt had already been raised, the creditor should be entitled to register a notice of litigiosity in the personal registers, to obtain his extract decree, to complete title to the adjudged property and to register an abbreviate of adjudication. But no further steps should be competent while the scheme application was pending. If a case occurred in which the adjudging creditor had already obtained civil possession by virtue of a decree of maills and duties, he would be entitled to continue to draw the rents.

4.106 Since an inhibition is in principle a prohibitory diligence, an interim sist should not preclude the procedure for obtaining warrant for inhibition, executing the warrant by service on the debtor, and the registration of the inhibition and any prior notice of inhibition, nor should it affect the operation of an existing inhibition or notice pending disposal of a scheme application.

4.107 The grant of a warrant for imprisonment of a debtor for wilful default in paying aliment under the Civil Imprisonment (Scotland) Act 1882, section 4, would prejudice any chance of a scheme application being successful and on balance we think that an interim order should render such a warrant incompetent pending disposal of the scheme application.

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[1]We propose later that the maintenance creditor would not rank in a scheme for maintenance arising after the first notice date: Recommendation 4.22(1) (para. 4.168) so that sums attached by a current maintenance arrestment would not affect disbursements made to the creditor under the scheme.

[2]We propose later that a current maintenance arrestment like other diligences would be rendered ineffectual by the commencement of a scheme.

[3]The nature and incidents of adjudications for debt are described at para. 3.28 above.

4.108 We propose that where the sheriff refused a scheme application, he should at the same time make an order recalling the interim order sisting diligence, and the administrator should intimate the order to the creditors concerned. As in the case of time to pay orders,[1] the period during which an interim order precluded further steps in diligence pending a scheme application should be disregarded in calculating any period during which by law a diligence remains effective.[2]

4.109 We **recommend:**

(1) On appointing an administrator in a scheme application, the sheriff should make an interim order "sisting" diligence against the debtor.

(2) A copy of the order should be intimated as soon as practicable to each of the known creditors and should bind the creditor from the date of intimation.

(3) The interim order should have the following effects:—

(*a*) It should render incompetent the grant of a warrant of sale of poinded goods; but it should not prevent a creditor from executing a poinding in common form; (the references here are to "personal" poindings, not to the secured creditor's diligence of poinding of the ground[3]).

(*b*) It should render incompetent intimation of the sale, or removal and sale, of goods poinded under a summary warrant for rates and taxes under the procedure outlined in Chapter 7; but it should not prevent the execution of such a poinding.

(*c*) It should render incompetent the execution of an earnings arrestment but it should not affect an earnings arrestment already executed. It should neither prevent nor affect a current maintenance arrestment or a conjoined arrestment order.

(*d*) It should render incompetent the raising of an action of furthcoming or sale of arrested property or ships or the grant of decree in an action already raised, but it should not render incompetent the execution of an arrestment in common form.

(*e*) It should render incompetent the raising of an action of adjudication for debt or, if such an action had already been raised the taking of any steps (such as entry into possession, ejection of the debtor) other than the registration of a notice of litigiosity in connection with the action, the obtaining and extracting of decree, registration of an abbreviate of adjudication and the completion of title (by recording the decree in the property or personal registers). But it should not affect any steps already taken in the diligence.

(*f*) It should not render incompetent the procedure for obtaining and registering a warrant of inhibition or notice of inhibition nor affect any existing inhibition (or notices) which had already been registered.

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[1]See para. 3.84 above.

[2]As to the effect of an interim order on prescription, see para. 4.214.

[3]See paras. 4.175 and 4.176 below.

(*g*) It should render incompetent the grant of a warrant for the civil imprisonment of an aliment defaulter.

(4) Time limits on the duration of diligences should be extended by the period during which the interim order affects the diligence.
(Recommendation 4.13; clause 20(1)–(3), (5); Schedule 7, paragraph 2.)

(b) *Effect of scheme on diligences for unsecured debts, and ranking of debts enforced by such diligences*

4.110 While a debt arrangement scheme was in force, it should not be competent for any creditor[1] to execute or commence the diligences by which ordinary unsecured debts are enforced or secured, namely, a poinding and sale, whether in common form (not being a poinding of the ground by a creditor in a *debitum fundi*[2]) or under a summary warrant for recovering rates and taxes, an earnings arrestment, or an arrestment and action of furthcoming or sale, an inhibition, an action of adjudication for debt, or a charge for payment, whether the diligence was used on the dependence, in security or in execution. This prohibition should take effect when the order confirming the scheme is made, superseding the interim sist of diligence.

4.111 Further, with certain exceptions, the sheriff's order confirming the scheme should have the effect of rendering ineffectual, on the date of expiry of the appeal days or the final decision on appeal upholding the order as the case may be, any of the foregoing diligences which were in operation immediately before that date. An unexpired charge should lapse as superseded by the scheme.

4.112 *Arrestments and poindings.* Where one of the "inchoate" diligences of arrestment in common form or poinding had proceeded to an advanced stage, it would often be unsatisfactory to render the diligence ineffectual, perhaps on the eve of a warrant sale. We propose therefore that the coming into force of a scheme should not render ineffectual (1) a poinding in which a warrant of sale of poinded goods had been granted but not yet executed, or (2) a poinding under a summary warrant for recovery of rates or taxes where intimation of the dates of removal and sale, or of sale, of the poinded goods had been intimated under the procedure recommended in Chapter 7, or (3) an arrestment of moveable goods or funds where decree of furthcoming or warrant of sale had been granted but not yet executed or enforced. The scheme should, however, render ineffectual poindings and arrestments which had not reached those stages.

4.113 *Diligences against earnings.* Any existing earnings arrestment or conjoined arrestment order such as we recommend in Chapter 6 would be rendered ineffectual by a debt arrangement scheme. Intimation of the confirmation of the scheme would be made by the administrator to the employer under an earnings arrestment, and to the sheriff clerk operating a conjoined arrestment order in a different sheriff court.

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[1]Whether included in a scheme or omitted from it: for omitted creditors, see para. 4.148 below.
[2]See paras. 4.175 and 4.176 below.

4.114 *Adjudications for debt.*[1] Clearly a debt arrangement scheme should preclude the raising of any new action of adjudication for debt while the scheme was in force. Pending our review of the diligence of adjudication for debt, we think that a debt arrangement scheme should not extinguish an adjudication for debt in which decree of adjudication had already been granted, nor affect an action of adjudication for debt already commenced before the interim order sisting diligence and not yet disposed of at the time when the confirmation of the scheme took effect. An adjudication for debt might have subsisted for many years and should therefore not be cut down by a debt arrangement scheme. Unlike arrestments and poindings which, having reached an advanced stage, were not rendered ineffectual by a debt arrangement scheme, an adjudication might well not be completed during the currency of a scheme. Moreover, adjudged property is not sold but ultimately vests in the adjudging creditor unless redeemed, and the effect which such vesting has on the amount of the debt is somewhat obscure. In these circumstances, pending reform of adjudications for debt, we propose that a creditor adjudging for debt should be treated in the same way as under our recommendations a secured creditor would be treated: that is to say (1) his debt would not be included in a scheme unless and until, at the first notice date or subsequently, the creditor had abandoned his action of adjudication and, had discharged any notice of litigiosity and abbreviate of adjudication which had been registered in connection with the diligence and any decree in the action which he had already obtained and (2) the scheme would not affect any existing action or decree of adjudication for debt.

4.115 *Inhibitions.*[2] Though an inhibition is in principle a prohibitory diligence and might thus be regarded as not inconsistent with a debt arrangement scheme, we consider that a debt arrangement scheme should render incompetent the obtaining of a warrant of inhibition and the registration of the inhibition in the personal registers while the scheme is in force. This is consistent with the general policy that a debt arrangement scheme should allow the debtor to pay his debts free from the threat of diligence.

4.116 The effect of a scheme on an inhibition already registered and the inclusion and ranking of a debt secured by an inhibition raises more difficult issues. We considered whether an existing inhibition and notice of inhibition should continue in force notwithstanding the scheme. We reject this option because an inhibiting creditor might obtain a preference in a ranking process (e.g. on the surplus proceeds of sale of property sold under a heritable security) for his full debt (because his debt would not be compounded in a composition scheme until the discharge of debts at the end of a successful scheme) while poinding or arresting creditors would not receive more than a composition and in many cases their diligences would be rendered ineffectual by the scheme. Moreover, while provisions in schemes requiring the debtor to dispose of heritable property and pay the proceeds to the administrator are likely to be unusual, an inhibition would prevent the debtor from complying with such a provision: this would be inappropriate, especially where the value of the heritable property was disproportionately greater than the creditor's debt. We conclude therefore that a debt arrangement scheme should render

[1]The nature and effect of adjudications for debt are described at para. 3.28 above.
[2]The nature and effect of an inhibition are described at para. 3.29 above.

a pre-existing inhibition, and any related notice of inhibition, ineffectual. This is a different solution from that adopted in time to pay decrees and orders but the difference flows from the need (which does not arise in time to pay decrees and orders) to ensure equality between creditors who have executed diligence.

4.117 An inhibiting creditor is entitled to a preference, in a sequestration or other process of ranking over the debtor's heritable estate, over posterior creditors, i.e. other creditors whose debts were created after the registration of the inhibition.[1] This is achieved by a very complicated process, sometimes called double round ranking, which in effect results in the inhibitor being compensated, for any shortfall in his dividend out of the proceeds of the bankrupt's heritable property, at the expense of the posterior creditors.[2] As we observed in our Consultative Memorandum No. 50,[3] it is desirable that the rules of ranking of inhibitions should not have to be applied in debt arrangement schemes because of the extreme complexity of these rules. This was agreed by those who commented. Where an inhibiting creditor wished to retain the benefit of his preference, he should petition for the debtor's sequestration before the confirmation of the scheme. Before presenting his petition, the inhibiting creditor would require to obtain the leave of the sheriff dealing with the scheme application but such leave would be granted if the inhibiting creditor could show that *prima facie* the scheme was unduly prejudicial to him.

4.118 We **recommend:**

(1) A debt arrangement scheme, while in force, should render incompetent the commencement or execution of a charge for payment and any of the ordinary diligences used to enforce or secure unsecured debts, namely, poinding and sale in common form (not being a poinding of the ground) or under summary warrant, earnings arrestment, arrestment and action of furthcoming or sale, inhibition, and adjudication for debt, including diligences (arrestments and inhibitions) used on the dependence or in security as well as diligences in execution. The same prohibition should apply while the order confirming the scheme is appealable or subject to appeal.

(2) As regards diligences already commenced, the scheme should render ineffectual:

   (*a*) a poinding in common form (not being a poinding of the ground) not already followed by warrant of sale;

   (*b*) a summary warrant poinding not already followed by intimation of the dates of removal and sale, or of sale;

   (*c*) an arrestment in common form not already followed by decree of furthcoming or sale;

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[1]Bankruptcy (Scotland) Bill 1984, clause 30(2) replacing Bankruptcy (Scotland) Act 1913, s. 97(2).

[2]Bell, *Commentaries* vol. ii, p. 346; *Baird and Brown* v. *Stirrat's Tr.* (1872) 10 M. 414; Gretton, "Inhibitions, Securities, Reductions and Multiplepoindings" (1982) 27 J.L.S.S. 13, 68.

[3]See para. 2.65.

(*d*) an earnings arrestment and a conjoined arrestment order such as are recommended in Chapter 6; and

(*e*) an inhibition.

(3) A debt arrangement scheme should not affect any action of adjudication for debt which had already been raised. An adjudging creditor's debt should be excluded from a scheme unless the creditor, at the first notice date (or subsequently in terms of the rules on "late" inclusion), had abandoned his action, discharged any notice of litigiosity or abbreviate of adjudication already registered, and discharged any decree of adjudication already obtained, as the case may be.

(4) An unexpired charge should lapse.
(Recommendation 4.14; clauses 15(9); 18(1)(*a*), 5(*a*) and (*b*) and (6).)

(c) *Clearing the registers of ineffectual inhibition and adjudication documents*

4.119 Where an existing inhibition was rendered ineffectual on the coming into force of a debt arrangement scheme, the debtor should be entitled to clear the personal registers (the Register of Inhibitions and Adjudications) by registering a notice in the prescribed form of the order confirming the scheme in those registers after the scheme had come into force.[1] The debtor would be responsible for paying the registration dues. We do not think that schemes should be registered in the personal registers automatically; there may be no existing inhibition and indeed, the debtor may have no heritable property requiring protection from future inhibitions and adjudications during the currency of a scheme.

4.120 A somewhat different problem arises in relation to (1) inhibitions and notices of inhibition[2] which, though their registration had been rendered incompetent by confirmation of a scheme, were nevertheless in fact registered in the personal registers[3] during the days for appeal against the confirmation order or during the currency of the scheme, and (2) documents connected with actions of adjudication for debt[4] whose registration in the personal or property registers was ineffectual by reason of the fact that the action had been rendered incompetent by the service of an interim order on the creditor, or (as would be more likely) by confirmation of a scheme which may not have been served on the creditor in question. We think that the debtor should not

[1]A similar procedure is adopted when an inhibition is recalled. The old practice in which the Keeper marked the inhibition as recalled (Graham Stewart, p. 572; *Encyclopaedia,* vol 8, p. 189) is no longer followed.

[2]In a case of an inhibition, the documents registered are either signeted letters of inhibition on a "bill" or fiat, or a warrant in a signeted summons or other document in an action, together with the messenger's certificate of execution against the debtor; a prior notice of inhibition may also be registered and if the letters or warrant of inhibition and certificate of execution are registered within 21 days after the recording of the notice, the inhibition has effect from the date of registration of the notice.

[3]There may be a cross-entry in the Land Register since the Keeper must enter in a Title Sheet any subsisting entry in the personal registers which is adverse to the registered interest: Land Registration (Scotland) Act 1979, s. 6(1)(*c*).

[4]Namely, a notice of litigiosity and an abbreviate of adjudication registered in the personal registers and a decree of adjudication registered in the property (Land or Sasines) registers (if the adjudged interest is capable of infeftment) or in the personal registers.

be put to the trouble and expense of an action of reduction of such documents in the Court of Session and that a simpler procedure is required.

4.121 Interim orders "sisting" diligence would only affect adjudging creditors (not inhibiting creditors) and that only if the action of adjudication had been raised after service on the creditor of the interim order. Here we think that, if the creditor refused or delayed in discharging the notice of litigiosity, abbreviate of adjudication or decree of adjudication at his own expense, the debtor should be entitled to obtain from the sheriff (on an application intimated to the creditor) an order declaring that the notice, abbreviate or decree was ineffectual. A certified copy of the order would be registrable in the personal registers and, where the document was a decree of adjudication, would also be registrable in the property registers in the usual case where the decree was registrable in the property registers. The expense of registering the order would be borne by the debtor in the first instance.

4.122 A confirmed scheme would affect creditors adjudging and inhibiting either during the days of appeal against the order confirming the scheme or during the currency of the scheme. Such creditors might not have received prior notice of the scheme. As regards the method of making schemes effective against such inhibition or adjudication documents, one option would be to enact that an inhibition or adjudication document would be rendered ineffectual only if a notice of the scheme had been registered in the personal registers before registration of the document.[1] The notice would be registrable at the debtor's option.[2] Provision would be made as to the duration and, if necessary, renewal of the abbreviate, and for its cancellation on the termination of the scheme. We doubt however whether a registration of such a notice would necessarily help either creditors seeking to register an inhibition (since they would be unlikely to search the personal registers before presenting the inhibition for registration[3]) or conveyancers transacting on the faith of the registers (since the grantee in a conveyance is normally entitled, under the grantor's agent's letter of obligation to give a clear search, to have an inhibition discharged at the grantor's or agent's expense even though the inhibition is not effective in law against the conveyance[4]). This, however, assumes that the Keeper would not himself search the personal registers and refuse to accept an inhibition rendered ineffectual by the notice: we understand that since most inhibitions are presented to the Keeper for registration personally "across the counter" rather than by post, searches to identify prior registrations of schemes would be random rather than systematic and could not be accommodated within existing arrangements and resources. Registration of a scheme would alert adjudging creditors who searched the registers before raising an action of adjudication; we propose below, however, that schemes would be registered in the register of insolvencies kept by the Accountant of Court under the Bankruptcy (Scotland) Bill 1984 and the prudent creditor seeking

[1]Compare the registration of an abbreviate of the petition and first deliverance in a sequestration: Bankruptcy (Scotland) Act 1913, s. 44; Bankruptcy (Scotland) Bill 1984, clause 14.

[2]Registration would be pointless if the debtor did not own or acquire heritable property.

[3]We understand that in practice creditors register notices of inhibition and inhibitions without first searching to ascertain whether the inhibition would be ineffectual in a question with a trustee in a sequestration who has registered an abbreviate of sequestration.

[4]*Dryburgh* v. *Gordon* (1896) 24 R. 1.

to adjudge for debt could identify a scheme application or a scheme by having a search made of that register before raising his action.

4.123 We propose that where the registration of an inhibition document was ineffectual because the registration was effected during the appeal days or the currency of the scheme, or where the registration of an adjudication document was ineffectual by reason of the commencement of the action of adjudication either after the service on the adjudging creditor of the interim order or, as the case may be, during the appeal days or the currency of the scheme, the debtor should be entitled to have the document discharged, at the creditor's expense if at the time of registration the creditor had known that registration would be ineffectual or at the debtor's expense if the creditor did not possess that knowledge at that time. A discharge at the debtor's instance would be effected by a procedure similar to that for discharging adjudication documents outlined at paragraph 4.121 above. The sheriff, on the debtor's application (intimated to the creditor) would make an order declaring that the inhibition or adjudication document was ineffectual and a certified copy of the order would be registrable in the personal registers or, in the case of a decree adjudging a registrable interest in land, the property registers. This procedure would be used where it was incumbent on the debtor to clear the records at his own expense and also where the inhibiting or adjudging creditor refused or delayed in carrying out a duty of clearing the registers at his (the creditor's) expense. In the latter case, the debtor would be entitled to recover the expense of the procedure from the creditor. To avoid further complications of debt arrangement scheme procedure, we propose that the sheriff's order would not be appealable.

4.124 We **recommend:**

(1) Where an existing inhibition was rendered ineffectual on the coming into force of a debt arrangement scheme, the debtor should be entitled to have the inhibition discharged by registering in the personal registers a notice (in a form prescribed by statutory rules) of the order confirming the scheme.

(2) The sheriff should have power, exercisable (on the debtor's application intimated to the creditor concerned) on or after confirming a debt arrangement scheme, to make an order declaring ineffectual:

  (i) any inhibition or notice of inhibition which was incompetent by reason of being registered after the confirmation of the scheme; and

  (ii) a notice of litigiosity, an abbreviate of adjudication or a decree of adjudication registered in connection with an action of adjudication for debt which was incompetent by reason of the raising of the action either in contravention of an interim order sisting diligence or after the confirmation of the scheme.

A certified copy of the order should be registrable in the same registers (personal or property registers) as the document concerned was registrable. The declaratory order should not be subject to appeal and should take effect only after the confirmation order is no longer appealable nor subject to an appeal.

(3) The dues of registration of the notice or certified copy presented by or on behalf of the debtor should be borne by him in the first instance.

(4) As regards liability for expenses and registration dues:

(*a*) the debtor should bear the expense of obtaining and registering a prescribed notice of the order confirming the scheme mentioned in paragraph (1) above;

(*b*) the debtor should be entitled to recover from the creditor the expense of obtaining and registering a declaratory order relating to an adjudication document which was ineffectual by reason of the raising of the action of adjudication for debt in contravention of the interim order served on the adjudging creditor; and

(*c*) where a notice of inhibition or an inhibition had been registered, or an action of adjudication for debt had been raised, after the confirmation of the scheme, the debtor should be entitled to recover from the creditor the expense of obtaining and registering a declaratory order relating to the inhibition or adjudication document only if (i) the creditor had been aware, at the time of registration of the document, that the registration would be ineffectual and (ii) the creditor had refused to discharge, or unduly delayed in discharging, the registration of the document at his own expense. (Recommendation 4.15; clause 40.)

(4) "Late" inclusion and ranking of omitted unsecured debts and stoppage of diligence enforcing such debts

4.125 *The problem of omitted debts.* Under the legislation which we propose, some unsecured debts might be omitted from a draft scheme prepared by the administrator and from the scheme as confirmed by the sheriff. We propose that some categories of debts would not be initially eligible for inclusion in a draft scheme because between the first notice date and the date of confirmation of the scheme they were future debts not yet due, or contingent, or disputed, or subject to challenge under section 139 of the Consumer Credit Act 1974 (re-opening of extortionate credit agreements). Another category of omitted debts would be debts which were eligible for inclusion between those dates but were omitted from the scheme because the debtor had failed to disclose them and the administrator and sheriff were not otherwise made aware of the debts' existence or the events rendering them eligible for inclusion. Yet another category of omitted debts would consist of debts which were newly incurred during the currency either of the scheme application or of the scheme itself ("subsequent" debts).

4.126 Each of these categories of omitted debts raises somewhat different issues from the others but common to all are the problems of whether, when and how such debts should be included and ranked in schemes and how far covered by the discharge of debts at the end of a successful scheme; and whether the rules on the stoppage of diligence should apply to the enforcement of omitted debts as well as included debts and, if so, what safeguards should be enacted to protect an omitted creditor executing diligence in justifiable ignorance of a scheme.

(a) *"Late" inclusion of excluded debts*

4.127 *Future and contingent debts.* Under bankruptcy legislation, in a sequestration a creditor is entitled to vote and rank for a future debt (not yet due) only after deduction of interest from the date of sequestration to the due date of payment.[1] Where a debt is subject to a contingency which has not yet eventuated, a creditor cannot vote or rank unless his claim is capable of valuation and is valued by the trustee or sheriff.[2] If it is not valued, the trustee will, in calculating the divisible estate for the payment of dividends, set aside funds to meet the claim. We think, however, that in a debt arrangement scheme, a future debt should not be included until the time for payment has arrived, and that a contingent debt should not be included until the contingency has been purified. The functions of valuing future and contingent debts, and of setting aside funds to meet unquantified contingent debts, would be unduly onerous for the administrator. The exclusion of future and contingent debts was generally agreed on consultation[3] and is consonant with the views of the Cork Report[4] and the Australian Law Reform Commission.[5]

4.128 Debts may arise in respect of periodic or recurring payments under a wide variety of different contracts which it is impossible to enumerate exhaustively: examples include hire, hire purchase, conditional sale, credit sale, loan agreements, insurance policies and contracts of employment or for services. In the case of certain agreements (e.g. agreements secured by contractual securities, hire purchase or conditional sale agreements, and certain regulated consumer hire agreements) we propose special rules below for the inclusion of debts.[6] In other cases, the creditor would rank for arrears accrued at the first notice date. Unless there were an irritant clause providing for the termination of the contract on insolvency, the debt arrangement scheme would not terminate the contract. The debtor would require to make up his mind whether he intended to keep up payments outside the scheme, or to default and leave creditors to rank in the scheme for sums due under the contract and to use their other contractual remedies. Continuance of payments might be justifiable if, for example, the contract were a credit sale agreement for necessaries, or even a commercial contract enabling the creditor to continue in business in a small way to earn money to pay his creditors. It should however be made clear to creditors on whom a scheme application was served that payments outside the scheme were contemplated.[7] If default occurred in sums falling due after the first notice date, the creditor would have the same rights and options as any other "subsequent creditor" to apply for late inclusion in the scheme, or for its revocation, or to stay outside the scheme and enforce the subsequent debt in full after its termination.

4.129 *Disputed debts.* Where a dispute had arisen between a creditor and the debtor as to whether the debtor was liable for a particular debt or as to

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[1]Bankruptcy (Scotland) Bill 1984, Sched. 1, para. 1(2) replacing Bankruptcy (Scotland) Act 1913, s. 48.

[2]1984 Bill, Sched. 1, para. 3, replacing 1913 Act, ss. 49 and 51.

[3]Consultative Memorandum No. 50, Proposition 25 (para. 2.71).

[4]Para. 319.

[5]A.L.R.C. Report No. 6, paras. 59 and 60.

[6]See paras. 4.169 to 4.180, 4.199 to 4.201, 4.204, 4.205 (Recommendation 4.28(2) and (5)).

[7]We suggest at para. 4.234, head (i) below that this should be explicitly mentioned in the statement of affairs served on creditors along with the scheme application and scheme.

its amount, we do not think that the administrator, or the sheriff dealing with the scheme application, should be required to determine the dispute. In some cases, e.g. an illiquid delictual claim, liability and the amount of damages could only be determined in an ordinary reparation action. Even where a debt had been constituted by decree, there could be difficult questions as to whether payment had subsequently been made in whole or in part, which could only be determined in a court action. We think therefore that any debt which at the first notice date had not been constituted by decree and in respect of which the debtor did not admit liability or quantum, should be excluded from a scheme until the debt was constituted. Moreover, where a debt had been constituted by decree but the debtor and creditor were in dispute as to the state of the debt at the first notice date, the debt should be excluded from the scheme until the dispute was resolved, whether by agreement between the parties or judicially, for example by an action of declarator. A similar proposal relating to the constitution of unconstituted debts was agreed on consultation.[1]

4.130 *Debts challenged as due under extortionate credit agreements.* Under the Consumer Credit Act 1974, if the court finds a credit bargain extortionate, it may reopen the credit agreement so as to do justice between the parties.[2] In so doing, the court may relieve the debtor or any "surety" (i.e. guarantor) from payment of any sum in excess of that fairly due and reasonable and, for that purpose, may *inter alia* set aside the whole or part of any obligation imposed on the debtor or a surety by the credit bargain or any related agreement, require payment of sums or the return of property to him, and alter the terms of the credit agreement or security instrument.[3] Jurisdiction is vested in the sheriff, and may be invoked by the debtor or surety in an application brought for that purpose in the sheriff court of the debtor's or surety's residence or place of business, or in other proceedings in any court where the amount paid or payable under the credit agreement is relevant,[4] (which proceedings could include an application for a debt arrangement scheme). The Bankruptcy (Scotland) Bill 1984, clause 58, confers on the court in a sequestration process similar powers to make, on the application of the permanent trustee, orders with respect to extortionate credit transactions entered into within three years before the date of sequestration. The permanent trustee and the undischarged bankrupt are not entitled to apply under the 1974 Act for the reopening of an extortionate credit agreement.[5]

4.131 We propose that where an application under section 139 of the 1974 Act relating to a credit agreement is pending at the first notice date, any debt due under the agreement should be excluded from the scheme subject to its possible late inclusion by the procedure for variation mentioned below.[6] The uncertainty surrounding such a debt puts it in much the same position as a disputed or contingent debt. Moreover, we do not think that the sheriff should exercise powers to reopen the credit agreement in an incidental application

[1]Consultative Memorandum No. 50, Proposition 25 (para. 2.71).
[2]1974 Act, s. 137.
[3]*Ibid.*, s. 139(2)
[4]*Ibid.*, s. 139(1).
[5]1984 Bill, clause 58(7).
[6]Para. 4.134.

in the scheme application, whether under the 1974 Act, section 139 or under separate statutory provisions modelled on the new powers introduced by the Bankruptcy (Scotland) Bill in sequestrations. Such an incidental application would unduly complicate the procedure. Furthermore, we think it would be reasonable to require a debtor, wishing to make an application under section 139, to do so before the first notice date so that debts included in the draft scheme or schemes are not subject to uncertainty and change brought about by the debtor's belated action. We propose therefore that an application under the 1974 Act, section 139 should not be competent after the first notice date in a scheme application and thereafter while the scheme application was pending or the scheme was in force.

4.132 *Exclusion of debt as ground of refusal of scheme application.* The existence of a future, contingent or disputed debt, or a debt subject to challenge under the 1974 Act, section 139, which was excluded from a scheme, might well prejudice the success of any scheme especially if the amount of the debt was substantial. We would expect that the administrator in reaching a view on whether a scheme application should proceed, and the sheriff in determining whether to confirm a scheme, would take into account future debts and, so far as practicable, contingent and disputed debts and debts challenged under the 1974 Act. If the amount of the future, contingent, disputed or challenged debt was small relative to the debtor's total liabilities, the advantage would normally lie in allowing the scheme application to proceed to confirmation leaving it to the excluded creditor to apply for late inclusion thereafter. If on the other hand the amount was material, the advantage might often lie in refusing the scheme application, leaving it to the debtor to apply again if and when the omitted debt had become eligible for inclusion.

4.133 *"Late" inclusion of future, contingent, disputed or challenged debts between first notice date and confirmation of scheme.* Though a debt which was future, contingent, disputed, or challenged as due under an extortionate credit agreement, as at the first notice date, would generally not be included in a scheme, the circumstances requiring exclusion might cease to obtain in the period between the first notice date and the sheriff's confirmation of the scheme. If the administrator was aware of the change in circumstances which rendered inclusion of the debt competent, we propose that he should normally be under a duty to include the debt in the scheme. Where the debt became eligible for inclusion after a draft of the scheme had already been circulated to creditors, the administrator would require to adjust the draft scheme by including the debt, and re-circulate the adjusted draft to creditors. A new period for objections would then be allowed. In some cases, however, inclusion might become competent only at a very late stage in the scheme application, e.g. on the day of the hearing of objections. In such a case, it could be very inconvenient and unfair to the other parties to require adjustment of the scheme to include the debt and re-circulation to creditors. Accordingly, we think that, in these circumstances, if the sheriff, having regard to the stage which the scheme application had reached, were of the opinion that inclusion would be more appropriately considered in an application after confirmation for variation of the scheme so as to include the debt, the debt should not be included in the scheme before confirmation.

4.134 *"Late" inclusion of future, contingent, disputed or challenged debts by variation of confirmed scheme.* Where a debt was excluded as future, contingent, disputed, or challenged, and thereafter became eligible for inclusion, the creditor should have the option of applying to the sheriff to vary the scheme by including the debt or of waiting till the scheme was terminated (by revocation or on discharge of the included debts) and enforcing the debt in full by diligence thereafter. He should not, however, be entitled to enforce his debt by diligence during the currency of a scheme and any such diligence should be ineffectual. In contrast to "late" inclusion of a debt before confirmation, the sheriff should have a discretion whether or not to vary the scheme so as to include the creditor if he applied for "late" inclusion. It seems unlikely that there would be many cases in which the debtor would be able to increase his payments to yield the same dividend following inclusion of a new debt. If he could, we would expect that the sheriff would include the debt virtually automatically. Otherwise, the disposal of the application would depend on all the circumstances of the case, including the effects of the inclusion on the dividends and the length of time which the scheme had yet to run. In an application to vary a scheme so as to include a debt after confirmation, we think on balance that if the aggregate amount of the debts already included and the debt sought to be included "late" exceeded to a substantial extent the financial limit (of £10,000) recommended above, the sheriff must refuse the application.[1] The creditor would have the options of applying for revocation or of enforcing his debt in full after the scheme's termination. We concede, however, that a case could be made for disapplying the financial limit altogether once a scheme was in operation.

(b) *"Late" inclusion of debts identified or incurred since first notice date*

4.135 *Unidentified debts.* Cases could occur where a creditor having an admissible claim had been wrongly omitted from the scheme through some error. Normally it would be in the debtor's interest to disclose all debts to the administrator since an omitted debt would be neither subject to any composition nor discharged under the scheme. Nevertheless the debtor might have deliberately failed to disclose the existence of the debt or he might have forgotten or overlooked it. In such cases, we think that the creditor should have the options of (a) applying for inclusion in, or revocation of, the scheme, or (b) waiting till after the scheme had terminated (whether by revocation or on discharge of the included debts) and enforcing his debt by diligence thereafter. In a composition scheme, the advantage to the creditor of the second option would be that the creditor could enforce his debt in full notwithstanding that, if his debt had been included in the scheme, he would have received only a dividend. Any diligence to recover his debt executed during the currency of the scheme should be ineffectual, but as we indicate below[2] there would be safeguards for creditors executing diligence while unaware of a scheme. Where the administrator had identified the debt between the first notice date and confirmation of the scheme, the provisions on inclusion applicable to future and contingent debts, etc. should apply. Where the scheme had been confirmed the sheriff should have power to revoke the

[1]This proposal applies also to applications for "late" inclusion of "unidentified" and "subsequent" debts discussed in paras. 4.135 to 4.137.

[2]Para. 4.147.

scheme on the application of (among others) an erroneously omitted creditor which he could exercise where, for example, the creditor established that the debtor had deliberately failed to disclose the debt, or where the sheriff would not have confirmed the scheme if he had known of the omitted debt.

4.136 *"Subsequent" debts.* Notwithstanding the restrictions on a debtor obtaining credit which we propose could be included in schemes,[1] the debtor might incur a new debt subsequent to the confirmation of the scheme or indeed between the first notice date and confirmation. Under bankruptcy legislation, "subsequent" creditors cannot rank in sequestrations nor execute diligence after sequestration on pre-sequestration assets.[2] Under the Bankruptcy (Scotland) Act 1913, in certain circumstances a subsequent creditor could execute diligence on post-sequestration assets and rank in a second sequestration relating to those assets,[3] but under the Bankruptcy (Scotland) Bill 1984 post-sequestration assets and the income therefrom vest in the trustee,[4] and it appears that only income not payable to the trustee by court order may be attached by the diligence of post-sequestration creditors.[5] In England and Wales, a subsequent creditor may be scheduled to an administration order but will not be entitled to any dividend under the order until the pre-order creditors are paid to the extent provided by the order,[6] but the Cork Report recommended that a subsequent debt could not be included in their proposed debt arrangement orders, even as a deferred debt, except in limited circumstances.[7] The Australian Law Reform Commission on the other hand have recommended that a subsequent creditor if so advised should be entitled to apply for inclusion in a regular payments plan,[8] and we prefer that solution.

4.137 We propose therefore that a subsequent creditor should have the same options as other omitted creditors, i.e. he should be entitled to wait till after the scheme has terminated to enforce his debt or to apply for inclusion in, or revocation of, the scheme. We concede that in some cases this solution could be regarded by pre-scheme creditors as unfair and induce some to oppose scheme applications. However, if subsequent debts were incurred in breach of a restriction in the scheme on the debtor obtaining credit, a pre-scheme creditor would normally have a good case supporting an application by him for revocation of the scheme. Moreover, cases could arise where it would seem unjust to exclude a subsequent creditor, as where the subsequent creditor provided necessaries under credit arrangements not struck at by the credit restriction, and default occurred, all soon after the scheme's confirmation. A judicial discretion to include a subsequent debt, to revoke a scheme, or to retain the scheme as originally confirmed, takes account of the reality that circumstances could vary greatly.

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[1]See Recommendation 4.5 (para. 4.49).

[2]Bankruptcy (Scotland) Bill 1984, Sched. 1, para. 1(1); clause 36; Bankruptcy (Scotland) Act 1913, s. 117; ss. 103 and 104.

[3]*Grant* v. *Green's Tr.* (1901) 3 F. 1016.

[4]Bankruptcy (Scotland) Bill 1984, clause 31(1) and (5).

[5]Clause 31(2)–(4).

[6]County Courts Act 1984, s. 113(*d*).

[7]Para. 319.

[8]A.L.R.C. Report No. 6, para. 76.

(c) *Recommendations on late inclusion*

4.138 We **recommend:**

(1) Subject to the recommendation made below on "late" inclusion, there should be excluded from a debt arrangement scheme any debt which, at the first notice date, was:

(*a*) future or contingent;

(*b*) either (i) unconstituted by decree (or other document of debt) and disputed as to liability or quantum or (ii) constituted but disputed as to the amount remaining unpaid;

(*c*) due under a credit agreement subject to an application under the Consumer Credit Act 1974, section 139 (re-opening of extortionate credit agreements).

(2) (*a*) An application by the debtor under the 1974 Act, section 139 should not be competent after the first notice date in a scheme application and thereafter while the scheme application was pending or the scheme was in force.

(*b*) The sheriff's powers under the 1974 Act, section 139 to reopen extortionate credit agreements should not be exercisable in a scheme application but only in other proceedings (if commenced before the first notice date).

(3) (*a*) As a general rule, the administrator should include in a draft scheme:

(i) any debt identified after the first notice date and while the scheme application was pending;

(ii) any debt newly incurred since the first notice date which was undisputed as to liability or quantum and otherwise eligible under the above rules; and

(iii) any debt ineligible for inclusion by reason of being future, contingent, disputed or subject to challenge under the 1974 Act, section 139 at the first notice date if that reason ceased to obtain while the scheme application was pending.

(*b*) The administrator should not, however, include the debt where:

(i) the sheriff took the view that, having regard to the stage which the scheme application had reached, a later application by the debtor for variation of the scheme after its confirmation would be a more appropriate way of dealing with the question of inclusion; or

(ii) the inclusion of the debt would have the effect that the total included debts would exceed to a substantial extent the upper limit on indebtedness recommended above.

(*c*) If the existence, and eligibility for inclusion, of the debt was ascertained by the administrator after copies of the draft scheme had been served on creditors, the scheme should be adjusted to include the debt, and re-served on creditors. A new period for objections should be allowed.

PART 1.2

Scottish Law Commission

(SCOT. LAW COM. No. 95)

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(4) The sheriff should have a discretionary power, on application by a creditor and after giving interested persons an opportunity to make representations, to vary a confirmed scheme so as to include a debt which:

(*a*) had been omitted from the scheme in error;

(*b*) had been incurred since the first notice date and was undisputed; or

(*c*) had been excluded from the scheme as future, contingent, disputed or subject to an application under the 1974 Act section 139 as at the first notice date but had subsequently become eligible for inclusion as presently payable and no longer disputed nor subject to such an application.

But there should be no such inclusion if the effect would be that the total included debts would exceed to a substantial extent the upper limit on indebtedness recommended above.

(5) A creditor omitted from a scheme should have the options of making an application to the sheriff for inclusion of his debt by variation of the scheme, or for revocation of the scheme, or a combined application in the alternative for variation or revocation, or of staying outside the scheme and enforcing his debt in full on termination of the scheme notwithstanding any composition in the scheme of the other debts. (Recommendation 4.16; clauses 15(1), (3) and (5)(*c*), 23(1), (2), (4) and (5), 28(1) and (3) and 30; Schedule 7, paragraph 22.)

(d) *Ascertaining amount for ranking of debts identified, incurred or becoming eligible for inclusion only after first notice date: decrees for undischarged debts*

4.139 We proposed above[1] that for the purpose of ranking creditors on the product of a scheme, and on each disbursement by the administrator under a scheme, the amount of a debt payable and otherwise eligible for inclusion at the first notice date should be fixed by reference to the amount due as at that date. This rule would require modification in the case of certain debts which were identified by the administrator, or were incurred, or became eligible for inclusion, either (1) between the first notice date and confirmation of the scheme or (2) during the currency of the scheme.

4.140 It will be seen that the first of these categories comprises debts included in the scheme as confirmed, which were (*a*) payable and otherwise eligible for inclusion at the first notice date but only identified by the administrator thereafter; or (*b*) ineligible at the first notice date but became eligible for inclusion thereafter because the circumstances requiring exclusion no longer obtained; or (*c*) incurred after the first notice date. It would scarcely be possible to prescribe by statute a single date applicable to all these types of debt, such as the first notice date (which would not be apt for a future, contingent or disputed debt) or the date when the debt became payable (which would not be apt for a disputed debt, especially if court expenses were awarded against the debtor later, or a debt subject to an application under the Consumer Credit Act 1974, section 139). To prescribe a different date for different types

[1]Recommendation 4.10 (para. 4.80).

of debt would be unduly complicated since *inter alia* a debt may be ineligible on more than one ground (e.g. a debt may be contingent, disputed and subject to an application under the 1974 Act, section 139). In these circumstances, we propose a simple, flexible rule. The amount of the debt should be fixed by reference to the date when the administrator became satisfied as to the eligibility and the amount of the debt. If a draft scheme had already been circulated to creditors, we have proposed that the scheme would be adjusted to include the debt and re-circulated, and the date would be specified in the adjusted scheme: if a draft of the scheme had not yet been circulated, the date would be specified in the original draft scheme.

4.141 The second category of debts are those included by the sheriff in an order varying a confirmed scheme. We propose for those debts a simple rule that the amount of the debt should be fixed by reference to the date when the application for variation of the scheme was lodged. The sheriff would have a discretion to include or exclude the debt, and could delay inclusion until, for example, the expenses of a court action had been agreed or extracted. To prevent a creditor included late from obtaining a disproportionately large share of subsequent disbursements under the scheme, the creditors included in the scheme as originally confirmed would continue to rank on future disbursements along with the late creditor rateably in proportion to the amount of their debts as originally included in the scheme, and not as at the date of variation. This solution seems preferable to other options such as payment to the "late" creditor of a balancing disbursement, or deferment of his claim till the original debts were paid, which seem to us to favour unduly the late creditor and the original creditors respectively. Where there were two variation orders including creditors "late" at different times, the first of these creditors would continue to rank for his debt as it stood at the time of the first application for variation while the second would rank for his debt as it stood at the time of the second application for variation.

4.142 A creditor included "late" by variation of a confirmed scheme would receive a smaller number of disbursements under the scheme than creditors included from the beginning. The unpaid balance of the debt should therefore be excepted from the discharge of the debts which would be granted at the end of a successful scheme. We propose, however, that at the same time as the sheriff granted such a discharge, he would be under a duty to grant a special kind of decree in favour of the "late" creditor which would (*a*) contain a time to pay direction providing for payment of the unpaid balance of the sum due to the creditor under the scheme (i.e. in a composition scheme, the unpaid balance of the creditor's dividend and including any interest claimed in a scheme providing for payment in full) and (*b*) provide that if the time to pay direction lapsed through the debtor's default, the unpaid balance of the whole debt (not the unpaid balance of the composition) would become payable. In this way, "late" creditors included in a scheme after its confirmation would be treated in much the same way as creditors included from the beginning. A decree of the kind just described should be competent though the debt had been previously constituted by decree, and any previous decree would become inoperative when the new time to pay decree took effect. The time to pay direction should be capable of variation by the sheriff, but not

recall since, if there had been a composition, recall would deprive the debtor of the benefit of the composition.

4.143 We **recommend:**

(1) Where the administrator included in a draft scheme a debt which was:

(*a*) payable and otherwise eligible for inclusion at the first notice date but only identified by the administrator thereafter; or

(*b*) incurred after the first notice date; or

(*c*) ineligible for inclusion at the first notice date (as being future, contingent, disputed, etc.) but became eligible for inclusion thereafter,

the amount of the debt should be fixed by reference to the date when the administrator became satisfied as to the eligibility of the debt for inclusion and as to its amount, including court and diligence expenses incurred to that date for which the debtor was liable. That date should be specified in the draft scheme originally served on creditors or, if the debt was included after such service, in the scheme as adjusted and re-served on creditors.

(2) (*a*) Where the sheriff included a debt by variation of a confirmed scheme, the amount of the debt should be fixed by reference to the date when the application was lodged.

(*b*) Creditors previously included in a scheme would continue to rank on future disbursements rateably in proportion to the amount of their debts as fixed by reference to the first notice date or other date fixed for ascertaining the amount of their debt under the above proposals.

(3) A debt included "late" after confirmation of a scheme should be excepted from the discharge of debts on termination of a successful scheme. But at the time of granting the discharge of other debts the sheriff should be required to grant a decree decerning (*a*) for payment of the unpaid balance of the sum due to the creditor under the scheme (being in a composition scheme the unpaid balance of the dividend, and including interest claimed in a scheme providing for payment in full) together with a time to pay direction for payment of that balance by instalments or deferred lump sum, and (*b*) if the time to pay direction ceases to have effect by reason of the debtor's default or death, for payment of the unpaid balance of the whole debt (not the unpaid balance of the dividend in a composition scheme). The time to pay direction should be subject to variation, but not recall, by the sheriff's order.

(Recommendation 4.17; clauses 16(2) and 31(1), (6)–(8) and (10).)

(e) *Stoppage of diligence enforcing omitted debts and safeguards for creditors executing diligence*

4.144 *Stoppage of diligence enforcing omitted debts.* An interim order sisting diligence pending disposal of a scheme application would only bind creditors on whom a copy of the order had been served and accordingly would not affect diligence executed by a creditor in ignorance of the scheme application.

4.145 We considered whether a scheme should only preclude and render ineffectual diligences by included creditors or at least creditors to whom the confirmation of the scheme had been intimated. In the case of a creditor wrongly omitted from a scheme, the debtor would only have himself to blame for not disclosing the debt. We think, however, that fairness to creditors included in a scheme requires that all diligence by any creditor, included or not, should be incompetent while the scheme was in operation. This approach is consistent with the position in sequestrations under bankruptcy legislation where the interest of the sequestration creditors in the bankrupt's property is protected against the diligences of individual creditors, including post-sequestration creditors, even if the diligence is executed without actual notice of the sequestration.

4.146 *Safeguards for creditors executing diligence.* As a consequence of the stoppage of diligence, executed before or during a scheme, certain safeguards for creditors would be necessary. *First*, we propose that it should be expressly provided by statute that a creditor should not be liable in damages to the debtor by reason only of commencing or executing any diligence rendered incompetent by a debt arrangement scheme unless the debtor proved that at the time of executing the diligence the creditor was aware that the scheme had been confirmed. *Second*, legislation should also expressly provide that registration of a scheme (in accordance with proposals made below) should not be treated as fixing a creditor with constructive knowledge or awareness that a scheme is in force. In a reparation action by the debtor for wrongful diligence, the debtor should be required to establish that the creditor had actual knowledge of the scheme. Registers of schemes should be a facility to be used by creditors if so advised: and the many thousands of creditors executing diligence every year should not be required to search the register to avoid liability for wrongful diligence. *Third*, a creditor executing diligence while unaware of a scheme should, if he stays out of the scheme, nevertheless be entitled, after the termination of the scheme (whether on revocation or discharge of debts in a successful scheme), to recover the expenses of the diligence chargeable against the debtor so far as incurred before he became aware of the scheme. For this purpose, the rule recommended below[1] that in general the expenses of a diligence of certain types (poinding and sale, earnings arrestment, and conjoined arrestment order) should be recoverable only by that diligence should not apply. If the creditor were included in the scheme by variation order, he should be entitled to rank for those expenses in the scheme. *Fourth*, a creditor whose prior competently executed diligence was rendered ineffectual by the confirmation of a scheme should be entitled to recover the expenses of his diligence (so far as chargeable against the debtor) after the termination of the scheme, and again the proposed new general rule restricting the recovery of diligence expenses should not apply. *Fifth*, where a debt had not been discharged by a scheme and became enforceable by diligence on the termination of the scheme, and a poinding enforcing the debt had been either competently executed before the scheme and rendered ineffectual by it or executed after confirmation of the scheme by a creditor unaware of the existence of the scheme, then the rule proposed

[1]Para. 9.58; Recommendation 9.9(1).

below[1] prohibiting second poindings on the same premises for the same debt should not apply.

4.147 Notwithstanding our proposed rule that the expenses of a diligence of certain types[2] should in general be recoverable only by that diligence and not by any other legal process, the expenses of such a diligence should be eligible for inclusion in a scheme unless the creditor was entitled to complete his diligence despite the scheme. Thus, diligence expenses incurred prior to the first notice date would be included as mentioned above. Moreover, where a creditor had competently executed diligence after the first notice date, and the diligence was then rendered ineffectual by confirmation of the scheme, the creditor should be entitled to apply for a variation order including those expenses in the scheme as a "subsequent" debt so far as the expenses were chargeable against the debtor. On the other hand, a creditor whose arrestment or poinding had proceeded to the stage of warrant of sale or decree of furthcoming before the creditor received intimation of the interim order could, under our proposals, competently complete his diligence notwithstanding confirmation of the scheme: having regard to that fact, we think that such a creditor should take his chance of recovering expenses from the proceeds of his diligence and that any expenses not so recovered should not be eligible for inclusion in the scheme.

4.148 We **recommend:**

(1) The recommendation[3] that a debt arrangement scheme should render existing diligences ineffectual and render incompetent diligences executed while a scheme was in force should apply to diligences at the instance of omitted creditors as well as included creditors.

(2) The following safeguards for creditors executing diligence while a scheme was in force should be enacted.

  (*a*) A creditor should not be liable in damages for executing diligence rendered incompetent by a scheme unless at the time of execution he had been aware that the scheme was in force.

  (*b*) The registration of a scheme recommended below[4] should not be treated as constructive notice to a creditor of a scheme.

  (*c*) A creditor executing diligence while unaware of a scheme should be entitled, after termination of the scheme, to enforce recovery in full of the diligence expenses chargeable against the debtor notwithstanding Recommendation 9.9(1) at para. 9.58 for restricting the recovery of such expenses.

(3) The restriction on second poindings in the same premises recommended in Chapter 5[5] should not apply to poindings enforcing debts undischarged on termination of a scheme if the previous poinding had been either executed before confirmation of the scheme and rendered ineffectual

[1]Para. 5.134; Recommendation 5.28(1).

[2]A poinding and sale, an earnings arrestment, and a conjoined arrestment order: see Recommendation 9.9(1) (para. 9.58).

[3]Recommendation 4.14 (para. 4.118).

[4]Recommendation 4.38 (para. 4.267).

[5]Recommendation 5.28(1) (para. 5.134).

by it or had been executed after confirmation when the creditor was unaware that the scheme subsisted.

(4) It should be competent to include diligence expenses chargeable against the debtor in a debt arrangement scheme (notwithstanding Recommendation 9.9(1) at paragraph 9.58 restricting the recovery of those expenses), unless the creditor was entitled to complete his diligence despite the scheme.
(Recommendation 4.18; clauses 18(1)–(4), (6), 38(2), 118(4)(*b*) and (5).)

(5) Sums paid to creditor or recovered by diligence outside a scheme

4.149 We have proposed that partial payments to account of debts after the first notice date (or other date prescribed for ascertaining the amount of a debt) should not be taken into account for the purposes of a debt arrangement scheme in order to promote equality between creditors and to minimise the need for adjustment or variation of schemes. Most debtors would be unlikely to make payments to a creditor outside a scheme after the first notice date. Such payments, moreover, could give an unfair preference to a creditor which, if brought to the sheriff's notice, would justify the refusal of a scheme application or the revocation of a scheme. It is possible, however, that the debtor might feel constrained to make payments to account of, for example, past rent arrears or fuel debts included in a scheme, to prevent ejection from his residence or discontinuance of gas or electricity supplies. A relative or friend might pay a debt voluntarily, or a co-obligant bound along with the debtor might do so under legal obligation.

4.150 We propose that where a creditor whose debt was included in a draft scheme or a scheme received payment of the amount to which he was entitled under the scheme, wholly from payments outside the scheme, or partly from such payments and partly from disbursements under the scheme, he should be required to intimate this fact to the administrator as soon as reasonably practicable. Payments by a co-obligant outside the scheme, however, would fall to be be ignored unless and until the unpaid balance of the whole debt (not the composition in a composition scheme) was satisfied. The reason is that a creditor is entitled to receive his composition in a scheme and the deficit from a co-obligant. (We revert later[1] to the rule allowing subrogation of a co-obligant on payment of the whole debt (not the composition) or that part of the whole debt for which he is liable.)

4.151 The administrator should have an express statutory title to recover from the creditor (*a*) payments made by the administrator after the creditor had received the amount due to him under the scheme, together with (*b*) interest at the rate applicable to sheriff court extract decrees.[2] The sheriff should be empowered to make an order decerning for payment to the administrator which would be enforceable by diligence. The expenses of any such diligence, if not met out of its proceeds, would be met out of the sums paid by the debtor to the administrator in priority to the creditors' claims, which failing by the public purse. We would expect, however, that the threat

[1]Para. 4.186.
[2]Sheriff Courts (Scotland) Extracts Act 1892, s. 9.

of diligence would normally suffice to elicit payment. We believe it would be useful if the sheriff had power to make an order requiring a creditor to give information to the administrator as to any payments made to the creditor outside the scheme. Breach of the order would be a contempt of court.

4.152 Where a debt had been paid outside a scheme, the level of the debtor's payments to the administrator ("in-payments") should not be reduced to reflect the debtor's reduced indebtedness. Those in-payments would have been set at a level which the court thought reasonable having regard to the debtor's income and other resources. The fact that a debt had been paid outside a scheme, whether by a relative or friend gratuitiously or by a co-obligant under legal obligation, should not affect the level of in-payments or the overall amount payable to creditors. The early discharge of a debt should simply lead to an increase in the rate of disbursements to other creditors under the scheme and to the earlier termination of the scheme. Accordingly, we propose that if the administrator ascertained the fact of payment of a debt between service to creditors and confirmation of a draft scheme, he would exclude the debt from the scheme, make any other necessary adjustments, and re-serve the adjusted scheme together with a notice allowing a new period for objections. If the administrator ascertained the fact of payment of the amount due to the creditor under the scheme after the scheme had been confirmed, he should cease making disbursements to the creditor and the sheriff, on the administrator's application, should vary the scheme by excluding the creditor's debt, increasing the amounts to be paid in disbursements under the scheme to the remaining creditors, and requiring disbursement to creditors under the scheme of any over-payments recovered from the creditor. This would be an automatic administrative procedure which would be simpler than an application to the sheriff for a discretionary order varying a scheme. Where, however, the administrator ascertained the fact of full payment of the sum due to the creditor under the scheme otherwise than by intimation by a creditor as mentioned at paragraph 4.150 above, the sheriff should not vary the scheme unless, after giving the creditor an opportunity to be heard, he was satisfied that full payment of that sum had indeed been made. In a case where a co-obligant had paid the full debt (not the composition) or the part thereof for which he was liable, we recommend later[1] that he should have 14 days within which he could claim to be subrogated for the original creditor in the scheme. If, however, the scheme had been varied so as to distribute the original creditor's share among the remaining creditors, there would be no share left to which the co-obligant could be subrogated (unless the scheme was again varied). We propose therefore that there should be a delay in varying the scheme of 14 days after the date when the administrator received intimation, or was otherwise satisfied, of payment of the debt. This should suffice to protect the co-obligant's right to claim subrogation.

4.153 We **recommend:**

(1) The sheriff should have power to make an order requiring a creditor to give information to the administrator as to payments received by him outside the scheme.

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[1]Recommendation 4.27(6) (para. 4.193).

(2) Where a creditor whose debt was included in a scheme or draft scheme received payment of the full amount due to him under the scheme, whether wholly from payments outside the scheme or partly from such payments and partly from payments under the scheme, he should as a general rule intimate that fact to the administrator as soon as practicable. As an exception to the general rule, payments by a co-obligant would be disregarded for this purpose unless payment by the co-obligant satisfied the unpaid balance of the whole debt (not the composition in a composition scheme).

(3) The sheriff should be empowered to order repayment to the administrator of sums paid by the administrator after the creditor had received the total amount due to him with interest at the statutory rate for sheriff court decrees. The order should be enforceable by diligence. The sheriff should also have power to order the creditor to inform the administrator of the amount of any over-payment.

(4) The early discharge of an included debt wholly or partly by payments outside the scheme should result in an increase in the rate of disbursements to creditors under the scheme.

(5) A procedure should be prescribed enabling the administrator to adjust a draft scheme to exclude a debt which was satisfied before confirmation of a scheme and to re-serve the adjusted scheme. A procedure should also be prescribed requiring the administrator to cease payments when the debt (or composition) was satisfied during the currency of the scheme and requiring the sheriff to vary the scheme by excluding the debt and increasing the disbursements to the other creditors. Where the creditor did not himself intimate satisfaction of the debt, the sheriff should give him an opportunity to be heard before excluding the debt.

(6) After the administrator receives intimation from the creditor or is otherwise satisfied of payment of a debt outside a scheme, there should be a short delay (of 14 days) before the scheme is varied under the foregoing procedure, to give time for a co-obligant to claim subrogation to the original creditor's debt as proposed in Recommendation 4.27 (paragraph 4.193) below.
(Recommendation 4.19; clause 33.)

4.154 In order to secure equality as between the creditors included in a confirmed scheme, we considered whether any poinding or arresting creditor whose diligence was completed by sale or furthcoming after the first notice date should be bound to pay the proceeds of the diligence (less diligence expenses incurred since the first notice date[1]), to the administrator. In the case of an earnings arrestment or conjoined arrestment order continuing after the first notice date, we considered whether sums recovered by creditors under those diligences since the first notice date should also be payable to the administrator by the creditor on confirmation of the scheme, or alternatively whether the sheriff should make an order requiring the employer to pay the sums to the administrator pending disposal of the scheme application. We have however rejected these options because of the legislative and adminis-

[1]The creditor would already have ranked for diligence expenses incurred prior to the first notice date so far as chargeable against the debtor.

trative complications which they would involve. It seems to us that the best solution would be to treat the net proceeds of diligences competently executed after the first notice date in the same way as, under the foregoing recommendation, payments to account of a debt made outside the scheme would be treated.

4.155 We **recommend:**

Sums recovered by diligence after the first notice date should be treated in the same way as payments to account of a debt would be treated in terms of Recommendation 4.19 above.
(Recommendation 4.20; clause 33.)

(6) Criminal fines etc., certain Crown debts and maintenance

(a) *Exclusion and enforceability of fines and other debts due under criminal court orders, and certain civil fines and penalties due to the Crown*

4.156 Following precedents in other legal systems, we consider that priority should in effect be given to criminal fines by excluding these debts from debt arrangement schemes, and by permitting their enforcement notwithstanding the stoppage of other diligences, even in cases where the criminal court has ordered the recovery of the fine by civil diligence[1] (which is at present very rare indeed in relation to offenders who are natural persons rather than bodies corporate). The court may itself order payment of the fine by instalments[2] and may change its order from a fine to a sentence of imprisonment in default of payment.[3] Such orders raise questions of sentencing policy in which the debtor's ability to pay (perhaps the central question in debt arrangement schemes) is only one factor. Further, to concede co-ordinate jurisdiction to the civil and criminal courts would create a confusing and troublesome overlap of powers.

4.157 Criminal fines already have a special status in insolvency law: thus in a sequestrian fines or other penalties due to the Crown and liabilities to forfeiture of bail are not discharged by the bankrupt's discharge.[4] The effect of exclusion of criminal fines from a debt arrangement scheme would be that the debtor would have to pay his criminal fines before meeting his civil liabilities under the scheme. It must just be accepted that default in payment of such a fine might result in the debtor's imprisonment with the result that the debtor could no longer earn wages or salary to make payments to creditors. Accordingly, the debtor should specify any liability for a fine in his statement of affairs and the administrator and the sheriff, in considering whether a debt arrangement scheme would have a reasonable prospect of success, should allow for the payment of any existing criminal fine by the debtor outside the scheme. If it were thought that insufficient surplus income would remain after payment of a fine then the application should be refused.

4.158 We prefer this approach to the alternative approach of including fines

[1]Criminal Procedure (Scotland) Act 1975, s. 411.
[2]*Ibid.*, s. 399(1).
[3]*Ibid.*, s. 407(1).
[4]Bankruptcy (Scotland) Bill 1984, clause 52(1) and (2)(*a*) and (*b*), replacing Bankruptcy (Scotland) Act 1913, s. 147.

in debt arrangement schemes as prior debts,[1] and we consider that our recommended approach should be adopted in relation to other liabilities arising out of criminal proceedings such as bail, caution or security due under an order of a court in criminal proceedings.[2] On consultation, it was represented to us that sums due under a compensation order against a convicted person made by a court in criminal proceedings[3] should be included in a debt arrangement scheme upon the view that the order is made in respect of what would otherwise be a civil debt. Debts under such compensation orders, however, may be varied by the criminal court and made payable by instalments; collection under the orders is undertaken by the clerks of court in like manner as collection of fines; and as in the case of fines imprisonment can be imposed in default of payment. Thus, in many respects sums due under compensation orders have more in common with fines than they have with civil debts. We conclude therefore that compensation orders in criminal proceedings should be treated in the same way as criminal fines orders and excluded from debt arrangement schemes.

4.159 Because of their quasi-criminal character, the same policy should apply to fines or penalties due to the Crown imposed for contempt of court in civil proceedings, or for professional misconduct under particular enactments regulating professions, or under section 91 of the Court of Session Act 1868. We understand that civil penalties imposed for failure to pay tax are generally recovered by the Revenue Departments along with the taxes to which they relate and on balance we think that they should not be excluded from debt arrangement schemes.

4.160 We **recommend:**

(1) Priority should in effect be given to criminal fines by excluding them from debt arrangement schemes and by permitting their enforcement by imprisonment, or civil diligence under a warrant of the criminal court, while a scheme is in force.

(2) The same rule should apply to other debts (such as bail, caution, security or compensation) due under an order of a court in criminal proceedings, and fines or penalties imposed for contempt of court in civil proceedings.
(Recommendation 4.21; clause 42(1), definition of "debt", as read with clause 4(7).)

(b) *Aliment, periodical allowance and analogous maintenance obligations*

4.161 Aliment and periodical allowance on divorce due by the debtor raise a number of problems. In a sequestration whether under the existing law or under the Bankruptcy (Scotland) Bill 1984, an alimentary creditor of the bankrupt will rank as an ordinary creditor in respect of arrears of aliment due

[1] In England and Wales criminal fines may be included as prior debts in attachment of earnings orders under the Attachment of Earnings Act 1971 but there appears to be no *express* exclusion of fines from administration orders. Criminal fines are excluded from arrangements or plans under the Australian and Canadian federal legislative proposals.

[2] E.g. Criminal Procedure (Scotland) Act 1975, ss. 190, 284, 289, 391, 445; Bail etc. (Scotland) Act 1980, s. 1(3).

[3] Criminal Justice (Scotland) Act 1980, Part IV.

under a court decree or agreement at the time of sequestration, but cannot rank as a contingent creditor for future aliment accruing during the sequestration.[1] The principle underlying the present law is that the latter claim is inconsistent with the nature of aliment, which is due only when the alimentary debtor has a surplus. There can be no surplus if he is insolvent: so a maintenance creditor must follow the maintenance debtor's fortunes.[2] Where, however, the court makes an order under bankruptcy legislation for the payment of instalments to the trustee in the sequestration out of the bankrupt's income,[3] the court will allow the debtor to retain part of his income not only for his own subsistence but also for the support of his alimentary dependants, at least if living in family with him.[4]

4.162 The effect of these rules is that a maintenance creditor to whom pecuniary maintenance is owed does not compete with ordinary creditors in the distribution of the bankrupt's assets (except in respect of a claim for maintenance arrears), but a maintenance creditor may be supported by him out of current (after-acquired) personal earnings and other income, at least if living in family with him. The practical justification for the latter rule is that, whereas it is possible to divest a bankrupt of his assets compulsorily in order to distribute them to his creditors, it is not possible to compel him to work for his creditors without allowing him to retain enough for the subsistence of himself and his immediate family. We think, however, that different considerations apply where the maintenance creditors are a separated or former spouse, or children, living apart from the debtor. First, where the debtor is maintaining persons as dependants in his household, there is as it were a common roof, hearth and table which would generally make it inhumane and impracticable to make support available to the debtor but not the other members of the household. Second, the debtor is likely to want to support the dependants whom he is maintaining in his household: if not allowed to do so, he is likely to give up his paid employment, so that a scheme would not be feasible. Third, for the purpose of supplementary benefit, regard will be had to the debtor's household: the spouse and children who are living with the debtor will not be able to claim supplementary benefit. In all these respects, the position of separated maintenance creditors is, or is likely to be, different, though there will be cases where the debtor wishes to support maintenance creditors, especially children, to whom he owes pecuniary aliment.

4.163 We propose that there should not be rigid rules defining the liabilities (whether for maintenance or anything else) which a debtor can meet out of income before fulfilling his obligations under the scheme. We propose that a scheme should be competent only if the debtor's resources would suffice to yield a minimum sum over three years after meeting the daily needs of himself and any person whom he is maintaining in his household.[5] In the light

[1] *Matthews* v. *Matthews' Tr.* (1907) 15 S.L.T. 326; *Barnes* v. *Tosh* (1913) 20 Sh. Ct. Reps. 340: Bankruptcy (Scotland) Bill 1984, Sched. 1, para. 2.

[2] *Reid* v. *Moir* (1866) 4 M. 1060, 1063.

[3] Bankruptcy (Scotland) Bill 1984, clause 31(2) replacing the vesting declarator relating to income under the Bankruptcy (Scotland) Act 1913, s. 98(1), *Caldwell* v. *Hamilton* 1919 S.C. (H.L.) 100.

[4] See *Birrell's Tr.* v. *Birrell* 1957 S.L.T. (Sh. Ct.) 6.

[5] Recommendation 4.9(5) (para. 4.72); see clause 17(4) of the Bill annexed to this report.

of that provision, we would expect that, in assessing whether a scheme was feasible, the administrator and sheriff would take into account the debtor's obligations to aliment such dependants, but generally not dependants living in a separate household and that this would be reflected in the level of deductions from earnings fixed by any pay deduction order made in connection with the scheme.

4.164 We propose that a maintenance creditor to whom periodical allowance on divorce or pecuniary aliment is owed should rank in a debt arrangement scheme for arrears accrued up to the first notice date. To that extent, maintenance arrears should be treated like any other ordinary debt. It should not, however, be competent to include maintenance payments falling due after the first notice date whether in the scheme as originally confirmed or by way of an application to the sheriff for late inclusion of those payments after confirmation of the scheme.

4.165 As regards existing diligences by maintenance creditors, any current maintenance arrestment, and any conjoined arrestment order under which maintenance was payable,[1] operating against the debtor's earnings while the scheme application was pending would continue unaffected by the interim order sisting diligence, and that order would not render incompetent the execution of a new current maintenance arrestment while the scheme application was pending. Since the maintenance debtor would by that stage be insolvent, in principle current maintenance ought no longer to be due:[2] the maintenance debtor's remedy would be an application for recall of the award of periodical allowance or aliment to the court which had made that award. If this consequence seems harsh especially as regards children entitled to pecuniary aliment, it must be borne in mind that such children would be entitled to receive supplementary benefit which is usually a more regular and secure source of income than pecuniary aliment.[3] Though aliment may be due at a higher level where the alimentary debtor's "station in life" is above that of supplementary benefit, we do not think that this consideration should be given any weight. A scheme debtor cannot be allowed to pay pecuniary aliment for, say, boarding school fees while he is in debt to his ordinary creditors. It seems better that, while a scheme is in force, the separated family should be supported by the State through supplementary benefit than by the debtor at the expense of his creditors. And where supplementary benefit has been provided to the maintenance creditor, the D.H.S.S. may in certain cases recover the cost from the maintenance debtor:[4] where the maintenance debtor is insolvent, it seems unfair to prefer the D.H.S.S. to his ordinary creditors.

4.166 The recall of a maintenance decree would have the effect, after intimation, of terminating the current maintenance arrestment or as the case

[1]See Chapter 6 for a description of these diligences.

[2]*Reid* v. *Moir* (1866) 4 M. 1060. Under the Family Law (Scotland) Bill 1984, clauses 4(1) (aliment) and 8(2)(*b*) (periodical allowance on divorce) the court is bound to have regard to the resources of the parties, and resources must mean resources remaining after meeting ordinary debts due by the maintenance debtor to other creditors.

[3]The rates of aliment and supplementary benefit are compared in Doig, *The Nature and Scale of Aliment and Financial Provision on Divorce in Scotland* (1982), Scottish Office Central Research Unit Papers, para. 6.17.

[4]Supplementary Benefits Act 1976, ss. 18 and 19.

may be payment of maintenance from earnings under the conjoined arrestment order. As indicated above, the interim order should prevent, pending disposal of the scheme application, the grant of warrant for imprisonment of the debtor for wilful default under the Civil Imprisonment (Scotland) Act 1882, section 4, since imprisonment would prejudice the success of a scheme application or a scheme. If the debtor were truly insolvent, it is unlikely that such an application would be successful.

4.167 The commencement of the scheme would render ineffectual all diligences against the debtor's earnings, including earnings arrestments recovering arrears of maintenance, current maintenance arrestments recovering maintenance as it falls due, and conjoined arrestment orders recovering maintenance whether arrears or current. Similar considerations apply to periodic payments due under non-Scottish maintenance orders and agreements enforceable in Scotland and under contribution orders in respect of children in care and orders or decrees against liable relatives for the recovery of the cost of supplementary benefit, which we propose should be treated in the same way as periodical allowance and pecuniary aliment under Scottish decrees and agreements.

4.168 We **recommend:**

(1) A maintenance creditor to whom maintenance (periodical allowance on divorce or pecuniary aliment) is owed should rank for arrears accrued up to the first notice date, but not for maintenance payable after that date.

(2) An interim order sisting diligence should not preclude or affect a current maintenance arrestment, or a conjoined arrestment order enforcing current maintenance, such as we recommend in Chapter 6.

(3) The confirmation of a scheme should render incompetent and ineffectual new and existing current maintenance arrestments and conjoined arrestment orders enforcing current maintenance.

(4) Diligences enforcing arrears of maintenance should be affected by an interim order and the coming into force of a scheme in the same way as diligences enforcing ordinary debts would be so affected (as recommended above[1]).

(5) An interim order sisting diligence and the coming into force of a scheme should render incompetent an application for and the grant of a warrant for civil imprisonment of the debtor for failure to pay aliment.

(6) The above rules should apply to maintenance agreements registered for execution, decrees and contribution orders for periodical sums enforcing recovery of supplementary benefit or the cost of maintaining children in care, and analogous non-Scottish judgments and instruments enforceable in Scotland.
(Recommendation 4.22; clauses 15(1), 18(1) and (4), 20(3), 23(3), 28(2), 42(1) (definition of "debt" and "decree") and 74 (definition of "maintenance" and "maintenance order").

[1]Recommendations 4.13 (para. 4.109) and 4.14 (para. 4.118).

(7) Debts secured or enforceable by remedies other than ordinary diligence

(a) *Debts secured by contractual securities*

4.169 *Heritable securities.* In Scots law, a heritable creditor's remedies under a standard security depend on whether the security has a non-default calling-up clause (which allows the security to be called up on one month's notice even in the absence of default[1]) or whether his remedies become available only on the debtor's default. In either case, however, the borrower's rights to delay enforcement proceedings are more limited than elsewhere in the United Kingdom.[2] Apart from cases of heritable securities securing regulated agreements under the Consumer Credit Act 1974, the courts in Scotland do not possess powers to restrain the calling up of a standard security over a dwelling-house or to delay enforcement proceedings to give time to pay.[3] As from the coming into operation of the relevant provisions of the Consumer Credit Act 1974 on 19 May 1985, enforcement of a standard security securing a regulated agreement usually requires, in addition to a notice of default or calling up notice under the general law on standard securities, a default notice under section 87 of the 1974 Act, and a court order authorising enforcement of the security under section 126 of the 1974 Act.[4] In our Consultative Memorandum No. 50 we invited comments on whether, in the case of a loan heritably secured over the debtor's home, the sheriff in a debt arrangement scheme should have power to suspend, for the duration of the debt arrangement scheme, the personal obligation to repay capital instalments, the amount not paid being made up on the termination of the scheme.[5] There was no dissent from our provisional view that restraints on the calling-up of standard securities could only be appropriately considered in a review of heritable securities over the homes of all debtors, not merely those fortunate enough to obtain debt arrangement schemes. We adhere to that view.

4.170 In many debt arrangement scheme cases, such a restraint would be neither practicable nor reasonable. If the debtor had "mortgaged" his house completely (e.g. by a second or subsequent heritable security), he could scarcely expect to keep it. On the other hand, if the debtor had a considerable reversionary interest in the house, the cases would be rare where he could reasonably offer his creditors merely a composition, or even obtain time to pay his debts in full, especially if he was meantime building up an asset of considerable value by capital payments. We do not, however, think that the mere existence of a heritable security should be an absolute bar to a debt arrangement scheme;[6] there may be cases where the heritable creditor and other creditors accept the debtor's proposals for payment and agree to allow

[1]Conveyancing and Feudal Reform (Scotland) Act 1970, s. 19, Sched. 3, para. 8.

[2]The loan agreement will normally stipulate that on default, the whole unpaid balance of the principal sum, together with interest accrued, will become immediately payable. On default the heritable creditor can proceed to sell on one month's notice without judicial warrant: 1970 Act, Sched. 3, para. 10. He can raise an action of ejection immediately on default (1970 Act, s. 24) and the court has no discretion to refuse or delay warrant of ejection: *United Dominions Trust Ltd.* v. *Site Preparations Ltd. (No. 1)* 1978 S.L.T. (Sh.Ct.) 14.

[3]Compare Administration of Justice Act 1970, s. 36(1); Administration of Justice Act 1973, s. 8.

[4]See Wood, "The Consumer Credit Act 1974" (1985) 30 J.L.S.S. 130, 133.

[5]Proposition 18(2) (para. 2.55).

[6]We propose that a heritably secured loan should be excepted from the upper financial limit on the indebtedness of a debtor applying for a scheme.

him to keep the house, and other cases in which the scheme could come into operation while the heritable creditor called up his security. We think that if debt arrangement scheme procedure is to be a ground of calling-up a standard security, the security should expressly so provide and that such a consequence should not be a statutory standard condition of such a security.[1] Moreover, while we propose elsewhere[2] that references to "apparent insolvency" (or "notour bankruptcy") in irritant clauses in legal documents should in future be presumed to include a reference to an order appointing an administrator in a debt arrangement scheme, this presumption should not apply to references to apparent insolvency in heritable securities.

4.171 In our view, to enable a heritable creditor to value his security and rank for the balance in a debt arrangement scheme would be too complicated a solution. We propose therefore that a heritably secured debt should not be included in a debt arrangement scheme unless and until the heritable creditor had either discharged his security, or realised the security subjects, or acquired them by "foreclosure" in partial satisfaction of the debt. It should, however, be made clear that a scheme was competent which assumed that payments would be made outside the scheme to account of a debt heritably secured over the debtor's residence. Thus, we have proposed above[3] that a scheme application should be entertained only if it appeared to the sheriff that the debtor's resources left to him after meeting "daily needs" would be sufficient to yield a minimum sum for creditors: and we further propose that it should be made clear that "daily needs" for this purpose may include periodic payments required to be made by the debtor outside the scheme in respect of a security over his residence. Whether there was a need for such payments would also be an important factor taken into account by the sheriff in considering whether to confirm a scheme which assumed that such payments would be made. We also propose that the sheriff having jurisdiction over a debt arrangement scheme should be empowered to make an order requiring a heritable creditor who had exercised his power of sale under a heritable security to pay to the administrator the balance of the net proceeds of sale which would otherwise be payable to the debtor as owner of the subjects. The order should authorise enforcement by diligence of the sum payable as if it were a debt due to the administrator, and the expenses of the diligence, if not met by its proceeds, would be met by the fruits of the scheme in priority to creditors' claims, which failing by the public purse.

4.172 *Securities over moveables.* In the case of contractual securities over moveables (e.g. pledges and assignations of life assurance policies or shares[4]), the secured creditor should also have the option of realising the security subjects and ranking for the balance by applying for late inclusion or discharging the security and ranking in the scheme for the whole debt. It would be too complicated to allow the creditor to value his security and rank for the deficiency.

4.173 *Interest.* Where a contractual security secured payment of interest on

[1]See Conveyancing and Feudal Reform (Scotland) Act 1970, Sched. 3, para. 9.
[2]Recommendation 4.46(1) (para. 4.311).
[3]See para. 4.70.
[4]We deal later with securities created by operation of law, such as hypothecs and liens.

the debt, the creditor would be entitled to recover interest in full out of the proceeds of sale of the secured subjects notwithstanding the existence of a composition scheme. In ranking for the unsecured and unpaid balance of the principal sum and interest after realisation, however, the rules as to interest on unsecured debts outlined above would apply.

4.174 We **recommend:**

(1) An interim order sisting diligence and a debt arrangement scheme should not affect the entitlement of the creditor under a contractual security to exercise the rights and remedies by which his security is enforceable (such as rights of calling-up the security, entry into possession, ejection from heritage, realisation of the security subjects, and acquisition of the subjects by foreclosure in default of sale).

(2) A debt secured by a contractual security over heritable or moveable property of the debtor (as distinct from the property of a cautioner or other co-obligant) should be excluded from the scheme unless and until the creditor had discharged the security, or sold the security subjects under his power of sale, or acquired them in partial satisfaction of the debt.

(3) Provision should be made amending the Conveyancing and Feudal Reform (Scotland) Act 1970, Schedule 3, paragraph 9 (which makes it a standard condition in a standard security that the debtor shall be held in default when the proprietor of the security subjects has become insolvent) to make it clear that the proprietor should not be held insolvent for the purposes of that paragraph by reason only of the fact that a debt arrangement scheme has been applied for or confirmed.

(4) In determining whether the debtor's resources after meeting his "daily needs" would exceed the "minimum product threshold" for scheme applications recommended above, the sheriff should be empowered, but not required, to treat as "daily needs" payments by the debtor outside a scheme in respect of a security over his residence.

(5) The sheriff should be empowered to make an order requiring a heritable creditor who had exercised his power of sale to pay to the administrator the surplus proceeds of sale otherwise due to the debtor. The order should be enforceable by diligence.
(Recommendation 4.23; clauses 15(7)(*a*), 17(4)(*a*), 23(1)(*g*), 26(4), 28(1)(*g*), 37 and 41(1), Schedule 7, paragraph 15.)

(b) *Debts enforceable by sequestration under the landlord's or superior's hypothec or by poinding of the ground*

4.175 As explained above,[1] sequestration for rent under the landlord's hypothec, sequestration for feuduty under the superior's hypothec, and poinding of the ground are diligences whereby special kinds of security, created by operation of law rather than by contract, are enforced. In a sequestration, full effect is given to the landlord's hypothec,[2] and partial effect is given to a poinding of the ground by a secured creditor executed within 60

[1]See paras. 3.39 and 3.40.

[2]Bankruptcy (Scotland) Bill 1984, clause 48(6) replacing Bankruptcy (Scotland) Act 1913, s. 115.

days before, or on or after, the date of sequestration, limited to interest on the *debitum fundi* for the current half yearly term and for the previous year.[1] We propose to review these forms of diligence in due course with a view to possible reform or abolition, but meantime we think that they should be treated in debt arrangement schemes in the same way as securities created by contracts.

4.176 We **recommend:**

(1) An interim order sisting diligence and a debt arrangement scheme should not affect the right of a creditor to use the "security diligences" of poinding of the ground or sequestration under the landlord's or superior's hypothec.

(2) Any debt enforceable by poinding of the ground or sequestration under the hypothecs should be excluded from a scheme unless and until the creditor agrees not to use those remedies to enforce that debt. (Recommendation 4.24; clauses 15(8), 18(8), 20(3) and (7), 23(1)(*g*), 28(1)(*g*) and 41(1).)

(c) *Debts secured by creditors' liens or rights of retention over goods or papers*

4.177 Our consultation revealed disagreement on what should be the effect of a debt arrangement scheme on creditors' rights of retention or lien over goods or papers.[2] Such rights enable a creditor in possession of goods or papers belonging to the debtor to retain possession until the debt is paid (e.g. a repairer's lien for the cost of his services; a solicitor's or accountant's lien over papers for his fees; or the unpaid seller's lien over the goods sold). Generally the creditor can only sell the goods if he obtains a warrant of the court[3] or, in the case of the unpaid seller's lien, gives the buyer notice of intention to re-sell.[4] In a sequestration, the creditor must surrender the articles subject to the lien but is given a preference for the debt secured by the lien.[5] In the case of liens over corporeal moveables, the true worth of the lien to the creditor is the sale value of the goods; in the case of a lien over papers, the true worth of the lien to the creditor consists in withholding the use of the papers from the debtor as an inducement to payment, since the papers are not marketable.[6] We think that in the case of a lien over moveable goods (other than papers), the solution should be similar to that proposed for a contractual security (such as a pledge): the creditor should not rank in the debt arrangement scheme unless and until either he had realised the goods (under the court's warrant where necessary) in partial satisfaction of the debt or the lien had otherwise ceased to have effect. In the case of a lien over title-deeds, accounts and other papers the creditor should rank in the debt arrangement scheme in the same way as an unsecured creditor but should be entitled to retain the papers during the currency of the scheme. On discharge of the debt at the termination of the scheme or, as the case may be, on

[1]Bankruptcy (Scotland) Bill 1984, clause 36(6) replacing Bankruptcy (Scotland) Act 1913, s. 114.

[2]Consultative Memorandum No. 50, Proposition 24(2) (para. 2.69).

[3]*Gibson and Stewart* v. *Brown & Co.* (1876) 3 R. 328; *Parker* v. *Brown & Co.* (1878) 5 R. 979.

[4]Sale of Goods Act 1979, s. 48(3).

[5]*Train and McIntyre* v. *Forbes* 1925 S.L.T. 286.

[6]*Parker* v. *Brown & Co.* (1878) 5 R. 979, 981.

payment of the sums due under a time to pay decree mentioned at Recommendation 4.17(3),[1] the lien should fly off, this being an exception to the general rule that a discharge should not affect security rights. In view of the peculiar character of liens over papers as a security not leading to sale, this special solution seems justifiable.

4.178 We **recommend:**

(1) Debts secured by liens or rights of retention over goods other than papers should be treated in the same way as debts secured by contractual securities under Recommendation 4.23(1) and (2) (paragraph 4.174) above.

(2) Debts secured by a lien over papers should be eligible for inclusion in a scheme in the same way as unsecured debts and the scheme should not affect the creditor's right to retain possession of the papers during the currency of the scheme. The lien should be discharged by a discharge of the debt at the end of a scheme or on payment of the sums due under a time to pay decree mentioned at Recommendation 4.17(3) (paragraph 4.143).

(Recommendation 4.25; clauses 15(7)(*b*), 23(1)(*g*), 28(1)(*g*) and 41(2).)

(d) *Debts enforceable by compensation (set off) or retention of money (balancing of accounts in bankruptcy)*

4.179 The general rules of compensation (set off) under the Compensation Act 1592 as developed by the common law should apply where a debtor who has applied for or obtained a debt arrangement scheme (a scheme debtor) owes a liquid debt to one of his creditors who simultaneously owes a liquid debt to the scheme debtor. Under these rules, the two debts would be "compensated" or set off to the extent to which they corresponded in amount (i.e. the lesser debt), the balance remaining being the debt due to, or by, the scheme debtor. The debts must generally be liquid in the sense of presently payable (not future or contingent) and ascertained or immediately ascertainable (not disputed or uncertain as to liability or amount).

4.180 Where one of the parties is bankrupt, liquid debts can only be set off if the other party acquired right to the debt, as original creditor or assignee, before notice of bankruptcy.[2] In technical language, there must be "concourse of credit and debit"[3] before such notice. One at least of the main policies underlying this rule is to prevent a bankrupt's debtor from buying debts due by the bankrupt at a low figure and setting them off at face value in a subsequent bankruptcy process to the prejudice of the general body of creditors.[4] In bankruptcy processes, where the bankrupt is divested of his estate, the date of divestiture is taken as implying notice of bankruptcy.[5] Where the bankrupt is not divested of his estate (as would be the case in a

[1]Para. 4.143.

[2]Bell, *Commentaries*, vol- ii, p. 123; Goudy, p. 554.

[3]That is to say, the parties must be debtor and creditor in the debts simultaneously and each party must be debtor in the same legal capacity (e.g. personal or as trustee) as he is creditor.

[4]Goudy, pp. 554–5; *Liquidators of Highland Engineering Ltd.* v. *Thomson* 1972 S.C. 87, 91; *Cauvin* v. *Robertson* (1783) Mor. 2581.

[5]Bell, *supra*; Goudy, p. 555.

debt arrangement scheme) but is merely in "apparent insolvency" (notour bankruptcy) or absolute insolvency, it seems that set off is only competent if the bankrupt's creditor acquired right to the debt before actual notice of the bankruptcy or insolvency and possibly in good faith without the purpose of achieving set off.[1] We think that the common law should regulate any question of set off of liquid debts involving a scheme debtor. We propose below that registration of a debt arrangement scheme should not imply constructive notice of the existence of such a scheme:[2] accordingly it would not imply constructive notice of bankruptcy for the purpose of the rules on set off.

4.181 The foregoing rules relate to set off between liquid debts. Under the doctrine known as "balancing of accounts in bankruptcy", the restriction noted above that an illiquid debt cannot be set off against a liquid debt is relaxed. The main policy reason is that it would be unjust to require a creditor of a bankrupt to pay a liquid debt in full while he received only a dividend for his illiquid (future, contingent or disputed) claim in the sequestration or trust deed.[3] So, subject to certain limitations,[4] the creditor in an illiquid claim against a bankrupt has a right to retain a liquid debt due by him to the bankrupt until his illiquid claim becomes a liquid debt, and then to set off the two debts.[5] One limitation is that the debt must have been acquired before notice of bankruptcy since, as in the case of compensation under the 1592 Act, there must be concourse of debit and credit before then.[6] We have proposed that in a debt arrangement scheme, the creditor in an illiquid (future, contingent or disputed) debt would be excluded from the scheme until the debt became liquid, and since the insolvent party is normally the debtor in the illiquid claim,[7] a question of balancing accounts in bankruptcy should in practice rarely arise in a scheme application. If the debtor were to raise an action for payment of a liquid debt against a party whose illiquid debt was excluded from a scheme, we think that the common law should determine whether a plea of retention with a view to eventual set off should be allowed, against the background of our recommendation that registration of a debt arrangement scheme would not imply constructive notice of insolvency.[8]

4.182 We **recommend:**

(1) No statutory rules are needed to regulate questions of compensation (set off) of liquid debts, or of retention of illiquid debts for the purpose

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[1]See *Encyclopaedia,* vol. 13, p. 13 (article by Gloag); Goudy, pp. 555–6; Erskine, *Institute,* III, 4, 18; Bell, *Commentaries, supra.*

[2]See Recommendation 4.38 (para. 4.267).

[3]Goudy, p. 550. A subsidiary reason is that retention by the bankrupt's creditor is inconsistent with the creditor's right to obtain a warrant for diligence in security of an illiquid claim due by the bankrupt.

[4]The plea of retention must not involve double ranking in the sequestration for the same debt, and the claim on which retention is pleaded must be acquired by the creditor in good faith and not involve a breach of a contract or fair understanding between the parties; *Encyclopaedia*, vol. 13, pp. 14 and 15.

[5]*Mill* v. *Paul* (1825) 4 S. 219; *Smith* v. *Lord Advocate* (*No. 2*) 1981 S.L.T. 19.

[6]*Mill* v. *Paul, supra*; *Taylor's Tr.* v. *Paul* (1888) 15 R. 313.

[7]Wilson, *Law of Scotland Relating to Debt* (1982) p. 191: cf. *Borthwick* v. *Scottish Widows Fund* (1864) 2 M. 595 where the insolvent party was creditor in an illiquid claim against an insurance company which had a liquid claim against him.

[8]See Recommendation 4.38 (para. 4.267).

of eventual compensation, in cases where one of the parties has applied for or obtained a debt arrangement scheme.

(2) In applying, however, the common law rule that compensation, or retention and compensation, of a debt due to an insolvent person against a debt due by him cannot be competently pleaded where there was no concourse of credit or debit before notice of bankruptcy, the registration of a debt arrangement scheme should not by itself be treated as giving such notice.
(Recommendation 4.26; clause 38(2).)

(e) *Debts secured by recourse against co-obligants*

4.183 The debtor may be liable along with a co-obligant, such as a co-debtor or cautioner (guarantor) in respect of the whole or part of a debt included in a debt arrangement scheme. Since many consumer as well as commercial debts are secured by guarantees granted by relatives, friends, workmates or business associates of the debtor, specific provision is necessary to deal with such problems as can be anticipated. A scheme may affect other kinds of co-obligants, moreover, such as wrongdoers jointly and severally liable in delict or persons jointly and severally liable as principals under contracts. In short, we are concerned here with any cautioner or other co-obligant who, on paying all or part of the debt, would acquire a right of relief against the debtor which he may wish to vindicate by claiming to be included in the debtor's scheme.

4.184 We think that a debt secured by a right of recourse against a co-obligant should be included in a debt arrangement scheme if and insofar as it was payable by the debtor but unpaid at the first notice date. It would be unfair to the co-obligant, and if the co-obligant were insolvent, possibly unfair to the creditor, to require the creditor to recover first from the co-obligant. Where the creditor had a "real security" granted by the debtor over his property as well as a "personal security" or right of recourse against a co-obligant, the debt should be excluded from the scheme unless and until the creditor discharged, realised or "foreclosed" the security as mentioned above.[1] This exclusion should not however apply where the real security had been granted over the co-obligant's property rather than the debtor's property.

4.185 On analogy with sequestration law, it should be provided by statute that any right of recourse by a creditor against the co-obligant should not be prejudiced by either (a) the inclusion of the creditor's debt in a scheme or the acceptance by the creditor of a disbursement under the scheme, or (b) the debtor's discharge from liability for the debt at the end of a scheme[2] (which would be of importance in a composition scheme).

4.186 If a co-obligant of a bankrupt pays the debt *in full*, he may require the creditor to grant an assignation of the debt to him and may then rank in the sequestration in subrogation for the creditor in respect of the right of relief to which he is entitled[3] and indeed may rank in the sequestration without

[1]Recommendation 4.23(2) (para. 4.174).

[2]Compare Bankruptcy (Scotland) Bill 1984, clause 57(1) replacing Bankruptcy (Scotland) Act 1913, s. 52.

[3]Goudy, pp. 562–3; Gloag and Irvine, p. 803 *et seq.*

obtaining a formal assignation.[1] On the other hand, if the creditor has ranked and drawn a dividend from the bankrupt's sequestration, a co-obligant who pays the *deficit* cannot rank in the sequestration, because to allow a second ranking of this type would give that particular debt a preference over other debts.[2] It appears to us that this common law rule against double ranking should apply *mutatis mutandis* in debt arrangement schemes. As we observed in our Report in Bankruptcy:[3]

> "From the point of view of other creditors, the bankrupt has incurred one debt and one debt only and the fact that the creditor has secured collateral obligations from another person should not entitle that debt to a double ranking."

We do not think that this matter can be left to the common law since the common law rule against double ranking only applies in those bankruptcy processes (such as sequestrations or trust deeds for creditors) where the debtor is divested of his estate, and not in processes (such as private composition contracts) where there is no divestiture.[4] We propose therefore that the implementing legislation should expressly provide that where after the first notice date a co-obligant pays the unpaid balance of the full amount of the debt (not the composition in a composition scheme) or if the co-obligant's liability is less than that of the scheme debtor, where he pays the unpaid balance of the full amount (not the composition) of the part of the debt for which he is liable, and thereby acquires a right of relief against the debtor, then the co-obligant may apply to the administrator to vary the scheme or draft scheme by subrogating him for the original creditor to the extent of his right of relief. In no other circumstances however should a co-obligant be entitled to have a claim of relief arising after the first notice date against the debtor included in a debt arrangement scheme. The foregoing rule should apply to schemes providing for payment of debts in full as well as composition schemes. The scheme may break down so that the debts may not in fact be paid in full, and to allow a co-obligant who had paid part of a debt to rank in a scheme in addition to, and not in place of, the original creditor would be to give that debt a preference in the disbursements under the scheme made before it broke down.

4.187 If the co-obligant paid part of the debt prior to the first notice date, the partial payment would be deducted from the amount of the debt for which the creditor ranked. The co-obligant's claim of relief against the debtor could then be included in the scheme since it would not infringe the rule against double ranking.[5]

4.188 The precise terms of a contract of caution may be held to exclude ranking on the principal debtor's estate by a cautioner e.g. where the cautioner has agreed not to prejudice the creditor in any competition or ranking process.[6] Moreover, where the cautioner's liability is less than that of the principal

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[1]Goudy, p. 562, footnote (d); Gloag and Irvine, *supra*.

[2]Goudy, pp. 561–2.

[3]Para. 16.27. A prohibition of double ranking in debt arrangement schemes was agreed on consultation: Consultative Memorandum No. 50, Proposition 23 (para. 2.68).

[4]Goudy, pp. 562–3; *Mackinnon* v. *Monkhouse* (1881) 9 R. 393.

[5]Compare *Thomson* v. *Latta* (1863) 1 M. 913, 920.

[6]*Harvie's Trs.* v. *Bank of Scotland* (1885) 12 R. 1141.

debtor, in construing the contract of caution a somewhat fine distinction is drawn between a cautioner's guarantee of the whole debt subject to limited liability on his part (which is construed as precluding ranking by the cautioner on the principal debtor's estate to enforce his right of relief)[1] and a guarantee of part only of the debt (which is not so construed).[2] Accordingly the legislation allowing subrogation in a scheme by a co-obligant to vindicate a right of relief should not override any agreement expressly or impliedly prohibiting the co-obligant from claiming subrogation.

4.189 Where the co-obligant had paid the unpaid balance of the whole debt, he would rank in place of the creditor on the whole future disbursements under the scheme which would otherwise have been paid to the creditor. Where the co-obligant's liability was less than that of the scheme debtor and he paid the whole amount of the part of the debt for which he was liable, we propose that he and the original creditor would rank on the original creditor's share of future disbursements in such proportions as would secure, so far as practicable, that the amounts to which they were entitled under the scheme were satisfied at the same time. The following example may illustrate the principle involved.

EXAMPLE

Scheme provides for composition of 50%	
Debt due by scheme debtor to original creditor	£1,000
∴ sum due to original creditor under scheme	£ 500
less amount already disbursed by administrator	£ 100
leaves amount due to the original creditor under the scheme	£ 400
Total liability of co-obligant to original creditor duly paid	£ 600
∴ sum due to co-obligant under scheme (50%)	£ 300
∴ sum due to original creditor under scheme (£400–£300)	£ 100

∴ creditor and co-obligant rank on future disbursements of the original creditor's share in the scheme in the proportions of 25% to the original creditor and 75% to the co-obligant.

The foregoing example also illustrates the principle that the creditor receives the full benefit of his right of recourse against the co-obligant (£600) plus a composition of the balance of the £1,000 debt from the scheme, (50% of £400=£200) while the co-obligant receives a composition of his right of relief (50% of £600=£300). In cases where the original creditor's debt had been included "late", the sums due in terms of the scheme would be satisfied partly by disbursements by the administrator under the scheme and partly by payments under a decree such as we recommend above.[3] However, the disbursements made by the administrator would be apportioned in the proportions just mentioned since the implementing legislation would require such apportionment to be made "so far as practicable".

4.190 It would be both unnecessary and undesirable to attempt to make

[1] *Idem.*
[2] *Veitch* v. *National Bank of Scotland* 1907 S.C. 554.
[3] Recommendation 4.17(3) (para. 4.143).

comprehensive statutory provision regulating the very complex rights and liabilities of a creditor, scheme debtor and co-obligants in cases where one or more of the co-obligants is or are also insolvent. Apart from the prohibition of double ranking, the leading common law principle is that the creditor may rank on all the bankrupt estates simultaneously provided that he does not draw more than 100p in the pound in all.[1] We think that the courts would apply this principle where one or more of the insolvent co-obligants obtained a debt arrangement scheme and that legislation is unnecessary.

4.191 The "late" inclusion in confirmed schemes of debts owed to contingent and other creditors would, under our proposals, normally be a matter to be decided by the sheriff in his discretion. We think, however, that where inclusion was merely a matter of a co-obligant replacing wholly or partially a creditor already included in a confirmed scheme, then the administrator should be entitled to effect the subrogation on a simple application by the co-obligant.[2] We have already proposed that a contingent creditor should have an option to stay out of a scheme and enforce his debt in full on the termination of the scheme or to apply for late inclusion and these options would be available to a co-obligant having a right of relief. A co-obligant, however, should be put to his choice between those options within a short period after making the payment entitling him to subrogation. The reason for this is that the creditor, on receiving payment of the full amount of his debt from the co-obligant, or the administrator and co-obligant, would be required (as recommended above[3]) to intimate that fact to the administrator who would then be obliged to cease disbursements to that creditor and to apply to the sheriff to vary the scheme by excluding the debt. But the exclusion of the debt would not be appropriate if a co-obligant elected to be included in a scheme and became entitled to rank on future disbursements in subrogation for the original creditor. We think therefore that a co-obligant should be entitled to be subrogated for the creditor to the extent of the amount due to him under his right of relief only if he applied to the administrator for subrogation within a short period, say 14 days, after making the payment, or last payment, by virtue of which he became entitled to rank in the scheme.

4.192 On the model of the procedure proposed for excluding debts from draft schemes before confirmation,[4] there should be a simple administrative procedure for the adjustment by the administrator of a draft scheme where subrogation was applied for before confirmation.

4.193 We **recommend:**

(1) A creditor's right of recourse against a scheme debtor's co-obligant should not be affected by the inclusion of the debt in a scheme, or by the creditor's acceptance of a disbursement under the scheme, or by the discharge of the debtor's liability to the creditor at the end of a scheme.

(2) Where after the first notice date:

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[1]Goudy, pp. 563–4.

[2]This would be modelled on the procedure proposed at paras. 4.277 and 4.288 below for subrogating the assignee of a debt in place of the original creditor.

[3]Recommendation 4.19 (para. 4.153).

[4]See Recommendation 4.19(5) (para. 4.153).

(*a*) a co-obligant pays the unpaid balance of the full amount of the debt (not the composition in a composition scheme); or

(*b*) if the co-obligant's liability is less than that of the scheme debtor, where the co-obligant pays the unpaid balance of the full amount (not the composition) of the part of the debt for which he is liable,

and thereby acquires a right of relief against the scheme debtor, then the co-obligant may apply to the administrator to vary the scheme or draft scheme by subrogating him for the original creditor to the extent of his right of relief. In no other circumstances should a co-obligant be entitled to have a claim of relief, acquired after the first notice date against the debtor, included in a debt arrangement scheme.

(3) Where the co-obligant's claim of relief arises by virtue of his payment of part of the debt, he should rank along with the original creditor on the original creditor's share of future disbursements under the scheme in such proportions as will secure, so far as practicable, that the sums due to the original creditor and the co-obligant under the scheme are satisfied at the same time.

(4) The common law should regulate questions of ranking where one or more of the co-obligants is or are insolvent.

(5) There should be a simple procedure whereby the administrator could effect the subrogation of a co-obligant in the creditor's place in a draft scheme or confirmed scheme.

(6) A co-obligant should be required to make his election between subrogation in a confirmed scheme and remaining outside the scheme, within a short period (say 14 days) after the payment was made by virtue of which he became entitled to subrogation.
(Recommendation 4.27; clauses 27(6), 28(4)(*b*) and 34.)

(8) Debts due under regulated agreements and related securities under Consumer Credit Act 1974, and unregulated hire purchase and conditional sale agreements

4.194 *Existing law.* Though the effect of sequestration on regulated agreements and securities under the Consumer Credit Act 1974, and on judicial orders under Part IX of that Act controlling the enforcement of such agreements, is not specifically regulated by statute, some provision seems necessary in the context of debt arrangement schemes. Hire purchase and hire contracts and other credit transactions involving reservation of title or the grant of a security normally provide that the creditor or owner may terminate the agreement and exercise other contractual remedies (such as acceleration of payments and repossession of goods) in the event of the debtor or hirer becoming notour bankrupt (in future, "apparently insolvent") or being sequestrated or granting a trust deed for creditors or entering into a composition contract,[1] and such a provision would normally in future include an application for a debt arrangement scheme.[2] (The agreement may alternatively provide that such states of bankruptcy terminate the agreement *ipso facto*.) Other credit agreements (e.g. loan agreements) not involving reservation of title or a security may provide for such contractual remedies as

[1]E.g. Gow, *The Law of Hire Purchase in Scotland* (2nd edn.), p. 196.
[2]See Recommendation 4.46(1) (para. 4.311).

acceleration of payments in the event of insolvency. Under the 1974 Act the creditor must give written notice of seven days before exercising his remedies.[1] Since insolvency is not a remediable breach of contract, an insolvent debtor cannot prevent the running of the period of notice, but he may apply to the court for judicial control of enforcement under Part IX of the 1974 Act.

4.195 Judicial control of regulated agreements under Part IX is exercised mainly through the following orders:

(1) A *time order under section 129(2)(a)* for payment by instalments by the debtor or hirer or a surety (guarantor) of sums owed under *any regulated agreement or a security* (e.g. a guarantee) (i.e. arrears owed at the time when the order is made);

(2) A *time order under section 129(2)(a) and 130(2)* for payment by instalments by such a person of future sums due under a *regulated hire purchase or conditional sale agreement* which, though not payable by the debtor at the time when the order is made, would if the agreement continued in force, become payable under it subsequently;

(3) A *time order under section 129(2)(b)* for the remedying by the debtor or hirer within a specified period of any *non-monetary breach* of a regulated agreement;

(4) An *order under section 130(6)* varying or revoking a time order;

(5) An *order under section 131 protecting property* of the creditor or owner under a regulated agreement *pending proceedings* under the 1974 Act;

(6) An *order for financial relief of a hirer under section 132* (for repayment of sums paid by the hirer, or reducing or extinguishing sums owed by the hirer) available when the owner has recovered possession of the goods without an action or obtains a delivery order in an action;

(7) A *"return order" under section 133* for the return of any goods comprised in a *regulated hire purchase or conditional sale agreement* (not merely "protected goods") or a *"transfer order" under section 133* (a "split order") for the transfer of title to the debtor of some goods and the return of the remainder to the creditor;

(8) An *ancillary order under section 135(1)* attaching conditions to, or suspending the operation of, any term of a (statutory or common law) order made in relation to a regulated agreement;

(9) An *ancillary order, for variation of an agreement, under section 136* which provides that the court may "make such provision as it considers just for amending any agreement or security in consequence of a term of the order";

(10) A *combination of some of the above orders*, e.g. the equivalent of a postponed order for specific delivery under the Hire Purchase (Scotland) Act 1965 would be a return order under section 133 suspended under section 135 pending compliance with a time order under section 129(2)(*a*).

4.196 A time order under section 129(2)(*a*) would not, by itself, prevent the owner or creditor from exercising his contractual remedies of termination or

[1]1974 Act, ss. 76 and 98.

repossession of "unprotected goods" on the debtor's insolvency but an ancillary order under section 136 varying the agreement or a return order under section 133 (relating to goods held under a regulated hire purchase or conditional sale agreement) suspended under section 135 pending compliance with a time order, or a common law decree for delivery (e.g. relating to goods held under a regulated consumer hire agreement) suspended by an order under section 135 pending such compliance, might do so.[1] In the case of a time order relating to a regulated hire, hire purchase or conditional sale agreement, where the debtor or hirer is in possession of the goods, he is treated as "a custodier of the goods under the terms of the agreement" (if title has not passed to him) even though the agreement has been terminated.[2] In such a case, the effect of the time order is not to revive the terminated agreement but rather to create a new statutory agreement which has the same terms as the original agreement, except as regards payment obligations regulated by the time order and except as varied by the court under section 136, and which has effect for so long as the debtor retains possession, apparently even if the time order is later revoked.[3] It will be seen that time orders under section 129(2)(*a*) for payment by instalments which could be superseded by a scheme may be associated with orders (relating for example, to the possession, ownership or delivery of goods comprised in a regulated agreement) which cannot be readily superseded by a scheme. Further, the practical effect of certain orders under Part IX of the 1974 Act may be to prevent the inclusion of debts in a scheme where under our proposals it is a condition precedent of inclusion that the creditor should first exercise or waive his contractual remedies (e.g. security rights[4]).

4.197 *Secured debts due under regulated agreements.* We have recommended[5] that a debt secured by a contractual security over property of the debtor (such as a heritable security or pledge) should be excluded from a scheme unless and until the security was discharged, or the secured property realised or acquired in default of sale in partial satisfaction of the debt. In principle we think that this rule should apply to debts due under regulated agreements secured by a contractual security over the debtor's property. The enforcement of the security would continue to be subject to the provisions of the 1974 Act, including those on judicial control in Part IX of the Act. For so long as the secured debt was not included in a scheme, existing orders under the 1974 Act would continue in operation after confirmation of the scheme. If an order under Part IX was applied for after confirmation of the scheme, the sheriff's decision whether or not to make the order would be reached in the light of the existence of the scheme.

4.198 *Unsecured debts due under regulated agreements.* In the case of unsecured debts due under regulated agreements, we think that since a debt arrangement scheme would apply in principle to all such debts once they became payable and undisputed, the debtor's obligations of payment should so far as practicable be regulated by the debt arrangement scheme rather than

[1]Goode, "The Consumer Credit Act 1974", [1975] C.L.J. 79, 117–8.
[2]1974 Act, s. 130(4).
[3]Goode, *The Consumer Credit Act* (1979) p. 326.
[4]See Recommendation 4.23(2) (para. 4.174).
[5]*Idem.*

by a monetary time order under section 129(2)(*a*) of the 1974 Act. The debtor's admitted insolvency would create a new situation. It would be anomalous if an unsecured debt subject to a time order was always excluded from a scheme with the result that the unsecured creditor was not bound by the general composition of debts under the scheme.

4.199 *Debts under hire purchase and conditional sale agreements.* Since most hire purchase and conditional sale agreements entered into by a debtor subject to a debt arrangement scheme will be regulated under the 1974 Act, we have found it convenient to deal with such agreements here, though our proposals relate to unregulated agreements as well as regulated agreements. We have considered three options on debts due under hire purchase and conditional sale agreements. First, to focus discussion on a solution adopted or proposed in other countries,[1] we sought views in our Consultative Memorandum No. 50[2] on whether the creditor should be compelled to elect between his remedy of repossession and his remedy of claiming sums due under the contract by ranking in the scheme, but having used one remedy, he would be barred from using the other. The argument for this approach is that repossession, while causing hardship to the debtor, is often of little value to the hire purchase creditor.[3] On consultation, the few who commented rejected this solution. The Scottish Association of Citizens Advice Bureaux thought that it would be unfair to the creditor, unduly reducing his property rights. The Law Society of Scotland thought that if the debt arrangement scheme provided for payment in full, the hire purchase creditor should be required to rank in the scheme, but that if it provided only for a composition, the creditor should be entitled to rank in the scheme in respect of any deficit arising after re-sale of the repossessed goods: in no circumstances, they said, should the creditor be obliged to elect between the two remedies. In our view, the safeguards in the 1974 Act must be taken as adequately protecting hire purchase debtors and there seems no reason why hire purchase debtors fortunate enough to obtain a scheme should be in a better position than other hire purchase debtors.

4.200 Second, we considered whether a hire purchase creditor[4] should be obliged to rank for arrears accrued to the first notice date, since a hire purchase agreement is not a form of security in strict law. Under this option, if payments outside the scheme were kept up but further default then occurred, the hire purchase creditor could exercise his contractual remedies including repossession and realisation[5] and opt either to rank in the scheme for the deficit on realisation or stay out of the scheme and enforce the deficit in full after termination of the scheme. We reject such a solution as unduly complex requiring complicated provisions on, for example, whether or how the net proceeds of sale of the repossessed goods should be ascribed to the arrears originally included in the scheme or to the sums for which the creditor had not yet ranked in the scheme. Furthermore, a time order and other orders

[1]E.g. U.S. Bankruptcy Report, pp. 165–6; Tassé Report in Canada, pp. 93–4; A.L.R.C. Report No. 6, pp. 28–30; Draft E.E.C. Directive No. C80/7 of 27.3.1979, article 9.

[2]Paras. 2.56 to 2.63, Proposition 19.

[3]Crowther Report, para. 6.6.45. Most goods taken on hire purchase are motor vehicles or household goods and the repossession value is generally low: *ibid*, para. 6.6.46.

[4]The same considerations apply to creditors in conditional sale agreements.

[5]Subject in the case of a regulated hire purchase agreement to judicial control under the 1974 Act.

under the 1974 Act would be applicable only to the sums for which the creditor had not yet ranked in the scheme and it is not easy to see how this would work in practice.

4.201 We propose therefore the adoption of a third solution, namely that sums due under a hire purchase (or conditional sale) agreement should not be included in a scheme unless and until (*a*) the agreement had been terminated, and (*b*) if by virtue of section 130(4) of the 1974 Act the debtor were treated as a "custodier of the goods under the terms of the agreement",[1] until he ceased to be so treated. The effect would be that a hire purchase creditor would not rank in a scheme for arrears of hire purchase instalments until the hire purchase agreement was terminated. On termination we would expect that the hire purchase creditor would exercise the normal contractual remedies of acceleration of payments and repossession and realisation of goods comprised in the agreement, and rank for any deficit on realisation. If, however, the debtor in the hire purchase (or conditional sale) agreement fell to be treated as a "statutory custodier of the goods under the terms of the agreement" by virtue of section 130(4) of the 1974 Act for so long as he retained possession of the goods without becoming owner of them, there would in effect be a new statutory agreement corresponding to the original agreement (except as regards payment obligations regulated by a time order under section 129(2)(*a*) and except as varied under section 136) but not terminable by the creditor so that the creditor could not exercise his contractual remedies of repossession or realisation of the goods. In such a case, we envisage that the creditor would apply for a return order or a transfer order under section 133(1) or a common law order for delivery of goods to the creditor having the effect of terminating the new statutory agreement.[2]

4.202 *Effect of scheme on orders under 1974 Act, Part IX* .Where a debt subject to a time order for payment by instalments under section 129(2)(*a*) of the 1974 Act was included in a scheme, either on confirmation of the scheme or on variation of the scheme in a creditor's application to include the debt, the confirmation order or variation order as the case may be should have the effect of revoking the time order. An application for revocation of the time order should be unnecessary. To avoid inconsistent dual regulation of instalment payments by a scheme and a time order, it should be incompetent for the court to make a time order relating to an included debt while the scheme was in force and it should be provided by act of sederunt that any application by the debtor for a time order should state that the debt concerned was not included in a scheme.

4.203 The foregoing rules of inclusion and automatic revocation would apply to cases where only a time order for payment by instalments under section 129(2)(*a*) (or that section as read with section 130(2)) of the 1974 Act was involved. In more complicated cases involving, in addition to a time order under section 129(2)(*a*), other types of order, (such as a time order under section 129(2)(*b*) for remedying a non-monetary breach, or a return order, or a transfer order, or an order suspending the exercise of contractual

[1]See para. 4.196 above for an explanation of this expression.

[2]In some cases, the creditor may also have to apply for the revocation of a time order as proposed in para. 4.203 before the debt could be included.

remedies, or imposing conditions, or varying a regulated agreement, or one or more orders of those types combined with an instalment time order[1]), it would not be right to lay down any rule revoking the order on inclusion of the debt since such orders apply or may apply to matters other than the payment of debts. In such cases, we think that to avoid inconsistent dual regulation of payment by a monetary time order and a scheme, the debt should not be included in the scheme unless the creditor obtains from the court an order under section 130(6) revoking the monetary time order. Moreover, consequential provision would be needed under which, where a scheme application was pending or a scheme had been confirmed and the creditor applied for revocation of a monetary time order, the court would have an express power, on revoking the time order, to vary or revoke any other order made in relation to the debt, or to the agreement under which the debt was owed, under sections 129(2)(*b*), 131, 133, 135 or 136 of the 1974 Act. Thus for example, if a return order or common law delivery order had been suspended under section 135 pending compliance with a time order under section 129(2)(*a*), the court on revoking the time order could revoke the suspension order under section 135 so as to make the return order or delivery order have immediate effect.

4.204 *Orders for financial relief of hirer.* Under the 1974 Act, section 132, where the owner under a regulated consumer hire agreement recovers possession of the goods without an action or the sheriff orders delivery of the goods to the owner, the sheriff may *inter alia* make an order that the obligation to pay the whole or any part of a sum owed by the hirer to the owner in respect of the goods should cease. We propose that where at the first notice date an application under the 1974 Act, section 132 or an action for delivery of goods under a regulated consumer hire agreement was pending, the debt should be excluded from the scheme until the application or action was disposed of and it was known what the amount of the debt will be.[2] If a debt subject to a regulated consumer hire agreement had already been included in a draft scheme or a confirmed scheme, and the sheriff subsequently ordered under section 132 that the obligation to pay the debt should cease, we envisage that the rules relating to the payment of debts outside a scheme described above[3] should apply.

4.205 We **recommend:**

(1) Where a debt secured by a contractual security over the property of the debtor was payable by the debtor under a regulated agreement under the Consumer Credit Act 1974, or under a related "security" (e.g. a guarantee), it should be excluded from a scheme in accordance with the general rule on secured debts recommended above.[4] Time orders and other orders under the 1974 Act relating to the debt should

[1]See para. 4.195 above.

[2]This is the same as the solution for orders re-opening extortionate credit agreements proposed at paras. 4.132 to 4.133 above, except that in the case of a regulated consumer hire agreement, the hirer must be allowed to apply for relief after the first notice date in his scheme application since his right to apply for relief may not arise till after that date when the creditor delays recovery of possession or a possessory action.

[3]See paras. 4.149 *et seq.*

[4]Recommendation 4.23(2) (para. 4.174).

not be affected by the scheme unless and until the debt was included in the scheme. The same rules should apply to debts under regulated agreements being enforced by adjudications or enforceable by poinding of the ground.[1]

(2) A debt due by the debtor under a hire purchase or conditional sale agreement, whether regulated under the 1974 Act or not, should be excluded from a scheme unless and until (*a*) the agreement had been terminated and (*b*) if by virtue of section 130(4) of the 1974 Act the debtor were treated as custodier of the goods in terms of the agreement, until he ceased to be so treated.

(3) Where a debt was subject to a time order for payment by instalments under section 129(2)(*a*), or that section as read with section 132, of the 1974 Act, then:

(*a*) if another order relating to the debt, or to the agreement under which the debt is owed, was in force, being an order made under:

section 129(2)(*b*) (remedying by debtor or hirer of a non-monetary breach of agreement);

section 131 (protection order);

section 133 (return order or transfer order relating to goods comprised in a regulated hire purchase or conditional sale agreement);

section 135(1) (order attaching conditions to, or suspending the operation of, any order made in relation to a regulated agreement); or

section 136 (variation of agreements or securities),

the debt should be excluded from the scheme until the order under section 129(2)(*a*) had been revoked under section 130(6) or had otherwise ceased to have effect;

(*b*) if another order mentioned in the foregoing list relating to the debt or agreement is not in force, the debt may be included in the scheme on its confirmation or by variation, and the order confirming or so varying the scheme should have the effect of revoking the order under section 129(2)(*a*).

(4) Where a scheme application was pending or a scheme had been confirmed and the court revoked a time order under section 129(2)(*a*), the court should have power to vary or revoke any other order mentioned in paragraph 3(*a*) above made in relation to the debt, or the agreement under which the debt was due.

(5) In the case of a debt due by the debtor as hirer under a regulated consumer hire agreement, where at the first notice date an application under the 1974 Act, section 132(1) (financial relief of hirer), or proceedings in which the court may make an order under section 132(2), were pending, the debt should be excluded from the scheme until the application or proceedings were disposed of.

(Recommendation 4.28; clauses 15(5)(*a*) and (*b*), 15(6), 18(5)(*c*), 23(1)(*f*) and (*g*), 28(1)(*f*) and (*g*), 28(5), Schedule 7, paragraph 21.)

[1]Recommendations 4.14(3) (para. 4.118) and 4.24(2) (para. 4.176).

(9) Preservation of creditors' other rights and remedies

4.206 In general, we consider that an interim order sisting diligence and a debt arrangement scheme should not affect the rights and remedies for enforcing payment of debts other than the ordinary modes of diligence applicable to unsecured debts. Accordingly, we propose that any legislation following on this report should expressly "save" such rights or remedies. This would preserve not only the security and other rights discussed above but also remedies which, though not given by law expressly for the purpose of enforcing debts, are in fact used for that purpose. Such remedies include the threat of disconnection of supply of gas and electricity for non-payment of charges, and ejection and removing for non-payment of rent.[1]

4.207 *Gas and electricity charges.* The British Gas Corporation and the electricity boards should be required to rank in the debt arrangement scheme for arrears of gas and electricity charges accrued to the first notice date. In the case of the supply of gas or electricity to the debtor's residence, we would expect that the administrator in preparing the scheme would make allowance to the debtor of sufficient income to keep up payments of gas and electricity for his residence as these would be part of normal "necessaries".

4.208 There should not however be any restraint on the fuel boards' powers of disconnection.[2] Under their Code of Practice, the fuel boards will not disconnect supply if the defaulting customer agrees to make regular payments for future supply and to pay off arrears in reasonable instalments. These arrangements are not unlike those under a debt arrangement scheme with the difference that in a composition scheme, the arrears would not be payable in full. It should be for the fuel boards to determine in a particular case whether there was a sufficient ground for discontinuance of future supply.

4.209 In relation to subsequent default, the fuel boards would have the same rights as a "subsequent creditor" or contingent creditor to apply for late inclusion, or revocation, or to wait till after the termination of the scheme and to enforce their subsequent debts in full.

4.210 *Rent.* In general, the same solution should apply to rent arrears as to fuel debts. A landlord should rank in a debt arrangement scheme for rent arrears accrued before the first notice date and should be entitled to apply to have arrears arising after that date included in a scheme. Where the rent related to the debtor's residence, and no court proceedings for recovery of possession had been initiated, it would be assumed in preparing the scheme that the debtor would keep up payments outside the scheme; and, where the rent related to property other than the debtor's residence, the fact that the landlord might terminate the lease might be relevant in determining whether a debt arrangement scheme should be confirmed.

4.211 In some cases, an action by the landlord for recovery of possession of the debtor's residence for non-payment of rent might already have been commenced, and this may have been adjourned under the Tenants' Rights Etc. (Scotland) Act 1980 or the Rent (Scotland) Act 1984 to allow an

[1]The background law on these topics is described at paras. 3.103 *et seq.* in the context of time to pay decrees and orders.

[2]As to these powers, see para. 3.115 above.

arrangement for payments of arrears to have effect. In some of these cases the arrangement may have been imposed by the court as a condition of the adjournment.[1] As mentioned in Chapter 3,[2] however, in some courts it is common practice, at least in cases under the 1980 Act, to use such an adjournment merely as a trial period to determine whether or not the debtor is able and willing to make regular payments towards his arrears: if the trial is successful, the action is then sisted on the basis of an informal arrangement between the debtor and his landlord.

4.212 The existence of any of these arrangements would have to be taken into account in deciding whether to make a debt arrangement scheme; but, if a scheme were made, there would then be a question as to what effect that scheme should have on any arrangement in the possessory action. In our view, the inclusion of rent arrears in the debt arrangement scheme should not prejudice any right which the landlord might have to seek a possessory decree in a court action, and it would then be for the court entertaining that action to determine in the circumstances of the case whether the action should be adjourned or sisted to allow payment of arrears through the debt arrangement scheme to be made or whether a possessory decree should be granted.

4.213 We **recommend:**

(1) Any legislation introducing debt arrangement schemes should make it clear that an interim order sisting diligence and a scheme would not affect creditors' remedies other than the diligences enforcing unsecured debts.

(2) In particular, such an order or scheme should not affect the rights of the electricity and gas boards to discontinue supply to a defaulting customer nor the right of a landlord to recover possession for non-payment of rent.
(Recommendation 4.29; clause 41.)

(10) Effect of scheme on negative prescription of debtor's obligation to pay

4.214 Under the law on negative prescription,[3] an obligation to pay a debt is extinguished if a "relevant claim" (such as the raising of a court action or the execution of diligence[4]) is not made by the creditor, or the debtor does not "relevantly acknowledge" the subsistence of the obligation, for a continuous period of five or 20 years (according to the kind of debt). If the prescriptive period is "interrupted" by such a claim or acknowledgement, the part of the prescriptive period which had already elapsed is cancelled and a new prescriptive period commences from the date of interruption. Under bankruptcy legislation, a creditor's petition, or the submission of a claim by a creditor, in a sequestration interrupts prescription on the creditor's debt,[5] and we considered whether the procedures for inclusion of a debt in a debt arrangement scheme should also have the effect of interrupting prescription.

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[1]See 1980 Act, s. 15(1).
[2]See para. 3.107.
[3]Prescription and Limitation (Scotland) Act 1973, ss. 6 and 7.
[4]*Ibid.*, s. 9(1).
[5]*Ibid.*, s. 9(1)(*b*) as originally enacted; and as amended by the Bankruptcy (Scotland) Bill 1984, Sched. 7, para. 3.

It would however be difficult and complex to list all the acts which should be treated as interrupting prescription: for example, should the list include objections by an excluded creditor to a scheme application or applications for revocation of a scheme? Moreover, such a list would not cover all the cases of creditors who would require protection from the running of prescription. For example a creditor holding a warrant for diligence omitted from a scheme for whatever reason should, we have proposed, have the option (which is not available in sequestrations) of staying out of the scheme and enforcing his debt in full after termination of the scheme or of applying for late inclusion. In the meantime he could not interrupt prescription by diligence. A debt arrangement scheme may subsist for three years and in some cases five years, with minor further extensions and, especially in the case of debts subject to the short negative prescription of five years, the dangers are obvious. It would be wrong to encourage a creditor to take steps, such as objecting to a scheme or applying for revocation of a scheme, simply to interrupt prescription.

4.215 In these circumstances we propose the adoption of a different approach. Section 6(4)(*b*) of the Prescription and Limitation (Scotland) Act 1973 provides that in computing the short negative prescriptive period, any period during which the creditor is under legal disability (by reason of nonage or unsoundness of mind[1]) shall not be reckoned as, or as part of, the prescriptive period. The disability does not "interrupt" the prescriptive period (in the technical sense of cancelling the old period and starting a new period[2]) but lengthens the prescriptive period by the period of legal disability. We consider that a similar principle should apply to debt arrangement scheme proceedings with the effect of lengthening the period of both the short and the long negative prescriptions.

4.216 We **recommend:**

In computing the short negative prescriptive period of five years under section 6 of the Prescription and Limitation (Scotland) Act 1973, and the long negative prescriptive period of 20 years under section 7 of that Act, none of the following periods, namely:

(*a*) the period after the first notice date while a scheme application was pending;

(*b*) the period when the sheriff's order disposing of a scheme application was appealable or subject to appeal;

(*c*) the period while a scheme was in force,

should be reckoned as, or as part of, the prescriptive period.
(Recommendation 4.30; Bill, Schedule 7, paragraph 18.)

Section E. Functions, recruitment etc. of administrators of debt arrangement schemes

4.217 Because of the central position of the administrator in preparing and obtaining confirmation of a draft scheme and thereafter in promoting the smooth operation of the scheme and keeping it under review, it would be essential to ensure that suitable persons are appointed to act as administrators.

[1]1973 Act, s. 15(1).
[2]1973 Act, s. 6(5).

4.218 In allocating functions as between the sheriff and the administrator, regard must be had to the fact that there are no "judicial officers" within the Scottish Court Service equivalent to the English High Court masters or county court registrars. Accordingly, we propose that the main decisions and orders on the confirmation, variation, and termination of a scheme, and the discharge of the debtor, should be made by the sheriff.

4.219 The main functions of the administrator would thus be executive or procedural rather than "adjudicatory" in character. In summary, these functions would include those in the following list (which is not exhaustive):

(i) to intimate to creditors copies of the interim order sisting diligence;

(ii) to interview the debtor and explain the nature of the procedure and the debtor's rights and duties in connection with it;

(iii) to check the statement of affairs lodged with the debtor's application and to interview the debtor to ascertain his financial position; if necessary to prepare a new statement of affairs;

(iv) to check that the application is within the statutory limits of competence and may be entertained by the sheriff;

(v) in appropriate cases to obtain the sheriff's authority for an advertisement for creditors' claims or for valuation of items of the debtor's property and, if necessary, to obtain an undertaking from the debtor not to remove or dispose of items of property;

(vi) to assess whether a scheme was feasible, i.e. that the debtor would be likely to comply with a scheme;

(vii) after such informal contacts, if any, with creditors as he thought fit, to serve on creditors a formal notice inviting them to verify their debts or to claim interest;

(viii) to explain to the debtor the various types of scheme (extension of time, composition, or combined extension and composition) and, in consultation with the debtor, to prepare a draft scheme containing the debtor's proposals for payment, and to serve it with relative documents on creditors and co-obligants;

(ix) where appropriate, to adjust the draft scheme by including omitted debts, or excluding newly satisfied debts or subrogating co-obligants or creditors' assignees and if necessary to re-serve the adjusted scheme;

(x) on receipt of any objections to the scheme, to ascertain whether agreement can be obtained as between the parties and, if not, to arrange a hearing before the sheriff;

(xi) to attend a hearing on objections or any other hearing before the sheriff and to intimate the sheriff's decisions and orders;

(xii) to receive payments from the debtor under a scheme and to disburse them in dividends to the creditors periodically;

(xiii) to keep the operation of the scheme under review;

(xiv) to make reports, on request, to the creditors included in the scheme on the manner in which the debtor was performing his obligations under the scheme;

(xv) to supervise, and to report to the sheriff on, the debtor's compliance with a provision of the scheme requiring disposal of items of property;

(xvi) to deal with the subrogation in the scheme of assignees of creditors and co-obligants of the debtor, and to perform any necessary functions in connection with applications for variation or revocation of a scheme;

(xvii) to contact the debtor if he defaults, ascertain the reason for default, and if necessary apply to the sheriff for variation or revocation of the scheme;

(xviii) to apply to the sheriff for the debtor's discharge on the termination of a successful scheme; and

(xix) to comply with any regulations on obtaining his own discharge from the office of administrator.

4.220 In our Consultative Memorandum No. 50, we invited views on the type of person who should be eligible for appointment as administrator, and in particular whether they should be sheriff clerks or full-time officials of the sheriff clerks' departments or unpaid, part-time volunteers appointed from a list of persons recruited from the community.[1] On consultation, reactions were divided. The Scottish Association of Citizens Advice Bureaux said that the administrator should not be a Citizens Advice Bureau volunteer because "the post needs a full-time commitment. Secondly, the job capability includes executive functions which are totally alien to advice givers. Lastly, the job if filled by CAB volunteers would prejudice the impartiality and approachability of the CAB service". In their view, an administrator would have to be a court official on a similar grade to a sheriff clerk.

4.221 The Society of Messengers-at-Arms and Sheriff Officers pointed out that some officers of court already operate informal debt arrangement schemes, or debt pooling arrangements, for both consumer and commercial debtors; that they had deep knowledge and experience of debtors and debt problems; and that they were well placed to keep schemes under review because they already make visits periodically to debtors in their area.

4.222 The Law Society of Scotland thought that, while it might be possible to secure a debt counselling service by way of volunteers, a debt arrangement scheme system requiring a service of volunteer administrators would not be practicable. The Law Society did not think that the sheriff court staff, as presently organised, could accept the additional burden of operating the schemes. Apart from certain specialists in bankruptcy and liquidation, they would require extensive training on such matters as assessing whether a scheme should be made (having in mind the specialities of bankruptcy preferences, which the Society argued should apply in debt arrangement schemes, and of gratuitous alienations and fraudulent preferences) and adjudicating on claims. They suggested therefore that the administrator should be a chartered accountant specialising in bankruptcy work, possibly supplemented in the remote areas by solicitors. The costs of administration would be a charge on the debtor's payments, or in cases where the scheme was not confirmed, or broke down, or yielded insufficient income, by the Exchequer.

[1]Proposition 34 (para. 2.134).

4.223 The Scottish Law Agents Society was sceptical of the need for debt arrangement schemes, and pointed to the increase in the pressure on the time of the sheriff and court staff, which was already severe in many areas. They thought it necessary to ensure that a large additional bureaucracy should not emerge and tentatively suggested that administrators should be recruited from local authority social work departments.

4.224 We note that the Hughes Report on *Legal Services in Scotland* recommended that high priority should be given to developing a money management counselling service in Scotland, in consultation with Citizens Advice Bureaux and social workers.[1] Such a service might provide ultimately a source for the recruitment of persons qualified to act as administrators, but since it is not known whether or when the proposal will be implemented, other provision would require to be made at least in the meantime.

4.225 While we appreciate the difficulties involved in securing sufficient training for sheriff clerks, and while we acknowledge that the resources of the sheriff court are under pressure, we are firmly of the view that the function of administrator should, at least in the normal case, be performed by the sheriff clerk, or a member of his department. The sheriff clerk has easy and regular access to the sheriff; he has an existing staff, office facilities, record system, and an accounting system subject to government audit; he already collects instalments under criminal fines orders and compensation orders and in the latter case makes disbursements to members of the public.[2] It is envisaged that in cases where the debtor's affairs were complicated by gratuitous alienations, or unfair preferences, or by other factors, the sheriff could refuse the application.

4.226 There was no dissent on consultation from the suggestion that administrative duties of this kind would not be the best way of employing the skills of social workers, especially as they are already over-extended by their present duties. They might be regarded by creditors as over-sympathetic to debtors and conversely their relationship with their client—the debtor—might be prejudiced. Provision of administrators should not be a local authority function since the local authority will often be an important creditor. The appointment of a sheriff officer would be regarded by some as inconsistent with his duty of executing diligence, which he may require to do if a scheme is revoked. We doubt whether funds would be available to pay professional fees to chartered accountants and solicitors, and without adequate remuneration, they would have little incentive to act.

4.227 While we think that sheriff clerks or their subordinates would normally require to act as administrator, we think that it should be possible for the Secretary of State for Scotland, perhaps after experience of the working of the legislation has been obtained, to make one or more statutory instruments enabling other manpower resources to be tapped, whether throughout

[1](1980; Cmnd. 7846) para. 12.10: the Report recommends that the function of developing the service is to be entrusted to a newly constituted Legal Services Commission. The C.R.U. Debt Counselling Survey (1980) contains a wealth of valuable information on the existing "generalist" and specialist debt counselling agencies in Scotland.

[2]If our recommendations on conjoined arrestment orders in Chapter 6 were implemented, he would perform similar duties under such orders.

Scotland, or in particular sheriffdoms or sheriff court districts. Following the making of the statutory instrument relating to a court district or districts, the sheriff principal would compile and maintain a list of suitable persons who would be eligible for appointment as administrator. The Secretary of State should also be empowered to make regulations governing bonds of caution securing the due performance of the administrator's functions; resignation and removal from office; casual vacancies and other incidental matters.

4.228 It should be competent for professional persons (such as accountants or solicitors) to accept office as administrator on condition that they would be remunerated, and their remuneration should be governed by regulations made by the Secretary of State with consent of the Treasury. In such a case, the remuneration would be a prior charge on the debtor's in-payments if a scheme was confirmed. Any unpaid fees not met from that source (e.g. because the scheme terminated early), and the fees incurred in connection with a scheme application which was refused, would be met out of public funds.

4.229 We **recommend:**

(1) The legislation following on this report should provide that sheriff clerks, and their deputes and assistants, should be eligible for appointment as administrator.

(2) It should, however, be competent for the Secretary of State to institute arrangements whereby, throughout Scotland or in particular sheriff court districts, it would be competent for the sheriff to appoint a person from a list compiled by the sheriff principal.

(3) Subordinate legislation should govern such matters as resignation, removal from office, discharge and replacement for any necessary cause and, in the case of administrators who are not sheriff clerks or their assistants, caution and (where the administrator does not consent to act gratuitously) remuneration.

(4) Persons appointed from the list should be entitled to elect either to act gratuitously or to require payment of fees as a condition of acceptance of office. The fees would be a prior charge on payment made by the debtor under a confirmed scheme but to the extent that the fees were not so paid, they should be met by public funds.
(Recommendation 4.31; clause 36.)

Section F. The procedure in scheme applications

4.230 *Regulation of procedure.* In view of the distinctive and novel character of applications for debt arrangement schemes, ("scheme applications"), we have ventured to make full and detailed recommendations as to the relevant procedural rules which we propose should be largely embodied in primary legislation. These rules could be supplemented by procedural rules in an act or acts of sederunt made by the Court of Session under its existing wide powers.[1] We have not thought it necessary to submit detailed recommendations on the procedure in applications for variation or revocation of schemes or for

[1]Sheriff Courts (Scotland) Act 1971, s. 32.

discharge of debts which, we propose, should be regulated by act of sederunt so far as regulation is necessary.

4.231 *Lodging application.* An application for a debt arrangement scheme would be initiated by the debtor lodging in the sheriff court an application in a form prescribed by act of sederunt together with a statement of the debtor's affairs. As recommended later,[1] in relation to all procedures available to a debtor under the legislation following on this report, the sheriff clerk or his depute or assistant would be obliged, on request, to furnish the debtor with information as to the procedure to be followed in a scheme application and to assist the debtor in the completion of the forms of application and statement of affairs.[2] The competent authorities may wish to consider whether the application could be lodged by post or only "across the counter". The application and its relative statement of affairs would have to contain sufficient information to enable the court to check whether the scheme application was competent and could be entertained.

4.232 *Appointment of administrator.* If the application appeared on the face of it to satisfy the conditions of competence, the sheriff would make an order appointing an administrator.

4.233 *Administrator's initial functions.* At the same time as appointing the administrator, the sheriff would pronounce an interim order sisting diligence and the administrator's first duty would be to intimate copies of that interim order to the known creditors. The administrator would interview the debtor with a view to (*a*) assessing the debtor's financial circumstances; (*b*) explaining to the debtor the options open to him in making proposals for payment to his creditors through the medium of a debt arrangement scheme; (*c*) assessing whether any assets could or should be disposed of for payment of debts under the scheme out of the proceeds of sale; and (*d*) assessing generally whether a debt arrangement scheme would be feasible in the circumstances of the case. The order of priority of performing these functions would vary with the circumstances of each case.

4.234 *Statements of the debtor's affairs.* A statement of the debtor's affairs completed by the debtor would be lodged along with his application and at a later stage of the procedure, the same statement, or a fuller statement prepared by the administrator, would be sent to creditors and co-obligants of the debtor entitled to object to the scheme, along with the draft scheme. The statement served on creditors would require to give a full itemised account of the debtor's income, property and liabilities in order to provide the sheriff, the creditors and other interested persons with a full picture of the debtor's financial position as a basis for considering the proposals for payment set out in the draft scheme. It might be found by experience that the statement of affairs lodged with the application should be less full (and therefore perhaps less daunting to applicants for schemes) than the statement circulated to creditors since it would be designed mainly to enable the court and the administrator to check that the financial conditions of competence of schemes

[1]See Recommendation 9.6(1) (para. 9.31).

[2]We also propose that court dues would not be exigible: see Recommendation 9.6(5) (para. 9.31).

were satisfied. The administrator could then elicit from the debtor and other sources the fuller information required for the final statement of affairs circulated to creditors. The contents and form of the statements of affairs should be regulated by act of sederunt, but we suggest that the statement circulated to creditors should disclose the following information:

(*a*) the debtor's name, address and occupation (whether employed, self-employed or unemployed); his or her liability (if any) for dependants (e.g. wife and children supported by debtor and the children's ages), whether alimented in cash or in kind, and particulars of any award of aliment or periodical allowance against or in favour of the debtor;

(*b*) details of any creditors holding a decree for payment which had not been satisfied and information on whether any debt had been or was being enforced by a diligence on the dependence, in security or in execution;

(*c*) details of other debts presently due (including electricity, gas, rent and rates arrears) and of any court action or decree, or any order controlling enforcement under the Consumer Credit Act 1974 relating to those debts; details of any future, contingent or other debt which would be excluded from the scheme;

(*d*) whether the debtor's residence is owned or rented by him; in the case of an owner-occupier, information as to any heritable security; and particulars of any other land or buildings owned or rented by him and of any security;

(*e*) information as to moveable goods, especially goods not likely to be exempt from poinding, owned by the debtor, together with a reasonable estimate of their value; this would cover not only details of any car owned by the debtor but also non-essential household goods together with a reference to any hire purchase or conditional sale agreement affecting the goods;

(*f*) details of co-debtors or guarantors liable along with the debtor;

(*g*) particulars of cash, shares or other savings of the debtor and his or her spouse;

(*h*) information as to the income of the debtor from all sources (the items here varying according as the debtor was employed, unemployed or self-employed) and perhaps also as to the over-all income of the debtor's household;

(*i*) a list of the continuing expenses requiring to be met by the debtor to enable him and his dependants to maintain a reasonable standard of living, including food, clothing, outgoings on the home (rent, secured loan payments, hire purchase or hire payments on necessary goods, rates, house insurance premiums, heating and lighting charges) and also periodic subscriptions to trade unions or professional bodies, and the cost of transport to and from work. The statement should show all the continuing payments which the debtor proposed to make outside a scheme while the scheme was in force.

The statement served on creditors should be accompanied by a declaration

by the debtor that the statement is a full and accurate statement of his financial affairs.[1]

4.235 *Public advertisement for claims.* In our Consultative Memorandum No. 50[2] we suggested that, while the application for a scheme and the interim order appointing the administrator should be available from public court records to the public (e.g. credit rating or reference agencies), in the interests of existing and prospective creditors, advertisement might also be made in the Edinburgh Gazette. No advertisement should be made in the newspapers because the resulting intrusion on privacy and embarrassment might deter debtors from applying for a scheme. On consultation, however, several bodies argued that there should be provision for advertisements inviting creditors to lodge claims, at least in some cases. One body suggested that the normal rule should be advertisement subject to the sheriff's power to dispense with the requirement. Another body suggested advertisement in one newspaper and the Edinburgh Gazette.

4.236 The object of an advertisement would primarily be to ensure that creditors were not erroneously omitted from a debt arrangement scheme. Since a debtor would not obtain a discharge or composition in respect of a debt not inlcuded in a scheme, he would have a strong interest to disclose all debts. As stated above, if a creditor were erroneously omitted, he would have the right to apply for late inclusion or revocation of the scheme or to wait till the termination of the scheme and to enforce his debt in full by diligence. In any event, there is no guarantee that an advertisement would be seen by an omitted creditor. In the circumstances, we propose that, as a general rule there should be no public advertisement in the Edinburgh Gazette or newspapers for creditors' claims, but the sheriff should have power, on the administrator's application, to permit such an advertisement if he were satisfied that there was likely to be an eligible creditor who had not been listed in the statement of affairs or otherwise identified by the administrator. In general, we think that advertisements for claims should be kept to a minimum as an undesirable intrusion on the debtor's privacy, and as a possible deterrent to debtors from applying for debt arrangement schemes. We propose that the cost of the advertisement would be met by the debtor.

4.237 *Verification of debts.* Within a period prescribed by act of sederunt, the administrator should serve on each creditor known to the administrator whose debt was eligible for inclusion in the scheme a notice which would state the amount of the creditor's debt as at "the first notice date" and require the creditor to inform the administrator in writing within 10 days (i) whether he accepted that the amount was correctly stated and, if not, to correct it, and (ii) of any claim for interest on his debt accrued to the first notice date. Failure to comply with the notice would debar the creditor from objecting to the scheme on the ground that the debt or interest was erroneously omitted or stated, unless he could show cause (e.g. that he had not received the notice).

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[1]Any statement false in a material particular made in a statutory declaration is an offence under the False Oaths (Scotland) Act 1933, s. 2.

[2]Para, 2.87.

4.238 We **recommend:**

(1) A scheme application should be initiated by lodging a form prescribed by act of sederunt and a statement of affairs containing particulars also prescribed by act of sederunt.

(2) If the application appears to satisfy the conditions of competence of scheme applications, the sheriff would make an order appointing an administrator.

(3) Within a prescribed period the administrator should require creditors within 10 days to verify their debts and state whether interest accrued before the first notice date was claimed. Failure of a creditor to do so would normally bar him from objecting to the scheme on the ground that the debt or interest was not included or was incorrectly stated in the scheme.

(4) There should be no advertisement for creditors' claims unless ordered by the sheriff. The expenses of any advertisement should be met by the debtor.

(Recommendation 4.32; clause 19.)

4.239 *Protection of creditors' interests.* In seeking to strike a fair balance between the interests of debtors and creditors, we have already recommended important measures to protect creditors, including among other things recommendations that a scheme application, while it was pending, should not prevent the attachment (as opposed to the sale or handing over) of moveable property by poinding or arrestment in common form,[1] nor prevent the inhibition of heritable property transactions,[2] and also recommendations on damages for wrongful diligence, on the recovery of expenses, on second poindings,[3] and on prescription of the debtor's obligations of payment.[4] Further, an application for a scheme would not bar a creditor's application for sequestration if the creditor could show undue prejudice in an application to the sheriff for leave to petition.[5] Other safeguards include powers and duties to refuse a scheme application and undertakings not to remove or dispose of goods, to which we now turn.

4.240 *Powers to refuse scheme application apart from creditors' objections.* In our Consultative Memorandum No. 50, we suggested that the administrator should be entitled to apply to the sheriff for an order dismissing the debtor's application on the ground that the application was not competent or that a debt arrangement scheme would have no reasonable prospect of success.[6] We also suggested a third ground, namely that the debtor had failed to disclose all relevant information or to give assistance reasonably requested by the administrator in connection with the proceedings or had otherwise failed to carry out his duties.

4.241 The proposals were accepted but one body suggested that the third ground should be subject to the qualification that the principal criteria should

[1]Para. 4.109; Recommendation 4.13(3)(*a*)–(*d*).
[2]Para. 4.109; Recommendation 4.13(3)(*f*).
[3]Para. 4.148; Recommendation 4.18(2) to 4.18(4).
[4]Para. 4.216; Recommendation 4.30.
[5]Para. 4.311; Recommendation 4.46(4).
[6]Proposition 9 (para. 2.36).

be the first two and that the third ground should not lead the administrator to apply for dismissal of the proceedings if he took the view that the scheme had a reasonable prospect of success. We accept this qualification since, notwithstanding the debtor's lack of co-operation on a specific matter, the scheme may be feasible and in the best interest of creditors.

4.242 We propose therefore that the sheriff, at any time while the scheme application was pending, should be under a duty to refuse the scheme application if he was satisfied that the debtor was unlikely to comply with a scheme. This would cover cases where the scheme application had been made in bad faith or where for other reasons it was clear that a scheme was not feasible. The sheriff should also have a power (as opposed to a duty) to refuse an application if the debtor had failed to disclose information relevant to the preparation of the scheme or had otherwise failed to co-operate with the administrator. The sheriff would also have a duty to refuse a scheme application if he was satisfied that the conditions of competence were not met, or the financial conditions (the £10,000 limit on indebtedness and the minimum product threshold[1]) were to a substantial extent not met, or that a scheme application, though competent when made, had been superseded by an award of sequestration (competently granted on the petition of a creditor unaware of the scheme application or in pursuance of leave to petition granted by the sheriff under proposals made below) or trust deed for creditors or composition contract.

4.243 On or after refusing a scheme application, the sheriff would recall the interim order sisting diligence. Generally we propose that the sheriff's decisions under the implementing legislation should be appealable, by leave of the sheriff, on questions of law, and we propose that the recall of the interim sist of diligence should not take effect till the expiry of the appeal days or the disposal of any appeal against the refusal of the application.

4.244 We **recommend:**

(1) The sheriff at any time during a scheme application, acting on his own or the administrator's motion without objection by a creditor, should have:

   (*a*) a *duty* to refuse a scheme application if he was satisfied that the conditions of competence were not met, or the financial conditions were to a substantial extent not met, or that the debtor was unlikely to comply with a scheme, or the application was incompetent by reason of sequestration proceedings or a trust deed for creditors or composition contract;

   (*b*) a *power* to refuse a scheme application on the debtor's failure to disclose information to, or to co-operate with, the administrator.

(2) The debtor should have an opportunity to make representations before the sheriff reaches his decision.

(3) On refusing the scheme application, the sheriff should recall the interim order sisting diligence but the recall should not take effect until the expiry of the days of appeal against the refusal of the scheme application

[1]See para. 4.72; Recommendation 4.9(5).

or the disposal of any such appeal.
(Recommendation 4.33; clause 21.)

4.245 *Undertakings not to dispose of or remove property.* Having regard to the relatively limited scope of the restrictions on diligence while an application for a debt arrangement scheme was pending,[1] and to the need to keep the procedure simple, it should not be necessary to confer on the sheriff powers to make interim orders preventing the debtor from voluntarily disposing of his property to the prejudice of creditors, and affecting the rights of third parties transacting with the debtor, pending a scheme application.

4.246 Thus, until a debt arrangement scheme was made, a creditor would be able to register an inhibition in the personal registers, thereby preventing the debtor from granting any voluntary conveyance (including any conveyance in security) of his heritable estate. We considered whether the administrator should be empowered to record in the personal registers a statutory notice of litigiosity having a similar effect to an inhibition, but this would seem to be an unnecessary complication in a procedure which should be kept as simple and inexpensive as possible. The administrator, who would usually be a sheriff clerk, would have to be given a statutory title to raise an action of reduction to enforce the notice at public expense, and special provision would be necessary regulating the duration of the notice including its cancellation if the scheme application were unsuccessful, and as to its possible recall and renewal. On balance, it seems better to rely on the creditors' powers to register inhibitions which would effectively preclude disposal of heritable property.

4.247 Similarly, an interim sist of diligence would not prevent a creditor from laying an arrestment against funds of the debtor in the hands of third parties (e.g. bank accounts) notwithstanding the proceedings for a debt arrangement scheme and this right, together with the right of other creditors holding liquid documents of debt to claim an equal share of the arrested funds under existing legislation[2] would seem to protect creditors adequately without the need for new provisions conferring on the court or administrator special powers to attach funds pending debt arrangement scheme proceedings.

4.248 Not infrequently, the debtor may have property of value which had not been poinded, arrested or affected by an inhibition. Again the scheme may include a condition requiring the debtor to realise property in order to make payment to creditors out of the proceeds of sale.[3] Clearly the debtor should not be entitled to abuse the procedure by disposing of valuable property. We propose therefore that it should be competent for the administrator to require the debtor to give an undertaking not to dispose of specified articles of moveable property pending disposal of the scheme application. On any breach of the undertaking, the sheriff would have a power to refuse the scheme application; a duty of refusal would seem unnecessarily inflexible since the breach might have been inadvertent and the scheme might be in the best interests of creditors notwithstanding the breach.

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[1]See Recommendation 4.13(3) (para. 4.109) above.

[2]Bankruptcy (Scotland) Bill 1984, Sched. 7, para. 10, replacing Bankruptcy (Scotland) Act 1913, s. 10.

[3]See Recommendation 4.4 (para. 4.47).

4.249 We **recommend:**

The administrator should be empowered to require the debtor not to dispose of or remove property from a place in Scotland. The sheriff should have a power to refuse the scheme application if the undertaking was breached. (Recommendation 4.34; clauses 20(6) and 21(3)(*b*).)

4.250 *Power to order valuation of items of property.* We think that the court should possess power to make a remit to a sheriff officer or any other suitable person such as a specialist valuator to make a valuation of items of the debtor's property. Such a power could be useful in deciding whether a provision should be included in a scheme requiring the debtor to dispose of property and pay the proceeds to the administrator for disbursement under the scheme, and might be useful in other circumstances, which we think would be exceptional. We think that the debtor should bear the expense of any valuation.

4.251 We **recommend:**

The sheriff should have power to order a valuation of items of property of the debtor, the cost of which should be borne by the debtor. (Recommendation 4.35; clause 22(3) and (4).)

Preparation and service of draft scheme, and title to object

4.252 On the expiry of the 10-day period for verification of debts and for claims for interest, the administrator would prepare, or complete his preparation of, a draft scheme. To ensure that the scheme would state the debtor's proposals for payment, not what the administrator thought that the debtor should or could pay, the administrator would be required to prepare the draft in consultation with the debtor and, as mentioned above, the debtor would be entitled to withdraw his application at any time. The administrator would also complete his investigation of the debtor's affairs.

4.253 The administrator would serve, on the parties entitled to object to a scheme, a copy of the scheme application and of the draft scheme, a statement of the debtor's affairs (being the statment lodged by the debtor as checked or revised by the administrator or a new statement prepared by the administrator) and also a notice stating that objection may be made to the scheme by notice in writing to the administrator within a prescribed period after the date of service. We think that, as the Law Society of Scotland suggested, three weeks would be an appropriate period, but the period should be variable by act of sederunt in the light of experience.

4.254 To ensure that the procedures were carried through reasonably quickly, the service of the notice giving an opportunity to object should be effected by the administrator within a period prescribed by act of sederunt after his appointment but the sheriff would have power to extend the period on cause shown.

4.255 We propose that the following persons would have a title to object to the scheme, namely:

(*a*) the creditors entitled to be included in the scheme;

(*b*) creditors excluded from the scheme under the rules proposed above who may nevertheless become eligible for inclusion under those rules,

namely creditors in debts which at the first notice date were future; contingent (including co-obligants of the debtor having contingent claims of relief against him); disputed; due under agreements subject to proceedings under the Consumer Credit Act 1974, section 132 or 139; secured by adjudications or contractual securities, or by liens over goods; enforceable by sequestration under the hypothecs or poinding of the ground; or due under hire purchase or conditional sale agreements;

(*c*) co-obligants bound jointly and severally with the debtor even though they may be debarred by contract from ranking in the scheme to recover a claim of relief against the debtor;

(*d*) maintenance creditors not claiming arrears and so not included in the scheme.

The creditors in category (*b*) would have a direct interest in whether a scheme should be made since they would all lose the right to enforce their debts by the ordinary modes of diligence for the duration of the scheme, and they would also have an interest in the terms of the scheme as being potential included creditors. Even "contingent creditors" (who could include persons likely never to become true creditors at all) would have an interest since they would lose the right to seek a warrant for diligence in security, and in some cases the occurrence of the contingency might be probable rather than remote, as where a co-obligant was about to pay the creditor and rank in the scheme by virtue of his right of relief. Probably every co-obligant would have an interest to object to a scheme other than a co-obligant who was severally liable and had no contingent right of relief against the debtor. A co-obligant having a contingent right of relief might be debarred by contract from ranking in the scheme in competition with the creditor but would have an interest to object since, during the currency of the scheme, he would be debarred from enforcing his right of relief by diligence. The scheme would preclude the enforcement of maintenance and recall existing diligences enforcing maintenance though the maintenance creditor had not ranked for arrears. The maintenance creditor would therefore have an interest to object. Accordingly, the draft scheme and other documents would require to be served on all those creditors.

4.256 We **recommend:**

(1) Within a prescribed period, which may be extended by the sheriff on cause shown, the administrator should prepare a draft scheme and serve it on the parties entitled to object to a scheme together with a copy of the scheme application, a full statement of the debtor's affairs so far as known to the administrator, and a notice giving an opportunity to object in writing within three weeks (or other period prescribed by act of sederunt) after service.

(2) The following parties should be entitled to object to a scheme, namely:

(*a*) the included creditors;

(*b*) excluded creditors who may become eligible for inclusion;

(*c*) any co-obligant of the debtor who on paying the debt would acquire a right of relief against the debtor; and

(*d*) maintenance creditors, though not ranking in the scheme for arrears.
(Recommendation 4.36; clause 22(1) and (2).)

Obtaining confirmation of scheme by sheriff

4.257 On consultation,[1] there was general agreement that meetings of creditors should not be called in scheme applications. Such meetings would unduly complicate the procedure and legislation since elaborate provision would be required regulating the calling of meetings, proxies, quorums, adjournments and the like. In the United States, where wage-earners' plans had to be accepted by a majority in number and value of creditors, experience showed that few creditors bothered to attend meetings or even qualified to vote by lodging claims. The U.S. Federal Bankruptcy Commission recommended the abolition of creditors' meetings and argued that an independent determination by the court that a plan met certain statutory standards (e.g. that the wage-earner's plan is in the best interests of creditors and is feasible and the proposal for a plan is in good faith) provided the best protection for creditors.[2] In England and Wales, the grant or refusal of an administration order depends on judicial discretion and the creditors have only a right to be heard.[3] In our Consultative Memorandum No. 50, we suggested certain statutory guidelines or standards,[4] and while there was little dissent by consultees, we think, on reflection, that general guidelines are unnecessary.

4.258 We also suggested that if a majority in number and value of the creditors objected to a draft scheme, the proceedings should be dismissed by the sheriff. The Committee of Scottish Clearing Bankers thought that a majority in value should suffice. On reflection, however, we reject both solutions. A majority in value would require the valuation of securities, and of future, contingent and disputed debts, which we rejected as too complex. Moreover, if debt collection agencies, for example, were to adopt a policy of objecting to schemes on principle, the legislation might become useless.

4.259 If no creditor objected to the scheme within the prescribed period, the sheriff would confirm the scheme. A power to correct any minor error (such as a drafting or arithmetical mistake) without re-service on creditors might be useful. If a creditor did object, the administrator would intimate the objection to the debtor, the other creditors and any co-obligants on whom the application had been served. Having regard to the wide variety of objections which might be made, to require a hearing in every case in which an objection was made would appear to be an unduly rigid rule. An objection might relate to a minor matter which could be resolved without recourse to a full hearing, such as a change in the specified intervals between disbursements or even a small increase in the level of the debtor's in-payments. We suggest

[1]Consultative Memorandum No. 50, para. 2.82.

[2]U.S. Bankruptcy Report, pp. 162–3.

[3]County Courts Act 1984, s. 112. The same solution is adopted in New Zealand for summary instalment orders under the Insolvency Act 1967 (New Zealand) s. 146.

[4]Viz. (*a*) that the scheme has a reasonable prospect of success; (*b*) that the public interest does not require the sequestration of the debtor's estate; and (*c*) that it would otherwise be reasonable to make an order confirming the scheme, having regard to all the circumstances, including the interest of any objecting creditor: Proposition 29(2) (para. 2.84).

therefore a flexible procedure whereby the parties would be given an opportunity to make representations on the objection and only if agreement was not reached as to whether a scheme should be confirmed or as to its terms would a hearing before the sheriff be held.

4.260 At any hearing, we would expect that the sheriff would allow the creditors and any co-obligants concerned or their representatives,[1] to question the debtor as to his financial position and willingness or ability to meet his obligations under the scheme, and also as to any conduct prejudicing creditors which may be alleged or suspected, such as recent gifts to his family or associates, or the granting of unfair preferences, or concealment, disposal or undervaluation of assets, or collusive inclusion in the scheme of fictitious creditors to the prejudice of the real creditors.

4.261 The sheriff should be under a duty to refuse the scheme application if he was satisfied as to the mandatory grounds of refusal mentioned at paragraph 4.244 above. Otherwise, he would have a discretion to confirm the scheme application with or without modifications.[2]

4.262 *Intimation of sheriff's decision.* The sheriff's order confirming a scheme and the scheme itself should be intimated by the administrator to the debtor, and to the parties entitled to object. The order (but not the scheme) should also be intimated to any employer who was operating an earnings arrestment or a current maintenance arrestment against the debtor's earnings since we have proposed[3] that the scheme should render those diligences ineffectual. Where a conjoined arrestment order was being operated by the sheriff clerk of the court in which the order confirming the scheme was made, the sheriff would recall the conjoined arrestment order and that recall would be intimated to the employer.[4] Where a conjoined arrestment order was being operated by the sheriff clerk of a different court, the administrator would intimate the confirmation order to that sheriff clerk, who would arrange for the recall of the conjoined arrestment order and intimation of the recall to the employer.[5]

4.263 Where the sheriff refused the scheme application, he would at the same time recall the interim sist of diligence. The refusal of the application would be intimated by the administrator to the debtor, creditors and any co-obligants who had recived copies of the scheme application and the recall of the interim sist would be intimated to the creditors affected by it.

4.264 The sheriff's decision confirming a scheme should not take effect until the days of appeal (which would be competent on a question of law only) had expired or any appeal taken had been disposed of. Intimation of the confirmation of the scheme to an employer or sheriff clerk operating a diligence against earnings would be effected only after the scheme had taken

[1]We propose at Recommendation 9.6(2) (para. 9.31) below that provision should be made by act of sederunt allowing lay representation in hearings under the legislation following this report, including applications for debt arrangement schemes.

[2]The modifications could include an extension of the duration of the scheme to be a period of up to five years in all; see Recommendation 4.2(3) (para. 4.41).

[3]Recommendation 4.14(2) (para. 4.118).

[4]See para. 6.266, and Recommendation 6.50(1) and (2) (para. 6.270).

[5]*Idem.*

effect: intimation to other parties would be made forthwith. The interim sist of diligence would be recalled immediately since the order confirming the scheme would itself preclude new diligences while the order is appealable or subject to appeal.[1]

4.265 We **recommend:**

(1) If no objections are made to a scheme, the sheriff should make an order confirming it. It should be competent for him to modify it without re-service on creditors to correct any error in it not materially affecting the interest of any creditor.

(2) Any objection should be intimated to the debtor and the creditors and co-obligants entitled to object who should be given an opportunity to make representations and, failing agreement as to the confirmation or terms of the scheme, an opportunity to be heard.

(3) Following objections or representations by creditors, the sheriff should be under a duty to refuse a scheme application on the same grounds as require him to refuse such an application on his own or the administrator's motion in terms of Recommendation 4.33 (paragraph 4.244) above.

(4) In any other case, the sheriff should have a discretion to confirm the scheme with or without modifications or to refuse the scheme application, subject to the requirement to disregard objections by preferred creditors and creditors wishing to sequestrate proposed at Recommendations 4.11(3) (paragraph 4.96) and 4.46(5) (paragraph 4.311).

(5) An order confirming a scheme or refusing a scheme application should recall the interim sist of diligence.

(6) The administrator should forthwith intimate an order confirming a scheme (together with a copy of the scheme) or an order refusing a scheme application to the debtor, the creditors and co-obligants who received copies of the scheme application. On the coming into force of the scheme, he should also intimate the order confirming the scheme to an employer operating an earnings arrestment or current maintenance arrestment, or to a sheriff clerk operating a conjoined arrestment order in a different court.

(7) An order confirming a scheme or refusing a scheme application, should not take effect until the expiry of the appeal days or the disposal of any appeal, but in the case of an order confirming the scheme, the recall of the interim sist of diligence should take effect immediately. (Recommendation 4.37; clause 24(1)–(4) and (7)–(10).)

Section G. Publication, operation, variation and termination of debt arrangement schemes

4.266 *Publication of debt arrangement schemes.* We propose that public notice of debt arrangement schemes should be given by registration in the register of insolvencies (formerly the Register of Sequestrations), which is a

[1]See Recommendation 4.14(1) (para. 4.118).

public register kept under bankruptcy legislation[1] by the Accountant of Court,[2] but not by advertisements in the newspapers or the Edinburgh Gazette. Further, in each of the sheriff courts, the sheriff clerk should keep a register of schemes which would be open to inspection at all reasonable times by members of the public on payment of a small prescribed fee. The registers would contain particulars prescribed by act of sederunt of discharges of debts and termination of schemes as well as the schemes themselves.[3]

4.267 We **recommend:**

Prescribed particulars of schemes, discharges of debts and termination of schemes should be registered in the register of insolvencies and by each sheriff clerk in a public register for his own court.
(Recommendation 4.38; clause 38(1) and (3).)

4.268 *Pay deduction orders ancillary to schemes.* On consultation, there was general agreement with our suggestion[4] that the sheriff should be empowered to make an order requiring payment of a part of the debtor's wages or salary to the administrator for disbursement to the creditors. In Chapter 6 below, we recommend the introduction of new types of earnings arrestment in which the deductions from earnings would be made in accordance with fixed rules in order to avoid the need for a compulsory means enquiry. In the case of a debt arrangement scheme, however, the periodic amounts which the debtor could afford to pay to his creditors would already have been determined on the basis of the debtor's voluntary disclosure of his means and, accordingly, a judicial order for deduction of earnings at source could be made without a compulsory means enquiry. Such a pay deduction order would not be inconsistent with the voluntary character of scheme applications: once a scheme voluntarily applied for had been confirmed, a pay deduction order would give some assurance, however imperfect, to creditors that the debtor would comply with the scheme. The power to make such an order seems essential even though the risk of larger deductions than would be possible under earnings arrestments might deter some debtors from applying for schemes. There are precedents in bankruptcy legislation. In sequestrations under the Bankruptcy (Scotland) Act 1913, the court (on the trustee's application) could grant a declaratory order vesting the bankrupt's after-acquired earnings in the trustee,[5] and though such an order bound the bankrupt rather than the employer, the revised provision in the Bankruptcy (Scotland) Bill 1984 would—it is thought—enable the court directly to require the employer to deduct and remit future earnings.[6]

4.269 We propose therefore that on or after confirming a scheme, the court should have a power, after giving the debtor an opportunity to make representations, to make an order requiring the employer to deduct and pay

[1]Bankruptcy (Scotland) Bill 1984, clause 1(1)(*c*) replacing Bankruptcy (Scotland) Act 1913, s. 156.

[2]As Accountant in Bankruptcy under the 1984 Bill.

[3]Registration would be a facility for creditors not imputing to them constructive knowledge of schemes; Recommendation 4.18(2)(*b*) (para. 4.148).

[4]Consultative Memorandum No. 50, Proposition 31(2) (para. 2.95).

[5]Bankruptcy (Scotland) Act 1913, s. 98(1); *Caldwell* v. *Hamilton* 1919 S.C. (H.L.) 100.

[6]Bankruptcy (Scotland) Bill 1984, cl. 31(2) and (3); cf. Bankruptcy (Scotland) Act 1913, s. 98(2) construed in *Wilson* v. *Shaw* (1926) 46 Sh.Ct.Reps. 133.

to the administrator the whole or part of the debtor's earnings specified in the order. In some cases, e.g. where the debtor had other sources of income, it may be appropriate to attach the whole of the earnings from a part-time job. The employer should not be liable for failure to comply with the order until seven days had elapsed after intimation.[1] The same fee should be exigible by the employer as we recommend in Chapter 6 in the case of the new diligences against earnings.[2] The order should be subject to variation or recall and should subsist until cessation of employment or until the employer received intimation of recall of the order or termination of the scheme. The order is intended to be a means of securing payments by the debtor to the administrator under the scheme as they fall due; if for some reason (e.g. fluctuation in earnings) a larger amount than the sum currently due was paid by the employer to the administrator, the excess should be paid over to the debtor without delay. The administrator should be entitled to recover from the employer by diligence sums payable under the pay deduction order and the employer's wilful breach of the order would be punishable as a contempt of court without the need for express legislation to that effect.

4.270 We **recommend:**

(1) On or after confirming a scheme, and after giving the debtor an opportunity to make representations, the sheriff should be empowered to make an order requiring an employer of the debtor to deduct and pay to the administrator on each pay day the whole or a specified part of the debtor's earnings until cessation of the employment or intimation of either an order to cease payments or the termination of the scheme.

(2) The employer should have seven days' grace before being required to operate the order.

(3) If the employer does not comply, the administrator should be entitled to obtain an order for the recovery by diligence of the sums which the employer should have deducted and the employer should not be entitled to recover those sums from the debtor.

(4) An employer should be entitled to the same fee on each pay day as an employer operating an earnings arrestment would under Recommendation 6.21 (paragraph 6.125) below.

(5) The administrator should hand over to the debtor any sums paid by the employer in excess of those currently due by the debtor to the administrator under the scheme.

(6) The order should be subject to variation or recall by the sheriff. (Recommendation 4.39; clause 25.)

4.271 *Extent of supervision by administrator.* In our Consultative Memorandum No. 50, we sought views on whether the administrator should be empowered to permit a debtor who had complied with a scheme for a prescribed period to act as his agent in collecting and disbursing moneys due to the creditor.[3] This suggestion, which followed precedents in other countries, was designed to encourage the debtor to budget and manage his own affairs,

[1] See para. 6.97; Recommendation 6.13.
[2] See paras. 6.124 and 6.125; Recommendation 6.21.
[3] Proposition 31(3) (para. 2.95) and para. 2.94.

and to prevent him from becoming dependent on the support and tutelage of the administrator since a primary aim of the legislation is to promote the debtor's financial rehabilitation. However, this proposal was opposed by all who commented, including debt counselling interests, and we therefore reject it. We envisage that the administrator would keep the scheme constantly under review and monitor closely the debtor's in-payments. Given that the administrator would normally be a sheriff clerk or his depute or assistant, it seems unlikely that the administrator could or should have a statutory duty of "money management counselling" or (as in the case of New Zealand supervisors under summary instalment orders[1]) a power of supervising the payment out of earnings of the reasonable living expenses of the debtor and his family. There should, however, be nothing to prevent the administrator from giving informal advice and even encouragement on these matters, and the system would require that a debtor in difficulties should feel free and able to contact the administrator to explain those difficulties.

4.272 *Disclosure of information.* The debtor should be under a duty to disclose to the administrator any material changes in his circumstances occurring during the currency of the scheme. Further, the administrator should be bound to report to an included creditor on the debtor's performance of his obligations under the scheme, if a request for such a report was made by such a creditor. But to prevent the unreasonable repetition of requests by a creditor for reports, the sheriff should have a power to make directions as to whether or when a report should be made.

4.273 *Interdict against disposal or removal of property.* Once a debt arrangement scheme is in operation, it may become clear that the debtor has assets which ought to be made available to creditors whether by diligence or insolvency proceedings but which have been recently acquired or were not disclosed to the administrator. In such a case, it should be possible for the court, on cause shown, to pronounce an interdict prohibiting the debtor from disposing of or removing from Scotland any items of property specified in the interdict in order to protect creditors while, for example, consideration is given to bringing an application for revocation of the scheme or pending such an application.

4.274 We **recommend:**

(1) The debtor should not act as the administrator's agent in making payments to creditors.

(2) The debtor should be bound to disclose a material change in his circumstances to the administrator and subject to any direction by the sheriff, the administrator should, on request, report to creditors on the debtor's compliance with the scheme.

(3) The sheriff should be empowered, on cause shown by the administrator, a creditor or co-obligant, to interdict the debtor from disposing of property or removing property from any place in Scotland.
(Recommendation 4.40; clause 26(1) to (3).)

4.275 *Variation of debt arrangement scheme.* We dealt above with variations

[1]Insolvency Act 1967 (New Zealand), s. 146(9).

of a scheme to include an omitted debt. In addition we think it should be competent for any creditor included in a debt arrangement scheme to apply to the court for variation of the scheme, e.g. for an increase in in-payments and disbursements, where a material change in the debtor's financial position had occurred which might make such a variation reasonable. There may be cases where it comes to light that a debt, or part of a debt, had been wrongly included in a scheme; as where it was accepted as valid by the debtor in good faith and listed in his statement of affairs. On the other hand, where the debtor had listed the debt to give an unfair preference at the expense of other creditors, revocation of the scheme might be the appropriate remedy. The debtor and the included creditors generally (but not omitted creditors) should be entitled to oppose an application for variation by an included or omitted creditor.

4.276 We consider that the court should also have a general power to vary a scheme exercisable, on the debtor's application, not only where there had been a demonstrable change in his financial position (for example, through sickness or unemployment) but also where for example it appeared to the court that the original level of payments had been shown by experience to be unduly high. Most of the comparable systems which we have examined enable the court or administrator to vary the scheme where a debtor is unable to continue payments. For example, in the English administration order system, if at any time it appears to the court that the debtor is unable from any cause to pay any instalment, the court may suspend the order for such time and on such terms as it thinks fit, or vary the amount of instalments.[1]

4.277 The variation of a scheme should not have the effect of reducing the amounts payable under the scheme to any creditor below the amount already disbursed to him, e.g. if the composition was lowered following the inclusion of a debt in the scheme. The sheriff's discretion to confirm a scheme should, in our view, not be controlled by general statutory guidelines, and we think that the same solution should apply to the variation, and indeed the revocation, of a scheme.

4.278 *Subrogation.* A simpler procedure than an application to the sheriff for variation, intimated to all creditors, is required in the case where the only amendment desired is to subrogate a new creditor (such as an assignee, executor or statutory successor[2]) in place of an existing creditor in respect of the whole or part of an included debt. Here we think that the subrogation should be effected by the administrator on an application by the new creditor accompanied by documents (e.g. an assignation or will) deducing title to the included debt. The application would be intimated only to the original creditor (unless he were deceased) and would be granted if the documents disclosed a good title to the debt. An appeal by the applicant or the original creditor to the sheriff should be competent against the administrator's decision in the application.

4.279 We **recommend:**

[1]County Court Rules 1981, Order 39, rule 14.

[2]E.g. the Secretary of State under the Employment Protection (Consolidation) Act 1978, s. 125; see paras. 4.86 and 4.95 above.

(1) The sheriff should have a discretionary power, on cause shown, to vary a scheme on the application of any creditor (included or not), the debtor or the administrator, after giving the debtor and the included creditors an opportunity to make representations.

(2) A variation should not reduce the amount payable to a creditor under the scheme below the sums already disbursed to him under the scheme.

(3) When the right to payment of an included debt is assigned or transmits from the creditor to another person, there should be a simple procedure to enable the administrator to vary the scheme by subrogating the new creditor in place of the original creditor.
(Recommendation 4.41; clauses 27; 28(7) to (9).)

4.280 *Revocation of debt arrangement scheme.* Regrettably, it is likely that a significant number of debtors would default at some point in the life of a scheme because of the high level of self-discipline which compliance with the scheme would require: we understand that the "mortality rate" of English administration orders, New Zealand summary instalment orders and American wage-earner plans is quite high. In considering what default should justify revocation of a scheme, a balance must be struck between the need to prevent a debtor's abuse of the procedures for the purpose of escaping diligence and the need to give the debtor sufficient opportunity to comply with the scheme notwithstanding occasional crises which adversely affect his ability to pay. The proper course for a debtor in difficulties would be to apply for a variation, but he may neglect to do so.

4.281 The administrator would immediately identify default and investigate the reasons for it. We do not propose any system of automatic lapse such as we recommend for time to pay directions and orders (which have no official of the court supervising their operation). The statutory framework should be sufficiently flexible to allow appropriate action to be taken. The creditors and the administrator would have a right to apply for revocation of the scheme or its variation. If it appeared to the administrator that the scheme should be varied (e.g. by a change in the level or frequency of the instalments or temporary suspension of payments), or revoked, he should apply to the sheriff for variation or revocation. The sheriff should have power to revoke the scheme, as an alternative to variation, after giving the parties an opportunity to make representations.

4.282 In our Consultative Memorandum No.50 we suggested, following precedents elsewhere, that specific grounds of revocation other than default should also be prescribed.[1] While we think that revocation on grounds of "misconduct" should be competent quite apart from default, we consider that the administrator and creditors should have a discretion on whether or not to apply to the sheriff where misconduct occurs or the risk of abscondence arises, and that the sheriff should have a discretion to make such order as seems reasonable in the circumstances: though a debtor might have been

[1]Para. 2.110. These were (*a*) that the debtor had given false information to the administrator in his statement of affairs (e.g. particulars of a creditor or debt) or otherwise; (*b*) that the scheme amounted to a fraud on a particular creditor or creditors; (*c*) that the debtor had failed to fulfil his duties under the scheme, or to obey a direction by the administrator or an order of the court; and (*d*) that the debtor had absconded or was likely to abscond or leave the jurisdiction.

temporarily non-co-operative, it might be in the best interests of creditors to continue with the scheme, e.g. if a pay deduction order was operating successfully.

4.283 *Effect of revocation.* We consider that, where a scheme was revoked, it should not necessarily be replaced automatically by the sequestration of the debtor. The expenses of a sequestration might swallow up the debtor's non-exempt assets and it might be to the advantage of the creditors to instruct diligence or for the debtor to grant a trust deed for creditors. On revocation of the scheme, the creditors' rights to enforce their debts in full by diligence or to petition for sequestration would revive and it should be for the individual creditors to choose which course to adopt. Since revocation would have irreversible effects on the rights of parties, we consider that it should not take effect till the expiry of the appeal days or the disposal of any appeal (which under proposals in Chapter 9 would be confined to questions of law).

4.284. *Sanctions against debtor for default or "misconduct".* The main sanction against a debtor who did not comply with a scheme should be sequestration or renewed diligence. Where the debtor had made a false statement or was guilty of fraud, then he would be liable to prosecution under the False Oaths (Scotland) Act 1933 or at common law. In our Consultative Memorandum No. 50,[1] we sought views on whether on the analogy of the Bankruptcy (Scotland) Act 1913, sections 178 and 179, provision should be made creating specific offences by the debtor or a creditor,[2] but on consultation there was no support for such an approach.

4.285 We **recommend:**

(1) The sheriff should have a discretionary power to revoke a scheme, on the grounds of the debtor's default or misconduct or on other cause shown on application by any creditor, included or not, the debtor or the administrator, and after giving the debtor and included creditors an opportunity to make representations.

(2) On revocation, the unpaid balance of the debts (not merely of the dividend due in a composition scheme) would again become enforceable by diligence.

(3) Revocation should not take effect till expiry of the appeal days or, when an appeal was taken, the disposal of the appeal.
(Recommendation 4.42; clause 30(1), (3), (6) and (7).)

4.286 *Discharge of debts.* Where the debtor had fulfilled all his obligations under the scheme, he should be entitled to obtain a discharge of the debts included in the scheme (apart from special provision for debts included "late" during a scheme and for interest arising after the first notice date). After sufficient payment had been made to the administrator to meet the claims of the included creditors, other than creditors included "late" by variation of the scheme, in full or in the case of a composition to the amount of the composition, the debtor or administrator would apply to the sheriff for a discharge of those

[1]Proposition 33(3), paras. 2.114 and 2.115.

[2]E.g. where the debtor fails to inform the administrator of a false claim, or if he prepares to abscond, or makes a gift of property to defraud creditors; or when a creditor wilfully and with intent to defraud makes a false claim or untrue affidavit or statement.

debts. The application would be intimated to all creditors whose debts were included in the scheme. At the same time, creditors in schemes providing for payment in full would be given an opportunity to claim interest accrued since the first notice date[1] and for this reason the application would be intimated to creditors whose debts had been included but had been satisfied earlier, by payments made outside the scheme, to the extent of their entitlement under the scheme. Before the sheriff decided whether to grant the discharge, the included creditors (but not creditors whose debts had been satisfied earlier) would have an opportunity to make representations, and if agreement was not reached as to whether a discharge should be granted, an opportunity to be heard. We would expect that normally the discharge procedure would be uncontentious.

4.287 In the U.S.A., a debtor may obtain a discharge from debts comprised in a wage-earner's plan where failure to complete the plan was due to circumstances outside his control. This resembles the conditions of discharge under the Bankruptcy (Scotland) Act 1913 where the dividend was less than 25p in the pound;[2] in future under the Bankruptcy (Scotland) Bill 1984, a bankrupt will automatically become entitled to a discharge after three years. In bankruptcy sequestrations, however, the discharge is a *quid pro quo* for the full surrender of assets which a scheme avoids. Having regard to the possibility of variation of the level of in-payments and the extension of the scheme to five years, we think that creditors should be entitled to expect the debtor to comply fully with a scheme. On the other hand, in a five-year scheme, we propose that the sheriff should have power to extend the duration of the scheme by up to three months if it appeared likely that the sums due under the scheme would be paid off within that period, but only one extension of this kind should be permitted. An application for a discharge would have to be made within one month after the expiry of the period for payments under the scheme or such longer period as the sheriff may allow.

4.288 Since a discharge could have irreversible effects, the order for discharge should only take effect after expiry of the appeal days or the disposal of any appeal.

4.289 We **recommend:**

(1) The sheriff should be empowered, on application by the administrator or debtor, to grant a discharge of the debts included in the scheme as originally confirmed where the debtor had paid all the sums required to be paid under the scheme to the administrator in respect of those debts.

(2) An application for discharge should be intimated to creditors whose debts are included, or were included but have since been satisfied to the extent of the creditor's entitlement under the scheme.

(3) The creditors whose debts are included should have an opportunity to make representations and, if agreement was not reached as to whether a discharge should be granted, an opportunity to heard.

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[1]See para. 4.77 and Recommendation 4.10(3) (para. 4.80).

[2]Viz. that the failure to pay the dividend has, in the opinion of the court, arisen from circumstances for which the bankrupt cannot justly be held responsible: 1913 Act, s. 146.

(4) In a five-year scheme, the sheriff should have power to extend the scheme, once only, for a further period not exceeding three months, if it appears likely that the debts would be paid within that period.

(5) The application for discharge should be competent when the debtor's payments under the scheme have been made, but not later than one month, or such longer period as the sheriff may allow, after expiry of the period specified in the scheme for making those payments.

(6) A discharge should not take effect until the expiry of the appeal days or the disposal of any appeal.
(Recommendation 4.43; clause 31(1), (2)(*a*), (4), (5), (11) and (12).)

4.290 *Exceptions from discharge.* We recommended above that in certain cases there should be two types of exception from the discharge of debts in a scheme, namely, claims for interest accruing after the first notice date,[1] and the unpaid balance of the sum due under the scheme to a creditor who had been included "late" by a variation order and who had therefore received fewer disbursements than the creditors originally included in the scheme as confirmed.[2]

4.291 As mentioned above,[3] interest accrued after the first notice date could only be claimed by a creditor in a scheme providing for payment of debts in full, not in a composition scheme. Such a claim could only be allowed in the case of an interest-bearing debt and no separate right to interest would be conferred by the scheme. At the same time as intimating the application for discharge, the administrator would give creditors an opportunity to claim such interest within two weeks (or such other period as might be prescribed by act of sederunt) and to state the amount of interest. The obligation to pay interest which was due but not claimed or allowed would be extinguished if the principal sum bearing the interest was discharged under the scheme. A claim for interest would be intimated by the administrator to the debtor: any dispute as to liability or quantum would be determined by the sheriff in incidental proceedings in the scheme process. If interest was found due, the sheriff would grant a decree for payment of the interest even though interest at a specified rate had been already decerned for in a decree for the principal sum, and the earlier decree would be treated as no longer operative. In such a decree, the sheriff would have a discretion to insert a time to pay direction.

4.292 Since a creditor included late would receive fewer disbursements under a scheme than the original creditors, the sheriff would be under a duty to grant a time to pay decree of the kind described above,[4] for payment of the unpaid balance of the sums due under the scheme, and in the event of default decerning for immediate payment of the balance of the whole debt (not the composition).

4.293 A decree for payment of interest or of the unpaid debt (or composition) would not take effect until the days for appealing against the sheriff's decision

[1]See Recommendation 4.10(3) (para. 4.80).
[2]See Recommendation 4.17(3) (para. 4.143).
[3]Recommendation 4.10(3) (para. 4.80).
[4]Para. 4.142; Recommendation 4.17(3) (para. 4.143).

on interest or discharge of debts had expired or any appeal had been disposed of.

4.294 We **recommend:**

(1)(*a*) In the case of a scheme providing for payment of debts in full, creditors whose debts are included, or were included but have been satisfied to the extent of the creditor's entitlement under the scheme, should have an opportunity to claim interest arising after the first notice date on an interest-bearing debt and to state its amount. The sheriff should determine any dispute as to liability or amount and have power to grant a decree for interest with or without a time to pay direction.

(*b*) A discharge of debts:

(i) in a scheme providing for payment in full, should discharge any interest arising after the first notice date if it is not claimed and allowed by the foregoing procedure;

(ii) in a scheme providing for a composition, should discharge any interest arising after the first notice date.

(2) An order determining a dispute as to interest should not take effect till expiry of the appeal days or disposal of any appeal, and a decree for payment of an unpaid debt such as is proposed at Recommendation 4.10(3) (paragraph 4.80) above, and a decree for interest should only take effect when the discharge or determination takes effect. (Recommendation 4.44; clauses 29 and 31(2)(*b*), (3), (9), (10), (12) and (13).)

4.295 *Termination of scheme.* A scheme would cease to have effect in the following circumstances:

(*a*) revocation by the sheriff's order;

(*b*) the grant of a discharge of the debts included in the scheme as originally confirmed;

(*c*) on the expiry of the one-month period for an application for discharge where either no such application or no application for extending the duration of the scheme had been made or such an application had been refused;

(*d*) on the refusal of an application for variation pending at the end of the one-month period;

(*e*) on the refusal of an application for discharge pending at the end of the one-month period unless the sheriff granted an extension of up to three months as mentioned at Recommendation 4.43(4) (paragraph 4.289); and

(*f*) the debtor's death.

4.296 *Unpaid disbursements.* If for any reason the administrator was unable to make payment of disbursements to a creditor entitled thereto, he should deposit the disbursements in a separate account in a bank authorised to take deposits. At the termination of the scheme, the administrator should send the

deposit receipts to the Accountant of Court who, as we have proposed,[1] should keep a register of subsisting and terminated schemes, and who, in his capacity as Accountant in Bankruptcy, holds deposit receipts for unclaimed dividends in sequestrations.[2] The creditor would be entitled to claim the deposit receipts by application to the Accountant of Court within seven years from the date of termination of the scheme. Any receipts not so claimed at the end of seven years would be handed over to the Secretary of State for Scotland for payment to the Exchequer.[3]

4.297 *Administrator's discharge.* On the termination of a scheme, the administrator would have a number of functions to perform depending on circumstances, such as intimation to the parties of the sheriff's decisions on revocation of the scheme or discharge of debts, intimation of the termination of the scheme to an employer operating a pay deduction order, or deposit of unclaimed disbursements. When these duties had been performed, the administrator would apply to the sheriff for the discharge of his appointment which would be governed by regulations.

4.298 We **recommend:**

(1) A scheme should cease to have effect on the occurrence of any of the events mentioned in paragraph 4.295 above.

(2) There should be a procedure for disposing of unpaid disbursements at the termination of a scheme.

(3) The procedure for discharge of the administrator after termination of a scheme should be governed by regulations made by statutory instrument.
(Recommendation 4.45; clauses 32 and 36(5)(*b*)(i).)

Section H. Debt arrangement schemes, "apparent insolvency", sequestrations and other insolvency proceedings

4.299 Though doubts were raised on consultation by some commentators about the need to regulate the relationship between debt arrangement scheme proceedings and other insolvency proceedings, we believe that, to avoid foreseeable difficulties having to be resolved at the expense of litigants, some provision is desirable, especially (but not only) if, as we now recommend, business debts were to be included in schemes. Other things being equal, the general policy of the law should probably be to foster the use of schemes, at least where a debtor has insufficient assets to make sequestration worthwhile. Other things may often not be equal, however, as when there is uncertainty as to the extent of the debtor's assets, or allegations of unfair preferences or voluntary gifts which a trustee in a sequestration (but not an administrator) would have a title to challenge, or where the creditors include a creditor whose debt would be preferred in a sequestration but not a scheme. Our proposals in Consultative Memorandum No. 50[4] have had to be substantially

[1]Recommendation 4.38 (para. 4.267).
[2]Bankruptcy (Scotland) Bill 1984, clauses 54(1)(*a*) and (*b*), and 55; replacing Bankruptcy (Scotland) Act 1913, s. 153.
[3]Compare 1984 Bill, clause 55.
[4]Paras. 2.18 to 2.20.

revised in the light of the Bankruptcy (Scotland) Bill 1984 without the benefit of consultees' views on some key issues. Our present proposals are as follows.

4.300 First, we propose that the making of the interim order sisting diligence in a debt arrangement scheme should be treated as constituting "apparent insolvency" in the statutory sense[1] for the purpose of clauses in documents (other than unvaried statutory standard conditions in standard securities over land[2]) such as clauses providing for termination of the contract, or acceleration of payments or repossession of goods e.g. held on hire purchase or hire. Since the coming into force of a scheme would prevent a creditor from constituting apparent insolvency by service of a charge, and would cause an unexpired charge to lapse, a creditor might lose the benefit of the clause in the absence of such a provision. Moreover, a scheme application is an acknowledgment by the debtor of practical insolvency. We have hesitated to go further and propose that the interim order should have all the effects of apparent insolvency, such as the equalisation of diligences,[3] or the various enactments imposing disqualifications on persons who are notour bankrupt or apparently insolvent from public office, membership of statutory authorities, or holding of various licences,[4] though we suggest below[5] that it should enable a creditor to petition for sequestration. Such a proposal might be considered a logical extension of out recommendations and we would not oppose it.

4.301 Second, we propose that, as a general rule, a scheme application should not be competent while a petition for sequestration of the debtor's estate was continuing or sequestration had been awarded but the debtor had not obtained his discharge. We propose that this rule should apply even where the scheme application and the sequestration involved different creditors, as where an undischarged bankrupt sought to obtain a debt arrangement scheme relating to debts incurred after the award of sequestration, as a protection against the diligences of post-sequestration creditors (whose claims would not be admissible in the sequestration). The trustee in the sequestration would be entitled to obtain an order attaching the undischarged bankrupt's personal earnings so far as exceeding a suitable aliment[6] and we agree with the comments of the Law Society of Scotland that those earnings should not be subject to a debt arrangement scheme.

4.302 We think that a subsisting trust deed for creditors or composition contract should have the same effect as a sequestration in precluding a scheme application, but, with the repeal of section 14 of the Bankruptcy (Scotland) Act 1913.[7] it seems unnecessary to make comparable provision with respect

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[1]Bankruptcy (Scotland) Bill 1984, clause 7.

[2]See Recommendation 4.23(3) (para. 4.174).

[3]Bankruptcy (Scotland) Bill 1984, Sched. 7, para. 10, replacing Bankruptcy (Scotland) Act 1913, s. 10.

[4]See para. 4.312 below.

[5]Para. 4.302.

[6]Bankruptcy (Scotland) Bill 1984, clause 31(2) and (3).

[7]This section empowered the court to appoint a judicial factor for the immediate preservation of an estate which was the subject of a petition for sequestration. Judicial factories under the 1913 Act, s. 163 (replaced by Judicial Factors Act 1889, s. 11A as set out in the Bankruptcy (Scotland) Bill 1984, Sched. 7) relate to deceased debtors, and judicial factories on bankrupt estates of living debtors will be competent only under the residual common law powers of the court.

to judicial factories on bankrupts' estates, which are likely to be unusual in the case of living bankrupts. Nor do we think it necessary to make express provision regulating competitions between on the one hand debt arrangement schemes and, on the other, English adjudications in bankruptcy or administration orders under the County Courts Acts or other insolvency proceedings outside Scotland.

4.303 Third, there does not seem to be much scope for a special procedure enabling a sequestration to be replaced by a debt arrangement scheme. Already there are provisions enabling the creditors in a sequestration to accept an offer of a composition by the debtor. Generally the offer must be of at least 25p in the pound, secured by caution or other security,[1] and be accepted by a majority in number and not less than two-thirds in value of the creditors.[2] Such judicial composition contracts are unusual but some of the former procedural restrictions are relaxed by the Bankruptcy (Scotland) Bill 1984, and we think that rather than provide for a change from sequestration to a scheme, it might be more appropriate to relax the requirements of judicial composition contracts in cases where the total indebtedness does not exceed the financial limit for schemes. We identified this option late in our consideration of schemes, have not consulted on it, and make no firm recommendations but, if schemes are introduced in Scots law, consideration might be given to relaxing the requirements of judicial composition contracts in cases which would be eligible for a scheme if there had been no sequestration.

4.304 Fourth, while we do not propose that proceedings in a scheme application should have the effect of constituting "apparent insolvency" (except for the purpose of clauses in deeds and contracts[3]), we think that in an important respect the appointment of an administrator should have effects similar to apparent insolvency[4] insofar as it should enable a qualified creditor or creditors to petition for the debtor's sequestration. Normally, a debtor will already have been rendered "apparently insolvent" with the service of a charge prior to the scheme application, but the scheme application may have been "triggered" by an arrestment in common form which does not create apparent insolvency.[5] A scheme application would imply practical insolvency and we think a creditor should not be put to the delay and pointless expense (for which the debtor would be ultimately liable) involved in serving a charge.

4.305 Fifth, there ought however to be some restraint on a creditor's right to supersede a scheme application by a petition for sequestration lest that right be exercised unreasonably. We propose that any creditor on whom an interim order sisting diligence has been served, and who has therefore official notice of the scheme application, should apply to the sheriff for leave before presenting a petition for sequestration. On the model of the tests which the courts will apply in determining whether a sequestration should be permitted to supersede a "protected" trust deed for creditors,[6] the sheriff should grant leave to petition only if it appeared to him that sequestration would be likely

[1]Bankruptcy (Scotland) Bill 1984, Sched. 4, para. 3.
[2]*Ibid.*, para. 8.
[3]See para. 4.300.
[4]Bankruptcy (Scotland) Bill 1984, clause 5(2)(*b*).
[5]*Ibid.*, clause 7.
[6]*Ibid.*, Sched. 5, para. 7.

to be in the best interests of the general body of creditors or that a scheme would be unduly prejudicial to a particular creditor or class of creditors. On granting leave, the sheriff should sist the scheme application to allow the petition for sequestration to proceed. If sequestration was not awarded, he should recall the sist and the order granting leave to petition, and make such consequential orders as might be necessary to allow the scheme application to proceed. If an award of sequestration were made, the sheriff should refuse the scheme application on his own or the administrator's motion.

4.306 Sixth, we think that if a creditor did not petition for sequestration (with the sheriff's leave) prior to confirmation of the scheme, he should not be entitled to oppose a scheme application on the ground that he wished to petition for sequestration. If a scheme application were refused on that ground, there would be no assurance that the creditor would in fact petition for sequestration. Moreover, we have already proposed[1] that a creditor should not be entitled to oppose a scheme application on the ground that he would not obtain a preference in a scheme which he would have obtained in a sequestration.

4.307 Seventh, once a scheme had been confirmed, it should not be competent for any creditor, whether included or not, to present a petition for the debtor's sequestration while the scheme subsisted. The creditor should be entitled to apply for revocation of a scheme which the sheriff would have a discretion to grant or refuse having regard to all the relevant circumstances including the length of time which the scheme had yet to run. In exercising his discretion, however, the sheriff should be required to disregard an argument to the effect that the creditor was being deprived of a preference which he could obtain if the scheme was revoked with the result that he would then be able to sequestrate.

4.308 The effect of the proposals in the preceding paragraphs would be that a creditor having a preference in a sequestration or who desired to sequestrate for some other reason would have to act timeously by petitioning for sequestration (with the sheriff's leave), and could not found on that preference or his desire to sequestrate as a ground for objecting to or for revoking a scheme.

4.309 Concurrent debt arrangement scheme proceedings are most unlikely to occur given that only the debtor can apply for a scheme. For completeness, however, it should be made clear that a scheme application would be incompetent if a scheme was already in force, or if a scheme application had been previously commenced and was still pending.

4.310 We think that provision should be made by act of sederunt to secure that the debtor would include in his scheme application a statement that to the best of his knowledge and belief no sequestration proceedings were continuing in the same or another court, and also a statement in unqualified terms that no trust deed for creditors, composition contract, scheme application or scheme was subsisting.

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[1]Recommendation 4.11(3) (para. 4.96).

4.311 We **recommend:**

(1) The making of the interim order sisting diligence in a scheme application should be treated as constituting "apparent insolvency" in the statutory sense for the purpose of clauses in legal documents (other than statutory standard conditions in standard securities).

(2) A scheme application should not be competent if:

(*a*) at the time of the scheme application:

(i) a petition for sequestration of the debtor's estate was pending, or sequestration had been awarded but the debtor had not yet obtained his discharge; or

(ii) a trust deed for creditors or composition contract was subsisting; or

(iii) a scheme was already in force or a prior scheme application by the debtor was pending; or

(*b*) during the scheme application sequestration is awarded or a trust deed for creditors is granted or a composition contract is made.

(3) A qualified creditor petitioning for the debtor's sequestration at any time between the intimation to the creditor of an interim order sisting diligence and the disposal of the scheme application, should not be required to establish that the debtor was "apparently insolvent" in the statutory sense.

(4) (*a*) While a scheme application is pending, a creditor should not be entitled to present a petition for the debtor's sequestration unless he has obtained the leave of the sheriff having jurisdiction in the scheme application.

(*b*) Leave should be granted only if it appears to the sheriff that sequestration would be in the best interests of the general body of creditors, or that the scheme would be unduly prejudicial to a particular creditor or class of creditors.

(*c*) There should be procedures for sisting the scheme application to allow a petition for sequestration to be presented; for recalling the sist and restarting the procedure if sequestration is not awarded; and for refusing the scheme application if sequestration is awarded.

(5) A creditor should not be entitled to oppose a scheme application on the ground that he wished to petition for sequestration.

(6) A petition for sequestration should not be competent while a scheme is in force, without prejudice to a creditor's right to apply for revocation of a scheme, and to petition for sequestration if the scheme is revoked.

(7) An act of sederunt should require an applicant for a scheme to state in his application that no trust deed for creditors, composition contract, scheme, or scheme application was subsisting, nor to his knowledge any petition for or award of sequestration was subsisting.
(Recommendation 4.46; clauses 17(2); 18(1)(*c*); 20(4); 21(2)(*d*), (*e*) and (*f*); 24(4)(*a*)(iv), (v) and (vi); 24(5); and 35.)

4.312 *Bankruptcy disqualifications.* A large number of specific enactments place insolvent persons under certain civic disqualifications or disabilities, or

render them liable to be disqualified from statutory office by the act of a government minister. While these enactments normally link the disqualification to sequestration, the enactments disclose no coherent or consistent policy towards other states of bankruptcy or insolvency processes recognised by law. For example, sequestration alone disqualifies a person from sitting or voting in the House of Lords or House of Commons,[1] from membership of a local authority,[2] from acting as a J.P.,[3] or as director[4] or receiver[5] of a company, or from holding a licence to conduct a credit or hire business.[6] A solicitor is liable to suspension from practice not only if he is sequestrated but also if he grants a trust deed for creditors.[7] In the case of membership of statutory boards, disqualification seems normally to be linked to sequestration, a trust deed for creditors or a composition contract,[8] but in some cases notour bankruptcy is in effect added,[9] in other cases a composition contract is not a disqualification,[10] and in other cases simple bankruptcy or an arrangement with creditors suffices.[11]

4.313 Against this background we think that a debtor who has applied for or obtained a debt arrangement scheme should not be subjected to civic disabilities. To make a debtor subject to such disqualifications might discourage debtors from applying for schemes which might be in the interests of creditors as well as themselves. So far as we are aware, an administration order under the County Courts Acts in England does not attract civic disabilities. This proposal was generally accepted on consultation.

4.314 We **recommend:**

The disqualifications from public office applying to an undischarged bankrupt should not be extended to a debtor who has applied for or obtained a debt arrangement scheme.

(Recommendation 4.47; Schedule 7, paragraph 39.)

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[1]Bankruptcy Act 1883, s. 32, as read with Bankruptcy (Scotland) Act 1913, s. 183, replaced by Bankruptcy (Scotland) Bill 1984, Sched. 7, para. 11(*a*).

[2]Local Government (Scotland) Act 1973, s. 31(1)(*b*).

[3]1883 Act, s. 32 (*supra*).

[4]Companies Act 1985, s. 302 (leave of the court is required).

[5]*Ibid.*, s. 467(3).

[6]Consumer Credit Act 1974, ss. 37 and 38.

[7]Solicitors (Scotland) Act 1980, ss. 18(1); 15(2)(*h*).

[8]E.g. membership of the electricity boards, the Countryside Commission, Nature Conservancy Council, Highlands and Islands Development Board, Tourist Board, Scottish Development Agency, Civil Aviation Authority: see e.g. Electricity (Scotland) Act 1979, Sched. 1, para. 2; Countryside (Scotland) Act 1967, Sched. 1, para. 2(3).

[9]Sex Discrimination Act 1975, Sched. 3, paras. 3(5)(*b*) and 7(5)(*b*); Race Relations Act 1976, Sched. 1, paras. 3(5)(*b*) and 7(5)(*b*).

[10]Teaching Council (Scotland) Act 1965, Sched. 1, para. 4(2) (sequestration or trust deed).

[11]New Towns (Scotland) Act 1968, Sched. 2, para. 5 (membership of development corporation).

CHAPTER 5

POINDINGS AND WARRANT SALES

Section A. Introduction

5.1 In Chapter 2, we reached the firm conclusion that, subject to exemptions protecting the standard of living of debtors and their dependants, the compulsory attachment and sale of a debtor's moveable goods, or the threat of sale, is an essential method of satisfying debts and inducing debtors to honour their obligations. We therefore recommended that poindings and warrant sales should not be abolished.[1] To safeguard debtors from undue hardship, however, we also recommended in Chapters 3 and 4 the introduction of new procedures which would give debtors an extension of time to pay their debts free from the threat of diligence.

5.2 These procedures will, however, require the debtor to take the initiative by lodging an application in court. There will be cases in which the debtor does not take this initiative. In other cases, the debtor will default on the instalment or other payments which have been ordered to be paid and diligence will become necessary. The reforms which we propose in this Chapter are designed to complement the safeguards already recommended by making the operation of the diligence of poinding and warrant sale more humane to debtors and to protect them from undue hardship, in cases where, unfortunately, execution of that diligence becomes necessary.

5.3 The procedure in the diligence forms a logical progression which can be prosecuted through its stages quickly or slowly, at the creditor's option, depending on whether it is wished primarily to satisfy the debt out of the proceeds of sale or (as is more usual) to use the threat of stages of the diligence to induce settlement. The diligence has been criticised as cumbersome, but the so-called cumbersome characteristics of the diligence consist entirely of procedures designed to safeguard debtors, creditors or third parties. Some complexity is essential if adequate provision is to be made for such safeguards. Another criticism of the diligence is its expense which can be disproportionately high where the debt is small. On consultation one body suggested that poinding should be incompetent if the likely expenses of poinding and sale exceeded the debt sought to be enforced. We would reject this suggestion because it could lead to small or even moderate sized debts becoming unenforceable against debtors who had no arrestable earnings or assets.

5.4 In this Chapter we discuss the main stages of the procedure in their sequence:[2] the service on the debtor of a charge requiring payment of the debt within a specified period; the poinding (attachment, inventorying and valuation) of the debtor's goods; the application to the court for warrant of sale, and the intimation of the warrant to the debtor; the sale of the poinded goods (or delivery of unsold goods to the creditor); and finally the sheriff's approval of the report of sale. Third party claims in respect of poinded goods can be

[1] See paras. 2.142 to 2.153.

[2] The warrant to charge and poind is dealt with in Chapter 9.

made at any stage after poinding and are discussed towards the end of this Chapter in Section E.

Section B. Charging the debtor to pay

5.5 The charge is a formal demand in writing served by an officer of the court on the debtor demanding payment of the sums due under the decree within a specified time, in default of which the debtor's goods may be poinded.[1] A charge is an essential preliminary to the diligence of poinding and sale rather than a stage of the diligence. In Consultative Memorandum No. 48 we sought views on whether charges should be retained as an essential preliminary, and if retained what improvements should be made in the form, manner of service and effect of charges. This Section sets out our recommendations on these topics.

Retention of charges before poinding

5.6 The service of a charge has been a necessary preliminary to poinding since 1669[2] except that, under the (now abolished) small debt procedure, a charge was unnecessary if the defender had been personally present in court when decree was granted.[3] The McKechnie Report recommended that, even in these circumstances, a charge should be given since it was doubted whether most debtors would realise the consequences of the grant of decree.[4] Our provisional conclusion in Consultative Memorandum No. 48[5] that charges should be retained as a necessary preliminary to poinding was approved by all those who commented and we would adhere to it.

5.7 The first argument in favour of dispensing with charges is that they are alleged to be unnecessary. Debtors (it is said) should be aware that decree has been granted and that one of the consequences of continued failure to pay will be poinding and sale of their goods. In summary warrant poinding procedure charges are not given and consultation revealed no pressure for their introduction. The other argument is that dispensing with charges would reduce the expense of the diligence. The expense of a charge where the officer has to travel for three miles to serve it ranges from £5.61 to £10.27 depending on the type of decree and whether a solicitor was involved in instructing the officer.[6] In rural areas the expense of a charge can easily exceed £20 due to large mileage charges. We do not find these arguments persuasive.

[1] In this Chapter charge means a charge for payment of money. Other types of charge, such as a charge to deliver goods or remove from a house also exist.

[2] Originally poinding was competent without the need for a prior charge. By custom, the debtor was given 15 days in which to implement the decree (Graham Stewart, p. 337). The Poinding Act 1669, which is still in force, provides that poinders for "personal" debts (debts not secured over heritable property) must first charge and wait for the days of charge to expire before poinding under pain of punishment for spuilzie (illegal interference with moveable goods) and nullity of their diligence. The Debtors (Scotland) Act 1838, s. 4 further provides that "on the expiration of the days of charge it shall be lawful by virtue of such extract [decree of the Court of Session] to poind the moveable effects of the debtor in payment of the sums of money therein mentioned". Similar provision for sheriff court extracts is made by s. 9 of the 1838 Act.

[3] Small Debt (Scotland) Act 1837, s. 13 (now repealed).

[4] Para. 157. In consonance with this recommendation, in summary causes a charge must be given whether or not the defender was present; Summary Cause Rules, rule 91(1); Sheriff Courts (Scotland) Extracts Act 1892, s. 7(1).

[5] Proposition 6 (para. 3.11).

[6] Act of Sederunt (Fees of Messengers-at-Arms) 1978, Act of Sederunt (Fees of Sheriff Officers) 1978 and Act of Sederunt (Alteration of Sheriff Court Fees) 1971, all as amended.

The Edinburgh University Debtors Survey shows[1] that the charge plays an important role in informing the debtor of the existence of the decree and the creditor's intention to enforce it. The comparison with summary warrant diligence is not entirely apt because that diligence is regarded as summary in character and because the creditors concerned (local authorities and central government departments) have procedures designed to ensure that debtors are aware of their debts and liability to diligence in the event of non-payment.

5.8 In our view charges ought to be retained for the following reasons. First, settlement of the debt (or abandonment by the creditor) is often made after a charge has been served.[2] Service of a charge warns the debtor that continued failure to pay may lead to diligence[3] and is a valuable means of eliciting payment in full or by instalments and so preventing further diligence. Secondly, in Chapters 3 and 4 of this report we recommended that a debtor should be entitled to apply for a time to pay order or a debt arrangement scheme only after a charge has been served or diligence has commenced. We considered it to be important that all debtors should be made aware of their right to apply for these safeguards; the easiest way to achieve this is to include such information with a charge, since no document intimating the granting of the decree is normally sent to debtors. Thirdly, there might be resentment if officers were to turn up at debtors' houses to poind without a prior warning that the enforcement process had reached that stage. Even in summary warrant poindings where a charge is not necessary, the general practice of officers is to issue informal warnings.

5.9 We **recommend:**

The service of a charge requiring the debtor to pay the debt should continue to be a necessary preliminary to the execution of a poinding to enforce that debt.

(Recommendation 5.1; clause 115(1).)

Standardising the days of charge

5.10 A charge served on the debtor specifies the number of days within which payment is required. On the expiry of this period (called "the days of charge") without payment, the creditor may proceed to poind. As Table 5A shows, the days of charge vary according to the type of decree on which the charge proceeds and the place where the charge is served.[4]

5.11 In Consultative Memorandum No. 48 we suggested that the days of charge should be 14 but that the courts should have power to shorten or lengthen this period.[5] Commentators were generally in favour of uniformity although one body suggested a longer period where the debtor is outwith Europe. We agree with the principle behind this modification. While 14 days are sufficient for debtors within the United Kingdom, others should have 28 days after service of the charge in which to make payment. In view of this extended period for debtors abroad we think that empowering the courts to

[1]Para. 5.7.

[2]See C.R.U. Diligence Survey (para. 3.5) which estimates that in 1978 there were 46,000 charges and only 20,000 poindings.

[3]Poinding and under Recommendation 6.7 (para. 6.59) an earnings arrestment.

[4]Table 5A does not include charges on decrees of ejection, removing, recovery of heritable property, or delivery of goods or children.

[5]Proposition 11 (para. 3.23). This had also been recommended by the McKechnie Report, para. 156.

TABLE 5A: PERIODS PRESCRIBED FOR THE DAYS OF CHARGE

Decree, etc.	Debtor	Days	Authority
Court of Session decrees	(1) Within Scotland	15	Codifying Act of Sederunt 1913, Book VIII, Schedule A.
	(2) Furth of Scotland	14	Court of Session Act 1868 section 14
Extracts of deeds registered for execution in books of court or Sasines Register	(1) Within Scotland	6	Titles to Land Consolidation (Scotland) Act 1868 section 138; Land Registers (Scotland) Act 1868, section 12
	(2) Furth of Scotland	14	Court of Session Act 1868 section 14
Decrees in Exchequer causes in favour of the Crown	(1) Within Scotland	6	Exchequer Court (Scotland) Act 1856 section 28 and Schedule G
	(2) Furth of Scotland	6	Exchequer Court (Scotland) Act 1856 section 28 and Schedule G
Decrees of Teind Court	(1) Within Scotland	10	Act of Sederunt 17 July, 1925
	(2) Furth of Scotland	60	Act of Sederunt 17 July, 1925
Decrees of sheriff courts (ordinary actions)	(1) Within Scotland	14	Ordinary Cause Rules, rule 13
	(2) Furth of Scotland	14	Ordinary Cause Rules, rule 13
Decrees of sheriff courts (summary causes)	(1) Within Scotland	14	Summary Cause Rules, rule 91(1)
	(2) Furth of Scotland	14	Summary Cause Rules, rule 91(1)
Registered protests of bills of exchange	(1) Within Scotland	6	Bills of Exchange Act 1681 Inland Bills Act 1696
	(2) Furth of Scotland	14	Court of Session Act 1868, section 14
Extract certificates registered under Judgments Extension Act 1868	Within Scotland	15	Codifying Act of Sederunt 1913 B.VI.5
Extract certificates registered under Inferior Courts Judgments Extension Act 1882	Within the Sheriffdom	15	Codifying Act of Sederunt 1913, L.IX.2
Foreign judgments or awards registered under the Administration of Justice Act 1920, Foreign Judgments (Reciprocal Enforcement) Act 1933, or Arbitration International Investment Disputes Act 1966	Within Scotland	15 (or period fixed by Court)	R.C. 248(*f*), 249(11), 249A(7)(3)
Decrees of the Land Court	(1) Within Scotland	7	Crofting Reform (Scotland) Act 1976, section 17(1)
	(2) Furth of Scotland	14	
Orders for recovery of criminal fines and compensation orders	Within or furth of Scotland	14	Criminal Procedure (Scotland) Act 1975, section 411 (as amended).

lengthen or shorten the days of charge on cause shown is an unnecessary refinement.

5.12 We **recommend:**

The present multiplicity of different periods prescribed for the days of charge in a charge for payment should be replaced by a single period. This period should be fixed at 14 days where service is to be made within the United Kingdom and otherwise at 28 days.
(Recommendation 5.2; clause 115(2).)

Postal or hand service of charges?

5.13 Generally a charge must be served by an officer of court on the debtor personally or by one of the substitute modes of service requiring the officer to visit the debtor's dwelling or place of business.[1] These modes of service are conveniently described as "hand service". Hand service requires the presence of a witness who is usually a member of the officer's staff. A charge may be served by post only if the decree on which the charge proceeds is a summary cause decree, and the place of service of the charge is more than 12 miles from the court which granted the decree or is in any of the islands of Scotland or is in any sheriffdom in which there is no resident sheriff officer.[2] The McKechnie and Grant Reports[3] but not the First Ashmore Report[4] favoured the introduction of postal service of charges for all decrees.

5.14 On consultation, our proposal[5] to introduce postal charges for all decrees provoked a mixed reaction. Several commentators argued that charges would lose many of their existing advantages if they were served by post. First, a visit to serve a charge may enable the officer to make an assessment of the debtor's means and to report to the creditor on the likelihood of recovery, thereby preventing unproductive diligence. Second, an officer making contact with the debtor or a member of the debtor's family may be able to arrange an instalment settlement, or to explain the serious consequences of continued non-payment. Third, officers serving charges by hand can sometimes elicit information on the debtor's employment which enable an arrestment of earnings to be used in lieu of a poinding.[6] Fourth, there is evidence that in up to 10% of cases where documents are served by recorded delivery post in connection with civil proceedings, the documents may not reach the defender or debtor[7] and it has been argued that hand service by an officer is much more reliable.

[1]In the case of summary cause decrees, the charge must normally be served personally on the defender or left in the hands of an inmate at the debtor's dwellingplace or of an employee at the debtor's place of business. If unsuccessful in effecting service by these modes, the officer must deposit the charge in the defender's dwellingplace or place of business through the letter box or by other lawful means or affix it to the door, and in that event send a copy of the charge by ordinary post to the address where the debtor is most likely to be found: see Summary Cause Rules, rule 6. In diligence following Court of Session and sheriff court ordinary action decrees, the normal modes of service of the charge are similar: see Citation Act 1540.

[2]Execution of Diligence (Scotland) Act 1926, s. 2(1)(*b*) as amended by the Sheriff Courts (Scotland) Act 1971, Sched. 1, para. 1. All sheriffdoms have a resident sheriff officer, and we think that the provision should refer to sheriff court districts, since many sheriffdoms are very extensive. See Sched. 7, paras. 12 and 13 of the Bill annexed to this report.

[3]See respectively para. 149 and para. 644.

[4]Pp. 12–13.

[5]Consultative Memorandum No. 48, Proposition 6 (para. 3.11).

[6]We recommend that a charge should be an essential preliminary step to an arrestment of earnings, see Recommendation 6.7 (para. 6.59).

[7]O.P.C.S. Defenders Survey, para. 5.1; Edinburgh University Debtors Survey, paras. 5.1. and 7.4.

5.15 Other commentators argued that the benefits of postal service would outweigh those of hand service. The first and primary advantage of postal service would be the reduction in expense. The current fee for service of a summary cause charge by post is only £2.68 as compared with £5.61 (three miles travelling) and £11.50 (10 miles travelling) for hand service.[1] It was represented to us that this is uneconomic and has been accepted in the past only because there have been so few postal charges. Nevertheless, the fee for service of a charge by post should be appreciably less than the fee for hand service. Second, while we do not have statistics distinguishing between the numbers of "keyhole service" and "personal service" cases,[2] nevertheless, there is reason to suppose that in the majority of cases where a charge is served by hand, the officer is unable to make contact with the debtor though contact may be made with the debtor's spouse from whom the officer may gain information on the potential for recovery or the debtor's employment. Where the officer is unable to hand the charge to the debtor's spouse or other person on the premises, and puts the charge in the letter box, it may be doubted whether this is any more effective than postal service, though it was represented to us that knowledge of a visit by a sheriff officer rather than the postman has more effect in inducing settlements. Third, while personal contact between officer and debtor is far more likely to elicit instalment payments than information in writing explaining the serious consequences of continued default, nevertheless, such information could be given in the charge itself or an accompanying document which might have an effect in a proportion of cases.

5.16 The majority of commentators favoured retention of hand service. Under the present law, where the vast majority of charges are served by hand, far fewer poindings are executed (20,000 in 1978) than charges served (46,000 in that year).[3] Substituting postal service for hand service would, in our view, lead to a substantial increase in the number of poindings because lack of contact between officer and debtor at the charge stage would decrease the opportunity and likelihood of arrangements being made to pay the debt then.

5.17 We **recommend:**

> No change should be made in the present law, whereby, with certain statutory exceptions in the case of charges proceeding on summary cause decrees, charges for payment must be served by hand by an officer of court. (Recommendation 5.3.)

Need for witnesses?

5.18 The service of a charge by an officer of court requires the attendance of a witness[4] who signs the certificate of execution of the charge along with

[1]Act of Sederunt (Fees of Messengers-at-Arms) 1978 and Act of Sederunt (Fees of Sheriff Officers) 1978 as amended.

[2]The Edinburgh University Debtors Survey (para. 7.7) reveals that out of 73 poinding cases examined in which charges were (or ought to have been) served, 9 charges were executed by keyhole service.

[3]C.R.U. Diligence Survey, para. 3.5.

[4]Debtors (Scotland) Act 1838, s. 32; Citations (Scotland) Act 1846.

the officer.[1] The only exception to this rule is where a charge proceeding on a summary cause decree is served postally.[2] In Consultative Memorandum No. 48, we asked whether, to reduce expense, the requirement of a witness should be abolished.[3] Of those who commented on this question, most thought that abolition was desirable for summary cause charges, but conflicting opinions were expressed for charges on Court of Session decrees and sheriff court ordinary action decrees. However, the Society of Messengers-at-Arms and Sheriff Officers and others with practical experience of the problems involved were opposed to the abolition of witnesses. The principal argument in favour of abolition is the saving of expense, but the proportion of the total expense of serving a charge attributable to the presence of a witness is one-third or less.[4] Moreover, a witness is necessary for citation and many other diligences so that an officer will invariably be accompanied on business by a witness. Abolishing the requirement of a witness to the service of charges would probably lead to increases in the cost of witnesses for citations and other diligences.

5.19 It was urged on us that charges often achieve their effects in eliciting payment and preventing further diligence only because the officer can make personal contact with the debtor or a member of the debtor's family, advise of the consequences of non-payment, and evaluate whether poinding would be worthwhile. To do this properly an officer must be able to enter the debtor's house; in some areas an unaccompanied officer would not be able to enter in safety. Also the witness provides corroboration of the officer's actings and affords protection to the officer against unfounded averments of misconduct or failure to serve the charge correctly. Expiry without payment of a validly served charge makes the debtor notour bankrupt[5] or apparently insolvent[6] and may lead to the debtor's sequestration or liquidation. The validity or otherwise of a charge is therefore important and the requirement of a witness to the service increases the burden of proof placed on a challenger.

5.20 We **recommend:**

It should continue to be necessary for an officer of court serving a charge for payment otherwise than by post to be accompanied by a witness. (Recommendation 5.4.)

Duration of warrant to charge in decree

5.21 The period after decree within which the creditor may serve a charge is determined by the law of prescription of obligations, which in the case of an obligation to obey a decree of court is 20 years.[7] A charge may, however, be served more than 20 years after the date of the decree if the creditor

[1]Debtors (Scotland) Act 1838, Sched. 2; R.C. Appendix, Form 44.

[2]Execution of Diligence (Scotland) Act 1926, s. 2(2)(*e*) and Summary Cause Rules, rule 6(3). No witnesses were required under the former small debt procedure although it was normal practice for officers to take witnesses with them.

[3]Proposition 7 (para. 3.15).

[4]For example out of a fee of £7.20 for a summary cause charge instructed by a solicitor and involving three miles travelling, the witness's fee amounts to £1.40.

[5]Bankruptcy (Scotland) Act 1913, s. 5.

[6]Bankruptcy (Scotland) Bill 1984, clause 7.

[7]Prescription and Limitation (Scotland) Act 1973, s. 7 and Sched. 1, para. 2(*a*).

enforces the debt by other diligence[1] (such as an arrestment) or the debtor acknowledges the debt[2] by making payments to account for example. The obligation is not extinguished by prescription unless there has been no enforcement or acknowledgement for a continuous period of 20 years; if the period is interrupted a new prescriptive period begins.

5.22 In Consultative Memorandum No. 48[3] we invited views on a tentative proposal that the creditor should be required to apply to the court for leave to serve a charge where more than a prescribed period (say two years) had elapsed after obtaining the decree. Such a proposal would reduce the threat of enforcement hanging over a debtor's head for 20 years or more. Many of those commenting argued strongly against the proposal. First, short limitation periods would benefit dishonest debtors who managed to evade their creditors. Secondly, a creditor may have a sound reason for not enforcing the decree within the prescribed period. Our consultation did not elicit information on cases in which debtors were prejudiced by delay in enforcement and in the absence of any proven need for leave to charge we have decided against the introduction of such a requirement.

5.23 We **recommend:**

It is unnecessary to introduce a new rule requiring creditors to obtain leave of the court to serve a charge for payment after a prescribed period has elapsed since the granting of the decree.
(Recommendation 5.5.)

Duration of a charge and second charges

5.24 Once the days of charge have expired without payment there is no fixed period after which the creditor loses the right to poind in the case of Court of Session and sheriff court ordinary cause decrees. Poindings executed for up to four years after the expiry of the days of charge have been held to be valid.[4] In summary causes, however, an expired charge remains a valid basis for poinding for one year only from the date of the charge.[5]

5.25 In summary causes the right to poind may be reconstituted by service of a new charge.[6] Despite doubts expressed[7] there is nothing to stop a creditor abandoning an existing charge proceeding on a decree other than a summary cause decree and serving a new charge.[8] This seems a necessary rule since a creditor can only petition for sequestration within a period of four months after the constitution of notour bankruptcy[9] or apparent insolvency[10] by expiry of a charge without payment.

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[1] *Ibid.*, s. 7(1)(*a*) as read with s. 9(1).
[2] *Ibid.*, s. 7(1)(*b*) as read with s. 10(1)(*a*).
[3] Proposition 14 (para. 3.32).
[4] See Graham Stewart, p. 338.
[5] Summary Cause Rules, rule 91(2).
[6] Summary Cause Rules, rule 91(2).
[7] *New Day Furnishing Stores Ltd* v. *Curran* 1974 S.L.T. (Sh.Ct.) 20 at p. 21.
[8] *Clark* v. *Hamilton & Lee* (1875) 3 R. 166. It is however essential that proceedings for the suspension of the first charge are not in dependence, except in relation to expenses.
[9] Bankruptcy (Scotland) Act 1913, s. 13.
[10] Bankruptcy (Scotland) Bill 1984, clauses 7 and 8.

5.26 For reasons similar to those set out in paragraph 5.22 above we do not favour any rule whereby leave of the court would be required for poinding after expiry of a prescribed period from the date of service of a charge. We think, however, that the present different time limits on the period between charge and poinding depending on the type of decree (one year for summary cause decrees, no fixed periods but up to three to four years for other decrees) make for unnecessary complication. One year seems too short given that an informal instalment arrangement entered into after the service of a charge may break down only after one year. We suggest a uniform period of two years.

5.27 In Consultative Memorandum No. 48, we sought views on a suggestion that, where a charge has been served and not followed by poinding within a prescribed period (of say three months) then the creditor should notify the debtor by letter of the intention to proceed to a poinding within a specified time.[1] The notification would be made by the creditor not the officer, and the expenses would not be chargeable to the debtor. This proposal elicited a mixed response. Some commentators agreed with it. One commentator agreed in principle but thought the period should be six months. Some commentators thought that a further warning would jeopardise the creditor's position by encouraging the debtor to remove assets, especially in commercial cases. Again, we do not think that the case for this proposal has been made.[2]

5.28 On consultation there was general agreement that no change should be made in the present rule whereby a charge may be withdrawn and a new charge served by the same creditor under the same warrant to charge, and that service of a new charge should not enable a creditor to evade the restrictions (which we discuss below) on repeated poindings and repeated warrants of sale by repeating the whole process on the basis of a new charge.[3] It has however come to our notice that some creditors who serve a second charge on a debtor claim the expenses of the second charge from the debtor. The creditor's entitlement to these expenses is not specifically regulated. We think that such expenses should not be recoverable from the debtor, otherwise subsequent charges could be served oppressively.

5.29 We **recommend:**

To simplify the law, a poinding should be incompetent if executed more than two years after the date of service of a charge. However, it should continue to be competent for a creditor to reconstitute the right to poind by serving a new charge for payment. The expenses of a second or subsequent charge to implement a decree should not be recoverable from the debtor. (Recommendation 5.6; clause 115(4) and (5).)

Modernisation of form of charges

5.30 There is no prescribed statutory form of charge;[4] the styles currently in use refer to the decree and specify what sums are to be paid, by whom to

[1]Proposition 13 (para. 3.32).

[2]We revert below to the question of prior intimation of poinding to avoid forcible entry: see para. 5.79.

[3]Consultative Memorandum No. 48, Proposition 14 (para. 3.32).

[4]*Williamson* v. *McLachlan* (1866) 4 M. 1091 per L. J. C. Inglis at p. 1095.

whom. The McKechnie Report recommended that the charge be accompanied by an explanatory note setting out what the debtor is required to do and the effect of non-payment.[1] This recommendation is supported by the findings of the Edinburgh University Debtors Survey[2] and by comments which we received on consultation to the effect that many debtors simply do not understand the technical words and phrases used in the forms they receive and are confused as to their rights and obligations. In our view it is essential that a charge should be in a prescribed form and so drafted that it can be readily understood by debtors.

5.31 Elsewhere in this report[3] we have recommended that a charge should be used to alert debtors as to their rights to apply for a time to pay order in respect of the debt for which the charge is served or a debt arrangement scheme in respect of that and other debts. The Scottish Association of Citizens Advice Bureaux suggested that, like a summary cause summons,[4] a charge should advise the debtor to consult a Citizens Advice Bureau or other local advice centre if help is needed. We think this is a good idea as prompt action taken at the stage of a charge may prevent further steps being taken in the diligence.

5.32 We **recommend:**

(1) An act of sederunt should prescribe the form of the charge and explanatory notes to be served on the debtor along with a charge, with a view to making the charge more intelligible to debtors.

(2) The charge should specify the decree on which it proceeds and the full amount of the debt (including the expenses of serving the charge) and should demand payment within the days of charge to the creditor or a specified agent.

(3) The charge and other forms served on the debtor in connection with the diligence should indicate that the debtor should consider consulting a solicitor, Citizens Advice Bureau or other local advice centre if advice or assistance is required.

(4) The explanatory note should inform the debtor of the consequences of non-payment, in particular liability to poinding and becoming notour bankrupt or apparently insolvent (which entitles a creditor to petition for the debtor's sequestration), and of the applications that the debtor can make to the court.
(Recommendation 5.7.)

Serving a charge on firms

5.33 In the Court of Session, a firm with a social name (such as "Smith, Jones and Brown") is charged by service at the place of business. But if the firm has a descriptive name ("Modern Builders" for example) then, in addition to service on the firm at the place of business, the officer must charge three partners (if there are as many) personally or at their dwellingplaces.[5] In the

[1]Para. 155.
[2]Para. 7.6.
[3]Chapters 3 and 4.
[4]Summary Cause Rules, Form Q.
[5]Graham Stewart, p. 325.

sheriff court, it is competent to charge a firm (whether it has a descriptive or social name) at the principal place of business without service on the partners.[1]

5.34 On consultation there was agreement with our suggestion[2] that the sheriff court rule was to be preferred. However, we have come to the view that the method of charging a firm cannot be considered in isolation from its capacity to sue and be sued in the Court of Session, the form of decrees against a firm, and the manner in which it is cited. We therefore make no recommendation on this point.

Edictal service of charges

5.35 Edictal service is used where the debtor cannot be found or has no domicile of citation within Scotland. Edictal service of charges on Court of Session decrees is effected by delivering the charge to the Extractor of the Court of Session.[3] In Consultative Memorandum No. 48[4] we expressed doubts as to whether edictal service by itself is effective to bring the charge to the notice of the debtor at all, let alone within the days of charge. The rules of the Court of Session already recognise the inadequacy of edictal service where a summons is concerned, since a copy must also be posted to a defender who has a known residence or place of business furth of Scotland or to his or her Scottish solicitor (if any).[5] We proposed that a similar rule should apply to edictal charges,[6] and all those who commented agreed.

5.36 In Consultative Memorandum No. 48 we suggested similar improvements in edictal service of charges proceeding on sheriff court ordinary cause decrees.[7] Since then edictal service has been abolished for such charges and replaced with service by means of registered or recorded delivery letter.[8] But section 7(6) of the Sheriff Courts (Scotland) Extracts Act 1892 authorising edictal charges remains unrepealed and we take the opportunity of including such a repeal in our draft Bill.[9] In these circumstances we think serious consideration should be given to the abolition of edictal charges on Court of Session decrees. But if such charges are to be retained, we recommend they should be restricted to cases where the debtor has a known residence or place of business furth of the United Kingdom or the debtor's whereabouts are unknown. Where the debtor has a known residence or place of business furth of Scotland but within the United Kingdom the charge should be served by post instead of edictally. For debtors furth of the United Kingdom the edictal charge should be supplemented by posting a copy of the charge to the debtor or his or her Scottish solicitor (if any).

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[1]Ordinary Cause Rules, rule 14(1). This rule is applied to summary causes by Act of Sederunt (Summary Cause Rules, Sheriff Court) 1976, para. 3(2).

[2]Consultative Memorandum No. 48, Proposition 9 (para. 3.18).

[3]Court of Session Act 1850, s. 22. The keeper of edictal citations is now the Extractor of the Court of Session.

[4]Para. 3.17.

[5]R.C. 75(*c*).

[6]Proposition 8 (para. 3.17).

[7]Proposition 8 (para. 3.17).

[8]Ordinary Cause Rules, rule 12.

[9]Sched. 9.

5.37 We recommend above[1] that the days of charge should be standardised at 14 if the debtor is within the United Kingdom and 28 otherwise. For all edictal charges the days of charge should be 28 since if the debtor's whereabouts are unknown the longer period is more appropriate.

5.38 We **recommend:**

If edictal charges on Court of Session decrees are to be retained, an act of sederunt should be made along the following lines:

(1) It should cease to be competent to charge edictally a debtor with a known residence or place of business furth of Scotland but within the United Kingdom. Such a debtor should be charged postally, the days of charge being 14.

(2) A charge should be served edictally where the debtor's whereabouts are unknown or where the debtor has a known residence or place of business furth of the United Kingdom. In the latter case a copy of the charge should be sent by post to the debtor or his or her Scottish solicitor (if any). The days of charge of an edictal charge should be 28 days.

(Recommendation 5.8.)

Section C. Poinding the debtor's goods

5.39 After the charge to pay the debt has expired without payment the creditor may proceed to poind the debtor's goods. The poinding is carried out by an officer of court who goes to the premises where the debtor's goods are situated and inventories and values them. The poinding brings the goods within the control and protection of the court until they are put up for sale and the debtor is prohibited from disposing of them voluntarily. The poinding creditor has the right to satisfy the debt out of the proceeds of sale of the poinded goods, and poinding also creates a preference over other creditors.[2]

Exemptions from poinding for protection of debtor

5.40 In Chapter 2 we recommended the retention of poinding as a method of debt enforcement. Given that a debtor's goods should in principle be capable of being sold to meet debts, the question becomes what exemptions should be allowed. If too many goods are exempt poinding becomes ineffective as a method of enforcing payment of debts; while if too few goods are exempt debtors are forced to live at unacceptably low standards. In Consultative Memorandum No. 48 we considered several possible approaches to giving exemptions,[3] viz:

(1) a list of goods could be prescribed that would always be exempt;

(2) a specified class or category of goods could be prescribed that would always be exempt;

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[1]Recommendation 5.2 (para. 5.12).

[2]A poinding creditor's preference is cut down by the debtor's notour bankruptcy or apparent insolvency, sequestration, liquidation, or, in the case of a company, by the appointment of a receiver. The preference may also be defeated if another poinding creditor sells the goods first even though that creditor's poinding was executed later—see Graham Stewart, pp. 364–7.

[3]Paras. 4.18 to 4.22.

(3) a list of goods or a class of goods could be prescribed as exempt subject to:

(*a*) a monetary ceiling on the value of the goods; or

(*b*) a condition that the goods must be necessary or reasonably required for debtors and their dependants.

In general Scots law follows the approach in (3)(*b*) above in that certain classes of goods are exempt in so far as they are reasonably necessary for debtors and their families.

5.41 The first approach has some advantages in that it is easily understood and applied, no subjective judgment of need arises, and it is unaffected by changes in the value of money. But the main disadvantage is that the list does not distinguish between valuable and cheap specimens of prescribed goods and debtors may be tempted to use the exemption to evade liability by converting their money into exempt goods. For example if a table and chairs were unconditionally exempt a valuable antique dining table and matching set of chairs would be exempt just as any others.

5.42 On consultation there was little criticism of the existing Scottish approach to exemption; only one commentator suggested that goods to a prescribed value should be exempt. We would reject this as a general approach because debtors' circumstances vary, so that what may be too generous for a single man may not be sufficient for a married man with a wife and children to support. Moreover, in view of the difficulty experienced by officers of court in valuing poinded goods and the unease felt by many debtors at the correctness of such valuations, it would be unwise to make exemptions generally depend on an officer's valuation. Finally an exemption based on a prescribed monetary value tends to become out-of-date due to changes in the value of money, and even if the prescribed limit can be changed by subordinate legislation, Governments may be slow to make the necessary statutory instruments in view of their contentious nature.

5.43 In our opinion the existing approach to exemption—whereby certain classes of goods are exempt in so far as they are necessary for debtors and their dependants—is by and large correct. But reasonable necessity is too high a standard and we would substitute the concept of a reasonable requirement. We turn now to discuss the main classes of exempt goods—domestic furniture and plenishings, clothes and tools of trade.

Domestic furniture and plenishings

5.44 At present in terms of the Law Reform (Diligence) (Scotland) Act 1973 an article in a prescribed list of basic furniture and plenishings is not liable to be poinded if it is situated in a dwellinghouse in which the debtor is residing and it is "reasonably necessary to enable him and any person living in family with him in that dwellinghouse to continue to reside there without undue hardship".[1] The prescribed list at present consists of:[2]

[1] S. 1(1).
[2] S. 1(2).

beds or bedding material;
chairs;
tables;
furniture or plenishings providing facilities for cooking, eating or storing food;
furniture or plenishings providing facilities for heating.

5.45 In Consultative Memorandum No. 48 we suggested[1] that the best approach to reform was to extend the prescribed list of articles in the 1973 Act so as to include items such as curtains, floor coverings and cleaning implements and we also invited views on what other household goods might be included. On consultation there was general agreement on the foregoing proposals. Nevertheless in view of the wide and continuing concern about poinding and sale of domestic furniture and plenishings we have reconsidered the matter.

5.46 In our reconsideration we have attempted to pay regard to several principles. First, poindings should remain an effective method of debt enforcement. Were the exemptions to become such that nothing poindable could be found in a normal debtor's home, creditors would be deprived of the only diligence which they can use to enforce debts in many cases, with undesirable consequences for creditors (particularly small tradesmen and businessmen), the credit system and the community as a whole. Secondly, selling normal household furniture and plenishings, whose replacement value is very much greater than its sale value, inflicts much greater hardship on the debtor than it confers benefit on the creditor. This harshness can only be partly mitigated by the courts having discretionary powers to refuse to grant warrant of sale where a sale would be unduly harsh[2] or where the proceeds of sale would not be likely to cover the expenses of sale.[3] Some harshness to the debtor is inevitable for a diligence which does not threaten to reduce the debtor's standard of furnishing will not usually operate as a spur to payment of the debt. Finally, any new system of exemptions for household goods must be workable; whatever the merits or demerits of the Law Reform (Diligence) (Scotland) Act 1973 the small number of appeals against poindings suggests that it operates successfully in practice.

5.47 Guided by these principles we recommend that a more extensive list of furniture and plenishings than that contained in the 1973 Act should be exempt. We would include as exempt curtains, carpets, washing machines, one refrigerator, a vacuum cleaner and lights and light fittings subject to their being reasonably required for the use of the debtor or dependants of the debtor. Also the test of "reasonably necessary" to avoid "undue hardship" is we think too severe; it could be argued that in a household with young children a washing machine, iron, refrigerator or vacuum cleaner were labour-saving luxuries and not reasonable necessities. On the other hand we think that for the sort of household postulated they would count as reasonable requirements. Legislation along these lines would, we think, be workable. A

[1]Proposition 21 (para. 4.30).
[2]See Recommendation 5.30 (para. 5.146).
[3]*South of Scotland Electricity Board* v. *Carlyle* 1980 S.L.T. (Sh.Ct.) 98 and Recommendation 5.30.

prescribed list of exempt articles would give officers of court executing poindings sufficient guidance to deal with the majority of cases, for articles on the list found in normal debtors' dwellinghouses would more often than not meet the test of being reasonably required. On the other hand officers are being given a measure of discretion so that items in excess of the debtor's reasonable requirements or disproportionately valuable items would be liable to be poinded. In order to correct any deficiencies which may become apparent in practice after the legislation has been brought into force we suggest that, as under the existing law, changes may be made to the prescribed list of articles by statutory instrument made by the Secretary of State.[1]

5.48 We **recommend:**

(1) It should not be competent to poind articles in the debtor's dwellinghouse which are reasonably required for the use of the debtor or any member of the debtor's household, being articles of the following descriptions:

beds or bedding;
household linen;
chairs or settees;
tables;
food;
lights or light fittings;
heating appliances;
curtains;
floor coverings;
furniture, equipment or utensils used for cooking, storing or eating food;
one refrigerator;
articles used for cleaning the dwellinghouse or cleaning, mending or pressing clothes;
articles used for safety in the dwellinghouse (such as fireguards);
furniture used for storing clothes, bedding, household linen and articles used for cleaning the dwellinghouse.

(2) The above list of articles should be capable of being amended by regulations made by the Secretary of State by means of statutory instrument subject to negative resolution.
(Recommendation 5.9; clause 43(2), (3) and (7).)

Clothes and child care articles

5.49 At present clothes so far as not extravagant for the social position of the debtor are exempt from poinding.[2] No adverse comments on this exemption were made on consultation and we recommend its retention but with the criterion for exemption being reasonably required by the debtor instead of the somewhat antiquated phrase of not extravagant for the social position of the debtor.

5.50 On consultation two commentators suggested that children's toys and

[1]The Law Reform (Diligence) (Scotland) Act 1973, s. 1(3) empowers the Secretary of State to amend the list prescribed in s. 1(2) by statutory instrument. This power has not been exercised to date.

[2]Graham Stewart, p. 345.

child care articles should also be exempt. We agree provided the articles are for the use of the debtor's children. The Society of Messengers-at-Arms and Sheriff Officers commented that officers of court do not in practice poind such articles; nevertheless we think there is merit in making a specific statutory exemption for these articles.

5.51 We **recommend:**

There should be exempt from poinding:

(*a*) clothing reasonably required for the use of the debtor or any member of the debtor's household; and

(*b*) articles reasonably required for the care or upbringing of any child who is a member of the debtor's household; and

(*c*) toys for the use of any child who is a member of the debtor's household. (Recommendation 5.10; clause 43(1)(*a*), (*e*) and (*f*).)

Tools of trade and similar articles

5.52 Under the common law "tools of the trade" by which the debtor earns a livelihood are exempt.[1] Generally the exemption has been construed as mainly intended for low-income debtors whose "tools of trade" are of relatively small value. Thus the rule has been held to cover the books belonging to a language teacher[2] or the sewing machine of a dressmaker[3] but not the library of a solicitor[4] or the furniture of a hotel keeper.[5] In Consultative Memorandum No. 48 we proposed[6] that any new statutory exemption should be subject to a monetary limit because implements, tools or books used in connection with a trade, profession or business could be worth many thousands of pounds.

5.53 Our proposal evoked a mixed reaction on consultation. The Society of Messengers-at-Arms and Sheriff Officers observed that monetary ceilings would place officers in a difficult position since they would require to value and set aside exempt articles before valuing the articles to be poinded. They suggested that all tools of trade should be poindable and that the sheriff not the officer should decide on the scope of the exemption. The drawback to this suggestion is that unless the debtor applied to the sheriff no exemption for tools of trade would apply. Despite our general reservation about monetary limits expressed above[7] we think that exempting tools of trade up to an appropriate prescribed aggregate value is the simplest and most practicable way to ensure that the exemption is confined to articles of modest value.[8] Some commentators thought our proposed figure of £250 was too low and we would accept this. £500 seems more appropriate and this figure should be capable of being varied by subordinate legislation in line with changes in the value of money.

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[1]Graham Stewart, pp. 345–6 and cases cited there.

[2]*Gassiot* 12 Nov. 1814 F.C. per L. J. C. Boyle.

[3]*McMillan* v. *Barrie and Dick* (1890) 6 Sh.Ct.Reps. 103.

[4]*Pennell* v. *Elgin* 1926 S.C.9.

[5]*Gassiot, supra*, per Lord Robertson quoted with approval in *Pennell* v. *Elgin, supra*.

[6]Proposition 22 (para. 4.31).

[7]Para. 5.42.

[8]Tools of trade in excess of the monetary limit could be released from the poinding on grounds of undue harshness, see para. 5.63 below.

5.54 In Consultative Memorandum No. 48 we proposed[1] that medical aids and books and other educational aids needed for the debtor and members of the debtor's household should be exempt. All those who commented agreed. We would however suggest that a monetary limit of £500 be placed on educational or vocational training material since otherwise material needed by a trainee to a trade, business or profession would attract unlimited exemption, while once the person was trained the exemption for tools of trade would only cover the first £500 worth of articles. We would however place no such limit on medical aids (such as a wheel-chair) since if they are reasonably required by the debtor they should be exempt from poinding however much they are worth.

5.55 Under the Diligence Act 1503 goods used for ploughing cannot be poinded during the ploughing season if other goods are available for poinding. This exemption is similar to the exemption for tools of trade but differs in two respects. First, it does not exempt the goods from poinding permanently but merely delays it until the end of the ploughing season. Second, the exemption is conditional on the availability of other goods which may be poinded in lieu of plough goods. The old case-law defines the ploughing season as varying in different parts of the country according to custom, but "generally . . . may be considered to begin in October and end with June."[2]

5.56 In Consultative Memorandum No. 48, we invited views[3] on whether the exemption should be retained or abolished and, if retained, whether the 1503 Act should be replaced by a modern provision, which would allow a creditor to poind the goods in question, but would provide safeguards permitting the debtor to continue to use them for agricultural operations for a limited period. On consultation, the weight of opinion was marginally for abolishing the exemption. We do not think it possible to justify the retention of a special exemption for "plough goods", or a wider exemption for agricultural implements in modern conditions. We agree with the representation made to us that agriculture is an ordinary business and should be treated on the same footing as all other businesses; that is to say, the new statutory provision on "tools of trade" would apply to agricultural implements but no other or further exemption should apply.

5.57 We **recommend:**

(1) The common law exemption for tools of trade should be replaced by a statutory rule exempting implements, tools, books and other equipment reasonably required in the practice of the profession, trade or business of the debtor or any member of the debtor's household not exceeding in aggregate value £500 (or such other sum as may be prescribed).

(2) The Diligence Act 1503, which makes provision for the temporary and conditional exemption from poinding of "plough goods," should be repealed.

(3) Articles reasonably required for the educational or vocational training of the debtor or any member of the debtor's household should be

[1]Proposition 25 (para. 4.40).
[2]Graham Stewart, p. 345.
[3]Proposition 23 (para. 4.34).

exempt from poinding up to an aggregate value of £500 (or such other sum as may be prescribed).

(4) Medical aids or equipment reasonably required for the use of the debtor or a member of the debtor's household should be exempt from poinding. (Recommendation 5.11; clause 43(1)(*b*), (*c*) and (*d*) and (7) and Schedule 9.)

Residential mobile homes

5.58 A mobile home,[1] such as a residential caravan, is moveable property and hence can be poinded and sold within a matter of weeks or even days, whereas the appropriate form of diligence for attachment of ordinary homes, which are heritable property, is the archaic action of adjudication.[2] We suggested in Consultative Memorandum No. 48[3] that special provision for a sist of poinding was needed to allow the debtor time to obtain alternative accommodation. This is especially important since many mobile homes are situated in rural areas where alternative accommodation may be scarce.

5.59 On consultation, this suggestion was approved by almost all bodies who commented.[4] Some thought that a maximum period of six months should be prescribed for the duration of each period of the sist; others thought the duration should be at the discretion of the sheriff. We tend to agree with the latter view. One body suggested that, if possible, mobile homes should be treated in the same way as heritable property and subject to a process similar to but cheaper than inhibitions. Inhibitions, however, do not enable the inhibiting creditor to sell property but merely prevent the debtor from disposing of it. Moreover, we do not think that purchasers of mobile homes should be required to search the Register of Inhibitions. On the other hand, we do not think it realistic to treat residential mobile homes as being equivalent to other moveable goods. For this reason, we think that special provision is needed to safeguard the owners of such homes from their poinding and sale,[5] although we realise that our recommendation is only in the nature of an interim solution until the question of sale of heritable property for debt is discussed at a later stage of our work on diligence.

5.60 We **recommend:**

(1) Where a caravan or other moveable structure which is the only or principal residence of the debtor is poinded, the debtor should be entitled at any time before warrant of sale is granted to apply to the sheriff for a sist of further proceedings.

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[1]It has been estimated that approximately 3,800 households (some 10,000 people) were living in mobile homes on licensed sites in Scotland in 1975: see Scottish Office Central Research Unit Paper on Residential Mobile Homes in Scotland (1977).

[2]A decree of adjudication (which can only be granted by the Court of Session) entitles the creditor to enter into possession of the property and let it, but no sale can take place until at least 10 years elapse in order to give the debtor an opportunity to redeem on paying the debt.

[3]Proposition 24 (para. 4.35).

[4]One body thought that where the poinding was based on a decree for the price of the mobile home, the provision for a sist of diligence should not apply. We revert to provisions of this type at para. 5.73 below.

[5]See para. 5.242 below for protection against immediate sale by the trustee in sequestration.

(2) The period of the sist should be at the discretion of the sheriff and should be renewable on application for a further period or periods. (Recommendation 5.12; clause 51.)

Applications for release of goods from poinding

5.61 At present if goods which are exempt from poinding are in fact poinded the debtor's remedy, with one exception, is to apply for interdict, or suspension and interdict, of the diligence in relation to those goods. The exception relates to articles of domestic furniture and plenishings exempted by the Law Reform (Diligence) (Scotland) Act 1973.[1] Here a summary procedure (termed an appeal against poinding) using prescribed forms[2] is provided, the debtor being informed of the right to apply to the court by means of a prescribed form left for the debtor with the poinding schedule. If the sheriff is satisfied after hearing the officer, creditor or debtor (if they wish to be heard) that the articles which are the subject of the application are exempt an order is pronounced releasing them. In Consultative Memorandum No. 48 we suggested[3] that the 1973 Act procedure should be extended so as to provide a simple method of having all classes of exempt goods released from poinding. All those who commented agreed. The 1973 Act procedure has as far as we are aware worked well in practice and we would recommend its extension to other cases where the exemption is provided by law to protect debtors and their dependants.

5.62 An application for release under the 1973 Act must be made within seven days after the poinding; there is no express time limit for applications for interdict or suspension and interdict. We recognise that there is a need for finality at an early date as to what goods are included in a poinding, but think that the present seven day period is unduly short, and recommend a period of 14 days instead.

5.63 In Consultative Memorandum No. 48[4] we also sought views on whether other goods, such as personal possessions of sentimental value or small family heirlooms, should be exempt and if so how these goods might be defined. Consultation produced a variety of views ranging from rejection to support subject to a £50 limit on aggregate value. The Society of Messengers-at-Arms and Sheriff Officers suggested that the goods should be poinded and any exemption given by the sheriff. We would adopt this suggestion. Requiring officers of court to grant exemption would place an unfair burden on them in view of the wide variety of articles which could be claimed to be exempt. An advantage of conferring on the sheriff a discretionary power to order release of specific items is that the ground of exemption could be expressed in more general terms than sentimentality. The ground we recommend is that the poinding and sale of the article in question would be unduly harsh. We envisage the power to release might be used not only in relation to articles of little or no commercial value which are of sentimental value to the debtor—a family photograph album for example or small items of personal jewellery such as a wedding ring—but also in relation to articles essential to the debtor's

[1]See para. 5.44 above.
[2]Act of Sederunt (Appeals against Poinding) 1973 (S.I. 1973/1860).
[3]Proposition 19 (para. 4.23).
[4]Proposition 25 (para. 4.40).

business which have been poinded although other non-essential articles were available. To secure finality we propose that an application for release should be permitted only within 14 days after the date of the poinding.

5.64 Standing the present prohibition on executing a second poinding on the same premises except in respect of goods which were not there at the time of the first poinding,[1] the creditor would be prejudiced if the sheriff released items from the poinding on the grounds of undue harshness. To rectify this we recommend that the sheriff should have power to authorise a poinding of further articles in the debtor's premises.

5.65 We **recommend:**

(1) The sheriff should have power, on application by the debtor made within 14 days after the date of the poinding, to order the release of specified articles from the poinding on the grounds that:
   (*a*) the articles were exempt from poinding; or
   (*b*) the continuation of the poinding of the articles or their sale would be unduly harsh.

(2) The sheriff on granting an order releasing articles on grounds of undue harshness should have power to authorise a poinding of further articles in the debtor's premises in order to restore the value of the creditor's poinding.
(Recommendation 5.13; clauses 43(4) and (5) and 48.)

Money and negotiable instruments

5.66 It is unclear whether coin and bank notes may be poinded,[2] but the invariable practice is to exclude such items from poindings.[3] In Consultative Memorandum No. 48 we proposed[4] that this practice should become a statutory rule. All those who commented with one exception agreed. The Society of Messengers-at-Arms and Sheriff Officers observed that they frequently came across cases where there were insufficient articles on the debtor's premises to cover the debt but that large sums of cash (in a shop till for example) were available.

5.67 Since money and negotiable instruments are taken by the trustee in a bankrupt's sequestration[5] they ought to be capable of being made available to creditors outwith sequestration. However, poinding and sale would be an inappropriate diligence to attach money since it could not be safely left in the debtor's possession and the later steps of the diligence—advertisement and sale of the poinded goods—are designed to realise property into money. Moreover, there might have to be exemptions to cover the cases where the cash represented social security payments (presently exempt from diligence) or the balance of the debtor's wages after deductions had been made under an arrestment of earnings. We think there is a case for a new diligence against

[1]See paras. 5.131 to 5.134 below.
[2]Graham Stewart, p. 340; Bell, *Commentaries* vol. ii, p. 60; *Alexander* v. *McLay* (1826) 4 S. 439.
[3]McKechnie Report, para. 50; the Report recommended that this practice should continue.
[4]Proposition 17 (para. 4.11).
[5]Bankruptcy (Scotland) Act 1913, s. 97; Bankruptcy (Scotland) Bill 1984, clause 30.

money and negotiable instruments, but we make no recommendations for change in this area of the law in this report.

Poinding by creditor of goods in own possession

5.68 At common law it is competent for a creditor to poind goods belonging to the debtor which are in the creditor's possession.[1] We proposed in Consultative Memorandum No. 48[2] that this should continue to be competent and our proposal was unanimously agreed on consultation. Unless the creditor can poind there would seem to be no other diligence to attach goods (machinery for example) left on the creditor's premises by the debtor since arrestment is confined to items in the hands of third parties. The procedure whereby the creditor poinds and sells the debtor's goods in the creditor's possession is exactly the same as if the goods had been in the debtor's possession, but we deal with the question of notification of the poinding to the debtor in our discussion of poinding procedure.[3]

5.69 We **recommend:**

The common law rule whereby a creditor in possession of goods of the debtor may poind those goods should be retained.
(Recommendation 5.14.)

Poinding by seller

5.70 We turn now to deal with the situation where the creditor has sold goods to the debtor but has retained possession of them. Here the creditor may, if the title of the goods has passed to the debtor, poind them by virtue of the common law rule referred to in paragraph 5.68 and so obtain security for the unpaid price (or any other debt) due by the debtor. In addition, section 40 of the Sale of Goods Act 1979 provides:

> "In Scotland a seller of goods may attach them while in his own hands or possession by arrestment or poinding; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party."

On consultation, there was general agreement with our suggestion[4] that the section should be repealed for the following reasons:

(*a*) The unpaid seller of goods already has adequate remedies under the Sale of Goods Act 1979 and the common law without the addition of a statutory right of attachment.[5]

(*b*) It is unclear whether the "arrestment and poinding" referred to in the section are diligences properly so called or merely pieces of legal

[1]Graham Stewart, p. 338; *Lochhead* v. *Graham* (1883) 11 R. 201 (poinding by landlord of furniture left by tenant on leased premises); *Tillicoultry* v. *Lord Rollo* (1678) Mor. 10517.

[2]Proposition 16 (para. 4.10)

[3]Para. 5.93 below.

[4]Consultative Memorandum No. 48, Proposition 16(1), para. 4.10.

[5]The unpaid seller has a lien (or right of retention) (ss. 39 and 41–43); a right of stoppage in transit (ss. 39 and 44–46); a right of resale (ss. 39 and 48); and a right to withhold delivery if property has not passed (s. 39).

machinery deriving from an earlier enactment[1] and re-enacted in the Sale of Goods Act but having no value in the context of that Act.[2]

(*c*) Section 40 is arguably inconsistent with section 47 of the Sale of Goods Act 1979.[3] The safeguards in the latter section (for the rights of third parties taking in good faith and for value documents of title for the goods from the purchaser on a sub-sale or pledge) are not expressly applied to the seller's right of attachment under section 40 but only to the rights of lien and stoppage in transit.

(*d*) There is doubt whether a sub-sale by the purchaser has the effect that the original seller loses the right to attach the goods, or whether the original seller who retains possession, may attach the goods notwithstanding the sub-sale.[4]

(*e*) An arrestment is not an appropriate diligence to attach goods in the hands of the creditor.

In short, the section is unnecessary and creates problems out of proportion to its utility.

5.71 One body disagreed with our view that section 40 should be repealed. They argued that the seller's other rights under the Sale of Goods Act are restricted to the situations where the seller is unpaid in respect of the particular goods forming the subject of sale;[5] and that section 40 is an additional protection which lends the sanction of the court to the seller's retention of the goods.[6] We do not find these objections persuasive. We do not see why the Sale of Goods Act should provide for the enforcement of debts other than the price of goods. We understand that section 40 is rarely, if ever, invoked and accordingly its repeal would not deprive creditors of an important protection. Further, if the seller has a right of retention under the Act for the price of the goods, it is difficult to see why provision should also be made for poinding and arrestment (for the expenses of which the debtor would presumably be liable).

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[1]Mercantile Law Amendment (Scotland) Act 1856, s. 3.

[2]Brown, *Sale of Goods* (2nd edn.) pp. 314–8.

[3]This section provides that a seller's lien and right of stoppage in transit are not affected by a sale or other disposition of the goods by the buyer, unless the seller has assented thereto; but the rights are affected where documents of title have been given to the buyer and transferred on a sub-sale to a third party taking in good faith and for value. If the documents are transferred by the original buyer, not on sub-sale but by way of pledge or other disposition, then the lien or right of stoppage in transit is retained but is subject to the rights of the transferee.

[4]For the conflicting views, see Gloag and Irvine, p. 269; Brown, *supra* p. 318 respectively.

[5]Although in the Acts of 1893 and 1979, section 40 appears in a group of sections with the shoulder note "Rights of unpaid seller against the goods", it is generally accepted that the section entitles the seller to poind the goods which are the subject of sale not merely for the price but for any debt due to the seller by the purchaser: see Gloag and Irvine, p. 269; Brown, *op. cit.*, p. 318.

[6]They further argued that section 40 merely states the common law rule as it would in any event apply where the creditor was in the position also of being a seller. It is true that the Sale of Goods Act 1893, by enabling the seller to transfer goods on sale without delivery, made it competent for the seller to poind at common law goods in his or her possession sold and undelivered since property had passed to the debtor. But the section differs from the common law (*a*) in allowing arrestment (as well as poinding) of goods in the seller's hands, and (*b*) in allowing poinding of goods belonging to the seller where the contract of sale postpones transfer of title to the goods.

5.72 We **recommend:**

Section 40 of the Sale of Goods Act 1979 (poinding and arrestment by seller of goods in possession of the seller) should be repealed.
(Recommendation 5.15; Bill, Schedule 9.)

Poinding of exempt goods by unpaid seller

5.73 In Consultative Memorandum No. 48 we considered whether an unpaid seller should be entitled to poind goods which had been sold to the debtor and which were in the debtor's possession, even though the goods were such that they would otherwise be exempt from poinding. If, for example, a person bought a bed or a cooker on credit for use in his or her dwellinghouse but failed to pay for it, the creditor would, under the present law[1] and under our Recommendation 5.10 above,[2] not be entitled to poind it to enforce payment. Although this inability to poind could leave the creditor without any diligence, we suggested[3] that an exception to the rules exempting goods from poinding should not be made where the creditor was the unpaid seller of the goods in question. Consultation evoked a mixed response. Two bodies considered that the unpaid seller's entitlement to poind for the price should override the exemption of the goods sold, while one body thought that the unpaid seller should be able to obtain a court order for repossession of the goods sold. One body thought that the court should have a general power to except goods from the exemption provisions. Another body thought that our recommended provisions for sisting diligence against mobile homes[4] should not apply where the diligence was based on a decree for the price of the mobile home. Most commentators, however, considered that an exception related to the price of goods should not be introduced. The seller has the alternatives of not parting with the goods until they are paid for or of securing the price by hire purchase or conditional sale. The officer executing a poinding might have difficulty in identifying the goods as those sold by the creditor. In any event, it is difficult to see why the seller of goods should have advantages not enjoyed by other unsecured creditors.

5.74 We **recommend:**

The seller of goods otherwise exempt from poinding should not be entitled to poind them in order to recover the unpaid price.
(Recommendation 5.16.)

Times when poinding allowed.

5.75 The days on which poindings and other diligences may competently be executed are regulated by common law.[5] It is clear that poindings cannot be executed on Sundays but it is not clear whether, or to what extent, poindings on public holidays are void. We understand that the current practice is not

[1]Law Reform (Diligence) (Scotland) Act 1973, s. 1(2).
[2]Para. 5.48.
[3]Proposition 25(4) (para. 4.40).
[4]Recommendation 5.12 (para. 5.60) above.
[5]Stair, *Institutions* IV. 47.27 states that execution may not be carried out "on the Lord's day or on solemn days appointed by Church or State for humiliation or thanksgiving". Bankton, *Institute* IV 42.3 to 42.5 is to a similar effect. In *Monteith* v. *Hutton* (1900) 8 S.L.T. 250, Lord Kincairney doubted whether a proclamation by the magistrates of a public holiday in Perth in celebration of Queen Victoria's birthday prevented an arrestment from being served, at least if the arrestee's premises were open.

to execute diligence on Sundays, nor on Christmas Day, New Year's Day or Good Friday. In Consultative Memorandum No. 48 we proposed[1] that the days on which a poinding could competently be executed should be regulated by a statutory rule reflecting current practice in order to remove the present uncertainty which can cause difficulties for officers of court who may be liable in damages for not executing diligence timeously.[2] One body thought there was no need for statutory regulation but the other commentators welcomed our proposal.

5.76 A poinding must be executed during the hours of daylight: if it is commenced before sunset and ends while there is still daylight, it will be upheld. If the poinding is not completed in the hours of daylight it must be adjourned to the next day. In some respects, this rule is unduly restrictive. It sometimes requires an officer executing a long poinding in a remote area to stay overnight unnecessarily. By itself the criterion of the hours of darkness may be thought unsatisfactory since they vary in different parts of the country and at different times of the year, and further, for historical reasons, take no account of the invention of the electric light. On the other hand, any rule allowing poinding during the hours of darkness would require to be restricted to the early evening and even then would have to be applied with common sense since the debtor's electricity supply may have been disconnected. Further, some flexibility is needed since a rigid rule will not be uniformly appropriate to all circumstances, for example, cars and other vehicles may never be at the debtor's premises during the permitted hours.

5.77 In Consultative Memorandum No. 48, we suggested that it should not be competent to commence a poinding before 9 a.m. or after 8 p.m. except by leave of the sheriff and that it should be incompetent to continue a poinding after 8 p.m. unless the officer has obtained prior authority from the sheriff or can show reasonable cause in the report of poinding why it was continued after 8 p.m.[3] Except for one body who observed that to regulate this matter was unnecessary and would create complexity and uncertainty, all other commentators on the proposal agreed with the need for regulation. One body suggested that the normal permitted hours should commence at 8 a.m. since many debtors will have left for work by 9 a.m. We would accept this suggestion. Another body thought it was unreasonable that officers should have a discretion to continue with a poinding after 8 p.m. which would be valid provided the sheriff was satisfied at a later date that the officer had a reasonable cause for the continuation. On reconsideration we agree that such a rule would place officers in an invidious position and think that a better solution is to require them to obtain the prior authority of the sheriff to a proposed continuation after the normal permitted hours or a proposed commencement prior to the normal permitted hours.

5.78 We **recommend:**

(1) No poinding should be competent on a Sunday, Christmas Day, New Year's Day or Good Friday nor on such other day as may be prescribed by act of sederunt.

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[1]Proposition 15 (para. 4.4).
[2]*Monteith* v. *Hutton, supra*; and Chapter 8, Section E. below.
[3]Proposition 15(2) and (3) (para. 4.4).

(2) It should be incompetent to commence a poinding before 8 a.m. or after 8 p.m. or to continue a poinding after 8 p.m. without in either case prior authority from the sheriff.
(Recommendation 5.17; clause 44.)

Powers of entry

5.79 Since last century extract decrees (including decrees of registration) have contained a warrant authorising an officer of court to open shut and lockfast places if forcible entry to premises is required to execute the poinding.[1] There is little authority on the scope and incidents of the powers conferred by warrants to open shut and lockfast places. One old manual of practice states that "before breaking open the front or most patent door of a house, the officer should knock six audible knocks on the door, and state who he is, and the purpose of his coming, and if admission be refused, or if no one be in the house, the officer may then competently proceed to enter and enforce his warrant".[2] Preventing an officer of court from gaining entry may constitute the common law crime and delict of deforcement.[3] Deforcement, however, normally implies assault or a show of violence.[4] Where officers of court have been specifically instructed to poind goods they must, if they cannot otherwise gain entry, use the powers of forcible entry unless they are deforced.[5] Officers of court may call on the police if they are deforced or a breach of the peace is committed or if they reasonably anticipate such occurrences on their attempting to gain entry.[6] Where the debtor's goods are in the possession of a third party, poinding is competent but the creditor will normally instruct the alternative diligence of arrestment which can be effected without entry. Forcible entry into the premises of a third party is not normally required, although warrants are not in terms restricted to lockfast places belonging to the debtor.

5.80 We understand that where it appears to an officer of court that nobody is in the premises, and that it is necessary to open a locked door, the practice of officers is generally to write a letter or leave a note for the debtor intimating when the officer will return to effect a poinding. The same practice may be adopted if the officer is refused admission. Only if no contact is made or admission is again refused, will a locksmith (whose fees are ultimately chargeable to the debtor) be engaged to open the door. Any error as to the address or identity of the debtor usually emerges before the premises are forcibly entered. We understand that to avoid the expense of locksmiths, and the risk of damage to locks or doors, officers will sometimes use skeleton keys to obtain entry to unoccupied premises.

5.81 In Consultative Memorandum No. 48 we suggested[7] that extract decrees

[1]Debtors (Scotland) Act 1838, Scheds. 1 and 6; Writs Execution (Scotland) Act 1877, s. 3; Sheriff Courts (Scotland) Extracts Act 1892, s. 7(1).

[2]Gillespie, *Powers and Duties of Sheriff Officers* (1852) pp. 91–2.

[3]Gordon, *Criminal Law* (2nd edn.) pp. 819, 1086; Walker, *Delict* (2nd edn.) pp. 501–2.

[4]*McConnell* v. *Brew* (1907) 23 Sh.Ct.Reps. 261.

[5]*Ibid.*

[6]The duties of the police do not generally encompass the enforcement of civil obligations (*Caldwell* v. *Caldwell* 1983 S.L.T. 610) but the occurrences mentioned in the text are criminal offences.

[7]Proposition 28 (para. 4.52).

should continue to contain a warrant to open shut and lockfast places, since it was difficult to justify the extra expense of an application for a separate warrant. All those who commented agreed. We also suggested that if regulation of the exercise of the power of entry was required it should be done by Practice Notes of the sheriffs principal or by rules of conduct applicable to officers of court. Two commentators in close touch with debtors and their problems, the Scottish Association of Citizens Advice Bureaux and the Scottish Council for Civil Liberties expressed reservations about the manner in which the powers of entry are exercised and we have considered the matter afresh.

5.82 Our preference for regulation by rules of conduct was based on the difficulty of framing clear rules of strict law, applicable to all circumstances, which would achieve the right balance between the creditor's interest in enforcing the decree and the debtor's interest in maintaining privacy. Despite this difficulty we think that some rules of law are required. We would reject any rule enabling debtors to refuse to admit an officer to their dwellinghouses. The notion that a dwellinghouse is a castle should not entail that it can also be a sanctuary in which debtors can store poindable goods and snap their fingers at creditors. If the law permits certain goods to be poinded, then it should also permit officers of court to execute their warrants to poind, whatever the wishes of the debtor. In short, a rule prohibiting forcible entry in all circumstances in inconsistent with the rules allowing certain goods in the debtor's dwellinghouse to be poinded.

5.83 The Edinburgh University Debtors Survey[1] disclosed that where a poinding in the debtor's dwelling is executed in the presence of friends, relatives or children this generates a considerable amount of ill feeling. We do not think that this can be completely avoided unless officers were required to give debtors prior notice of intention to poind in all cases.[2] Prior notice would involve officers in more paperwork and hence increase the expense of the diligence to debtors; it would also give debtors an opportunity to remove their goods so as to defeat any poinding or to make arrangements for resisting the officer's attempts to gain entry on return. Moreover, prior notice could well lead to uncertainty and confusion where the debtor on receipt of a notice comes to some arrangement with the creditor which is not intimated to the officer in time.

5.84 The current practice of officers on finding no-one at home when they call to execute a poinding is to leave a message for the debtor stating their intention to return on a specified future date. Although we recognise that this practice may in some cases enable some debtors to remove their goods or to make arrangements for resisting the officer's attempts to gain entry on return, it is nonetheless in our view a sensible practice in general. We recommend that it should be embodied in a statutory rule whereby the warrant to open shut and lockfast places contained in the extract decree could not competently be used where the dwellinghouse was empty unless prior notice had been

[1]Para. 7.11.

[2]The Edinburgh University Debtors Survey disclosed (at para. 7.10) that only four out of 75 debtors interviewed were given warning of the day of the proposed poinding and these were all cases in which the officer found nobody at home on a previous call.

given or a special warrant[1] had been granted by the sheriff. One commentator suggested that a poinding should never be carried out in an empty house, but this would enable debtors to defeat diligence simply by absenting themselves. Special warrants are in our opinion necessary to deal with cases where the officer from experience knows, or has reasonable grounds for suspecting, that giving prior notice is likely to result in the poinding being prejudiced or defeated. The Edinburgh University Debtors Survey also disclosed that occasionally poindings are carried out when only young children are present in the house.[2] This practice, apart from causing understandable resentment on the part of debtors, also makes it difficult for the officer to ascertain the number of persons living in the household and hence the exempt items under the provisions of the Law Reform (Diligence) (Scotland) Act 1973 before poinding. We would therefore extend our recommendation regarding empty houses to houses where no adults were present and further recommend that where children but no adults are present the officer should give notice of intention to poind to the local social work department. Where business premises are involved the officer should not be required to give prior notice before using the warrant to open empty premises, because the sense of invasion of privacy is less than for dwellinghouses and there is a greater danger of the poinding being frustrated by removal of the goods.

5.85 We **recommend:**

(1) Warrants for poinding in extract decrees should continue to contain warrants to open shut and lockfast places.

(2) It should not be competent for a warrant to open shut and lockfast places to be used to gain entry to a dwellinghouse where there appears to be nobody or only persons under 16 years present unless the officer:

(*a*) had at least four days previously given notice of intended entry; and

(*b*) if on the first visit only children under 16 appeared to be present, had sent a copy of the notice to the local Social Work Department.

(3) The sheriff should be empowered, on application, to dispense with the requirements in paragraph (2) above if it appears that notice would be likely to prejudice the execution of the poinding.
(Recommendation 5.18; clause 45.)

Procedure in carrying out a poinding

5.86 Having obtained entry to the premises, the officer proceeds to poind the debtor's goods in accordance with rules laid down by the Debtors (Scotland) Act 1838 and the common law. In Consultative Memorandum No. 48, Part IV, we advanced provisional proposals, which were generally approved, for modernisation, clarification and reform of the procedure, and our recommendations follow the pattern of those proposals subject to modifications in the light of comments received. We consider later in the last section of this Chapter the assumptions as to ownership of goods officers are

[1]A special warrant would be obtainable summarily and without intimation of the application to the debtor.

[2]Para. 7.11.

entitled to make and their duties to make enquiries as to the ownership of goods they propose to poind.

5.87 *The existing procedure.* The procedure, as described by Graham Stewart[1] and other authorities, is as follows:

(1) According to the traditional styles of reports of poindings currently, or until recently, in use, the officer first cries three oyezes, and reads the extract decree containing the warrant to poind and the execution of the charge.[2] (A messenger whose credentials are disputed must display the blazon;[3] a sheriff officer, however, has no official credentials.)

(2) The officer must then demand payment of the debt.[4]

(3) Before carrying out the poinding, the officer should make enquiries as to ownership of the goods proposed to be poinded.[5]

(4) If payment in full is not tendered, the officer is in theory required to appoint two persons as valuators, or, in summary cause poindings, one person as valuator.[6] They accept office and take an oath to perform their duties properly.[7]

(5) In theory, the valuators should examine the goods and fix their value.[8]

(6) The officer draws up and signs a schedule of poinding which must specify the goods poinded and the creditor at whose instance they were poinded, and state their values as appraised by the valuators.[9]

(7) The officer makes three "offers back" of the goods to the debtor, or to anyone who appears for the debtor, on payment of the appraised values.[10]

(8) If the debtor refuses to accept the offer back, and the poinding is not otherwise competently interrupted, the officer adjudges and declares the poinding to be complete and the goods to belong to the poinding creditor, and ordains them to remain on the premises under certification that any person intromitting with them may be imprisoned until that person restores them or pays double the appraised value.[11]

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[1]P. 348 and following.

[2]This requirement stems from the common law but is almost certainly directory rather than mandatory, so that its omission would not affect the validity of the diligence: see para. 5.88 below, and it is not in practice followed though the report of poinding often refers to the ceremony.

[3]See Graham Stewart, p. 348: in para. 8.142 below, we suggest that all officers of court should be furnished with official identity cards.

[4]Graham Stewart, p. 348.

[5]See para. 5.218.

[6]Debtors (Scotland) Act 1838, s. 23; Summary Cause Rules, rule 90.

[7]Graham Stewart, p. 348; *Le Conte* v. *Douglas* (1880) 8 R. 175 per Lord Craighill at p. 177.

[8]Graham Stewart, p. 348; in practice, the valuation is done by the officer of court with the "valuator(s)" as witness(es); see para. 5.89 below.

[9]Debtors (Scotland) Act 1838, s. 24.

[10]Graham Stewart, p. 348; in part this stems from the common law and at least one offer back would appear to be mandatory; see para. 5.90 below.

[11]Graham Stewart, p. 348: this formality would appear to be mandatory.

(9) The proceedings must take place before two witnesses (or in a summary cause poinding, one witness) who may be and usually are the two valuators (or valuator).[1]

(10) The officer leaves the poinded goods together with the signed poinding schedule with the possessor.[2] In the case of a poinding of household goods the officer also leaves a notice informing the debtor of the entitlement to appeal to the sheriff within seven days against the poinding.[3]

5.88 *Abolition of opening ceremony.* The opening ceremony with its three oyezes and public reading of the extract decree is an anachronism left over from the time when the goods were appraised both at the debtor's premises and the market cross. The foundation of the present procedure was laid by the Bankruptcy Act 1793,[4] and there is some authority for the view that, since that Act and as a result of it, the opening ceremony has not been necessary in strict law[5] but has been carried forward into modern times by the draftsmen of the published styles of reports of poindings[6] and by officers because of uncertainty whether the statute was intended to abolish the old common law requirement. An unfortunate feature of the present uncertainty is that the officer will sometimes use one of the traditional styles of report but not follow the procedure which it describes, with the result that the report will misstate what actually happened.[7] We think that the opening ceremony in its present form should be expressly abolished, and replaced by a requirement to exhibit the extract decree or other document containing the warrant to poind and the certificate of service of the charge to pay.

5.89 *Valuators and witnesses.* There is at present a gap between the theory and the practice of the law on who should value poinded goods. When the requirement of appointment of two valuators was introduced in 1814,[8] it was probably the intention that the valuators should be independent persons who

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[1]Debtors (Scotland) Act 1838, s. 25; Summary Cause Rules, rule 90. The purpose of requiring witnesses is to identify the poinded goods since they remain in the debtor's premises: *Norman* v. *Dymock* 1932 S.C. 131, 134.

[2]Debtors (Scotland) Act 1838, s. 24.

[3]See Act of Sederunt (Appeals against Poinding) 1973, s. 3 and Form A; Law Reform (Diligence) (Scotland) Act 1973, s. 1(4).

[4]The Bankruptcy Act 1793 (c. 74) s. 3 (otherwise known as the Payment of Creditors Act 1793) dispensed with the need for a second appraisal at the market cross and provided that the officer should leave the poinded goods in the hands of the debtor with a schedule of the goods and a note of their appraised values and thereafter report this to the sheriff. This section was repealed and re-enacted by the Bankruptcy Act 1814 which was in turn repealed and re-enacted with modifications by the Debtors (Scotland) Act 1838, s. 24.

[5]See *McKnight* v. *Green* (1835) 13 S. 342; cf. *J. Ratcliff & Co. Ltd.* v. *McKelvie* 1977 S.L.T. (Sh.Ct.) 64 where the sheriff was of opinion that the opening ceremony was accepted practice "on which Parliament has not yet innovated."

[6]See the forms in Bell, *System of the Form of Deeds* (3rd. edn., 1812) vol. 6, p. 584; Darling, *Powers and Duties of Messengers-at-Arms* (1840) p. 164; Gillespie, *Powers and Duties of Sheriff Officers* (1852) p. 94; Campbell on *Citation* p. 238.

[7]See *J. Ratcliff & Co. Ltd.* v. *McKelvie* 1977 S.L.T. (Sh.Ct.) 64.

[8]Bankruptcy Act 1814, s. 4, replaced by Debtors (Scotland) Act 1838, s. 23.

would be skilled in valuation.[1] In fact, for some considerable time, the officer has valued the goods and the "valuators" (who are usually members of staff of the officer's firm) merely act as witnesses. On consultation there was general agreement with our proposal[2] that the officer should normally value the goods to be poinded, that save in exceptional circumstances no valuator or valuators should be appointed, and that (to save expense) only one witness should attend the poinding and sign the schedule and report of poinding. These proposals were also made by the McKechnie Report,[3] and we adhere to them. While it would be too expensive to require the use of a professional or specialist valuator in all poindings, the officer should be able to bring in such a person if the nature of the goods makes that course of action advisable.

5.90 *The "offer back".* Though the three "offers back" of the goods at their appraised values are not prescribed by statute, the procedure affords a protection to debtors[4] which has been held an essential formality under the common law[5] although it may be that even under the present law one offer back would be enough. In our view the offer back fails to achieve its objective of allowing the debtor an opportunity to redeem goods at their appraised values, so providing some protection against low valuations. First, the poinded goods can only be offered back to the debtor or person authorised to act for the debtor who is present at the poinding.[6] In household poindings the debtor is frequently not present and any other person who is present may not be authorised to accept the offer back. Secondly, the offer back has to be accepted there and then; most debtors require time to obtain the necessary money. We recommend replacing the offer back by conferring on the debtor an entitlement to redeem all or some of the poinded goods on paying their appraised value at any time within 14 days after the date of the poinding. Where the debtor is present at the poinding the officer should tell the debtor of this right to redeem and this information should also be contained in the schedule of poinding given to or left for the debtor.

5.91 *The poinding schedule.* The traditional styles of poinding schedule specify not only the matters required by statute[7] but also other matters,[8] though it seems that errors in the non-statutory parts of a poinding schedule do not invalidate the diligence.[9] A variety of styles of schedule have been recently

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[1]See Bell, *Commentaries* vol. ii, p. 58. In *Broomberg* v. *Rheinhold & Co. Ltd.* (1944) 60 Sh.Ct.Reps. 45, the officer had placed values on poinded goods and asked the valuators if they agreed: the sheriff observed (at p. 55) "While I am not prepared to go the length of holding that this made the valuation a nullity, I think it is not in accordance with the intention of the Act and is very apt to undermine the essential independence of the valuators".

[2]Consultative Memorandum No. 48, Proposition 27(3) (para. 4.44); para. 4.54.

[3]Paras. 163 and 165.

[4]Goods re-acquired by the debtor through an "offer back" cannot be poinded again for the same debt: *Fiddes* v. *Fyfe* (1791) Bell's Octavo Cases 355.

[5]*Broomberg* v. *Rheinhold & Co. Ltd.* (1944) 60 Sh.Ct.Reps. 45; *South of Scotland Electricity Board* v. *Brogan* 1981 S.L.T. (Sh.Ct.) 8.

[6]*Hogg* v. *Taylor* 1934 S.L.T. (Sh.Ct.) 36; *South of Scotland Electricity Board* v. *Brogan, supra.*

[7]Debtors (Scotland) Act 1838, s. 24, see para. 5.87.

[8]Graham Stewart, p. 349 states that the schedule also narrates the extract decree and warrant, the poinding of the goods, the names and designations of the valuators, and generally the procedure followed by the officer in carrying out the poinding.

[9]*McKnight* v. *Green* (1835) 13 S. 342 per L. J. C. Boyle at p. 346 "Provided there is a schedule with a note or notandum of the appraised value, that is all which is required": *Urquhart & Son* v. *Wood* (1906) 22 Sh.Ct.Reps. 255.

in use (including some which are more appropriate to the now abolished small debt procedure) and some of them are not readily intelligible to ordinary debtors. Our general view that forms served on debtors in connection with diligence should be clear, expressed in modern language and be in prescribed form, applies to the poinding schedule. The schedule should contain the following information; the name of the poinding creditor, the goods which have been poinded and their values as appraised at the poinding, the amount of the debt and expenses (including the expenses of the poinding) due and the person to whom payment of the debt may be made. The schedule should also warn the debtor against removing the poinded goods and inform the debtor of the rights to redeem goods on payment of their appraised value[1] and to apply to the sheriff for release of goods on the grounds of undue harshness or their being exempt from poinding.[2]

5.92 The poinding schedule describes the poinded goods so that they can be identified later when they are put up for sale. One commentator expressed surprise that officers did not label poinded goods or mark them in order to identify them more clearly. We think that such a practice should not be permitted, as it would be humiliating for debtors in that any visitors would be able to see that goods had been poinded.

5.93 Section 24 of the Debtors (Scotland) Act 1838 requires the officer to "deliver" the poinding schedule to the possessor. One body suggested that the officer should be required to serve the poinding schedule on the possessor using one of the legal modes of service. This amendment seems unnecessary. The present practice is to hand over the schedule to the possessor, or if the possessor is not present at the poinding, to leave it in a prominent place on the premises. This practice does not appear to present problems in the normal household or commercial poinding and we do not recommend any change in this respect. At present where the goods have been poinded in the possession of a third party the officer is required to deliver the schedule to the possessor rather than the debtor. We recommend that in this case the officer should be required if reasonably practicable to send a copy of the schedule to the debtor.

5.94 *Time of completion of poinding*. We proposed that the officer should no longer be required orally to adjudge and declare the poinding to be complete and the goods to belong to the poinding creditor. The latter declaration is inappropriate since a poinding does not by itself transfer ownership to the poinding creditor, but merely creates a kind of right in security. It is, however, necessary to establish for various legal purposes when the poinding is complete. Thus, in terms of the bankruptcy legislation a poinding is ineffectual if executed within the period of 60 days before the date of sequestration.[3] It has long been an open question whether a poinding is "executed" for this purpose when at the end of the actual poinding the officer adjudges the goods to belong to the poinding creditor, or when the report of the sale, or of the delivery of the goods to the poinding creditor in default

[1]See para. 5.90.
[2]See para. 5.65.
[3]Bankruptcy (Scotland) Act 1913, s. 104 and Companies Act 1985, s. 623 re-enacting earlier legislation. See also Bankruptcy (Scotland) Bill 1984, clause 36.

of sale, is lodged.[1] The time of completion of the poinding is also relevant to determine whether, apart from sequestration, a poinding falls to be equalised with another diligence within the prescribed period before and after notour bankruptcy or apparent insolvency;[2] and whether a creditor can be conjoined in a poinding.[3] In order to clarify the law we proposed in Consultative Memorandum No. 48[4] that for all relevant purposes a poinding should be executed when the officer hands the signed poinding schedule to the possessor of the poinded goods or leaves it for the possessor on the premises. Those who commented approved of this proposal and we recommend accordingly.[5]

5.95 We **recommend:**

(1) The procedure in executing a poinding should be as follows:

(*a*) The opening ceremony (the saying of three oyezes and the reading of the extract decree and execution of the charge) should be expressly abolished by statute. The officer should however exhibit the extract decree and execution of the charge on which the poinding proceeds.

(*b*) Before carrying out the poinding the officer should, as at present, demand payment of the debt and expenses and make enquiries of any person present on the premises as to the ownership of the goods proposed to be poinded.

(*c*) The goods should be valued by the officer, but the officer should be entitled to have them valued by a professional valuator if the officer considers that the nature of the goods makes it advisable.

(*d*) The officer should be accompanied by only one witness.

(*e*) If the debtor is present the officer should inform him or her of the right to redeem the goods within 14 days on payment of their values.

(*f*) The officer should prepare a poinding schedule specifying the poinding creditor, the poinded goods, and their values, the amount of the debt and expenses due.

(*g*) An act of sederunt should be made prescribing the form of the poinding schedule which should contain, in addition to the above matters, information on the applications which the debtor may make to the court and the right to redeem.

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[1]Support for this latter view is found in *Tullis* v. *Whyte* 18 June 1817 F.C.; *Samson* v. *McCubbin* (1822) 1 S. 407; *Wm. S. Yuile Ltd.* v. *Gibson* 1952 S.L.T. (Sh.Ct.) 22 but the former view appears to receive recognition in *New Glenduffhill Coal Co. Ltd.* v. *Muir & Co.* (1882) 10 R. 572; *Galbraith* v. *Campbell's Trustees* (1885) 22 S.L.R. 602; *Bendy Bros. Ltd.* v. *McAlister* (1910) 26 Sh.Ct.Reps. 152.

[2]Bankruptcy (Scotland) Act 1913, s. 10; Bankruptcy (Scotland) Bill 1984, Sched. 7, para. 10, (which repeals and re-enacts s. 10).

[3]See Dobie, *Sheriff Court Practice*, pp. 279-80; it may also be relevant in cases of breach of poinding and it fixes the commencement of the period within which the report of poinding must be lodged and the period within which an application for warrant to sell must be made.

[4]Proposition 27 (para. 4.44).

[5]In *Lord Advocate* v. *Royal Bank of Scotland Ltd.* 1977 S.C. 155 the opinion was expressed that an executed poinding not followed by a sale was not an effectually executed diligence on property for the purposes of s. 15(2)(*a*) of the Companies (Floating Charges and Receivers) (Scotland) Act 1972 (now s. 471 (2)(*a*) of the Companies Act 1985). Our recommendation would not affect the position.

(*h*) The officer should, along with the witness, sign the poinding schedule and deliver it to, or leave it in the premises for, the possessor of the poinded goods. Delivery of the schedule should be deemed to be the time of execution of the poinding for all legal purposes. Where the debtor is a different person from the possessor, the officer should if reasonably practicable send a copy of the poinding schedule to the debtor.

(*i*) As at present the officer should leave the poinded goods on the premises in which they were poinded.

(2) The debtor should be entitled to redeem some or all of the poinded goods on payment of their appraised values to the officer of court within 14 days after the execution of the poinding. The officer of court should be under a duty to give the debtor a receipt identifying the redeemed goods and the issue of the receipt should have the effect of releasing the goods from the poinding.
(Recommendation 5.19; clause 46(1), (5), (6) and (8)).

Valuation of poinded goods

5.96 *Time of valuation.* Our recommendation that officers should value the poinded goods when poinding them implies that we reject the alternatives, discussed in Consultative Memorandum No. 48[1] that in order to reduce expense the valuation could be postponed to a later stage in the diligence or be dispensed with altogether. Most of those who commented considered that the disadvantages of these alternatives outweighed the advantages.

5.97 Valuation cannot be dispensed with because, first, the officer is entitled to poind goods only up to the value of the debt and expenses (including expenses likely to be incurred in the sale of the goods)[2] so that some valuation must be carried out at the poinding stage. Secondly, valuation safeguards the debtor in that at the subsequent sale of the poinded goods the debtor is credited with the actual sale price or the valuation whichever is the greater. Thirdly, we recommend above[3] that the debtor should have a right to redeem the goods at their appraised values within a period after valuation. This right serves as a check to undervaluation. Fourthly, we recommend below[4] that the sheriff should have power, on application at any time before warrant of sale is granted, to recall the poinding on grounds that the goods are in aggregate substantially undervalued or that the proceeds of sale of the goods (as measured by the appraised values) are not likely to cover the expenses of sale. The sheriff could not deal with such applications unless a valuation of the goods was available. The first and fourth reasons set out above also lead us to reject the postponement of valuation until after the granting of the warrant of sale. Moreover, the valuation should be at an early stage to assist the creditor in deciding whether it is worth proceeding with the diligence. For these reasons we have recommended that the valuation should, as under the present law, take place when the goods are poinded.

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[1]Paras. 4.62 to 4.64; Proposition 31.

[2]*McNeill* v. *McMurchy, Ralston & Co.* (1841) 3 D. 554; *McKinnon* v. *Hamilton* (1866) 4 M. 852.

[3]Recommendation 5.19 (para. 5.95).

[4]Recommendation 5.29 (para. 5.137).

5.98 *The problem of low valuation.* Over a very long period, criticisms have been made from time to time that the values placed by officers of court on pointed household goods are too low.[1] The Edinburgh University Debtors Survey found that the great majority of debtors interviewed were dissatisfied with the valuations placed on their goods.[2]

5.99 It seems to us that in general low valuations can be attributed to three main causes. First, the sale price of second-hand furniture and other household goods is generally well below the price of such items when new. This was recognised by the Payne Committee[3] when considering execution upon goods in England and Wales and by the Crowther Committee[4] in considering repossession of hire purchase goods. Secondly, the value placed on a pointed article is the upset price[5]—the price at which bidding will start for that article in any subsequent sale. Yet because of the poor attendance at sales of pointed household goods held in dwellinghouses of debtors, only in a few cases are goods disposed of at more than their upset price.[6] Thirdly, officers may be liable in damages to creditors for over-valuation, for if goods are delivered to the pointing creditor in default of sale, over-valuation will result in a greater amount being deducted from the debt due to that creditor than can be recouped by resale.[7] Certain allegations that officers deliberately in collusion with second-hand furniture dealers made low valuations have been made in the past, but we are not aware of any evidence substantiating them.

5.100 Our scheme to ensure, in so far as it is possible to do so, that pointed goods are correctly valued consists of several recommendations. First, officers should be under a statutory duty to value an article at its open market value—the price which it can reasonably be expected to fetch at a public auction, rather than its upset price—the price at which bidding would commence for that article.[8] Secondly, we recommend later[9] that, unless the debtor consents, household goods should be sold in an auction room instead of in the debtor's dwellinghouse. The better attendance and likelihood of competing bids at auctions should help ensure that goods attain their market

[1] In *Stewart* v. *Carson* (1900) 16 Sh.Ct.Reps. 115, the sheriff observed: "It is a question whether there should not be some amendment of the law with regard to the sale of pointed and sequestrated effects . . . the clerk of court informs me that it has been a matter of very frequent complaint to him of the low price at which articles . . . are sold". See also *Scottish Gas Board* v. *Johnstone* 1974 S.L.T. (Sh.Ct.) 65.

[2] Paras. 7.14 and 7.15. Of 73 debtors who replied to the relevant questions, 66 said they were dissatisfied with the valuation compared with only seven who were satisfied.

[3] Para. 634.

[4] Paras. 6.6.45 to 6.6.50.

[5] Debtors (Scotland) Act 1838, s. 27.

[6] In 58 of the 94 "personal" (non-business) sales examined in the C.R.U. Warrant Sales Report the goods were adjudged to the pointing creditor in default of sale (para. 38). In 9 of the 36 warrant sales where the goods were sold the price exceeded the appraised value, but generally only by a few pounds (para. 40). Only in three cases was the excess substantial. In a follow-up study of sales executed during 1980 and 1981 the C.R.U. found that in only 15 cases out of 261 "personal" sales did the price exceed the appraised value.

[7] While there are no reported decisions, we understand there have been several cases where actions of damages have been raised or threatened and thereafter settled. Creditors are more likely than consumer debtors to sue officers for mistaken valuations.

[8] We recommend later (Recommendation 5.42, para. 5.199) that the appraised value should operate in a subsequent sale as a reserve price which need not be disclosed.

[9] Recommendation 5.32 (para. 5.161).

value. Thirdly, we recommend later[1] that the sheriff should have power to recall a poinding or refuse to grant a warrant of sale where the goods have been in aggregate substantially undervalued or where the likely proceeds of sale of the goods (as measured by their appraised values) will not cover the likely expenses of sale. The existence of this power and the possibility of its exercise should help ensure that poinded goods are correctly valued. Finally, our recommendation that the debtor should have a right to redeem articles at their appraised values[2] may assist in preventing under-valuations since low valuations may enable or encourage the debtor to exercise the right. On the other hand it has to be recognised that substitution of market values for upset values could prejudice debtors in that it would make it more expensive for them to redeem articles and more likely that sheriffs would grant warrants of sale. Nevertheless, we are of the view that requiring officers to appraise articles at their open market value is in the general interests of all concerned and we recommend accordingly.

5.101 We **recommend:**

An officer valuing poinded goods should be required to value each article on the basis of what it would be likely to fetch if sold on the open market. (Recommendation 5.20; clause 46(1)(*c*).)

5.102 *Valuation at officer's or creditor's risk.* An officer of court who makes a mistake in appraising the value of poinded goods cannot subsequently, without authority, change the appraised value to rectify the mistake. In a recent case, the sheriff, without expressing a concluded view, suggested that where a sheriff officer discovers such a mistake, it should be immediately reported to the sheriff, and that the sheriff, in the exercise of powers to regulate the poinding, might be able to put the matter to right.[3] There is, however, no clear authority on whether the sheriff has a power to rectify mistakes in valuation[4] nor on the circumstances in which it should be exercised.

5.103 We have considered therefore whether, in order to rectify mistakes in the valuation of poinded goods, the sheriff should have an express statutory power to order a re-appraisal of the goods upon such terms as to expenses as appear just and to make any necessary incidental or consequential orders (for example extending the duration of the poinding or granting a second warrant of sale). It seems to us, however, that in most circumstances debtors would be prejudiced by a re-appraisal of poinded goods. Thus, if the sheriff decided that the original appraised values were substantially below the open market value of goods the poinding should be recalled[5] rather than the goods re-appraised to permit a higher value to be substituted. Allowing a lower valuation to substituted for the original appraised value would normally

[1]Recommendations 5.29 and 5.30 (paras. 5.137 and 5.146).

[2]Recommendation 5.19 (para. 5.95).

[3]*South Side Sawmills* v. *MacGregor* 1981 S.L.T. (Sh.Ct.) 48 at p.51. In this case, the sheriff officer, having discovered a latent defect in a poinded article, substituted at the time of sale of his own accord a value lower than the value appraised at the time of poinding.

[4]In *Wallace Evans and Partners* v. *T. Daly & Co. Ltd.* 1984 S.L.T. (Sh.Ct.) 25, the sheriff held he had no power, once the goods had been delivered to the creditor in default of sale, to substitute lower values for goods which had been damaged after the poinding was executed.

[5]See *Scottish Gas Board* v. *Johnstone* 1974 S.L.T. (Sh.Ct.) 65, and Recommendation 5.29 (para. 5.137).

operate to the prejudice of the debtor, in that the reserve price at the subsequent sale (and hence the sum which the debtor is credited with if the article is not sold) would be less, although a lower valuation might allow the debtor to redeem the article. We think the officer making the valuation (and hence the creditor) should bear the risk of any mistakes in valuation. We deal below[1] with the question of re-valuation following damage or destruction of poinded goods.

5.104 We **recommend:**

> Subject to Recommendation 5.26 (revaluation if the goods are damaged or destroyed) the sheriff should have no power to order a revaluation of poinded goods.
> (Recommendation 5.21; clause 46(7).)

Stopping the poinding by payment of debt

5.105 If the debtor offers to pay the debt at any stage of the poinding, the officer must stop. At present only the principal sum, accrued interest (if charged) and judicial expenses need be tendered and the officer is not entitled to proceed with the diligence to recover the expenses of charging and poinding.[2] If, as we recommend later,[3] the expenses of a diligence are only recoverable by that diligence, the debtor would also have to pay the diligence expenses in order to stop the poinding.

5.106 Payment by cheque is only a conditional payment since there is a certain delay before the cheque is honoured and there is a risk that the cheque will not be honoured. Such a payment does not therefore necessarily stop diligence.[4] In Consultative Memorandum No. 48 we suggested[5] that the poinding should be stopped if the debtor offers payment by a banker's draft or by a cheque supported by a banker's card. Although most of those who commented agreed, we have come to the conclusion that it would be wrong to introduce a statutory rule applying only to poindings requiring the creditor or officer to accept payment in these fashions.

Conjoining other creditors

5.107 Section 23 of the Debtors (Scotland) Act 1838 provides:

> "Where an officer of the law shall proceed to poind moveable effects, he shall, if required, before the poinding is completed, conjoin in the poinding any creditor of the debtor who shall exhibit and deliver to him a warrant to poind . . ."

The officer may refuse to conjoin the second creditor only if there is an objection such as would have entitled the officer to refuse to act in the first place: for example, if the days of charge on the second creditor's decree have

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[1]Para. 5.125.
[2]*Inglis* v. *McIntyre* (1862) 24 D. 541; *Holt* v. *National Bank of Scotland* 1927 S.L.T. 484.
[3]Recommendation 9.9 (para. 9.58).
[4]*Caithness Flagstone Co.* v. *Threipland* (1907) 15 S.L.T. 357.
[5]Proposition 32 (para. 4.67).

not expired.[1] If the officer conjoins the second creditor, sufficient goods must then be poinded to satisfy the claims of both creditors.[2] If there are not enough goods of sufficient value, then the conjoined creditors rank rateably in proportion to their debts in the poinding.[3] In practice, conjoining creditors is necessary only where the debtor has insufficient goods to enable separate poindings under the several decrees to be executed. Section 23 seems to have been designed to deal with the situation where two officers representing different creditors arrive to poind virtually simultaneously, but the real utility of the section lies in the more frequent cases where one officer is instructed by different creditors against the same debtor. This occurs, for example, in commercial debt cases in outlying areas which the officer does not visit daily. The section enables the officer to act for all the instructing creditors.

5.108 In Consultative Memorandum No. 48 we expressed the view[4] that these provisions appeared satisfactory subject to clarification of the exact time when the execution of a poinding was complete for the purposes of section 23. On consultation those who commented generally agreed with our view. We have recommended above[5] that for all legal purposes a poinding should be taken to be executed when the officer delivers the poinding schedule to, or leaves it for, the possessor. Section 23 of the 1838 Act does not exclude the conjunction of a summary warrant creditor with an ordinary creditor. In view of the widely differing procedures in summary warrant poindings and ordinary poindings (no warrant of sale is necessary in summary warrant poindings for example)[6] we think there should be an express rule prohibiting such conjunctions. But there is no reason why two or more summary warrant poindings should not be conjoined with each other.

5.109 We **recommend:**

The statutory procedure for conjoining creditors before execution of a poinding should be retained, but it should not be competent to conjoin ordinary creditors and summary warrant creditors.
(Recommendation 5.22; clause 46(9).)

Reporting the poinding to the court

5.110 After the poinding has been carried out, the officer must report it to the sheriff within eight days unless the officer can justify the delay.[7] Where by reason of delay, the court refuses to receive the report of poinding, the

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[1]Bell, *Commentaries* vol. ii, p. 58. A creditor who is not entitled to be conjoined may be able to participate in the proceeds of sale of the poinded goods by making a claim under equalization provisions in the bankruptcy legislation, Bankruptcy (Scotland) Act 1913, s. 10, repealed and re-enacted by Bankruptcy (Scotland) Bill 1984, Sched. 7, para. 10.

[2]Graham Stewart, p. 356.

[3]Graham Stewart, p. 366.

[4]Proposition 33 (para. 4.69).

[5]Recommendation 5.19 (para. 5.95).

[6]See Chapter 7 for further details.

[7]See Debtors (Scotland) Act 1838, s. 25. In four of the five sheriffdoms having more than one court district, it is provided by Practice Note that a report of poinding must be made to the sheriff of the sheriff court district in which the goods are situated.

effect is that the poinding is null,[1] and since a second poinding of the same goods is not normally competent,[2] the consequences of delay are serious. On consultation, there was general agreement with our suggestion[3] that a period of 14 days should be allowed. Officers may sometimes have many reports of poindings to prepare and lodge and the time scale can be very tight.[4]

5.111 Section 25 of the 1838 Act prescribes certain particulars which the report must specify.[5] In addition, some at any rate of the somewhat uncertain requirements of the common law should be included in the report.[6] Much of the uncertainty as to what should be included in a report of poinding would presumably be removed if (as we suggested above) the procedure were codified in an enactment. On consultation those who commented agreed with our suggestion,[7] that the form of reports of poinding should be prescribed by act of sederunt. Some of the forms currently in use have not been much altered for the past 150 years and are archaic; a uniform style would make it easier for sheriff clerks to check reports for omissions and inaccuracies.

5.112 The purpose of the report of poinding is to enable the sheriff to supervise the diligence. The sheriff can take note of errors and deficiencies in the report or of the poinding without the need for an application by the debtor.[8] Where the report contains a material error or discloses a material error in the way the poinding was executed the sheriff can refuse to receive the report[9] as a result of which the poinding is null. Since we recommend later[10] that the sheriff should have wide powers to recall a poinding on procedural and other grounds and that these powers may be exercised, not simply on receipt of the report, but at any time up to the granting of warrant of sale, we would restrict the sheriff's powers to refuse to receive a report to the cases where the delay in lodging it was unjustifiable or the officer and witness failed to sign the report.

5.113 We **recommend:**

(1) The officer of court should be required to make a report of poinding in prescribed form to the sheriff within 14 days after the execution of

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[1]All the reported cases e.g. *Miller* v. *Stewart* (1835) 13 S. 483 were decided on a construction of the Bankruptcy Act 1814 (which required the report to be lodged "forthwith"), but on this point these cases remain authoritative in relation to the Debtors (Scotland) Act 1838.

[2]See para. 5.131 below.

[3]Consultative Memorandum No. 48, Proposition 34(1) (para. 4.72).

[4]The critical date is the date of the receipt of the report and we understand that no extension is allowed for postage of the report, though a postal delay of a report which had been timeously posted would perhaps be reasonable cause for receiving the report of poinding late.

[5]These are "the diligence under which the poinding is executed, the amount of the debt, the names and designations of the debtor and of the creditor at whose instance the effects were poinded, the effects poinded, the value thereof, the names and designations of the valuators, the person in whose hands they were left, and the delivery of the schedule . . ".

[6]In particular, whether the "offer back" of the poinded goods to the debtor was made and, in a case where no offer was made, the reasons for omitting the offer; see for example *Allison's (Electrical) Ltd.* v. *McCormick* 1982 S.L.T. (Sh.Ct.) 93.

[7]Consultative Memorandum No. 48, Proposition 34(2), para. 4.72.

[8]*Thornton, Applicant* 1967 S.L.T. (Sh.Ct.) 71.

[9]*Broomberg* v. *Rheinhold & Co. Ltd.* (1944) 60 Sh.Ct.Reps. 45;*Scottish Gas Board* v. *Johnstone* 1974 S.L.T. (Sh.Ct.) 65; *J. Ratcliff & Co. Ltd.* v. *McKelvie* 1977 S.L.T. (Sh.Ct.) 64.

[10]Recommendation 5.29 (para. 5.137).

the poinding (or such longer period as the sheriff may, on cause shown, allow).

(2) The sheriff may refuse to receive a report only on the grounds that it is not signed by the officer and witness or that it was not submitted within the required period.

(3) If the sheriff refuses to receive a report the poinding should cease to have effect.

(Recommendation 5.23; clause 47.)

Disposal of perishable goods

5.114 In terms of section 26 of the Debtors (Scotland) Act 1838 the sheriff has power on the poinding being reported to give orders for the immediate disposal of perishable goods. We think these powers are deficient in that they only arise once the poinding has been reported and that they are restricted to perishable goods. Given that the officer under our recommendations will have 14 days within which to lodge a report of poinding, an application by the debtor or the creditor for an order for immediate disposal should be competent at any time after the poinding has been executed. Perishable seems too narrow a concept; cases can be envisaged (magazines or Christmas cards for example) where the goods would not perish but might be much less valuable by the time they were sold in the normal time span of a poinding. The proceeds of sale should be paid to the creditor, but where only part of the poinded goods are disposed of immediately, the sheriff should have power to order the proceeds of their sale to be consigned in court to await the completion of the diligence in respect of the remainder of the goods.

5.115 We **recommend:**

The sheriff should have power, on an application by either the creditor or the debtor made after the execution of the poinding, to order the immediate disposal of goods which are perishable or likely to deteriorate in value rapidly, and make consequential orders including orders as to the disposal of the proceeds of sale.

(Recommendation 5.24; clause 46(2)(*b*).)

Removal of or interference with poinded goods

5.116 Poinding brings the poinded goods within the control and protection of the court. The goods should not be removed from the premises without the authority of the court and a person who removes them without authority is liable, on summary civil complaint by the creditor, to be imprisoned until the goods are restored or a sum representing double their appraised value is paid to the creditor.[1] Breach of poinding renders the breacher liable in damages to the creditor[2] and is probably also a contempt of court.[3] Poinding also has the effect of prohibiting the debtor from voluntarily disposing of the goods although a third party purchaser who was unaware of the poinding acquires

[1]Debtors (Scotland) Act 1838, s. 30.

[2]*Arnot* v. *Dowie* (1863) 2 M.119; *Angus Bros Ltd.* v. *Crocket* (1909) 25 Sh.Ct.Reps. 323 at p. 326.

[3]Graham Stewart, pp. 222–3 and 357.

a good title.[1] In Consultative Memorandum No. 48[2] we asked for views as to whether the existing remedies for breach of poinding were effective or adequate. Consultation disclosed considerable dissatisfaction with the existing remedies. Accordingly we have devised a new scheme for dealing with breach of poinding rather than attempting to reform the existing summary complaint procedure. First, however, we deal with the topic of authorised removal.

Authorised removal of goods

5.117 A poinding may last for several months and during this period the debtor may wish or require to remove the goods to other premises. For example the debtor may move house or the lease of the premises in which the goods are situated may terminate. At present the sheriff has a statutory power, on application, to give orders for the security of poinded goods.[3] Although the object of this power is apparently to prevent the possessor or others from removing the goods it could be used to authorise their removal to other premises of the debtor. We understand that the view sometimes taken in current practice is that provided the debtor obtains the consent of the poinding creditor, the goods may be removed to other premises without the sheriff's authority. This sensible practice, which avoids the need for an application to the court, should we think be embodied in a statutory rule. Application to the court should however remain competent to deal with cases where the creditor refuses consent to removal of the goods.

5.118 The goods which are removed to other premises remain subject to the poinding. At present this can cause practical problems where the goods are removed to a different sheriffdom or even a different sheriff court district in the same sheriffdom. Unless the poinding process is transferred to the sheriff court to whose jurisdiction the goods have been removed, the original sheriff court has to grant warrant of sale, receive the report of sale and deal with any incidental applications in respect of goods situated outwith its jurisdiction. Such problems would be multiplied in cases where only some of the goods were removed to another sheriff court district, the others remaining in the premises where they were originally poinded. Those with practical experience of the problems suggested that the goods should be poinded again in their new location, as is sometimes done in practice at present. A new poinding would avoid the jurisdictional difficulties and may also make identification of the goods easier since articles are often identified in the poinding schedule and report of poinding by their location within the debtor's premises at the time of the poinding. We would accept this suggestion but think a new poinding should be an option rather than a requirement, since in some cases it would be possible for the original poinding to proceed even though some or all of the goods had been removed to a new location. A creditor who executed a new poinding should be deemed to have abandoned the original poinding as goods cannot be subject to two poindings by the same creditor. The effect of this rule would be that in cases of removal of some of the goods two new poindings might have to be executed; one to repoind the remaining

[1]Graham Stewart, p. 358.
[2]Proposition 35 (para. 4.74).
[3]Debtors (Scotland) Act 1838, s. 26.

goods in the original location, the other to poind again the removed goods in their new location, for if only one poinding was allowed the creditor's security would be lessened.

5.119 Where poinded goods are poinded again the question of liability for the expenses of the original poinding and the new poinding arises. Although it would be possible to devise rules making the debtor liable except where removal was due to circumstances outwith the debtor's control, or to give the court, on application, a power to award expenses as seems fit, we think there would be considerable benefit in a simple rule. We would recommend that where goods are poinded again the debtor should be liable for the expenses of the new poinding while the creditor should have to bear the expenses of the poinding deemed to have been abandoned.

5.120 We **recommend:**

(1) The debtor (or possessor) of poinded goods may remove them to other premises if:

(*a*) the poinding creditor or officer of court consents; or

(*b*) the sheriff, on application, authorises such removal.

(2) Where poinded goods are removed to other premises the creditor should be entitled to poind them again there, and should also be entitled to poind again any goods remaining on the original premises. Where a new poinding of poinded goods for the same debt is executed, the original poinding should be deemed to have been abandoned so that further proceedings in that poinding would be incompetent.

(3) The debtor should be liable for the expenses of the second or subsequent poinding but not for the expenses of the original poinding deemed to have been abandoned.
(Recommendation 5.25; clause 63 and Schedule 1, paragraph 5.)

Unauthorised interference with poinded goods

5.121 Section 30 of the Debtors (Scotland) Act 1838 provides:

> "If any person shall unlawfully intromit with or carry off the poinded effects, he shall be liable on summary complaint to the sheriff of the county where the effects were poinded, or where he is domiciled, to be imprisoned until he restore the effects or pay double the appraised value."

The object of this provision is not punishment but to have the defender ordered to restore the goods or pay double the appraised value, and on failure to obey to have imprisonment ordered to compel obedience.[1] On consultation it was reported to us that imprisonment was a severe sanction which the courts were reluctant to use.[2] Moreover, there is no limit on the period of imprisonment if the intromitter is unable to restore or pay double the appraised value as often happens when the intromitter is the debtor.

5.122 The principal remedy for removal of goods in breach of poinding

[1] *Wilson* v. *McKellar* (1896) 24 R. 254.

[2] 16 people have been imprisoned for breach of poinding in the period 1970–83, *Prisons in Scotland* and unpublished information obtained from the Scottish Office.

should be their restoration within a specified period thus restoring parties to the position they were in before the breach occurred. To make an order for restoration effective the sheriff should have power at the same time to grant warrant to officers of court to search for and restore the goods if the goods have not been restored within the specified period. An order for restoration should however not be made against a third party who without knowledge of the poinding acquires the goods for value, since such a third party acquires a good title.

5.123 Where a third party removes articles in breach of poinding and restoration is impossible because the articles have been sold or lost, the creditor should be entitled to have the value of the poinding restored at the third party's expense. On application the sheriff should, we suggest, have power to order the third party to consign in court the appraised value of the articles removed in breach of poinding. It seems to us wrong that under the present law the creditor can receive double the appraised value of the article and possibly be in a better position than if the breach had not occurred. Another method which we suggest for restoring the value of the creditor's security involves empowering the sheriff to authorise a poinding of further goods of the debtor. This power could be useful where the identity of the third party breacher is not known so that orders for restoration or consignation are not possible. But a further poinding should only be authorised where removal of the article has occurred as a result of some fault on the debtor's part (such as failure to look after the articles properly). The creditor should however have to bear the loss if the debtor's premises are broken into and the articles stolen. Finally, breach of poinding should be capable of being dealt with as a contempt of court, but we think that this should be used only as a remedy of last resort and be reserved for cases of flagrant and wilful breach.

5.124 We would extend our recommendations relating to consignation of the appraised value, authorisation of a poinding of further goods and contempt of court to cases where the goods are wilfully damaged or destroyed rather than removed. Where poinded articles are damaged or destroyed in circumstances in which the debtor is at fault[1] we think it unreasonable for the creditor to have to bear the loss. In addition to the power to authorise a poinding of further articles, the sheriff should have power to order a revaluation of the articles in order to avoid the debt being reduced by the appraised values of the articles in their undamaged state.

5.125 We **recommend:**

Section 30 of the Debtors (Scotland) Act 1838 (unlawful intromitter to restore or pay double the appraised value on pain of imprisonment) should be replaced by a new provision on the following lines:

(1) Where the debtor or a third party removes goods in breach of poinding the sheriff should have power, on application by the creditor, to order restoration of the goods within a specified time, and in default of restoration to grant warrant to officers of court to search for and restore the goods.

[1]See *Wallace Evans and Partners* v. *T. Daly & Co. Ltd.* 1984 S.L.T. (Sh.Ct.) 25.

(2) An order for restoration of the goods should not be competent against a third party who acquires the goods for value and without knowledge of the poinding.

(3) Where goods have been removed, damaged or destroyed in breach of poinding the sheriff should have power, on application, to authorise the creditor to poind further articles of the debtor, or in the case of damaged or destroyed goods to authorise a revaluation of those goods.

(4) Where a third party has removed, damaged or destroyed goods in the knowledge that they were poinded the sheriff should have power, on application, to order that third party to consign in court a sum representing the appraised value of the removed or destroyed goods or a sum representing the diminution in value caused by the damage. The sum consigned in court should, on completion of the diligence in respect of the remainder of the goods, be paid to the creditor in satisfaction of the debt, any surplus being paid to the debtor.

(5) Wilful removal, damage or destruction of articles in the knowledge that they were poinded should be liable to be dealt with as a contempt of court.

(Recommendation 5.26; clauses 64 and 65.)

Duration of poindings

5.126 The time scale for completion of the diligence by application for a warrant to sell the poinded goods and their subsequent sale is flexible. The creditor may apply for a warrant when lodging the report of the poinding or delay to allow the debtor time to pay the debt by instalments or otherwise. The courts have held it to be an implied condition of the Debtors (Scotland) Act 1838 that the poinding should be followed by sale "without undue delay".[1] As originally promulgated in 1973 and 1976, Practice Notes of the sheriffs principal provided in all six sheriffdoms that a poinding should be effective for a period of six months from the date of the poinding but (in five sheriffdoms) the sheriff could extend the period, on application, for a further period though not beyond twelve months from that date.[2] This was a time limit affecting the sale, rather than merely the application for warrant. As a result, however, of decisions holding that the Practice Notes in this respect purported to alter the substantive law and were accordingly *ultra vires*,[3] the Practice Notes were amended or revoked. In all sheriffdoms, it remains, as a matter of substantive law, for the sheriff to decide in each individual case whether there has been undue delay, but those Practice Notes currently in force provide that an application for warrant of sale made within six months of the poinding will generally be granted (if otherwise lawful) without enquiry as to whether there has been undue delay.

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[1] *Henderson* v. *Grant* (1896) 23 R. 659; *New Day Furnishing Stores Ltd* v. *Curran* 1974 S.L.T. (Sh.Ct.) 20; *City Bakeries Ltd.* v. *S. & S. Snack Bars and Restaurants Ltd.* 1979 S.L.T. (Sh.Ct.) 28.

[2] In the sixth sheriffdom, Glasgow and Strathkelvin, if the application for warrant of sale was made before the end of the sixth month, the sale could take place in the seventh month.

[3] *Post Office* v. *Gorham* (unreported) Sheriffdom of Tayside, Central and Fife, 22 March 1977; *Holbourne (Granite House) Ltd* v. *Kelly* (unreported) Glasgow Sheriff Court (Sheriff Principal Reid) 14 December 1979; *United Dominions Trust* v. *Stark* 1981 S.L.T. (Sh.Ct.) 58.

5.127 What the appropriate period between the execution of a poinding and an application for warrant of sale should be depends to some extent on how the diligence is viewed. We concentrate on this period here as the question of what period should elapse between the granting of a warrant of sale and the sale involves different issues which we discuss later.[1] We would stress that once a warrant of sale has been applied for, the duration of the poinding ceases to be governed by the one-year time limit (with extensions if granted), but is regulated by the terms of the warrant of sale or by those terms as amended, or if warrant of sale is refused the poinding ceases to have effect forthwith. If poinding and sale were regarded primarily as a means of obtaining payment of the debt from the proceeds of sale of the debtor's goods, a period of 2–3 months would be adequate. On the other hand, if creditors are to continue to use the threat to sell poinded goods to obtain payment of the debt by instalments, then the poinding must endure for a considerable period to allow time for such instalments to be paid. In Consultative Memorandum No. 48 we inclined to the latter view and proposed that a poinding should endure for a period of one year with the possibility of extension by court order for a further period or periods. Most of those who commented agreed with our view, only two arguing for a short period.

5.128 The first argument in favour of a short period for poindings is that moveable goods should not be subject for too long a period to poinding which does not by itself transfer ownership of the goods to the creditor, but which prevents the debtor from dealing with them. The debtor must keep them on the premises; cannot exchange them for other goods; and if they are damaged, the debtor may be blamed. We doubt, however, whether in practice the restrictions on disposal cause debtors sufficient inconvenience to require that poindings be of very short duration. Secondly, it has also been said that delay in completing the poinding may be unfair to other creditors since they are prevented from obtaining a right to the goods. It is true that a poinding may induce the debtor to pay the poinding creditor before other creditors. But the argument overlooks the facts that a second poinding creditor who executes warrant of sale first will have priority[2] and that the other creditors can share in the proceeds of sale if they lodge a claim at the proper time,[3] though they may not be entitled to share in payments to account made under pressure of the poinding.[4] In most consumer debt cases, to require the poinding creditor to incur the expense of a warrant sale will rarely assist other creditors. A third argument against allowing poindings to endure for a lengthy period is that debtors will usually have been subject to pressure by the creditor to pay the debt for some considerable time before their goods were poinded. On the other hand, there are cases where it is only at the stage of poinding that the debtor is moved to make serious efforts at payment. In other cases, the debtor's circumstances may have changed from a position of insolvency to a position where the debt can be paid by instalments. Yet another argument

[1]See para. 5.167

[2]Graham Stewart, p. 366.

[3]Within the period of 60 days before and four months after the debtor's notour bankruptcy or apparent insolvency; Bankruptcy (Scotland) Act 1913, s. 10 repealed and re-enacted by Bankruptcy (Scotland) Bill 1984, Sched. 7, para 10.

[4]The bankruptcy legislation (see previous footnote) appears to impose a duty to account to other creditors only if the poinding creditor "shall carry through a sale".

against delay is that the social impact on debtors and their families of the threat of warrant sale is such that they should not be subjected over too long a period to that threat.

5.129 In the light of consultation, however, we remain of the view that poindings should continue to be capable of being operated as a spur to instalment settlements. Where household goods have been pointed it is generally in the interest of neither the creditor nor the debtor that they be sold. The duration of the poinding should therefore be such as to allow most debts to be paid within it by instalments of reasonable amount. The C.R.U. Diligence Survey conducted in 1978 found that in 55% of the cases where goods had been pointed the principal sum was less than £100, in 74% of cases the principal sum was less than £200 and nearly one-half (42%) of poindings were for between £50 and £200.[1] When judicial and diligence expenses have been added on, a slightly above average debt would be in the range of £150–200. This could be satisfied over a period of a year by instalments of £3–4 per week, which would have been a reasonable figure for debtors on low incomes. We think that this analysis based on 1978 statistics still holds good today since it is likely that the size of the debt and the instalments affordable by debtors have increased in the same proportion. In order to deal with larger debts, and cases where the debtor can only afford small instalments, the sheriff should have power to extend the duration of the poinding on application by the creditor for such a period as appears necessary to allow the debt to be paid by instalments or otherwise. Such an application would, however, have to be made before the period of a year had elapsed, because otherwise there would be no subsisting poinding capable of extension. Further extensions should be possible. Where an application for an extension is made, the poinding should continue pending the determination of the application even though the one year period (or that period as extended) elapses after the lodging of the application and before its determination. Were this not the rule, applications for extension would have to be lodged well before the end of the year or extended period in case there were delays in granting them (perhaps because they were opposed).

5.130 We **recommend:**

(1) Unless a warrant of sale has been applied for while the poinding remains effective, a poinding should cease to have effect on the expiry of a period of one year after the date of its execution. The sheriff should, however, have power on application by the creditor to extend the duration of the poinding by such period as appears reasonable to allow the debtor to pay off the debt by instalments or otherwise as agreed between the creditor and the debtor and to grant a further extension or extensions.

(2) An application for extension of a poinding should be made before the expiry of the one-year period or the period of a previous extension, but the poinding should not cease to have effect pending the determination of such an application.
(Recommendation 5.27; clause 62(1) and (2).)

[1] Annex D, Table (5).

Restrictions on second poindings

5.131 To prevent evasion of the implied statutory condition that a warrant sale must be effected without undue delay, it has been held that a second poinding of the same goods in the same premises under the same extract decree is invalid.[1] Moreover, where a creditor purports to poind for a second time goods in the same premises under the same extract decree, and when the value of the poinded articles in the first poinding was less than the debt due, a presumption is raised that the goods referred to in the officer's schedule of the second poinding are the same as the goods covered by the first poinding.[2] In four of the six sheriffdoms, Practice Notes of the sheriffs principal now expressly prohibit or restrict second poindings of goods (not merely the *same* goods but *any* goods) in the same premises by the same creditor unless the debtor has brought into the premises poindable goods which were not in the premises when the first poinding was executed. In the Sheriffdom of Glasgow and Strathkelvin a second poinding is prohibited unless the sheriff on cause shown grants leave, and in the Sheriffdom of South Strathclyde, Dumfries and Galloway there is no Practice Note regulating poindings.

5.132 On consultation, commentators agreed with our suggestion that, to prevent evasion of time-limits on the duration of poindings, the present restriction on second poindings should be retained and embodied in statute rather than Practice Notes. The Society of Messengers-at-Arms and Sheriff Officers suggested however that second poindings should be allowed in certain circumstances such as where the goods were found to be the property of third parties, or where they had been disposed of in breach of poinding. We would agree that a complete prohibition on second poindings would be too harsh on creditors, and elsewhere in this report in the course of discussion of other topics (such as breach of poinding or a third party's goods) recommend that where a poinding has been prejudiced through no fault of the creditor or officer, one of the remedies of the creditor should be an entitlement to execute a second poinding notwithstanding the general prohibition. Gathering together these scattered recommendations we suggest that a second poinding should be competent if:

(*a*) a time to pay order is made which recalls the poinding and gives the debtor time to pay the debt by instalments, and the order is recalled due to the subsequent default of the debtor or otherwise;[3]

(*b*) a debt arrangement scheme comes into force and the poinding is recalled giving the debtor time to pay the included debts over a period of time, and the scheme ceases to have effect or is revoked due to the subsequent default of the debtor or otherwise;[4]

(*c*) the sheriff has ordered release of certain articles on grounds of undue harshness;[5]

(*d*) some or all of the poinded goods have been removed with consent of the creditor or authority of the sheriff to other premises;[6]

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[1] *New Day Furnishing Stores Ltd* v. *Curran* 1974 S.L.T. (Sh.Ct.) 20.
[2] *New Day Furnishing Stores Ltd.* v. *Curran* 1974 S.L.T. (Sh.Ct.) 20.
[3] See para. 3.96 above.
[4] Recommendation 4.42 (para. 4. 285).
[5] Recommendation 5.13 (para. 5.65).
[6] Recommendation 5.25 (para. 5.120).

(*e*) articles have been removed in breach of poinding in circumstances where the debtor is at fault;[1]

(*f*) articles have been destroyed or damaged in breach of poinding in circumstances where the debtor is at fault;[2]

(*g*) articles have been released by the creditor or the sheriff on the ground that they belong to a third party.[3]

5.133 Where the creditor has executed a second poinding while the first poinding subsists (for example if an article has been removed from the first poinding in breach of poinding and cannot be restored), it would be advantageous to the creditor to be able to have the two poindings conjoined so that they thereafter proceed as a single poinding. In this way two applications for warrant of sale, two sales and two reports of sale would be avoided. We think that the sheriff should have power, on application by the creditor, to order the poindings to be conjoined. This power should not be capable of being exercised if a warrant of sale of the goods comprised in either the first or the second poinding had already been granted, otherwise the debtor would lose the right to object to the granting of a warrant to sell the goods contained in the other poinding.

5.134 We **recommend:**

(1) In order to prevent evasion of time limits on the duration of poindings the present restriction on second poindings (incompetent in respect of goods on the same premises under the same extract decree except for goods brought onto the premises after the first poinding) should be set out in statute rather than Practice Notes of the sheriffs principal. The statutory rule should however be subject to the exceptions mentioned in paragraph 5.132.

(2) The sheriff should have power, on application by the creditor, to make an order conjoining two poindings by the same creditor at any time before warrant of sale is granted in either poinding.
(Recommendation 5.28; clauses 50 and 69.)

Recall of poinding

5.135 Under the present law a poinding may be held null on the grounds of its invalidity at any time after execution. Apart from this the sheriff has powers to refuse to receive a report of the poinding on grounds of irregularities in the execution of the poinding or deficiencies in the report.[4] At the stage of an application for warrant of sale, warrant may be refused if the proceedings in the diligence are irregular[5] and, in a recent development[6] also on equitable grounds where the proceeds of sale of the poinded goods are likely not to

[1]Recommendation 5.26 (para. 5.125).
[2]*Ibid.*
[3]Recommendation 5.48 (para. 5.229).
[4]See para. 5.112.
[5]*Clark* v. *Clark* (1824) 3 S. 143; *Clark* v. *Hinde Milne & Co.* (1884) 12 R.347.
[6]*South of Scotland Electricity Board* v. *Carlyle* 1980 S.L.T. (Sh.Ct.) 98.

exceed the expenses of their sale. These powers may be exercised on application by the debtor or by the sheriff at his or her own instance.[1]

5.136 Later in this Chapter we recommend[2] that the sheriff should have more extensive powers than at present to refuse to grant warrant of sale. In short warrant may be refused if the poinding is invalid or has ceased to have effect, the granting of a warrant of sale would be unduly harsh, the goods are in aggregate substantially undervalued, or the proceeds of sale of the goods are likely not to exceed the expenses of their sale. The sheriff may refuse to grant warrant of sale on any grounds other than undue harshness even in the absence of an objection by the debtor. However, we can see no justification for confining the sheriff's powers to the stage of the diligence when the creditor applies for warrant of sale. If circumstances are such that an application for warrant of sale would be refused and the poinding thus terminated, then the sheriff should have power, on an application made by the debtor at any time between the execution of the poinding and the grant of warrant of sale, to recall the poinding. The debtor should not have to remain under the threat of sale until the creditor chooses to apply for a warrant. However, with the exception of invalidity of the poinding or its ceasing to have effect, the powers of recall prior to an application for grant of warrant of sale should be exercised only on application by the debtor. The debtor's application should be intimated to the creditor in order to give the creditor an opportunity to answer the debtor's averments. Similarly where the sheriff proposes to recall a poinding on his or her own motion that fact should be intimated to both debtor and creditor.

5.137 We **recommend:**

(1) A poinding should be capable of being recalled by the sheriff at any time before the creditor applies for a warrant of sale on the same grounds as the sheriff may refuse to grant a warrant of sale in terms of Recommendation 5.30.

(2) The sheriff may recall a poinding which is invalid or which has ceased to have effect without an application for recall being made by the debtor. Otherwise the power to recall should be exercised only on an application by the debtor. The debtor and creditor should be given an opportunity to make representations before an order for recall is made. (Recommendation 5.29; clause 49(1) to (4).)

Section D. Selling the poinded goods

5.138 At one time warrant of sale was granted along with a warrant to charge and poind. This was the position in letters and precepts of poinding before 1793,[3] and in diligence on small debt decrees until small debt procedure was abolished in 1976. Now all poinding creditors must apply to the sheriff for warrant to sell the poinded goods in order to complete the diligence. In this Section we consider the application for warrant to sell, the arrangements

[1]See for example *Thornton, Applicant* 1967 S.L.T. (Sh.Ct.) 71; *New Day Furnishing Stores Ltd* v. *Curran* 1974 S.L.T. (Sh.Ct.) 20.

[2]Recommendation 5.30 (para. 5.146).

[3]Bankruptcy Act 1793, s. 5. The relevant provisions were re-enacted with modifications by the Bankruptcy Act 1814 and thereafter by the Debtors (Scotland) Act 1838.

made for the sale in the warrant of sale, intimation of the warrant to the debtor, the conduct of the sale, and the report of sale to the sheriff.

Application for warrant of sale

5.139 The Debtors (Scotland) Act 1838, section 26 provides that "if no lawful cause be shewn to the contrary" the sheriff shall, if required, grant warrant of sale. Apart therefore from a power to approve with or without modifications the officer's arrangements for sale (such as the time and place of sale),[1] the sheriff has a limited jurisdiction to decide whether warrant of sale should be granted at all. At one time it was thought that this jurisdiction was merely "ministerial" (that is to say, administrative or executive in character). In the exercise of this jurisdiction, the sheriff has a power, indeed a duty, to decide whether or not the proceedings are on the face of it regular[2] (for example whether the goods are exempt from poinding). The sheriff may also decide whether the goods are so grossly undervalued or otherwise so irregularly valued as to make the poinding a nullity.[3] Objections may be taken by the sheriff even if none are raised by the debtor or a third party.[4]

5.140 Until recently, it was generally thought that the sheriff's power to refuse warrant of sale was strictly limited to cases where the proceedings were irregular, and that the sheriff had no discretion to refuse warrant of sale on equitable grounds: if the proceedings were regular, the sheriff had to grant warrant; if they were not regular, the sheriff could not grant warrant.[5] In the recent case of *South of Scotland Electricity Board* v. *Carlyle*,[6] however, the sheriff principal upheld a sheriff's decision refusing warrant of sale on the ground that the expenses of the sale would be likely to exceed the proceeds derived from it and would only add to the defender's indebtedness. The result of the decision seems to be that the sheriff is entitled to refuse warrant of sale on grounds of "expediency", and that holding a sale is inexpedient if its result would be to impoverish the debtor, or at least to add to the debt, without financially benefiting the creditor. On the other hand, in comparing the likely proceeds of sale and the diligence expenses, only the expenses subsequent to the warrant of sale are taken into account. The proceeds of sale do not require to cover the whole expenses of the charge and poinding (as well as the expenses of sale) since the "creditor is entitled to take these steps in

[1]These are set out in the draft warrant submitted by the officer or solicitor to the sheriff along with the execution of poinding on which is endorsed the crave for warrant of sale.

[2]See *Clark* v. *Clark* (1824) 3 S. 143 at p. 144 (where the court held that the sheriff's power "is merely ministerial and only entitles him to take cognizance of objections arising as to the *ex facie* regularity of the diligence"); *Clark* v. *Hinde Milne & Co.* (1884) 12 R. 347 per Lord Shand at p. 354 " . . . the judge must examine the proceedings and satisfy himself of the regularity of what has taken place and of the applicant's right to a warrant"; *Jack* v. *Waddell's Trs.* 1918 S.C.73.

[3]*Scottish Gas Board* v. *Johnstone* 1974 S.L.T. (Sh.Ct.) 65 (an application for warrant of sale); *Le Conte* v. *Douglas* (1880) 8 R. 175, (an action of reduction).

[4]*Thornton, Applicant* 1967 S.L.T. (Sh.Ct.) 71; *New Day Furnishing Stores Ltd* v. *Curran* 1974 S.L.T. (Sh.Ct.) 20; *City Bakeries Ltd* v. *S. & S. Snack Bars and Restaurants Ltd* 1979 S.L.T. (Sh.Ct.) 28; *South of Scotland Electricity Board* v. *Carlyle* 1980 S.L.T. (Sh.Ct.) 98.

[5]See *City Bakeries Ltd* v. *S. & S. Snack Bars and Restaurants Ltd supra*, per Sheriff Kearney at p. 29.

[6]1980 S.L.T. (Sh.Ct.) 98. We understand that in several other recent unreported cases prior to *Carlyle*, the sheriff had refused warrant of sale on equitable grounds but this appears to have been a novel practice.

attempting to enforce his decree and ascertain the extent of his debtor's poindable effects".[1]

5.141 In Consultative Memorandum No. 48 we discussed possible criteria for the refusal of warrant of sale.[2] On consultation only one body suggested that the sheriff should have an unfettered discretion to refuse or grant the warrant. But we do not think that an unfettered discretion is appropriate for it would not afford those involved in diligence sufficient guidance as to whether or not warrants would be granted until a considerable number of decisions had been reported. There was no dissent on consultation from our proposal that the sheriff should retain the existing powers to refuse warrant on the grounds of gross under-valuation of the goods or some other irregularity in the proceedings, and these grounds should be specified in statute.

5.142 In our Consultative Memorandum No. 48 we found it unnecessary to state a view on whether *South of Scotland Electricity Board* v. *Carlyle*[3] was correctly decided in law since we suggested that the general policy underlying the decision is sound and should be placed on an unchallengeable statutory basis.[4] On consultation there was general agreement by all those who commented. One body suggested that warrant of sale should be refused unless the whole diligence expenses and a prescribed proportion of the debt were likely to be recovered out of the proceeds of sale. In our view this goes too far; a creditor should be entitled to recover all or part of the expenses of poinding and charge even if the debt is not reduced. There is no doubt that of the admittedly few warrant sales which took place in 1977,[5] in a small but significant number the proceeds of sale did not cover the expenses of advertisement and sale.[6] A further unpublished study undertaken by the Central Research Unit indicates that although the decision in *Carlyle* was being generally followed there were still warrants of sale being granted in 1980 and 1981 where the proceeds of sale did not meet the expenses of sale.[7] Such diligence is in our opinion oppressive since it harms the debtor without benefiting the creditor. We would reject the argument that a creditor should be allowed to make an example of a few debtors by pursuing diligence against them to the bitter end in order to persuade others to settle their debts promptly.

5.143 In Consultative Memorandum No. 48 we rejected[8] a specific ground of refusal of warrant of sale based on a comparison between the likely proceeds of sale and the expenses of sale and proposed instead a general ground based on harshness and unconscionability. On reconsideration we think that it would offer more guidance to those involved if there was an express statutory ground

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[1] *South of Scotland Electricity Board* v. *Carlyle*, *supra*, at p. 100

[2] Paras. 5.24 to 5.32.

[3] 1980 S.L.T. (Sh.Ct.) 98.

[4] Proposition 38 (para. 5.32).

[5] 285 in 1977; 289 in 1978.

[6] The C.R.U. Warrant Sales Report shows that of the 94 reports of sales of household goods in 1977 which were available for examination, the proceeds of sale did not cover the expenses of advertisement and sale in 10 cases (10%), did not cover the total diligence expenses in 19 cases (20%), and did not cover the total judicial and diligence expenses in 37 cases (39%).

[7] 6 cases out of 261 reports of sales of household goods which were available for examination.

[8] Proposition 38(2) (para. 5.32).

for refusal of warrant of sale where the likely proceeds of sale would not exceed the likely expenses of sale. There is, however, in our opinion still room for a general ground of refusal based on harshness which was agreed on consultation. Even if creditors generally abandon or at least delay diligence where it would be inhumane to proceed—where the debtor's spouse was dying in hospital for example—this might not always be the case. We envisage that the courts would interpret "undue harshness" (which we prefer to the term "harsh and unconscionable" used in our proposal) as being something beyond hardship, so limiting a refusal of warrant of sale on this ground to exceptional cases.

5.144 At present there is no procedural rule requiring that the debtor be given an opportunity to object to the grant of a warrant of sale[1] except in some sheriffdoms where Practice Notes of the sheriffs principal require service of applications made later than six months after the execution of the poinding. Our proposal[2] that all applications for warrant of sale should be intimated to the debtor who should be entitled to object to the granting of a warrant was generally agreed on consultation, especially in view of the extension of the grounds on which sheriffs may refuse warrant of sale, and we recommend accordingly. In order to assist debtors we think that the copy of the application for warrant of sale should be accompanied by a notice in prescribed form informing the debtor of the right to object, to make other applications to the court[3] or to redeem some or all of the poinded goods at their appraised values.[4]

5.145 We understand that problems arise in cases where the sheriff refuses to grant a warrant of sale with the result that the poinding terminates. Creditors often do not intimate this fact to the debtor or possessor of the goods who consequently are left in a state of uncertainty as to their rights and obligations in respect of the goods. We recommend that the sheriff clerk should make the necessary intimation.

5.146 We **recommend:**

(1) An application for warrant to sell poinded goods should be intimated by the creditor to the debtor along with a notice in prescribed form informing the debtor of the rights to redeem, to object to the granting of the application, and to make various applications to the court.

(2) The sheriff should have power to refuse to grant a warrant to sell on the grounds that:

(*a*) the poinding is invalid or has ceased to have effect; or

(*b*) the goods are in aggregate substantially undervalued; or

(*c*) the likely proceeds of sale would not exceed the likely expenses of sale; or

(*d*) it would be unduly harsh in the circumstances to grant a warrant.

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[1]Under an Act of Sederunt of 6 March 1833, the application for warrant of sale is made by the creditor, officer or solicitor endorsing on the report of the poinding a short crave: see Graham Stewart, p. 358; *British Relay Ltd* v. *Keay* 1976 S.L.T. (Sh.Ct.) 23 at p. 24; *New Day Furnishing Stores Ltd.* v. *Curran* 1974 S.L.T. (Sh. Ct.) 20.

[2]Proposition 38(1)(para. 5.32).

[3]For example for a time to pay order.

[4]Recommendation 5.19 (para. 5.95).

(3) The sheriff should be entitled to exercise the powers in (*a*), (*b*) and (*c*) of paragraph (2) above on his or her own motion as well as on an objection being made by the debtor, but should only be able to refuse warrant on ground (*d*) on an objection being made by the debtor to this effect.

(4) Where the sheriff refuses to grant a warrant of sale and the poinding is thereby terminated, the sheriff clerk should be under a duty to intimate this to the debtor (and possessor if a different person from the debtor).

(Recommendation 5.30; clause 52.)

Redemption of goods on payment of appraised value

5.147 We recommended earlier in this Chapter that the "offer back" to the debtor of the goods at their appraised values by the officer when conducting a poinding should be replaced by an entitlement of the debtor to redeem the goods at their appraised values at any time within 14 days after the date of the poinding.[1] We consider that a right of redemption should also arise at the stage of the application for warrant to sell. The creditor's application for warrant to sell marks for the debtor a new and more urgent stage in the diligence, making it appropriate that the debtor be given a further opportunity to avoid a sale by redeeming the goods. We suggest that this opportunity should be available for seven days following the receipt by the debtor of intimation of an application for warrant of sale.

5.148 Once the sheriff has granted warrant of sale of the poinded goods, however, the debtor should have no further entitlement to redeem. Redemption on the eve of sale would cause considerable practical problems and the expenses so far incurred in arranging the sale might well become irrecoverable. Redemption of some of the goods could render the sale of the remainder uneconomic and so frustrate the warrant of sale granted by the court. We also think that the debtor should not be entitled to redeem the goods in the interval between the expiry of the 14 day period after the execution of the poinding and the application for warrant of sale. If, for example, debtors could compel the release of particular goods piecemeal on payment of small amounts (representing perhaps the regular instalments agreed with the creditor), the officer's fees for dealing with the release of the goods would mount up and this would be in the interests of neither the creditor nor the debtor. Moreover, there would be an increased risk that confusion would arise as to what goods remained in the poinding. These considerations suggest that in the period between the expiry of the 14 day period after the execution of the poinding and application for warrant of sale, during which instalment arrangements for settlement of the debt operate with varying degrees of success, the debtor should not be entitled to redeem.

5.149 The fact of redemption by the debtor ought to be properly evidenced and reported to the court, as otherwise disputes may arise as to what goods remain in the poinding, and the court in dealing with the application for warrant of sale may be unaware of the current situation. On the debtor tendering the appraised value of an article, the officer of court should be

[1]Recommendation 5.19 (para. 5.95).

under a duty to issue a receipt identifying the article and having the effect of releasing it from the poinding. Where redemption takes place within the 14 day period after execution of the poinding but before the officer lodges the report of poinding the redemption should be mentioned in the report. If the report has been lodged but no application for warrant of sale has been made, any redemption should be noted by the creditor or officer in the application to sell the remainder of the goods; while any redemption made after an application for warrant of sale has been made should be reported forthwith to the court, since the sheriff must know what goods are included in the poinding in view of the various grounds on which warrant of sale may be refused, in particular that the likely proceeds of sale of the goods will not exceed the likely expenses of their sale.

5.150 We **recommend:**

(1) On receiving intimation of an application for warrant of sale the debtor should be entitled to redeem some or all of the poinded goods on payment of their appraised values to the officer of court within a period of seven days after receipt of the intimation.

(2) The officer of court should be under a duty to give the debtor a receipt identifying the redeemed goods. The issue of a receipt should have the effect of releasing the specified goods from the poinding. The officer should be required to report the redemption forthwith to the court. (Recommendation 5.31; clause 53(2), (3) and (5).)

Arrangements for sale made in the warrant of sale

Location of sale

5.151 The Debtors (Scotland) Act 1838, section 26 provides that the sheriff must grant warrant of sale by public roup (auction) "at such place with such public notice of the sale, as may appear to the sheriff most expedient for all concerned". The sheriff must fix the place of sale in the warrant; the warrant cannot be in general terms leaving it to the officer to insert the place of sale later.[1] Except in one or two areas, nearly all warrant sales of household goods take place in the debtor's residence. Until recently, the practice (which had been followed for many years[2]) was to order one advertisement in a specified newspaper circulating in the area where the goods were to be sold.

5.152 The result was that a sale in the debtor's residence necessarily meant that the debtor's name and address were identified in the advertisement of the sale so that his or her indebtedness was publicised to the local community. This practice was widely criticised. In November 1980, members of the Society of Graphical and Allied Trades withdrew their co-operation from the publication of advertisements of warrant sales[3] and shortly thereafter the Scottish Newspaper Proprietors' Association recommended that their members should not publish such advertisements. It appears that this "ban" on warrant sale advertisements was not restricted to sales in debtors' dwellings but

[1] *McVicar* v. *Kerr* (1857) 19 D. 948.
[2] The McKechnie Committee (para. 167) noted the practice in 1958.
[3] See e.g. *The Scotsman* 28 November 1980; *The Glasgow Herald* 28 November 1980.

extended to all warrant sales, including sales of commercial goods on business premises.

5.153 As a consequence, four different modes of giving public notice of warrant sales are now used. First, public notice by newspaper advertisement is used in areas of Scotland where newspapers circulate which still accept warrant sale advertisements. Second, in many areas, the only public notice ordered is by way of intimation on the notice board of the court granting the warrant. Third, in one sheriffdom the court orders in some cases that handbills advertising the sale be circulated in the locality of the debtor's residence or other place of sale in addition to intimation on the court notice board. This is a reversion to an older practice which had been followed before newspaper advertisement became the common form of public notice. Fourth, in some areas the practice is to remove goods to an auction room for sale together with other non-poinded goods so that the advertisement of the auction suffices and does not identify the debtor.

5.154 Our Consultative Memorandum No. 48 was issued in October 1980 and therefore did not take account of the "ban" on newspaper advertisements of warrant sales, or public notice on court notice boards and by handbills. In that Memorandum, we proposed[1] that (as is the practice elsewhere in the United Kingdom) warrant sales should not take place in the debtor's residence unless the debtor consents and the poinded goods should normally be removed for sale to an auction room.

5.155 The grounds for requiring sales in auction rooms may be summarised as follows:

(*a*) The Edinburgh University Debtors Survey[2] and other evidence discloses that the humiliation and distress inflicted by newspaper advertisements identifying debtors and publicising their indebtedness is deeply resented by the debtors and indeed the advertisement is often feared more than the sale itself. The advertisement is not effective in inducing potential bidders to attend sales in debtors' residences, and its primary role is as an inducement to payment; this was not the intention of Parliament when it enacted the 1838 Act.

(*b*) Apart from the advertisement, it is likely that debtors generally are also distressed by the actual holding of a sale in the home far more than they would be by a sale in an auction room.

(*c*) As the McKechnie Report recognised,[3] it seems likely that better prices for the poinded goods would be obtained because of the competition which usually occurs at a sale in a public auction room but which is generally lacking at a warrant sale in the debtor's dwellinghouse.[4] Requiring a sale in a public auction room is the most that can be done to ensure that poinded household goods are sold at their market value, and the procedure is more likely to be accepted as fair to all concerned.

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[1]Proposition 41 (para. 5.40).
[2]Para. 8.6.
[3]Para. 172.
[4]The large proportion of warrant sales in which the goods are adjudged and delivered to the poinding creditor, or sold at the upset price, suggests that competition is rare.

5.156 These arguments were accepted by most of those who commented. It was, however, represented to us that poinding and sale is effective in enforcing debts mainly because a sale in the home with attendant publicity is so disliked that debtors find some way of paying their creditors before these steps are reached. If goods were to be sold in auction rooms without publicity identifying the debtor, fewer debtors would pay up and (so the argument ran) more sales would be necessary. We have little doubt that the practice of advertising and holding sales in debtors' homes is generally regarded as an unwarrantable intrusion on their privacy and is no longer acceptable. Moreover, if goods are to be sold in auction rooms the threat to remove the goods from the home to the auction room will constitute a very effective spur to payment of the debt.

5.157 It was also argued that once a decree for payment of a debt had been granted the matter ceased to be private and advertisement of the debtor's position served a useful purpose in that small traders in the locality are warned not to give further credit to that debtor. Large traders are able to find out about the decrees through Stubbs Gazette and other credit reference agencies, but small shopkeepers cannot or at least do not. Other creditors are, it was argued, entitled to know of the impending warrant sale so that they can take steps to share in the proceeds. It is probably true that small shopkeepers will no longer be warned against giving further credit to the debtor in question, but we do not think this factor is decisive as most small shopkeepers trade on a cash basis. So far as sharing by other creditors is concerned, it is almost unknown in modern practice for them to claim to participate in the proceeds of a warrant sale of household goods.[1]

5.158 Our proposal that a sale of household goods should be held in an auction room, unless the debtor consents to a sale in the house, presents considerable problems, especially in the case of poindings in areas remote from auction rooms. It is true that the cost of advertising the sale and the fee and travelling expenses of the auctioneer could be set against the cost of removing the poinded goods to the nearest auction room, and that in some cases arrangements could be made for uplifting poinded goods along with other goods (whether poinded or non-poinded) destined for the same auction room. But in a substantial proportion of cases it would be more expensive to hold the sale in an auction room rather than in the debtor's house, and the creditor would be unlikely to recover the extra expense by the higher prices expected for goods sold in the competitive conditions of an auction room. In Consultative Memorandum No. 48 we invited views on three options to deal with this problem.[2] These were that the sheriff should have power to direct the sale to be held in a debtor's dwellinghouse notwithstanding the debtor's refusal to consent, that the sale should be held in premises other than an auction room, or that an Exchequer subsidy should be provided towards the cost of removal to the nearest auction room. Most of those who commented

[1]Small creditors are not aware of their right to claim to participate under s. 10 of the Bankruptcy (Scotland) Act 1913 (repealed and re-enacted by para. 10 of Sched. 7 to the Bankruptcy (Scotland) Bill 1984). Moreover, it is unclear as a matter of law whether or how the provision would operate in the common household goods case where there are no proceeds of sale but the goods are made over to the creditor in default of sale.

[2]Proposition 41 (para. 5.40).

favoured the second option. We would reject the first option as this would entail warrant sales outwith the main centres of population generally being held in debtors' dwellinghouses. We favour a combination of the second and third options. If the cost of removal to the nearest auction room is such that the likely expenses of sale there will exceed the likely proceeds of sale with the result that the sheriff will refuse to grant warrant of sale, the officer or creditor should have an opportunity to find suitable alternative premises nearer to hand. Government assistance could take the form of making premises available (such as a room in nearby offices or in the sheriff court) or cash payment towards hiring premises or removal expenses.

5.159 In our view the only way in which the wide public concern about sales of poinded household goods in dwellinghouses (which involve distressing publicity, invasion of privacy and in many cases failure of the goods to attain a reasonable price) can be met is by requiring the sale to be held elsewhere unless the debtor consents to a sale in the house. Furthermore some element of Government assistance seems inevitable because otherwise poinding and sale will cease to be an effective diligence or spur to payment against debtors who live above a certain distance from auction rooms. We would stress that our recommendations only apply to the sale of goods in debtors' dwellinghouses; sales in other premises belonging to the debtor such as a shop or an office should continue to be competent, whether or not the debtor consents, since there is not the element of invasion of domestic privacy in these cases.

5.160 We think the opportunity should be taken to regulate the rights of third parties on whose premises it is desired to hold the warrant sale. At present, it seems that a third party has no right to object[1] and on consultation, those commentators who expressed a view thought that the third party's consent should be obtained and produced to the sheriff before warrant of sale in those premises was granted. On reconsideration we have come to the view that there should be a procedure for overriding the lack of consent where the poinded goods are of such a nature (a heavy crane for example) that removal to other premises for sale would be unreasonable. We suggest that the sheriff should have power, on cause shown, to dispense with the third party's consent but that this power should only be available in respect of non-residential premises. Where goods were poinded in a third party's dwellinghouse, both the debtor and the third party occupier should be required to consent to a sale being held there, and there should be no machinery for overriding a refusal to consent by either.

5.161 We **recommend:**

(1) A warrant of sale should not provide for sale in a dwellinghouse unless the debtor (and the occupier of the dwellinghouse if a different person) consents in writing to a sale being held there.

(2) Where the consent or consents required in paragraph (1) above are not given, the sale should normally be required to be held in an auction room specified in the warrant of sale. But if the expenses of removal to the nearest auction room would be likely to exceed the proceeds of sale of the goods there, the sheriff may direct that the sale be held in

[1] *McNaught and Co.* v. *Lewis* (1935) 51 Sh.Ct.Reps. 138.

other premises made available by the creditor if such other premises appear suitable and the occupier of those premises consents in writing to their use, but if no other suitable premises are available the sheriff should refuse to grant a warrant of sale.

(3) Where goods have been pointed in a dwellinghouse and the creditor is unable to find other suitable premises for holding a sale, assistance should be given by the Government, either by making Government premises available or by subsidising the removal of goods to the nearest auction room or other suitable premises.

(4) The sheriff should not grant a warrant of sale to sell pointed goods in premises (other than a dwellinghouse or an auction room) occupied by a third party unless the third party occupier consents in writing, provided that if the goods have been pointed in those premises and their nature is such that it would be unreasonable for them to be removed for sale, the sheriff should have power to direct that the sale be held in those premises notwithstanding the lack of consent by the third party occupier. (Recommendation 5.32; clause 54(1) to (5).)

Advertising the sale

5.162 In order to avoid clandestine or collusive sales public advertisement of the sale is essential. One of our reasons for recommending that pointed household goods should generally be sold in auction rooms is that, in these cases, any advertisement of the sale would not mention the debtor as the goods would normally be sold along with other goods, so that a general advertisement of the sale would suffice for all. In view of the distress caused to debtors by advertisements which named them, we think there should be a specific prohibition against any advertisement which names the debtor or discloses that the goods offered for sale are pointed goods, except where the sale is to take place on the debtor's premises. In these cases (sales on the debtor's commercial premises or the rare sale in a dwellinghouse with the debtor's consent) identification of the debtor by name and publication of the address of the premises is inevitable, although it may be unnecessary to reveal the fact that the goods have been pointed or that the sale is a warrant sale.

5.163 To avoid misunderstandings, and perhaps also to facilitate the provision of premises by third parties, we think that any advertisement of the sale of pointed goods to be held on a third party's premises (other than an auction room) should be required to state that the goods do not belong to the third party. This requirement would be in addition to the requirement not to name the debtor or disclose that the goods were pointed.

5.164 We understand that most hire, hire purchase and conditional sale agreements require the hirer or purchaser to notify the supplier if the goods are pointed, but many debtors may fail or forget to do this. Third party owners of goods which have been pointed (such as finance companies involved with hire purchase goods) rely to some extent on public advertisements of sales in order to find out about sales of their goods. Our recommendation that most public advertisements of sales will not disclose the identity of the debtor would prejudice third party owners. To prevent this, prescribed details of forthcoming sales should be displayed on a public notice board in the sheriff

court. In our view this publicity would not inflict anything like the same humiliation and distress on debtors as newspaper advertisements or hand bills do.

5.165 Section 26 of the Debtors (Scotland) Act 1838 provides that public notice of the sale must be given between eight and 20 days before the sale takes place. The intention was to secure the attendance of bidders at the sale although in many cases this is not achieved. We think that statutory time limits are unnecessary and that the sheriff should have power to regulate the timing of the public notice when granting warrant of sale. This power would only be appropriate in non-auction room sales; where the goods are to be sent to an auction room for sale the arrangements for any public notice could be left to the auctioneers.

5.166 We **recommend:**

(1) Where the sale is to be held in an auction room or premises other than the debtor's premises, the public notice of the sale should not name the debtor or disclose that the goods consist of or include poinded goods.

(2) Where the sale is to be held in premises occupied by a third party, then in addition to the prohibition in paragraph (1) above, the public notice should state that the goods are not those of the occupier.

(3) The sheriff should continue to direct in the warrant of sale the form and timing of public notice to be given in any sale on premises other than an auction room.

(4) Prescribed particulars of every sale should be displayed on the public notice board of the court which granted the warrant of sale. (Recommendation 5.33; clause 56(3)–(6).)

Time of sale

5.167 Section 26 of the Debtors (Scotland) Act 1838 requires the sheriff in granting warrant of sale to specify the time (the time of the day and the date) at which the sale is to take place. For goods to be sold in auction rooms it may not be possible for the time of sale to be ascertained when an application for warrant of sale is made. Furthermore, a fixed time of sale is inflexible and where the arrangements have to be changed due to unforeseen circumstances an application to the sheriff for a fresh warrant of sale becomes necessary. On the other hand a warrant of sale which did not state any time by which the goods had to be sold would be undesirable as the debtor could remain subject to the threat of sale (and the goods could remain poinded) indefinitely. Since a statutory time limit might be too long for some areas and too short for others, we think the sheriff in granting warrant should specify a period within which the sale must take place.

5.168 We recommend above[1] that a poinding should cease to have effect a year after its execution, unless extended by the sheriff. This rule does not apply once warrant of sale has been applied for. In order to preserve the creditor's security during the period allowed for sale specified in the warrant,

[1]Recommendation 5.27 (para. 5.130).

the poinding must not lapse. We therefore suggest that the granting of the warrant should have the effect of extending the poinding until the sale is carried out or the specified period elapses without a sale having been held.[1]

5.169 We **recommend:**

Instead of the warrant of sale specifying the time and date of the sale it should specify a period within which the sale must take place. The granting of the warrant should have the effect of extending the duration of the poinding until the sale is executed or the warrant expires unexecuted at the end of the specified period.
(Recommendation 5.34; clauses 55(4) and 62(3).)

Appointment and functions of auctioneer and officer

5.170 Under the present law, the persons responsible for the conduct of a warrant sale are the auctioneer and the judge of the roup. The functions of the judge of the roup, who is appointed in the warrant of sale,[2] are (*a*) to open the sale, to supervise the sale, to intervene if any irregularity occurs and to close the sale;[3] (*b*) if the goods are not sold, to deliver the goods to the poinding creditor;[4] and (*c*) to make a report of the sale (or delivery) to the sheriff within eight days.[5] The practice is for an officer of court to be appointed judge of the roup, the advantage being that if the officer does not carry out the functions properly, he or she may be disciplined by the sheriff principal. There is also an advantage in appointing the officer who executed the poinding lest any dispute arise as to the identity of the poinded goods.

5.171 Clearly someone has to be appointed to make arrangements for the sale, make arrangements for the goods to be removed if they are to be sold in an auction room or other premises, supervise the sale and make a report on the sale to the court. We received no comments on consultation that would lead us to recommend any alteration in the current practice of appointing an officer of court to perform these functions. We envisage that the officer who poinded the goods would normally be appointed in order to avoid any mistakes as to the identity of the goods to be sold. The officer's attendance at the sale might be thought superfluous in the cases where the poinded goods are offered for sale in an auction room. In Consultative Memorandum No. 48 we suggested[6] that to save expense an officer should no longer be required to attend. The auctioneer could report to the officer who would in turn report to the sheriff. The creditor rather than the officer would be responsible for taking delivery of unsold goods although most creditors would probably authorise the auctioneer to sell the goods to the highest bidder (notwithstanding any reserve price) in order to avoid this. On consultation this suggestion provoked a mixed reaction. The main justification in our opinion for the presence of the officer is the avoidance of delay in making a report to the sheriff. It is generally a week or so before auction rooms account to the sellers, yet an officer of

[1]Further extension may be available as the result of an instalment agreement (para. 5.194) or by the grant of an amendment to the warrant (para. 5.188).
[2]Debtors (Scotland) Act 1838, s. 26.
[3]*Strachan* v. *Auld* (1884) 11 R. 756.
[4]Debtors (Scotland) Act 1838, s. 27.
[5]*Ibid.*, s. 28.
[6]Proposition 45 (para. 5.52).

court has only eight days (14 under Recommendation 5.44 below) in which to lodge in court a report of the sale together with an account of the balance due to or by the debtor. An officer who was present would, however, be in a position to take a note of the prices fetched by the articles and could submit the report without delay. We would not favour imposing a statutory duty on auctioneers to account to officers, within say seven days, as this might well deter them from accepting poinded goods especially as the duty would have to be backed by sanctions such as penalties for contempt of court or criminal fines. Other advantages of the officer's attendance at the sale would be that arrangements could be made on behalf of the creditor in respect of any unsold goods, and that a cancellation of the sale could be authorised if the debtor paid the debt at the last minute.

5.172 We **recommend:**

The warrant of sale should continue to appoint an officer of court to make arrangements for the sale, to supervise or attend the sale, and to make a report to the court.
(Recommendation 5.35; clauses 55(5), 59(1) and 61(1).)

5.173 The auctioneer is also appointed by the sheriff in the warrant of sale. This power stems from the common law. At the time when Consultative Memorandum No. 48[1] was issued, the general practice was to appoint an auctioneer for all sales, the person appointed being someone who, alone or with others, carried on business as an auctioneer and who was independent of the officer or creditor.[2] In some sheriff court districts, however, the officer of court appointed as judge of the roup could also be appointed as auctioneer where the goods were sold in pursuance of a summary cause decree.[3] Where an auctioneer is appointed, that person (or his or her firm) is usually a member of the Incorporated Society of Valuers and Auctioneers (Scottish Branch) or the Scottish Association of Auctioneers. In the case of a sale in an auction room an auctioneer of that sale room is appointed.

5.174 In Consultative Memorandum No. 48 we discussed whether an officer of the court should be able to act as both auctioneer and supervisor in cases where goods were not sold in auction rooms.[4] The main disadvantage of the practice of appointing a separate auctioneer is the extra expense which can be disproportionately high for goods of relatively small value.[5] Moreover, the Incorporated Society of Auctioneers and Valuers (Scottish Branch) informed us that it is not easy to obtain the services of an auctioneer to conduct warrant sales at present. This is perhaps because of the travelling involved and the likelihood that the sale will be cancelled after arrangements have been made.

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[1]October 1980.

[2]This practice developed following *Cantors Ltd* v. *Hardie* 1974 S.L.T. (Sh.Ct.) 26 where the appointment of an employee, partner or employer of the officer as auctioneer was disapproved.

[3]See *Allison's (Electrical) Ltd.* v. *McCormick* 1982 S.L.T. (Sh.Ct.) 93 for a summary of the practices in various sheriffdoms at January 1981.

[4]Paras. 5.47 to 5.51.

[5]Unpublished data collected by the Central Research Unit in their investigation of warrant sales show that in 1977 in the case of commercial goods sold by an auctioneer, the fee varied between 1% and 23% (average 6%) of the proceeds (including appraised values of unsold goods) of sale. Where the proceeds were under £500 the auctioneer's fee amounted on average to 9% of the proceeds.

5.175 It has been argued that the appointment of an independent auctioneer makes it appear that every effort has been made to obtain a fair price for the goods; on this view the auctioneer:

> "should be independent of the sheriff officers who nominate him and act as judge of the roup. Otherwise it cannot be said that the judge of the roup will be seen to be 'there to see fair play on both sides at the sale and to interfere if anything irregular is done'."[1]

On the other hand officers of court can be disciplined if they fail to conduct warrant sales fairly and these disciplinary sanctions, rather than the appointment of another person to act as auctioneer (ultimately at the debtor's expense), should be sufficient protection for debtors.

5.176 It would be a strong argument in favour of requiring auctioneers if their appointment resulted in the goods being sold for higher prices than if officers acted as auctioneers. From the C.R.U. Warrant Sales Report however, it appears that, in 1977, in over three-quarters of sales held at business premises, the items were either sold at their appraised values or delivered as unsold to the creditor. Because of the low level of attendance at such warrant sales, the professional skills of auctioneers are seldom needed.

5.177 On consultation, reaction was divided but most of those who commented favoured removal of the prohibition against appointment of officers of court as auctioneers in summary cause sales and retention of the prohibition in other cases. The Practice Notes currently in force (in the Sheriffdom of South Strathclyde, Dumfries and Galloway there is no Practice Note) are now along these lines although an officer of court may be appointed to act as auctioneer in ordinary auction sales if an auctioneer is unavailable. We think the appointment should be regulated by statute rather than by Practice Notes and the common law. The provisions we recommend would follow those contained in the current Practice Notes but in our opinion the value of the goods being auctioned is more relevant than the type of decree being enforced. Where the goods are valued at more than £1,000 an auctioneer should if possible be appointed to sell them. Only where the services of a professional auctioneer cannot be obtained should an officer of court or other suitable person be appointed. On the other hand where the goods are valued at £1,000 or less the court may appoint an officer of court as auctioneer to conduct the sale. Where the court intends to appoint an officer of court to conduct the sale[2] it should in order to save trouble and expense, appoint the same officer as is appointed to make arrangements for and supervise the sale. In these circumstances, where only a single officer is present at the sale, we think a witness should be required to be in attendance to provide an independent account of what occurred if the proceedings are challenged.

5.178 We **recommend:**

(1) Provision should be made by statute rather than by Practice Notes regulating the appointment of persons to conduct warrant sales. Where the sale is to be held in premises other than an auction room:

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[1] *Cantors Ltd.* v. *Hardie* 1974 S.L.T. (Sh.Ct.) 26, at p. 28.

[2] We envisage that the officer who executed the poinding would normally be appointed in order to avoid mistakes as to the identity of the goods to be sold.

(*a*) if the goods are valued at more than £1,000 (or such other sum as may be prescribed by act of sederunt) the sheriff should appoint an auctioneer to conduct the sale, but if an auctioneer is not available an officer of court or other suitable person may be appointed;

(*b*) if the goods are valued at or less than the above sum the sheriff may appoint either an officer of court or an auctioneer to conduct the sale.

(2) If an officer of court is appointed to conduct the sale he or she should normally be the officer appointed to make arrangements for and supervise the sale, in which case a witness should be required to be in attendance at the sale.

(Recommendation 5.36; clauses 55(6) and 59(2).)

Intimation of arrangements for sale to debtor

5.179 Section 26 of the Debtors (Scotland) Act 1838 requires the sheriff to order intimation of the warrant of sale to the debtor (and to the possessor of the pointed goods if a different person) at least six days before the date of the sale. The intention was to give the debtor adequate notice of the sale and the Act contemplates that intimation might be made after the sale has been advertised. In practice, intimation is made by the officer as soon as the warrant of sale is granted in order to give warning not only of the sale but the impending advertisement, which as the Edinburgh University Debtors Survey suggests[1] is often as powerful an inducement to payment of the debt as the threat of sale.

5.180 In terms of our previous recommendation[2] the officer of court rather than the sheriff would make detailed arrangements for the sale although the sale would have to take place within the period stipulated by the sheriff in the warrant of sale. Therefore intimation of the warrant of sale alone will no longer inform the debtor of the time when the sale is to be held. We think the officer should intimate the proposed date for the sale to the debtor as soon as the arrangements have been made. Intimation of the warrant of sale should also be made to debtors so that they know that the sale is taking place by authority of the sheriff. This scheme would retain the option, open to creditors under the existing law, of intimating the warrant of sale as soon as it has been granted. This practice should not be discouraged since intimation leads many debtors to settle, thus reducing the number of warrant sales that have to be carried out. On the other hand to save expense officers may (as at present) wish to intimate the warrant and the arrangements made for sale at the same time. While intimation of the warrant of sale should be made before or at the same time as intimation of the date arranged for the sale, it should not be competent to intimate the warrant later, because debtors are entitled to know that the officer's arrangements are in pursuance of a warrant granted by the court.

5.181 In Consultative Memorandum No. 48[3] we sought views on whether

[1]Para. 7.24.
[2]Recommendation 5.34 (para. 5.169) above.
[3]Proposition 40 (para 5.34).

intimation of the warrant of sale should be done by an officer serving a copy of the warrant on the debtor by hand.[1] At present intimation is normally made by recorded delivery post, and although hand service is competent, only the fee for postal service can normally be charged.[2] On consultation opinion was in favour of retaining the present law, which in our opinion strikes the correct balance between saving expense and the greater likelihood of settlement if personal contact can be made between officers and debtors.

5.182 Where goods are to be removed from the premises in which they are situated to an auction room or other premises for sale the debtor (and possessor if a different person) should be given adequate notice of the removal. We think that such notice should be given not less than seven days before the date fixed for the removal of the goods. The officer should also be under the duty of informing the debtor (and possessor) of the place of sale.

5.183 We **recommend:**

(1) The officer of court appointed to arrange the sale should be under a duty to intimate the date of the sale as soon as it has been arranged to the debtor (and possessor if different), and not later than the date of that intimation, to serve a copy of the warrant of sale on the debtor (and possessor if different).

(2) Where the goods are to be removed from the premises in which they are situated for sale the officer should give the debtor (and possessor if different) not less than seven days' notice of the date fixed for removal and the place to which the goods are to be removed for sale.
(Recommendation 5.37; clause 56(1) and (2).)

Removal of goods

5.184 Where goods are to be removed for sale the officer should attend the debtor's premises at the time fixed for the removal for three reasons. First, powers of entry and search might be needed to facilitate the uplifting of the goods. Second, the officer should identify the poinded goods and supervise their removal. Third, an officer present at the uplifting of the goods could be authorised by the creditor to receive payment of the debt on the creditor's behalf, or even to conclude an instalment settlement with the debtor and cancel the removal which would be permitted on one occasion only.[3]

5.185 We **recommend:**

The officer should either carry out or at least supervise the uplifting and removal of the poinded goods from the debtor's premises. For use, if necessary, in uplifting the goods, the warrant of sale should include a warrant authorising the officer to open shut and lockfast places.
(Recommendation 5.38; clause 55(2) and (3).)

5.186 In principle, it appears that a poinding creditor cannot release or withdraw some goods from a poinding and proceed to a warrant sale of the

[1]See para. 5.13 for what "hand service" means.

[2]Citation Amendment (Scotland) Act 1882, ss. 3 and 6; *Lochhead* v. *Graham* (1883) 11 R. 201. The sheriff may on cause shown allow the hand service fee.

[3]See Recommendation 5.41 (para. 5.197).

remaining goods.[1] Thus, the poinding creditor is not entitled to hold back poinded goods from the sale on the ground that they have deteriorated or to refuse to credit the debtor with the appraised values.[2] This rule would require modification, however, if goods are to be removed to sale rooms. It may be, for example, that the balance of the debt has been reduced since the time of the poinding by payments to account so that some only of the poinded goods require to be removed for sale. In such cases, the officer should be entitled to uplift only such part of the poinded goods as, according to their appraised values, would satisfy the debt, interest and expenses, and to withdraw the remaining goods from the poinding. Subject to this exception, we think that the rule is sound and that, since creditors may choose when to apply for warrant of sale, they must bear the risk of deterioration attributable to the passage of time.[3] On consultation, one body observed that a power to remove part only of the goods would place an unreasonable responsibility on the officer. The officer could not in all cases know whether it was safe to withdraw goods from a poinding until after the outcome of the sale. The answer to this objection is that officers have a similar responsibility when they carry out a poinding since they are entitled to poind only up to the amount of the debt and expenses likely to be incurred in the sale of the goods. Moreover, at the stage of removal the officer has a note of the appraised values and should be able to estimate with some accuracy what the expenses will amount to. In the rare case where more goods are removed to a sale room than are required to satisfy the outstanding balance of the debt, interest and expenses, then the expense of returning the unsold goods to the debtor should be borne by the creditor.

5.187 We **recommend:**

> Where goods are to be removed for sale the officer should be entitled to uplift and remove only such part of the poinded goods as, according to their appraised values, would satisfy the outstanding balance of the debt, interest and expenses, and should withdraw the remaining goods from the poinding. (Recommendation 5.39; clause 53(1).)

Alterations to arrangements made for sale

5.188 Under our recommendations the warrant of sale will appoint a named officer to arrange and supervise the sale,[4] appoint a person (whether that officer, an auctioneer or another suitable person) to conduct the sale,[5] and will specify the place of sale,[6] and the period within which the sale is to be held.[7] Occasionally it will happen that the arrangements made for the sale by the officer fall through so that new arrangements become necessary. Where new arrangements can be made within the terms of the warrant of sale the officer should, we think, be entitled to proceed to carry out the sale after intimating

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[1]We recommend in Section E below that the officer should be empowered to withdraw goods claimed by third parties.

[2]*Cantors Ltd.* v. *Hardie* 1974 S.L.T. (Sh.Ct.) 26 at p. 30.

[3]If the deterioration (other than fair wear and tear) is due to the conduct of the debtor or a third party, then the offender will be liable for wrongful interference with poinded goods.

[4]Recommendation 5.35 (para. 5.172).

[5]Recommendation 5.36 (para. 5.178).

[6]Recommendation 5.32 (para. 5.161).

[7]Recommendation 5.34 (para. 5.169).

the new arrangements for sale (and removal as the case may be) to the debtor. To remove any possibility of creditors or officers altering the arrangements simply in order to put further pressure on debtors to pay by way of repeated communications with them, we propose that, once the arrangements made for sale have been intimated to the debtor the officer should not be entitled to alter them, unless new arrangements are necessary due to reasons for which neither the creditor nor the officer can be held responsible (for example the auction room cancelling the sale in which the poinded goods were to have been included).

5.189 Circumstances may also arise, either before or after the officer has made arrangements for the sale, whereby it becomes impossible to implement the warrant of sale in accordance with its terms. Thus, for example the officer or auctioneer might fall ill,[1] the auction room might go out of business, or bad weather might make it impossible to remove the goods for sale within the period specified in the warrant. Provided the circumstances preventing the warrant being implemented are such that neither the creditor nor the officer can be held responsible for them, we think that the sheriff should have power, on application by the creditor, to make an appropriate amendment to the warrant.

5.190 It would in our view be wrong for an application for amendment of the warrant of sale to provide the debtor with an opportunity to challenge the creditor's entitlement to sell the poinded goods, or another opportunity to redeem goods at their appraised values. The creditor's entitlement was conferred by the granting of the original warrant which the debtor had an opportunity to oppose on various grounds,[2] and the creditor should not be at risk of losing this entitlement simply because a minor amendment of the warrant has become necessary. However, the sheriff should remain able to take note of any invalidity of the poinding or the fact that it has at the date of application for amendment ceased to have effect, and so refuse the application and indeed recall the poinding.[3] The sheriff should also be empowered to refuse to grant the amendment sought if of the opinion that the proposed amendment of the warrant is unsuitable.

5.191 An application for an amendment to a warrant of sale would require to be made within the period specified for holding the sale in the warrant, because if this period expires with no sale having been held the poinding ceases to have effect.[4] The making of an application for amendment should have the effect of extending the duration of the poinding at least until the application is disposed of, since the circumstances giving rise to the application may have occurred just before the expiry of the specified period. Where an application for amendment is granted the poinding should continue to have effect either for the period specified in the original warrant, or for an extended period where the sheriff has granted an extension. Generally on refusal of an application for amendment the poinding should cease to have effect

[1]In appointing an officer to supervise the sale, the warrant usually appoints another officer or officers on a "whom failing" basis to make provision for the first officer's illness.

[2]Recommendation 5.30 (para. 5.146).

[3]Recommendation 5.29 (para. 5.137).

[4]Recommendation 5.34 (para. 5.169).

forthwith. But to meet the case where the application is refused as unnecessary, (for example where the sheriff takes the view that the original warrant can be implemented albeit with difficulty), the sheriff should have power to make other provision for the duration of the poinding.

5.192 On granting an application for amendment of a warrant of sale the sheriff should have power to make any necessary incidental and consequential orders, including an order requiring a copy of the warrant as amended to be served on the debtor. Earlier in this Chapter, in the context of an application for warrant of sale, we recommended[1] that the sheriff clerk should intimate the refusal of the application (and hence the termination of the poinding) to the debtor (and possessor of the poinded goods if a different person). We would extend this recommendation to applications for amendment in cases where the effect of refusal is to bring the poinding to an end.

5.193 We **recommend:**

(1) The creditor or officer should be entitled to alter within the terms of the warrant for sale the arrangements made for sale after intimation of those arrangements to the debtor, only if the alteration is necessary because of circumstances for which neither the creditor nor the officer is responsible.

(2) The sheriff, on application by the creditor or officer, should have power to amend the warrant of sale if the original warrant cannot be executed in accordance with its terms due to circumstances for which neither the creditor nor the officer is responsible, and to make any necessary incidental and consequential orders.

(3) An application for amendment of a warrant of sale should require to be made within the period for holding the sale specified in the warrant. The application should be intimated to the debtor. The sheriff, on a motion by the debtor or on his or her own motion, should refuse the application if the poinding was invalid or has ceased to have effect, or the amendment proposed is unsuitable.

(4) The poinding should not lapse pending the determination of an application. Where the application is granted the poinding should continue to have effect until the sale is held or the period specified for holding the sale elapses, whichever is the sooner. Where the application is refused the poinding should cease to have effect forthwith, unless the sheriff directs otherwise. The sheriff clerk should intimate any cessation of the poinding to the debtor (and possessor of the poinded goods if different).

(Recommendation 5.40; clauses 57 and 62(4).)

Instalment arrangements after grant of warrant of sale

5.194 While there is nothing inherently unlawful in an application for a second warrant of sale it has been held[2] that this second application, like the first, must be sought without undue delay. The effect of this decision is that, where an instalment arrangement is made after warrant of sale and the

[1]Recommendation 5.30 (para. 5. 146).

[2]*City Bakeries Ltd.* v. *S. and S. Snack Bars and Restaurants Ltd.* 1979 S.L.T. (Sh.Ct.) 28.

arrangement breaks down, the creditor is not normally able to obtain a second warrant of sale. Generally the creditor must have the sale carried out on the date specified in the warrant or lose altogether the right to sell.

5.195 It would often be in the interests of both creditor and debtor if the arrangements for sale made in pursuance of the warrant could be cancelled and the duration of the poinding extended to allow the debtor time to pay by instalments. In Consultative Memorandum No. 48 we put forward proposals[1] whereby arrangements made for sale could be cancelled and on this being reported to the sheriff the poinding would be extended for six months from the date of the report. Cancellation would however be incompetent after goods had been removed for sale in order to avoid administrative and legal complications. These proposals were generally agreed to by those who commented. One body thought that the above proposals were too complex, and that it would be better to leave detailed procedure to the discretion of the sheriff so making statutory rules unnecessary. We think, however, that a diligence requires regulation by rules and that the presence of rules would remove the need for applications to the court. Another body expressed the view that our proposals were too restrictive and that creditors and debtors should have greater freedom to cancel. But there has to be finality in the diligence process; the entitlement to cancel on one occasion only and postpone the sale for six months in our opinion strikes the correct balance between finality and flexibility.

5.196 On breakdown of the instalment agreement the creditor should be entitled to make fresh arrangements to sell the poinded goods. In most cases arrangements for sale could be made within the terms of the original warrant after allowing for the fact that the effect of reporting the agreement to the court is to extend the period within which a sale must be held to six months from the date of the report. Thus, unless the arranging officer (or auctioneer if one was appointed) or the place of sale specified in the warrant required to be changed, the creditor would be able to instruct the officer to make new arrangements for the sale without further application to the court. Where a change was necessary the creditor would have to apply to the sheriff for an amendment of the warrant under the procedure outlined in paragraphs 5.188 to 5.193 above. As in the cases where no instalment agreement had been made the sheriff should only be empowered to amend the warrant if satisfied that it is necessary for reasons for which neither the creditor nor the debtor is responsible. Such reasons might include a withdrawal of consent by a third party or the debtor to a sale in his or her premises although such consent was given at an earlier stage when the warrant of sale was applied for.

5.197 We **recommend:**

(1) After the grant of warrant of sale the creditor should be entitled, on one occasion only, to cancel the arrangements for sale for the purpose of allowing time for an agreement for payment of the debt to have effect.

(2) It should not be competent to cancel under paragraph (1) above after the goods have been removed for sale.

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[1]Proposition 37 (para. 5.22).

(3) A report of the agreement should be lodged in court forthwith by the creditor or officer, whereupon the duration of the poinding would be extended for a period of six months from the lodging of the report.

(4) On breakdown of an agreement the creditor should be entitled to sell the goods without further application to the court, provided the sale takes place within the six months' extension and the warrant can otherwise be implemented according to its terms. In other cases, the creditor should have to apply to the sheriff for an amendment of the warrant as in Recommendation 5.40 or a direction that the sale be held in the same premises notwithstanding that the required consents no longer subsist.

(Recommendation 5.41; clauses 58 and 62(5).)

The sale

5.198 *Appraised value as a reserve price.* Under the existing law the value put on an article at the poinding operates as an upset price (the price at which bidding commences for it) in the subsequent sale.[1] In Consultative Memorandum No. 48 we proposed[2] that the appraised values should be treated as undisclosed reserve prices. In conducting an auction an auctioneer normally starts by inviting bids at a moderately high level and, if no bids are made, lowers the price to stimulate interest with a view to working it up as bids are made. The goods would we think be more likely to fetch a better price with undisclosed reserve prices than with upset prices. All those who commented agreed but on reflection we think that there might be an advantage in some cases in disclosing the reserve to potential bidders.

5.199 We **recommend:**

The appraised value of a poinded article should be treated in the subsequent sale as a reserve price which need not be disclosed to bidders.

(Recommendation 5.42; clause 59(3).)

5.200 *Unsold goods.* If an article is not sold, because no bid is made at or above the upset (or reserve) price it is made over to the poinding creditor, and the debtor is credited with the appraised value.[3] On consultation, it was pointed out to us that the creditor may wish the goods to be sold to the highest bidder even though the highest bid was below the upset or reserve price, in order to save the trouble and expense of removing the goods or putting them up for sale again later. We think this would be a useful facility for creditors provided the debtor was credited with the appraised value of the goods.

5.201 In a sale in the debtor's premises the proper practice is that the goods which have been made over to the creditor in default of sale should be removed immediately after the sale or on the day of the sale. If there is a short delay before removal the officer should remain on the premises as there is no entitlement to re-enter. In Consultative Memorandum No. 48 we suggested[4]

[1]Debtors (Scotland) Act 1838, s. 27. In terms of Recommendation 5.20 (para. 5.101) above, the appraised value would be the open market value.

[2]Proposition 29 (para. 4.57).

[3]Debtors (Scotland) Act 1838, s. 27.

[4]Proposition 47 (para. 5.56).

that the creditor should have a prescribed period (of say 24 hours) in which to uplift the goods. Some commentators thought that this period was too short, but the Society of Messengers-at-Arms and Sheriff Officers observed that if the sale is in the debtor's house, the goods should be removed on the same day. We accept this point but a longer period, which we suggest should be three days, seems reasonable where the goods are put up for sale on the debtor's business premises, as heavy machinery or articles requiring specialised transport might be involved. In order to prevent officers having to remain on the premises until the goods are uplifted we recommend that the officer should be authorised to re-enter (by force if necessary) in order to enable the creditor to uplift the goods.

5.202 In sales of goods in the debtor's dwellinghouse, the creditor often simply abandons unsold goods to the debtor. There have, however, been cases where the creditor has used the threat of collecting the goods to put pressure on the debtor to make further payments. To prevent such a practice we further proposed that the ownership in the unsold goods should not pass to the creditor unless and until the goods were removed within the prescribed period. On reflection we think a delayed passing of ownership creates problems and leaves the debtor responsible for the security of the goods until the creditor uplifts them. Our preferred solution is for the ownership to pass immediately to the creditor but to revert to the debtor if the creditor failed to uplift them within the prescribed period. Because of the prohibition against second poindings, the creditor would not normally[1] be entitled to poind again for the same debt articles the ownership of which had reverted to the debtor.

5.203 We **recommend:**

(1) The ownership of goods which are not sold should pass to the creditor but the creditor should be permitted to instruct the auctioneer to sell an article to the highest bidder even if the bid is less than the appraised value. The debtor should however still be credited with the appraised value.

(2) Where goods are put up for sale on the debtor's premises and remain unsold, the ownership passing to the creditor by virtue of paragraph (1) above should revert to the debtor on the expiry of the times mentioned below unless:

   (*a*) where the sale was held in the debtor's dwellinghouse the creditor uplifts them by 8 p.m. or such time as may be prescribed on the day of sale;

   (*b*) where the sale was held in other premises belonging to the debtor the creditor uplifts them by 8 p.m. or such time as may be prescribed on the third day after the sale.

(3) The officer of court should be entitled to remain on or re-enter the premises to enable the creditor to uplift the goods.
(Recommendation 5.43; clause 59(3), (5), (6) and (8).)

[1]Articles could be repoinded if the debtor removed them to premises other than those in which they were originally poinded.

Report of sale

5.204 *Lodging the report.* Within eight days from the date of the sale, the officer presents a report of the sale to the sheriff. The report details the creditor and debtor; specifies the warrant of sale; sets out the date on which the sale was carried out and by whom; and contains a statement of whether each item was sold or delivered to the creditor, and the price at which each article was sold. The whole expenses of the diligence are itemised and a statement of the balance due by or to the debtor is made. The report of sale has two purposes: to provide an independent accounting, through the auditor of the sheriff court, between the debtor and creditor;[1] and to enable the court to check that the sheriff's warrant of sale has been properly carried out. These aims would suggest that a report should be made to the sheriff even if the proceedings following the warrant of sale have not reached the stage of a sale.[2] For some considerable time, however, it has been the practice that only where a sale has been held is a report on the proceedings made to the sheriff.

5.205 It follows from this practice that, in over 90% of the cases in which warrant of sale is granted by the courts, the courts make no check on the way in which the warrant has been implemented, or on the diligence expenses, except in the rare event where a complaint has been made. Because of the accounting and other errors identified in recent reported cases, and other evidence of errors identified by the research undertaken on our behalf, we suggested in Consultative Memorandum No. 48,[3] that a report should also be made to the sheriff, in cases where no sale was held because the debt was paid or the creditor abandoned the diligence. Those who commented doubted whether it was necessary or appropriate to burden the creditor or debtor with the expense of the officer's fee for reporting in such cases. Moreover, it was suggested the proposal would involve sheriff clerks in a considerable amount of extra work. On reconsideration we have come to the view that the best method of preventing abuses in diligence which does not reach the stage of a sale is to have spot checks and inspections of officers' work by an official appointed on an *ad hoc* basis by the court.[4]

5.206 We also suggested that eight days gave officers too little time in which to lodge the report of sale and proposed a period of 14 days. This was agreed on consultation as was our suggestion that reports of sale should be in a single prescribed form instead of the wide variety of styles presently in use. A standard form would assist the court staff in checking reports and detecting errors.

5.207 We **recommend:**

The report of sale (which should be in a form prescribed by act of sederunt) should be made to the sheriff within 14 days after the date of the sale. (Recommendation 5.44; clause 61(1) and (3).)

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[1]See *Cantors Ltd.* v. *Hardie* 1974 S.L.T. (Sh.Ct.) 26.

[2]After the Debtors (Scotland) Act 1838 was enacted, it was the practice for the execution of the intimation of the warrant of sale to the debtor to be returned to the sheriff clerk together with a note of expenses to date for taxation: see McGlashan *Sheriff Court Practice* (2nd edn., 1842) paras. 1679–80. We understand that this practice has not been followed for many years.

[3]Paras. 5.57 to 5.59 (Proposition 48).

[4]See Chapter 8 (paras. 8.67 to 8.73) for further details.

5.208 *Sheriff's powers on dealing with report.* Although the procedure for auditing and checking reports of sale was at one time open to criticism,[1] a procedure has since been introduced in all sheriffdoms to ensure that reports of sale are properly checked and the expenses taxed. On receiving the report, the sheriff signs an interlocutor remitting it to the auditor of court (or sheriff clerk as auditor) for taxation. The auditor then adds a docket to the report stating that the report has been examined and setting out the balance due to or by the debtor.[2] Finally, the sheriff adds a further docket approving the report after allowing, if necessary, both creditor and debtor an opportunity of commenting on any points made by the auditor. This practice should in our opinion be embodied in statutory rules. The sheriff may approve the report of sale with or without amendments, as a result of an application made by the debtor or creditor, or on his or her own motion, or may refuse to approve it.[3] Refusal of approval probably renders the whole diligence null but this is not entirely clear.[4]

5.209 Although no adverse comments on these procedures were made on consultation, we think some amendments are necessary. First, the sheriff should not have power to refuse to receive a report; if a report is submitted however late it should be dealt with. Secondly, the sheriff should have an express power to declare the diligence null, but this power should be limited to cases where there has been some substantial irregularity in the way the sale was conducted or some fundamental defect in the report of sale which cannot be put right. In our opinion nullity of the diligence is an inappropriate penalty to impose for failure without good cause to lodge a report timeously; it benefits the debtor and prejudices the creditor, whereas the person who ought to be penalised is the officer who conducted proceedings irregularly or failed to report properly. A more appropriate sanction for failure or delay without reasonable cause in lodging a report would in our view be to require the officer (with or without other disciplinary sanctions) to forego all or part of the fees for the diligence. Thirdly, nullity of the diligence should not affect the title of any third party who has acquired the poinded goods in good faith and for value. Finally, the report of sale is at present made to the court so that debtors are often unaware of how much they still owe after the sale. This problem will become more acute when nearly all household goods are sold outwith the debtor's dwellinghouse. The sheriff clerk should inform the debtor of the result of the sale, perhaps by sending a copy of the report as finally taxed and approved.

5.210 We **recommend:**

(1) The present procedure for auditing and checking reports of sale should be embodied in statute.

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[1] *Cantors Ltd.* v. *Hardie* 1974 S.L.T. (Sh.Ct.) 26.

[2] The auditor may also draw to the attention of the sheriff any matter which seems to call for further investigation, such as an unrealistic valuation of the goods: *Lombard North Central Ltd* v. *Wilson* (unreported) Glasgow Sheriff Court, October 1980.

[3] *Cantors Ltd.* v. *Hardie supra; British Relay Ltd.* v. *Keay* 1976 S.L.T. (Sh.Ct.) 23; *South Side Sawmills* v. *Macgregor* 1981 S.L.T. (Sh.Ct.) 48.

[4] Graham Stewart, p. 361 states that a report of sale should be lodged within the statutory period to prevent any question arising. In *McGhie* v. *Mather* (1824) 3 S. 339, (a case on the Bankruptcy Act 1814 in which the same requirement was imposed) it was held that a delay of 36 days after the sale did not render the diligence null.

(2) Where the officer refuses or delays without reasonable cause to lodge a report of sale, the sheriff should have power to report the officer to the appropriate disciplinary authority (Court of Session or sheriff principal) and to find the officer liable for all or part of the expenses of the diligence, but should not have power to refuse to receive the report.

(3) If there has been a substantial irregularity in the diligence the sheriff should have power to declare the diligence null. Nullity of the diligence should not affect the title of any third party purchasing the goods in good faith at the sale or subsequently.

(4) The sheriff clerk should send the debtor a copy of the report of sale as approved or intimate the sheriff's order nullifying the diligence. (Recommendation 5.45; clause 61(2), (4), (5), (9) and (10).)

Disposal of proceeds of sale

5.211 Following the report of sale, the sheriff may order the officer to consign the proceeds of sale in the hands of the sheriff clerk.[1] The power to order consignation is discretionary and rarely exercised but may be needed where, for example, another creditor with a decree or other document of debt has lodged a claim in the proceedings to share in the proceeds of sale under the equalisation provision in the bankruptcy legislation.[2] In the absence of consignation, the officer usually pays the net proceeds of sale to the poinding creditor. Where a claim for equalisation is made after the payment to the creditor, the creditor is bound to consign the funds, since until the expiry of the period for equalisation of diligence on notour bankruptcy or apparent insolvency or the cutting down of diligence by sequestration, the funds are deemed to be still technically in the hands of the court.[3] Difficulties could, however, arise if for example there had been an overpayment or if a claim for equalisation was made after the payment and the creditor could no longer be traced.

5.212 On consultation, three different views were expressed on the manner of dealing with the proceeds of sale. Some thought that the proceeds should be consigned in court until the time when the sheriff approved the report of sale; others thought that the officer should retain the proceeds until that time; while yet others thought that the present practice of payment to the creditor, unless the sheriff ordered consignation, should be retained. No person suggested consignation or retention until the expiry of the statutory periods for equalisation or cutting down of the diligence. We did not, however, receive evidence that the present practice causes problems, and moreover the practice appears just since the creditor has already had to wait long enough for the money. If the officer makes a mistake (in the summation of an account or charging of a fee for example) resulting in an overpayment or underpayment to the creditor, then it will normally be a simple matter to rectify the mistake,

[1]Debtors (Scotland) Act 1838, s. 28.

[2]Bankruptcy (Scotland) Act 1913, s. 10, repealed and re-enacted by the Bankruptcy (Scotland) Bill 1984, Sched. 7, para. 10. It is not clear whether or how a claim could be made under these provisions where the goods are delivered in default of sale to the poinding creditor.

[3]*Gillon & Co. Ltd.* v. *Christison* (1909) 25 Sh.Ct.Reps. 283.

and ultimately the aggrieved party should be protected by the officer's bond of caution. Accordingly, we do not propose any change in the law.

5.213 The 1838 Act does not make express provision for the case where the sale produces a surplus. This is curious since the (now repealed) Small Debt (Scotland) Act 1837 provided that it should be paid to the debtor or consigned if the debtor cannot be found.[1] There is however clear authority that any balance due to the debtor must be paid over,[2] and we think that this should be done by the officer. The cases in which warrant sales produce a surplus are unusual.

5.214 We **recommend:**

No change should be made in the present law and practice whereby the proceeds of a warrant sale are consigned in court by the officer only if the sheriff so directs. The officer should be under a duty to pay any surplus to the debtor or the debtor's agent, or to consign the surplus in court if the debtor or agent cannot be found.
(Recommendation 5.46; clause 60.)

Section E. Inclusion in poindings of the goods of third parties

5.215 The inherent difficulty of distinguishing the goods of the debtor from the goods of third parties presents problems in poindings. In the common case of the poinding of household goods, the problems are exacerbated by the widespread use of hire purchase and hiring agreements relating to consumer durables and are likely to be further aggravated by the recently proposed statutory presumption of common ownership of household goods by married couples.[3]

5.216 In this branch of the law, the primary problem is how best to reconcile the protection of the property rights of innocent third parties with the need to ensure that poindings are not stopped, by spurious claims by or on behalf of third parties, to an extent that undermines the effectiveness of the diligence. It may seem axiomatic that a creditor should not be entitled, nor an officer empowered, to poind and sell the goods of A for B's debts. This is indeed the primary principle which the courts apply in determining whether the goods of a third party should be excluded from a poinding, or whether an interdict should be granted prohibiting a warrant sale of that party's goods, or whether that party can recover the goods after the proceedings from the poinding creditor to whom they have been delivered in default of sale or, as the case may be, from a purchaser in good faith and for value at the sale. On the other hand, to impose strict liability on an officer for mistakenly including the goods of third parties in a poinding would place an impossible burden on officers. Determination of moveable property rights can raise difficult questions of fact and law which often cannot be resolved at the stage of a poinding. The rule is therefore that, if an officer makes certain enquiries, and reports the third party's claims to the court, the third party's goods can be competently poinded, but at a later stage the goods can be excluded by the sheriff from the poinding

[1]S. 20.
[2]Graham Stewart, p. 361.
[3]Family Law (Scotland) Bill 1984, clause 25.

or warrant sale, on the application of the third party, if he or she is the true owner.

5.217 It follows that the general question whether a creditor is or should be entitled to poind the goods of A for B's debts does not receive a simple affirmative or negative answer, and is perhaps best approached by considering the following specific questions:

(*a*) What duties are, and ought to be, imposed on officers of court with a view to ensuring, so far as practicable, that the goods of third parties are excluded from a poinding and warrant sale?

(*b*) What remedies are, and ought to be, available to a third party owner of goods mistakenly or wrongly included in a poinding to recover the goods before the warrant sale?

(*c*) Following a warrant sale, what should be the rights and remedies of the third party owner, and of either the poinding creditor to whom the goods are delivered or, as the case may be, a purchaser in good faith and for value?

(*d*) What special provision, if any, is needed where the goods belong to the debtor's spouse?

Officer's duties when poinding

5.218 The officer's powers, duties and liabilities with respect to the poinding of the goods of third parties are governed by common law rules which have been supplemented, in some sheriffdoms, by Practice Notes of the sheriffs principal. The current position is as follows:

(*a*) As a general rule, if goods are in the debtor's possession, the officer may treat them as the debtor's property and include them in the poinding though the true owner may later claim the goods in an application to the sheriff.[1] The rule has to be applied with common sense however, and in cases where the debtor's business involves the deposit of customers' goods (for example auctioneers, laundries and garages) the rule that ownership is presumed from possession would not justify the poinding of those goods.

(*b*) If an officer poinds a third party's goods on a third party's premises, the poinding of those goods is normally inept.[2] Before proceeding to poind, therefore, the officer should ascertain whether the debtor is the owner or tenant in occupation of the premises where the goods are located,[3] for example, by checking the Valuation Roll.

(*c*) At one time, it was the orthodox view that where goods were in the debtor's possession the onus was on the debtor or third party to claim

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[1]Graham Stewart, p. 351.

[2]*Ibid.*, p. 352; *Thompson* v. *A.G. fur Glasindustrie* (1917) 2 S.L.T. 266; *Broomberg* v. *Rheinhold & Co. Ltd.* (1944) 60 Sh.Ct.Reps. 45 at pp. 54–5: but see *McLean* v. *Boyek* (1894) 10 Sh.Ct.Reps. 10 for a case where the officer was held justified in poinding the goods formerly belonging to the debtor in a third party's hands.

[3]*Idem;* see also *Jack* v. *McCaig* (1880) 7 R. 465 per Lord Deas at p. 468: "Every man who is going to execute a poinding of furniture is bound to inquire whether it belongs to the individual for whose debt he is going to poind. He is further bound to inquire whether he is the proprietor or the tenant of the house".

that the goods belonged to the third party.[1] The fact that hire purchase agreements relating to household goods were common did not place on officers the onus of enquiring into the true ownership of the goods.[2] But in 1953 (in a case concerned with the title to goods rather than the officer's duties in carrying out a poinding), Lord President Cooper observed *obiter* that enquiry should be made.[3]The practice of officers did not, however change until, in certain sheriffdoms, Practice Notes were made in 1976 requiring a sheriff officer, before carrying out a poinding, to enquire of the debtor if any of the goods proposed to be poinded are the subject of a hire purchase agreement or are otherwise the property of a third party. No fee is allowed for poinding goods which are not the property of a debtor except on cause shown. There are older authorities to the effect that the officer need not listen to statements by the debtor or any other person who is not the person claiming ownership,[4] but it is doubtful whether the courts would now follow these authorities.

(*d*) Where a claim or statement as to ownership is made by or on behalf of a third party, it depends on circumstances whether the officer is justified in not poinding the article in question or, alternatively, in poinding it and mentioning the claim or statement in the report of poinding. The orthodox view, expressed by Graham Stewart, is that, as the poinded goods are not removed from the premises, "it would seem permissible and will be advantageous in most cases for the officer to execute the poinding and leave the matter for the decision of the Sheriff".[5]

(*e*) Where a claim is made and no documentary evidence is produced, the common law rule seems to be that the officer should delay poinding and examine the claimant on oath as to the ownership of the goods and how the goods came to be in the debtor's possession.[6] At any rate this rule applied where the claim was made by the third party though, as already mentioned, there was authority for the view that the officer was not bound to listen to claims made by the debtor that the goods belonged to a third party.[7] Now the Practice Notes of the sheriffs principal mentioned above provide that where a debtor claims that goods are subject to a hire purchase agreement but refuses, or is unable,

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[1]Graham Stewart, pp. 351–2.

[2]*Singer Manufacturing Co.* v. *Beale & Mactavish* (1905) 8 F. (J) 29 per Lord Johnston at p. 32: "If the Singer Company and others peril their machines on contracts of [hire purchase] they must either rely on the honesty and alertness of their customers, or themselves attend to their own interests. They cannot require the sheriff officers to act as detectives on their behalf".

[3]*George Hopkinson Ltd.* v. *N.G. Napier & Son* 1953 S.C. 139 at p. 147: "I do not think that it is an overstatement of the position today to say that any creditor proposing to poind the furniture in an average working-class dwelling is put on his inquiry as to whether the furniture is the property of his debtor or is only held by him upon some limited title of possession. The possession of the furniture *per se* goes only a short distance towards establishing a presumption of ownership".

[4]Graham Stewart, pp. 352–3.

[5]P. 353.

[6]Graham Stewart, p. 352. In *Cameron* v. *Cuthbertson* 1924 S.L.T. (Sh.Ct.) 67, it was held by the sheriff-substitute that an officer's failure to put a third party claimant on oath and make inquiry into the claim rendered the poinding inept.

[7]Graham Stewart, pp. 351–2.

to produce evidence to that effect, the sheriff officer may poind the goods but must note the debtor's claim in the report of the poinding. The Practice Notes also provide that no fee for poinding articles is allowed if the debtor subsequently establishes that they were in fact subject to a hire purchase agreement.

(*f*) If documentary evidence (such as a hire purchase, conditional sale or hiring agreement) is produced, it seems that the officer has a measure of discretion. Graham Stewart's opinion is that "it would seem reasonable that production of a written title, fortified by the oath of the claimant, would be sufficient to stop the poinding".[1] The practice of officers of court, however, is to accept documentary evidence, without an oath, unless the document appears collusive. Only if ownership is doubtful on the evidence should the officer proceed and leave the third party to make an application to the sheriff.[2]

(*g*) Failure by the officer to specify in the report of poinding that a claim has been made by or on behalf of a third party is a breach of a mandatory requirement which will render the whole poinding null.[3]

5.219 These provisions are not altogether satisfactory. First, the main question is whether a positive duty should be placed on the officer to enquire before poinding whether the goods belong to the debtor or a third party. The common law is unclear on whether the officer has such a duty, and Practice Notes of the sheriffs principal imposing such a duty have not been made in all sheriffdoms and may not in any event technically bind messengers-at-arms. On consultation almost all commentators agreed that the duty to make enquiries was a desirable safeguard for third parties and we think therefore that provision should be made to that effect. We recommend that this provision should be in statute so that it would apply uniformly throughout Scotland and to messengers-at-arms as well as sheriff officers.

5.220 Second, on the question of the persons to whom officers should address their enquiries, the Practice Notes provide only that enquiry be made of the debtor. In many cases, however, the debtor is not present, nor indeed is the third party owner. In household poindings, the debtor's spouse may often be present and able to provide information or evidence as to his or her own rights or those of hire purchase or rental companies. Most commentators agreed with our suggestion that the officer should make such enquiries of the debtor, or other person on the premises, as are reasonable in the circumstances.[4] We think however it is unnecessary and inappropriate for an officer of court to put the debtor or other person on oath before making enquiries.

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[1] *Ibid.*, p. 353.

[2] Bell *Commentaries* vol. ii, p. 59: "Where the evidence of the property is perfectly clear on the part of the claimant the messenger ought to stop; expressing in his execution the grounds of his forbearance. Where the property is doubtful, he ought to proceed, leaving it to the claimant to make good his right before the sheriff".

[3] See *Maxwell* v. *Controller of Clearing House* 1923 S.L.T. (Sh.Ct.) 137; *Cameron* v. *Cuthbertson* 1924 S.L.T. (Sh.Ct.) 67: failure to note the third party's claim could prejudice the third party in a subsequent claim for the goods. It might also prejudice the third party's entitlement to the expenses of a subsequent successful claim or action of interdict against the warrant sale: cf. *Anderson* v. *Jackson* (1920) 36 Sh.Ct.Reps. 237.

[4] Consultative Memorandum No. 48, Proposition 51(1) (para. 6.7).

5.221 Third, the duties of the officer when a claim is made by or on behalf of a third party should, in the interests of uniformity, be regulated by statute instead of leaving the matter to be governed partly by the common law and partly by Practice Notes. The basic rule should, as at present, be that goods which are in the possession of the debtor are presumed to be owned (either solely or in common with a third party[1]) by the debtor and hence poindable. Clearly, the officer should continue to be under a duty to note any claim made as to the ownership of poinded articles in the report of poinding. Beyond that we think it is impracticable to lay down rigid rules. The officer has to be given a discretion in view of the wide variety of circumstances that may be encountered; whether the article should be poinded or excluded will depend on the nature of the claim, the credibility of the person making it, the nature of the goods, and whether satisfactory documentary or other corroborative evidence is available. We do not think an officer should be precluded from poinding an article which on the face of it belongs to the debtor simply because many articles of that sort are commonly hired or bought on hire purchase, or because an unsupported assertion is made that the article belongs to a third party. On the other hand if the officer knows or ought to know from the whole circumstances (including any claim) that the article does not belong to the debtor then it should not be poinded. To illustrate these rules consider an officer executing a domestic poinding. The officer would be entitled to poind the television set even though televisions are commonly hired or bought on hire purchase, and even though the debtor or a member of the debtor's family states that it is hired. The officer may desist from poinding if satisfied that the claim is true, although he or she would probably err on the side of caution and include it, unless some corroboration of the claim (for example a rental payment book, a notice on the back of the set, or a statement made by the hirers as a result of a telephone call) emerged. A wrongly included article may be excluded later on production of satisfactory evidence of a third party's ownership, but the rule against second poindings prevents officers returning to the premises to poind articles they decided not to poind on the occasion of their first visit.

5.222 In some, but not all, sheriffdoms Practice Notes regulate the fees that an officer is entitled to charge the creditor for poinding goods which turn out not to belong to the debtor. We think that provision should be made by amending the existing acts of sederunt[2] so that the regulations would apply throughout Scotland and to messengers-at-arms as well as to sheriff officers. Depending on the content of the amendment, consideration may have to be given by the competent authorities to the need for statutory provisions to regulate the separate issue of the creditor's entitlement to recover fees paid to the officer from the debtor against whom diligence was executed.

5.223 We **recommend:**

(1) The powers and duties of officers in connection with the poinding of goods in the debtor's premises should be regulated by statute rather than the present mixture of common law and Practice Notes of the

[1]See paragraphs 5.230 to 5.235.

[2]Act of Sederunt (Fees of Messengers-at-Arms) 1978 and Act of Sederunt (Fees of Sheriff Officers) 1978 as amended.

sheriffs principal. The statute should make provision on the following lines:

(*a*) The officer should be entitled to presume that an article in the possession of the debtor is owned by the debtor either solely or in common with a third party.

(*b*) An officer should be bound to make enquiries of any person present at the poinding about the ownership of articles proposed to be poinded. It should cease to be competent for an officer to examine a person on oath as to ownership of such articles. Any claim made should be noted in the report of poinding.

(*c*) An officer should not be entitled to rely on the above presumption if he or she knows or ought to know (whether as a result of the enquiries or otherwise) that the article does not belong to the debtor.

(*d*) An officer may still rely on the above presumption even though the article is such as is commonly hired or purchased on hire purchase or conditional sale agreement or an assertion is made unsupported by other evidence that the article does not belong to the debtor.

(2) The entitlement of officers of court to charge fees for poinding goods which do not belong to the debtor should be regulated by act of sederunt.

(Recommendation 5.47; clause 46(1)(*a*)(iii), (3) and (4).)

Remedies of a third party whose goods have been poinded

5.224 The third party's remedies depend in part on the stage which the diligence has reached. In between the lodging of the report of the poinding and the granting of a warrant of sale the third party may either claim ownership by lodging a minute in the poinding process[1] or apply in separate proceedings for an interdict prohibiting the creditor from proceeding to obtain warrant of sale together with an action for delivery of the goods if so desired.[2] After the granting of a warrant of sale interdict remains competent but a minute is incompetent.[3] Where the goods have been put up for sale, the third party can recover unsold goods from the poinding creditor to whom they have been delivered[4] and can also recover goods from a purchaser.[5] The third party may also be entitled to claim damages from the officer or creditor.[6]

5.225 We understand that most standard form hire or hire purchase agreements require the debtor to notify the finance company or other owner if the goods are poinded. The owner who finds out about the poinding by this or other means (through the advertisement of sale for example) may contact the officer and produce the hire or hire purchase agreement to the officer as

[1] *Lamb* v. *Wood* (1904) 6 F. 1091.

[2] Burn Murdoch, *Interdict* p. 189. Such an interdict is only competent in the sheriff court.

[3] *Philp* v. *Stuart* (1959) 75 Sh.Ct.Reps 109; Dobie, *Sheriff Court Practice* p. 280. Interdict proceedings after warrant are competent in both the Court of Session and the sheriff courts; *Jack* v. *Waddell's Trs.* 1918 S.C. 73.

[4] *George Hopkinson Ltd.* v. *N.G. Napier & Son* 1953 S.C. 139.

[5] *Carlton* v. *Miller* 1978 S.L.T. (Sh.Ct.) 36.

[6] Graham Stewart, p. 771; *Boyle* v. *James Miller and Partners Ltd.* 1942 S.L.T. (Sh.Ct.) 33; *Macintyre* v. *Murray and Muir* (1915) 31 Sh.Ct.Reps. 49.

proof of ownership. The officer will then normally exclude the goods from the poinding. On consultation this sensible practice, which avoids the need for legal proceedings, was approved. We think that any doubts about its competence should be removed by embodying it in statute. We would, however, recommend two minor improvements; first, the officer should mention the release in the report of poinding, the application for warrant of sale or the report of sale, or, if the goods are released after the application for warrant of sale has been lodged but before warrant has been granted, the officer should forthwith report the release to the court; secondly, the officer should secure the debtor's consent to release as the ownership of the goods may be a matter of dispute between the debtor and third party.

5.226 On consultation, commentators agreed with our suggestion[1] that after warrant of sale has been granted, the third party owner should be able to claim the goods by minute rather than by the more cumbersome procedure of interdict or suspension and interdict. The general rule is, however, that if a claim by minute is competent the other procedures are not and one body suggested that interdict and suspension and interdict should remain as competent alternatives. We would agree, for in cases of urgency a court might entertain an application for interim interdict where it might not entertain a minute.

5.227 In Consultative Memorandum No. 48 we suggested[2] that where the sheriff makes an order releasing a third party's goods from the poinding, the sheriff should also have power to authorise a poinding of further goods so that the creditor is not prejudiced by the reduction in the value of the poinding. This was generally approved on consultation and we would extend this suggestion to those cases where the goods are released by the officer. Rather than the sheriff specifically authorising a further poinding, we recommend that a release of goods either by the sheriff or the officer should automatically authorise the creditor to carry out a further poinding.

5.228 In Consultative Memorandum No. 27[3] we suggested that a purchaser of goods in good faith at a judicial sale should acquire a statutory title to the goods preferable to that of the third party owner, provided the sale had been properly conducted after due advertisement. In Consultative Memorandum No. 48[4] we pointed out that such a rule would create differences between different classes of purchasers where the sale was conducted in an auction room, and proposed[5] that the purchaser of poinded goods should have no better rights to obtain a good title than a purchaser of unpoinded goods at the sale.[6] We also proposed for clarification that since the appraised value of unsold goods is deducted from the debt, the creditor to whom they are delivered should be regarded as an acquirer for value. There was no dissent from these proposals on consultation. We think that the law already achieves

[1]Proposition 52 (para. 6.10).
[2]Proposition 52 (para. 6.10).
[3]Memorandum on Corporeal Moveables: *Protection of the Onerous Bona Fide Acquirer of Another's Property* (1976), para. 50.
[4]Para. 6.11.
[5]Proposition 53 (para. 6.13).
[6]As a general rule a purchaser acquires no better title to the goods than the seller had: Sale of Goods Act 1979, s. 21.

the results of our proposals, but we may require to reconsider the topic in the context of a general review of the rights of purchasers of goods who act in good faith.

5.229 We **recommend:**

(1) An officer of court should be entitled to release goods from the poinding if a third party produces satisfactory evidence of ownership unless the debtor disputes the third party's ownership.

(2) The officer should report any release of goods to the court in the report of poinding, application for warrant of sale or report of sale depending on the stage at which the goods are released. Where goods are released while an application for warrant of sale is pending the officer should forthwith report the release to the court.

(3) It should be provided by act of sederunt that, without prejudice to any other remedy, a claim of ownership of poinded goods by a third party should be capable of being made by a minute lodged in the poinding process even after warrant of sale has been granted.

(4) Where any article has been released by the officer or the sheriff on the ground that it belongs to a third party, the creditor should be entitled to poind further articles in the debtor's premises.

(5) No change should be made in the law relating to the remedies available to a third party whose goods have been sold at a warrant sale or delivered to the poinding creditor in default of sale.
(Recommendation 5.48; clause 66.)

Third party co-owners

5.230 In recent years there has been an increasing tendency for the ownership of household goods to be spread more evenly between husbands and wives. Nowadays the goods are often no longer the husband's exclusive property; they may be owned in common or belong solely to the wife. In Consultative Memorandum No. 48 we drew attention[1] to the problems this causes in domestic poindings since one spouse's goods are not liable to be poinded for the debts of the other spouse, and goods owned in common by both spouses are not liable to be poinded for the debts of either.[2] Since then the Family Law (Scotland) Bill 1984 has been introduced, clause 25 of which provides that a married couple are presumed to own their household goods in common unless the contrary is proved. Domestic poindings might therefore cease to be an effective method of enforcing debts if and when the Bill is enacted unless some provision is made.

5.231 While it would be possible to make an exception to the presumed common ownership of a married couple's household goods for the purposes of carrying out poindings, it seems to us that a more radical solution is necessary. The underlying difficulty in this area is the common law rule that property which is owned in common by the debtor and a third party cannot

[1]Para. 6.16.

[2]This rule is not restricted to married couples, but applies to any co-owners. Graham Stewart, p. 346.

be poinded for the debts of either.[1] Provided the interests of the other owner or owners are adequately protected, we recommend that common property should be capable of being poinded and sold in order to enforce a debt of one of the owners.[2] If this recommendation were implemented one of the legal consequences of holding property in common with others will be that it is liable to be poinded and sold for the debts of any of the other co-owners. Such a rule seems to us to be right in principle and capable of producing reasonable and fair results. Although the problem of common ownership arises mainly with married couples, we think it would be artificial to restrict our recommendation to them and leave the property of other types of co-owners immune from diligence. The result of such a restriction would be that poinding would be allowed in the case of spouses where there was only a presumption of common ownership, but prohibited in other cases where common ownership was a fact rather than a presumption.

5.232 The protection we would provide for the non-debtor co-owner consists of an entitlement to obtain release of the property on payment of the debtor's share of its appraised value, or to be credited with a proportion of the proceeds of sale if the property is sold. The release should be capable of being made by the officer (with the consent of the debtor in order to avoid problems where common ownership is disputed), or by the sheriff on application by the non-debtor co-owner, in a similar fashion to our recommendations dealing with the release of property which is wholly owned by a third party.[3] To prevent the creditor being prejudiced by a release of goods, the creditor should be entitled to poind further articles in the debtor's premises.

5.233 We recommend earlier in this Chapter[4] that the sheriff should have power to release goods from a poinding on the grounds that their continued poinding or sale would be unduly harsh in the circumstances. We would extend this recommendation to goods which are owned in common so that a third party co-owner as well as the debtor could apply for release on these grounds.

5.234 Our recommendation to make poinding of common property competent implies that we reject an alternative approach whereby goods belonging to the debtor's spouse could be poinded for debts which relate to goods obtained or services rendered for the general use and enjoyment of the debtor and his or her family.[5] Such a scheme is in our view impracticable; before executing a poinding an officer would have to investigate the marital status of the debtor and ascertain whether the debt sought to be enforced was a "family debt". Furthermore, the recently proposed statutory presumption of co-ownership of household goods by a married couple[6] will result in most cases in there

[1]Graham Stewart, p. 346.

[2]Property held jointly should remain unpoindable since each owner has no separate interest in the property capable of being attached for debt.

[3]Recommendation 5.48 (para. 5.229).

[4]Recommendation 5.29 (para. 5.137).

[5]Such a provision exists in Northern Ireland; Judgments Enforcement (Northern Ireland) Order 1981 (S.I. 1981/226), art. 32(*d*). But we understand that household goods are hardly ever seized there.

[6]Family Law (Scotland) Bill 1984, clause 25.

being few items of household goods which could be taken to belong solely to the debtor's spouse.

5.235 We **recommend:**

(1) It should become competent to poind and sell goods owned in common by the debtor and a third party or parties to enforce a debt due by the debtor.

(2) To protect the interests of co-owners, the officer should be entitled to release co-owned goods from the poinding if a third party co-owner tenders the debtor's share of the appraised value, unless the debtor denies the third party's claim to co-ownership.

(3) The sheriff should have power, on application by a third party co-owner, to order release of any goods if satisfied that they are co-owned and the applicant pays the debtor's share of their appraised value to the creditor.

(4) The sheriff should also have power to order release of co-owned goods if satisfied that their continued poinding or sale is in the circumstances unduly harsh to the third party co-owner.

(5) In order to restore the value of the poinding where co-owned goods have been released by the officer or the sheriff, the creditor should, on release, automatically become entitled to carry out a poinding of further articles in the debtor's premises.

(6) Where co-owned goods are sold or delivered to the creditor in default of sale, the creditor should be liable to pay to the co-owner a sum representing that co-owner's share of the proceeds of sale of the goods, or their appraised value in the case of unsold goods.
(Recommendation 5.49; clause 67.)

Section F. Miscellaneous

No poinding on the dependence of an action

5.236 Warrants to charge and poind are only granted in execution of extract decrees or liquid documents of debt,[1] and it is thus incompetent to charge and poind on the dependence of an action or in security of a debt payable in the future. As the McKechnie Committee recognised,[2] it seems at first sight difficult to justify a rule whereby arrestment on the dependence is permitted but poinding on the dependence is not permitted. In Consultative Memorandum No. 48, however, we suggested[3] that warrant for poinding should not be available on the dependence, or in security of future debts, on the grounds that in practice arrestment is generally a quicker, cleaner and cheaper diligence and less often attended by unpleasant consequences; that it has been traditional in Scotland to use an arrestment rather than a poinding as a diligence of first resort; and that diligence on the dependence, or indeed poindings, should not be made more widely available than is necessary.

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[1]See as to decrees, Debtors (Scotland) Act 1838, Scheds. 1 and 6; Sheriff Courts (Scotland) Extracts Act 1892; Summary Cause Rules, rule 89(2) and Forms U1–U5, U7–U14; as to extract registered deeds, Writs Execution (Scotland) Act 1877; as to protests of bills of exchange, Bills of Exchange Act 1681 and Inland Bills Act 1696.

[2]Paras. 48–49.

[3]Proposition 2 (para. 2.3).

5.237 On consultation, one body observed that an arrestment on the dependence may deprive a defender of funds to meet ordinary running expenses whereas a poinding does not deprive the debtor of the use and possession of property, though the debtor cannot sell it. They suggested that a warrant for poinding on the dependence should be automatically available subject to the same provisions for restriction and recall as apply to arrestments on the dependence. Another body suggested that a pursuer should be entitled to obtain a warrant for poinding on the dependence, not automatically as of right, but on showing cause to the court why such a warrant should be granted. This suggestion has been dealt with by the Maxwell Committee who recommended that the Court of Session should have a discretionary power, on application by the pursuer, to make an order securing moveable property in the hands of a defender on the dependence of an action in that court.[1] As this discretionary power has been the subject of a recommendation made by another advisory body we do not make any recommendations concerning it in this report. Most of those who commented, however, generally agreed with our proposal. With the possible exception of the case where a special warrant is granted on cause shown, we consider that poinding on the dependence or in security should remain incompetent.

5.238 We **recommend:**

> The diligence of poinding should not be available in security of debts payable in the future, nor should it be automatically available on the dependence of a court action. We make no recommendation as to whether the Court of Session should have power to make an order securing moveable property on the dependence of an action in that court.
> (Recommendation 5.50.)

Extension of exemptions to other diligences

5.239 The exemptions from poinding apply not only to ordinary poindings but also to summary warrant poindings[2] and poindings of the ground by heritable creditors.[3] Tools of trade appear to be exempt from arrestment in the hands of third parties,[4] but domestic furniture and plenishings may be arrested because the Law Reform (Diligence) (Scotland) Act 1973 which exempts certain basic items applies only to poindings and to items which are situated in a debtor's dwellinghouse.[5] In a case of sequestration for rent only clothes and perhaps tools of trade are exempt so that all the furniture may be sold.[6]

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[1]Paras. 14.8–14.25. The order would be enforced in Scotland by the ordinary procedure of poinding and would thus be a type of poinding on the dependence which, on final judgment, would be converted into a poinding in execution followed ultimately by warrant of sale. This recommendation appears to be a response to European cases which suggest that the Scottish courts would be required by Community law to give effect to comparable orders of courts in E.E.C. Member States made on the dependence of actions in those courts. It has not been implemented to date.

[2]Law Reform (Diligence) (Scotland) Act 1973, s. 1(5).

[3]Graham Stewart, p. 501.

[4]*Steele* v. *Eagles* 1922 S.L.T. (Sh.Ct.) 30.

[5]S. 1(1).

[6]Graham Stewart, p. 466: the 1973 Act is limited to poindings, s. 1(1).

5.240 There was general agreement on consultation with our proposal[1] that the exemptions should apply to rent sequestrations and to arrestments of goods (other than domestic furniture and plenishings). On reconsideration we have come to the conclusion that the exemptions we recommend for domestic furniture and plenishings should apply in the case of arrestments. Arrestment of the debtor's household goods in the hands of a removal or storage firm would cause even more hardship than if they had been poinded in the home, since in the latter case the debtor at least would have the use of them pending sale.

5.241 Another area where the rules relating to exemption of domestic furniture and plenishings from diligence appear to be in need of reform concerns furnished lettings. Where a poinding is executed in such premises for a debt of the tenant the exemptions will apply to items belonging to the tenant and the landlord's goods cannot be poinded for the tenant's debt. However, where the debtor is the landlord the whole furniture and plenishings (except items belonging to the tenant) can be arrested (or perhaps poinded) and sold since the Law Reform (Diligence) (Scotland) Act 1973 does not apply to arrestments and only applies to poindings in premises in which the debtor is residing. We understand that cases of this sort arise from time to time and cause considerable distress to tenants whose homes are suddenly displenished to enforce their landlord's debts.

5.242 The exemptions from poinding designed to protect debtors and their families also apply to sequestrations under the bankruptcy legislation.[2] We recommend earlier in this Chapter[3] that the sheriff should have power to sist proceedings where a mobile home has been poinded in order to allow the debtor time to find alternative accommodation. We think the courts should have similar powers where a bankrupt's sequestrated estate includes a mobile home.

5.243 Our recommendations on poindings include regulation of the times when poinding may be competently carried out,[4] the powers and duties of officers in entering dwellinghouses[5] and the sheriff's powers to release items from a poinding on the ground of undue harshness.[6] We would extend these recommendations to sequestrations for rent or feuduty since poindings and sequestrations are similar in procedure and effect to each other.

5.244 We **recommend:**

(1) The exemptions from poinding set out in Recommendations 5.9 to 5.11 (clothes, tools of trade, household goods) should apply to arrestment of the debtor's goods in the hands of a third party.

(2) Where household goods are situated in premises in which a person other than the debtor is living, the same exemptions from arrestment

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[1]Proposition 26 (para. 4.41).
[2]Bankruptcy (Scotland) Act 1913, s. 98, and Bankruptcy (Scotland) Bill 1984, clause 32(1).
[3]Recommendation 5.12 (para. 5.60).
[4]Recommendation 5.17 (para. 5.78).
[5]Recommendation 5.18 (para. 5.85).
[6]Recommendation 5.13 (para. 5.65).

and poinding should apply as would apply if that person were the debtor.

(3) The court should have power, on application by the bankrupt, to sist sequestration proceedings in connection with a mobile home which is the only or principal residence of the bankrupt.

(4) The exemptions from diligence, the time when diligence is competent, the officer's powers and duties in connection with entry to dwelling-houses, the sheriff's powers to sist proceedings in connection with a mobile home, and the sheriff's powers to release articles on grounds of undue harshness should apply to sequestrations for rent or feuduty as they do to poindings.
(Recommendation 5.51; clauses 43(2)(*b*) and 124, and Schedule 7, paragraph 35.)

Poinding of ships

5.245 At common law the only competent diligence for attaching ships is arrestment and sale.[1] In Consultative Memorandum No. 48 we identified two statutory exceptions (Merchant Shipping Act 1894, section 693 and Prevention of Oil Pollution Act 1971, section 20) to this general rule which refer to poinding, adopted perhaps as an analogue of the English process of distress, and proposed[2] removal of these anomalies by substituting the correct Scottish diligence of arrestment and sale. All those who commented agreed. We have identified three further statutory exceptions[3] and recommend that in all these cases ships should be attached by arrestment.

5.246 We **recommend:**

The diligence for attaching ships and other vessels in Scotland under specific statutory provisions should be arrestment and sale rather than poinding and sale.
(Recommendation 5.52; Bill, Schedule 7, paras. 3, 11, 14, 16 and 32.)

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[1]Graham Stewart, p. 242; McMillan, *Scottish Maritime Practice*, p. 56.

[2]Proposition 18, (para. 4.12).

[3]Harbours, Docks and Piers Clauses Act 1847, s. 46; Illegal Trawling (Scotland) Act 1934, s. 1(4); British Fishing Boats Act 1983, s. 5.

PART 1.3

Scottish Law Commission

(SCOT. LAW COM. No. 95)

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CHAPTER 6

ARRESTMENT OF EARNINGS

Section A. Preliminary

6.1 In Chapter 2, we referred in general terms to the need to replace the present system of arrestments of earnings (under which an arrestment only attaches pay due on the next pay day) with a new system of continuous diligence against earnings which would avoid the need for repeat arrestments to enforce a debt. Such a system would also make it easier to justify an increase in exemption levels so that debtors would be left with sufficient exempt earnings for the subsistence of themselves and their families. In this Chapter we explain in more detail the need for a continuous diligence against earnings to enforce debts and put forward specific recommendations for the introduction of such a diligence, which we call an "earnings arrestment" (Sections A to C). The enforcement of maintenance debts raises special problems considered in Section D, where we advance proposals for the introduction of a modified form of earnings arrestment, which we call a "current maintenance arrestment". As the name implies the object of this diligence is to ensure, so far as practicable, that current maintenance is paid more or less as it falls due so that substantial arrears do not arise. In Section E we recommend the introduction of conjoined arrestment orders which enable more than one creditor to attach the debtor's earnings at the same time. Section F deals with some questions common to earnings arrestments and current maintenance arrestments.

6.2 It is important to note that we are concerned here with arrestments of wages, salary and pensions. Arrestments of a debtor's other property in the hands of third parties (such as stocks and shares; money in bank accounts; and moveable goods) are not affected by our recommendations in this Chapter and will continue to be competent.[1] Arrestments of funds other than earnings normally attach not merely the income produced by the funds but the funds themselves. Repeat arrestments are therefore not required and accordingly a continuous diligence against such funds is unnecessary and inappropriate.

6.3 We would emphasise that the introduction of a continuous arrestment of earnings or pensions would not in any way involve discrimination against debtors who are employees or pensioners. Indeed, self-employed debtors and debtors having investment income are now, and under our proposals will continue to be, normally less well protected than employees from arrestment. As a general rule, arrestments of the funds and income of self-employed persons, and of debts due to them, do not attract any exemptions (such as apply to wages arrestments) to protect standards of living. And, as already indicated, debtors having income from investments (such as stocks and shares) generally stand to lose by arrestment not only the income but also the

[1]As we mentioned in Consultative Memorandum No. 47, Part V, we propose to examine some aspects of arrestments, including arrestments on the dependence, in a later consultative memorandum.

investment which produces the income, again without exemption.[1] On consultation, there was virtually unanimous support (only one body dissenting) from our view that arrestments, which in this context are very effective, should continue to apply in such cases.[2]

Section B. The need for continuous diligence against earnings

The present law

6.4 A brief explanation of the way in which arrestments of earnings work at present may be helpful. Where a creditor obtains a court decree for payment of a debt, the extract (an official authenticated copy) of the decree contains a warrant of the court enabling the creditor to instruct an officer of court (sheriff officer or messenger-at-arms) to arrest the debtor's wages. A new application for warrant of arrestment is almost always unnecessary.[3] The officer serves a schedule of arrestment on the debtor's employer which, in the normal case, attaches a prescribed proportion (half the balance over £4 per week[4]) of the instalment of the debtor's wages due for the pay period in which the arrestment is served.[5] Earnings for subsequent pay periods are not attached by the arrestment. Where the arrestment is used to enforce aliment, rates or taxes, the whole of the earnings for the pay period in question, and not merely a prescribed proportion, is arrested.[6] The effect of an arrestment is that the employer cannot pay the arrested wages to the employee but must hold them for the benefit of the arresting creditor. An employer who pays the debtor in breach of the arrestment is liable to pay the arrested sum again to the arresting creditor and, in exceptional cases, may be liable to proceedings for contempt of court.

6.5 The arrestment, however, does not by itself require or even authorise the employer to pay the arrested sum to the creditor. Before paying that sum to the creditor, the employer should obtain the authority of the debtor-employee. If this authority (which may be given orally or in writing) is refused, the creditor can obtain payment by raising an action of furthcoming which the debtor or employer can defend.[7] It is generally not in the interest of the

[1] As an exception to these general rules, property held in an alimentary trust and part at least of the current income of the trust are exempt from arrestment, but arrears and the excess current income above a suitable aliment fixed by the court are arrestable. We do not propose any change in this rule.

[2] The types of income which should be subject to earnings arrestments are discussed in more detail at paras. 6.32 to 6.48.

[3] The only exception is that a special application must be brought where the arrestment is used in security of a future or contingent debt; such cases are very rare.

[4] Wages Arrestment Limitation (Scotland) Act 1870 as amended by the Wages Arrestment Limitation (Amendment) (Scotland) Act 1960, s. 1.

[5] An arrestment normally attaches only debts presently due but an arrestment of certain "termly payments" will attach the whole term's payment though the future part of the term's payment is not yet due at the time of the arrestment. Earnings are treated as termly payments for this purpose: Graham Stewart, p. 53; *Marshall* v. *Nimmo & Co.* (1847) 10 D. 328 at pp. 329, 331; cf. *Shiel & Co. Ltd.* v. *Skinner & Co.* (1934) 50 Sh. Ct. Reps. 101. Earnings paid in advance or payable for the next pay period will not be attached because they are not presently due at the time of the arrestment.

[6] Wages Arrestment Limitation (Scotland) Act 1870, s. 4.

[7] For example, the debtor may allege that the debt has been paid and the employer may allege that no wages were due at the time of the arrestment. Either may found on a defect invalidating the arrestment, such as a material error in the form of the arrestment schedule or in the mode of service.

employee-debtor to refuse to authorise payment since refusal may lead to liability for the expenses of an action of furthcoming. Actions of furthcoming of arrested earnings are relatively rare.

Criticisms of the existing system

6.6 The two main criticisms which may be made of the present system are, first, the relatively frequent need for a creditor to repeat an arrestment in order to clear a debt and, second, the excessive amount which an arrestment requires the employer to deduct from the debtor's pay.

6.7 A single arrestment of pay will generally not recover the whole of a debt due under a decree for payment. It has been estimated that the average debt sued for in summary cause actions in 1978 was about £102,[1] and that 55% of arrestments laid in that year were used to enforce debts of over £100.[2] Even though a substantial proportion (nearly one-half) of the debtor's pay is attached by an arrestment, several arrestments are usually needed to recover the whole debt unless an informal arrangement is made between the debtor and the creditor for payment immediately or by instalments. Out of about 6,000 first arrestments of earnings laid in 1978, nearly 30% (1,700, 28.3%) were repeated at least once. The total number of arrestments against earnings in 1978 is estimated to have been about 8,700, made up of 6,000 first arrestments, 1,700 single repeat arrestments and 1,000 multiple repeat arrestments.[3] Where arrestments are repeated, in almost all cases the debtor is liable to meet the expense of the first arrestment and the repeats.[4]

6.8 On consultation there was general agreement with our view that the level of repeat arrestments is unduly high and could be eliminated or substantially reduced only by the introduction of a continuous diligence against earnings.

6.9 As indicated above, for debts other than aliment, rates or taxes, wages are arrestable to the extent of one-half of the surplus above £4 per week. In our Consultative Memorandum No. 49[5] we pointed out that the effect of this formula is to reduce the household income of a married man with two children earning an average wage to near supplementary benefit level if the formula is applied to net wages or well below it if the formula is applied to gross wages.[6] Many debtors whose wages are arrested, however, earn below the national average and in their case the hardship is correspondingly greater. Where the debt is aliment, rates or taxes, the whole wages can be arrested, leaving the debtor with no earnings for that pay period. The present formula

[1]C.R.U. Court Survey, para. 3.6.

[2]C.R.U. Diligence Survey, para. 4.10; Annex D, Table (5). The arrestments in question cover arrestments of earnings and funds other than earnings but it is thought that the percentage relating to earnings is not significantly lower than 55%.

[3]C.R.U. Diligence Survey, para. 3.6. The multiple repeat arrestments ranged from arrestments repeated twice to arrestments repeated thirteen times. The majority were repeated twice only.

[4]Except in those few cases where the arrestment does not attach sufficient money to cover the expense of the arrestment: see Wages Arrestment Limitation (Scotland) Act 1870, s. 2.

[5]Paras. 1.9 and 1.10.

[6]The C.R.U. Arrestment Survey para. 25 shows that a few employers operated the formula on gross wages. We do not find it necessary to express a view on whether the formula should apply to gross or net wages since we propose to clarify the law: see para. 6.72 below.

produces harsh results especially if repeated arrestments are made; indeed, in many cases the debtor's family can only meet their essential household expenses by defaulting on other commitments or delaying payment of other debts.[1]

6.10 Accordingly, a major objective of reform should be to increase the amount of wages exempt from diligence. It might be thought that this could be relatively easily achieved by increasing the level of exempt wages under the Wages Arrestment Limitation (Scotland) Act 1870.[2] It seems likely, however, that if that exemption were raised significantly, creditors would have resort to repeated arrestments even more than at present and the diligence would become even more expensive for debtors. It seems to us therefore that, in order to raise the subsistence exemption to a realistic level in a way which secures a reasonable return to a creditor using the diligence, it would be necessary to spread the arrestment of earnings over a longer period by introducing a continuous diligence against earnings.

6.11 To sum up, the two main criticisms of the existing system could be met by introducing a continuous diligence against earnings with higher exemption limits. Although the proportion deducted from each individual payment of the debtor's wages would be less than under the present system, we think that the total amount recovered in the long run by the creditor towards satisfaction of the debt would be likely to be greater.

Objections to a continuous diligence

6.12 A system of continuous diligence against earnings, however, might have some disadvantages; and, indeed, the risk of these led the McKechnie Committee in their Report to reject such a system.[3] The possible disadvantages are that:

(*a*) a continuous diligence against earnings would cause additional expense and inconvenience to employers;

(*b*) it would increase the risk of debtors being dismissed from their jobs;

(*c*) it would induce debtors to leave their jobs;

(*d*) it would impose hardship on debtors and discriminate against those in steady employment; and

(*e*) it would penalise considerate creditors, encourage immediate arrestment and discourage voluntary instalment settlements.

6.13 *Inconvenience and expense to employers.* A system of continuous diligence against earnings would require employers to make deductions from earnings of smaller sums over longer periods than at present. But the methods recommended below[4] for calculating the amount to be withheld from the debtor's pay would we believe in most cases be relatively easily applied by

[1]See the findings of the Edinburgh University Debtors Survey, paras. 6.3 and 6.4 referred to at para. 2.67 above.

[2]Such an increase may be achieved by Order in Council under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, s. 3, but the power conferred by that section has not been exercised.

[3]Paras. 54 to 56.

[4]Recommendation 6.9 (para. 6.76).

employers. And to some extent the additional burdens on employers would be offset by the elimination of repeat arrestments. Although we suggest that employers should be entitled to charge a fee for the work involved,[1] we concede that this sum would fall short of adequate remuneration. We sympathise with the position of employers and we have been particularly careful in framing our recommendations to try to impose the minimum of additional burdens upon them. Nevertheless we consider that the likelihood of increased work for employers is not a decisive consideration; on consultation, the employers who commented did not object to continuous diligence against earnings.

6.14 *Dismissal by employers.* It is possible that the work and inconvenience involved in operating an arrestment and, in some cases, the suspicions about an employee which an arrestment may arouse in the mind of an employer, may tempt the employer to dismiss the employee. There is however little evidence that dismissal occurs on any significant scale in Scotland, and the legislation on unfair dismissal would be likely to prevent the practice from developing if continuous diligence against earnings were introduced. We revert to this point later,[2] but we do not find much force in the argument that the introduction of a continuous diligence against earnings instead of single or repeated arrestments would lead to more dismissals.

6.15 *Inducing debtors to leave their jobs.* Even at present debtors may change or give up their jobs to evade repeated arrestment of wages.[3] It is possible that there would be a greater incentive for debtors to do this if continuous diligence against earnings was introduced. In our view however debtors, particularly those who see a definite end to their liabilities towards their creditors, would be no more likely to change jobs to evade a continuous diligence than to avoid repeated arrestment of wages, especially when each deduction will be lower and therefore more bearable.

6.16 *Hardship to debtors.* Undoubtedly hardship to debtors would result if the present rules (under which nearly half the debtor's wages are attachable in each pay period) were to be applied to a continuous diligence. An important objective of continuous diligence, however, is that the deductions from wages made each week can be decreased if the diligence is spread over a reasonable period; this would cause less hardship to debtors than large deductions concentrated in one or two weeks.[4]

6.17 We do not think there is much force in the argument that a continuous diligence would discriminate against those in steady employment. The existing system of arrestment, after all, cannot be used against unemployed or self-employed debtors and may be difficult to use against many casual workers (whose employer is often not easily traced); but we are not aware of criticism of the present system of arrestments of wages on the ground that it is discriminatory.

6.18 *Encouraging diligence.* At present, a creditor, whose arrestment is

[1]Recommendation 6.21 (para. 6.125).

[2]See para. 6.282 below.

[3]The Edinburgh University Debtors Survey, (para. 6.6) found that out of 25 debtors whose wages had been arrested, one had left employment.

[4]Edinburgh University Debtors Survey, para. 6.3.

postponed to a prior arrestment in one pay period, may in the following pay period be the first or only creditor to lay an arrestment. Direct competition between arresting creditors is therefore uncommon.[1] In the case of a continuous diligence against earnings, the likelihood of competition will increase; the later creditors will be "shut out" for the duration of the existing diligence; and creditors may be tempted to lay arrestments quickly to avoid being pre-empted by other creditors. This criticism has some weight, especially where the debtor has few assets other than wages. However, the recommendations we make below[2] will allow sums deducted to be shared amongst all creditors who are in a position to do diligence against the debtor's earnings.

6.19 Another argument against a continuous diligence against earnings is that the threat of moderate deductions spread out over a lengthy period would be insufficient to induce debtors to settle their debts voluntarily. The present system, whereby a large proportion of the debtor's wages is arrested often operates as a spur to informal arrangements for payment of the debt, usually by instalments which may be more than the debtor can reasonably pay. A continuous diligence against earnings, on the other hand, is based on a different and more acceptable premise, namely that the diligence should itself recover reasonable instalments and should not operate so harshly as to compel the parties to work outwith it. Even so we think that the existence of earnings arrestments will induce the majority of debtors to settle without an arrestment having to be laid on.

Conclusion

6.20 The proposals contained in Consultative Memorandum No. 49 for the introduction of a continuous diligence against earnings were welcomed by those consulted. Nobody preferred to retain the present system. The Scottish Association of Citizens Advice Bureaux commented that even the informal arrangements entered into after an arrestment has been served often proved too onerous for debtors to keep up. Some support for this comes from the findings of the Edinburgh University Debtors Survey that although half the debtors whose wages were arrested came to an informal arrangement, only one (out of seven) did not subsequently default.[3] Our new system of earnings arrestments endeavours to remove this defect by regulating the deductions from earnings in a way which would not be too onerous to debtors. In our view the advantages of a continuous diligence against earnings easily outweigh the disadvantages.

The form of continuous diligence against earnings

6.21 Having concluded that a system of continuous diligence against earnings should be introduced we turn to consider what form that diligence should take. The choice lies between two different schemes. The first, which we call an "earnings arrestment" is modelled on the existing diligence of arrestment

[1]The C.R.U. Arrestment Survey, para. 29 discloses that only nine employer firms out of 28 interviewed had, in all their experience, ever known two or more arrestments to be served during the same pay period.

[2]In Section E of this Chapter.

[3]Figure 1 (page 23).

of wages and salary. The principal features of earnings arrestments are as follows.

(*a*) The earnings arrestment would be preceded by a charge to pay the debt within a certain number of days specified in the charge on pain of execution of an earnings arrestment.

(*b*) The warrant to charge and lay an earnings arrestment would be contained in the court decree, and there would be no need for the creditor to make a special application to the court for authority to arrest earnings.

(*c*) On each pay day, the employer would be required to deduct from the debtor's pay a sum calculated in accordance with a sliding scale of deductions laid down by statutory rules and tables.

(*d*) The employer would be bound, without the need for a decree of furthcoming or authorisation by the debtor, to remit the deducted sum to the creditor, and the remittance would be made directly rather than indirectly through the court.

(*e*) The earnings arrestment would last until the debt was paid.

Somewhat similar systems of enforcement against earnings exist in Australia, Canada and the United States of America.[1]

6.22 The other option is a system of court orders, which we call for convenience attachment of earnings orders, on the lines of the procedure introduced in England and Wales in 1970 and now governed by the Attachment of Earnings Act 1971. The main features of this system may be summarised as follows.

(*a*) A creditor seeking to recover a decree debt by deductions from earnings would have to apply to the court for an attachment of earnings order.

(*b*) The court would inquire into the debtor's financial position, resources and liabilities and would fix an appropriate deduction from the debtor's earnings.

(*c*) The order would require the employer on whom it had been served to deduct the amount specified in the order on each pay day and remit it to the court for disbursement to the creditor.

(*d*) The order would last until the debt was paid or the debtor changed employment.

6.23 In our Consultative Memorandum No. 49 we sought views on two similar provisional schemes for recovering ordinary civil debts, though there were differences of detail.[2] All those who commented expressed support for

[1]New South Wales, District Court Act 1973, s. 98(3); British Columbia, Family Relations Act R.S.B.C. 1972, s. 36(3); California, Code of Civil Procedure, s. 682.3.

[2]The first option (which we called an extended arrestment) resembled earnings arrestments such as we now recommend but with two main differences, namely (i) it would have lasted for a fixed period of months and would have required to be re-served if the debt had not been satisfied within that period; (ii) the employer would only be bound to remit the sum if authorised, either by the debtor or by a decree of furthcoming, to do so. We explain later why we have rejected these different features. The second option (which we called an "earnings transfer order" since the order would not merely "attach" a proportion of the debtor's earnings but would require it to be paid or transferred to the creditor) was closely modelled on attachment of earnings orders.

a system of continuous earnings arrestments rather than a system of court orders attaching or transferring earnings, and we adhere to our provisional view that earnings arrestments would be preferable.

6.24 We concede that attachment of earnings orders would have some advantages. The deduction from earnings would be fixed by the court at a level which took into account the whole financial circumstances of the individual debtor. Thus the court would be able to have regard to the number of dependants being supported by the debtor and the contributions to household income being made by other members of the debtor's household. By contrast, the statutory rules and tables regulating the deductions to be made under an earnings arrestment could not be varied to meet the individual circumstances of particular debtors. It may be said that attachment of earnings orders would benefit debtors with one pay packet and many dependants. On the other hand, the sliding scale deduction scheme for earnings arrestments which we recommend below[1] minimises the rigidity of deductions based on statutory rules. Moreover, where the debtor's income fluctuates considerably, as might happen in the case of a salesman remunerated by commission or a person with fluctuating overtime payments, the statutory sliding scale would produce a fairer result than a fixed deduction specified in an attachment of earnings order. In cases where the statutory tables did not relieve hardship sufficiently, it would generally be open to the debtor to apply for a time to pay order in which the instalments would reflect the debtor's ability to pay and which would recall the earnings arrestment.

6.25 From the standpoint of debtors, attachment of earnings orders would also have certain disadvantages. Diligence expenses are generally chargeable against the debtor and the expenses connected with an attachment of earnings order would be substantially more than the expenses of executing an earnings arrestment since the expenses of the court procedure would have to be borne by the debtor. Moreover, in a creditor's application for an attachment of earnings order, the debtor would be compelled to submit to a means enquiry, and new sanctions, such as fines or imprisonment, would require to be introduced in the field of civil debt enforcement to deal with debtors who refused or delayed disclosure of their means. Furthermore, if (as we believe, for reasons to be noted shortly) the introduction of attachment of earnings orders would induce very many creditors to rely instead on poinding and warrant sale procedures whereas earnings arrestments would not have that result, then we think that the balance of advantage from the standpoint of debtors tips decisively in favour of earnings arrestments.

6.26 Our consultation and the research commissioned for this report strongly suggest that creditors in Scotland would much prefer earnings arrestments to attachment of earnings orders. An earnings arrestment could be executed under the authority of the warrant in the extract decree, the only preliminary step under our recommendations being the relatively simple one of the service of a charge. By contrast, attachment of earnings order procedures would entail the expense, uncertainty and trouble of an application to the court; delay while the court obtained and considered details of the debtor's financial circumstances, including in a proportion of cases orders requiring the debtor

[1]Recommendation 6.9 (para. 6.76).

to attend the court for examination in person as to means; and the making of an attachment of earnings order which would then have to be served on the debtor's employer. It seems to us likely that, faced with a choice between instructing a poinding and making an application to the court for an attachment of earnings order (as opposed to instructing the officer of court to serve an earnings arrestment), very many creditors in Scotland would instruct poindings.

6.27 On consultation it was generally agreed that such a consequence would be undesirable. As we indicated in Chapter 2 there is a long tradition in Scotland whereby creditors who know the name and address of the debtor's employer will generally instruct an arrestment of earnings in preference to a poinding and it appears from the research and consultation that this beneficial tradition would almost certainly not survive the introduction of attachment of earnings orders. In Scotland, creditors rely on enforcement against earnings in preference to enforcement against goods in the debtor's possession more than do their counterparts in England and Wales where (as in Scotland) execution against goods in the debtor's possession is not preceded by a court application involving a means enquiry. In 1978, (the last year for which comparisons can be made), in Scotland for every first arrestment of wages (i.e. not counting repeats) there were eight charges and as few as three poindings whereas in England and Wales in the same year, for every application to the county court for attachment of earnings there were 10 warrants of execution against goods and for every county court attachment of earnings order actually made, there were as many as 20 warrants of execution against goods.[1] These cross-border comparisons support our view that creditors are likely to regard earnings arrestments as more effective diligences than attachment of earnings orders and are less likely to have recourse to the alternative of poinding and warrant sale procedures than they would if attachment of earnings orders were introduced.

6.28 Once an extract of a decree has been issued to the creditor an earnings arrestment could be used without further reference to the court. But attachment of earnings orders would impose new and substantial burdens on the resources of the courts: in processing the application, in obtaining and considering information about the debtor's financial circumstances, in making the order, and once the order was in operation in collecting money from the employer and disbursing it to the creditor. If the present scale of use of arrestments were maintained for attachment of earnings orders, more court staff would be necesssary, the cost of which would have to be borne either by debtors or by the public purse. Furthermore, as we indicated in Chapter 2, obtaining accurate and complete information about the financial circumstances of debtors and their families, either by way of forms or means enquiries, is a difficult and often lengthy task.[2]

6.29 In our view earnings arrestments would have considerable advantages over attachment of earnings orders and we therefore conclude that continuous

[1]See Consultative Memorandum No. 49, para. 1.33. In 1974/75, creditors in Scotland relied on enforcement against earnings rather than enforcement against goods even more heavily than in 1978, and much more so than in England and Wales in that period: see Consultative Memorandum No. 49, para. 1.31.

[2]See para. 2.91.

diligence against earnings should take the form of earnings arrestments rather than attachment of earnings orders.

6.30 We **recommend:**

(1) A new system of continuous diligence against earnings (called earnings arrestments) should be introduced and arrestments in their present form should cease to be available as a diligence against earnings.

(2) An earnings arrestment would require the debtor's employer to deduct sums calculated in accordance with legal rules from the debtor's net earnings on each pay day occurring after service of the earnings arrestment.

(3) An earnings arrestment would require the employer, without the need for a decree of furthcoming or mandate from the debtor, to pay the sums deducted under paragraph (2) above forthwith to the arresting creditor, subject to a procedure allowing the debtor and the employer to contest an earnings arrestment on the grounds that it is invalid or has ceased to have effect.
(Recommendation 6.1; clauses 72(1) and (2)(*a*), 75(1) and 78(1).)

Section C. Earnings arrestments

6.31 In this Section we discuss earnings arrestments and put forward detailed recommendations on the provisions which would be needed to introduce this new diligence against earnings into the law of Scotland.

Sums arrestable by earnings arrestment

Earnings of employees

6.32 In Consultative Memorandum No. 49 we proposed[1] that an earnings arrestment should only be available to attach the pay and certain other sums due by the employer of an employed individual.[2] All those who commented agreed. We do not think that it is either necessary or desirable to apply earnings arrestments to the income of companies, partnerships and unincorporated associations, since repeat arrestments against the income of such bodies do not present practical problems, and there is no pressure for such an amendment of the law.[3] The creditors of such bodies can use ordinary arrestments[4] or other diligences to attach their assets (such as investments, bank accounts, trade debts or heritable property) themselves and thus any income produced by them. Moreover, the concept of a subsistence exemption is out of place in relation to companies and other bodies. We have, therefore, excluded companies, partnerships and unincorporated associations from our recommendations.

6.33 On consultation, there was virtually unanimous agreement that the

[1]Propositions 2 and 3 (paras. 2.2 to 2.13).

[2]Employer includes the payer of an arrestable pension; see Recommendation 6.3 (para. 6.45) below.

[3]Arrestments against commercial debtors are much less common than other arrestments: between 3% and 6% of all arrestments served in 1978 were against such debtors (C.R.U. Diligence Survey, para. 4.1 and Table 1). They are, however, very important in commercial legal practice and the cases which do occur often involve large sums.

[4]By an ordinary arrestment we mean an arrestment according to the existing law and practice.

funds and income of self-employed persons should be arrestable by ordinary arrestments rather than earnings arrestments. The variety of income sources of the self-employed and the irregularity and fluctuations in the amounts of the payments made to them combine to make it impractical to apply earnings arrestments. For example, shopkeepers, plumbers, solicitors or accountants receive income from the many customers to whom they supply goods or services. There is no one person on whom an earnings arrestment could be served to attach such self-employed persons' income, and there is no one person in a position to calculate the subsistence exemption. Some self-employed people such as doctors, dentists, opticians, advocates and solicitors often receive the whole or a substantial proportion of their income from one source.[1] Even in these cases we think that earnings arrestments would be inappropriate. The sums are paid irregularly so that exemptions for subsistence expressed as a certain sum per week or month would be difficult or impossible to apply. Moreover, such self-employed persons have to pay the expenses of their offices or practices. A fair exemption for personal subsistence would therefore be difficult to establish without a lengthy means enquiry, which it is one object of earnings arrestments to avoid. Again, we would stress that an ordinary arrestment would be more effective and since it does not attract a subsistence exemption, no discrimination against employed persons is involved in applying ordinary arrestments rather than earnings arrestments to the income of the self-employed.

6.34 An individual's income may come from many sources, including salary or wages, pensions,[2] social security benefits,[3] rents, dividends and interest. We do not think that earnings arrestments should be used to attach rents. Rent is unlikely to be the main source of a debtor's income and, where it is, the rents are likely to be due from a number of tenants. Moreover, many tenants could not cope with the calculations involved in administering earnings arrestments. With regard to dividends and interest, as already mentioned, ordinary arrestments attach the shares and deposits themselves and therefore the income arising from them.[4] Thus there is no need to provide for a continuous diligence against dividends and interest.

6.35 The present statutory limitations on wages arrestment are anachronistic in so far as they apply only to "the wages of all labourers, farm servants, manufacturers, artificers and workpeople".[5] In practice the provisions are almost invariably applied to salaried employees also.[6] Our view, which was approved on consultation, is that earnings arrestments should be applied to salaries as well as wages. The distinction between the two concepts is imprecise

[1]The Area Health Boards pay for services rendered to National Health Service patients. Faculty Services Limited collect and disburse advocates' fees. Legal Aid Committees make payments to solicitors in respect of legal aid and legal advice and assistance work.

[2]See para. 6.40 below.

[3]See para. 6.43 below.

[4]As to shares, see Graham Stewart, pp. 231, 240, 847–9; *Sinclair* v. *Staples* (1860) 22 D. 600; *American Mortgage Co.* v. *Sidway* 1908 S.C. 500; *Stenhouse London Limited* v. *Allwright* 1972 S.C. 209.

[5]Wages Arrestment Limitation (Scotland) Act 1870, s. 1. For some time after 1870 the scope of this provision was much litigated, but the last reported case seems to be *Thomson* v.*Cohen* (1915) 32 Sh.Ct.Reps. 15.

[6]C.R.U. Arrestment Survey, para. 26.

and, since it turns on the nature of the employee's work, it is irrelevant in the present context.

6.36 In Consultative Memorandum No. 49, we suggested[1] the following definition of the earnings which should be attachable by earnings arrestment:

> "any sums payable by way of wages or salary (including any fees, bonus, commission, overtime pay or other emoluments payable in addition to wages or salary by the person paying the wages or salary or payable under a contract of service)."[2]

The emoluments covered by this definition would include contractual payments such as holiday pay,[3] sick pay or lay-off pay, as well as certain non-contractual statutory rights to remuneration such as maternity pay,[4] statutory sick pay,[5] sick pay during periods of notice,[6] pay during suspension on medical grounds[7] and guarantee payments on lay-off when work is not available.[8] On the other hand, there is authority in England and Wales to the effect that a similar formula does not include credits paid to the managers of a holiday fund.[9] Lump sums due by way of damages or compensation[10] or reimbursement of travelling and other expenses would also be excluded.

6.37 On consultation, the above definition of earnings was approved, but it was suggested that a redundancy payment (or the proportion representing loss of future income) should be attachable by earnings arrestment. Another organisation suggested that damages for personal injury or defamation should be similarly attachable since such damages if awarded to a bankrupt would be claimable by the trustee in sequestration.[11] We would agree that redundancy payments and damages for personal injury and defamation should be attachable. We think, however, that the appropriate diligence should be an ordinary arrestment. Earnings arrestments having a fixed deduction level and a weekly or monthly subsistence exemption are not suitable to attach lump sums.

6.38 In Consultative Memorandum No. 49, we also suggested that an earnings arrestment should attach, in addition to "earnings" (as defined above) payable as from the date when the earnings arrestment took effect,

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[1]Para. 2.11.

[2]Modelled on the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, s. 1(2)(*a*) (which exempts earnings from arrestment on the dependence) and the Attachment of Earnings Act 1971, s. 24(1)(*a*).

[3]Including accrued holiday pay if payable by the employer. Where the employer has made payments into a holiday fund held by managers or trustees, such sums would not be attachable by an arrestment served on the employer.

[4]Employment Protection (Consolidation) Act 1978, s. 33.

[5]Social Security and Housing Benefits Act 1982, s. 1.

[6]Employment Protection (Consolidation) Act 1978, s. 49, Sched. 3.

[7]*Ibid.*, ss. 19 and 20.

[8]*Ibid.*, ss. 12–18.

[9]*London County Council* v. *Henry Boot and Sons Ltd* [1959] 3 All E.R. 636; cf. C.R.U. Arrestment Survey, para. 14.

[10]E.g. redundancy payments or compensation for unfair dismissal (under the Employment Protection (Consolidation) Act 1978), compensation for dismissal on grounds of race, sex or marital status (under the Race Relations Act 1976 or the Sex Discrimination Act 1975) or damages at common law or under the Health and Safety at Work Act 1974.

[11]*Jackson* v. *McKechnie* (1875) 3 R. 130.

all other sums for which the employer was liable to account to the employee at that date, whether or not they were "earnings". The object was to relieve a creditor from the need, or to remove the temptation, to serve an ordinary arrestment as well as an earnings arrestment, in order to attach sums other than earnings which might happen to be due. On reflection, we consider that such a provision might be confusing for employers, that it would complicate the law unduly, and that few creditors are likely to incur the expense of serving an ordinary arrestment as well as an earnings arrestment on the off-chance that it might attach sums other than earnings.[1] Where a creditor has good reason to believe that such additional sums may be due, however, an ordinary arrestment could also be served to attach them.

6.39 We **recommend:**

(1) An earnings arrestment should attach a certain amount (calculated in accordance with our recommendations below) of the debtor's earnings payable on each pay day after the date when the earnings arrestment takes effect until the debt for which the arrestment is served is satisfied or the arrestment otherwise ceases to have effect.

(2) Earnings for this purpose should be defined to mean any sums payable to the debtor by way of wages or salary (including any fees, bonus, commission, overtime pay, or other emoluments payable in addition to wages or salary or payable under a contract of service).

(3) Sums not attachable by earnings arrestment due by the employer to the employee should be attachable by an ordinary arrestment.
(Recommendation 6.2; clauses 72(1), 73(1) and 75(2).)

Pensions, annuities and liferents

6.40 As a general rule, an arrestment of a pension, annuity or liferent, like an arrestment of wages, attaches the instalment due for the period in which it is served together with any unpaid arrears in respect of previous periods.[2] To this rule, there are two main exceptions. First, arrestment of an alimentary pension or alimentary liferent attaches (in addition to unpaid arrears) the current instalment only insofar as it exceeds a suitable aliment for the recipient and his or her family.[3] Second, the enactments regulating statutory occupational pension schemes (for example schemes for the police, firemen, teachers, civil servants, local government officers, National Health Service and Armed Forces personnel, and Members of Parliament) invariably have provisions protecting the pension from attachment by sequestration or diligence. Although there is some doubt on the point, the generally held view is that the whole of each instalment of a statutory occupational pension subject to such a provision is exempt, not merely the amount of the instalment required for

[1] If such an arrestment should prove abortive, the creditor would not be entitled to recover the expenses of the arrestment from the debtor, see para. 9.48.

[2] Graham Stewart, p. 52. Where the instalments are payable in advance, an arrestment will only attach unpaid arrears (if any). See *Smith and Kinnear* v. *Burns* (1847) 9 D. 1344.

[3] *Officers' Superannuation and Provident Fund etc.* v. *Cooper* 1976 S.L.T. (Sh.Ct.) 2. The whole instalment is arrestable where the arrestment is based on a debt which is itself "alimentary". Wilson and Duncan, *Trusts, Trustees and Executors*, pp. 96–97.

a suitable aliment.[1] Where the pension is not protected from diligence by legislation or its alimentary character, an arrestment will attach the whole instalment.[2]

6.41 On consultation, there was general agreement that pensions should be attachable by a continuous diligence. Since pensions may be seen as a form of deferred pay and are (unless protected) subject to attachment of earnings orders in England and Wales,[3] we think that in Scotland they should be arrestable by earnings arrestments. We note that disablement or disability pensions are not subject to attachment of earnings orders in English law[4] and we suggest that such pensions should not be attachable in Scotland by earnings arrestments or indeed ordinary arrestments.

6.42 On consultation, there was also general agreement with our provisional proposal that even pensions declared alimentary at common law should be subject to continuous diligence. The effect would be to avoid the need for repeated arrestments of the excess of the alimentary pension above a suitable aliment, and to give exemptions by legal rules without the need for applications to the court to fix a suitable aliment.[5]

6.43 The McKechnie Report[6] recommended in 1958 that statutory occupational pensions should be arrestable subject to the same limitations as arrestments of wages and this view found favour with those who commented on Consultative Memorandum No. 49.[7] On reflection, we do not think that it is for us to recommend changes in the many special superannuation enactments, but we draw the matter to the attention of the competent authorities. Such a change in the law should only be recommended by an advisory body with United Kingdom terms of reference. We would add that our recommendations are not intended to allow attachment of old age pensions or pensions, allowances and benefit payable under general social security legislation, which are exempt from diligence by statute.[8]

6.44 In Consultative Memorandum No. 49[9] we also sought views on whether liferents and annuities (whether declared alimentary or not) should be attachable by a continuous diligence. While this received some support on consultation, we think that earnings arrestments should not apply to liferents or to annuities (except those which are for past services and thus akin to a pension). Liferents are often paid at long intervals (such as half-yearly) so

[1]See *Borthwick* v. *McRitchie* (1908) 24 Sh.Ct.Reps. 374 and *MacFarlane* v. *Glasgow Corporation* (1934) 50 Sh.Ct.Reps. 247 (exemption total); but cf. *Macdonald's Tr.* v. *Macdonald* 1938 S.C. 536 (relating to s. 98(2) of the Bankruptcy (Scotland) Act 1913 which confers upon the court powers analogous to its common law powers to fix a suitable aliment) which suggests that the exemption does not apply to the excess above a suitable aliment.

[2]*Irvine and Shepherd* v. *McLaren* (1829) 7 S. 317.

[3]Attachment of Earnings Act 1971, s. 24(1)(*b*).

[4]*Ibid.*, s. 24(2)(*d*).

[5]In general, future instalments of alimentary income cannot be attached and the court will not fix a suitable aliment in respect of those instalments: *Cuthbert* v. *Cuthbert's Trs.* 1908 S.C. 967, 971.

[6]Para. 108.

[7]Proposition 5(2) (para. 2.19).

[8]E.g Child Benefit Act 1975, s. 12; Social Security Pensions Act 1975, s. 48; Supplementary Benefit Act 1976, s. 16; see Crown Proceedings Act 1947, s. 46, proviso (*b*).

[9]Proposition 5(1) (para. 2.19).

that the problem of repeat arrestments is relatively unimportant. Also, alimentary liferents are not so common that the existing power of the courts to allow an arrestment to attach the excess above a suitable aliment for the liferenter imposes a serious burden on the courts.[1] These arguments may apply to annuities, but in addition instalments of annuities often consist partly of income and partly of capital and in such cases are not analogous to wages or salary.

6.45 We **recommend:**

(1) Pensions (including annuities for past services and periodic payments by way of compensation for loss of office or employment) should be attachable by earnings arrestments.

(2) Pensions or allowances payable in respect of disablement or disability, however, should not be attachable by earnings arrestments.

(3) Provided the amount deductible under an earnings arrestment is fixed in accordance with our recommendations below, a pension which is alimentary at common law should be attachable by earnings arrestment notwithstanding the common law exemption.

(4) The competent authorities should consider whether the various enactments regulating specific public sector occupational pension schemes should be amended to enable creditors to attach such pensions by earnings arrestments.

(5) The foregoing recommendations are not intended to allow attachment of pensions, allowances and benefit payable under social security legislation.

(6) We make no recommendation to change the law on the arrestment of liferents or annuities (other than annuities for past services).
(Recommendation 6.3; clause 73(1)(*c*), (2)(*a*), (*d*), (*e*) and (*f*).)

Pay of merchant seamen and the armed forces

6.46 Two categories of pay currently exempt from arrestment—merchant seamen's pay and armed forces' pay—should not in our opinion be affected by our recommendations. In 1977, the Department of Trade issued a consultative document to interested bodies suggesting that, in modern conditions, it was doubtful whether there was still a case for the exemption of merchant seamen's pay from arrestment. In the light of consultation, however, a compromise solution was effected by the Merchant Shipping Act 1979, section 39(2) and (3) whereby the exemption of the wages of seamen on fishing boats was abolished, and the wages of all seamen were made arrestable for sums due under decrees of aliment, financial provision on divorce and other "maintenance orders" but not under other decrees. In the light of this recent legislation it would not be appropriate for us to re-open the topic. It would follow from our principal recommendation, however, that it would be competent to attach by earnings arrestment (*a*) the pay of a seaman of a fishing boat and (*b*) the pay of any other seaman only for arrears

[1] An arrestment of an instalment of a non-alimentary liferent attaches the whole instalment. Such liferents are rarely the liferenter's sole source of income.

due under a decree for aliment, financial provision on divorce or other maintenance order.[1]

6.47 The pay of members of the armed forces and women's services administered by the Defence Council is not arrestable.[2] The Defence Council will, however, on application by the creditor, usually make periodic deductions from the debtor's pay to settle the debt. In Consultative Memorandum No. 49 we proposed[3] that the pay of members of the armed forces and women's services should be exempt from the proposed new form of earnings arrestments on the ground that earnings arrestments would be very similar to the arrangements entered into by the Defence Council. Most of those consulted agreed with our proposal; those opposed did not point to the failure of the present system to work satisfactorily, but rather objected to the principle that some persons should be protected from arrestment. We see no need to disturb the current practice.

6.48 We **recommend:**

No changes should be made to the recently revised rules on the exemptions from arrestment of merchant seamen's pay, or the rules whereby the pay of members of the armed forces and women's services administered by the Defence Council is exempt from diligence.
(Recommendation 6.4; clause 73(2)(*b*) and (*c*).)

Debts enforceable by earnings arrestment

Debts due at date of execution

6.49 Arrestment against earnings and pensions on the dependence of an action was abolished by section 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966. Clearly, it should also be incompetent to use the new form of earnings arrestments against earnings or pensions on the dependence.

6.50 Arrestments in security of future or contingent debts due under decrees or liquid documents of debt (such as decrees or bonds for payment of future aliment) are competent[4] but very rare. In view of the fact that the amounts involved would normally be small, it is unlikely that a creditor would wish to arrest earnings in security. An earnings arrestment is a completed diligence in that the employer deducts certain sums from the debtor's earnings each pay day and remits them forthwith to the creditor. On the other hand a diligence in security envisages the debtor's funds or property being set aside for, but not handed over to, the creditor in order to meet that creditor's future or contingent debt. In our view earnings arrestments should be used only to enforce debts which are currently due at the date of the arrestment. A creditor in a future or contingent debt should, however, remain entitled to use an arrestment in security against funds other than earnings.

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[1]Sums currently due would be attachable by a current maintenance arrestment, see Section D of this Chapter.

[2]At common law, the pay of all Crown servants was not arrestable but this was changed by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, s. 2, which, however, retained the exemption for the armed forces and women's services.

[3]Proposition 4 (para. 2.16).

[4]See *James* v. *James* (1886) 13 R. 1153; Graham Stewart, pp. 15 and 22.

6.51 We **recommend:**

It should be incompetent to use an earnings arrestment to enforce a debt which is not due at the date of execution of the arrestment.
(Recommendation 6.5; clause 72(2)(*a*).)

Interest

6.52 The next question for consideration is to what extent interest due under a decree should be recoverable by earnings arrestment. The form of schedule of arrestment in general use states that the arrestment attaches all sums of money due by the arrestee to the debtor until payment is made to the arresting creditor of the principal sum, interest at a specified rate from a specified date until payment, and the expenses of the court action, under deduction of sums paid to account. The officer will normally endorse on the schedule of arrestment a statement of the debt—the principal sum and court expenses (which are attached by the arrestment), the solicitor's fee (if any) for instructing the arrestment and the officer's arrestment fee[1] (which are not attached by the arrestment), less payments to account. Thus in arrestments of wages, though the rate of interest is referred to in the schedule of arrestment, it is almost always excluded from the statement of the debt. One reason is that creditors find it difficult to compute the interest (which is calculated on a day-by-day basis) in the common case where a series of payments to account have been made at different dates, and accordingly they normally do not seek to recover it.

6.53 Having regard to the need for a simple procedure, we proposed in Consultative Memorandum No. 49[2] that the amount of interest attachable by an earnings arrestment should be the interest accrued up to the date of the service of the earnings arrestment, but that such interest should only be attached if, and to the extent that, the amount is specified in the arrestment schedule. This proposal was agreed by those who commented and we adhere to it. During the period for which the earnings arrestment has effect, interest would continue to run on the principal sum and might be recovered by other diligence (including a subsequent earnings arrestment). We do not however anticipate that in future creditors would be any more likely to seek to use an arrestment to recover interest accrued after the service of an earnings arrestment than they are under the present system.

6.54 We **recommend:**

An earnings arrestment should attach (in addition to the principal sum and judicial expenses due under the decree) interest accrued up to the date of service of the earnings arrestment, but only if, and to the extent that, the amount of interest is specified in the schedule of arrestment.
(Recommendation 6.6; clause 77(1)(*a*) and (*b*) and (2).)

Introduction of prior charge

6.55 Under the present law, an extract court decree contains a warrant for all lawful diligence, including immediate arrestment.[3] Accordingly, the creditor

[1]Recovery of expenses of executing earnings arrestments is dealt with later in Chapter 9.
[2]Proposition 6.2 (para. 2.26).
[3]Debtors (Scotland) Act 1838, ss. 2 and 9; R.C. 65; Sheriff Courts (Scotland) Extracts Act 1892, ss. 4 and 7; Summary Cause Rules, rule 89(2).

is entitled to lay an arrestment of wages without further application to the court. In some other legal systems, a creditor holding a decree has to apply to the court for a wage attachment or wage "garnishment" order. This would, we think, be a pointless formality in Scottish procedure.

6.56 At present, an extract decree is warrant for immediate arrestment of the debtor's earnings and other funds and no charge needs to be served as a necessary preliminary to arrestment. In Chapter 3 we recommend that the debtor should be entitled to make an application for a time to pay order only after a charge has been served or an arrestment of funds other than earnings has been executed. We made this recommendation because in our opinion an application for a time to pay order should only be competent after the first steps of diligence have occurred. To allow earlier application might undermine the continued effectiveness of the system of enforcement, and lead to a great number of applications. Moreover, we consider it to be important that all debtors should be made aware of their right to apply for time to pay; the easiest way to achieve this is to include such information with a charge, since no document intimating the granting of a decree is usually sent to the debtor.

6.57 Making the service of a charge an essential preliminary to an earnings arrestment will, we hope, reduce the number of earnings arrestments that might otherwise be executed. In the diligence of poinding there is a sharp drop between the number of charges served and poindings executed;[1] the charge brings home to the debtor the seriousness of the situation and the creditor's intention to do diligence. Also service of a charge often enables officers of court to discover by contact with the debtor or his or her spouse whether the debtor is employed and if so to recommend use of arrestment rather than poinding. The Society of Messengers-at-Arms and Sheriff Officers, commenting on our proposal to introduce a continuous diligence against earnings, thought that there was a danger that creditors would instruct earnings arrestments immediately rather than enter into negotiated instalment arrangements. Prior service of a charge would lessen this danger to some extent. These considerations lead us to recommend that a charge should become an essential preliminary to an earnings arrestment. We would stress that this recommendation will not affect a creditor's right to instruct immediate arrestment of the debtor's funds other than earnings—such as a bank or building society account.

6.58 Our discussion has up to now been on the basis that an earnings arrestment is enforcing one debt. We see no reason why a single earnings arrestment should not be capable of enforcing more than one debt due by the same debtor to the same arresting creditor, provided a charge has previously been served in respect of each debt and the schedule of arrestment itemises the debts and specifies the decrees or other documents constituting the debts.

6.59 We **recommend:**

(1) An extract decree or other writ containing a warrant for diligence should authorise an earnings arrestment without the need for a further application to the court.

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[1]C.R.U. Diligence Survey, para. 3.5. 46,000 charges served. 20,000 poindings executed. These are estimated figures for 1978.

(2) The service of a charge should be an essential preliminary to the service of an earnings arrestment. However, it should continue to be competent to serve an arrestment against funds other than earnings without first serving a charge.

(3) It should be competent to serve an earnings arrestment to enforce more than one debt due by the debtor to the same creditor providing a prior charge has been served in respect of each debt.
(Recommendation 6.7; clauses 77(3) and 112(1)(i), Schedule 7, paragraphs 8 and 10.)

Duration of earnings arrestments

6.60 An earnings arrestment could either endure until the sums recoverable thereunder were paid or could endure for a limited period fixed by law. In Consultative Memorandum No. 49 we proposed[1] that earnings arrestments should endure for seven months (or such other period as might be prescribed) and this proposal met with general agreement on consultation. Nevertheless we have now come to the view that an earnings arrestment should, in the normal course of events, endure till the debt is paid.[2] We deal with the termination of earnings arrestments by recall or events other than satisfaction of the debt later.[3]

6.61 For the creditor the advantage of indefinite duration is that the debt is paid without further action. There is no need to serve a further arrestment or arrestments if the first fails to recover the debt in full. An indefinite duration earnings arrestment is also easier for the employer; instead of processing several arrestment schedules served at intervals to recover a substantial debt there is only one schedule which is operated without a break. Debtors also benefit from an indefinite duration earnings arrestment since they do not have to bear the creditor's expenses in serving repeat earnings arrestments. One of the major defects we identified in the existing law of wages arrestment[4] is the necessity for repeat arrestments unless a voluntary instalment settlement can be agreed and implemented. Only an indefinite duration earnings arrestment eliminates this defect completely.

6.62 It might be objected that in the case of a large debt an earnings arrestment would have to endure for a long time—years perhaps—in order to pay off the debt. Too long a period might be a psychological barrier to payment and might induce debtors to leave their jobs. We doubt whether this would be so, and anyway it seems to us that in this respect there is no difference between a series of arrestments repeated over a long period and a single arrestment for the same total period.

6.63 The amount deducted from the debtor's pay in pursuance of an earnings arrestment will be calculated in accordance with statutory rules. Although the rules we recommend below[5] would leave debtors with a considerably higher

[1]Proposition 15 (para. 2.55).
[2]An earnings arrestment may be recalled (para. 6.91) or cease to have effect by virtue of the debtor's sequestration (para. 6.103).
[3]See para. 6.104 below.
[4]See para. 6.7 above.
[5]See para. 6.76.

proportion of their pay than they are left with at present under an arrestment of wages, the rules have, of necessity, to be framed with the average debtor in mind. Hardship could be caused to debtors with unusually heavy commitments—such as several dependent children—and it might be argued that such hardship would be exacerbated by the earnings arrestment having an indefinite duration rather than a short fixed period. But the debtor would suffer exactly the same hardship from a series of arrestments which the creditor repeated in order to recover the debt in full as from a single arrestment of the same duration. Furthermore, we have made recommendations to take account of the possibility of hardship. In terms of these recommendations a debtor subjected to an earnings arrestment could apply to the court for a time to pay order,[1] or, in certain circumstances, a debt arrangement scheme.[2] On granting a time to pay order the court would recall the earnings arrestment and allow the debtor to pay the outstanding balance of the debt by instalments set with regard to the debtor's financial circumstances.

6.64 One of the more difficult problems associated with a continuous diligence against earnings is how to avoid the first arresting creditor "shutting out" later creditors who may otherwise resort to poindings or extra-judicial methods in order to recover their debts. The solution we put forward in Consultative Memorandum No. 49[3] was to allow a later creditor the choice of waiting until the first creditor's earnings arrestment expired and then serving an earnings arrestment, or applying to the court for a conjoined arrestment order in which both creditors would share in the deductions made from their debtor's earnings. A reasonably short duration for an earnings arrestment (a few months) improves the attractiveness of the first choice to the later creditor and we also put forward the idea that for 10 days after the first arresting creditor's earnings arrestment expired that creditor should not be entitled to serve a repeat arrestment. The object of this latter proposal was to allow the later creditor to serve an earnings arrestment while the original creditor is precluded from competing. On reconsideration, however, we have come to the conclusion that a switching over of creditors every few months in order to give each a chance of recovering part of his or her debt would be confusing for creditors, troublesome for employers and provide only a facade of equality. We are now of the opinion that the best method of securing equal treatment for creditors (outwith sequestration or a debt arrangement scheme) is by means of conjoined arrestment orders, and to that end we recommend a simple administrative procedure for obtaining these orders.[4]

6.65 One body on consultation put forward the view that an arrestment for a particular debt should last only three months; if the debt was not then satisfied it should become unenforceable by earnings arrestment. In our view, such a limitation would severely prejudice an arresting creditor without necessarily protecting the debtor since another creditor could still lay an arrestment. It might also drive creditors into using poindings or extra-judicial methods in order to recover their debts.

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[1]See Chapter 3 of this report.
[2]See Chapter 4.
[3]Propositions 15, 16, 16A and 21.
[4]See paras. 6.229 to 6.236 below.

6.66 We **recommend:**

Without prejudice to Recommendations 6.12(2) and 6.16(1) (recall and cessation of earnings arrestments) an earnings arrestment should have effect on each pay day after service of the schedule on the employer until the debt recoverable by the arrestment has been satisfied.
(Recommendation 6.8; clause 75(2).)

Amount deductible under an earnings arrestment

The deduction formula

6.67 As already indicated, one of the main objectives of earnings arrestments is to allow debtors to retain a larger amount than at present from their pay, while securing to the creditor a reasonable return from the diligence over a period. The deductions from pay must be fixed by a formula which can be applied reasonably easily by employers and which has regard to the interests of both creditors and debtors. If the deductions are too small, debts will be paid too slowly to the prejudice of creditors. If the deductions are too large, debtors and their families may suffer hardship, and the debtors may be forced to leave their jobs to the prejudice, not only of themselves, but also of the creditor and possibly the employer.

6.68 In Consultative Memorandum No. 49,[1] we invited views on several models for deduction rules which we discussed in detail. In summary, these models are as follows:

(i) *Fixed sum in sterling exempt.* This simple model would allow all earnings above a fixed sum expressed in sterling to be arrestable. It was used in Scotland between 1870 and 1960[2] and is used in some other jurisdictions. An important disadvantage of this model is that it allows too great a deduction for debtors in the middle and upper income ranges. For example, with an exemption of £35 per week a debtor earning £60 would have £25 deducted while a debtor earning £150 has £115 deducted. Above the exemption limit debtors would simply be working for their creditors.

(ii) *Fixed percentage of earnings exempt.* Some legal systems exempt a fixed percentage of the debtor's earnings; thus in the United States of America federal law enacts a minimum exemption of 75% of disposable earnings for all states. This keeps step with inflation, whereas a fixed sum does not. But if a large percentage is exempt so as to prevent hardship to low income debtors, high income debtors are left with more than enough for reasonable subsistence (see the illustrative example in paragraph 6.69). High income debtors should not be able to maintain a good standard of living at the expense of their creditors.

(iii) *Fixed percentage of earnings above fixed sum.* In this model the amount deducted is a fixed percentage of the balance above a fixed sum. It

[1]Paras. 2.69 to 2.88.

[2]The Wages Arrestment Limitation (Scotland) Act 1870, as originally enacted, provided a fixed exemption of 20 shillings per week which was raised in 1924 to 35 shillings. The Wages Arrestment Limitation (Amendment) (Scotland) Act 1960 replaced the fixed sum formula by the present formula exempting £4 plus half the balance of the weekly wage.

has been in force in Scotland since 1960, the fixed sum being £4 per week and the percentage 50%. Where (as has happened in Scotland) the fixed sum is not updated to keep pace with inflation, it can be unfair to low paid debtors and the creditors of high income debtors.

(iv) *Fixed percentage exemption with fixed sum threshold.* Another model combining the fixed sum and fixed percentage exemptions exempts a percentage of the debtor's weekly wage with the proviso that the exempted amount must not fall below a certain prescribed sum. For example, where the percentage exemption was 80% and the prescribed sum was £35, persons earning £40, £50 and £60 per week net, would retain £35, £40 and £48 respectively. By prescribing a further exempt sum for each dependant, allowance can be made for a debtor with a family to support. But this would require employers to ascertain the existence of dependants.

(v) *Slilding scale percentage deductions.* The disadvantage of a model with a single fixed percentage deduction is that it is not possible to set a deduction level which is fair at the same time to both high and low income debtors (see illustrative example in paragraph 6.69). This disadvantage can be met by introducing a sliding scale of percentage deductions whereby a small proportion of the lowest income brackets would be deducted but the percentage deduction would increase as the earnings rise through successive income brackets. Such a model is used in some jurisdictions including France. A fixed sum threshold can also be provided, below which no deductions are made.

(vi) *Exemption by reference to supplementary benefit scale rates.* Some legal systems define exemptions by reference to a statutory formula (such as the minimum hourly wage) which is continually uprated to keep pace with inflation. In this country, supplementary benefit scale rates are uprated annually but are too complex and difficult for employers to apply in an earnings arrestment system.

(vii) *Fixed percentage of "taxable pay" for a pay period.* Another possibility would be to use the debtor's P.A.Y.E. tax code upon the view that if the debtor's "taxable pay" for P.A.Y.E. purposes provides a measure of ability to pay tax out of earnings, it might also provide a measure of ability to pay creditors out of earnings. This would however require extra calculations by employers; it is likely to be too complicated; and in any event the code number actually in operation may not clearly reflect the commitments of the taxpayer-debtor even to the extent to which such commitments are taken into account in code numbers.[1]

In Consultative Memorandum No. 49, we examined the advantages and disadvantages of these different models. Those who commented agreed with us that either a sliding scale percentage deduction (head (v) above) or a fixed percentage exemption with a fixed sum threshold (head (iv) above) should be adopted and most commentators preferred the sliding scale model.

6.69 In our view the sliding scale model has a decisive advantage over the fixed percentage exemption with fixed sum threshold model, in that under the

[1]For example, the code number may be decreased to repay tax over-deducted, or increased in order to collect tax due from other income which has not suffered deduction of tax at source.

latter if the percentage exemption is set high in order to protect low paid debtors, it allows well paid debtors to retain too great a sum; while if the percentage exemption is set low, low paid debtors suffer excessive deductions. An example may help in clarifying this point.

Amounts deducted (£) under various models

Net weekly earnings of debtor (£)	40	60	80	100	200	400
Sliding scale model[1]	1	5	9	13	38	133
Fixed percentage exemption 90%[2]	4	6	8	10	20	40
Fixed percentage exemption 70%[2]	5	18	24	30	60	120

Notes:

[1] The sliding scale deductions are those recommended by us and set out in Table A of Schedule 3 to the draft Bill annexed to this report.

[2] The fixed sum exemption is £35, the same figure as the zero deduction level in our sliding scale model.

It may be argued that most highly paid debtors usually have higher commitments than low income debtors and can thus only afford to have about the same proportion of their earnings deducted to meet their debts. We do not find this "station in life" argument acceptable as it would result in highly paid debtors being allowed to continue to enjoy their high standard of living at the expense of their creditors.

6.70 One possible disadvantage of the sliding scale model is that it would involve the employers in elaborate calculations. This we think can be avoided by having statutory deduction tables and the draft Bill annexed to this report contains such tables.[1] The schedule of arrestment would include a copy of the statutory tables together with brief explanatory notes.[2] Instead of having to do a series of calculations an employer merely has to look up in the appropriate table the amount to be deducted for the particular net earnings of the employee debtor.

6.71 In view of these considerations we have adopted the sliding scale model with a fixed sum threshold below which all earnings should be exempt from arrestment in order to protect the really low paid. We suggest a figure of £35 per week, which falls roughly midway between the short term supplementary benefit rate for a single person (£28.05 in 1984–85) and that for a couple (£45.55 in 1984–85).

6.72 The C.R.U. Arrestment Survey discloses variations in employers' practices in applying the present statutory limitation formula to gross or net earnings. We think that this problem should be met by a provision making it clear that the percentages should be reckoned on net or disposable earnings which should be clearly defined for this purpose. We would adopt the definition of attachable earnings in the Attachment of Earnings Act 1971[3] which refers to pay after deduction of income tax and certain social security and superannuation scheme contributions. This is not the same as "take home

[1]See Sched. 3.

[2]Recommendation 6.20 (para. 6.122) below.

[3]Sched. 3, para. 3.

pay" since it does not cover S.A.Y.E., union dues and other "voluntary" deductions.

6.73 The C.R.U. Arrestment Survey also discloses variations between employers in adapting the present statutory limitation formula of £4 per week plus one-half of the balance to monthly pay periods. Some use £4 per month plus one-half of the balance, others use £16 per month, yet others use £17.50 per month (£4 multiplied by 52 and divided by 12 rounded up to a convenient figure). We think therefore that provision has to be made directing employers how to operate an earnings arrestment where the debtor in question is paid at regular intervals other than a week or a whole number of weeks—calendar months for example. Table A in Schedule 3 to the draft Bill sets out the deductions for weekly paid employees, while Tables B and C in Schedule 3 to the draft Bill deal respectively with monthly debtors and debtors who are paid at regular intervals other than a week or a month or a whole number of weeks or months.

6.74 Some debtors receive, in addition to their basic earnings, payments of overtime, commission or bonus of variable amounts and frequency. In some cases—salesmen for example—the commission is the larger part of the remuneration, with only a small retainer being paid regularly. In the interests of simplicity we recommend that any additional payments paid on the same day together with the basic pay should be aggregated with that pay and treated as being due for the same period. To do otherwise would require the employer to do separate calculations for each element in the debtor's earnings. There would also be the problem of ascertaining the precise periods for which the additional payments were in fact payable and complex statutory rules would be necessary to deal with all the possible situations. Where the additional payment is paid other than on a regular pay day, again for simplicity, we recommend that the employer should deduct 20% of it. We think the number of such payments will be few as employers find it convenient to pay additional payments along with regular earnings. Furthermore, it would always be open to a debtor who might be harshly treated by the operation of the 20% rule to request the employer to pay the bonus or additional payment on the same pay day as the regular pay.

6.75 The figures in the recommended statutory deduction tables may become out of date over the years due to inflation or other causes. In order to reflect changes in the value of money the tables should be capable of being varied by the Secretary of State by means of regulations by statutory instrument subject to negative resolution. Officers of court executing an earnings arrestment after the regulations have come into force would serve a prescribed form schedule of arrestment containing the varied tables on employers. Given the length of time an earnings arrestment can endure, we think any variation should be capable of applying to a subsisting arrestment as well. There is, however, the practical problem of bringing the variation to the notice of the employer in question. The debtor or the creditor should be entitled to send a notice in prescribed form containing the varied tables to the employer, and on receipt the employer should be bound to give effect to the varied tables in making deductions from the debtor's earnings on subsequent pay days. But we consider that an employer should be entitled to give effect to the varied

tables on becoming aware of their existence in some other way. For example, the employer may be sent a prescribed form notice in connection with another arrestment, or trade organisations may bring the regulations to their members' attention.

6.76 We **recommend:**

(1) The amount deducted from a debtor's net earnings in pursuance of an earnings arrestment should be calculated in accordance with statutory tables based on the sliding scale model. Separate tables should be provided for weekly and monthly paid employees and employees paid at other regular intervals.

(2) Net earnings means the earnings which remain payable after deduction of income tax, social security contributions and superannuation scheme contributions.

(3) Overtime, bonus, commission and other payments paid in addition to the debtor's regular earnings should:

(*a*) if paid on the same day as the regular earnings, be aggregated with the regular earnings for the purpose of calculating the amount to be deducted;

(*b*) if paid separately, be subject to a deduction of 20%.

(4) The statutory tables and percentage specified in paragraph (3)(*b*) above should be capable of being varied by regulations made by the Secretary of State by statutory instrument subject to negative resolution. The varied tables and percentage should apply to an earnings arrestment executed after the coming into force of the regulations and to a subsisting earnings arrestment where either the creditor or the debtor has intimated in prescribed form the regulations to the employer. An employer should be entitled, but not bound, to give effect to the regulations in connection with a subsisting arrestment on becoming aware of their existence otherwise than by intimation in prescribed form.
(Recommendation 6.9; clauses 73(3), 76 and 95 and Schedule 3.)

Court's power to vary deductions

6.77 Before the limitation rules were introduced by the Wages Arrestment Limitation (Scotland) Act 1870, it was the practice of the courts to make orders, under the common law rule known as the *beneficium competentiae*, exempting a proportion of the debtor's pay from arrestment.[1] The statutory limitation rules were introduced in part to get rid of the uncertainty and variations in practice to which the court's exercise of its common law power had given rise. But in theory a debtor in need can still apply to the court to order, in the exercise of its old common law power, an exemption above the 1870 Act limit.[2] It appears, however, that this common law power of the court is little known and rarely applied to earnings[3] except in bankruptcy pro-

[1] *Shanks* v. *Thomson* (1838) 16 S. 1353.

[2] Wages Arrestment Limitation (Scotland) Act 1870, s. 2 (which provides that the surplus above the exempt wages shall still be liable to arrestment "as before the passing of this Act").

[3] See, however, *Thomson* v. *Cohen* (1915) 32 Sh.Ct.Reps. 15.

ceedings.[1] Debtors in need can rely instead on other assistance such as urgent needs payments from the Department of Health and Social Security,[2] financial assistance from local social work departments,[3] or money from friends and relatives.[4]

6.78 In Consultative Memorandum No. 49 we suggested[5] that the court should not have power on application by the debtor to alter the amount statutorily exempt from earnings arrestment under either the existing common law powers or a new statutory provision. Many earnings arrestments would susbsist for only a few months, so that applications have to be disposed of quickly; yet evaluation of the applicant's means and liabilities would take a considerable time. Moreover, if debtors became aware of the court's powers, the courts might be flooded with applications so that the advantages of simplicity and ease of operation of earning arrestments would be lost. On consultation, the balance of opinion was in favour of our proposals. In recommending adoption of them, we would point out that a debtor who found an earnings arrestment financially oppressive would be entitled to make an application to the court for a time to pay order.[6]

6.79 We **recommend:**

Without prejudice to any other remedy open to the debtor, the courts should not retain their common law powers to order lower deductions from arrestments of earnings than the deductions laid down by statute. The courts should not have a special statutory power to vary the deduction levels in earnings arrestments.
(Recommendation 6.10; clause 72(3).)

Maintenance, rates and tax arrears

6.80 Under the Wages Arrestment Limitation (Scotland) Act 1870, section 4, the statutory limitation on arrestment of wages does not apply in the case of arrestments for "rates and taxes imposed by law". In theory, the rates or tax defaulter has the right to apply to the court to reserve a suitable aliment under the common law *beneficium competentiae* but this right is rarely exercised, if ever. The practical effect is that the whole of the debtor's wages are arrestable for rates and taxes.[7] A continuous diligence against earnings should not attach the debtor's whole earnings over a prolonged period. Even in the case of a single arrestment, the McKechnie Report[8] observed that rates defaulters and their families should be left with enough to live on. Clearly, to strip debtors of all their earnings over a prolonged period would be self-defeating since it would compel them to leave their jobs. Such a provision

[1] *Caldwell* v. *Hamilton* 1919 S.C. (H.L.) 100; *Young* v. *Turnbull* 1928 S.N. 46; *Webster* v. *Douglas* (1933) 49 Sh.Ct.Reps. 294; *Birrell's Tr.* v. *Birrell* 1957 S.L.T. (Sh.Ct.) 6; *Cochran's Tr.* v. *Cochran* (1958) 74 Sh.Ct.Reps. 75.

[2] Supplementary Benefits Act 1976, s. 4 as amended by the Social Security Act 1980.

[3] Social Work (Scotland) Act 1968, s. 12.

[4] Edinburgh University Debtors Survey, para. 6.3.

[5] Proposition 17(4) (para 2.94).

[6] See Chapter 3 above.

[7] At present Inland Revenue and Customs and Excise tax debts constituted by summary warrant cannot be enforced by arrestment. In Chapter 7 we recommend that arrestment including earnings arrestment should become a competent diligence for these debts.

[8] Para. 92.

would not even safeguard the public purse since the debtors would often be forced to rely on supplementary benefit. On consultation,[1] all who commented agreed that an arrestment for rates or taxes should not prevail over the normal exemption from earnings arrestment.

6.81 The statutory limitation rule also does not apply in the case of arrestments enforcing "an alimentary allowance or payment", so that such an arrestment attaches the debtor's entire wages. Although we recommend below[2] that a special type of arrestment (called a current maintenance arrestment) should be introduced to recover instalments of current maintenance as they fall due, arrears of maintenance could still be recovered by ordinary earnings arrestments.[3] In such cases, we think that maintenance arrears should be treated in the same way as rates and tax arrears and other civil judgment debts.

6.82 We **recommend:**

The normal rules on deductions from earnings set out in Recommendation 6.10 above should apply to earnings arrestments for the recovery of arrears of maintenance, rates and taxes.
(Recommendation 6.11; clause 76.)

Direct payment to creditor and recall of arrestment

6.83 As we have seen, an arrestment of wages does not require or even authorise the employer to pay the arrested sum to the arresting creditor. The arrestment is merely an inchoate diligence attaching or "freezing" the debtor's pay in the hands of the employer-arrestee. The creditor can only compel payment by obtaining decree in an action of furthcoming. While this appears complex, the system operates far more simply in practice. Once an arrestment is served on the employer, the creditor is normally paid without the need for an action of furthcoming. The debtor may authorise the employer to pay the arrested sum to the creditor, and normally does so if the debt is admitted, since refusal to authorise payment would merely render the debtor liable for the expenses of an action of furthcoming. In short, actions of furthcoming are rarely brought in respect of arrested earnings.[4]

6.84 Under present law and practice an employer should obtain from the debtor a written or oral mandate authorising payment to the arresting creditor of the arrested sums. The research on this matter presents conflicting evidence. On the one hand, the interviews with employers in the C.R.U. Arrestment Survey[5] suggest that employers normally do in fact obtain a mandate, usually in writing, before releasing the arrested sum. On the other hand a few employers interviewed (three out of 22 having experience of arrestments) did

[1]Consultative Memorandum No. 49, Proposition 42 (para. 4.16).
[2]Section D of this Chapter.
[3]Recommendation 6.28(1) (para. 6.175).
[4]The published statistics on the number of sheriff court actions of furthcoming (138 as ordinary causes and 233 as summary causes disposed of during 1983; Tables 9 and 10, *Civil Judicial Statistics Scotland 1983*) do not reveal how many related to arrestments of earnings. (Information supplied prior to publication by Scottish Courts Administration). It is thought that such actions are rare; only two employers out of 28 interviewed in connection with the C.R.U. Arrestment Survey had ever had experience of furthcomings. (para. 23).
[5]Para. 23.

not obtain mandates since they (mistakenly) regarded the schedule of arrestment itself as providing sufficient authority not only to deduct the arrested sum but also to pay it to the creditor.[1] Moreover, evidence from interviews with debtors in the Edinburgh University Debtors Survey suggests that the practice of not obtaining mandates is more widespread.[2]

6.85 We tentatively proposed in Consultative Memorandum No. 49[3] that an earnings arrestment should have effect as a series of consecutive arrestments, so that the employer would, each pay day, hold the arrested portion of the debtor's earnings and await the debtor's mandate or creditor's action of furthcoming. Although there was general agreement with this proposal, on reflection we think that it would be far simpler if an earnings arrestment authorised, and indeed required, the employer to pay the arrested portion forthwith to the creditor. As was pointed out to us by two bodies on consultation, it would be inconvenient for an employer to have to get a new mandate every pay day, particularly if the debtor was paid weekly or was stationed away from the department handling the arrestment. Employers would feel obliged to retain such mandates to guard against any possible future challenge by debtors. Moreover, repeated mandates may increase the risk that debtors would be tempted to withhold them unreasonably.

6.86 It may be objected that if an earnings arrestment were to require the employer to pay the creditor, it is a completed rather than an inchoate diligence and the term "arrestment" is therefore inapt. This objection, however, seems more theoretical than real, and we think that the traditional terminology of "arrestment" should continue to be used.

6.87 There remains, however, the point that, if the employer must pay the creditor without mandate or decree of furthcoming, then both the employer and the debtor should be entitled to challenge the validity of the earnings arrestment. There is, unfortunately, some doubt in the existing law as to the circumstances in which an application for recall of an arrestment in execution may be brought. There is also the view that if an arrestment is not properly executed and is therefore technically null, it should be ignored and it is incompetent for the arrestee to seek recall.[4] Such a rule would however leave the employer in an invidious position. We think there should be express statutory provisions entitling both the employer and the debtor to apply to the court for recall of an earnings arrestment on the grounds that it is invalid or has ceased to have effect as between the debtor and creditor.[5]

6.88 In addition to disputes about the validity of an earnings arrestment there may be a dispute about the way in which it is being operated by the employer. For example the employer may be miscalculating net earnings or failing to use the deduction tables properly. We think the court should have power to determine such a dispute while the arrestment is subsisting: otherwise the error may continue to be made for a long time. In determining a dispute

[1]Para. 23.

[2]Of the 25 debtors subjected to arrestment who were interviewed, only 10 said that they gave their permission (nine in writing and one orally) to the release of the arrested wages.

[3]Proposition 18(1) para. 2.106.

[4]*Brand* v. *Kent* (1890) 20 R. 29, 31.

[5]See para. 6.105 below.

the court should be able to give directions as to the correct mode of operation of the earnings arrestment.

6.89 When the court determines the dispute about the mode of operation of an earnings arrestment it would be convenient if it had power in the same proceedings to order payments to be made by one party to another. The payments ordered by the court should bear interest, at the normal decree rate, running from a date to be decided by the court in making the order. A creditor would be entitled, under the rules on compensation, to set off any payment ordered to be made to the debtor against the unpaid balance of the debt being enforced by the earnings arrestment.

6.90 We think that any claim in respect of deductions made under an earnings arrestment should be required to be made within a reasonably short period, lest employers should feel obliged to keep records of deductions made for at least the prescriptive period of five years.[1] Although prudent employers may for other reasons wish to retain their pay records for such a period, they should not in our opinion be burdened with having to keep records for such a long period simply to meet the possibility that a question relating to an arrestment (which is primarily a matter between the creditor and the debtor) might arise some time in the future. We therefore suggest a period of one year after which no claim may be made by either the debtor or the creditor against the employer in respect of deductions made, or which should have been made, under an earnings arrestment.

6.91 We **recommend:**

(1) An earnings arrestment should not only (as under existing law) require the employer to make a deduction from the debtor's earnings on each pay day while it is in force, but also require the employer to pay forthwith the arrested sums to the creditor.

(2) The employer and the debtor (and the creditor in the case of determination of a dispute) should be entitled to apply to the court for an order recalling the earnings arrestment or determining any dispute as to the manner of its operation. The court in determining a dispute should have power to order payment to be made by one party to another, with interest from a date to be specified at the rate normally applicable to decrees.

(3) A claim by a creditor or debtor against the employer in respect of deductions made, or which should have been made, under an earnings arrestment should be incompetent after one year from the date when the deduction was made or should have been made.
(Recommendation 6.12; clauses 75(1), 78(1) and (2) and 95(4).)

Commencement of operation of earnings arrestment

6.92 The C.R.U. Arrestment Survey shows clearly that the place where an arrestment of wages is served, and the person to whom it is given, can be important factors in determining whether the arrestment can be applied by the employer conveniently or at all to the debtor's pay on the next pay day

[1]Prescription and Limitation (Scotland) Act 1973, s. 6 and Sched. 1.

following the arrestment, and also whether the arrestment is kept confidential.[1] Implementing arrestments of earnings is usually part of the normal work of the employer's pay section, or of a particular member of staff responsible for payment of earnings. Large companies often administer arrestments at the head office but an arrestment may be served at a branch office where the staff may be inexperienced in dealing with arrestments. Sometimes, an arrestment may be served on a branch office before the employee is paid, but may not reach the appropriate office until after the employee has been paid.[2] Indeed, an employer who receives an arrestment of pay too late for convenient operation may decide to apply it to the instalment of pay next following the instalment to which it should have been applied in strict law.[3]

6.93 Because of differences in the internal structure of organisations and their methods of administering arrestments of earnings, it is not possible to frame legal rules which will ensure that such arrestments are served at the most appropriate place or on the most appropriate person to facilitate compliance with the arrestments. In Consultative Memorandum No. 49,[4] however, we suggested that provision should be made giving the employer more time in which to operate an arrestment of earnings. We suggested that an earnings arrestment should only come into operation on the expiry of a prescribed period after the date of service of the schedule of earnings arrestment on the employer. This suggestion was generally welcomed by those who commented. The Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers, however, expressed concern that a period of delay would result in the earnings arrestment being ineffective if the debtor left the employment immediately after service of the arrestment and might enable employers, who often feel loyalty towards their employees, to defeat the arrestment. While we concede that such risks exist, we do not think that evasion will frequently occur. We note that in England and Wales an employer is not bound to comply with an attachment of earnings order until the lapse of seven days from the date of service of the order, but the employer may choose to comply with the order within that period.[5]

6.94 In deciding what period should be allowed, regard must be had to the varying practices of employers in administering wages and salaries including the calculation of the sums payable and the making up and distribution of the pay packets.[6] Smaller employers generally calculate pay manually on local premises, and the whole process is carried out over one or two days. Medium and larger employers generally use computers for calculating pay and the process is more complex as the relevant information on overtime for example has to be ascertained and sent from each workplace to the computer staff. This may take several days. The day on which the computer is run varies for weekly and monthly paid staff. Again, there are various practices, having various degrees of flexibility, in making up and distributing wages, in the use of security firms to make up and distribute wages paid in cash, and in the

[1] See C.R.U. Arrestment Survey, paras. 15 and 17–20.
[2] C.R.U. Arrestment Survey, para. 19.
[3] *Ibid.*, para. 28.
[4] Proposition 11(1) (para. 2.47).
[5] See Attachment of Earnings Act 1971, s. 7(1).
[6] See C.R.U. Arrestment Survey, paras. 11–4.

sending of instructions to local offices to withdraw money from the bank and to distribute the wages locally.

6.95 Having regard to these practices, we think that seven days from the date of service of the earnings arrestment schedule would be a reasonable period, though we concede that in the case of larger employers a longer period might cause less inconvenience to them.

6.96 We recommended earlier in this Chapter[1] that the employer should in operating an earnings arrestment deduct each pay day a sum calculated by reference to the period since the immediately preceding pay day. Where the employer fails to make a deduction on the first pay day after service of the schedule of arrestment, because it falls within the seven day period, but deducts on the second pay day, the deduction should be calculated by reference to the period from the second pay day to the first pay day. The employer should not be required to add to the deduction made on the second pay day the sum that would have been deducted on the first pay day had the employer chosen to put the earnings arrestment into effect then.

6.97 We **recommend:**

(1) An employer should be bound to give effect to an earnings arrestment schedule on any pay day occurring seven days or more after the date of service of the schedule.

(2) An employer should be entitled, but not bound, to give effect to an earnings arrestment schedule on any pay day occurring within seven days after the date of service of the schedule.

(3) An employer who does not give effect to an earnings arrestment until a pay day occurring after the expiry of the seven day period should not be required to make any deduction in respect of a pay day which fell within the seven day period.
(Recommendation 6.13; clauses 75(1) and (2)(*a*) and 95(2) and (3).)

Liability of employer for failure to operate

6.98 An arrestee who disposes of an arrested fund in breach of a valid arrestment is liable to pay again to the arresting creditor.[2] Exceptionally an arrestee may also be liable to be punished for contempt of court.[3] But an arrestee incurs no liability by simply retaining the arrested funds until the arrestment is recalled or a decree of furthcoming is obtained.

6.99 An earnings arrestment requires the employer to deduct a portion of the debtor's earnings on each pay day and pay it over forthwith to the arresting creditor.[4] We now deal with the question of a suitable sanction to enforce this duty. In our view a civil sanction would be sufficient; an employer who fails to give effect to an earnings arrestment remains liable to the creditor and could have an action for payment of the sums due under the arrestment brought by the creditor and would be liable for the expenses of that action.

[1]Recommendation 6.9 (para. 6.76).
[2]Graham Stewart, pp. 125–35.
[3]Graham Stewart, pp. 222–3.
[4]Recommendation 6.12 (para. 6.91).

The employer should not be entitled to recover from the debtor any earnings paid to the debtor previously in breach of an arrestment.

6.100 We **recommend:**

Failure by an employer to pay sums due to the arresting creditor under an earnings arrestment should render the employer liable to an action for payment of the sums without a right of recovery from the debtor. (Recommendation 6.14; clause 75(3).)

Effect of sequestration

6.101 Under section 104 of the Bankruptcy (Scotland) Act 1913, sequestration of the debtor renders an arrestment (or poinding) ineffectual in a question with the trustee in the sequestration if the arrestment (or poinding) was executed within 60 days prior to the date of the sequestration. In *Johnson* v. *Cluny Estates Trustees*[1] it was held that the arrestment is only rendered ineffectual by section 104 if it is still subsisting at the date of sequestration: payments of the arrested sums made within the 60 day period in pursuance of a furthcoming or a mandate by the debtor are not affected by the section.

6.102 In Consultative Memorandum No. 49, we suggested[2] that a sequestration should render ineffectual an earnings arrestment in so far as the arrestment had attached earnings falling due within the 60 day period before sequestration, and we also sought views on whether the rule in *Johnson* v. *Cluny Estates Trustees* should apply, that is to say, whether the earnings arrestment should be rendered ineffectual only if it were still in operation at the date of sequestration. These issues were discussed on the premise that an earnings arrestment would have effect as a series of consecutive inchoate diligences attaching earnings on each pay day, but we now recommend[3] that the employer must pay the deductions made on each pay day forthwith to the creditor. Accordingly, the retention of the rule in *Cluny Estates Trustees* would mean that the trustee would not be able to claim any earnings arrested in the 60 day period, unless perhaps in the tiny proportion of cases where the sequestration was intimated to the employer before the arrested earnings were paid over to the creditor. We have referred elsewhere[4] to the conflicting policy considerations involved in deciding whether to retain or abandon the rule in *Cluny Estates Trustees* but these considerations relate mainly to arrestments of funds other than earnings. We do not think it would be appropriate to require a creditor who has received payment of arrested earnings to surrender the payment to the trustee for the benefit of the general body of creditors.

6.103 We **recommend:**

The debtor's sequestration should render an earnings arrestment ineffectual in a question with the trustee so far as the arrestment relates to earnings

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[1] 1957 S.C. 184.
[2] Proposition 40(1) (para. 4.14).
[3] Recommendation 6.12 (para. 6.91).
[4] See our Bankruptcy Report, para. 13.12.

payable after the date of sequestration, but it should not affect deductions made before that date
(Recommendation 6.15; clause 98(2).)

Termination of earnings arrestments

6.104 There are two aspects of termination of earnings arrestments; first, the arrestment ceasing to have effect as between debtor and creditor, and secondly, the employer ceasing to operate the arrestment. We deal with these aspects in turn.

6.105 Earlier in this Chapter we recommended that an earnings arrestment should cease to have effect as between debtor and creditor (or the debtor's trustee in sequestration) when the debt enforced by the arrestment has been satisfied[1] or when the debtor is sequestrated.[2] Other situations where the earnings arrestment should cease to have effect include recall of the arrestment by the court, abandonment of the arrestment by the creditor, the debt becoming unenforceable by diligence and the debtor ceasing to be employed. Although the last-mentioned situation may seem self-evident, employers involved in arrestment of earnings would, we think, welcome an express rule on cessation of employment so that they need not retain an earnings arrestment against the unlikely event of the debtor becoming re-employed later.

6.106 Regarding termination as between debtor and employer, we consider that it would place an unfair burden on employers to require them to cease operating an earnings arrestment as soon as they become aware that it has ceased to have effect as between debtor and creditor. Employers should not be placed in a position of having to judge whether the earnings arrestment had in fact ceased to have effect because they might have to make enquiries or seek confirmation of statements made to them before they felt they could safely stop deducting. In order to remove this burden we consider that an employer should be entitled, but not bound, to continue operating an earnings arrestment until intimation in prescribed form is received of the fact of the arrestment ceasing to have effect or until the debtor ceases employment. It would be too rigid to impose a statutory duty on employers to continue operating until intimation. For example, an employer may calculate from the amounts deducted from the debtor's pay and knowledge of the amount of the debt that the debt has been satisfied. In such a case the employer should be entitled, but not bound, to cease deducting without waiting for the creditor to intimate.

6.107 If intimation is necessary who is to intimate? Where the court recalls the earnings arrestment we think that the sheriff clerk should be required to intimate the recall order to the employer, the debtor and the arresting creditor.[3] This would ensure that the employer is promptly notified. Where the debtor is sequestrated intimation should be capable of being given by any

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[1]Recommendation 6.8 (para. 6.66).

[2]Recommendation 6.15 (para. 6.103).

[3]We have already recommended in the case of recall on the granting of a time to pay order that intimation should be by the sheriff clerk and by the administrator on the coming into force of a debt arrangement scheme; see Chapters 3 and 4 respectively.

person. Although we envisage that the trustee in sequestration[1] would normally be the person to intimate to the employer, the arresting creditor or other creditors or even the debtor should be able to bring the sequestration to the employer's notice.

6.108 In the case of satisfaction of the debt or the debt becoming unenforceable by diligence, the creditor should be under a duty to intimate this fact to the employer as soon as reasonably practicable so that the employer ceases making deductions. It would place too great a responsibility on employers to require them to keep a running total of amounts remitted so that they could calculate for themselves when the debt was satisfied. Furthermore, where the creditor has received payments to account of the debt outwith the arrestment since it was laid on, the employer could not calculate when the debt was satisfied. The creditor should also intimate to the employer as soon as reasonably practicable that the debt has become unenforceable by diligence.

6.109 An employer who failed to cease making deductions from a debtor's pay after intimation by the creditor would be in breach of contract and could be sued by the debtor for the amount of the deductions wrongly made. But we have not found it easy to devise an appropriate sanction to enforce the duty of the creditor to intimate to the employer the satisfaction of the debt or its unenforceability by diligence. Intimation by the creditor is necessary if earnings arrestments are to work properly; in the absence of intimation an employer may go on deducting and the creditor go on receiving sums under an earnings arrestment long after it should have stopped because the fact of satisfaction or unenforceability was known only to the creditor. The problem is that the creditor has no interest to intimate, while the existing civil remedies based on unjust enrichment and damages for wrongful diligence would merely result in the creditor having to repay without further penalty any deductions received under the arrestment after it had ceased to have effect in law. We do not think that creditors should be subjected to criminal penalties (fines or imprisonment) for failure to carry out their duties in connection with earnings arrestments; and since the creditor's duty of intimation does not stem from a court order, contempt of court cannot be invoked as a sanction to enforce it. We have concluded that the court should have power, on application by a debtor, to order the creditor to pay to the debtor a sum not exceeding twice the amount the creditor received under the arrestment after it ceased to have effect with interest at the normal decree rate.[2] A discretionary penalty seems appropriate since the degree of fault in failing to intimate as soon as reasonably practicable may range from forgetfulness to deliberately ignoring the duty. As well as a sanction to enforce the creditor's duty the penalty may be seen as a kind of solatium for wrongful diligence. This penalty would be over and above the creditor's common law obligation to repay the amounts received after the arrestment ceased to have effect with interest.

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[1]Under the Bankruptcy (Scotland) Bill 1984, clauses 13 and 24, there will always be a trustee, interim or permanent, appointed on every sequestrated estate.

[2]This rate is currently 12%. R.C. 66 (Court of Session decrees); Sheriff Courts (Scotland) Extracts Act 1892, s. 9 (sheriff court decrees).

6.110 We **recommend:**

(1) In addition to an earnings arrestment ceasing to have effect on the debtor's sequestration, it should cease to have effect as between debtor and creditor when:
   (*a*) the debt due has been satisfied; or
   (*b*) the debt due becomes unenforceable by diligence; or
   (*c*) the creditor abandons the arrestment; or
   (*d*) the arrestment is recalled by the sheriff.

(2) The clerk of the court should intimate in prescribed form to the employer, debtor and creditor the making of an order recalling an earnings arrestment.

(3) The creditor should be under a duty of intimating in prescribed form to the employer as soon as reasonably practicable the fact that the debt has been satisfied or has become unenforceable by diligence. Sums received by the creditor after the debt has been satisfied or has become unenforceable by diligence should be recoverable by the debtor with interest at the rate normally applicable to decrees from the date of receipt to the date of payment.

(4) The employer should be entitled, but not bound, to continue to operate an earnings arrestment until receiving intimation in prescribed form that the arrestment has ceased to have effect or until the debtor ceases to be employed.

(5) Where the sheriff is satisfied, on an application by a debtor, that the creditor failed to intimate as soon as reasonably practicable satisfaction of the debt or its unenforceability by diligence, the sheriff may order the creditor to pay the debtor a sum not exceeding twice that recoverable by the debtor in terms of paragraph (3) above.
(Recommendation 6.16; clauses 75(2), (5), (6) and (7), 78(1) and 95(5)(*a*).)

Prescription of earnings arrestments

6.111 Section 22 of the Debtors (Scotland) Act 1838 provides:

> "All arrestments shall hereafter prescribe in three years instead of five; and arrestments which shall be used upon a future or contingent debt shall prescribe in three years from the time when the debt shall become due and the contingency be purified."

There are difficulties in construing this section. In *Jameson* v. *Sharp*[1] the arrestment of a vested interest in a trust was held to have prescribed three years after the arrestment and the provisions of the section as to the time when prescription begins to run on "future" debts was ignored. On the basis of this decision, it has been suggested that "future" is used in the section to mean "contingent".[2] Section 22 is of little importance in relation to arrestments of wages and salary under the present law. It would be inappropriate to apply this provision to earnings arrestments for these remain effective as long as the debt is unpaid and the employer is required to pay over the arrested sums to the creditor without the need for any furthcoming. Moreover, we recommend

[1](1887) 14 R. 643.
[2]Wilson, *The Law of Scotland Relating to Debt* (1982) p.13.

above[1] that earnings arrestments should not be competent to enforce future or contingent debts.

6.112 We **recommend:**

Section 22 of the Debtors (Scotland) Act 1838 (which deals with prescription of arrestments) should not apply to earnings arrestments.
(Recommendation 6.17; Schedule 7, paragraph 2.)

Procedural aspects

Mode of service on employer

6.113 An arrestment to enforce a sheriff court summary cause decree may be served on the employer by registered or recorded delivery service or at the creditor's option by what may be conveniently called "hand service".[2] By "hand service" (a non-technical term) we mean personal service or one of its three substitutes: service on an employee or inmate; letter-box or "keyhole" service; or "affixing" service. The C.R.U. Arrestment Survey[3] suggests that most schedules of arrestments of earnings, including summary cause arrestments, are executed by hand service though some employers with places of business away from the main centres of population receive arrestments by recorded delivery. A schedule of arrestment to enforce a sheriff's ordinary court decree must be served by hand. In all sheriff court arrestments served otherwise than by post or personally, a copy of the schedule of arrestment must also be sent by registered or recorded delivery letter to the arrestee.[4] Schedules of arrestment proceeding on Court of Session decrees can only be served by hand but the rule requiring postal copies does not apply.

6.114 The McKechnie Report in 1958 recommended that "service of arrestments by registered post should be made competent but that . . . service by an officer should be retained as a competent alternative to postal service, the additional expense being recoverable only when it can be shown that such service was expedient in the interests of justice."[5] The McKechnie Report however was considering arrestments of all types and not merely arrestments of earnings. In the case of earnings arrestments, we think that questions of urgency will not arise sufficiently frequently to require that hand service should be competent in the first instance.

6.115 As the C.R.U. Arrestment Survey discloses,[6] the main problem in this area is how to direct an earnings arrestment schedule to the department or person responsible for administering arrestments when the internal structure of organisations and their methods of handling pay and arrestments vary greatly from employer to employer. We doubt whether hand service makes it any more likely than postal service that the proper person will receive the

[1]Recommendation 6.5 (para. 6.51).

[2]Execution of Diligence (Scotland) Act 1926, s. 2(1)(*a*) as amended by the Sheriff Courts (Scotland) Act 1971, Sched. 1.

[3]Para. 17.

[4]Ordinary Cause Rules, rule 111. There are doubts whether personal service on a company is competent and the safest course is to serve a post copy of sheriff court arrestments in all cases of hand service on companies.

[5]Para. 148.

[6]Paras. 11–4, 17–22; and see para. 6.92 above.

schedule of earnings arrestment timeously. Moreover, such schedules should be treated as confidential, and we think that postal service would normally be as effective as hand service in maintaining confidentiality. Registered/recorded delivery service might be even more effective in these respects if (in addition to the note on the envelope directing the Post Office to return to the sender where delivery of the letter cannot be made), the envelope were clearly marked "Arrestment of earnings" to warn the employer.

6.116 On consultation there was support for a proposal[1] that a witness should not be required to the service of an earnings arrestment. We also think that provision should be made determining priority as between earnings arrestments received by post on the same date. In the case of ordinary arrestments priority is determined by the time of service[2] and we would adopt that rule for earnings arrestments.

6.117 We **recommend:**

(1) The normal mode of service of all schedules of earnings arrestment should be by recorded delivery or registered letter (which at present is competent only in the case of arrestment on sheriff court summary cause decrees).

(2) It should be provided by act of sederunt that the envelope containing a schedule of earnings arrestment should be clearly marked "Arrestment of earnings" in addition to the direction to the Post Office to return undelivered letters to the sender.

(3) Hand service of an earnings arrestment schedule should be used only if the registered or recorded delivery letter cannot be delivered.

(4) A witness should not be required to the service of an earnings arrestment schedule.

(5) Where an employer receives two or more schedules of earnings arrestment relating to the same debtor on the same date effect should be given to the schedule received first if the employer is aware of the different times of receipt, otherwise the employer may choose which schedule to give effect to.

(Recommendation 6.18; clauses 86(3) and 96(2).)

Intimation to debtor

6.118 Clearly, if the debtor's right to challenge an earnings arrestment[3] is to be of value, the execution of the arrestment must be brought to his or her attention. At present, arrestments of wages are usually intimated by the employer to the debtor,[4] but there is no requirement that it be intimated by the creditor to the debtor. Officers of court serving arrestments by hand do not, for understandable and proper reasons, ask to meet the debtor concerned.[5] The longer duration and greater complications involved in earnings arrestments suggest that the laying of such an arrestment should be intimated to the

[1]Consultative Memorandum No. 49, Proposition 10(3) (para. 2.39).
[2]Graham Stewart, pp. 137–8.
[3]See Recommendation 6.12 (para. 6.91).
[4]Edinburgh University Debtors Survey, para. 6.3.
[5]C.R.U. Arrestment Survey, para. 37.

debtor. We think that the extra cost involved would be justified by these considerations.

6.119 We **recommend:**

The officer of court serving an earnings arrestment schedule on the debtor's employer should, if reasonably practicable, at the same time serve a copy of the schedule on the debtor by registered or recorded delivery letter. Only if service cannot be effected by this means should hand service be used. Failure to serve a copy should not affect the validity of service of the arrestment schedule.
(Recommendation 6.19; clause 96(1) and (2).)

Modernisation of forms and guidance for employers

6.120 The forms of schedule of arrestment and the officer's certificate of service of the arrestment are regulated by the common law and practice. Criticisms of the forms have been made from time to time.[1] The McKechnie Report observed that arrestees often do not appreciate the import of the schedule and recommended that there should be a standard form of arrestment containing an explanatory note with information to the arrestee as to its effect and the obligations under it.[2] In Consultative Memorandum No. 49 we proposed[3] that a modernised form of schedule of earnings arrestment should be prescribed by act of sederunt and that an explanatory booklet should be published by H.M. Stationery Office for the guidance of employers in operating earnings arrestments. The schedule of earnings arrestment should also draw attention to this booklet.

6.121 All those who commented agreed with the need for modernised prescribed forms. Two bodies however suggested that it would be more useful, particularly to small employers, if the directions for operating earnings arrestments were set out in the schedule of arrestment or in a form sent with the schedule. Small employers might be unable to obtain a booklet in time to process the occasional earnings arrestment. The C.R.U. Arrestment Survey[4] tends to support this argument: small employers, who received arrestments infrequently, often relied on the printed notes which generally appear on schedules of arrestment in common form. While there may be a need for an explanatory booklet as well, we think that the schedule of earnings arrestment itself should contain notes for the guidance of employers. Our recommendation that the deductions in the case of weekly or monthly earnings should be ascertained by reference to statutory tables[5] should simplify the employers' task in the vast majority of cases. The statutory tables should be part of the schedule of arrestment, together with such further information and guidance as is thought appropriate.

6.122 We **recommend:**

Modern forms of schedule of earnings arrestment and the officer's certificate

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[1]C.R.U. Arrestment Survey, para. 22.
[2]Para. 153.
[3]Proposition 12 (para. 2.49).
[4]Para. 22.
[5]Recommendation 6.9 (para. 6.76).

of service of the earnings arrestment should be prescribed by act of sederunt. The statutory deduction tables, together with such further information as is considered appropriate for the guidance of employers, should be included in the prescribed form of schedule.
(Recommendation 6.20; clause 75(2)(*a*).)

Identification of debtor

6.123 Employers, especially large organisations, sometimes have difficulty in identifying the employee to whom an arrestment applies, for example where two employees have the same name, or where there is a discrepancy between the debtor's address shown in the schedule and the employer's records.[1] The McKechnie Report recommended that "the arresting creditor should be required to submit to the arrestee sufficiently detailed particulars of the debtor to enable the arrestee, e.g. the National Coal Board, readily to identify the employee in question".[2] We have sympathy with this proposal but do not think that fuller and better particulars can be inserted in the schedule of earnings arrestment. We think that the employer will usually be in a better position to ascertain the relevant information than is the creditor or officer, and that creditors or officers will give such aid in identification as they can to employers since they have an interest to do so. We conclude therefore that it would be impractical to require that a schedule of earnings arrestment should specify sufficiently detailed particulars of the debtor over and above the name and address to enable the employer readily to identify in every case the debtor to whom the schedule applies. This conclusion was supported by those who commented on a proposal to that effect in Consultative Memorandum No. 49.[3]

Employer's fee for operating

6.124 The employer will be put to a certain amount of trouble and expense in dealing with an earnings arrestment. The C.R.U. Arrestment Survey[4] discloses that some employers deduct a fee when operating an arrestment of wages. This fee is deducted from the sums remitted to the creditor and so is ultimately borne by the debtor. We proposed in Consultative Memorandum No. 49 that, as in England and Wales, the employer should be entitled to a fee chargeable directly against the debtor as a contribution towards expenses.[5] A realistic fee would probably be too high,[6] and we suggested a flat rate fee of 50p[7] since the work involved would not vary in proportion to the amounts deducted. Those who commented agreed that a fee should be chargeable and most agreed with our suggestion of 50p. Those who disagreed with that sum suggested sums ranging from 25p to £1.

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[1]See C.R.U. Arrestment Survey, para. 21.
[2]Para. 154.
[3]Proposition 13(1) (para. 2.50).
[4]Para. 32.
[5]Proposition 20 (para. 2.111).
[6]C.R.U. Arrestment Survey, para. 32.
[7]The same fee is chargeable by employers in England and Wales on each occasion on which a deduction and remittance is made under an attachment of earnings order. Attachment of Earnings Act 1971, s. 7(4) and Attachment of Earnings (Employer's Deduction) Order 1980 (S.I. 1980/558).

6.125 We **recommend:**

An employer should be entitled to deduct a fee of 50p (or such other sum as may be prescribed) on each occasion on which a deduction is made from the debtor's pay in pursuance of an earnings arrestment. The fee should be deducted from the exempt earnings payable to the debtor rather than from the arrested sum payable to the creditor. The employer should give the debtor a statement of the fee deducted along with the statement showing deduction of the arrested sum.
(Recommendation 6.21; clause 97.)

Mode of payment by employer

6.126 In practice employers usually send the arrested proportion of pay to the creditors or their agents without furthcoming or mandate and even without a request, although strictly speaking they are not entitled to do so.[1] Sometimes the debtor will settle the debt and the employer will retain the arrested sum until evidence of payment is received from the debtor. In Consultative Memorandum No. 49 we raised the question of whether the sums attached by an earnings arrestment should be remitted directly to the creditor or whether they should be sent to the court for disbursement to the creditor. We concluded[2] that payment through the court would cause delay and have considerable staffing implications for the courts since thousands of arrestments are laid every year.[3] Payment through the court would not be necessary[4] in order to provide proper accounting between the debtor, creditor and employer since the debtor would have the deductions recorded in the pay slips,[5] the employer would have duplicate pay slips and a note of the remittances sent to the creditor, while the creditor would have a record of the remittances received. Those consulted agreed. One large employer suggested that the employer should be entitled to pay over the sums deducted at the end of the period of earnings arrestment rather than have to make periodic payments. This suggestion was however made against the background of an earnings arrestment enduring for a period of a few months only. Now that an earnings arrestment would in terms of our recommendations last until the debt is satisfied, it would be wrong to keep creditors out of their money for perhaps years rather than months, particularly bearing in mind that some creditors may themselves be persons of modest means, and that no interest will be payable to the creditor by virtue of that arrestment in respect of any time after it is laid on.

6.127 The employer must give the debtor an itemised pay statement every time a payment of wages or salary is made and this statement should include a statement of variable deductions from the gross wages or salary,[6] including presumably a sum deducted in implement of an arrestment. While most employers note the deduction on the statement of pay (often describing it as

[1]C.R.U. Arrestment Survey, para. 34.
[2]Proposition 19 (para. 2.109).
[3]The C.R.U. Diligence Survey estimated that about 6,000 first arrestments of wages were laid in 1978 (para. 3.6).
[4]In the case of conjoined arrestment orders (para. 6.223 and following) the involvement of the court is essential since staff there have to divide the deductions amongst the conjoined creditors.
[5]See next paragraph.
[6]Employment Protection (Consolidation) Act 1978, s. 8.

a "special deduction") it appears that some employers may not always comply with this statutory duty.[1] However, we envisage that employers would be notified by the explanatory notes annexed to the earnings arrestment schedule of their duty to inform the debtor of the deductions made on each pay day.

6.128 The employer should be entitled to remit the arrested sums to the creditor by some convenient mode. Employers should not be required, for example, to pay creditors in cash and the mode of payment should be such as to enable them to obtain a receipt. Having considered several different modes of payment, we conclude that employers should have statutory authority to pay by crossed cheque marked "a/c payee, not negotiable" rather than by cash. This raises the problem that, whereas most ordinary creditors have bank accounts, some ordinary creditors and many maintenance creditors do not. However, it is easy for a creditor to open an account with a joint stock bank, trustee savings bank or Post Office Girobank into which cheques could be paid. Post Office Girobank branches are widespread. Payment by this mode is necessary because payment by the two modes of payment through banks otherwise than by cheque—bank giro slips and "BACS transfer"[2]—do not have any mechanism for providing the payer with a receipt. By contrast, an unindorsed cheque which appears to have been paid by the banker on whom it is drawn is evidence of the receipt by the payee of the sum payable by the cheque.[3]

6.129 Although we are against payments in cash there is one situation where an arresting creditor should be entitled to cash payments. If a cheque from the employer of a remittance due under an earnings arrestment is dishonoured, the creditor should be entitled to demand payment of that remittance and subsequent remittances in cash.

6.130 We **recommend:**

(1) Sums deducted from the debtor's earnings by an employer in pursuance of an earnings arrestment should be paid forthwith direct to the arresting creditor and not through a court collection department.

(2) Without prejudice to any other mode of payment which may be agreed between the employer and the creditor who has laid an earnings arrestment, the employer should be entitled to remit the arrested sums to the creditor or other person specified in the arrestment schedule (*a*) by postal letter enclosing a crossed cheque payable to the creditor bearing on it the words "not negotiable; a/c payee" together with a written statement of the pay period to which the payment relates, or (*b*) by such other method as may be prescribed.

(3) If a cheque in terms of paragraph (2) above is dishonoured the creditor should be entitled to demand payment of that remittance and subsequent remittances in cash.

(Recommendation 6.22; clause 75(1) and (4).)

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[1]C.R.U. Arrestment Survey, para. 33; Edinburgh University Debtors Survey, para. 6.3.

[2]A "BACS transfer" is a system operated by Banking Automated Clearing System Ltd. whereby payments between banks are cleared by computers.

[3]Cheques Act 1957, s. 3.

Section D. Current maintenance arrestments

The need for current maintenance arrestments

6.131 Under the present law, whereas an ordinary creditor can only arrest just under one-half of the debtor's weekly earnings, a creditor enforcing "an alimentary allowance or payment" can arrest the whole of the maintenance debtor's earnings.[1] This is the only difference between arrestments securing maintenance and other arrestments under the existing law. There is no continuous diligence against earnings that is available for the recovery of maintenance. As we indicated in our Consultative Memorandum No. 49,[2] however, it is a feature of maintenance (aliment and periodical allowance on divorce) that the maintenance creditor will wish to recover current maintenance as well as arrears. We suggested that it should be competent for the maintenance creditor to use a continuous diligence against earnings to recover current maintenance instalments falling due while the diligence subsists as well as arrears.[3] This was generally agreed by those who commented.

6.132 We propose therefore that the main aim of reform should be to introduce an effective diligence for the recovery of *current* maintenance out of the maintenance debtor's earnings, (which form of diligence we call a "current maintenance arrestment"). We have reached this conclusion for two main reasons.

6.133 First, it seems to us better to prevent arrears arising at all by attaching current maintenance than to allow current maintenance to fall significantly into arrears and then to provide for their recovery after they have arisen. Aliment and periodical allowance differ from other civil judgment debts insofar as the court which made the award has, subject to some exceptions and qualifications discussed below,[4] already assessed the maintenance debtor's ability to pay when it quantified the amount of the periodic instalments. If the court has performed this function properly, then it would seem right in principle—other circumstances remaining unchanged—for the whole of the maintenance instalments to be deducted from earnings at source.

6.134 Second, if aliment and periodical allowance are to achieve their objective of maintaining or supporting the creditor, then the instalments must be paid punctually and this strongly suggests that the new form of arrestments of earnings should recover current maintenance rather than arrears. In saying this, we have not overlooked the fact that, if our Report on *Aliment and Financial Provision* is implemented, periodical allowance on divorce would be treated in law not simply as a maintenance or support obligation but as a means of giving effect to a number of principles insofar as those principles could not be given effect by payment of a capital sum or a transfer of property.[5] Nevertheless, the principles include the fair sharing of the economic burden of child-care, fair provision for adjustment from married status to independence

[1]Wages Arrestment Limitation (Scotland) Act 1870, s. 4: likewise at common law the partial exemption of personal earnings from arrestment does not apply to arrestments enforcing alimentary debt.

[2]Para. 3.7.

[3]*Idem.*, also Proposition 24(2) (para. 3.9.).

[4]See para. 6.145.

[5]Recommendations 31 and 39(*a*). See also Family Law (Scotland) Bill 1984, clause 13(2).

and the relief of grave financial hardship.[1] To a large extent therefore the object of periodical allowance would, as in the case of aliment, still be current support.

6.135 It could, we suppose, be argued that if arrears of maintenance are allowed to mount up over a period, the object of paying maintenance, the support of the creditor, must have been accomplished by other means. On this view, arrears of maintenance have lost their alimentary character, may be regarded as a kind of bonus not needed for the maintenance creditor's support, and should therefore not be recoverable. We think that this line of argument goes too far. The fact that the maintenance creditor has survived without receiving maintenance does not necessarily imply that the object of the maintenance has been accomplished by other means. The object of aliment is not to maintain the creditor at a bare subsistence level but at a level which is reasonable having regard to the parties' means and resources and their "station in life". Further, the maintenance creditor may have borrowed from relatives or friends to make good the shortfall in income. Moreover, to make arrears of maintenance irrecoverable would present a temptation to maintenance debtors to abscond or otherwise to evade payment for as long as possible. We consider therefore that a maintenance creditor should be entitled to recover maintenance arrears by an earnings arrestment as well as current maintenance by a current maintenance arrestment.

6.136 We have already recommended in our Report on *Aliment and Financial Provision*[2] that the court should have power to vary or recall a decree for aliment or periodical allowance with retrospective effect. Clearly, if this power were conferred on the courts, it could be used in some cases to reduce, or to discharge altogether, arrears which had accumulated. But that report contemplated that the power could only be exercised where there had been a change in circumstances since the original decree, and we do not think that the mere non-payment of maintenance and accumulation of arrears would be treated as a change of circumstances for this purpose. We revert to the enforceability of arrears below.[3]

6.137 The difficulties experienced by maintenance creditors in collecting and enforcing aliment and periodical allowance have been considered by the reports of previous official advisory bodies, notably the McKechnie and Finer Reports. The McKechnie Report, adopting a suggestion of the Morton Report,[4] recommended the introduction in Scotland of a system of collection of maintenance by the sheriff clerks on the model of the collecting officer system of the magistrates' courts in England and Wales.[5] The McKechnie Report recommended, however, that the sheriff clerks should not have enforcement functions such as the English collecting officers possess.[6] The

[1]Recommendations 31–36 (paras. 3.35 to 3.112). See also Family Law (Scotland) Bill 1984, clause 9.

[2]Recommendations 22 (paras. 2.113 to 2.117) and 39(*d*) (para. 3.125). See Family Law (Scotland) Bill 1984, clauses 5 and 13(4).

[3]Para. 6.167.

[4]Report of the Royal Commission on *Marriage and Divorce* (1956) Cmd. 9678, Recommendation 69 (Scottish) (para. 984).

[5]Recommendations 83–91.

[6]Recommendation 86 (paras. 286–8; 292).

Finer Report, whose terms of reference extended to Great Britain as a whole, placed much more emphasis than did the Morton or McKechnie Report on the role of supplementary benefit as the main support of maintenance creditors and on the difficulties arising from the interaction between the private law obligation of maintenance and the public law obligation of support administered by the Department of Health and Social Security through the supplementary benefit code. We revert to this topic at paragraph 6.139 below.

6.138 It seems to us that an effective system of current maintenance arrestments would go a considerable way towards solving some of the main problems identified by the McKechnie Report. As we have seen,[1] the McKechnie Committee rejected the idea of a continuous diligence against earnings and do not seem to have considered continuous diligence for maintenance debts alone. In their view, the main problem was how to improve the system of *collecting* current maintenance. They considered that a system of court collection of maintenance would have the following advantages:

(*a*) It would relieve maintenance creditors of the burden of collection which, in the McKechnie Committee's opinion, was too onerous for them.

(*b*) Collection of maintenance by the courts would be more efficient than the present system of collection by solicitors.[2]

Clearly, however, an effective system of current maintenance arrestments securing payment of current maintenance would relieve a maintenance creditor of the burden of collection for so long as the debtor remained in employment. Even if the McKechnie Committee were right in their view that court collection of maintenance would be more efficient than collection by solicitors, it would not of itself solve the problem of enforcement and would require a considerable increase in the staffing of the sheriff courts and in public expenditure, whereas current maintenance arrestments would have a relatively small impact on public expenditure and manpower. There would remain the problem that maintenance creditors often do not keep records of arrears. This problem should, however, become less important if, as its name implies, a current maintenance arrestment secures current maintenance. Although we recommend later[3] that default should be made a precondition of current maintenance arrestment, it should nevertheless not be necessary to ascertain the precise amount of arrears before a current maintenance arrestment was used. The onus would be on debtors to prove the absence of sufficient arrears to constitute default if they were to challenge the validity of a current maintenance arrestment. We think that current maintenance arrestments would help to solve many of the problems identified by the McKechnie Report at far less cost to the public purse than a system of collecting officers would entail. We concede that the effect would be to place the burden on employers but, if it

[1]See para. 6.12 above.

[2]The argument here was that collection of maintenance is largely a mechanical process best done in bulk by a large organisation using routine procedures. The present system of collection by solicitors involves a dispersal of effort which is uneconomic and the absence of routine procedures results in the work being tackled spasmodically. The largely routine work of collection does not require the skills of highly paid solicitors but should be undertaken by less well paid clerical staff.

[3]Recommendation 6.25 (para. 6.155).

be accepted that earnings arrestments should be competent, then it seems to us to make little difference to the employer that the debt being enforced is current maintenance rather than arrears.

Maintenance creditors and supplementary benefit

6.139 There remains the question of how current maintenance arrestments would affect the large number of maintenance creditors who receive supplementary benefit. If a maintenance creditor holding a decree for aliment claims benefit, the first duty of the Department of Health and Social Security is to meet her or his needs by way of supplementary benefit on the basis of assessed requirements and resources. The practice of the Department will however vary according to circumstances, namely whether the level of aliment awarded is insufficient (when taken with the claimant's other resources) to meet needs and whether the sums due are paid regularly, intermittently or never. Broadly speaking, if aliment is being paid regularly, it will be taken into account in fixing the level of benefit payable; and if default occurs in any week, additional benefit will be paid to make good the deficiency. If aliment is not being paid at all, benefit will be paid in full on the understanding that arrears subsequently paid will be remitted to the Department. If aliment is being paid intermittently, the Department will, depending on circumstances, either pay benefit in any week once it is satisfied that the aliment has not been paid, or pay benefit in full on a regular basis, on the understanding that arrears subsequently received will be remitted to the Department.

6.140 A maintenance creditor receiving supplementary benefit normally has little incentive to do diligence to enforce payment of maintenance since the amount recovered will simply reduce entitlement to benefit. The existing practice of the Department is to give maintenance creditors information about their rights to enforce their maintenance decrees but not to press them to take enforcement proceedings.[1] We have framed our recommendations regarding current maintenance arrestments on the basis that this policy will continue.

6.141 Having paid benefit, the Department may seek to recover the cost from the liable relative either by arranging a voluntary agreement or as a last resort by taking its own legal proceedings.[2] In certain cases the Department may, with the consent of the maintenance creditor, request the liable relative to pay aliment due under the decree to the Department rather than the maintenance creditor. The object of such arrangements "diverting" payment to the Department is to enable them to pay benefit in full to the maintenance creditor on a regular basis so that the creditor does not need to claim additional benefit on each occasion when the liable relative defaults. This is clearly to the advantage of the maintenance creditor. However, it involves the Department in additional administrative action; it can lead to difficulties in obtaining the debtor's consent; and, because it involves intervening in what the Finer Report called "a finely balanced situation",[3] it is restricted to cases where

[1]Leaflet B.O. 100 set out in Appendix 4 to the Supplementary Benefit Handbook (1977 edition).

[2]Supplementary Benefits Act 1976, ss. 18, 19 and 25. See Finer Report, paras. 4.462 to 4.465 for the practice of Department of Health and Social Security officials in arranging voluntary arrangements whereby liable relatives undertake to reimburse the Department for the cost of benefit.

[3]Para. 4.469.

payment is being made irregularly. We think that the system of current maintenance arrestments could be adapted so as to enable the Department to obtain diversion of alimentary payments without the debtor's consent. We revert to this at paragraph 6.199 below. Moreover, there seems no reason why orders for periodical payments in favour of the Department to enable them to recover the cost of benefit should not be enforceable by current maintenance arrestments since the level of payments is based on the maintenance debtor's ability to pay.[1]

6.142 Current maintenance arrestments would therefore assist supplementary benefit claimants who choose to enforce their maintenance decrees, and would also assist the Department to recover the cost of benefit either by facilitating diversion arrangements or by enabling the Department the more easily to enforce decrees in their own name for the reimbursement of the cost of benefit. It should be noted that, while the Finer Report emphasised the role of supplementary benefit as the first source of financial support for one parent families,[2] a substantial proportion of maintenance creditors are not dependent on supplementary benefit.

Impact on maintenance defaulters

6.143 Current maintenance arrestments would be likely to have different impacts on different categories of maintenance defaulter. Four categories of case can be distinguished.

6.144 First, there are those maintenance debtors who deliberately flout maintenance decrees, being able but unwilling to pay. Here, we think a diligence securing current maintenance would be useful.

6.145 Second, some maintenance debtors cannot afford to pay because the awards of maintenance were unrealistically high when made by the court. To the extent that this problem can be solved, the solution must lie, not in the reform of enforcement, but in reforms of the substantive law and of court procedure. We have made recommendations in our Report on *Aliment and Financial Provision* to reform and clarify the law in this area so as to provide assistance to the courts in tackling this problem. Where a maintenance debtor has two households to support on one wage, we have recommended that the court in awarding maintenance for the first household should be empowered to take into account the debtor's responsibilities to maintain dependent members of the second household whether or not they are legally entitled to aliment from the debtor.[3] We also considered the problem that the courts may award maintenance without sufficient information of the needs and resources of the parties and recommended that in addition to its existing powers (to defer decree until information is provided for example) the court should have power to order either party to furnish information about his or her financial

[1]Supplementary Benefits Act 1976, ss. 18 and 19: see para. 6.149 below.

[2]The Finer Report (para. 5.6, Table 5.1) pointed out that in Great Britain in 1971 supplementary benefit was the main (i.e. largest single) source of income of 200,000 fatherless families (one-half of the total number of all fatherless families other than widows' families). Maintenance was the main source of income of only 50,000 fatherless families.

[3]Recommendation 19 (para. 2.110): Recommendation 45 (para. 3.189). See also Family Law (Scotland) Bill 1984, clauses 4(3) and 11(6).

affairs (such as a pay slip) or those of a child.[1] To meet the case where the maintenance debtor does not defend the action though unable to pay the amount claimed, we recommended that the court should have power in all cases to award less than the amount claimed even if the claim is undisputed.[2] The courts at present naturally do their best to avoid making awards which turn out to be unrealistically high but we think the reforms suggested above would assist in preventing inflated awards.

6.146 Third, some maintenance debtors are able to pay a maintenance award at the time when the court order was made but become unable to do so through a change in circumstances. In this case, the debtor's remedy is to apply to the court to vary or recall the award, and in our Report on *Aliment and Financial Provision* we recommended that the court should be empowered to backdate the variation or recall.[3] Maintenance debtors may at present be reluctant to apply for a variation, but their reluctance might well be overcome given a system of current maintenance arrestment since the whole of the maintenance instalment would be deducted at source from their pay.

6.147 Fourth, some maintenance debtors are able and not unwilling to pay, but find the temptation to spend rather than pay too strong. Where such a maintenance debtor is not put under pressure to pay by the creditor, arrears can accumulate to the point where the debtor can no longer pay. We think that a system of current maintenance arrestments would be very useful in this category of case.

6.148 We **recommend:**

(1) A new form of continuous arrestment of earnings (called a current maintenance arrestment) should be introduced to facilitate the recovery of current maintenance (aliment and periodical allowance and analogous orders) as it falls due.

(2) Accordingly, a current maintenance arrestment, which should normally have effect until the obligation to pay maintenance ceases, should require the employer of a maintenance debtor, on every pay day, to deduct from the debtor's net earnings the whole of the maintenance due for the period since the last pay day and to pay it forthwith to the maintenance creditor, except to the extent that the earnings are exempt as recommended in Recommendation 6.27 below.
(Recommendation 6.23; clauses 72(2)(*b*) and 79(1) and (2).)

Types of decree enforceable

6.149 Clearly, the types of decree enforceable by current maintenance arrestment should include decrees awarding aliment whether under common law or statute, and periodical allowance on divorce. It should also include obligations to pay maintenance contained in bonds or agreements registered

[1]Recommendations 17(e) (para. 2.94), 24 (para. 2.133), and 40(*a*)(x) (para. 3.146). See also Family Law (Scotland) Bill 1984, clause 20.

[2]Recommendation 17(*d*) (para. 2.94): see also Family Law (Scotland) Bill 1984, clause 3(1)(*d*). In *Terry* v. *Murray* 1947 S.C. 10, it was held that in an undefended action of affiliation and aliment, the court has no discretion to award a lower amount than that claimed: the court does have such a power in divorce actions: *Gould* v. *Gould* 1966 S.C. 88.

[3]Paras. 2.113 to 2.116, Recommendation 22 (para. 2.117). Recommendation 39(*d*) (para. 3.125); Family Law (Scotland) Bill 1984, clauses 5 and 13(4).

for preservation and execution in the books of court. On the other hand, common law claims constituted by decree for reimbursement of aliment provided to the debtor or alimentary dependants of the debtor in the past, while treated as alimentary for some arrestment purposes at common law, should be enforceable by ordinary earnings arrestments rather than current maintenance arrestments. These are claims by third parties who are not in need of aliment themselves, and in such cases the decree is for payment in a lump sum rather than by weekly or other periodic amounts. There are a number of decrees or orders in favour of government departments or local authorities which require a liable relative to contribute towards the support of persons in receipt of supplementary benefit[1] or children in the care of a local authority.[2] While these decrees or orders are in the nature of claims by third parties not in need of aliment themselves for reimbursement of the cost of benefit or maintenance, the decrees or orders make provision for payment by weekly or other periodic amounts, based on the debtor's ability to pay: they resemble therefore alimentary decrees and orders and should be enforceable by current maintenance arrestments. In addition non-Scottish maintenance orders registered in Scotland for enforcement under statute would also be enforceable by current maintenance arrestment.[3]

6.150 Current maintenance arrestments are designed to collect maintenance due each week, month or other interval; the employer being required to deduct from the debtor's earnings each pay day the amount of maintenance due for the period since the last pay day. It would be possible to devise rules so as to permit the expenses of the action in which maintenance was awarded and other incidental lump sums such as inlying expenses in an action for affiliation and aliment to be recovered by a current maintenance arrestment. In our opinion the complexity of the rules which would be required and the additional burden they would impose on the employer would be out of all proportion to the advantage. Other diligences remain available to recover such lump sums connected with maintenance orders.

6.151 We **recommend:**

A current maintenance arrestment should be competent to enforce decrees for aliment and periodical allowance, alimentary bonds and agreements registered for execution, decrees and orders for periodical payments for the recovery of the cost of supplementary benefit or the cost of maintaining children in the care of local authorities and comparable non-Scottish maintenance orders registered in Scotland for enforcement. It should not however be competent to enforce by way of a current maintenance arrestment expenses awarded in connection with maintenance actions or

[1]Supplementary Benefits Act 1976, s. 18 (recovery of cost of benefit from liable relative); s. 19(8) (decrees of affiliation and aliment in favour of Secretary of State, and orders "diverting" payments under decrees of affiliation and aliment, to recover cost of benefit).

[2]Social Work (Scotland) Act 1968, s. 80(6) (contribution orders in respect of children in care, enforceable in like manner as decree for aliment); s. 81 (decrees of affiliation and aliment in favour of local authority, and orders "diverting" payments under decrees of affiliation and aliment, to recover contributions to the maintenance of children in care); Guardianship Act 1973, s. 11(3) (orders for payment by parents of weekly or periodic sums to local authority towards maintenance of child who is in care by virtue of a court order in custody proceedings between parents).

[3]See para. 6.206 below.

other lump sums such as inlying expenses awarded in an affiliation decree, or decrees constituting claims at common law by third parties for reimbursement of the cost of aliment provided to maintenance debtors or their alimentary dependants in the past.
(Recommendation 6.24; clauses 72(2)(*b*) and 74.)

Need for default after intimation

6.152 The question arises whether it should be a prior condition of a current maintenance arrestment that the maintenance debtor has defaulted in payment of one or more instalments of maintenance. Since the main object of the new form of diligence would be to recover current maintenance, default is not a logically necessary precondition and slightly complicates the law. Further, it may be argued that if default were not a precondition of a current maintenance arrestment, no stigma would attach to it. On the other hand, a good payer may justifiably resent the use of such a diligence, and it would be difficult to defend the imposition on employers of the relatively onerous duties which the diligence entails unless there had been default. Solicitors would find it difficult to advise their clients against doing diligence immediately the decree became enforceable and unnecessary current maintenance arrestments might be laid on. Moreover, if the amount payable was not a "small maintenance payment" for tax purposes, the debtor would be able to deduct income tax at the basic rate, but where a current maintenance arrestment had been served on the employer, then (as we recommend below),[1] the employer would deduct the whole of the maintenance instalment and pay it to the creditor without deducting tax and accounting for it to the Inland Revenue. Some debtors therefore would be in a worse financial position as a result of the use of current maintenance arrestments until their coding had been altered after review by their income tax inspector. We conclude that prior default should be a precondition of the first use of a current maintenance arrestment.

6.153 Debtors ought to be notified of the granting of the maintenance decree before a current maintenance arrestment is used against their earnings, otherwise they may inadvertently default in paying maintenance simply because they were not aware of the terms of the decree. In connection with summary cause instalment decrees it is at present a source of complaint that some debtors lose the right to pay by instalments because by the time they become aware that decree has been pronounced the dates for payment of the first two instalments have already passed.[2] Notification should be in a manner prescribed by act of sederunt, and should be made by the creditor rather than the clerk of court because the creditor needs to know whether notification was duly effected prior to default before a current maintenance arrestment can be instructed. Moreover, where the obligation is contained in an alimentary bond or agreement no court is involved so that notification would have to be made by the creditor in this case. The prescribed form of notification should warn the debtor of the consequences of default.

6.154 The prescribed form of notification could be served on the debtor at any time after the maintenance decree is granted or the alimentary bond is

[1]Recommendation 6.29 (para. 6.180).
[2]Edinburgh University Debtors Survey, para. 5.8.

registered for execution. The form should contain a warning to the debtor that if at the end of one month from the date of notification or at any time thereafter, there were at least three instalments of maintenance due and unpaid a current maintenance arrestment could be served. We adopt this formula for default because it seems to us to work equally well for the case where arrears have accrued (perhaps under a decree granted before the proposed legislation comes into force) and the case where the decree had just been granted. In the former case the debtor ought to be given a short period in which to pay off the arrears, and in order to avoid a current maintenance arrestment thereafter, the debtor would also require to keep up payments of current instalments. In the latter case the debtor is being given an opportunity to comply voluntarily with the decree before diligence is done. This formula would enable an arrestment to be laid against a debtor who had been in arrears a long time ago but who had paid regularly since then. But it would complicate the law to deal with the problem of "stale defaults". Moreover, the likelihood of a current maintenance arrestment being laid on in such situations is remote, since the maintenance creditor would not receive any advantage thereby.

6.155 We **recommend:**

(1) It should be competent to lay a current maintenance arrestment only if:

(*a*) the debtor had received notification in prescribed form of the maintenance decree setting out the maintenance obligation; and

(*b*) at any time after four weeks from the date of notification at least three instalments of maintenance are due and unpaid.

(2) The notification should warn the debtor of the consequences of default and should be made by, or on behalf of, the creditor rather than by the clerk of court.

(Recommendation 6.25; clause 82(1).)

Amount deductible under a current maintenance arrestment

The deduction formula

6.156 A number of detailed rules are required to enable employers to calculate the sums to be deducted under a current maintenance arrestment. These rules have to be kept as clear and simple as possible in order to ease the burden on employers.

6.157 An employer operating a current maintenance arrestment should be required to deduct from the debtor's net earnings every pay day the amount of maintenance due for the period from the previous pay day to the pay day in question. This formula avoids any difficulties arising from "mismatch" of the dates when maintenance is due (usually in advance) and earnings are due (usually in arrears). It also copes with bonuses, commission and other such extra payments whether paid at the same time as the regular earnings or separately. Finally under this formula there is no need to ascribe payments of earnings to particular periods in order to discover whether maintenance due for those periods has been paid out of previous earnings. Such ascription can present difficulties in the case of bonuses and similar extra payments.

6.158 The amount of maintenance due for the period from the previous pay day to the pay day on which the employer operates the current maintenance arrestment would be the number of days in the period multiplied by the daily rate of maintenance. Normally courts award maintenance at specified weekly or monthly rates, although quarterly, half-yearly or even annual rates are also possible.[1] In order to simplify the task of the employer we suggest that the conversion of the weekly, monthly or other rate contained in the maintenance decree into a daily rate should be done by the creditor or officer of court so that the schedule of arrestment served on the employer would set out simply the daily rate. Where the rate was weekly, the daily rate is arrived at by dividing that rate by seven. A monthly rate would be converted into a daily rate by multiplying by 12 and dividing by 365. This conversion avoids difficulties that might be caused due to every calendar month not containing the same number of days.

6.159 An example may help illustrate the mode of operation of a current maintenance arrestment. The maintenance decree is for £28 per week (£4 a day) and the debtor is normally paid weekly.

Date	Debtor's net earnings (£)	Amount deducted (£)
Friday 1st	100	28
Friday 8th	130	28
Friday 15th	70	28
Wednesday 20th	40 (overtime)	20
Friday 22nd	100	8

6.160 Deductions would be made from the employee's net earnings and we would adopt the same definition of net earnings as we recommend for earnings arrestments.[2] In terms of this definition net earnings are gross earnings less income tax and certain social security and superannuation scheme contributions.

6.161 We **recommend:**

(1) A current maintenance arrestment schedule should specify the rate of maintenance to be deducted by the employer from pay as a daily rate. The daily rate should be derived from the rate of maintenance expressed in the decree in accordance with rules set out in statute.

(2) The employer should be required to deduct every time earnings are paid to the debtor while the current maintenance arrestment is in operation, the maintenance due for the period from the day on which earnings were last paid to the debtor to the day in question. The maintenance due would be the number of days in the period multiplied by the daily rate.
(Recommendation 6.26; clauses 79(4) and (5) and 81(1).)

[1]Dobie, *Sheriff Court Styles*, p. 25.
[2]See Recommendation 6.9 at para. 6.76 above.

Exempt earnings

6.162 We recommended above[1] that no deductions should be made under an earnings arrestment if the debtor's earnings were below a certain "threshold", which we suggested should be £35 per week having regard to current supplementary benefit scale rates. We think that the same sum should apply to current maintenance arrestments. On a daily basis this sum amounts to £5 per day. The following example illustrates the operation of the exemption level.

6.163 A man liable to pay £50 per week aliment for his wife and three children normally earns £100 per week net. His employer deducts £50, remits it to the wife and pays the balance of £50 to the man. One week the man earns only £80 net. The employer cannot deduct the full £50 due that week since this would leave the man with only £30 which is below the £35 per week exemption level. Instead the employer pays the man his exempt earnings of £35 and remits the balance of £45 to the wife.

6.164 We have considered whether, in addition, a current maintenance arrestment should also attract an exemption of (say) one-half or one-third of the maintenance debtor's disposable earnings above the fixed sum threshold. The aim would be to protect maintenance debtors in cases where the maintenance award had become, through a material change in circumstances, unduly high. This, however, would be inconsistent with the principle, referred to above, that the court's award of maintenance is based on the debtor's ability to pay.[2] We think, therefore, that a maintenance debtor in such circumstances should apply to the court for a downward variation of the maintenance decree.

6.165 In order to take account of changes in the value of money we recommended that the figure of £35 per week (which represents the sum below which earnings are not arrestable by earnings arrestment) should be variable by the Secretary of State by regulations.[3] We would extend this recommendation together with our provisions setting out how such regulations should affect subsisting and future earnings arrestments[4] to current maintenance arrestments.

6.166 We **recommend:**

(1) The first £5 of a debtor's daily net earnings (as defined in Recommendation 6.9(2)) should be exempt from arrestment by a current maintenance arrestment, but no other exemption should apply.

(2) The sum mentioned above should be capable of being varied by regulations made by the Secretary of State by statutory instrument subject to negative resolution. The varied sum should apply to a current maintenance arrestment executed after the coming into force of the regulations and to a subsisting arrestment where either the creditor or the debtor has intimated in prescribed form the regulations to the employer. An employer should be entitled, but not bound, to give

[1]Recommendation 6.9 (para. 6.76) and Table A in Sched. 3 to the Bill annexed to this report.
[2]Para. 6.133.
[3]Recommendation 6.9 (para. 6.76).
[4]Recommendation 6.9 (para. 6.76).

effect to the regulations in connection with a subsisting arrestment on becoming aware of their existence otherwise than by intimation in prescribed form.
(Recommendation 6.27; clauses 68(1)(*b*), (3) and (4), and 95(1).)

Enforcement of arrears of maintenance

6.167 Since a current maintenance arrestment can only be executed where a maintenance debtor is in default, the creditor will be due arrears of maintenance even at the start of the process of enforcing current maintenance by means of the arrestment. These pre-service arrears may range from a few weeks arrears to arrears that have built up over several years. Arrears (post-service arrears) can also arise during the currency of an arrestment, for example if the debtor falls sick or the debtor's earnings are insufficient on one or more occasions to satisfy the maintenance instalments. We deal with the problem of pre-service arrears first since they are more likely to be substantial sums.

6.168 We have considered a number of solutions for recovery of pre-service arrears. First, it could be provided that such arrears could not be recoverable at all by diligence against earnings. We think however that this would be unfair to maintenance creditors and it would tempt maintenance debtors to evade payment for as long as possible.

6.169 A second solution would be to make a limited amount of arrears (say one month's) recoverable out of earnings by means of a current maintenance arrestment. These arrears could be paid off in small amounts over say the first year of operation. These small amounts would form an additional deduction made by the employer each pay day over and above the maintenance due. It is however difficult to justify securing an arbitrary amount of arrears, and the complications in the law and the additional burden placed on the employer in our opinion outweigh the advantages.

6.170 A variant of the second solution would be that the creditor would be entitled to apply to the court for an upward variation of the maintenance decree for a specified period, so that the pre-service arrears could be converted into additional current maintenance recoverable out of earnings by means of the current maintenance arrestment over that period. After careful consideration we have come to the view that the complications outweigh the advantages. The creditor would have to go to court while the employer would have to remember to change from the higher rate to the lower rate at the end of the specified period.

6.171 We have come to the conclusion that it is not possible to modify current maintenance arrestments so as to enable them to collect arrears of maintenance or other lump sums, as well as current maintenance, without making the legislation unduly complex and imposing undue burdens on those involved. A maintenance creditor wishing to recover arrears of maintenance while enforcing payment of maintenance by means of a current maintenance arrestment would therefore have to use other diligence to recover the arrears. The most attractive alternative diligence would probably be an earnings arrestment, and it might become the general practice for maintenance creditors

to lay an earnings arrestment for arrears and other sums[1] at the same time as laying a current maintenance arrestment.

6.172 We concede that allowing recovery of arrears by a concurrent earnings arrestment against the earnings of maintenance debtors may well result in an increase in the burdens placed on employers, since two arrestments might be served in most maintenance cases. Another disadvantage is that maintenance debtors would have deducted from their net earnings not only the maintenance due, but also the amount deductible under the earnings arrestment rules. Where the arrears and other sums included in the earnings arrestment were substantial, these extra deductions could last for many months or even years. We did consider prohibiting a maintenance creditor from enforcing payment of arrears of maintenance by way of an earnings arrestment while a current maintenance arrestment laid by that creditor was in operation. Such a prohibition might, however, effectively deny the creditor any chance of recovering arrears until the maintenance obligation ceased in those cases where the only assets readily attachable by diligence were earnings. Moreover, it is difficult to justify treating arrears of maintenance differently from any other debt which could be enforced by a concurrent earnings arrestment. If, as we recommend later,[2] employers should be required to operate a current maintenance arrestment and an earnings arrestment at the same time, this duty should not depend on the nature of the debt sought to be enforced by the earnings arrestment.

6.173 We turn now to post-service arrears—arrears which arise during the currency of a current maintenance arrestment because the debtor's earnings are from time to time insufficient to meet the maintenance due. With some hesitation we recommend the same solution as we put forward for pre-service arrears—that without prejudice to the use of other diligence including a concurrent earnings arrestment, arrears should not be recoverable by means of the current maintenance arrestment. We gave considerable thought to a scheme whereby the employer would carry forward post-service arrears from pay day to pay day and make additional deductions from later earnings where they were sufficient to meet such deductions as well as the current maintenance. Such a scheme would be particularly useful in the case of a debtor—such as a commission salesman—whose earnings fluctuate considerably. Collection of post-service arrears however would unduly complicate current maintenance arrestments, and the calculations and record keeping involved would impose what might be thought of as an unacceptable burden on employers. Moreover, in the case of two or more maintenance creditors sharing in a conjoined arrestment order, the rules on distribution of sums deducted from the debtor's earnings amongst the creditors would become almost impossibly difficult if arrears were included. With regret we have come to the conclusion that the additional difficulties that would be occasioned by inclusion of post-service arrears are not worth it in order to cater for a small number of cases. Where arrears arise because of fluctuations in the debtor's earnings, arrestment of the debtor's bank account or an earnings arrestment may prove effective

[1]These could include the expenses of the maintenance action (see para. 6.175 below) and the expenses of serving the current maintenance arrestment schedule (see para. 9.58 below) as neither of these are recoverable by the current maintenance arrestment.

[2]Recommendation 6.45 (para. 6.249).

diligences to recover them. Where post-service arrears arise regularly and accumulate the debtor should consider applying to the court for a downward variation of the maintenance obligation since a rate of maintenance which the debtor consistently cannot meet would seem to be too high.

6.174 Under the present law, interest on arrears of maintenance may be recovered by an arrestment although we understand that this is very rarely done. Because maintenance periods and pay days will often not coincide, there may be a small amount of arrears on which interest could run in strict law in the case of many current maintenance arrestments. Again where the earnings are insufficient to meet the maintenance due for a period, arrears will accrue and interest thereon may begin to run. To avoid these complications we think that interest should not accrue on arrears of maintenance which may arise during the currency of a current maintenance arrestment. Where arrears have accumulated before the current maintenance arrestment was laid, the maintenance creditor would be entitled to recover interest on the arrears by an earnings arrestment.

6.175 A maintenance creditor might wish to enforce payment of the expenses of the action in which maintenance was awarded as well as arrears of maintenance and current maintenance. We argue in paragraph 6.172 above that there should be no distinction between arrears of maintenance and an ordinary debt unconnected with maintenance for the purpose of allowing enforcement by an earnings arrestment concurrently with a current maintenance arrestment. The same argument applies with equal force to the use of an earnings arrestment to enforce payment of expenses. Furthermore, prohibition of a concurrent earnings arrestment for expenses could lead to the Legal Aid fund having difficulty in recovering them. Where a maintenance creditor receives legal aid for the maintenance action the Law Society of Scotland is entitled to recover unpaid expenses awarded against the maintenance debtor.[1] We think they should not be barred from recovering these by way of earnings arrestment merely because the maintenance creditor is recovering current maintenance by means of a current maintenance arrestment. Yet different rules for legally aided and non-legally aided creditors would create an unjustifiable anomaly.

6.176 We **recommend:**

(1) Arrears of maintenance (whether arising before or after the execution of a current maintenance arrestment) should not be recoverable by a current maintenance arrestment, but the maintenance creditor may enforce payment of the arrears by other diligence, including an earnings arrestment operated concurrently against the same earnings.

(2) Interest should not run on any arrears of maintenance which may arise during the subsistence of a current maintenance arrestment. (Recommendation 6.28; clauses 72(2)(*a*), 79(7) and 85(1).)

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[1]Rule 6(1), Act of Sederunt (Legal Aid Rules) 1958, (S.I. 1958/1872).

Payment without deduction of tax

6.177 Aliment and periodical allowance due under decrees are payable under deduction of tax at the basic rate[1] unless they are "small maintenance payments" in the statutory sense.[2] The current statutory limits are payments to a spouse or ex-spouse of £33 per week or £143 per month; to a person under 21 for his or her own benefit of £33 per week or £143 per month; or to any person for the benefit of a person under 21 of £18 per week or £78 per month.[3] Payments under maintenance bonds or agreements are paid under deduction of tax whatever their amounts. Where tax is deducted, the maintenance debtor must on request furnish the creditor with a certificate of deduction of tax.[4]

6.178 The majority of payments of aliment and periodical allowance are "small maintenance payments" in the statutory sense. In 1980, the small maintenance payment limits were uprated from £21 to £33 per week for a spouse or an ex-spouse and from £12 to £18 for children under 21[5] and it has been estimated that in divorce actions in the same year, the average amount of periodical allowance awarded to ex-spouses was £18 per week, and the average amount of aliment awarded for a child was £9.30.[6]

6.179 We think that employers should not be required to ascertain whether the maintenance is paid gross or under deduction of tax or what the current statutory small maintenance payments are. If this information were given in the schedule of arrestment, it would become out of date as and when the statutory limits for small maintenance payments were uprated, and in addition the employer would have to change the deduction with every change in the basic rate of tax. Presumably an employer deducting tax from the remittances to the creditor would also have to furnish, on request, a certificate of deduction of tax and account for the tax to the Inland Revenue. If on the other hand the maintenance deducted by the employer were paid gross the Inland Revenue could still claim tax from the maintenance creditor. We suggest that the complications involved in requiring the employer to deduct tax would impose an exessive burden on employers.

6.180 We **recommend:**

An employer operating a current maintenance arrestment should not be required to deduct tax from payments to the maintenance creditor notwithstanding that the maintenance payments secured by the current maintenance arrestment are not "small maintenance payments" for the purposes of the income tax code.
(Recommendation 6.29; clause 79(5)(*a*).)

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[1]Income and Corporation Taxes Act 1970, ss. 52 and 53; (which refer to "annual payments" but this expression is deemed to include aliment and periodical allowance).

[2]*Ibid.*, s. 65 as amended by the Finance Act 1982, s. 33.

[3]*Idem.* See *Finnie* v. *Finnie* 1984 S.L.T. 109 and 439.

[4]*Ibid.*, s. 55(1): the duty may be enforced at the instance of the creditor, s. 55(2). The certificate shows the gross amount of the payment, the amount of tax deducted and the actual amount paid.

[5]Income Tax (Small Maintenance Payments) Order 1980 (S.I. 1980/951).

[6]B. Doig, *The Nature and Scale of Aliment and Financial Provision on Divorce in Scotland* (1982) Scottish Office Central Research Unit Papers paras. 6.13 and 6.17.

Recall or challenge of current maintenance arrestments

6.181 We have recommended that the employer or debtor should be entitled to apply to the court for the recall of an earnings arrestment on the ground that it is invalid or has ceased to have effect and that the employer, debtor or creditor should be entitled to apply for resolution of a dispute about the way in which the arrestment is being operated.[1] We would extend this recommendation to current maintenance arrestments.

6.182 The debtor should in our opinion also be entitled to have a current maintenance arrestment recalled if the court is satisfied that the debtor is unlikely to default again in paying maintenance. While we do not think this power would be exercised very often, it could be of use where the debtor obtains a better job which enables him or her to meet the maintenance obligation more easily and to secure the payment of current maintenance by way of a banker's standing order.

6.183 We **recommend:**

> The court should have the same powers to recall, or resolve a dispute about the operation of, a current maintenance arrestment and to make consequential orders for payment as it has in connection with an earnings arrestment in terms of Recommendation 6.12 above. In addition the court should, on application by the debtor, have power to recall a current maintenance arrestment if it is satisfied that the debtor is unlikely to default again in paying maintenance.
> (Recommendation 6.30; clause 83(1) to (3).)

Duration of current maintenance arrestments

6.184 In order to avoid the need for repeat arrestments, we recommend above[2] that an earning arrestment should normally endure until the debt due has been discharged. We would adopt the same approach to current maintenance arrestments—that the arrestment should continue to have effect for so long as the obligation to pay maintenance continues to exist or be enforceable by diligence. In reaching this conclusion, we have been influenced by the recommendation, which we consider later,[3] that in a competition between an earnings arrestment for an ordinary debt and a current maintenance arrestment the ordinary creditor's earnings arrestment would not be "shut out" indefinitely by the current maintenance arrestment and, indeed, if there were insufficient income to meet both arrestments, the ordinary creditor's earnings arrestment would have priority.

6.185 When dealing with earnings arrestments we made recommendations relating to termination of the arrestment by various events (such as satisfaction of the debt) and termination of the employer's duty to operate the earnings arrestment. Briefly, satisfaction of the debt, the debt becoming unenforceable by diligence, abandonment of the arrestment by the creditor, sequestration of the debtor, recall of the arrestment, and the debtor ceasing employment would terminate the arrestment; but the employer would be entitled, but not

[1]Recommendation 6.12 (para. 6.91).
[2]Recommendation 6.8 (para. 6.66).
[3]Paras. 6.246 to 6.249.

bound, to continue operating the arrestment until proper notification of the termination was received. We would extend these recommendations to current maintenance arrestments, but there are several aspects of current maintenance arrestments which have no parallels in earnings arrestments and which we now discuss.

6.186 Unlike a decree for payment of a debt, a maintenance decree may be varied, superseded or recalled by a subsequent order. For example a decree for periodical allowance in favour of an ex-wife may be varied on a material change in her, or her ex-husband's, circumstances; a decree for aliment may be superseded by a decree for periodical allowance; or an award of aliment *pendente lite* may lapse with the dismissal of the action. A maintenance obligation may also cease on the occurrence of certain events such as death of the maintenance creditor, remarriage of the person in receipt of periodical allowance, or a child to (or for) whom aliment was awarded in divorce proceedings attaining the age at which the award of aliment ceases (currently 16).

6.187 A current maintenance arrestment against a debtor's earnings may enforce more than one maintenance obligation due by that debtor provided the payee in each obligation is the same person[1]—a periodical allowance payable to an ex-wife and aliment payable to her on behalf of the children, for example. If one of the obligations is varied, superseded, recalled or ceases, the current maintenance arrestment enforcing it and the other obligations should cease to have effect in its entirety. It would be possible to provide that the unaltered obligation should continue to be enforceable by the subsisting current maintenance arrestment with the creditor notifying the employer of the change in the varied or cancelled obligation. But this introduces another entity—a notice of variation—and makes for complexity. In our opinion the simplest solution is that on any change in the rates of maintenance payable in terms of the obligations enforced by a current maintenance arrestment the subsisting arrestment should cease to have effect and the creditor should be entitled to serve a new arrestment schedule setting out the new aggregate rate of maintenance to be enforced.

6.188 The employer should be entitled, but not bound, to continue operating a current maintenance arrestment enforcing a maintenance obligation until notification in prescribed form is received of the arrestment ceasing by virtue of the obligation having been varied, recalled, superseded or ceasing. The proper person to notify the employer is, in our view, the creditor because in many cases the facts will be within the creditor's knowledge and a new current maintenance arrestment will have to be served to give effect to the varied obligation. If the creditor fails as soon as reasonably practicable to notify the employer who as a result continues to operate the current maintenance arrestment, the debtor could apply to the court for recall of the arrestment on the ground that it has ceased to have effect as between debtor and creditor. The creditor who receives payments as a result of the employer continuing to operate the arrestment is under a common law duty to repay them to the debtor. In addition, in line with our recommendation in the context of earnings

[1]See Recommendation 6.48 (para. 6.259).

arrestments,[1] we suggest that the court should have power, on application by the debtor, to order the creditor to pay to the debtor a sum not exceeding twice the amount of the payments received. An employer who, fails to cease making deductions from a debtor's pay after receiving notification by the creditor, would be in breach of contract and could be sued by the debtor for the amount of deductions wrongly made.

6.189 We **recommend:**

(1) A current maintenance arrestment should cease to have effect as between debtor and creditor when:

(*a*) the creditor abandons the arrestment; or

(*b*) the arrestment is recalled by an order of the court; or

(*c*) the debtor is sequestrated; or

(*d*) the obligation being enforced is varied, recalled, or superseded by a court order, ceases to be enforceable by diligence or otherwise ceases to be due, and where more than one obligation is being enforced by the current maintenance arrestment by the variation, recall, supersession, unenforceability, or cessation of any one of the obligations.

(2) The clerk of the court should intimate in prescribed form to the employer, debtor and creditor the making of an order recalling a current maintenance arrestment.

(3) An arresting creditor should be under a duty to intimate to the employer in prescribed form as soon as is reasonably practicable that the arrestment has ceased to have effect by virtue of a variation, recall, supersession, cessation of enforceability by diligence, or cessation of the obligation or one of the obligations being enforced by the arrestment. Any sum received by the creditor under the arrestment after the arrestment had ceased to have effect should be recoverable by the debtor with interest at the rate normally applicable to decrees from the date of receipt to the date of repayment.

(4) The employer should be entitled, but not bound, to continue to operate the current maintenance arrestment until notification in prescribed form that the arrestment has ceased to have effect is received or until the debtor ceases employment.

(5) Where the sheriff is satisfied, on an application by a debtor, that the creditor failed to intimate as soon as reasonably practicable that the arrestment had ceased to have effect by virtue of any of the circumstances in paragraph (3) above, the sheriff should have power to order the creditor to pay to the debtor a sum not exceeding twice the sum recoverable by the debtor from the creditor under paragraph (3) above. (Recommendation 6.31; clauses 83(1), (4), (5), (6), (7) and (8); 95(5) and 98(2).)

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[1]Recommendation 6.16 (para. 6.110).

Effect of new maintenance orders

6.190 A current maintenance arrestment is not to be competent unless and until the maintenance debtor has defaulted.[1] Where a maintenance decree which is being enforced by a current maintenance arrestment is varied or superseded by a new maintenance decree or has ceased to have effect in part, a new current maintenance arrestment schedule setting out the new daily rate of maintenance payable has to be served on the employer.[2] We do not think it would be either necessary or desirable for further default to be required before the varied decree, or the new decree, becomes enforceable by a new current maintenance arrestment. A maintenance debtor who has already defaulted might well default again under the varied decree, and we do not consider the debtor could justifiably feel aggrieved if default was not required whenever the decree is varied. From the standpoint of the employer, it seems better to allow continuity of deductions than to have a break in continuity whenever the decree is varied. A new requirement of default might discourage maintenance creditors from applying for a variation, to keep pace with inflation for example. The strongest case for requiring further default would be where a maintenance decree was varied so as to include a new alimentary creditor, for example where aliment for a child, on a change in custody, is ordered to be paid to a wife already receiving aliment under the decree. It might be thought that default in payments for the wife should not count as default in payments for the child. But, in our view, it would be impracticable, and of dubious value, to make an exception in such cases. We think therefore that further default should again become a necessary precondition of a current maintenance arrestment only where an existing current maintenance arrestment had ceased to operate, and where a reasonable period, which we suggest should be three months, has elapsed without a new current maintenance arrestment schedule being served.

6.191 Since current maintenance arrestments secure the maintenance at the level fixed for the time being in the decree, new maintenance orders superseding, or orders expressly varying or recalling, existing maintenance orders will immediately and directly affect any current maintenance arrestment securing the existing order as soon as the new order, or the variation or recall, comes into operation. At the present time the court may make several awards of maintenance within a short period affecting the same people. For example, on the breakdown of marriage, a wife may obtain first an interim order and then a "final" order for aliment for herself and the children in a sheriff court action; thereafter, she may obtain an interim order for aliment for herself and the children in a divorce action and then an order for periodical allowance and a "final" order for aliment for the children in the divorce decree. On each occasion, a new warrant for diligence for enforcement of the new order is issued.

6.192 We think that, in determining whether to make a new award, the court should be given information as to any current maintenance arrestment enforcing existing awards. This might prevent small and unnecessary changes in the existing rate of maintenance and therefore in the levels of deductions from earnings, and prevent unnecessary expense in intimating the termination

[1]Recommendation 6.25 (para. 6.155).
[2]See paras. 6.184 to 6.189 above.

of the old current maintenance arrestment and in serving a new current maintenance arrestment.

6.193 There remains the problem that, unless the court postpones the coming into operation of a decree varying an existing decree, or (as the case may be) a new decree superseding an existing decree, the employer will be deducting instalments at the rate specified in the original decree until intimation of the cessation of the old decree and service of a new current maintenance arrestment schedule, though the original decree which forms the warrant for diligence and the rate of maintenance specified in it have been superseded. Two different situations have to be distinguished, namely where the new decree varies or supersedes a decree for aliment or periodical allowance, and where a decree for aliment in favour of a spouse is superseded on divorce by a decree for periodical allowance payable to that spouse.

6.194 In the first type of case, delay may not matter greatly. The creditor would in practice delay until an extract of the new decree becomes available[1] so that the employer could be notified of the cessation of the original decree and served with a new schedule at the same time. The employer would continue deducting at the original rate until intimation and service, and under Recommendation 6.32 would not be liable for "wrongful" deductions. Any shortfall in deductions caused by the delay in intimation and service could be enforced by other diligence.[2] Any action by the maintenance debtor to recover sums wrongly deducted under the varied or superseded decree would be met by the creditor's counter-claim for sums under the varied decree. It might be thought that to require the court to postpone the coming into operation of the new decree would elevate the machinery of enforcement above the substantive law: if the court decides that a variation is just, it arguably ought to have immediate effect.

6.195 On the other hand, diligence is, as it ought to be, a matter of strict law, and the system should allow time for the maintenance creditor to intimate the change from the old rate of deductions to the new rate of deductions before that change takes place. We think therefore that when a decree for aliment or periodical allowance, which was being enforced by a current maintenance arrestment, is varied or superseded by a new court decree, the court should have an express statutory power to delay the coming into operation of the new decree to allow time for the employer to be informed, by service of an arrestment schedule, of the new rate of deductions.

6.196 In the second class of case, where a decree for periodical allowance on divorce supersedes a decree for aliment in favour of a spouse, the alimentary decree lapses immediately on divorce and it would be inappropriate to provide for an alimentary obligation to continue after divorce. There will be a time lag between the cessation of the alimentary obligation and the service of a new current maintenance arrestment requiring deductions of the periodical

[1]Extracts cannot normally be obtained until a certain period has elapsed since the decree was granted. This period is eight days for Court of Session decrees and 14 days for sheriff court decrees.

[2]In the event of the decree being varied downwards the debtor could recover the over-deductions by an action for payment against the creditor, but in many cases the debtor's claim would be compensated by arrears of maintenance owing.

allowance. This time lag is inevitable because of the delay in obtaining an extract decree of divorce containing the warrant for service of a new current maintenance arrestment, but would not in practice matter greatly. The spouse granted periodical allowance would intimate the termination of the alimentary decree to the employer and the debtor should have a similar right if the creditor failed to do so. A new current maintenance arrestment would be laid by the maintenance creditor after the decree had been extracted. As already mentioned default would not have to be established afresh. In many cases we would expect that the maintenance creditor would simply intimate the cessation of the aliment decree and serve a new arrestment schedule under the new decree for periodical allowance at the same time. Any claim for reimbursement of aliment overpaid by the debtor would normally be met by a counter-claim for unpaid periodical allowance by the creditor.

6.197 The new current maintenance arrestment should specify the date on which the relative maintenance decree varying or superseding the original decree takes effect. If the schedule was served before that date, the employer would (subject to one qualification) be required to comply with it as from the first pay day after that date. Thus, if a pay period straddled effective periods of successive current maintenance arrestments, the employer would not be required to apportion deductions as between the two diligences. The qualification to this rule would be that, as already recommended for earnings arrestments,[1] the employer would not be liable for not complying with the current maintenance arrestment within seven days after it was served.

6.198 We **recommend:**

(1) It should be provided by act of sederunt that in any action in which an application for aliment or periodical allowance is made, and in any application for variation of a decree for aliment or periodical allowance, the applicant should be required to furnish the court with such particulars within his or her knowledge as may be prescribed as to any existing maintenance decree against the other party to the application, and any existing current maintenance arrestment or earnings arrestment enforcing that decree.

(2) Where a maintenance decree, which was being enforced by a current maintenance arrestment, is varied, or superseded by a new maintenance decree, then:

(*a*) further default should not be a necessary prelude to enforcement, by a current maintenance arrestment, of the new decree within three months after the current maintenance arrestment enforcing the original decree had ceased to operate; and

(*b*) the court should have an express statutory power to delay the coming into operation of the new decree to allow time for intimation to the employer of the cessation of the original decree and service of a new current maintenance arrestment enforcing the varied or new decree. Where, however, a decree for aliment in favour of a spouse is superseded by an award of periodical allowance on divorce

[1]Recommendation 6.13 (para. 6.97).

in favour of that spouse, the court should not postpone the coming into operation of the decree for periodical allowance.

(3) Where a maintenance decree, which was being enforced by a current maintenance arrestment, ceases to be effective in part, further default should not be a necessary prelude to enforcement, by a new current maintenance arrestment, of the remaining obligation or obligations in the decree within three months after the current maintenance arrestment enforcing the whole decree ceased to have effect.

(4) Where a new current maintenance arrestment is served under a new maintenance order or a varied order before the date specified in that order, the employer should apply the new maintenance rate specified in the schedule as from the first pay day following that date. But the employer should not be liable for failing to comply with a current maintenance arrestment within a period of seven days after the date of the service of the arrestment schedule.
(Recommendation 6.32; clauses 82(3), 84 and 95(2).)

Diversion to the Department of Health and Social Security

6.199 We referred above[1] to the practice of the Department of Health and Social Security in arranging the diversion to itself of sums due to maintenance creditors under their decrees as reimbursement for the cost of supplementary benefit paid to them. We noted there that diversion arrangements (which benefit the maintenance creditors) are difficult to accomplish in Scotland at present because they require the debtor to agree to pay the maintenance to the Department instead of to the creditor. If an obligation to pay maintenance were being enforced by a current maintenance arrestment, diversion could be readily accomplished without the consent of the debtor, by the employer paying over the deductions to the Department instead of to the arresting maintenance creditor. Such an arrangement should require the creditor's consent, however, and should lapse on withdrawal of that consent or, since the purpose of diversion is reimbursement of benefit provided, if the creditor ceases to be in receipt of supplementary benefit.

6.200 We **recommend:**

(1) A maintenance creditor in receipt of supplementary benefit and current maintenance under a current maintenance arrestment or a conjoined arrestment order may authorise in writing the Department of Health and Social Security to receive sums payable under the arrestment or order. The Department should intimate the authorisation to the employer or the sheriff clerk as the case may be who should be bound thereafter to pay to the Department the sums due to the maintenance creditor.

(2) The authorisation may be withdrawn by the maintenance creditor and should lapse on the maintenance creditor ceasing to be in receipt of supplementary benefit. The Department should forthwith intimate the withdrawal or lapse of the authorisation to the employer or sheriff clerk.
(Recommendation 6.33; clause 94.)

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[1]Para. 6.141.

Application of certain earnings arrestment recommendations

6.201 Earlier in this Chapter we make recommendations dealing with the mode of service of earnings arrestments,[1] priority among earnings arrestments served postally on the same date,[2] intimation of service of an earnings arrestment on the employer to the debtor,[3] the time within which an employer is required to comply with an earnings arrestment,[4] the sanction against the employer for failure to comply with an earnings arrestment,[5] the form of an earnings arrestment,[6] the employer's fee for operating an earnings arrestment,[7] the mode of payment of sums deducted by virtue of an earnings arrestment,[8] the limitation of claims against the employer arising out of operation of an earnings arrestment,[9] and the prescription of arrestments.[10] We would extend all of these recommendations to current maintenance arrestments.

6.202 We **recommend:**

Recommendations 12(3), 13, 14, and 17 to 22 should apply to current maintenance arrestments as they apply to earnings arrestments. (Recommendation 6.34; clauses 79(6), 86(3), 95(2) to (4), 96(1) and (2) and 97 and Schedule 7, paragraph 2.)

Incoming non-Scottish maintenance orders

Preliminary

6.203 So far we have discussed earnings arrestments and current maintenance arrestments on the footing that the debt sought to be enforced was constituted by a decree from a Scottish court. We now turn to examine the situation where the debt is constituted by a foreign order registered for enforcement in Scotland. We confine our discussion of foreign orders to maintenance orders as the need for special provisions is by and large confined to them.

6.204 We expect that the use of the reformed diligences on non-Scottish orders enforceable in Scotland will not present undue difficulties, but special provisions will be necessary to ensure that the new system of current maintenance arrestments and earnings arrestments will operate satisfactorily in the case of non-Scottish maintenance orders registered in Scotland under the relevant statutory regimes. Five separate categories of such "incoming orders" have to be considered:

(i) maintenance orders of courts in England and Wales and in Northern Ireland registered in the sheriff courts in Scotland under Part II of the Maintenance Orders Act 1950;

(ii) maintenance orders made in certain "reciprocating countries" (mainly in the Commonwealth) being either provisional orders confirmed by

[1]Recommendation 6.18 (para. 6.117).
[2]*Ibid.*
[3]Recommendation 6.19 (para. 6.119).
[4]Recommendation 6.13 (para. 6.97).
[5]Recommendation 6.14 (para. 6.100).
[6]Recommendation 6.20 (para. 6.122).
[7]Recommendation 6.21 (para. 6.125).
[8]Recommendation 6.22 (para. 6.130).
[9]Recommendation 6.12(3) (para. 6.91).
[10]Recommendation 6.17 (para. 6.112).

courts in Scotland or final orders registered in the sheriff courts under Part I of the Maintenance Orders (Reciprocal Enforcement) Act 1972;

(iii) maintenance orders made in the Republic of Ireland and registered for enforcement in Scotland under an Order-in-Council of 1974[1] (which applies Part I of the 1972 Act with modifications);

(iv) maintenance orders made in "Hague Convention countries"[2] and registered for enforcement in Scotland under an Order-in-Council of 1979[3] (which likewise applies Part I of the 1972 Act with modifications); and

(v) maintenance orders made in Member States of the European Communities which will become enforceable in Scotland on registration when the European Judgments Convention[4] and Part I of the Civil Jurisdiction and Judgments Act 1982 come into operation.

Some of these categories overlap in the sense that a foreign creditor may be entitled to use one or other of two (or more) of them.[5] Clearly the solutions adopted must remain within the framework set by the statutory provisions since these have been enacted in pursuance of the international treaty obligations of the United Kingdom, or, in the case of the 1950 Act, are reciprocal with other parts of the United Kingdom.

6.205 It should be noted that authentic instruments and court settlements (such as agreements equivalent to Scottish bonds and agreements registrable for execution) are enforceable in the same manner as court judgments or orders under the European Judgments Convention, Articles 50 and 51, and the Civil Jurisdiction and Judgments Act 1982. Section 13 of the 1982 Act allows modifications to be made to the normal enforcement procedures to accommodate such instruments and settlements. The competent authorities may require therefore to adapt our proposals in their application to enforceable instruments and settlements.

Enforceability by current maintenance arrestment

6.206 The principal constraint on legislative freedom is that a non-Scottish maintenance order in each of the five categories, when registered in Scotland for enforcement, will become enforceable in the same manner as if it were

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[1]Reciprocal Enforcement of Maintenance Orders (Republic of Ireland) Order 1974 (S.I. 1974/2140) made under Part III of the Act of 1972.

[2]Countries which are parties to the Convention on the recognition and enforcement of decisions relating to maintenance obligations concluded at The Hague on 2 October 1973. (The countries in question at present consist of Czechoslovakia, France, Norway, Portugal, Sweden and Switzerland).

[3]Reciprocal Enforcement of Maintenance Orders (Hague Convention Countries) Order 1979 (S.I. 1979/1317).

[4]The Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters signed at Brussels on 27 September 1968, together with the Protocol annexed, and the Accession Convention of 9 October 1978.

[5]E.g. an Irish maintenance order could be enforced under the 1974 Order or the European Judgments Convention, while a French order could be enforced under the Hague Convention Order or the European Judgments Convention: see European Judgments Convention, Arts. 55–59.

an order of the registering Scottish court.[1] At present, the competence of a particular mode of diligence is generally determined by the nature of the property attached but in the case of current maintenance arrestments, the crucial factors are that the debt being enforced must be one for maintenance, or reimbursement of the cost of benefit provided by a public authority, and that the decree is one for periodical payments. These tests should, we think, be applied to incoming foreign maintenance orders; any incoming maintenance order not satisfying these tests (such as an order against a father for payment of the inlying expenses connected with the birth of his illegitimate child) would be enforceable by an arrestment, earnings arrestment or poinding but not by a current maintenance arrestment.

6.207 We **recommend:**

A non-Scottish maintenance order (including an authentic instrument or court settlement within the meaning of the European Judgments Convention and an order in favour of a public authority for reimbursement of the cost of maintenance provided by it) registered in Scotland for enforcement should be enforceable by current maintenance arrestment only if it provides for periodical payments to be made by the maintenance debtor.
(Recommendation 6.35; clause 74.)

Need for default

6.208 In the case of a Scottish decree we recommend earlier that a current maintenance arrestment cannot be served unless the debtor has received intimation in prescribed form and remains in default four weeks later (or any time thereafter).[2] Many non-Scottish maintenance orders have considerable arrears accrued by the time they are registered for enforcement in Scotland. In these cases we think it would be unfair to the creditor to give the debtor a further opportunity to clear the arrears before diligence can be done; a current maintenance arrestment should therefore be competent as soon as the order becomes enforceable in Scotland.[3] But where no certificate of arrears is lodged with the incoming maintenance order the intimation and default provisions applicable to non-Scottish decrees should be followed.

6.209 We **recommend:**

Where a certificate of arrears is produced to the registering court at the time of registration of the incoming maintenance order, it should be competent for the maintenance creditor to serve a current maintenance

[1]English, Welsh and Northern Irish orders: Act of Sederunt (Maintenance Orders Acts, Rules) 1980 (S.I. 1980/1727) rule 15, Act of Sederunt (Maintenance Orders Acts, Rules) 1980 (S.I. 1980/1732) rule 14; Republic of Ireland orders: Reciprocal Enforcement of Maintenance Orders (Republic of Ireland) Order 1974, Sched. 2, para. 8(1); Hague Convention country orders: Reciprocal Enforcement of Maintenance Orders (Hague Convention Countries) Order 1979, Sched. 3, para. 8(1); European Community orders: Civil Jurisdiction and Judgments Act 1982, s. 5(4); Reciprocating country orders: Maintenance Orders (Reciprocal Enforcement) Act 1972, s. 8(1).

[2]Recommendation 6.25 (para. 6.155).

[3]Some orders are enforceable on registration, but for orders registered under the Civil Jurisdiction and Judgments Act 1982 (European Judgments Convention, Arts. 36 and 39), and the Reciprocal Enforcement of Maintenance Orders (Republic of Ireland) Order 1974 (Sched. 2, para. 8(1A)), a period of one month after intimation of registration to the debtor must elapse during which only protective measures may be taken.

arrestment without the need to satisfy the requirements of notice and default proposed in Recommendation 6.25 above.
(Recommendation 6.36; clause 82(2).)

Payment to creditor

6.210 Where a non-Scottish decree is being enforced in Scotland by a current maintenance arrestment or an earnings arrestment the employer should not be required to remit sums to persons outwith the United Kingdom. Usually the applicant would have a solicitor in Scotland who instructed the diligence and to whom payment could be made, especially since almost all incoming orders will attract legal aid. In the unusual case where a foreign creditor acts without legal assistance, that creditor should be required to nominate a person to whom payment should be made and the name and address of the person so nominated should be stated on the schedule of arrestment served on the employer.

6.211 We **recommend:**

Provision should be made by act of sederunt that where a non-Scottish order is enforced by a current maintenance arrestment or an earnings arrestment, the schedule of arrestment served on the employer should specify the name and address of a person within the United Kingdom to whom deductions are to be remitted.
(Recommendation 6.37.)

Variation by subsequent orders

6.212 Where a Scottish maintenance order is varied or superseded by a new order changing the rate of maintenance, we have recommended[1] that the court in Scotland should have power to postpone the date of coming into operation of the new order. This postponement enables the creditor to intimate the cessation of the old rate of deductions under the original order and at the same time to serve a new current maintenance arrestment schedule specifying the new rate of deductions.

6.213 While the power of postponement can and should be extended to Scottish courts in granting a variation of a foreign maintenance order registered in Scotland, it cannot be extended to foreign courts unless the various international conventions are re-negotiated. As regards an order granted by a non-Scottish court varying the rate of maintenance due under an order registered for enforcement in Scotland, it has to be accepted that the current maintenance arrestment being operated in Scotland will not always collect the maintenance due by the debtor, because of the inevitable time lag between the date when the variation takes effect as between debtor and creditor and the date when the employer starts to deduct from the debtor's earnings at the varied rate. Given prompt registration of the variation order for enforcement in Scotland, the difference between maintenance due and maintenance collected is likely to be small and any claim by the debtor for return of overpayments would usually be met by a counter-claim for unpaid arrears of maintenance. The employer, however, should be entitled (but not bound) to

[1]Recommendation 6.32 (para. 6.198).

carry on deducting at the existing rate until notified in prescribed form of the existing current maintenance arrestment ceasing to have effect by reason of the variation.

6.214 We **recommend:**

Where a Scottish court grants an order varying a non-Scottish maintenance order registered for enforcement and the order is being enforced by a current maintenance arrestment, the court should have power to postpone the coming into operation of the variation to allow the change from the old rate to the new rate to be made without a break in the continuity of deductions.
(Recommendation 6.38; clause 84.)

Cancellation of registration

6.215 The prescribed officer of the Scottish court in which a non-Scottish maintenance order is registered for enforcement may cancel the registration if of the opinion that the debtor has ceased to reside in Scotland.[1] Where the order was being enforced by a current maintenance arrestment cancellation of the registration would render future payments under the order unenforceable by diligence; nevertheless the employers are entitled to continue making deductions until this fact is intimated to them. The foreign creditor should we think be bound to notify the employer as soon as reasonably practicable, and on failure to do so, should be liable to the same sanctions as a Scottish creditor who fails to intimate (repayment of the amounts received to the debtor together with a penalty imposed at the discretion of the court). As an additional safeguard to the debtor the prescribed officer cancelling the order should be required (so far as reasonably practicable) to notify the employer of the cancellation. Where the employer does not receive notification from either of these sources, the debtor would be entitled to apply to the court for recall of the arrestment on the ground that it had ceased to have effect due to the cancellation of the registration of the maintenance order.

6.216 The procedure would be slightly different if the cancelled order was being enforced along with other debts in a conjoined arrestment order. In this case notification should be made to the sheriff clerk of the court operating the order who would arrange for the conjoined order to be varied by that court and would then serve the variation order on the employer.

6.217 We **recommend:**

(1) It should be provided by act of sederunt that where the registration of a non-Scottish maintenance order registered for enforcement in Scotland is cancelled because the debtor has ceased to reside in Scotland, the prescribed officer of the court in which the order is registered should so far as reasonably practicable intimate the cancellation in prescribed form:

(*a*) if the cancelled order was being enforced by a current maintenance arrestment, to the employer operating that arrestment; or

[1]See Maintenance Orders (Reciprocal Enforcement) Act 1972, s. 10(2), for example.

(*b*) if the cancelled order was being enforced by a conjoined arrestment order, to the sheriff clerk of the court dealing with the conjoined arrestment order.

(2) The creditor in the maintenance order whose registration was cancelled should be bound as soon as reasonably practicable to intimate in prescribed form the cancellation to the employer or the sheriff clerk as the case may be, and in the case of failure Recommendation 6.31(5) (imposition of a discretionary penalty) should apply.
(Recommendation 6.39; clause 83(6) and (8).)

Section E. Conjoined arrestment orders

The problem of competing arrestments

6.218 It is important to find a fair and practicable solution to the problem of competition between two or more creditors who use or seek to use arrestments simultaneously against the same debtor's pay. In the absence of such a solution, later creditors would be "shut out" by the first arresting creditor for a considerable period and so might resort to poindings or extra-judicial methods of collecting their debts. Indeed, the McKechnie Committee recommended[1] against the introduction of a continuous diligence against earnings mainly because a creditor's fear of being shut out would, in their opinion, have encouraged a race of diligences.

6.219 At present, when two or more creditors serve arrestments on the debtor's employer in the same pay period, priority is given to the creditor whose schedule is served first.[2] The later arrestment will only attach the balance (if any) of attachable wages left after the first arrestment. Where the first arrestment is based on an ordinary debt and the second is based on aliment, rates or taxes, the first arrestment will attach the surplus wages above the statutory subsistence exemption (£4 per week plus half the remaining wages) and the later arrestment will attach the balance since the subsistence exemption does not apply to arrestments to enforce alimentary decrees, rates or taxes.[3]

6.220 The problem of competition under the present law is not serious,[4] and a creditor who fails to gain priority in a particular pay period has the opportunity to serve first in subsequent pay periods. However, if (as we recommend) earnings arrestments are to have effect until the debts are paid[5] and current maintenance arrestments are to endure until the maintenance obligations cease,[6] there is an increased risk that further arrestments would be served while an existing arrestment subsisted. We consider in this Section the ways in which more than one creditor could share in the debtor's earnings, dealing first with the case of competing earnings arrestments before turning to current maintenance arrestments and "mixed" cases.

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[1]Paras. 54–6.

[2]Graham Stewart, p. 137, except in the case of Exchequer arrestments; Exchequer Court (Scotland) Act 1856, s. 30.

[3]Wages Arrestment Limitation (Scotland) Act 1870, s. 4.

[4]The C.R.U. Arrestment Survey, para. 29 discloses that only nine firms (out of 28 interviewed) had ever experienced the situation where two creditors attempted to arrest a particular employee's pay in the same week.

[5]Recommendation 6.8 (para. 6.66).

[6]Recommendation 6.31 (para. 6.189).

Second arrestment to be ineffectual

6.221 In Consultative Memorandum No. 49 we considered[1] whether an employer should be required to give effect to a later earnings arrestment served during the subsistence of a prior earnings arrestment by sharing the arrested wages between the two arresting creditors. We rejected this on the ground that it would impose too heavy a burden on employers. Almost all of those who commented agreed with this view.

6.222 We **recommend:**

Employers should not be required to operate more than one earnings arrestment against a debtor's pay at any one time and accordingly it should be provided by statute that an earnings arrestment served during the currency of another earnings arrestment against the same debtor's pay should be ineffectual.
(Recommendation 6.40; clause 86(1).)

Fair sharing amongst creditors

6.223 We think that some provision should be made for fair sharing of the proceeds of an earnings arrestment in those cases where a creditor shut out by an earlier earnings arrestment does not wish to wait until the expiry of that arrestment. In Consultative Memorandum No. 49 we sought views on several different methods of sharing.

6.224 One of these methods was to apply section 10 of the Bankruptcy (Scotland) Act 1913[2] to earnings arrestments. This section provides for the equalisation of poindings and arrestments, and claims by creditors holding liquid documents of debt, used or made within a period of 60 days before and four months after notour bankruptcy. While this provision is sometimes used in the case of arrestments of bank accounts, it is rarely, if ever, used in relation to arrestments of pay. It is an already complicated provision and applying it to earnings arrestments would make it even more complicated. We rejected this solution and indeed proposed[3] that it should be made clear that this provision does not apply for the purpose of equalisation of earnings arrestments with other diligences on notour bankruptcy.[4] All those consulted agreed with this. Equalisation would be unduly troublesome to the arresting creditor especially if more than one later creditor claimed, and would impose too heavy a burden on some categories of creditors, such as maintenance creditors.

6.225 Another option considered in Consultative Memorandum No. 49[5] was that a later creditor, whose earnings arrestment had proved ineffective by reason of a prior subsisting earnings arrestment, should be entitled to claim a share in the sums arrested after notification of the claim to the arresting creditor. This option would be simpler than equalisation under the bankruptcy legislation but it suffers from similar defects—the arresting creditor would act as an unpaid and perhaps inefficient collector on behalf of the claiming

[1]Para. 2.114.
[2]Sched. 7, para. 10 of the Bankruptcy (Scotland) Bill 1984 replaces section 10 of the 1913 Act.
[3]Proposition 21(3) (para. 2.125).
[4]Or apparent insolvency, Bankruptcy (Scotland) Bill 1984, clause 7.
[5]Paras. 2.117 and 2.118 and Proposition 21(2)(*a*) (para. 2.125).

creditors—and it found little favour on consultation. We have therefore rejected this option.

6.226 Since neither the employer nor the first arresting creditor should have to assume the burden of disbursing the proceeds of an earnings arrestment to other creditors, the alternative is to give that function to the court. We suggested in Consultative Memorandum No. 49[1] that the court on application by a later creditor should make an order akin to an attachment of earnings order available in England and Wales.[2] While this suggestion was generally approved on consultation, we now recommend a simpler solution. In making an attachment of earnings order the court was to have inquired into the debtor's financial circumstances and fixed an appropriate amount for the employer to deduct from the debtor's earnings each pay day. But it seems unnecessary to require a means test and a discretionary deduction level merely because more than one creditor seeks to arrest the same debtor's pay. We now envisage that a creditor "shut out" by a prior earnings arrestment should be entitled to apply to the court for a conjoined arrestment order which would require the employer to make exactly the same deductions as for an earnings arrestment. The main difference between a conjoined arrestment order and an earnings arrestment from the employer's point of view would be that the employer sends the deductions to the court for distribution amongst the conjoined creditors rather than to an arresting creditor. Making a conjoined arrestment order would be an administrative act and such an order would be very much cheaper and quicker to obtain than an attachment of earnings order.

6.227 The later creditor should be able to obtain information from the employer as to when the subsisting earnings arrestment expires. Armed with this information, the creditor could then decide whether to wait for the earnings arrestment to expire or whether to apply to the court for a conjoined arrestment order. This and other details of conjoined arrestment orders are discussed in the following paragraphs.

6.228 We **recommend:**

(1) A creditor whose earnings arrestment is, or would be, ineffectual by reason of an existing earnings arrestment by another creditor should be entitled to apply to the court for an order (called a "conjoined arrestment order") requiring the employer to pay the sums deducted on each pay day into court for disbursement to the original creditor and the applicant creditor.

(2) Earnings arrestments should be expressly excluded from provisions in the bankruptcy legislation equalising poindings and arrestments executed within certain periods before or after notour bankruptcy or apparent insolvency.
(Recommendation 6.41; clauses 87(1) and 93 and Schedule 7, paragraph 38.)

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[1]Proposition 21(2)(*b*) (para. 2.125).
[2]See paras. 6.22 and 6.23 above for further details of such orders.

Orders conjoining earnings arrestments

Obtaining an order

6.229 A later creditor whose earnings arrestment has been rendered ineffectual by reason of an existing earnings arrestment should be able to discover sufficient information about the existing arrestment to enable the court to make a conjoined arrestment order. This information consists of or includes the name and address of the prior creditor, the sum due to that creditor (at the date of service of the prior creditor's schedule of earnings arrestment[1]) and the date on which the schedule was served. Under the present law an arrestee has no legal duty to assist an arresting creditor by disclosing the existence and details of a prior arrestment,[2] but we think that an employer should be under such a duty where a second earnings arrestment is served during the currency of an existing arrestment against the same debtor's pay. To assist the employer, the schedule of earnings arrestment might be accompanied by a detachable or separate form which the employer could complete and return to the arresting creditor.

6.230 If the employer fails to comply with this duty we think the later creditor should be entitled to apply to the sheriff court for an order requiring the employer to give the necessary information. The employer would be liable for the expenses of such an application. In the unlikely event of a refusal to comply with the order the employer would be liable to proceedings for contempt of court.

6.231 Relying on the information supplied by the employer, the later creditor might either wait for the existing earnings arrestment to expire and then serve an earnings arrestment, or apply to the court for a conjoined arrestment order. The application would contain particulars of both creditors and the amount of their debts, and particulars of the debtor and the employer. Under our recommendations the amount recoverable by an earnings arrestment consists of the debt, interest accrued to the date of service of the schedule[3] and the expenses of service of the prior charge and schedule,[4] provided that these sums are specified in the schedule. We would extend this to conjoined arrestment orders so that the amount recoverable under an order by a creditor who applies for it would be the debt, interest accrued to date of application and the expenses of serving a prior charge and applying for the order,[5] but only to the extent that these sums were specified in the application.

6.232 So far it has been assumed that a later creditor must first have served an ineffectual earnings arrestment before becoming entitled to apply for a conjoined arrestment order. We think it would be an unnecessary formality for a creditor, who can obtain by other means the information necessary for an application, to be required to serve an earnings arrestment which obviously will be ineffectual. Provided the later creditor is in a position to arrest the

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[1]See para. 6.242 below.

[2]The absence of such a duty of disclosure is consonant with sheriff court authority to the effect that an arrestee has no duty to assist an arresting creditor by disclosing whether or not funds belonging to the debtor have been arrested. *Veitch* v. *Finlay and Wilson* (1894) 10 Sh.Ct.Reps. 13.

[3]Recommendation 6.6 (para. 6.54).

[4]Recommendations 9.7(1) (para. 9.36) and 9.9(1) (para. 9.58).

[5]See Recommendations 9.8(4) (para. 9.44) and 9.9(1) (para. 9.58).

debtor's earnings having served a prior charge and can obtain the necessary information, an application for a conjoined arrestment order should be competent. However, the employer should only be under a duty of supplying information to a later creditor who actually serves an earnings arrestment schedule.

6.233 The fact that the large majority of debt decrees emanate from the sheriff court suggests that that court, rather than the Court of Session, is the appropriate forum for conjoined arrestment order applications. Moreover, the sheriff courts are located throughout Scotland making access for the parties and their agents cheaper and easier and making it easier also for court officials to give informal advice and assistance.

6.234 Providing the later creditor's applications for a conjoined arrestment order was competent and complete the making of the order would be in the nature of an administrative act. We therefore suggest that it should be made by the sheriff clerk rather than the sheriff unless the sheriff clerk decides otherwise or an interested party applies for the application to be called before the sheriff.[1] We do not think the application need be intimated to the first arresting creditor, the debtor and the employer. In the rare case where there is a dispute about the applicant creditor's debt it could be dealt with by recall or variation of the conjoined arrestment order after it has been made, but to require intimation of every application would be to complicate the procedure in order to deal with a very small number of problem cases. Once the conjoined arrestment order was made the sheriff clerk would serve copies on the employer, the creditors concerned and the debtor.[2]

6.235 A conjoined arrestment order should have the same effect as an earnings arrestment in rendering ineffectual a later earnings arrestment served by a different creditor on the employer in respect of the same debtor's earnings.[3] However, later creditors whose earnings arrestments were thereby rendered ineffectual should be allowed to share in the debtor's earnings by having their debts included in the conjoined arrestment order. We have considered whether there should be any restriction on the number of creditors entitled to participate in a conjoined arrestment order. We have concluded, however, that it would be difficult to justify an arbitrary fixed limit on the number of creditors.

6.236 We **recommend:**

(1) Where during the subsistence of an earnings arrestment a later earnings arrestment is served, the employer should be under a duty to disclose, as soon as reasonably practicable, to the later creditors:

(*a*) the name and address of the first arresting creditor;

(*b*) the total amount due to the first arresting creditor as at the date of service of that creditor's earnings arrestment; and

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[1]A similar provision is made for sheriff court summary causes; Summary Cause Rules, rule 18(1) and (2).

[2]By registered or recorded delivery letter, or by hand service by officer of court if for any reason the letter could not be delivered.

[3]See Recommendation 6.40 (para. 6.222).

(*c*) the date of service and place of execution of the first creditor's earnings arrestment.

(2) A creditor should have a title to apply for a conjoined arrestment order if entitled to serve an earnings arrestment on the debtor's employer, whether or not the creditor has served an earnings arrestment which is ineffectual because of a subsisting earnings arrestment.

(3) Power to make a conjoined arrestment order should be conferred on the sheriff court rather than the Court of Session.

(4) The amount recoverable under a conjoined arrestment order by the later creditor who applies for an order should be the principal sum and judicial expenses due under the decree, interest accrued to the date of application, the expenses of the prior charge and the expenses of the application for the order but only if, and to the extent that, the sums are specified in the application.

(5) It should be provided by act of sederunt that the creditor's application should contain sufficient information to enable the court to make an order without a hearing including:

(*a*) the applicant's name, address and amount of the debt due at the date of application;

(*b*) the first arresting creditor's name and address, the sum due to that creditor at the date of service of that creditor's earnings arrestment and the place of execution of that earnings arrestment; and

(*c*) the name and address of the debtor and of the employer.

(6) It should be provided by act of sederunt that a conjoined arrestment order may, in the absence of objections or special circumstances, be made by a sheriff clerk instead of a sheriff.

(7) The sheriff clerk should serve in the prescribed manner a copy of the conjoined arrestment order on the employer, the debtor and the creditors.

(8) An earnings arrestment served during the currency of a conjoined arrestment order affecting the same debtor's earnings should be ineffectual. The employer should be under a duty to inform the arresting creditor which court granted the order. A later creditor should be entitled to apply to that court to participate in the existing conjoined arrestment order.

(9) If the employer fails without reasonable excuse to discharge the duty in paragraph (1) or (8) above, the creditor should be entitled to apply to the sheriff court having jurisdiction over the employer for an order requiring the employer to disclose the required information.
(Recommendation 6.42; clauses 86(4) and (5), 87(1), (2), (6), (7), (9) and (11) and 88(1), (2), (4) and (5).)

Operation by employer

6.237 The conjoined arrestment order would supersede the existing earnings arrestment in favour of the first arresting creditor and would require the employer to pay future sums deducted from the debtor's pay to the court. In our discussion of earnings arrestments we saw the utility of providing a short

period after service before the employer was required to give effect to it,[1] in order to give the employer time to make the necessary arrangements. We think a similar arrangement should be made to facilitate the transition between an earnings arrestment and a conjoined arrestment order.

6.238 The amounts deducted from the debtor's earnings under a conjoined arrestment order would be the same as under the earnings arrestment which it supersedes. From the employer's standpoint, the main change would be that the sums deducted would be sent to the court instead of to the original arresting creditor.

6.239 A conjoined arrestment order like an earnings arrestment would be a completed diligence requiring the employer to deduct the arrested sums on each pay day and to remit them forthwith to the court. The appropriate sanction against an employer who wilfully fails to give effect to a conjoined arrestment order should, we suggest, (in line with our recommendation for earnings arrestments) be a civil sanction—making the employer liable to the sheriff clerk (as representing the creditors) for any deductions that would have been received but for the default. But since a court order is involved we consider that a flagrant breach in open defiance of the court should also be liable to be punished as a contempt of court.[2]

6.240 We recommended earlier[3] that an employer should be entitled to a fee of 50p, or such other sum as may be prescribed, every time a deduction is made from the debtor's pay under an earnings arrestment. We think a similar fee should be allowed for deductions in pursuance of a conjoined arrestment order.

6.241 We **recommend:**

(1) An employer should be bound to give effect to a conjoined arrestment order on any pay day occurring seven days or more after the date of service of the order.

(2) An employer should be entitled, but not bound, to give effect to a conjoined arrestment order on any pay day occurring within seven days after the date of service of the order.

(3) The conjoined arrestment order should supersede the subsisting earnings arrestment as soon as the employer gives effect to the order. The conjoined arrestment order should direct the employer to deduct from the debtor's earnings on each pay day until further order, a sum calculated in accordance with the rules applicable to an earnings arrestment, and to remit such deductions forthwith to the court.

(4) Recommendation 6.22 (payment by employer by cheque or otherwise) should apply to conjoined arrestment orders as it applies to earnings arrestments.

(5) The employer should be entitled to deduct a fee of 50p (or such other sum as may be prescribed) on each occasion on which a deduction is

[1]Paras. 6.92 to 6.97.

[2]Exceptionally breach of arrestment may be treated as contempt of court, Graham Stewart, pp. 222–3.

[3]Recommendation 6.21 (para. 6.125) above.

made from the debtor's pay under a conjoined arrestment order. The fee should be deducted from the exempt earnings payable to the debtor and the employer should give the debtor a statement of the fee deducted along with the statement showing the deduction made under the conjoined arrestment order.

(6) An employer who fails to comply with a conjoined arrestment order should be liable to pay the sheriff clerk the sums that would have been received if the order had been complied with, without a right of recovery from the debtor. In addition, a failure which is wilful and without reasonable excuse should be capable of being treated as a contempt of court.
(Recommendation 6.43; clauses 87(1), (3) and (13), 89(2) and (7), 95(2) and 97.)

The court's role

6.242 The court's primary role in a conjoined arrestment order is to ingather payments from the debtor's employer and to account to the participating creditors according to their ranking. As regards ranking, no priority should be given to unpaid aliment, rates or taxes. We recommended earlier that such debts should have no privileges in an earnings arrestment;[1] it would be inconsistent therefore to give them a privileged status in conjoined arrestment orders. We propose that the creditors in a conjoined arrestment order should be paid rateably in proportion to the size of the debts due to each. For this purpose, however, the debt of the original arresting creditor should be taken to be the sum due as at the date of service of that creditor's earnings arrestment schedule and specified in that schedule, rather than the balance outstanding at the date of service of the later earnings arrestment schedule or the date of the application for the order or of the order itself. Use of this figure rather than the balance due at a later date would give the original arresting creditor a small measure of priority over the later creditor since the original creditor's share of the sums received by the court would be calculated by reference to a larger sum. We think it only fair and reasonable that the original arresting creditor should receive this small measure of priority; otherwise he or she might be required to accept very small amounts over a very long period while one or more later creditors received the lion's share. Furthermore, use of the amount of the original debt avoids the employer having to work out the balance due at the date of service of a later creditor's schedule of arrestment. The debt of the later creditor should be taken to be the sums (debt, interest and expenses) due and specified in the application for the conjoined arrestment order. If other creditors subsequently applied to be conjoined, their debts should likewise be taken to be the sums specified in their respective applications. The above rule would apply for the purpose of ranking only: a conjoined arrestment order should continue until all the debts due to the participating creditors have been satisfied.

6.243 The frequency of distribution by the court to the creditors of the sums received under a conjoined arrestment order should be as prescribed, payments every month for example. With each payment, the court should send to each

[1]Recommendation 6.11 (para. 6.82) above.

of the creditors details of the total amounts received from the employer during the accounting period together with a note of how these amounts have been divided among the creditors. When a creditor's debt is satisfied or the conjoined arrestment order itself terminates, the court should send a complete account of its intromissions to that creditor (or to all creditors) and a copy to the debtor.

6.244 We **recommend;**

(1) The court should apportion between the creditors in a conjoined arrestment order rateably according to their debts, all sums received from the employer.

(2) For the purpose of calculating the shares due to the creditors, the debt of the original arresting creditor should be taken to be the sums due at the date of service on the employer of that creditor's earnings arrestment schedule and specified in that schedule, and the debt of the creditor who applied for the conjoined arrestment order and any subsequent conjoined creditor should be taken to be the sums (debt, interest and expenses) due and specified in their application to the court.

(3) There should be no preference for arrears of aliment, rates or taxes in a conjoined arrestment order.

(4) Provision should be made by act of sederunt regulating the disbursement by the court to the conjoined creditors of their share of the collected sums, including such matters as the frequency of payment, notification of the details of the ranking of the creditors, and an account of the court's intromissions on termination of the order.
(Recommendation 6.44; clause 90 and Schedule 4.)

Competitions involving current maintenance arrestments

6.245 We recommend above[1] that a later creditor who serves an earnings arrestment during the subsistence of an existing earnings arrestment should be entitled to apply to the court for a conjoined arrestment order, in which subsequent creditors could also be conjoined. We now turn to consider situations involving current maintenance arrestments.

One current maintenance arrestment and one earnings arrestment

6.246 Under the present law, priority between arrestments is by priority of the times of laying the arrestments, but where the first arrestment is an ordinary debt and the second an arrestment for aliment, the first arrestment will attach only the surplus earnings above the statutory subsistence exemption while the later arrestments for aliment will attach the whole remaining earnings, since there is no exemption from arrestment when the debt is for aliment.[2] If the present system is replaced by current maintenance arrestments and earnings arrestments, we do not think that it would be reasonable to allow one arrestment to "shut out" or supersede the other, given the length of time each may subsist. In a competition between a current maintenance

[1]Recommendation 6.41 (para. 6.228).
[2]See para. 6.219.

arrestment and an ordinary earnings arrestment, it should be possible for both arrestments to be laid and to have effect against the same earnings, but the remainder of the debtor's earnings should not be reduced below the fixed sum threshold of £35 per week (or £5 per day) which we recommend for both types of arrestment. This would be fairer to the debtor than the present law on arrestment for maintenance under which all the earnings are arrestable.

6.247 The question of priority would then become: which arrestment should abate first if there were insufficient earnings above the fixed sum threshold to satisfy both? The following table shows how a solution giving priority to the ordinary creditor would operate in practice assuming a maintenance award of £20 per week and assuming also that the deductions under the earnings arrestment are as set out in Table A of Schedule 3 to the draft Bill.

Debtor's net weekly earnings	Ordinary creditor receives	Maintenance creditor receives
£100	£13	£20
£80	£9	£20
£60	£5	£20
£50	£3	£12*
£40	£1	£4*

* Affected by £35 threshold.

If the rule on priorities were reversed so that the earnings arrestment abated first, then the result is illustrated by the following table.

Debtor's net weekly earnings	Ordinary creditor receives	Maintenance creditor receives
£100	£13	£20
£80	£9	£20
£60	£5	£20
£50	Nil*	£15*
£40	Nil*	£5*

* Affected by £35 threshold.

6.248 We recognise that in England and Wales, attachment of earnings orders securing maintenance have priority over other attachment of earnings orders,[1] and that a similar rule applies to enforcement against earnings in some other legal systems. We do not think, however, that such a rule should be adopted in Scotland. First, the rule in bankruptcy sequestrations is that a maintenance creditor cannot rank for current maintenance. The reason is that maintenance is due only when the debtor has surplus income and an insolvent debtor cannot be said to have a surplus. The general rule is therefore that a maintenance creditor must follow the maintenance debtor's fortunes.[2] We acknowledge that in making an order against the after-acquired earnings of

[1] Attachment of Earnings Act 1971, Sched. 3, para. 8.
[2] *Symington* v. *Symington* (1875) 3 R. 205.

bankrupts, the court will allow them to retain some earnings as aliment for their family living with them, lest a priority for creditors induce them to leave their jobs. But we do not think that this reasoning is applicable where (as is postulated here) the maintenance creditor is living separate and apart from the maintenance debtor. Second, the debtor's dependants would not be given priority if they were living in family with the debtor and being alimented in kind rather than in cash: it seems difficult to justify giving separated dependants who are alimented in cash a better right. Third, in most cases of competing arrestments, the debtor will be insolvent, and the maintenance decree should be varied downward or recalled. The ordinary creditor has no title to apply for this to be done and it seems unfair that the creditor should suffer loss simply because the maintenance debtor fails to make such an application. Fourth, in many cases the maintenance creditor can rely on supplementary benefit for support if maintenance fails; an ordinary creditor cannot make good a bad debt in this way. For these reasons, we think that an earnings arrestment securing an ordinary debt should have priority over a current maintenance arrestment. We concede that in some cases, the debtor might obtain credit unwisely or irresponsibly in the knowledge that, in a competition between creditors, the ordinary creditors will have priority, but this is an inescapable consequence of the long-standing general rule, which is generally thought to be sound, that a maintenance creditor must follow the maintenance debtor's fortunes.

6.249 We **recommend:**

It should be competent to lay both a current maintenance arrestment and an earnings arrestment against the same earnings and if, in these circumstances, there is only one arrestment of each type, a conjoined arrestment order should be incompetent. The employer should operate both arrestments simultaneously and if there were insufficient earnings above the fixed sum threshold to satisfy both arrestments, the employer should give priority to the earnings arrestment.
(Recommendation 6.45; clauses 85 and 87(4).)

Two or more current maintenance arrestments

6.250 Cases may arise occasionally of competitions between two or more current maintenance arrestments. For example, a man may owe aliment to his separated wife, periodical allowance to a former wife by a previous marriage as well as aliment for children by both marriages. In such cases we think that the creditors concerned should share in deductions made from the debtor's earnings by means of a conjoined arrestment order in the same way as ordinary creditors. Thus a current maintenance arrestment served during the currency of another current maintenance arrestment should be ineffectual,[1] but the second creditor should be entitled to apply to the court for a conjoined arrestment order, and current maintenance arrestments should be expressly excluded from the ambit of equalisation provisions in bankruptcy legislation.[2] It would be undesirable on cost and manpower grounds if a maintenance creditor could enforce, by means of a conjoined arrestment order, two or more maintenance obligations which he or she could enforce by way of a

[1]Recommendation 6.40 (para. 6.222).
[2]Recommendation 6.41 (para. 6.228).

current maintenance arrestment specifying the total daily rate of maintenance payable in terms of the obligations, and we recommend a rule prohibiting this.

6.251 The procedure we recommend for obtaining a conjoined arrestment order where the arrestments in question are earnings arrestments should also be used where the arrestments are current maintenance arrestments.[1] The conjoined arrestment order for the current maintenance arrestments would, like an earnings arrestment conjoined order, on being served on the employer, supersede the current maintenance arrestment which was being operated. The conjoined order would specify an aggregate daily rate being the total of the daily rates of the maintenance obligations the order enforces. The employer would operate the order in the same way as a current maintenance arrestment. Thus each pay day the employer would deduct a sum being the product of the aggregate daily rate and the number of days since the last pay day. But if there were insufficient net earnings above the £5 per day threshold to pay this sum in full, whatever net earnings there were in excess of the threshold would be remitted to the court for distribution among the maintenance creditors. We think that in this case the maintenance due to each maintenance creditor should abate rateably in proportion to the daily rates of current maintenance payable to them respectively. This would be a fairer solution than giving priority according to the dates of the maintenance decrees or the dates of service of the current maintenance arrestments.

Example 1

A man normally earns £100 per week net and is due to pay maintenance of £30 a week to his ex-wife and children and £10 per week to his present wife.

The employer every pay day deducts £40 and sends it to the court. The court pays £30 to the ex-wife and £10 to the present wife.

Example 2

The same man earns £59 net one week. The employer that week deducts £24 (£59–£35) and sends it to the court. The court pays £18 (three-quarters of £24) to the ex-wife and £6 (one-quarter of £24) to the present wife.

6.252 We **recommend:**

(1) A second current maintenance arrestment served during the currency of an existing current maintenance arrestment should be ineffectual, and current maintenance arrestments should be expressly excluded from provisions in the bankruptcy legislation equalising poindings and arrestments executed within certain periods before or after notour bankruptcy or apparent insolvency. A creditor whose current maintenance arrestment is or would be ineffectual by reason of an existing current maintenance arrestment or conjoined arrestment order should be entitled to apply to the court for a conjoined arrestment order or to be included in the existing order, and the procedure in Recommendation 6.42 above should apply.

[1]Recommendation 6.42 (para. 6.236).

(2) The conjoined arrestment order should require the employer to deduct and pay to the court the maintenance at the specified rate (being the aggregate of the daily rates due to the original creditors) so far as there were net earnings above the fixed sum threshold of £5 per day. The court would disburse the sums received to the maintenance creditors. In the event of there being insufficient net earnings to satisfy both maintenance creditors, the court would divide the amount deducted in proportion to the daily rates of current maintenance payable to each.

(3) It should be incompetent for a maintenance creditor to enforce by way of a conjoined arrestment order two or more maintenance obligations which he or she could enforce by a single current maintenance arrestment against the debtor's earnings.
(Recommendation 6.46; clauses 86(2), (4) and (5), 87, 88, 89(3), 90 and 93 and Schedules 4 and 7, paragraph 38.)

Three or more arrestments of different types

6.253 Where an ordinary creditor and a maintenance creditor both seek to attach the same earnings of their debtor, the employer is to be required to give effect to both the earnings arrestment and the current maintenance arrestment simultaneously, and accordingly a conjoined arrestment order would be incompetent.[1] Where this situation exists and yet another creditor, whether an ordinary creditor or a maintenance creditor, also seeks to attach the debtor's earnings we think that a conjoined arrestment order should be made. A "mixed three creditor" conjoined order would also arise by addition of another creditor of a different type to an existing order conjoining either two ordinary creditors or two maintenance creditors. The ranking of the three creditors within such a conjoined order would be as follows:

(*a*) where there were two ordinary creditors and one maintenance creditor, the two ordinary creditors would share the amount that would have been deducted by an earnings arrestment rateably according to the value of their debts. The maintenance creditor would receive the current maintenance due unless the debtor's net earnings were insufficient to allow this, in which case the ordinary creditors would receive priority.

(*b*) where there were two maintenance creditors and one ordinary creditor the ordinary creditor would have priority and receive the full amount that would be deducted by an earnings arrestment. The two maintenance creditors would receive their current maintenance in full, but in the event of insufficient net income their claims would abate rateably in proportion to the amounts of current maintenance payable to each of them respectively.

The following examples may help to demonstrate the operation of these rules. The deductions for the ordinary creditors are in accordance with Table A of Schedule 3 to the draft Bill.

Example 1

The debtor earns £100 per week net. He owes £100 to one creditor and £200 to another creditor while he is due to pay his ex-wife £20 per week.

[1]Recommendation 6.45 (para. 6.249).

The employer remits each week a total of £33 to the court, made up of £13 for the ordinary creditors and £20 for the maintenance creditor. She receives her maintenance in full, the creditor owed £100 gets one third of £13 per week, while the other creditor (owed £200) gets two-thirds of £13 per week.

Example 2

The debtor earns £50 per week net. He owes £100 to a creditor and is due to pay £10 per week to his ex-wife and £10 per week to his present wife. The employer remits £15 per week to the court calculated as follows. He first deducts £3 in respect of the ordinary creditor's debt leaving £47 of net earnings. He then deducts £12 leaving the debtor with £35—the weekly threshold figure. The two maintenance creditors abate equally and so share the £12, getting £6 per week each.

6.254 More complex "mixed" orders can be envisaged involving four or more creditors. The ordinary creditors would share rateably in the amount that would have been deducted by an earnings arrestment, and the maintenance creditors take their maintenance out of any balance above the £5 per day threshold, abating rateably if there were insufficient sums above this threshold.

6.255 We **recommend:**

In a conjoined arrestment order with three or more creditors and involving both ordinary creditors and maintenance creditors, the sum that would be deducted under an earnings arrestment should be paid to the ordinary creditor, or if more than one to the ordinary creditors as a class sharing rateably according to the amount of their debts. The maintenance creditor or creditors should receive their maintenance out of any balance above the fixed sum threshold, abating rateably between themselves according to the daily rates of current maintenance payable to each if there is more than one maintenance creditor and insufficient earnings to satisfy all.
(Recommendation 6.47; clauses 89(4), 90 and Schedule 4.)

Definition of maintenance creditor

6.256 It is necessary to make clear what is meant by "a maintenance creditor" for two purposes, namely (i) the proposed rule that it should be incompetent to enforce by way of a conjoined arrestment order two or more maintenance obligations due to the same creditor if the obligations could be enforced by a current maintenance arrestment,[1] and (ii) the proposed rule that where two or more different maintenance creditors seek to use a current maintenance arrestment against the same maintenance debtor's earnings, the situation should be resolved by a conjoined arrestment order.[2] One option would be that, for these purposes the person for whose support the maintenance was payable should be treated as the maintenance creditor. This, however, would mean that conjoined arrestment orders would be needed following the many divorce decrees in which there were awards of aliment to two or more children, or periodical allowance to the divorced spouse and aliment to one or more children, with the result that collection of most maintenance awards would

[1]Recommendation 6.46(3) (para. 6.252).
[2]Recommendation 6.46(1) (para. 6.252).

be undertaken by the courts. This would be undesireable, if only on manpower and cost grounds.

6.257 Another option, which we prefer, is to treat the payee, for this purpose, as the creditor whether payment is received on his or her own behalf or in a fiduciary capacity, or as tutor or curator for the children,[1] and whether the various maintenance obligations are contained in a single decree or in separate decrees. This, we think, is a practical rule which could be easily operated. In a common case where a divorce decree awards periodical allowance to the wife and finds the child entitled to aliment, but awards payment to the wife as tutor or curator, she would be treated, for the purpose of arrestments, as the maintenance creditor for both obligations. She could choose whether or not to enforce both maintenance obligations in the one current maintenance arrestment, but it would be incompetent for her to enforce each obligation separately by means of two current maintenance arrestments, or to apply for a conjoined arrestment order unless other creditors had executed arrestments.

6.258 Under various statutory provisions the Secretary of State[2] or a local authority[3] can obtain orders for periodical payments to be made reimbursing them for benefit or the cost of accommodation they have supplied to people (usually children) whom the debtor is liable to maintain. We would recommend that the rules set out in the preceding paragraph should also apply to these orders. Where the maintenance order is a non-Scottish order registered in Scotland for enforcement, we think that the rules applicable to Scottish maintenance orders should be adopted whether the non-Scottish order is in favour of an official, an authority or an individual.

6.259 We **recommend:**

For the purposes of Recommendation 6.46(1) (two or more maintenance creditors cannot use current maintenance arrestments simultaneously against the same debtor) and Recommendation 6.46(3) (a maintenance creditor not entitled to use conjoined arrestment order to enforce two or more obligations if current maintenance arrestment could be used) a maintenance creditor should be defined as the payee in a maintenance obligation whether the payee is an individual, an official or an authority.
(Recommendation 6.48; clause 80(1) and (3).)

Arrears of maintenance

6.260 In our discussion of arrears of maintenance we recommended[4] that a maintenance creditor should not be entitled to enforce arrears of maintenance by means of a current maintenance arrestment but that arrears would remain enforceable by other diligence including an earnings arrestment while a current maintenance arrestment laid by that creditor was in operation. A similar rule should apply to conjoined arrestment orders, so that a maintenance creditor

[1]See *Huggins* v. *Huggins* 1981 S.L.T. 179; *Finnie* v. *Finnie* 1984 S.L.T. 109 and 439.
[2]See for example Supplementary Benefits Act 1976, ss. 18 and 19.
[3]See for example Social Work (Scotland) Act 1968, ss. 80 and 81.
[4]Recommendation 6.28(1) (para. 6.176).

could include in the order the arrears as an ordinary debt and the current maintenance.

6.261 We also recommended[1] that no interest should run on arrears of maintenance which arise during the operation of a current maintenance arrestment. This rule should be extended to conjoined arrestment orders containing a maintenance obligation.

6.262 We **recommend:**

(1) It should be competent for a conjoined arrestment order to enforce arrears of maintenance and current maintenance payable to the same creditor.

(2) No interest should run on arrears of maintenance arising during the operation of a conjoined arrestment order which is enforcing current maintenance.
(Recommendation 6.49; clause 87(8).)

Termination and variation of conjoined arrestment orders

6.263 There are two aspects of termination of conjoined arrestment orders: first, the order ceasing to have effect as between one or more of the conjoined creditors and the debtor, and, secondly, the order ceasing to be operated against the debtor's earnings by the employer. We deal with these in turn.

6.264 In paragraphs 6.103 and 6.189 we recommended that the sequestration of the debtor should render an earnings arrestment and a current maintenance arrestment ineffectual. We would extend this principle to conjoined arrestment orders since the effect of sequestration should be the same whether one or more than one debt was being enforced against the debtor's earnings. Sums deducted on pay days occurring before the date of sequestration should therefore be handed over to the conjoined creditors whether or not the sheriff clerk had received or disbursed them before sequestration, but sums deducted after the date of sequestration should be claimable by the trustee and should be recoverable from the sheriff clerk or the creditors.

6.265 The problem of termination of a conjoined arrestment order on satisfaction of some or all of the debts has given us some difficulty. One scheme would be for a conjoined arrestment order to endure only until the remaining conjoined creditors could competently enforce their debts by earnings or current maintenance arrestments. In a simple case of two ordinary creditors the conjoined arrestment order on this scheme would be brought to an end as soon as one of the debts was satisfied. The remaining creditor could subsequently serve an earnings arrestment to recover the balance of the debt. The advantage of this scheme is that the court would be involved only for so long as it was necessary to divide the deductions made by the employer amongst the various creditors. The other scheme, which we favour, is that a conjoined arrestment order should endure until the debts of all the conjoined creditors have been satisfied. The principal advantage of this latter scheme is that the employer would not be faced with a change in practice when the conjoined arrestment order was replaced by an earnings or current maintenance

[1]Recommendation 6.28(2) (para. 6.176).

arrestment. The employer would carry on deducting and remitting to the court under the conjoined arrestment order until informed that all the debts have been satisfied. Where the last debt was a maintenance debt the conjoined arrestment order would thus endure until the obligation to pay maintenance ceased.

6.266 In Chapters 3 and 4 of this report we recommended that a conjoined arrestment order should be recalled following the granting of time to pay orders in respect of all the conjoined debts or on the coming into force of a debt arrangement scheme. Other grounds of recall should, by analogy with earnings and current maintenance arrestments, be that the conjoined arrestment order is invalid or has ceased to have effect. A conjoined arrestment order might be invalid, for example, if it was incorrectly served on the employer or one of the conjoined "debts" was not in fact due when the order was made. As discussed in previous paragraphs a conjoined arrestment order would cease to have effect on the debtor's sequestration[1] or on the last debt remaining in the conjoined order being satisfied (or in the case of a maintenance debt, ceasing to be due) or becoming unenforceable by diligence.[2] Apart from invalidity and ceasing to have effect, creditors should be entitled to apply for recall on the grounds that they no longer wish their debts to be collected by means of a conjoined order. Creditors can abandon an earnings arrestment or a current maintenance arrestment if they so wish and we see no reason for abandonment not to be available in respect of conjoined arrestment orders.

6.267 We turn now to look at termination from the employer's point of view. A conjoined arrestment order is an order of the court which requires the employer, on pain of being in contempt of court, on each pay day to make certain deductions from the debtor's earnings and remit them forthwith to the court. We think it is essential for the protection of the employer that this duty is brought to an end (subject to a minor exception) only on receipt of a further order from the court. Moreover, since the court is in charge of the conjoined arrestment order on behalf of the conjoined creditors, it would make for confusion if the order could be brought to an end simply by some action on the part of a creditor or the debtor.

6.268 The minor exception mentioned in the preceding paragraph is where the debtor ceases to be employed. It would be unnecessarily formal in our view for an employer in this situation to have to apply to the court for recall of the conjoined arrestment order. It might be thought that there is no need for an express rule—ceasing employment is self-evidently a terminating event since the employer no longer has any earnings to operate the conjoined arrestment order on. But we think an express statutory rule to this effect would be welcomed by employers who might otherwise feel obliged to retain an order against the unlikely possibility of the debtor being re-employed later.

6.269 We would recommend the same approach to variation as we recommend in the preceding paragraphs for termination. Thus an employer would be under a duty to continue to deduct in accordance with the original conjoined

[1]Para. 6.264.
[2]Para. 6.265.

arrestment order until a court order varying the order had been intimated. The court should have power to vary a conjoined arrestment order where a debt due to a creditor is satisfied, ceases, becomes unenforceable by diligence, or where a creditor no longer wishes the debt to be enforced by means of the conjoined arrestment order.

6.270 We **recommend:**

(1) The employer should continue to operate a conjoined arrestment order until the debtor ceases employment or until intimation of the recall or variation of the order by the court is received.

(2) In addition to the court's power to recall a conjoined arrestment order following the granting of a time to pay order or on the coming into force of a debt arrangement scheme, the court should, on application, recall a conjoined arrestment order if it is satisfied that the order is invalid or has ceased to have effect or if all the conjoined creditors (or the last remaining creditor) apply for recall.

(3) A conjoined arrestment order should cease to have effect on the sequestration of the debtor, or on all the debts included in the order (or the last remaining debt in the order) being satisfied, ceasing, or becoming unenforceable by diligence.

(4) The court should, on application, vary a conjoined arrestment order if:

(*a*) a debt due to a creditor is satisfied or becomes unenforceable by diligence; or

(*b*) a creditor no longer wishes to have the debt included; or

(*c*) in the case of maintenance the obligation to pay maintenance ceases, is recalled or varied, or becomes unenforceable by diligence. (Recommendation 6.50; clauses 87(10), 92(1) to (4) and 98(2).)

Procedural provisions

6.271 We have just recommended that a conjoined arrestment order should be varied when one of the debts included in the order is satisfied, or recalled when the last debt is satisified. We turn to consider who should have the responsibility of keeping track of payments made to creditors and applying for variation or recall of the conjoined arrestment order.

6.272 It is impracticable for employers to work out when the various creditors' debts are satisfied since they are not aware of the amounts distributed by the court to each of the conjoined creditors, nor would they be aware of a maintenance obligation ceasing (through remarriage of the creditor for example). We think the appropriate person to apply for variation or recall is the sheriff clerk who administers the order on behalf of all the creditors. In cases where there is no maintenance debt included in the conjoined arrestment order and no payments were made to creditors otherwise than under the order, the sheriff clerk has all the information required to work out when each creditor's debt is satisfied. To ensure that a conjoined arrestment order is varied or recalled promptly, a creditor should be under a duty to inform the sheriff clerk as soon as reasonably practicable when the debt is

satisfied or has become unenforceable by diligence, or in the case of a maintenance order, the obligation to pay maintenance has ceased.

6.273 In the context of earnings and current maintenance arrestments we recommended that payments received by a creditor under an arrestment after it had ceased to have effect should be recoverable by the debtor.[1] In addition, as a sanction to compel the creditor to intimate cessation of the arrestment to the employer and as a kind of solatium for wrongful diligence, the court should have power to award a penalty payable by the creditor to the debtor where the court was satisfied the creditor had failed to intimate as soon as reasonably practicable.[2] We would extend these recommendations to conjoined arrestment orders. The sums overpaid to a non-intimating creditor should be repaid to the sheriff clerk, rather than the debtor, for distribution to other creditors still conjoined. The other creditors should be entitled to receive the same disbursements as they would have received had the overpaid creditor intimated cessation of entitlement under the order at the proper time. However, the sum ordered to be paid by the creditor by way of discretionary penalty should be payable to the debtor as the other creditors should not be entitled to share in this.

6.274 We would confer a title to apply for recall or variation of a conjoined arrestment order on the debtor, any creditor, the employer, the sheriff clerk, and the debtor's trustee in sequestration. In many cases we envisage the application being made by the sheriff clerk in chambers before the sheriff, for example where recall of the order is sought because the last remaining creditor's debt has been satisfied. In other cases, such as an application by the debtor for recall on the grounds of invalidity, the application would have to be intimated to all interested parties and a hearing might be necessary. In view of the wide variety of possible circumstances we think the procedure should be regulated by act of sederunt rather than by statute.

6.275 Where a recall or variation order is granted we think that it should be intimated to the various interested parties by the sheriff clerk. Sheriff clerks will probably be the applicants in many cases and keeping everyone informed can be seen as part of their duty to ensure that conjoined arrestment orders run smoothly. Intimation should be made to the employer, debtor, creditors and in the case of recall on the grounds of the debtor's sequestration, to the trustee in sequestration if the sheriff clerk knows of the trustee's whereabouts. The employer would not, however, need to be informed unless there was a consequential change in the amount to be deducted from the debtor's earnings. For example, where one ordinary creditor's debt is satisfied but there were still two other ordinary creditors included in the conjoined arrestment order, no intimation need be made because the employer makes the same deduction however many ordinary creditors are included.

6.276 We **recommend:**

(1) A creditor whose debt is included in a conjoined arrestment order should be under a duty to inform the sheriff clerk when the debt is

[1]Recommendation 6.16 (para. 6.110) (earnings arrestments); Recommendation 6.31 (para. 6.189) (current maintenance arrestments).
[2]*Ibid.*

satisfied or ceases to be enforceable by diligence, and in the case of maintenance when the obligation to pay maintenance ceases. Sums received by a creditor after satisfaction of the debt, the debt becoming unenforceable by diligence or, in the case of maintenance, where the obligation to pay maintenance ceases, should be recoverable by the sheriff clerk with interest at the rate normally applicable to decrees from the date of receipt to the date of payment. The sheriff clerk should distribute the sums recovered among the remaining creditors as if the repaying creditor had ceased to be conjoined in the order.

(2) Where the sheriff is satisfied, on an application by the debtor, that the creditor failed to intimate as required in paragraph (1) above, the sheriff may order the creditor to pay the debtor a sum not exceeding twice that recoverable by the sheriff clerk in terms of paragraph (1) above.

(3) An application for variation or recall of a conjoined arrestment order should be capable of being made by the debtor, a creditor, the employer, the sheriff clerk operating the order and the debtor's trustee in sequestration.

(4) The sheriff clerk should be under a duty to intimate the granting of an order varying or recalling a conjoined arrestment order to the debtor, the creditors, and the debtor's trustee in sequestration if the trustee's whereabouts are known. Intimation should be made to the employer of any recall and any variation resulting in a change in the amount to be deducted from the debtor's earnings.
(Recommendation 6.51; clauses 91(4) to (8) and 92(2) and (5).)

Disputes about operation of conjoined arrestment orders

6.277 Earlier in this Chapter we recommended[1] that the court should have power to resolve disputes about the mode of operation of an earnings or current maintenance arrestment. Such a power would be useful to correct any errors while the diligence was still in operation. We think such a power would also be useful in connection with conjoined arrestment orders.

6.278 We **recommend:**

The court, on application by the debtor, the sheriff clerk, a creditor or the employer should have power to determine a dispute as to the manner of operation of a conjoined arrestment order. The court in disposing of the application should have power to order one of the parties to pay to another sums which had been deducted or retained in error with interest.
(Recommendation 6.52; clause 91(1) and (2).)

Intimation of new deduction tables

6.279 We recommended earlier that the Secretary of State should be empowered to vary the deduction levels contained in the statutory tables used in connection with earnings arrestments[2] and also the level of exempt earnings in connection with current maintenance arrestments[3] by means of regulations made by statutory instrument. These variations could affect the deductions

[1]Recommendations 6.12 (para. 6.91) and 6.30 (para. 6.183).
[2]Recommendation 6.9 (para. 6.76).
[3]Recommendation 6.27 (para. 6.166).

to be made by an employer operating a conjoined arrestment order. Since we consider the varied tables and level of exempt earnings ought to apply to conjoined arrestment orders in operation at the date of variation as well as orders made thereafter the sheriff clerk should be under a duty to intimate any variation to the employer as soon as it comes into force.

6.280 We **recommend:**

The sheriff clerk should be under a duty to intimate to an employer operating a conjoined arrestment order any variation in the statutory deduction tables applicable to earnings arrestments, or the level of exempt earnings applicable to current maintenance arrestments. The employer should be entitled, but not bound, to give effect to such a variation on any pay day occurring within seven days of the date of intimation, but should be bound to give effect to such a variation on any pay day occurring thereafter.
(Recommendation 6.53; clauses 89(6) and 95(2).)

Section F. Miscellaneous

6.281 We conclude this Chapter with an examination of issues incidental to the foregoing recommendations. These are the prohibition of dismissal of employees as a result of diligence against earnings, the prohibition or restriction of diligence against bank accounts or other accounts into which wages are paid, and the jurisdiction of the courts in connection with various applications.

Dismissal of employees whose earnings are arrested

6.282 Because of their continuous effect, earnings arrestments, conjoined arrestment orders and current maintenance arrestments would be more burdensome for employers to administer than arrestments in common form are at present. There is therefore a danger that employers may dismiss employees whose earnings are subjected to continuous diligence. At present, it seems that dismissal as a result of arrestment of wages occurs infrequently,[1] and that the majority of employees dismissed are those who do not have the qualifying service[2] to complain of unfair dismissal. It may, however, be unsafe to assume that this state of affairs would continue after the introduction of continuous diligence against earnings. In Consultative Memorandum No. 49

[1]The C.R.U. Arrestment Survey (para. 39) discloses that only one employer out of 22 interviewed had dismissed an employee within the previous few years as the result of an arrestment. The other employers said they would not dismiss an employee simply because of an arrestment of wages. The Edinburgh University Debtors Survey (para. 6.3) discloses that some of the debtors whose wages were arrested were or felt themselves to be under threat of dismissal, but no-one had been dismissed nor was there any evidence that they were about to be dismissed. The Advisory, Conciliation and Arbitration Service informed us that they could only trace one industrial tribunal unfair dismissal case involving arrestment, but that in a small number of cases—no more than, say, six a year—arrestment is given as the reason or one of the reasons for termination of their employment by people who do not have the qualifying service to complain of unfair dismissal.

[2]The period is one year for most people in employment before 1 June 1985, but is two years for people commencing employment on or after that date and for people employed by small organisations; Employment Protection (Consolidation) Act 1978, ss. 64 and 64A as amended by Employment Act 1982, s. 20 and Sched. 2, para. 5(1) and Unfair Dismissal (Variation of Qualifying Period) Order 1985.

we expressed the view[1] that it was likely that dismissal resulting from an earnings arrestment would be held unfair in the statutory sense.[2] In order to clarify the matter and to protect those employees without the necessary qualifying service, we sought views on whether provision should be made specifically prohibiting an employer from dismissing an employee wholly or mainly on the ground of diligence against the employee's earnings.[3]

6.283 Most of those who commented on consultation were opposed to making any specific provisions prohibiting dismissal for arrestment, mainly on the ground that the existing legislation—the Employment Protection (Consolidation) Act 1978—provides adequate protection.[4] One body thought that a specific provision dealing with arrestment or other diligence against earnings might call into question the adequacy of the protection afforded in other areas, and that it was undesirable to make provisions for Scotland which had no parallel in England and Wales.[5] On the other hand, a few of those consulted thought that specific provisions were desirable, particularly to deal with those employees not covered by the unfair dismissal provisions.

6.284 We think that provisions applying only in Scotland would need to command more than the minority support for legislation which emerged on consultation. In these circumstances, we have decided not to make any recommendation to change the law in this respect. If, however, experience were to show that dismissal became a problem, the need for legislation should be reconsidered.

Tracing earnings paid into bank or other accounts

6.285 Increasingly, employers pay their employees by cheque or by direct transfer to the employee's bank account.[6] The enactments limiting wages arrestable in execution of a decree, and prohibiting the arrestment of earnings on the dependence of an action,[7] do not expressly protect the earnings when they are deposited in a bank or savings account or otherwise invested. Likewise, there seems no authority for the view that alimentary income payments (which at common law include personal earnings) retain their alimentary character once they have been paid. The prevailing view is therefore that the exemption only applies to earnings in the employer's hands. In one sheriff court case,[8] however, it was held that a statutory provision that certain sums due to injured employees under Workmen's Compensation legislation "shall not be capable of being attached", protected the sum not merely in the employer's hands but also where it had been lodged in the employee's bank account, provided the sum was identifiable and not mixed with other funds.

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[1]Para. 4.6.

[2]Employment Protection (Consolidation) Act 1978, s. 57(1) and (2).

[3]Proposition 38 (para. 4.10).

[4]See generally Ewing and Maher "Arrestment of wages and unfair dismissal" 1979 S.L.T. (News) 185.

[5]There are no provisions in England and Wales dealing with prohibition of dismissal as a result of attachment of earnings orders. The Payne Report (para. 608) recommended against the introduction of such provisions.

[6]C.R.U. Arrestment Survey, para. 12.

[7]Wages Arrestment Limitation (Scotland) Act 1870; Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, s. 1.

[8]*Woods* v. *Royal Bank of Scotland* (1913) 1 S.L.T. 499.

6.286 In Consultative Memorandum No. 49,[1] we invited views on the question whether the exemptions of earnings from arrestment should be extended to earnings paid in to a bank or savings account or converted to some other form into which they might be traceable. Those who commented on this proposal unanimously rejected it. Several commentators thought it would be difficult to frame effective and fair rules on tracing earnings, where for example they had become mixed with other funds. In view of this response, we make no recommendations to change the law.

Jurisdiction

6.287 We turn to consider which courts should have jurisdiction to hear the various applications we recommend earlier in this Chapter. We have already recommended[2] that the sheriff courts should have exclusive jurisdiction to grant conjoined arrestment orders on the grounds that the vast majority of debt decrees emanate from the sheriff courts, and the sheriff courts are spread throughout Scotland making access for litigants and employers easier. Moreover, if the Court of Session were also to grant conjoined arrestment orders it would have to maintain staff to ingather and disburse payments, which would be an unnecessary duplication of effort.

6.288 It would clearly be sensible to confer jurisdiction to deal with applications relating to conjoined arrestment orders (for variation or recall for example) on the courts which granted the orders in question—that is the sheriff courts. We also think that the sheriff courts should have exclusive jurisdiction to deal with applications relating to earnings arrestments and current maintenance arrestments. In addition to the points made in connection with conjoined arrestment orders, which apply with equal force to arrestments of earnings, there is also the point that since the amounts at stake are likely to be modest, the Court of Session would be an inappropriate forum. It might be argued that the Court of Session should at least have jurisdiction to deal with applications relating to arrestments of earnings proceeding on its own decrees, but we think that the advantage lies in having all applications dealt with by the sheriff courts. In the case of poindings the sheriff courts control the diligence whether the decree being enforced is a sheriff court or a Court of Session decree.[3]

6.289 Given that the sheriff courts rather than the Court of Session should have jurisdiction, the selection of an appropriate sheriff court for a particular application arises. Where an existing earnings or current maintenance arrestment is the subject of an application we think that the court in whose jurisdiction the arrestment was executed should deal with the case, and where an existing conjoined arrestment order is involved the court which made the order in question should have jurisdiction. We would adopt a similar solution for applications for conjoined arrestment orders; the appropriate sheriff court would be the court in whose jurisdiction the existing earnings or current maintenance arrestment was executed. Jurisdiction based on the place of execution is more likely than any other jurisdictional ground to identify the court of the place of business at which the employer administers the existing

[1]Proposition 39 (para. 4.13).
[2]Recommendation 6.42(3) (para. 6.236).
[3]See Chapter 5.

arrestment. It can be applied to Court of Session arrestments or where the debtor or creditor resides outwith Scotland, and, in the case of applications for conjoined arrestment orders, it would generally avoid the risk that conflicting orders may be made in different courts. Moreover, it is consistent with the scheme of the Civil Jurisdiction and Judgments Act 1982 whereby, in proceedings concerned with the enforcement of judgments, exclusive jurisdiction is conferred upon the courts where the judgment has been or is to be enforced.[3]

6.290 A person applying for a conjoined arrestment order or seeking to challenge an arrestment or conjoined arrestment order might not be able to find out where the arrestment was executed or the order was made. We suggest that an application should also be capable of being made to any sheriff court in whose jurisdiction the employer has an established place of business. The application could subsequently be transferred to a more appropriate sheriff court if necessary.[4]

6.291 We **recommend:**

(1) The sheriff courts should have exclusive jurisdiction to:
   (*a*) grant conjoined arrestment orders; and
   (*b*) deal with applications for variation or recall of, or disputes regarding the mode of operation of, earnings arrestments, current maintenance arrestments and conjoined arrestment orders.

(2) An application under paragraph (1)(*a*) above should be made to the sheriff court in whose jurisdiction the place of execution of the earnings or current maintenance arrestment is situated. An application under paragraph (1)(*b*) above should be made to the sheriff court that granted the conjoined arrestment order in question or in whose jurisdiction the place of execution of the earnings or current maintenance arrestment in question is situated.

(3) It should also be competent to make an application under paragraph (1) above to a sheriff court in whose jurisdiction the debtor's employer has an established place of business.
(Recommendation 6.54; clause 99.)

[1]Sched. 8, para. 4(1)(*d*).
[2]Under Rule 19 of the Ordinary Cause Rules.

CHAPTER 7

DILIGENCES AND PRIORITIES ENFORCING RATES, TAXES AND CROWN DEBTS

Scope and arrangement of Chapter

7.1 In this Chapter, we advance recommendations for the reform of the law and procedure regulating diligence in pursuance of summary warrants granted by the sheriff for the recovery of local government rates and central government taxes (Section A). We propose very limited changes to the special procedures for enforcing betting and gaming duties and customs and excise duties (Section B). Subject to minor exceptions, we recommend the abolition of civil imprisonment for non-payment of rates, tax penalties, and civil fines and penalties due to the Crown (Section C). We recommend the abolition of Exchequer diligence and of the Crown preferences dependent on the execution of such diligence (Section D). We also recommend abolition of the priorities accorded to claims for rates and tax arrears where moveable property is taken by diligence or by assignation from rates or tax defaulters (Section E). Finally, we recommend abolition of imprisonment under *fugae* warrants in those few cases where it remains technically competent (Section F).

Section A. Reform of diligence under summary warrants for recovery of rates and taxes

7.2 Rating authorities,[1] the Inland Revenue[2] and H.M. Customs and Excise[3] have statutory powers to obtain summary warrants for the recovery of rates[4] and taxes.[5] Summary warrants differ from ordinary debt actions in two main ways. First, the warrant is obtained by an *ex parte* application to the sheriff by the collector rather than as a result of obtaining decree for payment in a court action. Secondly, the diligences authorised by a summary warrant and the procedures for executing them differ from those authorised by an ordinary decree.

7.3 We are here mainly concerned with the diligences available to enforce such warrants. To avoid any misunderstanding, we would emphasise that we have not examined the question of principle whether summary warrants authorising diligence should continue to be available to collectors of rates and taxes, or whether they are objectionable as infringing "due process" principles. We have not consulted on that question. In our Consultative Memorandum No. 48 we made it clear that we were not concerned with the procedure for

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[1]Local Government (Scotland) Act 1947, s. 247.

[2]Taxes Management Act 1970, s. 63.

[3]Value Added Tax (General) Regulations 1980 (S.I. 1980/1536), reg. 59; Value Added Tax Act 1983, Sched. 7, para. 6; Car Tax Regulations 1983 (S.I. 1983/1781), reg. 26; Car Tax Act 1983, Sched. 1, para. 3.

[4]Including private improvement expenses (Local Government (Scotland) Act 1947, s. 252) and charges for non-domestic and metered water supply (Water (Scotland) Act 1980, ss. 9(6) and 49(2)) which are recoverable in the same way as rates.

[5]Income tax, capital gains tax, corporation tax, development land tax and petroleum revenue tax: Taxes Management Act 1970, s. 118(1) and Oil Taxation Act 1975, Sched. 2, para. 1(1).

obtaining a summary warrant.[1] As background information, we pointed out[2] that summary warrants procedure "avoids the publicity attendant on the appearance of the debtor's name in court records" (which can lead to "black listing" by credit reference agencies) and that, while a debtor has no opportunity to object to the grant of summary warrant, the public authority creditor incurs strict liability in damages for wrongful diligence if the debtor establishes that the certificate supporting the *ex parte* application was erroneous.[3] In this report, as in our Consultative Memoranda, we assume that summary warrants will continue to be available.

7.4 Summary warrants are widely used. Table 7.A sets out the number of applications for summary warrants disposed of in some recent years.

Table 7.A

	1979	1980	1981	1982	1983
Rates	347	392	408	481	406
Income Tax	728	1,082	475	979	1,921
V.A.T.	2,753	6,752	3,157	10,996	14,487

Source: Civil Judicial Statistics for Scotland, Tables 11.

The above figures for rates applications give a wholly misleading impression of the number of debtors involved since it is customary for rates collectors to apply for a single warrant in respect of many debtors. There are no statistics available for the whole of Scotland for the number of rates debtors placed on summary warrant but in respect of arrears of rates for the rating year 1980/81 in Strathclyde Region (containing about half the population of Scotland) it has been reported that there were 38,482 rates debtors against whom a summary warrant was granted.[4] The figures for V.A.T. and income tax applications probably reflect fairly accurately the number of debtors involved, since it is normal for a separate warrant to be applied for in respect of each debtor. The number of tax warrants will, however, be greater than the figure shown since warrants would also have been applied for in respect of capital gains tax, corporation tax, development land tax and petroleum revenue tax.

7.5 Summary warrant poinding procedure has a "filter" effect similar to that of ordinary poinding procedure. The Keith Report observed[5] that it is the threat of sale rather than the actual execution of the sale which secures payment. The presence of the sheriff officer at the debtor's premises "itself

[1]Consultative Memorandum No. 48, para. 7.2.

[2]*Idem.*

[3]Notwithstanding what is said in the Keith Report, para. 24.2.23, we have not expressed the view that summary methods of recovery of debts without the need for a judgement are appropriate for local rates and central government taxes. Nor have we relied on any argument that rating bodies and tax collectors cannot choose their debtors: indeed, in our Bankruptcy Report, para. 15.3, in the context of Crown preferences in sequestrations, we pointed out that there are other classes of involuntary creditor (such as alimentary creditors and the victims of delicts) who receive no preference.

[4]*The Scotsman*, August 1982.

[5]Para. 24.2.14.

provides a powerful compulsion: . . . in most cases payment is obtained on the spot". It is the practice of many rating authorities to intimate the granting of the summary warrant to debtors in order to promote informal settlement of the arrears. Even after the summary warrant has been sent to sheriff officers for diligence to be done, many officers write to debtors before doing diligence intimating their intention to execute the warrant. The effect of these informal steps in promoting settlement of arrears is especially marked where rates are concerned. The available statistics are shown in Tables 7.B and 7.C.

Table 7.B

Rates summary warrants

	Lothian (1979/80)*	Strathclyde (1980/81)†
Debtors on warrant	7,544	38,482
Poindings executed	1,413	—
Arrangements for sale intimated to debtors	455	1,197
Sales advertised	191	—
Sales executed	7	7

* Information supplied by Lothian Regional Council.
† *The Scotsman*, August 1982.

Table 7.C

[Tax summary warrants (whole of Scotland)]

	Inland Revenue taxes* (1978)	Value Added Tax† (1978)
Debtors on warrant	2,127	3,745
Poindings executed	1,220	2,037
Sales executed	4	Less than 10

* Information supplied by Inland Revenue.
† Information supplied by H.M. Customs and Excise.

Summary warrants and ordinary actions

7.6 Rating and tax authorities may proceed by way of summary warrant, or by ordinary action either in the Court of Session or the sheriff courts. Recovery by way of action is generally used where the liability for, or the amount of, the rates or tax claimed is disputed. A rating authority which obtains a decree for arrears of rates in an action cannot subsequently apply for a summary warrant against the same debtor in respect of the same rates.[1] Where they have already obtained a summary warrant a rating authority cannot proceed by way of action against the debtor unless they abandon the summary warrant

[1]Local Government (Scotland) Act 1947, s. 247(2) proviso.

as regards that debtor[1] and an action for payment of rates arrears cannot be raised once a summary warrant for recovery of those arrears has been "put in force".[2] Although the meaning of this phrase is not entirely clear, it was probably intended[3] to restate the pre-existing law whereby an action could not be raised once diligence had been executed to enforce a summary warrant.[4] The tax authorities may, however, apply for a summary warrant even though they already hold a decree, and they may abandon their summary warrant at any time and proceed instead by way of an action.[5] An extract decree obtained as the result of an action is warrant for all lawful diligence so that there is little or no advantage in obtaining a summary warrant in addition.

7.7 In the interests of uniformity, we consider that the same rules should apply to both the rating and tax authorities. We propose that the raising of an action should be an absolute bar to proceeding by way of summary warrant. Both rating and tax authorities should be entitled to abandon an existing summary warrant in respect of a particular debtor and proceed by way of action against that debtor. Even after a summary warrant has been granted, a dispute as to liability or the amount of rates or tax arrears may arise which may require to be litigated. We consider, however, that once diligence has been commenced in pursuance of a summary warrant, it should not be possible for the rates or tax collector to abandon it and proceed by way of action. A rates or tax defaulter who has suffered diligence under a summary warrant should not be subjected to the trouble and expense of a court action for payment of the arrears to which the summary warrant related. Again, in the interests of uniformity, we recommend that the same rule should apply both to rates and taxes. In the field of rates recovery, the present restriction on changing from summary warrant diligence to ordinary action and diligence seems to cause few problems: any defect in the summary warrant or relative collector's certificate normally becomes apparent before the sheriff officer executes diligence under the warrant.

7.8 We **recommend:**

(1) It should be incompetent for a summary warrant to be granted for the recovery of arrears of rates or taxes due by a debtor if an action has already been raised for payment of those arrears.

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[1] *Govan Police Commissioners* v. *Clark* (1889) 5 Sh.Ct.Reps. 156; *Kilmarnock Town Council* v. *Sloan* (1914) 30 Sh.Ct.Reps. 238; *Lanarkshire County Council* v. *Burns* (1915) 31 Sh.Ct.Reps. 301; *Wright* v. *Craig* (1919) 35 Sh.Ct.Reps. 22; *Staig* v. *McMeekin* (1943) 59 Sh.Ct.Reps. 126.

[2] Local Government (Scotland) Act 1947, s. 247(1) proviso. The warrant must be abandoned before decree is granted.

[3] Hutton, *Local Government (Scotland) Act 1947*, p. 335.

[4] *Lanarkshire County Council* v. *Burns* (1915) 31 Sh.Ct.Reps. 301.

[5] *Wright* v. *Craig* (1919) 35 Sh.Ct.Reps. 22. S. 67 of the Taxes Management Act 1970 provides that tax arrears not exceeding the sum for the time being specified in s. 35(1)(*a*) of the Sheriff Courts (Scotland) Act 1971 (currently £1,000, Sheriff Courts (Scotland) Act 1971 (Summary Cause) Order 1981 (S.I. 1981/842)) may be sued for in the sheriff courts "without prejudice to any other remedy"; while s. 68 provides that any tax may be sued for in the Court of Session sitting as the Court of Exchequer "as well as by the other means specially provided by this Act for levying the tax".

(2) The raising of an action against the debtor for payment of arrears of rates or taxes should render an existing summary warrant for those arrears ineffective as regards that debtor.

(3) It should be incompetent to raise an action against the debtor for payment of arrears of rates or taxes once a poinding, arrestment or earnings arrestment has been executed for recovery of those arrears in pursuance of a summary warrant.
(Recommendation 7.1; Bill, Schedule 5, paragraphs 1, 4, 6 and 7.)

Who should grant and execute summary warrants?

7.9 Summary warrants for rates, value added tax and car tax can only be granted by a sheriff.[1] In the case of Inland Revenue tax debts, a summary warrant can also be granted by the General Commissioners[2] although we understand that this is not modern practice. The power to grant a summary warrant should, in our opinion, be exercised only by sheriffs since in principle a diligence should normally be authorised only by the warrant of a judge. The Keith Report[3] stated that they had "some sympathy in principle with this added judicial oversight".

7.10 Tax summary warrants may be executed only by "the sheriff officers of the sheriffdom"[4] while rates summary warrants may be executed by officers of court[5]—an expression which includes messengers-at-arms. In practice it appears that only sheriff officers are instructed to execute rates summary warrants. Later in this report we recommend that a messenger-at-arms should not as such have authority to execute sheriff court warrants.[6] In line with this recommendation and reflecting current practice, a rates warrant should be executed by sheriff officers only.

7.11 We **recommend:**

A summary warrant should be granted only by a sheriff and diligence in execution of a summary warrant should be carried out only by sheriff officers.
(Recommendation 7.2; clause 103(3) and Schedule 5.)

Diligence authorised by summary warrants

The existing law

7.12 Arrestment is available to enforce summary warrants for rates[7] but not summary warrants for taxes. Where the debtor's wages are arrested the limitation on the amount arrestable set out in section 2 of the Wages Arrestment Limitation (Scotland) Act 1870 (half the balance over £4 per

[1]Local Government (Scotland) Act 1947, s. 247(2); Taxes Management Act 1970, s. 63(1); Value Added Tax (General) Regulations 1980, reg. 59(*a*); Car Tax Regulations 1983, reg. 26.
[2]Taxes Management Act 1970, s. 63(1).
[3]Para. 24.2.23.
[4]Taxes Management Act 1970, s. 63(2); Value Added Tax (General) Regulations 1980, reg. 59(*b*); Car Tax Regulations 1983, reg. 26(*b*).
[5]Local Government (Scotland) Act 1947, s. 247(2).
[6]Recommendation 8.6 (para. 8.40).
[7]Local Government (Scotland) Act 1947, s. 247(3).

week) does not apply,[1] and in practice the debtor's whole wages are arrested. Poinding is the diligence generally used to enforce payment of rates and taxes. The poinding procedures differ from poindings used to enforce an ordinary decree. Further, the rates poinding procedure differs in many points of detail from the taxes poinding procedure.

7.13 The main differences between the poinding procedure under summary warrants for arrears of rates set out in section 247 of the Local Government (Scotland) Act 1947 and ordinary poinding procedure are as follows:

(i) No charge to pay is served before a summary warrant poinding is executed.

(ii) A summary warrant poinding is not supervised by the sheriff. Thus, the officer does not report the poinding or the sale; no warrant of sale is required and the officer himself makes arrangements for the sale; the sale can take place four days after poinding on three days' notice; and the proceeds of the diligence are not, or at least not normally, subject to audit and taxation by the auditor of court.

(iii) In a summary warrant poinding, the goods are not valued when poinded; there is no "offer back" to the debtor at their appraised value; and no provision is made for the adjudication and delivery of unsold goods at their appraised values to the rating authority.

7.14 The poinding procedure under summary warrants for recovery of Inland Revenue taxes is set out in section 63 of the Taxes Management Act 1970. Virtually identical procedures are provided for the recovery of value added tax[2] and car tax.[3] The tax procedure is similar to the rates procedure in that no charge to pay is served before the poinding is executed and the diligence is not supervised by the sheriff. However, the goods are valued not earlier than five days after the poinding and can be redeemed at their appraised values. The appraised values operate as upset prices at the sale and unsold goods are consigned into the sheriff's hands for a sale by public auction without the upset prices.

Use of arrestment

7.15 At present, summary warrants for recovery of rates authorise the use of arrestments,[4] but diligence authorised by tax warrants is limited to poindings.[5] In Consultative Memorandum No. 48 we proposed[6] that a summary warrant for recovery of tax arrears should also be enforceable by arrestment. All those consulted agreed and it was observed that arrestment would be helpful in recovering arrears of tax from a businessman who had ceased trading, but who had found employment. The Keith Report observed that arrestment would be a useful additional weapon in the Revenue Departments' armoury

[1]Wages Arrestment Limitation (Scotland) Act 1870, s. 4.
[2]Value Added Tax (General) Regulations 1980, reg. 59.
[3]Car Tax Regulations 1983, reg. 26.
[4]Local Government (Scotland) Act 1947, s. 247(3).
[5]Taxes Management Act 1970, s. 63; Value Added Tax (General) Regulations 1980, reg. 59; Car Tax Regulations 1983, reg. 26.
[6]Proposition 61 (para. 7.23).

and recommended implementation of our proposal.[1] We therefore propose that all summary warrants should authorise the use of arrestment.

7.16 In Consultative Memorandum No. 49, we proposed that it should be competent to enforce rates summary warrants by means of earnings arrestments (such as we now recommend in Chapter 6 of this report), and that if arrestment was to become a competent mode of diligence to enforce tax summary warrants, then earnings arrestments should also be available to enforce payment of tax.[2] No adverse comments were made on consultation and we recommend that earnings arrestment should be competent to enforce all summary warrants. In our discussion of earnings arrestments in Chapter 6 we recommend that the normal rules on the amount exempted from arrestment should apply where the debt is rates or taxes[3] and that such debts should not enjoy any preference in conjoined arrestment orders.[4]

7.17 In Chapter 6 of this report, we also recommend that a charge to pay a sum due under a decree must first be served on the debtor, and the days of charge must expire without payment being made, before an earnings arrestment could be laid.[5] We do not, however, think that a charge should be an essential preliminary step to an earnings arrestment where a summary warrant is concerned, since a summary warrant poinding also requires no prior charge. Charges are, in our opinion, incompatible with the expeditious nature of summary warrant diligence, and in practice most debtors get informal warning before diligence is done against them.

7.18 We **recommend:**

A summary warrant for the recovery of rates or taxes should authorise an arrestment of the debtor's funds and property other than earnings, and an earnings arrestment (or where appropriate a conjoined arrestment order) against his earnings.
(Recommendation 7.3; Bill, Schedule 5, paragraphs 1, 2, 6 and 7.)

Poinding

7.19 *Retention of special procedure.* Summary warrant poindings are not supervised by sheriffs: they can also be more expeditious than ordinary poindings since no charge to pay is required and a shorter interval need elapse between poinding and sale. In Consultative Memorandum No. 48 we provisionally proposed[6] that summary warrants should continue to be enforceable by a special poinding procedure rather than by poinding in common form used to enforce normal decrees. Those consulted agreed with this proposal. The O.P.C.S. Defenders Survey found that individual rates defaulters[7] pursued by summary warrant were generally from higher income groups than other

[1]Para. 24.2.25(iii).
[2]Proposition 43 (para. 4.18).
[3]Recommendation 6.11 (para. 6.82).
[4]Recommendation 6.44 (para. 6.244).
[5]Recommendation 6.7 (para. 6.59).
[6]Proposition 56 (para. 7.8).
[7]Many rates defaulters are business organisations: the survey only covered rates defaulters who are individuals.

debtors[1] and the amounts owed were relatively small,[2] that few were unable to pay the arrears (only 29% as opposed to 69% of all debtors); and that proportionately more rates defaulters than other debtors delayed payment on principle (10% of rates defaulters as against 1% of all debtors).[3] It seems therefore that many people delay or refuse payment of rates and taxes long after they would regard it as wrong to keep an ordinary creditor out of his money. This seems to us to justify a more expeditious poinding procedure. Moreover, as we observed on consultation,[4] the absence of judicial control is justified where the creditors are public bodies who retain direct and tight control over the use of diligence and who ought to be entrusted to use their enforcement powers in a fair and responsible manner. No consultee objected to this observation. Finally, the execution of summary warrant diligence would be subject to the new machinery for the inspection of the work of sheriff officers which we recommend in Chapter 8 below.

7.20 We **recommend:**

Summary warrants for rates and taxes should continue to be enforceable by a special statutory poinding procedure rather than by poinding in common form.
(Recommendation 7.4; Bill, Schedule 6.)

7.21 *A uniform statutory poinding procedure.* As noted in paragraph 7.14 above, the statutory poinding procedure for Inland Revenue tax summary warrants differs in many matters of detail from the procedure available for rates summary warrants; also, the value added and car tax provisions are not identical to the Inland Revenue tax provisions. We think that there is no justification for the continuance of these differences and that it would be better if a uniform summary warrant poinding procedure were adopted. We put forward such a proposal in Consultative Memorandum No. 48[5] and all those consulted agreed. We propose for summary warrants to adopt many of the provisions recommended for ordinary poindings in Chapter 5, the main modifications being designed to retain the "summary" nature of the procedure and the absence of supervision by the sheriff. This could have been done by a Schedule to the Bill annexed to our report showing merely the modifications in question, but we believe that it would be much more convenient for readers and users of the legislation to set out in a Schedule[6] a complete code regulating summary warrant poindings even though this code repeats much of the recommended clauses regulating ordinary poindings.[7]

7.22 We **recommend:**

The special statutory poinding procedure should be the same for all summary warrants for rates and taxes.
(Recommendation 7.5; Bill, Schedule 5, paragraphs 1, 2, 6 and 7 and Schedule 6.)

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[1]O.P.C.S. Defenders Survey, pages 13 and 14; Table 2.14.
[2]*Ibid.* Table 3.4.
[3]*Ibid.* Table 4.2.
[4]Consultative Memorandum No. 48, para. 7.8.
[5]Proposition 57 (para. 7.9).
[6]Bill, Sched. 6.
[7]Bill, Part III.

7.23 The procedure is set out at Schedule 6 to the Bill annexed to this report. The procedure would contain many of the safeguards for debtors recommended in Chapter 5 for poindings in common form, e.g. provisions preventing sales in dwellings without the consent of the debtor or occupier and advertisements of sales identifying the debtor unnecessarily.[1] We have not thought it necessary to discuss these safeguards in detail since the arguments for such safeguards were considered fully in Chapter 5. In the following paragraphs, however, we discuss some questions peculiar to the uniform procedure which we recommend.

7.24 *Valuation of poinded goods.* Under a tax summary warrant the debtor's goods are merely inventoried at the poinding stage and valued only after the expiry of at least five days.[2] The valuation operates as a price at which the debtor may redeem his goods[3] and as an upset price at the subsequent sale.[4] No formal valuation of goods poinded under a rates summary warrant is required, although an approximate valuation must be made since the officer is only entitled to poind and sell sufficient goods to satisfy the rates and 10% surcharge due.[5] In practice it appears that many officers do carry out a formal valuation when poinding for arrears of rates. In Consultative Memorandum No. 48, we suggested that goods poinded in pursuance of a summary warrant should be valued.[6] On consultation there was general agreement with that suggestion, but one body put forward the idea that valuation should not be necessary since the goods should be sold for whatever they could fetch. We would reject this idea because we think debtors ought to have the protection of upset or reserve prices in a forced sale of their goods. This protection is particularly important in summary warrant procedure because the sale is arranged by an officer of court without prior approval or subsequent scrutiny of the sale by the sheriff. Moreover, appraisal is essential if, as we recommend, the rates or tax defaulter is to have a right to redeem the goods.

7.25 If goods are to be valued, when should the valuation take place? In Consultative Memorandum No. 48 we suggested[7] that the valuation should be carried out immediately before the sale. Although most of those consulted agreed, we now think that the valuation should be done at the time when the goods are poinded. The debtor's right to redeem his goods at their appraised values within a prescribed period after valuation is an important right in itself and also serves to check undervaluation. This right, which exists at present only in relation to tax summary warrants,[8] should in our opinion be retained and applied to all summary warrants. Yet this right would be almost worthless if valuation were to take place immediately before sale or even on removal for sale. Later in this Chapter we recommend that the sheriff should have

[1]See e.g. Bill, Sched. 6, paras. 10 and 12(4).
[2]Taxes Management Act 1970, s. 63(4).
[3]*Ibid.*, s. 63(5).
[4]*Ibid.*, s. 63(4).
[5]Local Government (Scotland) Act 1947, s. 247(2)(*a*).
[6]Proposition 59 (para. 7.16).
[7]Proposition 59 (para. 7.16).
[8]See 1970 Act, s. 63(5). Under s. 63(3), the tax defaulter may redeem the goods by payment of the tax in arrears and costs (not the appraised value) within five days after the proceedings. Under s. 63(5), at a later stage, it appears that the tax defaulter may redeem the poinded goods on payment of the appraised value within five days after valuation.

power to recall a poinding where the goods have been substantialy undervalued or where the likely proceeds of sale are less than the likely expenses of sale;[1] again valuation immediately before sale would take away much of the usefulness of these provisions. Valuation at the time of poinding avoids the need for the officer to make an extra visit to the debtor's premises, and it allows the debtor adequate time to redeem his goods or to seek recall of the poinding. It also assists the officer to decide how many goods to poind and helps the collector of rates to consider whether the diligence is worth pursuing further. The common extra-statutory practice in rates recovery procedure of valuing the goods at the time of poinding suggests that valuation should be carried out when the goods are poinded.

7.26 In tax recovery procedures the valuation is supposed to be carried out by two persons appointed by the officer, the intention being, it is thought, that they should be skilled valuators,[2] but the officer himself acts as the valuator in practice. When we considered this problem in the context of poindings in common form, we recommended that the officer should value the goods himself, but that in exceptional circumstances a skilled valuator could be appointed.[3] The Inland Revenue, in commenting on our proposals regarding appraisal, expressed concern at valuation by officers alone since many goods poinded for tax debts are commercial goods which officers may not be able to value correctly. We share this concern, but it would be far too expensive to require the appointment of specialist valuators in every case. We recommend instead that the officer should be entitled to call in a specialist valuator. Officers are, we think, sufficiently familiar with the problems of valuation to recognise cases where they themselves cannot properly value the goods.

7.27 In relation to ordinary poindings, we recommend above that debtors should be entitled to apply to the sheriff for recall of the poinding, or to object to the granting of a warrant of sale, on the ground that the goods were substantially undervalued.[4] The entitlement to apply for recall should in our opinion be extended to summary warrant poindings; the objection to warrant of sale cannot be extended since we recommend that, as under existing law, there should be no separate warrant of sale in summary warrant poindings. In order to prevent applications for recall on the eve of a sale, we suggest that an application for recall should be competent only before arrangements for the sale or removal of his goods for sale have been intimated to the debtor.

7.28 A tax debtor is entitled to redeem his goods before sale on payment of the appraised value, provided he does so within five days after the valuation.[5] This right is valuable since it serves as a check to undervaluation. We recommend that it should become a feature of the proposed summary warrant poinding procedure, the period for redemption being 14 days after the poinding and that the debtor should have a further opportunity to redeem

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[1]Recommendation 7.9 (para. 7.42).
[2]Taxes Management Act 1970, s. 63(4).
[3]See paras. 5.89 and 5.95 above.
[4]Recommendations 5.29 (para. 5.137) and 5.30 (para. 5.146).
[5]Taxes Management Act 1970, s. 63(5).

the poinded goods within seven days after notification to him of the date of sale, or of removal and sale.[1]

7.29 In a sale under a tax summary warrant, the appraised value of an article operates as an upset price (the price at which bidding commences for it). In our consideration of ordinary poindings in Chapter 5 we recommended that the appraised value should operate as a reserve price (the price below which an article will not be sold to the bidder) in order to enable the auctioneer to obtain a better price in the interests of both the creditor and the debtor.[2] We further recommend that the creditor should have the option of disclosing the reserve at the auction. We would extend both these recommendations to summary warrant sales.

7.30 We **recommend:**

(1) In summary warrant poinding procedure, the goods should be valued at their open market value at the time of poinding. The valuation should be carried out by the officer except in special cases where a specialist valuator should value the goods.

(2) The debtor should have an opportunity and right to redeem any of his goods by payment to the officer of their appraised values within 14 days after the execution of the poinding and within seven days after notification to the debtor of the date of sale or removal and sale.

(3) The debtor should be entitled to apply to the sheriff for recall of the poinding on the grounds that the goods were substantially undervalued, at any time up to the officer's intimation to him of the date arranged for the sale or removal of his goods for sale.

(4) In any auction of goods in pursuance of a summary warrant the appraised values of the goods should be treated as reserve prices. The creditor need not disclose the existence of a reserve price or its amount to bidders.

(Recommendation 7.6; Bill, Schedule 6, paragraphs 5(1)(*b*); 5(5); 7; 11(2); 14(1).)

7.31 *Sale of poinded goods.* One major difference between a summary warrant sale and an ordinary poinding sale lies in the treatment of unsold goods. In ordinary poinding procedure, unsold goods are adjudged and delivered to the creditor, the debtor being credited with their appraised value. The creditor may then sell them at his own expense, retain them for his own use, or abandon them to the auctioneer or the debtor. By contrast, in summary warrants for the recovery of rates, no upset price is fixed and the goods may be sold for whatever price they may fetch, or may be exposed for sale on several occasions. In summary warrants for the recovery of taxes, goods which fail to reach their upset price are consigned in the hands of the sheriff[3] to be:

". . . rouped, sold and disposed of by order of the sheriff, in such manner and at such time and place as he shall appoint . . .".

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[1]We recommend similar periods in relation to poindings in common form; Recommendations 5.19 (para. 5.95) and 5.31 (para. 5.150).

[2]Recommendation 5.42 (para. 5.199).

[3]Value Added Tax (General) Regulations 1980, reg. 59(*g*); Taxes Management Act 1970, s. 63(7) (sheriff principal or sheriff).

In neither rates nor tax summary warrant procedure is any provision made for the delivery of unsold goods to the creditor at the appraised values.

7.32 In Consultative Memorandum No. 48, we suggested that if goods poinded under a summary warrant were not sold they should be adjudged to the rating or tax authority and the debtor should be credited with the appraised value as occurs with unsold goods in poindings in common form.[1] The majority of those commenting approved this suggestion.

7.33 The first argument put forward by those commentators who opposed our suggestion was that the rating and tax authorities would have no use for unsold goods adjudged to them. But this argument applies equally to other poinding creditors. In any event, collectors could avoid having to deal with unsold goods by arranging with the auctioneer that the goods should be sold to the highest bidder whether or not the appraised value was reached. Provided the debtor was credited with the appraised value or the amount of the highest bid, whichever was the greater, there could be no objection to such an arrangement.[2]

7.34 Those commentators opposed to our suggestions also feared that crediting the debtor with the appraised value of unsold goods would result in an unwarranted reduction in the debt. We can see no reason, however, for treating the rating and tax authorities differently from other creditors in this respect. Our earlier recommendation allowing appointment of specialist valuators[3] will, we think, help prevent serious discrepancies arising between the appraised value of poinded goods (especially valuable commercial goods) and the price they fetch at auction. Moreover, where goods have been appraised at too high a value, the rating or tax authority may obtain damages from the officer or valuator if he has failed to exercise the requisite degree of skill in carrying out his appraisal.

7.35 In our opinion, delivery of goods to the rates or tax authority at the appraised values provides a simple and satisfactory method of terminating the summary warrant poinding procedure. It also helps to safeguard the debtor from having his goods disposed of at an undervaluation in a sale not subject to judicial supervision.

7.36 We **recommend:**

> Where goods poinded under a summary warrant are exposed for sale, the appraised value should operate as a reserve price. The ownership of goods which are not sold because the highest bid fails to reach the reserve price should pass to the rating or tax authority, unless the authority authorises the auctioneer to sell the goods to the highest bidder. The debtor should be credited with the appraised value or the amount of the highest bid whichever is the greater.
> (Recommendation 7.7; Bill, Schedule 6, paragraph 14(3) to (6).)

7.37 *Release of articles and recall of poinding.* In Chapter 5 of this report,

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[1]Proposition 59 (para. 7.16).

[2]We have made a similar recommendation for sales under ordinary poinding procedure. See Recommendation 5.43 (para. 5.203) above.

[3]Recommendation 7.6 (para. 7.30) above.

dealing with ordinary poinding procedure, we recommended an extension of the range of household and other goods exempt from poinding so that a creditor would not be entitled to poind and sell tools of trade and articles reasonably required to enable the debtor and his family to continue to live in the house.[1] If exempt articles were poinded, the sheriff on application by the debtor, would be empowered to order that they be released from the poinding. We do not think that the rating and tax authority should have any greater powers of sale over goods than ordinary creditors have[2] and accordingly we propose that our above-mentioned recommendation should be extended to summary warrant poindings.

7.38 We also recommended as regards ordinary poindings that the sheriff should have power, on application by the debtor, to release particular articles from a poinding on the ground that it would be unduly harsh for them to be sold.[3] This power could be useful where the articles, although not exempt from poinding, nevertheless ought to be released having regard to the particular circumstances of the debtor. Cases where such a discretionary power might be useful include family photograph albums, small items of personal jewellery such as a wedding ring, or where articles essential to the debtor's business had been poinded although non-essential goods were available for poinding. We consider that this recommendation should also apply to summary warrant poindings.

7.39 We **recommend:**

The sheriff should have power on an application by the debtor made within 14 days of the execution of the poinding to release an article from the poinding on the grounds that:

(*a*) it is exempt from poinding; or

(*b*) continuation of the poinding or the sale of the article would be unduly harsh.

(Recommendation 7.8; Bill, Schedule 6, paragraphs 1 and 6.)

7.40 While we do not think that a poinding in pursuance of a summary warrant should be controlled by the sheriff in the same way as an ordinary poinding,[4] we consider that the sheriff, on application by the debtor, should be able to intervene and recall a summary warrant poinding in certain circumstances. Where the poinding is invalid[5] or has ceased to be effective,[6] the debtor should be entitled to apply for its recall at any time before the goods are sold. The other grounds of recall we recommend for ordinary poindings are that it would be unduly harsh in the circumstances for the sale to take place, that the goods are in aggregate substantially undervalued, and

[1]Recommendations 5.9, 5.10 and 5.11 (paras. 5.48, 5.51 and 5.57).

[2]The Law Reform (Diligence) (Scotland) Act 1973 (which exempts certain household goods from poinding) applies to summary warrant poindings.

[3]Recommendation 5.13 (para. 5.65).

[4]In ordinary poindings procedure the poinding has to be reported to the court, a warrant of sale sought, the arrangements made for sale approved by the sheriff, the sale reported to the sheriff, and the account of the sale audited by the auditor of court.

[5]E.g. where the poinding has not been properly executed.

[6]E.g. where the debt has been settled.

that the likely proceeds of sale will not exceed the likely expenses of sale.[1] We would extend these grounds to summary warrant poindings since the possibility of recall would serve as a check to undervaluation and to diligence being used punitively without any benefit accruing to the creditor. In recommending the introduction of these discretionary powers, we are not suggesting that the rating and tax authorities act oppressively at present.

7.41 The powers described in the proceding paragraph will under our proposals only be available up to the time of granting warrant of sale in ordinary poinding procedure, in order to prevent an application being made on the eve of sale. In summary warrant procedure, however, the warrant of sale is contained in the summary warrant itself; the officer makes the arrangements for sale himself in consultation with the creditor. We think that the time after which an application for recall should be incompetent in summary warrant proceedings should be when the officer intimates to the debtor the arrangements made for sale or for the removal of the debtor's goods to other premises for the purposes of sale.

7.42 We **recommend:**

The sheriff should have power, on application by the debtor or of his own accord at any time before the sale, to recall a summary warrant poinding on the ground that it is invalid or has ceased to have effect. The sheriff should also have power, on an application made by the debtor before intimation by the officer to the debtor of the arrangements made for the sale of the debtor's poinded goods or their removal for sale, to recall the poinding on the ground that a sale would be unduly harsh, the goods were in aggregate substantially undervalued, or that the likely proceeds of sale will not exceed the likely expenses of sale.
(Recommendation 7.9; Bill, Schedule 6, paragraph 7.)

7.43 *Warrant to open shut and lockfast places.* While an extract decree authorising poinding in common form automatically includes a warrant to open shut and lockfast places,[2] the relevant statutues and subordinate legislation are silent as to whether such a warrant is deemed to be included in the grant of a summary warrant. We think this matter should be put beyond doubt by including a warrant to open in the summary warrant. We would reject the alternative of granting a warrant to open only on application by the creditor since in that case every rating and tax authority would, as a matter of practice, include such an application in any application for a summary warrant.

7.44 In order to prevent unnecessary forcible entry to dwellinghouses, we have recommended in connection with ordinary poindings that an officer's powers of entry and warrants to open shut and lockfast places should not entitle him to enter dwellinghouses where no one or only children under 16 are present without prior intimation of his intention to enter or prior authorisation from the sheriff.[3] We would extend this recommendation to summary warrant poindings.

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[1]Recommendation 5.29 (para. 5.137).
[2]Debtors (Scotland) Act 1838, Scheds. 1 and 6; Writs Execution (Scotland) Act 1877, s. 3; Sheriff Courts (Scotland) Extracts Act 1892, s. 7(1).
[3]Recommendation 5.18 (para. 5.85).

7.45 We **recommend:**

(1) A summary warrant should be deemed to include a warrant to open shut and lockfast places in the debtor's occupancy for the purposes of executing a poinding and sale under the summary warrant.

(2) It should not be competent for an officer to enter a dwellinghouse which is unoccupied or in which no person over 16 years of age is present in pursuance of a warrant to open shut and lockfast places unless the officer had previously intimated to the debtor (and in the case of occupation by children under 16 years, the social work department) his intention to enter or had obtained prior authority from the sheriff.

(Recommendation 7.10; Bill, Schedule 6, paragraphs 4 and 24.)

7.46 *Witnesses to officer's execution of diligence.* In executing a poinding in pursuance of an ordinary decree the officer is required to be accompanied by two witnesses. By contrast, no witnesses are necessary where the officer is executing diligence under a tax summary warrant,[1] on the grounds that the procedure is intended to be expeditious and no report of poinding or sale is made to the court and accordingly no question of attestation by witnesses arises. Rates summary warrants are probably in the same position as tax summary warrants, although in practice many officers are accompanied by witnesses in executing poindings for rates. We accept that witnesses are unnecessary and this is reflected in our recommended summary warrant poinding procedure which requires no witnesses for poindings in pursuance of both rates and tax summary warrants.

7.47 *Notification of auctions to tax authorities.* Section 63(9) of the Taxes Management Act 1970 provides that every auctioneer who sells any goods or effects by auction shall give to the collector of taxes at least three days' notice of the date of the sale and the name and address of the person whose goods are being sold. Section 63(10) makes an auctioneer who fails to comply liable to a £50 penalty. Similar provisions occur in the corresponding value added tax and car tax legislation.[2] The Keith Committee observed that the purpose of section 63(9) is to allow the collector the opportunity of claiming the proceeds of sale of goods if he is aware that the person on whose behalf they are being sold is in default with the payment of tax. The provisions cover all auctions, not merely auctions of poinded goods. On the suggestion of the Inland Revenue, the Keith Report[3] recommended the repeal of these provisions which stem from an Act of 1812[4] and are now virtually a dead letter. We respectfully endorse this recommendation, and have omitted the provisions from the Bill annexed to this report.

7.48 We **recommend:**

In line with the recommendation of the Keith Report, the duty of an auctioneer to intimate an auction of moveables imposed by section 63(9)

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[1] *Norman* v. *Dymock* 1932 S.C. 131, construing s. 97 of the Taxes Management Act 1880, re-enacted with minor amendments in s. 63 of the Taxes Management Act 1970.

[2] Value Added Tax (General) Regulations 1980, reg. 59(*i*); Car Tax Regulations 1980, reg. 26(*h*).

[3] Para. 19.7.1, sub-para. (*c*).

[4] 52 Geo. III c. 95, s. 20.

and (10) of the Taxes Management Act 1970 should be abolished. (Recommendation 7.11; Bill, Schedule 5, paragraph 2.)

Review of diligence under summary warrant

7.49 The Keith Committee in the context of discussing our proposal for a uniform code to regulate the recovery of rates and taxes by summary warrant diligence recommended[1] that an explicit grievance procedure along the lines of section 249 of the Local Government (Scotland) Act 1947 should be extended to tax summary warrants in place of the existing common law remedies. Section 249(1) provides that an owner of goods sold under a rates summary warrant who feels aggrieved may apply to the sheriff who shall determine the dispute or claim of damages summarily. Subsection (2) of that section prohibits questioning of the summary warrant or any proceedings under the warrant by any other legal proceedings.

7.50 Section 249 of the 1947 Act derives from section 354 of the Burgh Police (Scotland) Act 1892 which is in turn derived from section 92 of the General Police and Improvement (Scotland) Act 1862 and section 86 of the Poor Law (Scotland) Act 1845. It is not clear whether the present section is to be regarded as providing aggrieved persons with a simple remedy, or protecting rating authorities from proceedings other than summary applications to the sheriff, although the latter appears to have been the intention behind the corresponding provision in the Poor Law (Scotland) Act 1845. The express prohibition in section 249(2) of the 1947 Act of legal proceedings other than by way of application to the sheriff has not in fact prevented the courts from entertaining an action of damages for wrongous diligence in respect of an arrestment which had proceeded on an invalid summary warrant,[2] a suspension of a poinding where the rates had been paid prior to the poinding,[3] an action of reduction of a summary warrant where the assessment had been paid,[4] and an interdict of a threatened poinding in respect of poor law rates where by error the defaulter's property had been entered twice in the Valuation Roll.[5]

7.51 We are grateful to the Keith Committee for drawing our attention to section 249. But in our opinion it would not be right to provide for the exclusion of common law remedies. In the first place, as is shown in the preceding paragraph, a purported exclusion of common law remedies may well be ineffectual. Secondly, an aggrieved person may need to raise an action to reduce a summary warrant, or the certificate of execution of an arrestment or of an earnings arrestment, or a schedule of poinding, and the remedy of reduction is not available in the sheriff court. Thirdly, the remedies of interdict and of suspension and interdict should be retained since, paradoxically, the courts might often be prepared to grant interim interdict in urgent cases more speedily than they would grant an order under section 249(1) notwithstanding its summary nature.

7.52 We would give effect to the substance of the Keith Committee's

[1] Para. 24.2.24.
[2] *Grant* v. *Magistrates of Airdrie* 1939 S.C. 738.
[3] *Hutchison* v. *Magistrates of Innerleithen* 1933 S.L.T. 52.
[4] *Ferguson* v. *Malcolm* (1850) 12 D. 732.
[5] *Sharp* v. *Latheron Parochial Board* (1883) 10 R. 1163.

recommendation not by extending section 249 to tax summary warrants, but by repealing it and by introducing into our recommended uniform summary warrant procedure the safeguards for debtors, such as applications to recall poindings, recommended for ordinary poindings in so far as they are compatible with the different procedure. These safeguards would, however, be without prejudice to any existing common law remedies. In the case of earnings arrestments, the provisions on recall and resolution of disputes recommended in Chapter 6 should apply without modification to earnings arrestments executed in pursuance of summary warrants since the arrestment procedure is the same whatever debt it enforces.

7.53 We **recommend:**

(1) Section 249 of the Local Government (Scotland) Act 1947 (which provides for a summary procedure for the review of summary warrant proceedings on application by an aggrieved owner of the pointed goods) should be repealed.

(2) Without prejudice to any other competent remedy:

(*a*) the provisions allowing a debtor to apply for the recall of a poinding or the release of articles from a poinding which are recommended for ordinary poindings should be competent in summary warrant poindings subject to such modifications as are necessary in view of the different procedure;

(*b*) the provisions allowing applications to be made for the recall of, and the resolution of disputes relating to, earnings arrestments proceeding on court decrees should be competent for earnings arrestments proceeding on summary warrants.
(Recommendation 7.12; clauses 78 and 92; Schedule 6, paragraphs 6, 7, 21, 22; Schedule 9.)

Surcharge on arrears

7.54 As soon as a summary warrant in respect of arrears of rates is granted, the rating authority becomes entitled to a 10% surcharge in addition.[1] The summary warrant does not, in contrast to an ordinary decree, render the debtor liable for the authority's expenses in obtaining the warrant or for interest on the arrears[2] at the legal rate from the date of granting the warrant until paid. The surcharge can be regarded as recompensing the authority for their work in pursuing debtors, and in obtaining the summary warrant and for the lack of interest chargeable on the arrears. But it may be a large sum if the arrears are large and may bear little relation to the actual loss suffered by the authority. In Consultative Memorandum No. 48 we proposed,[3] that the surcharge should not be abolished nor replaced by a right to interest at a prescribed rate. We expressed the view that in times of high interest rates a 10% surcharge was not an unreasonable penalty, and it was easily calculated, whereas interest is so troublesome to calculate that creditors very rarely attempt to recover it.

[1]Local Government (Scotland) Act 1947, s. 247(2). The 10% surcharge is not a fee to the officer such as arises in tax summary warrants: see para. 7.58.

[2]Arrears of rates do not bear interest.

[3]Proposition 60 (para. 7.21).

7.55 No surcharge becomes exigible on the granting of a summary warrant for arrears of taxes, but interest is often, but not always, due on the arrears.[1] In Consultative Memorandum No. 48 we asked for views[2] as to whether a surcharge should be introduced, but suggested that it might be inappropriate because of the provisions relating to interest.

7.56 On consultation there was general agreement that the rates surcharge should be retained, but there was no support for introducing a similar surcharge for tax summary warrants. The Board of Inland Revenue commented that it would not be acceptable to introduce a surcharge for taxes applicable to one part only of the United Kingdom. While we would adhere to our proposals to retain the rates surcharge and not to introduce a tax surcharge we think that the present level of rates surcharge (10%) can result, in the case of a large assessment, in payment of a sum far in excess of any loss suffered by the rating authority as a result of late payment. We therefore suggest that the amount of the surcharge should be reviewed or a sliding scale adopted.

7.57 We **recommend:**

The existing statutory surcharge due to a rating authority by the debtor on the granting of a summary warrant against him should be retained, but the level of the surcharge (presently 10%) should be reviewed. Surcharges should not be introduced for tax summary warrants.
(Recommendation 7.13; Bill, Schedule 5, paragraphs 1 and 2.)

Officer's fees and abolition of ten per cent commission for tax warrants

7.58 An officer executing a summary warrant for recovery of taxes is entitled to claim a statutory commission of 10% of the amount of tax due (in the words of the statute) "for the trouble of the officer".[3] Once the poinding has been executed, the goods are held for a period during which they may be redeemed on payment of the tax plus commission. If a sale is carried out, the proceeds of the sale are applied first towards satisfaction of the tax and then towards the commission. In addition, the officer is allowed the expenses of maintaining the goods and the expenses of the sale (e.g. the cost of advertisement, removal expenses etc.).

7.59 The officer's commission often bears no relation to the work done by him and while it may in some cases be inadequate remuneration, it often far exceeds the prescribed fees chargeable in connection with poindings in common form and is penal in effect.[4] If the defaulter is to be penalised, the penalty should be payable to the tax authority rather than the officer. In Consultative Memorandum No. 48 we proposed[5] that the officer's commission should be abolished and that officers executing tax warrants should be

[1]Inland Revenue taxes usually carry interest, but interest is remitted if it does not exceed a prescribed sum (currently £30, Finance Act 1980, s. 62). Value added tax arrears do not carry interest.

[2]Proposition 60 (para. 7.21).

[3]Taxes Management Act 1970, s. 63(5); Value Added Tax (General) Regulations 1980, reg. 59; Car tax Regulations 1983, reg. 26.

[4]In *Cuthbert and Wilson* v. *Shaw's Trustee* 1955 S.C. 8, Lord Patrick observed (at p. 13) that the Taxes Management Act "has quantified the sums due by the Crown's debtor to the sheriff officer at a sum far in excess of any merit involved in his services".

[5]Proposition 60 (para. 7.21).

remunerated in accordance with the normal prescribed fees. Those consulted agreed, including H.M. Customs and Excise and the Inland Revenue, and we adhere to the proposal. We revert in Chapter 9 below to the recovery by tax collectors and other creditors of diligence expenses from debtors.

7.60 The Society of Messengers-at-Arms and Sheriff Officers commented that an officer's official duties in executing a tax summary warrant should include collection of the arrears of tax (often by agreed instalments) and accounting for them to the collector.[1] If remuneration by prescribed fees was to be introduced, the Society suggested that officers should be entitled to charge a fee for this aspect of their work. In Chapter 8 we recommend that the collection by officers of debts constituted by decree should become part of an officer's official functions, the collection fee being borne by the creditor and not by the debtor.[2] In our view, this suggestion should also be adopted for summary warrant collection work.

7.61 We **recommend:**

(1) The statutory commission of 10% of the tax due payable to an officer executing a summary warrant should be abolished. Instead the creditor should be liable to the officer in the first instance for payment of the officer's diligence expenses charged in accordance with the table of fees prescribed by act of sederunt but with a right to recover the expenses from the debtor as recommended in Recommendations 9.7 to 9.9.

(2) The sheriff officer executing a summary warrant should be entitled to charge the rating or tax authority prescribed fees for collecting and accounting for sums paid to him by the defaulter in satisfaction of the sums due. The defaulter should not become liable for such fees. (Recommendation 7.14; Bill, Schedule 5, paragraphs 1 and 2.)

Execution of summary warrants outwith sheriffdom

7.62 Sheriff court extract decrees in summary[3] or ordinary[4] causes can be executed anywhere within Scotland without further procedure. But a summary warrant which is to be executed outwith the sheriffdom of the sheriff granting it must first, (under section 13 of the Debtors (Scotland) Act 1838) be endorsed by the sheriff clerk of the sheriffdom within which execution is to take place.[5] Besides being an extra step, endorsation gives rise to practical difficulties with rates warrants where one summary warrant often applies to many hundreds of debtors.[6]

7.63 Section 251 of the Local Government (Scotland) Act 1947 makes similar, and to some extent overlapping, provision for the execution of a summary warrant for rates, by enacting that if any person liable in payment of any rates removes to any place beyond the area of the rating authority,

[1]Taxes Management Act 1970, s. 63(3).

[2]Recommendation 8.22(*a*) (para. 8.125).

[3]Summary Cause Rules, rule 11.

[4]Ordinary Cause Rules, rule 16.

[5]Alternatively a warrant of concurrence may be obtained under section 13 from a clerk of court in the Court of Session, after which the warrant can be executed anywhere within Scotland.

[6]In the case of taxes, separate warrants are usually applied for and granted in respect of each debtor.

it shall nevertheless be lawful to put into execution any warrant within or beyond the area of the authority, provided that such warrant is first endorsed by the sheriff of the county within which the warrant is to be executed. Apart from the practical difficulties associated with endorsement of rates warrants, section 251 does not deal with the situation where the person liable to pay rates remains within the area of the rating authority, but has arrestable funds or poindable goods situated outwith the area. In these cases endorsement of the summary warrant under the provisions of the Debtors (Scotland) Act 1838 is necessary.[1]

7.64 In Chapter 9 of this report we recommend[2] that warrants of concurrence should be abolished on the grounds that they are an unnecessary formality. Any decree, warrant or order of a sheriff would therefore be capable of being executed anywhere within Scotland without further procedure. This recommendation would solve the practical problems associated with endorsement of rates summary warrants and would make section 251 of the 1947 Act redundant.

7.65 We **recommend:**

Diligence on a summary warrant should be capable of being executed anywhere within Scotland without endorsement of a warrant of concurrence and in consequence section 251 of the Local Government (Scotland) Act 1947 should be repealed.
(Recommendation 7.15; clause 116 and Schedule 9.)

Section B. Betting, Gaming and Excise duties

7.66 The procedure for the recovery of betting, gaming and excise duties is even more abbreviated than the summary warrant procedure for the recovery of rates and taxes. The warrant to poind is signed by a "proper officer" of H.M. Customs and Excise rather than a sheriff, and the poinding and sale may be carried out by any person authorised by that officer.[3] The warrant also authorises sale of the poinded goods by public auction after giving six days' notice of the sale. Arrestment is not competent to recover these duties.

7.67 We propose only minor changes in these procedures. The warrant for diligence should, we think, be granted by the sheriff rather than an officer of the creditor department as diligence is a judicial process. The warrant ought to be executed by sheriff officers, since, as we pointed out in Consultative Memorandum No. 48,[4] poinding by a person appointed by the creditor infringes a basic principle of diligence that it should only be executed by an officer of court instructed by the creditor.[5] It appears that in practice all Customs and

[1]1838 Act, s. 13.
[2]Recommendation 9.5 (para. 9.26).
[3]Betting and Gaming Duties Act 1981, s. 29; Customs and Excise Management Act 1979, s. 117.
[4]Para. 7.25.
[5]*Stewart* v. *Reid* 1934 S.C. 69. At p. 75 Lord Sands remarked "While to have one's household goods seized and sold up by an officer of the law may be regarded as Kismet, to have them seized and sold by an employee of the creditor may perhaps be regarded as tyranny".

Excise poindings are carried out by sheriff officers[1] so that our recommendation to allow execution by sheriff officers only would merely reflect current practice.

7.68 To call the provisions for recovering excise duties and penalties "poinding" is, we think, a misnomer. In poindings, the goods must belong to the debtor, whereas in the recovery of excise duties, goods in the possession of the debtor or his agent can be seized. In poindings, all the debtor's goods are liable to be poinded, whereas in the recovery of excise duties only goods liable to duty, and materials and machinery connected with their manufacture, can be seized. In poindings, goods which do not belong to the debtor at the time of poinding cannot be poinded, whereas in the recovery of excise duties, goods, materials and machinery belonging to the debtor at the time when the duty was charged and which are subsequently in the possession of third parties (except good faith purchasers) can be seized. We propose that the term "taking possession" should be used instead of "poinding". The proposal applies also to procedures for the recovery of betting and gaming duties which also differ from poinding procedures.

7.69 We **recommend:**

The procedure for recovery of betting, gaming and excise duties should be called "taking possession" instead of "poinding". A warrant to take possession of articles and sell them by public auction should be granted only by a sheriff and should be executed only by sheriff officers.
(Recommendation 7.16: Bill, Schedule 7, paragraphs 29 and 31.)

Section C. Civil imprisonment for non-payment of rates, taxes, and fines and penalties due to the Crown

7.70 The Debtors (Scotland) Act 1838 lays down procedures for the imprisonment of debtors which were appropriate to a period when civil imprisonment was used as a general creditor's diligence but are still in theory competent in a very limited class of debts which we describe below. In the case of Court of Session decrees for payment, and even in documents of debt registered for execution in the Books of Council and Session, it is still provided that, where payment is enforceable by imprisonment, the warrant in the extract decree or document has effect as a warrant to charge on pain of imprisonment for failure to pay during the days of charge.[2] On the expiry of the days of charge without payment, the certificate of execution of the charge is registered in the register of hornings and a certificate of registration is issued by the keeper of that register.[3] Application is then made to the Petition Department of the Court of Seassion, and "if there be no lawful cause to the contrary" a clerk of that Department endorses a docket, called a "*fiat*", which has the effect of a warrant to officers of court (instructed by the creditor) to search for and apprehend the debtor and take him to one of Her Majesty's prisons.[4] A similar process is enacted for sheriff court decrees and extracts

[1]Keith Report, para. 24.2.5.
[2]R.C. 65; Writs Execution (Scotland) Act 1877, ss. 1 and 3.
[3]1838 Act, s. 5.
[4]1838 Act, s. 6: "*fiat*" is short for "*fiat ut petitur*", meaning roughly "let the application be granted".

from the books of a sheriff court,[1] involving the issue by the sheriff clerk (within a year and a day of the expiry of the charge) of a *fiat* authorising imprisonment.[2]

7.71 It will be seen that both procedures are administrative in character involving the automatic grant by a clerk of court of warrant for imprisonment in cases where the papers presented to him are in order. This is in contrast to the modern legislative trend which makes warrant for civil imprisonment dependent on a decision by a judge exercising an equitable jurisdiction.

7.72 When civil imprisonment as a general creditor's diligence was abolished by the Debtors (Scotland) Act 1880,[3] an exception was made for "Taxes, fines and penalties due to Her Majesty" and local government rates.[4] Whereas the Civil Imprisonment (Scotland) Act 1882 required an alimentary creditor, after the expiry of a charge without payment, to apply to the sheriff for a warrant of committal and gave the sheriff power to refuse warrant if the failure to pay aliment was not wilful,[5] no corresponding provision was made for rates and tax defaulters or other Crown debtors owing civil fines or penalties. The 1882 Act did limit the period of a rates defaulter's imprisonment to six weeks for each year's arrears,[6] but that provision did not apply to tax defaulters in relation to whom the maximum period of civil imprisonment is 12 months.[7]

7.73 The Local Government (Scotland) Act 1947, section 247(5) provided that where goods or effects cannot be found to be poinded for the payment of rates, it shall be lawful for the sheriff by warrant to commit the defaulter to prison (for up to six weeks[8]), "there to be kept without bail until payment is made or security for payment is given". This provision appears in a section concerned mainly with diligence under summary warrants, and its effect appears to be to make imprisonment conditional on an unsuccessful attempt to poind under such a warrant. The provision does not seem to affect the 1838 Act procedure for enforcing payment of rates in pursuance of a court decree. We understand, however, that since 1972 there has been no civil imprisonment of rates defaulters in Scotland.[9]

7.74 The Crown Proceedings Act 1947, section 26(2)[10] limited the types of taxes in respect of which civil imprisonment was competent to death duties and purchase tax. These taxes have since been replaced by capital transfer tax and value added tax respectively, and civil imprisonment for default in payment of those taxes is not competent. The 1947 Act, section 26(3), however, saved any procedure available for enforcing an order or decree in favour of the Crown for the recovery of any fine or penalty. While in strict law, therefore, penalties imposed for failure to pay tax still appear to be

[1]Sheriff Courts (Scotland) Extracts Act 1892, s. 7(1) and (3); 1877 Act, ss. 2 and 3.
[2]1838 Act, ss. 10 and 11.
[3]S. 4.
[4]An exception was also made of civil imprisonment for failure to pay aliment with which this report is not concerned.
[5]1882 Act s. 4; *Hardie* v. *Hardie* 1984 S.L.T. (Sh.Ct.) 49.
[6]1882 Act, s. 5.
[7]Debtors (Scotland) Act 1880, s. 4, proviso.
[8]1882 Act, s. 5.
[9]In 1958, the McKechnie Report, para. 127 observed that there had not been any imprisonment for failure to pay rates since 1950.
[10]As read with s. 49(2).

enforceable by civil imprisonment under the 1838 Act procedure, failure to pay the tax itself is not now enforceable by civil imprisonment under that procedure (or indeed under Exchequer diligence procedure to which we revert later). We understand that in practice the Revenue Departments do not exercise their right to obtain warrant for imprisonment for tax penalties under the 1838 Act and that they recover the tax penalties by other means such as summary warrant diligence or ordinary diligence, which are conveniently applicable both to the tax and to the tax penalties.

7.75 We think that the procedure for imprisonment in the Debtors (Scotland) Act should be abolished. This, together with other reforms proposed below,[1] would enable Parliament to abolish the register of hornings and sweep away many out-of-date pre-Union enactments. As we have seen, the procedure is not used for the recovery of rates and taxes, and associated penalties. There remain, however, other fines and penalties due to the Crown imposed in civil proceedings. Of these, probably the most important, actually or potentially, are fines imposed for contempt of a civil court and for breach of an order under section 91 of the Court of Session Act 1868 (which enables the Court of Session, on summary petition, to order the restoration of possession of property in certain circumstances, and to order specific performance of any statutory duty, subject to conditions and penalties, including fine and imprisonment). Fines imposed for contempt of court in civil proceedings (e.g. breach of interdict) are recoverable as a penalty due to the Crown by the Secretary of State,[2] acting through the Scottish Courts Administration. In the case of a fine imposed by the Court of Session, the interlocutor imposing the fine is transmitted to the Scottish Courts Administration who then normally attempt to recover the fine by informal letters demanding payment. If these attempts fail, an *ex parte* application under the Exchequer Court (Scotland) Act 1856, section 13, is made by the Director of the Scottish Courts Administration to the Lord Ordinary in Exchequer Causes in the Court of Session, accompanied by a certificate showing the balance due and stating that he has been unable to recover it. The Lord Ordinary is required to grant an Exchequer decree which is enforceable (in theory by sheriffs principal) by the special modes of Exchequer diligence discussed below. These include a procedure for registration of an expired charge in the register of hornings and the issue by a sheriff principal of a warrant for imprisonment which is executed by a messenger-at-arms or sheriff officer and has similar effects to a warrant for imprisonment under the 1838 Act.[3] We understand that in recent years the procedure for imprisonment under the 1856 Act has not been used to recover fines for contempt of court nor indeed taxes or their associated penalties. We also understand that in recent years, cases of fines imposed by the sheriff courts for contempt of court in civil proceedings have not been transmitted to the Scottish Courts Administration for enforcement. It may be that the sheriffs treat a civil contempt in the same way as a criminal fine and use the procedures for recovery of fines under the Criminal Procedure (Scotland) Act 1975.

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[1]The abolition of the Exchequer diligence of civil imprisonment, and reforms outlined in Chapter 9.

[2]Transfer of Functions (Treasury and Secretary of State) Order 1974 (S.I. 1974/1274).

[3]Exchequer Court (Scotland) Act 1856, ss. 33 and 34.

7.76 In civil contempt cases, the court possesses a common law power to imprison for contempt as well as a power to fine. While there is a dearth of authority on this matter, in principle it would seem that the court can use the power of imprisonment in cases where the person in contempt has not paid any fine which has been imposed. The nature and incidents of imprisonment on default of payment of a fine for contempt are not free from doubt. It is not, for example, clear whether default in payment of the fine is itself to be treated as a contempt, or whether, if the court grants warrant for imprisonment on default in payment of the fine, the imprisonment has to be treated as a new punishment for the original contempt rather than for the default in payment. Both of these views imply that a person who is imprisoned on default in payment of a fine for contempt and who then pays the fine cannot claim to be liberated from prison as of right. A different approach is to treat imprisonment on default in payment of the fine as a means of coercing the person in contempt to make the payment with the result that payment would imply liberation as of right. The latter approach, which corresponds to the modern statutory law on default in payment of criminal fines,[1] seems at first sight to be preferable from the standpoint of social and legal policy.

7.77 We recommend in Section C of this Chapter that Exchequer decrees should be enforceable by the ordinary modes of diligence and that the special modes of exchequer diligence should be abolished. This would mean that a decree under section 13 of the 1856 Act would be enforceable by poinding, arrestment and earnings arrestment. We consider that the procedures for civil imprisonment under the 1856 Act as well as the 1838 Act should be abolished. In view of the quasi-criminal character of contempt of court, we consider that imprisonment for default in payment of a fine imposed for contempt should be retained. We think, however, that the decision whether to imprison for default in payment of a fine for contempt should normally be taken by the judge or court which imposed the fine, after enquiry as to the reason for the default. The procedures for civil imprisonment under the 1838 and 1856 Acts are thus inappropriate. In our view, for the reasons given in paragraph 7.76, the scope and nature of the court's powers to imprison for default in payment of a fine for contempt require to be clarified, and the procedures for dealing with such defaults require review. We note, for example, that there is no precise equivalent in Scotland of section 16(1) of the Contempt of Court Act 1981 under which in England and Wales payment of a fine for contempt of a superior court may be enforced, in the court's option, in like manner as a civil money judgment or as a criminal fine. We have, however, not consulted on this matter and do not advance specific recommendations but we draw the matter to the attention of the competent authorities.

7.78 In the case of any other civil fines and penalties due to the Crown, it would seem reasonable to expect that the statute under which the fine or penalty is imposed should provide expressly that it is enforceable by imprisonment of the defaulter (if that is Parliament's intention) and by what procedure. There must be few instances of civil fines and penalties due to the Crown (other than fiscal, contempt, or 1868 Act cases) but one such example which we have traced is that of fines imposed on a solicitor for professional

[1]See e.g. Criminal Procedure (Scotland) Act 1975, ss. 407(1C) and 409(1).

misconduct.[1] At present, these are recovered by the Scottish Courts Administration (representing the Secretary of State) which may obtain a decree under the 1856 Act, section 13, if required. If imprisonment in default of payment of such a fine is to be competent, we think that Parliament should expressly provide for it, that imprisonment should not be dependent on the irrelevant accident that the fine or penalty happens to be payable to the Crown, and that generally speaking imprisonment should only be competent if a judge decides that imprisonment in default is appropriate.

7.79 In the limited class of civil debts where imprisonment remains competent (rates and civil fines and penalties due to the Crown), the proviso to section 4 of the Debtors (Scotland) Act 1880 enacts that no person shall be imprisoned for a longer period than 12 months.[2] Section 15(2) of the Contempt of Court Act 1981 provides that the maximum penalty which may be imposed for contempt in *inter alia* civil proceedings in the sheriff court is to be three months' imprisonment, or a fine of £500, or both. The section does not however expressly state what maximum term of imprisonment may be imposed in those cases if a fine imposed for contempt is not paid, but we doubt whether it could ever be argued that any such imprisonment could exceed the maximum period provided for in the section as a direct sentence of imprisonment. On this view, there is a conflict between the proviso to section 4 of the 1880 Act and section 15 of the 1981 Act so far as these provisions apply to contempt in civil proceedings in the sheriff court. Moreover, the maximum penalty under section 15(2) of the 1981 Act for contempt of court in civil proceedings in the Court of Session is two years' imprisonment or a fine or both, and again a conflict arises between that provision and the proviso to section 4 of the 1880 Act. For this reason we propose that that proviso should be repealed. There are no maximum limits on the powers of the Court of Session to fine and imprison under the 1868 Act, section 91, and repeal of the proviso would remove an apparent conflict between that section, insofar as it applies to imprisonment for failure to pay a fine under that section, and the 1880 Act, section 4. It is for consideration whether the new statutory limits in section 15(2) of the 1981 Act should apply to fines and imprisonment under the 1868 Act, section 91: that question however falls outside the scope of this report.

7.80 We **recommend:**

(1) Civil imprisonment for failure to pay rates and fines and penalties due to the Crown, together with the procedure for civil imprisonment prescribed by the Debtors (Scotland) Act 1838 on the administrative *fiat* of a clerk of court and the corresponding procedure for imprisonment under the Exchequer Court (Scotland) Act 1856, sections 33 and 34, should be abolished, subject to the qualification mentioned in the following paragraph.

(2) The foregoing recommendation is not intended to remove the powers of the court to grant warrant for civil imprisonment on default in payment of a fine imposed by the court either:

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[1]Solicitors (Scotland) Act 1980, ss. 53 and 55. In Chapter 8, we recommend that the courts should have power to fine officers of court for misconduct: Recommendation 8.12(4)(*c*) (para. 8.84).

[2]The maximum period of imprisonment of aliment defaulters is six weeks as mentioned at para. 7.22 above.

(*a*) for contempt of court in civil proceedings; or

(*b*) for breach of an order for restoration of possession, or for specific performance of a statutory duty, under section 91 of the Court of Session Act 1868.

The competent authorities should, however, consider whether the powers of the court to grant such warrants, and the legal effect of such warrants, should be clarified and whether the courts should be empowered by statute to use the machinery for enforcement of criminal fines as a means of recovering fines for contempt in civil proceedings.

(3) The proviso to section 4 of the Debtors (Scotland) Act 1880 (which limits the maximum period of civil imprisonment for debt to 12 months) should be repealed as inconsistent with the limits provided by section 15(2) of the Contempt of Court Act 1981 in relation to contempt of court.

(4) The competent authorities should consider whether the maximum limits on fines and imprisonment for contempt in Court of Session proceedings provided by section 15(2) of the 1981 Act should apply to sentences of fines and imprisonment imposed by the Court of Session under section 91 of the Court of Session Act 1868.
(Recommendation 7.17; clause 100(3); Schedule 7, paragraph 9; Schedule 9.)

Section D. Abolition of Exchequer diligence

7.81 The Exchequer Court (Scotland) Act 1856 provides special modes of diligence, under special forms of warrant, for the enforcement of Crown debts constituted by a decree of the Court of Session exercising the jurisdiction of the Court of Exchequer in Scotland.[1] That jurisdiction, originally vested in the separate Court of Exchequer in Scotland by the Exchequer Court (Scotland) Act 1707 and transferred to the Court of Session by the above Act of 1856, is defined by the Act of 1707[2] in very wide terms as covering "all the revenues and duties and profits" appertaining to the Crown, all forfeited lands and "all the remedies and means for the recovering of the same"; all forfeitures and penalties "due and payable in Scotland by force or virtue of any law or statute touching on or relating to the customs and excise or by force or virtue of any penal or other laws or statutes whatsoever and also all fines issues forfeitures or penalties . . . arising to . . ." the Crown; and all actions, securities, prosecutions and remedies concerning the same. Accordingly, the core of Exchequer causes consists in actions for the recovery of central government taxes due to the Board of Inland Revenue and the various customs, excise and other duties due to the Board of Customs and Excise.

7.82 The specific warrants and modes of diligence in execution sanctioned by the 1856 Act are somewhat anachronistic. The warrant for diligence is addressed to "all sheriffs of counties", [scil. sheriffs principal] "and each of them, conjunctly and severally" and requires them "to put this decree in execution in manner underwritten". The sheriff principal is to cause a charge to be served under the decree. The debtor is charged to pay the sum in

[1]Ss. 28–34; 36.
[2]S. 7.

question to the sheriffs principal "or one or other of them" on the Crown's behalf. The sheriff principal is under a duty to put the decree into execution and to account for the sums collected to the instructing officer or government department. In 1958, the McKechnie Report[1] observed that where a sheriff is required to execute Exchequer cause warrants under the 1856 Act, the sheriff grants warrant to one of his sheriff officers to do what is to be done in the sheriff's name.[2] At the present time, however, we understand that the Boards of Inland Revenue and of Customs and Excise, or their solicitors, send extract Exchequer decrees directly to a messenger-at-arms or sheriff officer for enforcement rather than to a sheriff principal.

7.83 Exchequer decrees are enforceable by arrestment and charge, poinding and sale, and (in a few cases[3]) charge and imprisonment. Where the sheriff causes an arrestment to be used, the arrestment is in ordinary form. The 1856 Act provides that:

> "such arrestment shall operate to transfer to the Crown, preferably to all other creditors of the Crown debtor, all right to and interest in the arrested fund competent to the Crown debtor, to such extent as may be requisite to satisfy and pay the entire debt due to the Crown, including interest and expenses; . . ."[4]

The arrestee is entitled "to pay to such sheriff on behalf of Her Majesty" all funds of the Crown debtor to the extent of the debt, interest and expenses.[5] If the arrestee fails to do so, the Crown may use not only an action of furthcoming but all other diligences against the arrestee for recovery of the debt.[6] The effect is that in a competition between an Exchequer decree arrestment and an ordinary arrestment, the Exchequer arrestment has priority unless the creditor in the ordinary arrestment had obtained decree of furthcoming before the Exchequer arrestment was used.[7] If this provision is construed literally, it does not seem to apply where the Exchequer decree is sent by the Revenue Department concerned directly to a messenger-at-arms or sheriff officer (rather than through the sheriff principal) for enforcement. In recent times there have been cases of competitions in which the Inland Revenue have not relied on the privilege of Exchequer arrestments in litigation.[8]

7.84 It is competent to arrest on the dependence of an Exchequer cause action,[9] but it appears that the foregoing preference over ordinary arrestments applies only to arrestments in execution of Exchequer decrees and not to the arrestment on the dependence either at the time when it was laid, or at or after the time when decree was pronounced.

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[1]Para. 32.

[2]The 1856 Act, s. 28 provides that the special form of warrant addressed to the sheriffs is a sufficient warrant to any messenger-at-arms or sheriff officer to execute charge, arrestment and poinding in terms of the Exchequer warrant.

[3]Namely, fines and penalties for failure to pay tax but not the tax itself: Debtors (Scotland) Act 1880, s. 4; Crown Proceedings Act 1947, ss. 26(2) and (3). See paras. 7.72 and 7.74 above.

[4]1856 Act, s. 30.

[5]*Idem.*

[6]*Idem.*

[7]Bell *Commentaries* vol. ii, p. 69; *Borthwick* v. *Lord Advocate* (1862) 1 M. 94.

[8]See e.g. *Lord Advocate* v. *Royal Bank of Scotland* 1977 S.C. 155.

[9]1856 Act, s. 10.

7.85 The provisions on the equalisation of arrestments and poindings in section 10 of the Bankruptcy (Scotland) Act 1913 do not appear to affect the preference of Crown arrestments.[1]

7.86 The main difference between an Exchequer poinding instructed by the sheriff principal and an ordinary poinding is that under an Exchequer poinding the whole moveable effects of the Crown debtor "without exception" may be poinded.[2] This seems to us altogether unjustifiable.[3] The procedure has at least one other anachronistic feature not now observed.[4]

7.87 The procedure for civil imprisonment of a tax defaulter[5] (which is now confined to cases of failure to pay tax penalties and not failure to pay the tax itself[6]) is not now used by the Revenue Departments, nor, as indicated at paragraph 7.75 above, is it used to enforce fines imposed for a contempt of a civil court. In Section C of this Chapter, we recommended the abolition of the procedures for civil imprisonment under the Debtors (Scotland) Act 1838 and the 1856 Act.

7.88 In our view, the other special modes of Exchequer diligence should also be abolished as anachronistic and obsolescent.[7] Exchequer decrees should contain warrants to execute diligence in common form (including the new diligence of earnings arrestment). So far, we have assumed that the relevant provisions of the 1856 Act have not been impliedly repealed by the Crown Proceedings Act 1947, section 26(1), which provides:

> ". . . any order[8] made in favour of the Crown against any person in any civil proceedings to which the Crown is a party may be enforced in the same manner as an order made in action between subjects, *and not otherwise*". (Emphasis added).

It seems likely that the effect of this provision is to make Exchequer diligence incompetent for the enforcement of all debts, such as Inland Revenue taxes and Customs and Excise duties, other than the debts mentioned in the "saving" provisions in section 26(3) of the 1947 Act, namely fines and penalties due to the Crown. Fiscal penalties, however, are normally enforced along with the taxes and duties to which they relate. It seems to us, therefore, that

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[1]The section provides that arrestments and poindings within the statutory period shall be ranked *pari passu* as if they had all been used of the same date. It thus appears to contemplate equalisation of those diligences which, if they had been used of the same date, would have ranked *pari passu*. An Exchequer arrestment is not such a diligence. See now Bankruptcy (Scotland) Bill 1984, Schedule 7, para. 10, which, so far as material, is in the same terms as the 1913 Act, s. 10.

[2]1856 Act, s. 32.

[3]It is for example inconsistent with the Law Reform (Diligence) (Scotland) Act 1973 (exemptions from poinding of goods in the debtor's residence) which applies *inter alia* to poindings under summary warrants for the recovery of taxes.

[4]E.g. where goods exposed for sale are not sold, the sheriff principal is supposed to retain the goods for the Crown's benefit and dispose of them subject to any directions from the public officer who instructed the poinding.

[5]1856 Act, ss. 33 and 34.

[6]Debtors (Scotland) Act 1880; Crown Proceedings Act 1947, s. 26(2) and (3); paras. 7.72 and 7.74 above.

[7]We note that the McKechnie Report, para. 122, recommended that Exchequer diligences should be modified "in such a way that they more nearly conform to the normal forms of diligence on Scottish decrees".

[8]Defined by s. 38 to include a judgment, decree, etc.

Exchequer diligence has already been made generally incompetent by the 1947 Act and, since it is not now used in those few cases where it remains technically competent, it should be abolished.[1] This would give full effect to the principle enshrined in section 26(1) of the 1947 Act.

7.89 We envisage that Crown arrestments would no longer have a special preference over arrestments by subjects,[2] and all arrestments would rank *inter se* by priority of date of execution. Crown arrestments would also rank *pari passu* with other arrestments under the legislation on equalisation of diligences.[3]

7.90 *The writ of extent preference.* Section 42 of the 1856 Act preserves for the Crown the previous preference accorded to the Crown in respect of moveable property under a writ of extent. A like preference is conferred on the Crown by the execution of any charge at the instance of the Crown, or, where the Crown debtor is deceased, by the execution of a poinding or arrestment on the Crown's behalf. The charge or diligence is "deemed and taken to be equivalent in all respects to the teste of a writ of extent, according to the existing law and practice".[4] The result is that the Crown obtains a preference over other creditors if a charge is executed on its behalf before the debtor is divested of his property. (It is thought that this provision is confined to Exchequer diligence.) Thus, for example, if a charge on an Exchequer decree is executed under section 31 of the 1856 Act even after the date of the debtor's sequestration and before the debtor is divested of his property by the act and warrant appointing the trustee, the preference is established.[5] Further, an Exchequer charge would confer on the Crown priority over a diligence (such as an arrestment, poinding or sequestration for rent) by a subject provided that, at the date of the charge, the debtor had not been divested, e.g. by a warrant sale.

7.91 This seems to us to be another anachronism. Writs of extent were abolished in 1856 in Scotland, and were later also abolished by the Crown Proceedings Act 1947 in England and Wales.[6] We understand that the Crown does not have a similar preferance in England and Wales and we do not think that creditors executing diligence in Scotland should be in a worse position than their counterparts in England in competition with Crown enforcement procedures. If, as we recommend, Exchequer diligence is abolished, we think that the opportunity should be taken to abolish the out-of-date preference based on writs of extent. We understand that this preference is not now relied on by the Revenue Departments.

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[1]It should be observed that section 26(3) of the 1947 Act also saves "proceedings brought by the Crown for . . . the forfeiture or condemnation of any goods, or the forfeiture of any ship or any share in a ship": this saving does not seem relevant to Exchequer diligence.

[2]If this is not accepted, then the Crown should at least be bound to pay the expenses of any prior arrestment creditor.

[3]See para. 7.85 above.

[4]As Graham Stewart explains (at p. 456): "Writ of Extent was the process by which before 1856 Crown debts were recovered out of the debtor's moveable estate and the teste was the signature of the judge to the warrant initiating the proceeding. Under it the Crown acquired, at the issuing of the writ, i.e. the date of the teste or *fiat*, a preferential claim to all goods, money, and debts then belonging or due to the debtor".

[5]See *The Admiralty* v. *Blair's Trustee* 1916 S.C. 247, at pp. 253, 262, 266.

[6]1947 Act, ss. 13 and 23, Schedule 1, para. 1(4).

7.92 We **recommend:**

(1) The special diligences for the enforcement by the sheriff principal of Exchequer decrees should be abolished, and such decrees should be enforceable in the same manner as other decrees for payment.

(2) As regards Crown preferences acquired by virtue of Exchequer diligence:

(*a*) an arrestment under an Exchequer decree should no longer by itself confer on the Crown a special preference in a competition with an ordinary arrestment; and

(*b*) a charge or other diligence should no longer be deemed equivalent to the teste of a writ of extent and accordingly should no longer give the Crown a preference in a competition with diligences by other creditors over the debtor's moveable property, or in a competition with a trustee in a sequestration or liquidator of a company.

(Recommendation 7.18; clause 100(5).)

Section E. Prior claims for rates or taxes against persons taking moveables by diligence or assignation

7.93 One of the remedies of the Inland Revenue collector of taxes has been judicially described as "the very peculiar one of taking advantage, without any question of insolvency, of anyone else's diligence on the moveables belonging to the Crown's debtor".[1] Thus, the Taxes Management Act 1970, section 64 provides:

"(1) No moveable goods and effects belonging to any person in Scotland, at the time any tax became in arrear or was payable, shall be liable to be taken by virtue of any poinding, sequestration for rent, or diligence whatever, or by any assignation, unless the person proceeding to take the said goods and effects pays the tax so in arrear or payable:

Provided that where the tax is claimed for more than one year the person proceeding to take the said goods and effects may on paying the tax for one whole year proceed as he might have done if no tax had been so claimed.

(2) If the said person neglects or refuses to pay the tax so in arrear or payable, or the tax for one whole year, as the case may be, the tax claimed shall, notwithstanding any proceeding at his instance for the purpose of taking the said moveable goods and effects, be recoverable by poinding and selling the said moveable goods and effects under warrant obtained in conformity with the provisions contained in section 63 above."[2]

This provision applies to taxes recoverable by the Board of Inland Revenue,[3] but not for example to value added tax, car tax, betting and gaming duties or customs and excise duties recoverable by the Board of Customs and Excise, although such taxes and duties have a preference in sequestrations and liquidations. It will be seen that the privileged claim under section 64 differs from the Exchequer diligence preferences in so far as it arises even though the collector of taxes has not used any diligence: it is not a rule regulating

[1] *Campbell* v. *Edinburgh Parish Council* 1911 S. C. 280, 290, per Lord President Dunedin.

[2] Section 63 provides for diligence under summary warrant.

[3] I.e. income tax, corporation tax, capital gains tax, development land tax (as modified by subs. (3)) and other assessed taxes.

competitions between diligences but makes a creditor executing diligence against moveables, and even a person to whom moveables are assigned, liable for another person's debt.

7.94 Under the Local Government (Scotland) Act 1947, section 248, the collector of rates of a local authority has a similar privileged claim for up to one year's rates arrears owed by a debtor subjected to diligence[1] or making an assignation. An important difference is that by a proviso to section 247(2), inserted in 1956,[2] the collector of rates cannot recover from the person taking the goods and effects "any sum exceeding the amount recovered by that person under deduction of the expenses of and incidental to the taking of such goods and effects and their preservation and sale". Thus, although the 1947 Act provides for a privileged claim against a person taking moveables by diligence or assignation from a rates defaulter, the claim is more in the nature of a preference in the proceeds of the diligence or assignation than is the Inland Revenue's claim under the 1970 Act. Both sets of provisions, however, make the creditor or assignee liable for another person's debt.

7.95 It seems to us that the provisions of the 1947 Act, section 248, as well as the 1970 Act, section 64, are open to serious criticism both as to their general policy of conferring anomalous privileges on central and local government fiscal debts outside bankruptcy proceedings and as to the detailed provisions for giving effect to that policy.[3]

Defects in the present law

7.96 First, under both the rates and tax enactments, the creditor or assignee of a rates or tax defaulter must pay the defaulter's arrears before the defaulter's moveable goods are "taken" by the creditor's diligence or by the assignation. While the corresponding English provision on tax requires payment to be made before the sale or removal of the defaulter's goods,[4] the Scottish enactments do not make it clear at what stage of the various diligences the moveable goods of the debtor are to be treated as "taken": the possibilities include the stage when the goods are attached by poinding or arrestment; or when they are physically taken or removed for sale (if that is done); or when the poinded or arrested goods are either sold or delivered to the poinding or arresting creditor in default of sale. There is a similar uncertainty in relation

[1]The 1947 Act, s. 248 provides that no moveable goods and effects of the rates defaulter shall be liable to be taken "by virtue of poinding, sequestration or diligence or by any assignation . . ." Here "sequestration" means sequestration for rent or feuduty under the landlord's or superior's hypothec, not sequestration under bankruptcy legislation: see *Sinclair* v. *Edinburgh Parish Council* 1909 S.C. 1353.

[2]Valuation and Rating (Scotland) Act 1956, s. 34, implementing a recommendation of the Departmental Committee on *Valuation and Rating* (1954) Cmd. 9244 (Chairman: The Hon. Lord Sorn), para. 159.

[3]While we did not seek comments on these provisions in the Consultative Memoranda preceding this report, we have paid regard to comments on the topic made to our former Working Party on Diligence. Opinion was divided. Bodies representing local authorities wanted to retain the privilege for rates. Some bodies representing solicitors adopted the proposal of the McKechnie Report, para. 117 that the privilege for taxes should be limited in the same way as the privilege for rates. Others favoured abolition of both the rates and the tax privileges.

[4]Taxes Management Act 1970, s. 62(1).

to sequestration for rent and other diligences.[1] There is no legal procedure whereby a creditor can require the Inland Revenue or local authority to disclose the debtor's tax or rates arrears before proceeding to poind or to arrest the debtor's moveable property. As one commentator observed to our former Working Party on Diligence: "The normal result of an enquiry about a third party's tax position would presumably be a plea of confidentiality by H.M. Inspector of Taxes". While practice varies, we understand that enquiries to official collectors about arrears are generally not made until after a warrant of sale has been granted and indeed until the actual sale is imminent. This practice is no doubt influenced by the provisions of section 63(9) and (10) of the 1970 Act (requiring auctioneers to intimate impending sales of moveables to the collector of taxes) which the Keith Report recommended should be repealed as obsolete, a recommendation which we endorsed above.[2] In practice the provisions of section 63(9) and (10) are only obeyed in the case of sales under judicial warrant. They relate only to central government taxes and do not require intimation to be made to collectors of rates. Intimation to the collector at a late stage can be very unsatisfactory since the creditor's right to poind is restricted by the general law to goods of a value not exceeding the amount of his debt and expenses, and these would not normally suffice to cover privileged tax or rates arrears as well as the debt. So, as a result of the priority, the ordinary creditor may not only lose the whole benefit of his diligence but may be left without a practical remedy having regard to the restrictions on second poidings on the same premises for the same debt developed by judicial decisions and Practice Notes[3] which do not make any exception for cases where the official collectors scoop the pool. Intimation at an early stage of the procedure would also be unsatisfactory since it would entail extra work and expense in a large number of cases with no practical result. Either the privileged rates or tax arrears will be due, in which case the creditor is likely to be deterred from proceeding with his diligence or they will not be due, in which event, the work and cost of intimation will not have benefited anyone.

7.97 Second, as noted above, while the prior claim of a collector of rates is now limited to the net proceeds of the ordinary creditor's diligence by the proviso to section 248(2) of the 1947 Act (which proviso was inserted by the Valuation and Rating (Scotland) Act 1956, section 34), there is no corresponding provision in the 1970 Act, section 64, limiting the prior claim of the collector of taxes. The only reason for this discrepancy seems to be that the insertion of the proviso in section 248(2) of the 1947 Act was recommended by an advisory body whose terms of reference did not extend to the priority for taxes.[4] The McKechnie Report recommended that a creditor meeting a claim by the collector of taxes should be allowed the expenses of his diligence.[5] It seems to us, however, that this recommendation does not go far enough. The proviso to section 248(2) of the 1947 Act restricts the privileged claim

[1]The priorities have been held to apply to all diligences against moveables including poinding of the ground (*Campbell* v. *Edinburgh Parish Council* 1911 S.C. 280) and attachment of rents under decrees of maills and duties (*Bow* v. *Shaw* (1914) 30 Sh.Ct.Reps. 138).

[2]See paras. 7.47 and 7.48.

[3]See para. 5.131 above.

[4]The Sorn Report on *Valuation and Rating* cited above (footnote 2 to para. 7.94).

[5]Paras. 116 and 117.

not only by deducting the creditor's expenses from it but also by limiting the creditor's liability to the net proceeds (if any) of his diligence in cases where the rates arrears exceed those proceeds.

7.98 It seems to us altogether unjustifiable that an ordinary creditor executing diligence against a debtor should become automatically liable for the whole of that debtor's tax arrears for a year. The ordinary creditor's debt may be small, the goods attached may be of little value, and the year's tax arrears may be large. The collector of taxes has no duty to intimate his prior claim and the ordinary creditor's liability arises solely from the execution of otherwise lawful diligence. Over the years, there have been some very hard cases (decided mainly in the sheriff court and involving priority claims for rates before the law was changed). For example, a creditor sold goods under a sequestration for rent and the proceeds did not cover the expenses of the diligence: it was held that by selling the debtor's effects, the creditor became liable for the whole arrears of rates.[1] In another case, it was held that the creditor was liable only for the gross amount realised by a warrant sale (i.e. without deduction of expenses).[2] While this would remove some of the injustice, and legal arguments supporting it can be conceived, it requires the court to strain the wording of the section and does not remove the injustice entirely since the creditor would still not be able to deduct expenses from the proceeds of his diligence paid to the collector of taxes. It was suggested in the same case that a creditor executing a poinding may escape liability for arrears by restoring the pointed goods; but this right, if it exists, is of no help to a creditor who has already sold the goods under warrant. We understand that in practice the collectors of taxes never demand sums in excess of the net proceeds of diligence, but on a literal construction of the section the creditor appears to be liable for the whole year's arrears.

7.99 Third, the scope of the priorities whether for rates or taxes is arbitrary, creates somewhat strange anomalies, and seems to have been delimited haphazardly by historical accident. Though enacted in a modern statute, the tax priority stems at latest from an Act of 1803.[3] In more recent decades successive Governments, not surprisingly, have omitted to extend it to new taxes. It is not clear why in principle the priority should apply to Inland Revenue taxes but should not apply to value added tax, car tax, customs and excise duties and betting and gaming duties. These are preferential debts in sequestration under bankruptcy legislation and in liquidations.[4] The anomaly will be made even worse if the law on preferential debts in sequestrations and liquidations is amended as mentioned in paragraph 4.85 above. The situation will then be that local government rates and Inland Revenue assessed taxes,

[1] *Parish Council of Rathven* (1896) 4 S.L.T. 40: see also *Adamson* v. *Ambrose* (1858) 1 Guthrie's Select Cases 315; *Stirlingshire C.C.* v. *Stirlingshire Property Investment Co. Ltd.* (1908) 24 Sh.Ct.Reps. 320; and cases cited at para. 7.99.

[2] *Lanarkshire C.C.* v. *Hamilton's Trs.* 1934 S.L.T. (Sh.Ct.) 51.

[3] 43 Geo. III c. 150, s. 33. This Act, which consolidated earlier legislation on assessed taxes and adapted them for Scotland, was consolidated by the Taxes Management Act 1880, s. 88 of which preserved the tax collector's prior claim and applied throughout Great Britain. That section was in turn re-enacted with modifications for Scotland by the Inland Revenue Act 1884, s. 7(2), from which the 1970 Act s. 64 derives. The corresponding provision for England and Wales is now contained in the 1970 Act, s. 62.

[4] Bankruptcy (Scotland) Act 1913, s. 118; Companies Act 1985, s. 614 and Sched. 19.

(but not VAT and other Customs and Excise taxes and duties) will be prior claims in diligence but not preferential debts in sequestrations and liquidations, whereas VAT and other Customs and Excise taxes and duties (but not rates and Inland Revenue taxes) will be preferential debts in sequestrations and liquidations but will not be prior claims in diligence. Such inconsistency seems unjustifiable. Another oddity is that the claim for priority applies in terms only to "moveable goods and effects", an expression which on a literal construction seems apt to cover corporeal moveables, but not incorporeal moveable property and *a fortiori* not money. On the other hand, in several sheriff court cases it has been held that the claim covers money which has been arrested, or attached by decree of maills and duties, or assigned.[1] The priority applies to the remedy (maills and duties) by which the holder of a bond and disposition in security attaches the rents of the secured property but apparently not the remedy by which the holder of a standard security attaches those rents because the former happens to be a common law diligence whereas the latter is a recent creation of statute.[2] The priority does not apply to diligences against, or dispositions of, heritable property though in sequestrations and liquidations, rates and taxes have priority in the proceeds of the bankrupt's heritable property as well as his moveable property.

7.100 Fourth, the prior claim even applies in cases of "moveable goods and effects . . . liable to be taken . . . by any assignation" by the rates or tax defaulter. In a sheriff court multiple-poinding, the claim for priority has been held to apply to an intimated assignation of money so that a subsequent arrestment by a collector of rates was preferred.[3] It should be observed that if the prior claim does indeed apply where moveables are assigned, then the claim can be made even where the collector of rates or taxes has not executed diligence against those moveables. Moreover, on a literal construction of section 64, the priority applies even where the assignee takes the assigned moveable property without notice of the tax arrears and for onerous consideration. The potentially wide-ranging application of the priority to assignations is little known and rarely invoked, but seems to us to be exorbitant.

7.101 Fifth, the 1947 Act, section 248(2) and the 1970 Act, section 64(2) enable the collector of rates or taxes to execute diligence by summary warrant poinding where the moveables have been "taken" by poinding or other diligence without meeting the collector's prior claim. This provision seems to operate even where the goods have been sold in a warrant sale by the ordinary creditor to a purchaser for value taking without notice of the collector's prior claim. Such a purchaser losing his goods in this way could no doubt claim damages from the tax defaulter's ordinary creditor who ought to have paid the arrears, but this provision seems to us to be potentially unfair to bona fide purchasers at auction sales. It seems likely that this power is

[1] *Wood* v. *Glasgow Corporation* (1912) 28 Sh.Ct.Reps. 91 at p. 93; *Bow* v. *Shaw* (1914) 30 Sh.Ct.Reps. 138; *Wood* v. *Glasgow Corporation* (1916) 2 S.L.T. (Sh.Ct.) 242; *Cameron* v. *Neil* (1926) 42 Sh.Ct.Reps. 171.

[2] Conveyancing and Feudal Reform (Scotland) Act 1970, s. 11 and Sched. 3, standard condition 10(3); s. 24.

[3] *Cameron* v. *Neil* (1926) 42 Sh.Ct.Reps. 171. Concerning the words "or by any assignation", the sheriff remarked (at p. 181): "I have found no authority as to their meaning or application. It may be that they are subject to construction and are not applicable to every assignation, e.g. to an absolute assignation which transfers property".

rarely, if ever, used by the official collectors and it is one which, in our view, they ought not to possess.

Proposal for abolishing the prior claims for rates and taxes

7.102 Faced with the choice between recommending reform of the priorities for rates and taxes or abolition, we have no hesitation in recommending abolition. The arguments adduced in the past in favour of the priorities are broadly the same as the arguments for conceding preferences to rate and taxes in sequestrations under bankruptcy legislation, e.g. that central and local government do not choose their creditors; that they cannot obtain securities for their debts; that unlike commercial creditors or even electricity and gas boards, they cannot refuse to give services to defaulters in the future.[1] We considered fully and rejected these and other arguments in our Report on Bankruptcy.[2] As mentioned above,[3] in the context of the Bills amending the law on bankruptcy sequestrations and liquidations presently before Parliament, it has been accepted by the present Government that the preferential status for rates and Inland Revenue assessed taxes should be abolished, but the preferential status of VAT and other Customs and Excise taxes and duties should be retained.

7.103 Even on the basis that rates and taxes, or any of them, should receive priority in sequestrations under bankruptcy legislation, we do not think that a similar priority should be accorded to rates and tax collectors out of the diligences of ordinary creditors. First, the debtor may not be insolvent and, even if he is, he may have sufficient assets to satisfy diligence by the collector of rates or taxes.

7.104 Second, it cannot be said that abolition of the priority in diligence for rates and Inland Revenue taxes would amount to a new breach of the principle that the priorities in diligence should be the same as in sequestration: that principle has never been fully implemented in legislation. Since the priority for taxes was introduced, the types of preferential debts in bankruptcy sequestrations have multiplied greatly and even if local government rates and Inland Revenue assessed taxes cease to have preferential status, there will still be several categories of preferential debts under bankruptcy legislation including PAYE deductions, value added tax, car tax, betting and gaming duties, social security contributions, contributions by insolvent employers to occupational pension schemes, and wages, salaries and other benefits to employees of a bankrupt.[4] The legal processes of sequestration and liquidation are well designed to enable the claims of all creditors to be ranked and preferred, but the various individual modes of diligence are far less appropriate for that purpose unless an action of multiple-poinding is raised. While we sympathise with the view that the rules on the ranking of creditors' claims on a debtor's property should be the same whether those rules are applied in diligences, sequestrations (or liquidations), or other legal processes, it seems to us that there are practical constraints against applying sequestration preferences in diligences. A new statutory duty to intimate diligences to all

[1]See the McKechnie Report, paras. 111–5, which favoured the retention of the priorities.
[2]Chapter 15.
[3]Paras. 4.85 and 7.99.
[4]See para. 4.85 above; Bankruptcy (Scotland) Bill 1984, clause 48 and Sched. 3.

preferential creditors would be impractical and, in the many cases where no prior claim exists, no useful result would be served. Moreover, to replicate in the domain of diligence the rules of ranking in sequestrations, complicated machinery would have to be provided whereby preferred creditors executing diligence, including summary warrant diligence, could share rateably the fruits of that diligence with other preferred creditors. There is furthermore a difference in principle between diligence and sequestrations so far as the privileges of rates and taxes are concerned. In a sequestration, the rates or tax collector is ranked and preferred on property of the debtor vested in the trustee. In diligence, the privilege is not, or not merely, a preference in the proceeds of the debtor's property but takes the form of rules making one person liable for the rates or tax arrears of another person; requiring payment of the arrears before the goods are "taken" by diligence (though in the case of rates the amount will ultimately be limited to the net proceeds of the diligence); and allowing the collector to execute diligence against goods as if the creditor's diligence has not been executed. These rules seem to us to be exorbitant and anomalous, in the case of rates where the extent of liability is restricted to the amount of the net proceeds of the diligence, and even more so in the case of tax where there is apparently no restriction at all. Rates and tax collectors possess the valuable privilege of executing summary warrant diligences. This should suffice to protect the public purse.

7.105 Third, we concede that in matters of fiscal legislation, it is generally accepted that cross-border uniformity is desirable so far as differences between the different legal systems of the United Kingdom allow. In England and Wales, however, whereas tax collectors have a privileged claim[1] similar to tax collectors in Scotland, we understand that local rating authorities do not have a privileged claim, outside bankruptcy proceedings, corresponding to claims for rates under the Scottish Act of 1947, section 248. Of the two English analogies, we think that the rule relating to rates is to be preferred. In any event, the prior claim of the tax collector in Scotland seems wider than in England since it applies to cases where money is "taken" and prevails over a landlord's sequestration or diligence for rent[2] whereas as we understand it, the prior claim of the collector in England extends only to "goods and chattels" not money, and does not apply to enforcement at the suit of a landlord for rent.[3] Finally, abolition of the priorities for rates and Inland Revenue taxes would avoid the unjustifiable anomaly mentioned in para. 7.99 above, namely that rates and Inland Revenue taxes are preferred in diligence but (as a result of legislation presently before Parliament) not in bankruptcy proceedings whereas exactly the reverse is true of VAT and other Customs and Excise taxes and duties.

7.106 We **recommend:**

The priorities for recovery by official collectors of one year's arrears of rates and taxes, where moveable goods and effects are taken by diligence or assignation in Scotland, should be abolished.
(Recommendation 7.19; clause 100(4).)

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[1]Taxes Management Act 1970, s. 62.
[2]See para. 7.99.
[3]1970 Act, s. 62.

Section F. *Fugae* warrants

7.107 When the Debtors (Scotland) Act 1880, section 4 abolished civil imprisonment as a general creditor's diligence, it provided that nothing in the Act should "affect or prevent the apprehension or imprisonment of any person under a warrant granted against him as being *in meditatione fugae* . . ." that is, contemplating abscondence. A *fugae* warrant for imprisonment was a diligence on the dependence relating to a debt due but not yet constituted, or in security of a future or contingent debt. The creditor deponed that the debtor was contemplating abscondence and, on cause shown, could obtain a warrant for the debtor's imprisonment until he found caution for the debt. A *fugae* warrant was an ancillary diligence only competent where the debt, when constituted by decree, was enforceable by imprisonment under the decree.[1] It is thus no longer competent for alimentary debt because, since 1882, the procedure for imprisonment for aliment is not authorised by the alimentary decree but by a special warrant of the sheriff on a separate application where the failure to pay was wilful.[2] *Fugae* warrants appear thus to be technically competent only in those very few cases where imprisonment on decrees is still competent, i.e. for fines and penalties connected with central government taxes and duties and for rates.[3] The diligence has long been in disuse.[4] The abolition of civil imprisonment under the Debtors (Scotland) Act 1838 and the Exchequer Court (Scotland) Act 1856 recommended above would necessarily entail the abolition of the last vestiges of *fugae* warrants, and a repeal of the provisions of the 1880 Act, section 4 saving such warrants.

7.108 We **recommend:**

Fugae warrants should be abolished.
(Recommendation 7.20; Bill, Schedule 9 (amendment of Debtors (Scotland) Act 1880, section 4).)

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[1] *Kidd* v. *Hyde* (1882) 9 R. 803; *Hart* v. *Anderson's Trs.* (1890) 18 R. 169.
[2] Civil Imprisonment (Scotland) Act 1882, s. 4; *Glenday* v. *Johnston* (1905) 8 F. 24.
[3] Maclaren, *Court of Session Practice* (1916) p. 56.
[4] McKechnie Report, para. 140.

CHAPTER 8

OFFICERS OF COURT

Section A. Introduction

8.1 In this Chapter we put forward recommendations for reform of the system of administration of officers of court (messengers-at-arms and sheriff officers). The topics include the legal and administrative arrangements for the appointment, training, organisation, discipline and control of officers of court and the regulation of their standards of conduct. The present system is in part founded on the principle that officers of court on the one hand hold a public office with the exclusive right to execute court warrants for citation and diligence, yet on the other hand are independent contractors who receive instructions from litigants or creditors in much the same way as commercial agents receive instructions from their principals. There are, however, important differences between officers of court and commercial agents which stem from the public nature of their office within the judicial system. Officers have a duty to act when instructed and cannot pick and choose their clients; their fees are regulated by act of sederunt and they are subject to the disciplinary authority of sheriffs principal (or, in the case of messengers, Lyon King of Arms). An officer of court may operate as a sole practitioner, as a partner in a firm of officers or as an employee of a self-employed officer or firm of officers.

8.2 In Chapter 2 we considered[1] whether the present system of independent contractor officers of court should be replaced by a Court Enforcement Office similar to the Enforcement of Judgments Office in Northern Ireland whereby diligence would be authorised, controlled and executed by the Office. We concluded that the present system of execution of diligence, reformed along the lines recommended in this report, should be retained.

8.3 Another option which we put forward in Consultative Memorandum No. 47[2] was the replacement of fee-paid independent contractor officers of court by state-salaried officers employed within the Scottish Court Service who would execute citation and diligence on receipt of instructions from creditors in the same way as officers of court do at present. The difference between this option and the Court Enforcement Office is that creditors would remain in control of the diligence with salaried officers, whereas the Office would select the appropriate diligence and decide to what extent it should be pursued.

8.4 The first argument in favour of salaried officers is that the remuneration of officers of court by way of fees paid by creditors is allegedly inconsistent with their status as public officers executing decrees of court and acting impartially as between debtors and creditors, and creates a risk that excessive diligence will be done because an officer's remuneration will depend on the volume of work. We think that it is inevitable that officers who execute

[1]See paras. 2.79 to 2.110.
[2]Paras. 4.1 to 4.17.

diligence on behalf of creditors will be associated in the public eye with creditors and that this will be so however the officers are paid. The reforms recommended in this report should provide sufficient safeguard against excessive diligence, and moreover it would not be in the long term interests of an officer to encourage creditors to incur unnecessary diligence expenses.

8.5 Secondly, the introduction of salaried officers would enable officers to be located in the remote areas of Scotland and so enable diligence to be done in those areas more cheaply and quickly. While diligence in the remote areas does present problems it is not clear how extensive these are at present. We do not think that it would be reasonable to suggest a major change in the system to overcome some of the difficulties which creditors may experience in pursuing debts in outlying areas when we consider that the change would be unnecessary and undesirable for the more populous areas where by far the greatest volume of diligence is carried out. Moreover, it is questionable whether a change to salaried officers would do much to meet the problem of the outlying areas. It is doubtful how far public funds would or should be expended in maintaining officers in remote areas where they would probably be less than fully employed.

8.6 Thirdly, it has been argued that salaried officers forming part of the Scottish Court Service would be more amenable to control by the courts than are independent contractors, and hence more publicly accountable. We do not find this argument persuasive. An officer of court at present has no security of office and can be dismissed at the pleasure of the sheriff principal;[1] on the other hand the sheriff principal might have little direct control over state salaried officers, especially if they were organised so that the officers executing diligence were under the supervision of senior officers. Later in this Chapter we recommend[2] improved methods for dealing with complaints against officers of court and we also recommend provisions empowering the courts to inspect the work of officers of court even in the absence of complaint. These recommendations will in our opinion enlarge the courts' supervisory role and make officers of court more accountable for the way in which they carry out their duties.

8.7 No complaints regarding the overall efficiency of the service presently provided by officers of court emerged on consultation; indeed the majority of those consulted took the view that independent fee-paid contractors were likely to provide a more efficient and cost-effective service than state-salaried officers. Another argument for retention of the present system is that it operates at minimal direct cost to public funds. We think it unlikely that a system of state-salaried officers and ancillary staff could be made self-financing without a considerable increase in the level of fees presently chargeable for diligence.

8.8 Another way of restructuring the present system of officers of court would be to transfer the functions of appointment, discipline and control from the courts to an executive branch of government. We proposed in Consultative

[1]See para. 8.74 below.
[2]Recommendations 8.10 to 8.12.

Memorandum No. 51[1] that such a change should not take place and on consultation there was unanimous approval of our proposal. Diligence (the object of which is the enforcement of court orders) is in all material respects a judicial proceeding and not an administrative or executive function.[2] Officers of court also execute citation which is undoubtedly a step in judicial proceedings. Transfer of control of diligence to central government would be open to objection on the ground that the enforcement of court orders would be liable to be affected, or to appear to be affected, by political considerations, and would thus infringe the constitutional principle of the independence of the courts.[3]

8.9 We would reject both the above options—introducing state-salaried officers and making officers of court a branch of government. The arguments in favour of state-salaried officers are in our opinion unconvincing, and there is a danger that such a change would result in a more expensive and less effective enforcement service than that presently provided by officers of court. Scotland is not unique in having independent contractor fee-paid officers of court; the enforcement officers of the High Court of England and Wales (the sheriff's officers) and many European countries (such as the *huissiers* in France) are independent contractors. The system of officers of court has served Scotland reasonably well and we conclude that the present system should be retained with improvements in accordance with the recommendations we put forward in the remainder of this Chapter.

8.10 We **recommend:**

The present system whereby citation and diligence is executed by independent contractor fee-paid officers of court should be retained (subject to various reforms) and should not be replaced by salaried officers employed within the Scottish Court Service or a central government department. (Recommendation 8.1; clauses 101–111.)

Section B. Organisation and control of officers of court

8.11 Standing the retention of the present system of independent contractor fee-paid officers of court we consider in this Section how best such a service should be controlled and organised. Officers of court are at present divided into two classes, messengers-at-arms and sheriff officers.

8.12 Messengers-at-arms are appointed by the Lord Lyon King of Arms after a favourable report has been received on the applicant's knowledge of the law and practice relating to the duties of messengers from a senior messenger-at-arms appointed to conduct such an examination. Powers of control and dismissal over messengers are vested concurrently in the Lord

[1]Proposition 1 (para. 2.10).

[2]For example attachment of property by diligence brings it within the protection of the court; the courts supervise poindings, grant warrants of sale and recall or restrict arrestments; and the report of a poinding, when submitted to the court, thereby creates a pending court process. The forms and procedure in diligence may be changed by act of sederunt and diligence fees are prescribed by act of sederunt.

[3]In the leading case of *Stewart* v. *Reid* 1934 S.C. 69, Lord Sands (at p. 74) disapproved of "the enforcement of diligence by departmental officials, whether national or local" as being an "intrusion of the bureaucratic into the realm of the judicial" and observed that officers of court should be "free and independent of the control of any administrative body".

Lyon and the Court of Session, although in modern practice these powers are exercised by the Lord Lyon.[1] All Court of Session and Lyon Court writs generally require to be executed by a messenger, but in certain circumstances a sheriff officer may act instead.[2] Messengers are also entitled to execute warrants of the sheriff's ordinary court. On 1 January 1985 there were 88 messengers. It is thought that all practising messengers are also sheriff officers.[3]

8.13 A sheriff officer seeking a commission in a sheriffdom is appointed by the sheriff principal of that sheriffdom. The appointment is made only after examiners appointed by the sheriff principal have satisfied themselves as to the applicant's knowledge of the law and practice of citation and diligence. The officer's commission may cover the whole sheriffdom, or be restricted to a particular court district or districts, or to an area defined in some other way.[4] The officer is subject to the disciplinary jurisdiction and control of the sheriff principal who may suspend or revoke the commission. In general, sheriff officers are entitled to execute only sheriff court warrants, but they may in certain circumstances execute Court of Session warrants as well.[5] On 1 January 1985 there were 146 sheriff officers, many of whom held more than one commission.[6]

Retention of messengers-at-arms and sheriff officers

8.14 The first question to be considered is whether two separate classes of officers of court should continue to exist, or whether they should be replaced by a single class of officer competent to execute decrees and warrants of any court in Scotland. Such a proposal was rejected by the McKechnie Report,[7] but fusion into one service would not necessarily mean that all officers would execute the decrees of all courts in Scotland, as the McKechnie Report assumed, since it would be possible to have one service of court officers and yet impose limits on the territorial competence of individual officers. The arguments for and against fusion turn largely on what new arrangements would be made on such matters as the appointment, training, discipline, control and territorial competence of officers in a fused service, and the level and mode of regulation of fees.

8.15 By itself, therefore, the question of fusion is not of great importance, but we can see no compelling reason in favour of fusion. First, we argue below[8] that the Court of Session and the sheriffs principal should control the officers who execute the decrees of their respective courts, and it seems to us that the distinction between messengers-at-arms and sheriff officers provides a convenient method of achieving this. Second, it can be argued that messengers-at-arms should have a nationwide competence since the Court of

[1]See para. 8.21 below.

[2]Execution of Diligence (Scotland) Act 1926, s. 1; see para. 8.35 below.

[3]A survey conducted for us disclosed that in 1980 there were 74 messengers-at-arms and all practising messengers were also sheriff officers. For many years, only persons who are sheriff officers have applied for appointment as messengers-at-arms.

[4]See paras. 8.41 to 8.43 below for a discussion of a sheriff officer's powers to execute warrants in other sheriffdoms.

[5]Execution of Diligence (Scotland) Act 1926, s. 1.

[6]In 1980 there were over 120 sheriff officers.

[7]Paras. 206–7.

[8]See paras. 8.17 to 8.28.

Session has a nationwide jurisdiction, whereas sheriff officers should have a territorially limited competence corresponding to the limited territorial jurisdiction of the sheriff courts to which their commissions apply. Third, we understand all practising messengers-at-arms are also sheriff officers[1] so that a wide measure of fusion already exists. Messengers-at-arms are generally recruited from the more senior sheriff officers, and within the service tend to be regarded as having a higher status than sheriff officers, even though, with the exception of inhibitions, there are only minor differences between diligence on Court of Session warrants and diligence on sheriff court warrants.[2] Fourth, since fusion would not serve any very useful purpose, some weight should be given to history and tradition, and the avoidance of change for its own sake. On consultation all commentators, with one exception, agreed with these arguments, of which the first is the most important.

8.16 We **recommend:**

The separate offices of messenger-at-arms and sheriff officer should be retained and should not be replaced by one service of court officers authorised to execute warrants of all courts within Scotland.
(Recommendation 8.2; clauses 103 and 130.)

Control of sheriff officers

8.17 Earlier in this Chapter we considered and rejected the idea that officers of court should become part of the Scottish Court Service or employees of a department of central government. Another possible model for the service of officers would be that they should be self-regulating and self-disciplining with a professional organisation that controls and supervises them. Most, but not all, of the officers of court holding commissions are members of the Society of Messengers-at-Arms and Sheriff Officers,[3] which was established in 1922 by the amalgamation of two local societies of officers. The Society performs many useful functions. For example, it acts as a channel of communication between officers and the various authorities concerned with the law and practice of citation and diligence. It represents the interests of its members, and indeed officers generally, when consulted on an informal basis by the Court of Session as to proposed amendments to the acts of sederunt regulating fees payable to officers for executing diligence. It advises its members on practical problems concerned with the execution of diligence and has produced styles for use by officers in executing diligence. It has sponsored a manual on diligence for use in training officers, as a first step towards a training scheme for officers. But we do not favour self-regulation. Since messengers-at-arms and sheriff officers are officers of the courts charged with the functions of enforcing warrants for diligence and other warrants of the courts, we think that they should continue to be appointed, disciplined and controlled by the courts. It follows from this that the Society of Messengers-at-Arms and Sheriff Officers should remain a voluntary association

[1]At least, this was true in 1980 and we believe the situation has not changed materially since then. We recommend below (para. 8.56) that messengers-at-arms should be recruited from the ranks of sheriff officers.

[2]The differences in citation are more significant.

[3]In 1980, of the 126 officers of court holding commissions, 113 were members. The corresponding figures for January 1985 are 146 and 136.

rather than become a body, membership of which is compulsory, and expulsion from which would terminate an officer's commission.

8.18 Control of officers of court could be achieved within the judicial system by the establishment of a new central authority within that system having powers to appoint, discipline and control all officers of court and also to make and review rules regulating officers of court and the administration of diligence generally. The arguments in favour of central control include the following. First, a central authority would be able to set and enforce nationwide standards for the training, qualification, discipline and control of officers of court. Second, a central authority would be able to exercise the same functions in relation to messengers-at-arms and sheriff officers thus ensuring a uniform approach in the control of all officers of court. Third, the small number of practising officers (about 140) may suggest that control should be exerciseable by one authority, rather than by seven or eight authorities (the six sheriffs principal, the Lord Lyon and/or the Court of Session). Fourth, many sheriff officers hold commissions in more than one sheriffdom and, indeed, some firms operate throughout Scotland. Finally, the principle of local control by sheriffs principal of officers entitled to enforce sheriff court decrees has already been breached to some extent. Warrants of the sheriff's ordinary court may be executed by messengers-at-arms,[1] and sheriff court warrants may be executed outwith the jurisdiction of the court of origin by officers of the court of the place of execution, over whom the sheriff principal of the court of origin has no control.[2] While the former practice can and we think should be abolished, the latter practice is too convenient to admit of abolition.

8.19 Although the above arguments are attractive in some respects, we do not think a compelling case has been made for establishing a new central authority over officers of court. We remain of the view that the functions of appointment, supervision and discipline of sheriff officers are best exercised locally in the sheriffdoms where the sheriffs principal can take primarily into consideration the need to provide an efficient service by officers who are familiar with the community within which their commissions require them to operate. No support for a new central authority emerged on consultation,[3] although two bodies suggested that the relevant functions in respect of sheriff officers, as well as messengers-at-arms, should be entrusted to the Lord Lyon. Either of these solutions would mean that the courts would no longer have power to control the officers responsible for executing their warrants. The principle of control by the courts, on which the present system is largely based, is we think sound and should be retained and strengthened.[4] Nationwide standards for the training, qualification, discipline and control of officers of court (messengers as well as sheriff officers) can be achieved without establishing a central authority with executive powers.[5] The present structure of sheriff courts with full-time sheriffs principal who frequently consult one

[1] *Thornton, Applicant* 1967 S.L.T. (Sh.Ct.) 71.

[2] Ordinary Cause Rules, rule 16; Summary Cause Rules, rule 11.

[3] Consultative Memorandum No. 51, para. 2.9 and Proposition 1 (para. 2.10).

[4] In Recommendation 8.6 (para. 8.40 below) we recommend that a messenger-at-arms should be excluded from all sheriff court work except in districts for which he or she holds a commission as sheriff officer.

[5] See paras. 8.29 to 8.34 below, where we recommend the establishment of an advisory body to advise the Court of Session on the making of rules regulating officers of court.

another on matters of common interest seems capable of coping with any problems thrown up by the existence of large firms of sheriff officers whose operations transcend the boundaries of particular sheriffdoms.

8.20 We **recommend:**

Sheriff officers should not become a self-regulating and self-disciplining service. The functions of appointment, supervision and control of sheriff officers should continue to be exercised by sheriffs principal and should not be transferred to a new central authority having such functions in respect of sheriff officers and messengers-at-arms.
(Recommendation 8.3; clauses 104–7.)

Appointment and control of messengers-at-arms

8.21 At present, the function of appointing messengers-at-arms lies within the exclusive jurisdiction of the Lord Lyon while the functions of control and discipline have, following a chequered history, become vested in the Lord Lyon and Court of Session concurrently.[1] The powers of suspension and deprivation from office are in current practice exercised by the Lord Lyon acting on a complaint, or of his own accord, or on remit from the Court of Session.[2]

8.22 We argued above that the main justification for retaining the distinction between messengers-at-arms and sheriff officers is that each court, or group of courts, should control its own officers. On this principle, it seems to us that the primary responsibility for appointing, controlling, supervising, suspending and dismissing messengers-at-arms should be transferred from the Lord Lyon to the Court of Session. It appears to us that there is a wide divergence between the functions of the Lord Lyon in respect of messengers-at-arms and Lyon's other functions. Sir Thomas Innes of Learney, a former Lord Lyon, in an article in the *Encyclopaedia* listed sixteen functions entrusted to the Lyon King of Arms.[3] Fifteen of these functions relate to heraldry, genealogy and public ceremonial. The remaining function, the appointment, control and discipline of messengers-at-arms, does not appear to us to have any significant generic connection with the other functions, which belong rather to what in constitutional theory is known as "the dignified part of the Constitution" rather than its functional part. In our Consultative Memorandum No. 51, we therefore suggested that the powers and jurisdiction to appoint, discipline and control messengers-at-arms presently vested in the Lord Lyon should be transferred to the Court of Session.[4]

8.23 On consultation, the Lord Lyon observed that messengers-at-arms were not the officers of any one court but rather "Officers of the Sovereign competent to execute the decrees of any of the Sovereign's Courts" and that this concept should remain as a general principle though he conceded that it is now probably desirable that messengers-at-arms should not execute the decrees of the sheriff court. The courts in question would include the Court

[1] *Encyclopaedia*, vol. 9, pp. 622–7.
[2] *Ibid.*, p. 626; Mackay, *Practice of the Court of Session* p. 233; R.C. 56.
[3] Vol. 9, pp. 335–6.
[4] Proposition 12 (para. 4.9).

of Session, the Court of the Lord Lyon and the High Court of Parliament, and it might include new courts constituted in the future. The badge or insignia of the messenger-at-arms is the blazon (bearing the Royal Arms) and wand or baton of office presented by the Lord Lyon which the messenger should display when executing diligence.[1] The Lord Lyon remarked:

> "As Messengers-at-Arms are called such because they bear the Royal Arms, it seems also entirely appropriate that the control of those who bear the Royal Arms or Ensigns of Public Authority of the Sovereign should be in the hands of the Lord Lyon King of Arms, who is the Sovereign's Principal Officer of Honour in Scotland and the Officer to whom the Armorial Prerogative in Scotland has been assigned by sundry statutes".

The Lord Lyon further observed that the Officers of Arms and the messengers-at-arms are members of, and regard themselves as forming, a single corps and that it is competent for Officers of Arms—Heralds of Arms or Pursuivants of Arms—to execute decrees in the same way as messengers-at-arms, though it was not suggested that Heralds or Pursuivants in fact do so in current practice.

8.24 The proposed transfer of control was strongly opposed by the Society of Messengers-at-Arms and Sheriff Officers. Indeed, they argued that if change were necessary to achieve uniformity of standards throughout Scotland and the easy control and discipline of all officers of court, the Lord Lyon was the perfect instrument to achieve such uniformity and control. The Law Society of Scotland took broadly the same view. The few other bodies who commented supported the proposal.

8.25 The vast bulk of the work undertaken by messengers-at-arms is citation and diligence on Court of Session warrants if one excludes sheriff court warrants which we recommend below[2] should be executed only by sheriff officers. We remain of the view that the Court of Session should itself exercise a judgment as to how many messengers-at-arms should be appointed, and who is suitable to be appointed, and should also be responsible for exercising supervisory and disciplinary functions over messengers-at-arms.

8.26 It clearly emerges from our consultation, however, that the historic connection between the Lord Lyon King of Arms and the messengers-at-arms is highly valued and we see no reason why that connection should be severed completely. Indeed, if messengers-at-arms are to retain their traditional title, it seems appropriate that the functions of granting commissions to messengers-at-arms and depriving them of their commissions should continue to be exercised by the Lord Lyon. We suggest, therefore, that an application for appointment as messenger-at-arms should be made to the Court of Session. A judge of the Court of Session nominated by the Lord President should be required to be satisfied that the applicant is suitable, both in terms of knowledge and character, and that there is a need for an additional messenger.

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[1] *Encyclopaedia*, vol. 9, pp. 617–8. The blazon is a piece of silver bearing the impression of the Royal Arms which is attached by a chain and ring to a small ebony wand or baton. Where obstruction of messengers-at-arms amounting to the offence of deforcement takes place the theory is that the messenger-at-arms should "break" the wand or baton by slipping the ring down the baton: see para. 8.142 below.

[2] Recommendation 8.6 (para. 8.40).

On being so satisfied the judge would issue a finding to this effect. The applicant would then petition the Lord Lyon for a commission as messenger giving as evidence of suitability the judge's finding to this effect. In accordance with current practice, the Lord Lyon would interview the applicant, take the applicant's oath to perform the duties of messenger faithfully and then present the applicant with a commission and the blazon and baton of office. Similarly, where as a result of disciplinary proceedings before a judge of the Court of Session an interlocutor is pronounced finding that a messenger should be suspended from practice or deprived of office, that interlocutor should be sent to the Lord Lyon who would suspend or deprive as the case may be.[1] It should cease to be competent to bring proceedings in the Lyon Court for deprivation or suspension from the office of messenger-at-arms.

8.27 Our recommended changes regarding messengers-at-arms would not prevent the Lyon Court from appointing other officers to execute the warrants of that court, although we would expect the current practice of enforcement by messengers-at-arms to continue. Lyon Court diligence is highly specialised and we have regarded it as outwith the scope of this report.

8.28 We **recommend:**

(1) The primary function of appointment, supervision, control and discipline of messengers-at-arms should be transferred from the Lyon King of Arms to the Court of Session. The Lord Lyon should, however, retain formal functions in connection with the appointment, suspension and deprivation of office of messengers-at-arms and the Lyon Clerk should continue to keep the Roll of Messengers-at-Arms.

(2) An application for appointment as messenger should be heard by a judge of the Court of Session who if satisfied that the applicant is suitable should pronounce an interlocutor containing a finding to this effect.

(3) The Lord Lyon on receiving the interlocutor of the Court of Session should, after interviewing the petitioner, administer the oath to perform a messenger's duty faithfully, present the petitioner with a commission as messenger-at-arms and insignia (blazon and baton) of office, and instruct the petitioner's name to be entered in the Roll of Messengers.

(4) A Court of Session interlocutor finding that a messenger should be suspended from practice or deprived of office should be transmitted to the Lord Lyon who should suspend or deprive (as the case may be) the messenger and instruct an appropriate amendment to be made to the Roll of Messengers-at-Arms.
(Recommendation 8.4; clauses 103(1) and (5) and 104–7.)

Regulatory powers of the Court of Session

8.29 At present, the Court of Session regulates by act of sederunt the fees of sheriff officers[2] and (with the consent of the Lord Lyon) messengers-at-arms.[3] There is no obligation on the Court to consult the Sheriff Court Rules

[1]See also para. 8.90 below.
[2]Sheriff Courts (Scotland) Act 1907, s. 40.
[3]This is an inherent common law power.

Council or to obtain the concurrence of the Treasury. It is understood that changes in the fees are usually made following representations to the Lord President of the Court of Session by the Society of Messengers-at-Arms and Sheriff Officers. Officers' fees are now regularly varied to keep pace with inflation.

8.30 There are rules regulating the standards of conduct of messengers-at-arms and related matters in the Rules of the Court of Session[1] most of which derive with few modifications from the Regulations of the Lord Lyon (sanctioned by the Court of Session) of 11 March 1772.[2] There are no similar enactments applying to sheriff officers although to some extent the gap is filled by the common law.

8.31 Earlier in this Chapter we recommended[3] that sheriff officers and messengers should be appointed and controlled by the sheriffs principal and the Court of Session respectively, and rejected the notion of a central authority with executive powers to control all officers of court. But if nationwide standards of training, qualification, discipline, supervision and conduct are to be achieved, uniform rules and standards on these matters will be necessary.

8.32 In Consultative Memorandum No. 51 we proposed[4] that there should be a code of rules regulating the conduct of, and other matters relating to, officers of court, and that to that end the Court of Session's regulatory powers over officers should be extended so as to allow them to make rules regulating and controlling the service of officers of court. This proposal met with unanimous approval.

8.33 We also proposed,[5] following broadly a recommendation of the McKechnie Report,[6] that a standing advisory body should be established to advise the Court of Session on the making and revision of the rules mentioned above. All those consulted agreed. There is in our opinion a strong case for a standing council in which matters of concern to the administration of diligence can be debated, to which problems which have been identified can be referred and in which policy can be formulated by persons representative of the various interests involved. In our Memorandum we called the standing advisory body "the Officers of Court Council", but in the light of comments received, we now consider "the Advisory Council on Messengers-at-Arms and Sheriff Officers" to be a more appropriate title, since advocates and solicitors are also officers of court. For convenience, however, we do use the term "officers of court" in this Chapter and elsewhere[7] to refer to messengers-at-arms and sheriff officers.

8.34 We **recommend:**

(1) The Court of Session's existing powers to make rules regulating

[1]Rules 47–62.
[2]Campbell on *Citation* p. 485.
[3]Recommendation 8.3 (para. 8.20) sheriff officers, Recommendation 8.4 (para. 8.28) messengers-at-arms.
[4]Proposition 2 (para. 2.17).
[5]Proposition 2(2) (para. 2.17).
[6]Paras. 211–2.
[7]See clause 130 of the draft Bill annexed to this report.

messengers-at-arms and prescribing fees for citation and diligence should be replaced by wider statutory powers to make rules regulating and controlling the service of officers of court.

(2) A new standing body, which may be called the Advisory Council on Messengers-at-Arms and Sheriff Officers, should be established to advise the Court of Session on rules to be made under the foregoing powers and generally to keep under review all matters relating to officers of court.

(3) The Advisory Council should consist of a judge of the Court of Session (who should act as chairman) appointed by the Lord President of the Court of Session, five other members also appointed by the Lord President (including two sheriffs principal, two officers of court and a solicitor), and one member appointed by the Secretary of State for Scotland. The Secretary of the Council should be a full-time clerk of session or sheriff clerk appointed by the Secretary of State.
(Recommendation 8.5; clauses 101 and 102.)

Messengers-at-arms and the sheriff courts

8.35 The scope of the functions of messengers-at-arms and sheriff officers respectively is regulated by a mixture of common law rules, statutory provisions and rules of court on the meaning and effect of warrants,[1] and the provisions of the Execution of Diligence (Scotland) Act 1926. Subject to section 1 of the 1926 Act (enabling a sheriff officer to act as a messenger in any county where there is no resident messenger and in any of the islands of Scotland), all warrants of the Court of Session are required to be executed by a messenger-at-arms. After a long period of uncertainty, it appears to be accepted that warrants of the sheriff's ordinary court may be executed by messengers as well as by sheriff officers.[2] Warrants of the sheriff's summary cause court are generally executed by sheriff officers only,[3] although it has been suggested that messengers are not completely excluded.[4] Apart from that, section 2(2)(*b*) of the 1926 Act (as amended) authorises a messenger resident in the sheriffdom where a summary cause charge or arrestment is to be executed to execute the charge or arrestment by registered or recorded delivery letter in cases where postal execution is competent.[5]

8.36 In Consultative Memorandum No. 51, we proposed[6] that messengers should be authorised by their commissions to execute Court of Session warrants only, while sheriff officers (subject to section 1 of the Execution of Diligence (Scotland) Act 1926) should be restricted to sheriff court work. It is undesirable that a person should be refused a commission as a sheriff officer for a sheriffdom, and yet have authority to execute warrants of the courts in

[1]Debtors (Scotland) Act 1838, s. 9 and Scheds. 1 and 6; R.C. 67, 68 and Form 44; Sheriff Courts (Scotland) Extracts Act 1892, s. 8; Summary Cause Rules, rule 6(3).

[2]*Thornton, Applicant* 1967 S.L.T. (Sh.Ct.) 71; *Meridian Mail Order Co Ltd* v. *Lennox* (unreported, 1 February 1973, Sheriffdom of Ayr and Bute at Kilmarnock). We deal with the execution of summary warrants for rates and taxes in Chapter 7.

[3]Summary Cause Rules, rule 6(3).

[4]T. C. Gray "The Summary Cause Rules 1976" 1977 S.L.T. (News) 129 at p. 132.

[5]See s. 2(1)(*a*) and (*b*).

[6]Proposition 4 (para. 2.26).

that sheriffdom in the capacity of a messenger. Furthermore, sheriffs principal cannot effectively control the number of officers of court available to execute decrees of their courts if messengers have an inherent authority to execute sheriff court decrees. Execution of sheriff court decrees by messengers-at-arms is inconsistent with the general principle that each court or group of courts should be responsible for appointing and controlling the officers executing their warrants.

8.37 Our proposal was approved in principle by all those consulted, though as already indicated, the Lord Lyon made the point that messengers-at-arms have authority to execute warrants of all courts of the Sovereign (including the High Court of Parliament and the Lyon Court) and that, subject to the exclusion of sheriff court warrants, this principle should remain. We accept this argument. It should suffice that messengers-at-arms are precluded by statute from executing warrants of the sheriff court.

8.38 We make no recommendations as to criminal warrants. In the nineteenth century, messengers-at-arms and sheriff officers executed the warrants of courts of criminal jurisdiction, and, although in modern practice such warrants are now invariably executed by police constables, the old authority of messengers-at-arms and sheriff officers has not been abolished and indeed has been recently confirmed by statute[1] at least in relation to warrants of citation.

8.39 Our proposed prohibition of messengers from executing sheriff court civil warrants would also extend to enforcement of writs registered for execution in any sheriff court books. Thus writs registered for execution in the Books of Council and Session would be enforceable by messengers only;[2] while writs registered for execution in the books of a sheriff court would be enforceable by sheriff officers only. In Consultative Memorandum No. 51, we drew attention[3] to statutory provisions making an order of certain tribunals or enquiries enforceable "in like manner as a recorded decree arbitral".[4] Since registration of the order in either the sheriff court books or the Books of Council and Session seems to be unnecessary, it is not clear whether messengers or sheriff officers or both are authorised to carry out diligence to enforce the order. This doubt has, however, been recently removed in relation to the orders of industrial tribunals by legislation under which such an order has the same effect as an extract registered decree arbitral bearing a warrant of execution issued by the sheriff court of any sheriffdom in Scotland.[5] We think that this legislative formula should apply generally in place of the statutory style quoted above.

8.40 We **recommend:**

(1) Messengers-at-arms should not be authorised by their commissions as messengers to execute warrants of the sheriff courts (including writs registered for execution in any sheriff court books), without prejudice

[1]See Criminal Justice (Scotland) Act 1980, s. 25(1) inserting new definition of "officer of law" in the Criminal Procedure (Scotland) Act 1975, s. 462(1).

[2]Subject to the Execution of Diligence (Scotland) Act 1926, s. 1.

[3]Para. 2.25.

[4]Town and Country Planning (Scotland) Act 1972, s. 267(8); Patents Act 1977, s. 93(*b*); Education (Scotland) Act 1980, Sched. 1, para. 8.

[5]Employment Act 1980, Sched. 1, paras. 27 and 29.

to their authority to execute warrants of a particular sheriff court by virtue of their commissions as sheriff officers.

(2) Where a statute provides that a tribunal or inquiry order is enforceable "in like manner as a recorded decree arbitral" it should be amended to provide that the order is enforceable in like manner as an extract registered decree arbitral bearing a warrant of execution issued by the sheriff court of any sheriffdom in Scotland.
(Recommendation 8.6; clause 103(3) and Schedule 7, General Amendment and paragraphs 17, 24, 25 and 30.)

Territorial competence of sheriff officers

8.41 Messengers are authorised to execute the warrants of the Court of Session anywhere in Scotland, reflecting the nationwide jurisdiction of the Court of Session. The basic common law rule on the territorial competence of sheriff officers is that officers are authorised by their commissions to act only within the court district or other area for which their commissions were granted. This rule has been extensively modified by statutory provisions. Warrants of the sheriff court arising out of summary causes may be executed either by an officer of the court granting the warrant or an officer holding a commission for the place where the warrant is to be executed,[1] and since September 1983 this rule applies also to ordinary causes,[2] thus implementing a proposal we made in Consultative Memorandum No. 51.[3] It has to be conceded that these statutory provisions breach the principle of local control in that they allow officers commissioned to act in one area to act in other areas without holding commissions to that effect. Nevertheless we think that the rule allowing an officer holding a commission for the place of execution to execute warrants of courts outwith the sheriffdom is convenient and economic and should not be abolished.

8.42 We agree with the McKechnie Report that it would be undesirable for a commission granted by one sheriff principal to authorise the officer to act throughout Scotland.[4] If sheriff officers were to have a nationwide competence, individual sheriffs principal could no longer exercise any control over the number of officers available to execute the decrees of their courts and there would be a risk that a few large city-centred firms might obtain a virtual monopoly of business.

8.43 We **recommend:**

A sheriff officer should not be entitled to enforce a warrant of any sheriff court anywhere in Scotland. The existing rules whereby a warrant for diligence granted by a sheriff court is executed either by an officer of the court which granted the warrant or an officer holding a commission for the place where the warrant is to be executed should be retained.
(Recommendation 8.7; clause 116.)

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[1]Summary Cause Rules, rule 11.
[2]Ordinary Cause Rules, rule 16.
[3]Proposition 10(2) (para. 3.41).
[4]Para. 209.

Section C. Appointment, supervision and discipline

8.44 Having recommended that sheriff officers should be appointed and controlled by the sheriffs principal[1] and messengers-at-arms primarily by the Court of Session,[2] we now turn to consider the detailed arrangements for the appointment, training, organisation, discipline, supervision and control of officers of court.

Appointment and training

8.45 As the McKechnie Committee observed,[3] most new sheriff officers receive their initial training while working with an experienced officer of court. Some officers become "apprentices" on leaving school, and are sheriff officers for the whole of their working lives; other officers are recruited much later in life and have held other jobs.[4] Table 8.A (giving the results of a survey conducted in 1979/80) shows the age of sheriff officers at the date of their first appointment. Over half (56%) of the officers obtained their first commission before the age of 25 years. Relatively few officers enter the service as a major second career and only 17% obtained their first commission when over 40 years of age. As Table 8.B (giving the results of a survey conducted in 1979/80) shows, there is a wide variation in the length of "apprenticeship" or training served by sheriff officers: 58% of sheriff officers served an apprenticeship or training period of less than three years.

8.46 To obtain a commission as a sheriff officer the applicant presents a petition to the sheriff principal. Normally if the officer holds a commission for another district no examination will be held; if an examination is needed, the sheriff principal usually appoints a panel of examiners which may be composed of solicitors and/or senior sheriff officers. Examinations are usually oral. It was represented to us that this practice gives rise to a diversity in standards.[5]

8.47 In Consultative Memorandum No. 51 we proposed[6] that uniform examination standards and training qualifications applicable throughout Scotland should, if possible, be introduced by act of sederunt.[7] These proposals were generally approved on consultation. They would almost certainly require the introduction of written examinations set by a central examining body and a formal programme of practical training supervised by it. Attempts have been made in the past by the Society of Messengers-at-Arms and Sheriff

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[1]Recommendation 8.3 (para. 8.20).

[2]Recommendation 8.4 (para. 8.28).

[3]Para. 213.

[4]A survey of officers of court conducted in 1979/80 disclosed that of the 126 officers who participated in the survey, 27 entered the service of sheriff officers upon leaving school or shortly thereafter. A further 12 officers had been in H.M. Forces (generally national service) and 29 officers had been previously employed in the police force, the sheriff clerk service, or as an employee (typist for example) in a sheriff officer's firm. Insufficient information was available to classify the prior occupations of the remaining 48 officers.

[5]The procedure is similar to that which at one time regulated the admission of law agents as procurators in local sheriff courts. The Royal Commission on the Courts of Law in Scotland, Fourth Report (1870) p. 42 argued that this led to a diversity in standards and that "there should be one general examination applicable to agents throughout all Scotland." This recommendation was implemented by the Law Agents (Scotland) Act 1873.

[6]Proposition 5 (para. 3.6).

[7]The McKechnie Report (para. 213) made a similar suggestion.

Officers to introduce a formal scheme of apprenticeship or training.[1] One barrier to such a development was the absence of an up-to-date manual of practice, but such a manual has recently been published under the auspices of the Society.[2] The Law Society of Scotland in commenting on our proposals, suggested that part of the training of sheriff officers should include instruction by experts in the valuation of furniture and other goods, and that there should be an examination by a valuator of an applicant's skill in this field. We would support this suggestion in view of the importance of correct valuation in poindings.

8.48 We do not wish to make recommendations in this report as to the details of the training and examination of aspiring officers of court. These matters should, we think, be regulated by the Court of Session after consulting the Advisory Council on Messengers-at-Arms and Sheriff Officers. We

Table 8.A

Age when first appointed

Age	Number of officers	Percentage of officers
Less than 18	—	—
18–20	8	6
21–24	61	50
25–29	17	14
30–39	16	13
40–49	13	10
50–59	9	7
over 60	—	—
Total	124*	100

*2 not stated

Table 8.B

Length of apprenticeship

Length of "apprenticeship" or training	Number of officers	Percentage of officers
1 year or less	23	19
1–2 years	25	20
2–3 years	23	19
3–4 years	16	13
4–5 years	12	10
5–6 years	13	10
6–7 years	3	2
over 7 years	3	2
none	6	5
Total	124*	100

*2 not stated

[1]See Consultative Memorandum No. 51, para. 3.5.
[2]Maher, *A Textbook of Diligence* (1981); *Updating Supplement* (1985).

understand that the Society of Messengers-at-Arms and Sheriff Officers is currently working on a programme for training sheriff officers which could be of assistance in the preparation and implementation of regulations on apprenticeship and training and qualifications. We propose that a person who completes the required programme of training successfully would receive a certificate of competence to perform the work of a sheriff officer.

8.49 As mentioned above, an applicant wishing to obtain a commission as a sheriff officer presents a petition to the sheriff principal. The procedure, which is not regulated by act of sederunt, is at the discretion of the sheriff principal, who normally orders that the application should be made known publicly, for example by advertisement on the notice board of the relevant sheriff court-house.[1] The sheriff principal orders an examination to be made, if necessary, of the applicant's knowledge of the law and practice of citation and diligence; makes an assessment, on the basis of testimonials or otherwise, of the applicant's character, reputation and general suitability to hold office; and assesses whether it is expedient to appoint an additional sheriff officer in the districts or sheriffdom for which a commission is sought. Objections to the application may be lodged.

8.50 In considering an application for appointment as sheriff officer, the sheriff principal has regard to the interest of the applicant, to the interest of any objectors opposing the application and to the public interest, which is paramount.[2] Important factors in determining the public interest are that there should be an adequate but not excessive number of sheriff officers for the relevant district; that a single officer or firm of officers should not have a monopoly of business so that a choice is available to creditors; that the officer should be a person of good character; and that the officer should preferably have knowledge of the local community. Where contested applications occur, it is usually because other sheriff officers holding appointments in the relevant district claim that there is already an adequate provision of officers in that district. The total volume of warrants for citation and diligence emanating from a particular sheriff court is finite, so that a surplus of officers could well result in existing officers' businesses ceasing to be viable.

8.51 The Society of Messengers-at-Arms and Sheriff Officers remarked, in commenting on our proposals for a formal programme of training, that it was "essential for the recruitment of officers of court that any qualification must be seen as worthwhile obtaining" and not left "to the problematical question of 'obtaining' a commission". We think, as did all those who commented on this aspect, that there should be no change in the sheriff principal's discretionary powers in appointing officers so that other factors besides the applicant's competence can be taken into consideration. We do not think that the existence of these discretionary powers would devalue the certificate of competence; it seems clear that an application for a commission should be

[1]The procedure was at one time prescribed in general terms by model "Rules and Regulations" agreed by the sheriffs principal on 11 December 1867: these are set out at (1868) 12 Journal of Jurisprudence 156–7. The rules were circulated to the sheriffs in order that they might, if so advised, adopt them in their counties by an act of court. The present practice is broadly the same as laid down in those model rules.

[2]Few cases have been reported, but see *Lewis, Petitioner* 1963 S.L.T. (Sh.Ct.) 6, *Thornton, Applicant* 1967 S.L.T. (Sh.Ct.) 71.

incompetent unless the applicant holds such a certificate. If a certificate o competence were to become an essential precondition to an application fo appointment, it would clearly be "worthwhile": it cannot, however, be treatec as a passport to a commission in any sheriffdom of the applicant's choice. I might be provided that the sheriff principal would not be entitled to refus an application for a commission on the ground of lack of knowledge if th applicant held a certificate of competence. We prefer, however, to leave th precise effect of any certificate of competence to be regulated by act o sederunt.

8.52 In our Consultative Memorandum No. 51, we noted that in one sens the organisation of sheriff officers is beginning to transcend the boundarie of sheriffdoms since, for example, one group of associated firms has officer with commissions in all sheriffdoms and maintains offices in many parts o Scotland.[1] While this feature is very different from the original mode o organisation of officers' firms, there seems nothing inherently wrong in suc a development provided that the officers in the branch offices of large firm know the local community and perform their functions properly, and provide that the centralising trend does not go too far with the result that monopolie arise and creditors have no real choice of firms to instruct. We think tha control of the balance between large and small firms is best left to the sheriff principal to determine in the light of local circumstances. When an applicatio is made for an appointment, the sheriff principal can review the position and by either making or refraining from making the appointment, can ensure tha there is a balance between there being sufficient work for the officers of cour and enough choice for creditors to stimulate efficiency by competition.

8.53 The procedure in an application to the Lord Lyon for appointment a messenger-at-arms is similar to the procedure in an application for a sherif officer's commission.[2] The applicant is referred by the Lord Lyon to the Lyo Macer or another senior messenger-at-arms who examines the candidate o the relevant law and practice and reports the results of the examination t the Lord Lyon. If the report is favourable, the Lord Lyon interviews th applicant before administering the oath and issuing a commission and th insignia of office. As in the case of sheriff officers no apprenticeship o professional qualification is required by law for appointment as messenger.

8.54 As recommended above,[4] application for appointment as messenge would in future be made in the first instance to the Court of Session, althoug the commission as messenger would be granted by the Lord Lyon. W recommend that the further training qualifications necessary for appointmen as messenger and the examination of the applicant's competence should b regulated by the Court of Session after consultation with the Advisory Counci on Messengers-at-Arms and Sheriff Officers. The Court of Session in disposin of an application for appointment as messenger should be entitled to conside

[1]Para. 3.13.

[2]See *Encyclopaedia*, vol. 9, p. 618.

[3]*Idem*. The McKechnie Report's statement (at para. 213) that a six years' apprenticeship wa required before appointment as messenger-at-arms seems to have been an error.

[4]Recommendation 8.4 (para. 8.28).

not only the applicant's competence but also his or her general suitability and the need for an additional messenger.

8.55 We understand that all practising messengers-at-arms are also sheriff officers, and that for many years all applicants for appointment as messenger-at-arms have been sheriff officers. In our Consultative Memorandum No. 51, we suggested that this practice should be placed on a formal basis by providing that a person should be eligible to apply for, and to hold, a commission as messenger-at-arms only if he or she holds a commission as sheriff officer.[1] Our suggestion, which was generally approved on consultation, would be consonant with the establishment of national training standards for sheriff officers and would enhance the standing of messengers-at-arms. The Society of Messengers-at-Arms and Sheriff Officers agreed that only a sheriff officer should be entitled to apply for appointment as messenger, but suggested that an officer should be entitled to resign a sheriff officer's commission while retaining a commission as messenger-at-arms. The purpose of the Society's suggestion was to enable a senior officer in a firm of officers to resign as a sheriff officer while retaining a commission as messenger so that a newly trained assistant could apply to be appointed as sheriff officer to the vacancy thereby created. While we have some sympathy with this suggestion, it would entail setting up a separate system of authorisation of extra-official activities by the Court of Session for the few officers who held commissions as messengers only.[2]

8.56 We **recommend:**

(1) In order to secure uniformity of training standards and qualifications throughout Scotland, the Court of Session, after consulting the Advisory Council on Messengers-at-Arms and Sheriff Officers recommended above, should prescribe by act of sederunt rules governing the training and qualifications of sheriff officers and messengers-at-arms. The rules should regulate the apprenticeship of entrants to the sheriff officers' service, and require the holding of written examinations and the issue of certificates of competence to undertake the work of messenger-at-arms or sheriff officer.

(2) Consideration should be given by the competent authorities, after consulting the Society of Messengers-at-Arms and Sheriff Officers, to the introduction of a formal programme for the training of messengers-at-arms and sheriff officers using methods appropriate to the small numbers of persons who enter the service at any one time.

(3) The procedure to be followed in applications for a commission as messenger-at-arms or sheriff officer should be regulated by act of sederunt made by the Court of Session after consulting the Advisory Council on Messengers-at-Arms and Sheriff Officers. Such an application should not be competent unless the applicant holds the prescribed messenger's or sheriff officer's certificate of competence, as the case may be.

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[1]Proposition 11(1) (para. 4.5).

[2]We recommend in Recommendation 8.19 (para. 8.110) below that extra-official activities of sheriff officers should be authorised by the sheriffs principal from whom they hold commmissions.

(4) No change should be made in the existing powers of the sheriffs principal to grant a commission as sheriff officer having regard to the interests of the applicant, and to the public interest which should continue to be paramount. The Court of Session, in disposing of an application for appointment as messenger-at-arms, should have similar discretionary powers.

(5) A person should be eligible to apply for and to hold a commission as messenger-at-arms only if he or she holds a commission as sheriff officer.

(Recommendation 8.8; clauses 101(1) and 103(2) and (4).)

Firms and employees

8.57 Officers of court may be self-employed persons conducting their own business, partners of a firm of officers of court (consisting perhaps of both messengers-at-arms and sheriff officers) or employees of an officer or firm of officers. In the survey of officers of court showing the position at the end of 1979, 121 were actively working as sheriff officers and were organised in 34 separate "businesses" (including in the term "business" a firm, a group of associated firms and a sole practitioner's business). In 14 of these businesses, the work was done by a sole practitioner who did not employ any other officer; in four firms, all of the officers (two or three) were partners. One group of firms had three partners and 19 employees; one business had one principal and eight employees; one group of firms had two partners and six employees; and one business had one principal and five employees. Each of the remaining 12 businesses had no more than five officers with an equal or almost equal balance between principals and employees.

8.58 Rule 52 of the Rules of the Court of Session provides that:

> "No messenger shall be the servant of any particular master during the time he continues in office, under the pain of deprivation."

This rule which derives from the Lord Lyon's regulations of 1772 is not interpreted in practice as preventing a messenger from being the employee of another messenger. No equivalent enactment or rule of law applies to sheriff officers: the case of *Stewart* v. *Reid*[1] however can be taken as establishing that a sheriff officer cannot be the employee of a local authority or other employer under a commission in terms of which dismissal by the employer would entail deprivation of the commission. The case does not prevent a sheriff officer from being the employee of another sheriff officer where dismissal from employment would not terminate the commission.

8.59 We see nothing wrong in the practice of messengers-at-arms and sheriff officers employing other messengers and sheriff officers to execute citation and diligence. We understand that some officers do not wish to assume the responsibility of partnership status and it would be wrong to require them to do so.

8.60 While it has been suggested that the organisation of sheriff officers in

[1] 1934 S.C. 69.

firms is in some way undesirable,[1] there was no dissent on consultation from our view that the practice should be retained. It is a long-standing and highly convenient feature of the independent contractor system. It allows for the sharing of costs, which may be heavy since officers often require to be backed up by a considerable office staff and have to pay for office premises, stationery and equipment, cars for use by officers, and other expensive overheads; in busy firms it allows the continuous manning of the firm's place of business by an officer while other officers are executing citation or diligence; it permits continuity of business during holidays, sickness and other interruptions in the work of particular officers; and it creates the opportunity for new officers to gain experience by working with other more experienced officers.

8.61 We **recommend:**

Provision should be made by act of sederunt to make it clear that an officer of court may be employed under a contract of service by another officer of court or firm of officers to execute citation and diligence, and that officers of court are permitted to organise themselves in firms.
(Recommendation 8.9; clause 101(1)(*a*).)

Supervision of officers

8.62 Jurisdiction to discipline officers of court for misconduct is generally speaking exercised only where there has been a complaint, perhaps by the individuals concerned or by Members of Parliament on behalf of their constituents. In the absence of complaints, checks on the conduct of officers in executing citation and diligence made by courts of their own accord are limited. In the diligence of charge, poinding and warrant sale, the poinding is reported to the court but the report does not set out the expenses charged. It is only in those rare cases where a sale is executed that a report giving a full account of the diligence expenses is made and taxed by the auditor of court. Arrestments in execution are never reported to the court and arrestments on the dependence are only reported in those rare cases when the arrestment is used prior to the service of a sheriff court initial writ. The only check on arrestment fees occurs in the few cases where there is an action of furthcoming or other action in which fees are claimed. Apart from these cases, the question whether diligence has been regularly executed may occasionally come before the court if the diligence is challenged by the debtor or a third party in other legal proceedings. [2]Thus the court has neither the duty nor the opportunity to audit the vast bulk of diligence fees and outlays charged by officers of court, and control by the courts of other aspects of execution of diligence is in practice restricted to irregularities which appear on the face of reports of poinding or sale submitted to them, or which are the subject of a specific complaint.

8.63 In raising the question of supervision of officers' conduct, we do not intend to imply that irregularities occur on any significant scale. We think it essential, however, that enforcement officers with power to enter dwelling-

[1]*Lawrence Jack Collections* v. *Hamilton* 1976 S.L.T. (Sh.Ct.) 18 at p. 20.

[2]For example, in an application for withdrawal of goods owned by a third party from a poinding, or in proceedings for reduction of a poinding, suspension of a charge, interdict of a sale of a third party's goods mistakenly poinded, or damages for wrongful diligence.

houses, to take possession of property, to arrest debtors (in civil imprisonment cases) and bankrupts, and to take possession of children (under child delivery orders) should be subject to independent supervision by the courts whose orders they execute. A reformed system should not simply leave it to people to complain to the courts; it is for the courts to act positively and of their own accord to ensure that standards of conduct are maintained. The law should give them the powers needed for this purpose. We adopt a similar approach to the audit of fees discussed later.[1]

Supervision of conduct

8.64 In Consultative Memorandum No. 51 we suggested[2] that sheriffs principal should have power, even in the absence of any complaint, to appoint a suitable person or persons to inspect at public expense the work of a sheriff officer or officers in executing diligence and to make enquiry as to paid extra-official activities. We proposed similar powers for the Court of Session in relation to messengers-at-arms.[3] These proposals were broadly accepted by those consulted, although reservations were expressed about random use of the power in the absence of complaint or reasonable suspicion of misconduct. While we appreciate the arguments behind these reservations, limiting inspections to officers against whom complaints were made would not represent any material improvement on the present system. The mere possibility, however remote, that officers of court could be subject to "spot checks" would help to ensure that standards of conduct were maintained. The sort of persons who we think might act as inspectors are senior officers of court, solicitors, accountants and former sheriff clerks. The sheriff principal should, however, have freedom to appoint any person with skills suitable to tackle the inspection in question, and we have framed our recommendation accordingly.

8.65 In the absence of special provision, the existence of parallel powers of the Court of Session and the sheriffs principal to conduct inspections would create difficulties, because most firms of officers consist of or include both messengers-at-arms and sheriff officers and because virtually all messengers-at-arms are also sheriff officers. It would be difficult in practice for an inspector to examine the work of an officer or firm of officers in relation only to their work as messengers or only to their work as sheriff officers with separate reports to the Court of Session and the sheriff principal limited to the work of officers in their separate capacities of messengers and sheriff officers. We suggest therefore that where the Court of Session decides that the work of a messenger or firm of messengers should be inspected, it should request the appropriate sheriff principal to appoint an inspector so that the inspection will also cover the officer's work as sheriff officer. Similarly where a sheriff principal wishes to appoint an inspector to examine the work of any officer holding both offices or a firm of officers that includes one or more messengers, the concurrence of the Court of Session should be requested so that the inspector would have authority to examine all the work. The report of the inspection should then be submitted to both the Court of Session and the sheriff principal.

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[1]Paras. 8.67 to 8.73.
[2]Proposition 9 (para. 3.35).
[3]Proposition 12(4) (para. 4.9).

8.66 We **recommend:**

(1) A sheriff principal should have power, even in the absence of a complaint, to appoint a suitable person or persons to inspect the work of any sheriff officers in executing citation and diligence and to make enquiry as to paid extra-official activities and to report.

(2) Where an inspection would involve officers who are messengers-at-arms as well as sheriff officers, the sheriff principal should request the concurrence of the Court of Session to the inspection so that the work of the officers in both capacities can be examined. The person conducting the inspection should submit the report to the Court of Session and to the sheriff principal.

(3) The Court of Session should have power, even in the absence of a complaint, to direct a sheriff principal to appoint a suitable person or persons to inspect the work of any messengers in their capacity as messengers as well as sheriff officers and the work of sheriff officers associated in business with them. The person conducting the inspection should submit the report to the Court of Session and to the sheriff principal.

(4) The expenses of an inspection and report should be chargeable to the Exchequer.

(Recommendation 8.10; clause 104.)

Audit and taxation of diligence expenses

8.67 In the great majority of diligence cases, the fees and outlays charged by officers of court to the creditor, and recoverable by the creditor from the debtor, are not audited and taxed[1] by the court. There is mandatory provision for audit and taxation only in those few cases where a warrant sale has been executed.[2] Debtors and creditors have, it is thought, a legal right to require expenses to be taxed but few creditors and fewer debtors ever exercise that right. In our Consultative Memorandum No. 51,[3] we invited suggestions and discussed three options for extending the arrangements for audit, namely: (*a*) an audit by the auditor of court at and in respect of each and every step in diligence; or (*b*) an audit at two stages in the poinding process (on lodging the report of poinding and at the end of the proceedings following the grant of warrant of sale) and after an arrestment has been laid; or (*c*) a system of "spot checks" of diligence processes.

8.68 We have derived considerable assistance from comments made on our Consultative Memorandum. There was general agreement with our view that the first option should be rejected on the ground that it would entail a very considerable increase in the work load of court staff and officers of court. We also reject the second option, which would require arrestments to be reported to the court for the sole purpose of audit of fees. As the Law Society of

[1]"Taxation" and its verb "to tax" are the technical terms of Scots law denoting the procedure by which the auditor of court allows or disallows expenses and outlays claimed by one party to litigation or diligence from the other party, or by solicitors, messengers-at-arms or sheriff officers from the clients instructing them.

[2]This provision was made by Practice Notes of the sheriffs principal following criticisms made in *Cantors Ltd* v. *Hardie* 1974 S.L.T. (Sh.Ct.) 26 at p. 30 of the lack of such provision.

[3]Paras. 3.26 to 3.30; Proposition 8 (para. 3.30).

Scotland emphasised, the need to prevent abuses in this field has to be balanced against the need not to increase the expenses of the procedure borne by creditors and ultimately debtors. Such expenses would include not only the fees of the auditor of court but also the fee of an officer if required to attend at a taxation.

8.69 Our recommended solution is therefore a variant of the third option and involves four elements. First, reports of poindings, which are already reported to the courts, should contain an itemised statement of the fees, mileage charges and outlays incurred in serving the charge and executing the poinding, and these expenses should be liable to random checking by the auditor of court.

8.70 Second, we would adopt the helpful suggestion made by the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers that every diligence form served on the debtor should state the fees, mileage charges and outlays incurred. The requirement to itemise diligence expenses would in itself help to prevent errors. The forms should notify the debtor and creditor (in non-technical language) of their right to have the fees and outlays taxed, but warning them that they may have to bear the cost of taxation. If the auditor of court discovered that overcharging had occurred, the court, acting on a report by the auditor of court, should have power to adjust the diligence expenses, to order repayment of fees or other sums found to have been overcharged and to order the officer to pay the expenses of audit and any subsequent procedure. If, however, the diligence expenses were found on audit to be correct, the debtor or creditor requesting the audit should be made liable for the audit fee. In the case of arrestments proceeding on a Court of Session decree, taxation of the expenses should be carried out by the Auditor of the Court of Session, and any orders as to liability for any amount overcharged, and the expenses of audit and further proceedings, should be pronounced by a judge of that court. The expenses of a poinding proceeding on a Court of Session decree, however, should be subject to taxation by the auditor of the sheriff court which supervises the poinding, and the relevant orders should be made by the sheriff of that court. We reject the idea that the expenses in every report of poinding should be audited, as this would place a considerable burden on the sheriff court staff (many thousands of poindings are executed and reported each year).[1] All reports of sale are remitted to the auditor of court for audit and taxation of the fees and outlays charged by the officer of court and the auditor's fee is chargeable against the debtor. We think the auditor's fee should be waived in these circumstances since the taxation is not carried out at the debtor's request.

8.71 Third, we have recommended[2] that the Court of Session and the sheriffs principal should have power to order an inspection of officers' work. This power could be used to make random checks on the fees being charged by the officer concerned since the inspector could check the fees while investigating other matters or an inspector could be appointed simply to carry out a spot check on fees. Spot checks should be carried out at public expense since neither the creditor nor the debtor would have any say in the selection of

[1]See Chapter 2, Tables 2A (page 14) and 2B (page 19).
[2]Recommendation 8.10 (para. 8.66).

expenses to be audited. Liability to random spot checks would maintain officers' awareness of the need to calculate their fees correctly.

8.72 Finally, where evidence of overcharging by an officer emerged either through an investigation or audit of expenses, such evidence should be reported to the appropriate disciplinary authority. We think that deliberate overcharging would normally be treated as very serious misconduct, rendering the officer liable to severe penalties.[1]

8.73 We **recommend:**

(1) Provision should be made by act of sederunt that the report of a poinding should state the fees, mileage charges and outlays incurred in serving the charge and executing the poinding. The auditor of the sheriff court should have power, in the absence of any request by the creditor or debtor or remit by the court, to audit and tax selected expenses. Unless the audit was requested by the debtor or creditor, the audit expenses should be chargeable to the Exchequer.

(2) Any fee chargeable by the auditor of court in connection with audit and taxation of reports of sales of poinded goods should be waived.

(3) Provision should be made by act of sederunt that all diligence forms served on debtors should contain a detailed statement of the fees, mileage charges and outlays incurred in that step of the diligence.

(4) The debtor or creditor should, as at present, have a right to have diligence expenses audited and taxed. It should be provided by act of sederunt that for sheriff court diligence and poindings proceeding on a Court of Session decree, the audit should be carried out by the sheriff court auditor; for other Court of Session diligence the audit should be carried out by the Auditor of the Court of Session.

(5) Provision should be made by act of sederunt that where diligence expenses are found on audit to be stated correctly or understated, the debtor or creditor requesting the audit should be liable for the auditor's fee. Where the diligence expenses are found on audit to be overcharged, the sheriff (or in the case of an arrestment proceeding on a Court of Session decree, the Lord Ordinary) should have power to adjust the diligence expenses, to order repayment of fees or other sums found to have been overcharged, and to order the officer to pay the expenses of audit and subsequent procedure. The officer in question should also be liable to be reported to the appropriate disciplinary authority.

(6) A person appointed in terms of Recommendation 8.10 should have power to check diligence expenses charged by officers of court and to report evidence of overcharging. Deliberate overcharging should render the officer concerned liable to disciplinary proceedings for misconduct. (Recommendation 8.11; clauses 61(7) and 104(1).)

Disciplinary proceedings

8.74 The functions of disciplining and controlling sheriff officers to ensure the maintenance of appropriate standards of conduct are vested in the sheriffs

principal. In addition, sheriff officers may be liable in damages to a creditor or debtor for negligence or impropriety in the conduct of their business. The sheriffs principal have wide powers to suspend sheriff officers and to deprive them of office which have not been formally changed since at least the early 19th century when those powers were upheld in an unreported Court of Session case.[1] These powers have not previously been examined by any official report. A report in 1818[2] and later textbooks[3] state briefly that sheriff officers hold their office "during the pleasure of the sheriff principal" or "during their good conduct" or use a like formula. Although the sheriff principal's powers of discipline and dismissal are administrative in character and not subject to appeal, it is clear on general common law principles that these powers must be exercised in a judicial manner and, as such, are subject to the Court of Session's inherent jurisdiction to correct abuses of natural justice.[4]

8.75 The functions of disciplining and controlling messengers-at-arms are vested concurrently in the Lord Lyon and the Court of Session.[5] The procedure of the Lyon Court is governed by Rule 56 of the Rules of the Court of Session, but there are doubts as to the appropriate procedure in the Court of Session,[6] and in practice proceedings for suspension or dismissal take place in the Lyon Court. An appeal may be taken to the Court of Session against a sentence of the Lyon Court dismissing or suspending a messenger.[7]

8.76 In our Consultative Memorandum No. 51, we identified a number of defects (which had been brought to our attention by the sheriffs principal) in the powers of the sheriffs principal to deal with complaints of misconduct by sheriff officers.[8] The kinds of complaint are extremely varied and the sheriff principal requires to deal with them in different ways.[9] In most cases, the complaint can be disposed of without formal procedures, but there are exceptional cases in which disputed matters of fact require to be investigated and in which the difficulty of doing so, or the seriousness of the complaint,

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[1]MacLaurin, *Forms of Process* (2nd. ed.; 1848) vol. i, p. 66; Gillespie, *Powers and Duties of Sheriff Officers* (1852) p. 176.

[2]Third Report (Sheriff and Commissary Courts) of the Royal Commission on the Courts of Justice in Scotland (Parliamentary Papers; 1818) p. 54 refers to sheriff officers as being removable by the sheriff at pleasure.

[3]MacLaurin, *supra*; McGlashan, *Sheriff Court Practice* (4th. edn.; 1868) p. 89; Dove Wilson, *Sheriff Court Practice* (4th. edn.; 1891) p. 44; Wallace, *Practice of the Sheriff Court* (1909) p. 24; *Encyclopaedia*, vol. 13, p. 527; Dobie, *Sheriff Court Practice* (1952) p. 10.

[4]See *Malloch* v. *Aberdeen Corporation* 1971 S.C. (H.L.) 85 in which the majority of the House of Lords held that the power to dismiss a person from an office held during the pleasure of the appointing authority must be exercised only after giving the person an opportunity to be heard, and, in the absence of this safeguard, the dismissal was a nullity subject to reduction by the Court of Session.

[5]*Encyclopaedia*, vol. 9, pp. 622–7.

[6]Maclaren, *Court of Session Practice* (1916) p. 1114.

[7]R.C. 61.

[8]Para. 3.16.

[9]For example, a complaint that although rates arrears had been paid, a poinding had been carried out under a summary warrant was pursued by writing to the rating authority; a complaint that an officer had poinded too high a sum involved a question of law, whether under an obligation to pay £X per week it was lawful to poind goods to a value of a sum sufficient to cover what would be due by the date of sale; a complaint of assault or misconduct during a poinding may be conveniently dealt with in the first instance by interviewing the complainer, the sheriff officer and any witnesses separately; and a question whether the appraised value of poinded goods is too low might be dealt with by obtaining the opinion of an independent valuer.

makes it inappropriate that the sheriff principal should undertake the investigation personally. In such cases, the sheriff principal may experience difficulty in obtaining, and verifying the accuracy of, information in the absence of powers to appoint a suitable person to take precognitions and prepare a case against an officer and in the absence of any adversary procedure; in the absence of powers to cite witnesses or to order the recovery of documents; and in the absence of provisions for the recompense of witnesses in respect of travelling expenses. Moreover, in serious cases involving the possible dismissal of the officer, it seems inappropriate that the sheriff principal should be required to act as investigator, prosecutor and judge. In these respects, the procedures compare unfavourably with disciplinary procedures in the professions. While it is clear that the sheriffs principal can impose penalties of suspension or dismissal, it is not clear what other penalties can be imposed. It would be desirable to clarify and extend the range of penalties, for example by conferring express powers to fine, or to order repayment of collection charges or fees.

8.77 In Consultative Memorandum No. 51 we proposed[1] that the sheriff principal should have power, following a complaint not answered by the sheriff officer to the satisfaction of the sheriff principal, to appoint a solicitor to investigate the complaint, and where the investigation discloses evidence of misconduct, to present the case before the sheriff principal. The procedure should be adversarial in character and the officer should have fair notice of the case and the right to legal representation. Similar proposals were made in relation to complaints against messengers.[2] The same procedure should, we think, also be adopted where as a result of an inspection of the officer's work evidence of misconduct is disclosed. Where the inspection was carried out by a solicitor, the same person could subsequently be appointed as investigator and prosecutor. The procedure should also be used where suspicion of misconduct is reported to the sheriff principal or the Court of Session—for example by a sheriff dealing with litigation concerning taxation of expenses charged by an officer.

8.78 We do not think it would be advisable to attempt a comprehensive definition of misconduct, because the range of possible behaviour is too great. But it is important that misconduct should not be restricted to misconduct in the course of an officer's official duties. An officer of court has to enjoy the respect of the community in which he or she acts; the officer's extra-official business activities should therefore not be such as to render the officer unfit in the eyes of the community to hold office as a messenger-at-arms or a sheriff officer.

8.79 On consultation it was suggested that an officer should have the right to demand that an allegation of misconduct be disposed of by way of a formal investigation and disciplinary proceedings. We would reject this as formal proceedings might then have to be used for the most trivial of cases. The sheriff principal or the Court of Session should be able to deal with a minor infringement informally and give the officer a warning as to future conduct. But the powers of suspension, deprivation, fining and censure should be

[1]Proposition 7 (para. 3.17).
[2]Proposition 12(2) (para. 4.9).

available to the appropriate authority only if the misconduct is admitted by the officer in writing or is established in formal disciplinary proceedings. In this way minor cases of misconduct could be disposed of quickly and informally, yet officers accused of serious misconduct would be safeguarded.

8.80 Upon the view that few solicitors have sufficient knowledge of enforcement matters, it was suggested to us that a senior counsel should be retained as a permanent (but not full-time) investigator and procurator for the whole of Scotland, thus enabling that person to gain experience in such matters. Considerations of convenience and expense, however, suggest that a local solicitor should be appointed as and when needed.

8.81 In addition to the power to suspend an officer from practice or deprive the officer of office, the sheriff principal or the Court of Session should be able to censure the officer, impose a fine of not more than a prescribed amount, and, in the case of overcharging of fees and outlays, to order repayment of the sums overcharged. By analogy with the powers of the Scottish Solicitors' Discipline Tribunal, we suggest that the maximum fine that may be imposed on an officer of court should be £2,500.[1] The Secretary of State should have power to alter this figure by statutory instrument from time to time to reflect changes in the value of money.[2] In the unlikely event of the fine not being paid, we think that the court should have power, after giving an officer an opportunity to make representations, to grant a warrant for recovery of the fine by diligence, or to suspend or dismiss the officer.

8.82 Other aspects of disciplinary proceedings which require to be regulated either by statute or act of sederunt include empowering the sheriffs principal or the Court of Session to deal with the liability for the expenses of disciplinary proceedings, to cite witnesses and order the production of documents, and the publication of any sentence pronounced after a finding or admission of misconduct.

8.83 Diligence executed by an officer of court who has been suspended or deprived of office is null. In the case of messengers, the Lyon Court decree of suspension or deprivation takes effect from a specified date not earlier than the date of its publication,[3] but the position regarding sheriff officers requires clarification. A suspended or dismissed messenger incurs a small (and out-of-date) fixed penalty of £10 for each occasion on which he or she acts as messenger.[4] There is no fixed penalty for sheriff officers. A person who falsely claims to be an officer of court is guilty of the common law crime of fraud[5] if the pretence has some practical result (payment of the debt, for example) and could be charged with attempted fraud where the pretence was discovered before any practical result had been achieved. We prefer to deal with the problem by means of the existing common law rather than by the creation of new statutory offences. Moreover, the powers of the court on conviction for common law offences are sufficient to enable it to deal severely with an

[1]Solicitors (Scotland) Act 1980, s. 53(2).
[2]S. 53(8).
[3]R.C. 57.
[4]R.C. 57.
[5]*Donald MacInnes and Malcolm MacPherson* (1836) 1 Swin. 198.

officer who deliberately carried on practice after dismissal, which it might not be able to do if there was a fixed statutory penalty for each transgression.

8.84 We **recommend:**

(1) Where as a result of an inspection of the officer's work or a complaint or otherwise the sheriff principal has reason to believe that a sheriff officer may have been guilty of misconduct, the sheriff principal should have power to appoint a solicitor to investigate the matter, unless the officer admits the misconduct in writing or gives a satisfactory explanation of the matter. Misconduct should include conduct tending to bring the office of sheriff officer or messenger-at-arms into disrepute.

(2) If, following the investigation, the solicitor is of the opinion that there is a probable case of misconduct and sufficient evidence to support it, disciplinary proceedings should be brought at the instance of the solicitor before the sheriff principal. In such proceedings, the sheriff officer should be given fair notice of the allegations of misconduct and a right to legal representation. If the solicitor is of the opinion that there is no probable case of misconduct, or insufficient evidence, a report to this effect should be made to the sheriff principal.

(3) Similar powers to deal with allegations of misconduct involving messengers-at-arms should be conferred on the Court of Session.

(4) The Court of Session or the sheriff principal should have power following a written admission of misconduct or a finding of misconduct as a result of disciplinary proceedings as mentioned in paragraph (2) above to:

(*a*) deprive the officer of office;

(*b*) suspend the officer from practice;

(*c*) impose a fine of up to £2,500 or such other sum as may be prescribed by the Secretary of State;

(*d*) order repayment of fees, outlays and other sums overcharged; and

(*e*) censure the officer.

(5) It should not be competent to deal with an officer of court in any of the ways set out in paragraph (4) above unless the officer admits misconduct in writing or is found guilty of misconduct in disciplinary proceedings.

(6) The Court of Session after consulting the Advisory Council on Messengers-at-Arms and Sheriff Officers should make rules by act of sederunt regulating disciplinary proceedings against officers of court.

(7) The expenses of an investigation and disciplinary proceedings should be borne in the first instance by the Exchequer, but the Court of Session or the sheriff principal should have power at the termination of disciplinary proceedings to award expenses against either party. The party bringing the proceedings against the officer should be deemed, for this purpose, to be the Secretary of State.

(8) Where the officer is in default in payment of a fine imposed under paragraph (4)(*c*) above the court should have power to suspend or dismiss the officer or grant warrant for recovery of the fine by diligence. (Recommendation 8.12; clauses 101(1)(*h*), 105, and 106(4)–(8).)

Remits of disciplinary proceedings

8.85 Sheriff officers are entitled to execute a warrant, granted by a court within their commission area, outwith that area, and to execute within their commission area a warrant granted by a court outwith that area. Where an allegation of misconduct in the execution of such warrants is made it is necessary to regulate the question which sheriff principal should deal with it. In Consultative Memorandum No. 51 we proposed[1] that, as at present, the sheriff principal from whom the officer holds a commission should deal with the allegation either informally or by way of formal disciplinary proceedings, but may remit any part of the proceedings to the sheriff principal within whose sheriffdom the conduct in question had occurred so that that sheriff principal could conduct that part of the proceedings locally and report the results to the first mentioned sheriff principal. This proposal was generally approved on consultation, although one commentator suggested that allegations of misconduct should always be dealt with by the sheriff principal within whose sheriffdom they took place. We reject this suggestion because the sheriff principal holding disciplinary proceedings would not, in cases where the officer did not hold a commission in that sheriffdom, have power to suspend or dismiss the officer.

8.86 We think that the Court of Session should have similar powers to remit part of the proceedings to one or more sheriffs principal who would then report back to the Court of Session. Also, where the officer's alleged misconduct involved misconduct as a messenger-at-arms and as a sheriff officer (executing poindings before expiry of the days of charge for example) the Court of Session should be able to delegate the entire disciplinary proceedings to a sheriff principal so as to avoid the need for two sets of proceedings.[2] Conversely, a sheriff principal should be able to remit the disciplinary proceedings to the Court of Session where the allegations of the officer's misconduct while acting as a messenger were more serious than the allegations of misconduct as a sheriff officer.

8.87 We **recommend:**

(1) Provision should be made by act of sederunt that where allegations of misconduct arise in relation to the execution of a warrant granted by a court situated within the officer's commission area outwith that area, or a warrant granted by a court situated outwith the officer's commission area within that area, the allegations should (as at present) be dealt with by the sheriff principal from whom the officer holds a commission. But the sheriff principal should have power to remit any part of the proceedings to the sheriff principal within whose sheriffdom the alleged misconduct occurred, and the latter sheriff principal should report back to the former sheriff principal.

(2) Provision should be made by act of sederunt empowering the Court of Session to remit any part of proceedings dealing with allegations against a messenger to the sheriff principal within whose sheriffdom the alleged

[1]Proposition 10(3) (para. 3.41).

[2]In terms of Recommendation 8.15 (para. 8.91 below), suspension from practice or deprivation of office as sheriff officer will automatically result in suspension or deprivation of that officer as messenger.

misconduct arose. In addition, where an officer's alleged misconduct involves misconduct as a messenger-at-arms and as a sheriff officer, the Court of Session should have power to order that disciplinary proceedings be held by the sheriff principal from whom the officer holds a commission as sheriff officer, and the sheriff principal should have power to remit disciplinary proceedings to the Court of Session.
(Recommendation 8.13; clause 101(1)(*h*).)

Effect of criminal convictions

8.88 In line with our recommendation[1] that misconduct rendering an officer liable to suspension from practice or deprivation of office should not be restricted to misconduct in the course of official duties, we suggest that conviction by a court of any crime or offence should also render an officer liable to the same penalties. Convictions which occurred before the granting of a commission to an officer should count just as much as convictions afterwards, unless they had been disclosed in the officer's application for a commission. We think it is better to give the Court of Session and the sheriffs principal a wide discretion rather than attempt to produce a statutory list of the various crimes and offences that might lead to suspension or deprivation. Moreover, even conviction of a minor offence might merit a serious penalty if it was deliberately concealed from the sheriff principal when the officer applied for a commission. However, the Rehabilitation of Offenders Act 1974 should apply so that an officer could not be suspended or deprived on the basis of a conviction which was spent, or be obliged to disclose a spent conviction in an application for a commission as a messenger-at-arms or sheriff officer.

8.89 We **recommend:**

The sheriff principal having disciplinary authority over a sheriff officer should have power to suspend the officer from practice or deprive the officer of office if the sheriff principal becomes aware that the officer has been convicted of any crime or offence unless the conviction was disclosed in the application by the officer for a commission or is spent in terms of the Rehabilitation of Offenders Act 1974. Similar powers should be conferred on the Court of Session in relation to messengers-at-arms.
(Recommendation 8.14; clause 106(1)–(3).)

Effect on other commissions

8.90 Many sheriff officers hold commissions from more than one sheriff principal and all practising messengers-at-arms are at present, and under our recommendations will be required to be, sheriff officers. It is therefore necessary to consider the effect which disciplinary sanctions imposed by one disciplinary authority will have on the officer's commissions granted by other authorities. In the light of consultation,[2] in particular comments made by the Society of Messengers-at-Arms and Sheriff Officers, we recommend that suspension or deprivation of one commission should result in the suspension or deprivation of all commissions held by the officer in question. Suspension

[1]Recommendation 8.12(1) (para. 8.84) above.
[2]In Consultative Memorandum No. 51, Propositions 7(5) (para. 3.17) and 12(3) (para. 4.9).

or deprivation will in terms of Recommendation 8.12(5) be competent only where formal disciplinary proceedings have been held or where the officer has admitted the misconduct in writing. Suspension or deprivation of all other commissions should be automatic on the fact of suspension or deprivation being intimated to the Lord Lyon or other sheriffs principal (as the case may be) who would thereafter make amendments to the roll of messengers or sheriff officers. Any other penalty (such as a fine or a censure) imposed on an officer should also be intimated to the other authorities from whom the officer holds commissions.

8.91 We **recommend:**

(1) Any penalty imposed by one disciplinary authority on an officer for misconduct which has been admitted in writing or established as a result of formal disciplinary proceedings should be intimated to all other authorities from whom the officer holds a commission.

(2) Where a suspension from practice or deprivation of office is intimated to another authority it should be obliged to suspend the officer from practice or deprive the officer of the commission held from that authority. (Recommendation 8.15; clause 107.)

Section D. Standards of conduct

8.92 We now turn to discuss the possible content of rules regulating the standards of conduct including the regulation of debt collection,[1] a subject which in recent years has attracted public concern.[2] We recommended above[3] that the Court of Session after consultation with a new consultative body, to be called the Advisory Council on Messengers-at-Arms and Sheriff Officers, should enact rules regulating the conduct of officers. Most of our recommendations in this Section may be read as submissions for consideration by the Court of Session and the new Advisory Council for enactment by act of sederunt rather than by central government for enactment in primary legislation. However, the provisions dealing with diligence and citation executed by an officer having an interest in the proceedings should, in our opinion, be in statute, since the effect of a prohibited interest is to annul the acts of the officer.

8.93 There are two main reasons why a set of rules on conduct is necessary. First, standards as presently formulated are too vague in certain respects to offer satisfactory guidance to officers of court. Second, there has been recent public questioning of certain practices which met acceptance in the past and it seems desirable that rules relating to these and other aspects of the duties of officers of court should be formulated in the light of comment and criticism

[1]Debt collection is used to mean the collection of money from debtors, whether or not diligence is done to enforce payment.

[2]See e.g. the Sheriff Officers and Warrant Sales (Scotland) Bill 1980 clauses 4 and 6 (introduced under the ten-minute rule Bill procedure by Mr Dennis Canavan, M.P.). Clause 4 sought to prohibit officers benefiting from their involvement with debt collection agencies and Clause 6 would have required the Secretary of State to prescribe a code of conduct for officers by statutory instrument.

[3]Recommendation 8.5 (para. 8.34).

by interested parties.[1] A set of rules on conduct so promulgated should apply to both messengers-at-arms and sheriff officers.

Enforcement where officer has an interest

8.94 We deal first with rules prohibiting officers from executing citation or diligence in which they, or persons closely connected with them, have an interest. Interest here means an interest in the subject-matter of the proceedings or decree rather than an interest in the fees for executing citation or diligence. In the case of diligence to enforce payment of a debt, interest means an interest as creditor in the debt itself. The question of an interest in the commission for recovering the debt as the creditor's agent is dealt with later.[2]

Personal interest

8.95 It is a long established rule that officers of court are not entitled to execute diligence to enforce debts due to themselves and that any diligence so executed is null.[3] The basis of this rule, which was accepted by those consulted,[4] is that officers hold a public office which they must discharge in an independent and impartial manner. Officers should not enforce their own debts lest debtors and members of the public think that excessive diligence might be done. This rule should in our opinion be extended to citation and diligence unrelated to debt enforcement—such as service of an interdict or enforcement of a delivery order—where the officer has a personal interest. All such diligence and citation should not only be null, but an officer who knowingly acts where a personal interest exists should be liable to disciplinary proceedings for misconduct.

8.96 We **recommend:**

(1) Any citation or diligence executed by an officer of court should be null where the subject matter of the diligence or proceedings is one in which the officer has an interest as an individual.

(2) For the purposes of this recommendation and Recommendations 8.17 and 8.18 an officer who knowingly executes citation and diligence which is null should be liable to disciplinary proceedings for misconduct. (Recommendation 8.16; clause 109(1)(*a*).)

Interest of officer's associates or relatives

8.97 In Consultative Memorandum No. 51, we suggested[5] that an officer should be disqualified from enforcing a debt due to that officer's wife or husband, business partner, employer or employee. Unless the rules prohibiting an officer from acting were extended in this way, one of the partners of a firm

[1]The need for some regulation of standards of conduct of messengers and sheriff officers has been recognised by the Society of Messengers-at-Arms and Sheriff Officers who have adopted a short "Code of Professional Ethics". The Society also have a Complaints and Disciplinary Committee: see (1972) 17 *Journal of the Law Society of Scotland* 44. Although the Society's Code has no official standing, the Society has considerable persuasive powers and will assist solicitors and others who do not wish to take the more extreme step of a complaint to the sheriff principal.

[2]Para. 8.111.

[3]*Dalgliesh* v. *Scott* (1822) 1 S. 506; see also R.C. 50 (messengers-at-arms only).

[4]Consultative Memorandum No. 51, Proposition 15 (para. 5.13).

[5]Proposition 17 (para. 5.19).

of officers could purchase debts for enforcement and instruct the other partners or employee officers of that firm to execute citation and diligence. We also suggested that officers should be disqualified from enforcing debts due to their wives or husbands, since officers will often have as great an interest in a debt due to them as in their own debts. We were not in favour of extending the prohibition against enforcement of spouses' debts to other defined close family relatives because an officer might not derive any benefit from enforcing a close relative's debt, and because an officer determined to evade the spirit of the prohibition could get a relative outwith the defined class to run the debt purchase business. Instead we proposed that an officer should be disqualified from enforcing a debt due to another person only if the officer derived a pecuniary benefit other than by way of diligence fees or a commission for collection.

8.98 Although the above approach was accepted by those consulted, we are now of the opinion that it would be better to define in legislation the class of people whose debts an officer should not be entitled to enforce. As citation and diligence executed by an officer in breach of the statutory rules is to be null, the rules themselves must be clear and it should not be necessary to carry out further investigations as to an officer's precise financial arrangements with associates or family in order to establish the nullity or validity of diligence.

8.99 On consultation one body suggested that, because of the scarcity of officers in remote areas, the sheriff principal should be empowered to authorise a sheriff officer to enforce a particular debt due to a relative or associate which the officer would otherwise be prohibited from enforcing. We doubt whether such an additional provision is necessary; it would in most cases be easier to instruct another officer than apply to the sheriff principal for authorisation.

8.100 We **recommend:**

(1) Any citation or diligence executed by an officer should be null where the debt sought to be enforced is due to a business associate or a relative of the officer.

(2) In this recommendation and in Recommendation 8.18 "business associate" means a co-director, partner, employer, employee, agent or principal (other than the principal instructing the citation or diligence) and "relative" means wife or husband, and parent, grandparent, child, grandchild, brother or sister by blood or affinity.
(Recommendation 8.17; clause 109(1)(*b*), (2), (3) and (4).)

Interest of connected firm or company

8.101 As a result of a recent series of sheriff court cases,[1] it is clear that where an officer of court is a director of a company, diligence effected by that officer to enforce a debt due to the company is invalid. It is not clear, however, whether this rule extends to cases where the officer has a controlling interest

[1] *John Temple Ltd* v. *Logan* 1973 S.L.T. (Sh.Ct.) 41; *Lawrence Jack Collections* v. *Hamilton* 1976 S.L.T. (Sh.Ct.) 18; *Lawrence Jack Collections* v. *Dallas* 1976 S.L.T. (Sh.Ct.) 21; *British Relay Ltd* v. *Keay* 1976 S.L.T. (Sh.Ct.) 23; *Lewis, Petitioner* (unreported, 3 February 1978, Sheriffdom of North Strathclyde at Paisley).

or a substantial stake in the company. It would be pointless to prohibit an officer from enforcing personal debts if the prohibition could be avoided by setting up a company or partnership to purchase debts which the officer then enforced by diligence. In our Consultative Memorandum No. 51, therefore, we proposed that an officer who was a director of a company or a partner of a firm should not be entitled to execute diligence to enforce a debt due to that company or firm.[1] This proposition proved uncontroversial but the question whether officers should be prohibited from enforcing a debt due to a company or firm in which they have an interest other than as director or partner is more difficult. We think a distinction should be drawn between companies and firms which purchase bad debts for enforcement and those which do not. The rules on disqualification from enforcement of debts due to debt purchase companies ought to be stricter in order to prevent officers using such companies as a means of evading the prohibition against officers enforcing their own debts. In Consultative Memorandum No. 51, we tentatively suggested[2] that where a company or firm was involved in debt purchase, any interest of the officer, however small, should lead to disqualification. While the majority of those consulted agreed, we believe on reflection that this rule is too restrictive. Since many banks or other financial organisations are involved in debt purchase (although this normally forms only a small proportion of their business) the proposal would prevent an officer investing in many publicly quoted financial organisations or indeed in any unit trust which included such an organisation in its portfolio. We think therefore that the disqualification by reason of an interest however small should refer only to companies or firms whose principal business was the purchase of debts for enforcement.

8.102 As regards companies which do not purchase debts, we expressed no firm opinion but asked for views[3] as to whether an officer should be disqualified from acting by a pecuniary interest and if so, how substantial that interest ought to be. The variety of comments received shows the difficulty of framing practical rules. The mischief to be struck at is that of an officer acting for a company or firm in which he or she has such an interest that its debts are effectively to some extent the officer's debts, as where the officer has a controlling interest.[4] An officer should, we think, also be prohibited from acting where the officer's personal interest in a company or firm, when aggregated with the interests of relatives or business associates, amounts to a controlling interest.

8.103 In Consultative Memorandum No. 51, we suggested[5] that it would be necessary to extend the prohibition against enforcement by an officer for a company or firm in which the officer has an interest to cases where the debt is due to a company or firm in which the officer's spouse, partner, employer or employee has an interest; otherwise the rules could be evaded by an officer placing a debt purchase business in the name of his or her spouse or business associate. No adverse comments were made by those consulted, but we now

[1]Proposition 16(1)(*a*) (para. 5.15).
[2]Proposition 16(1)(*b*) (para. 5.15).
[3]Proposition 16(2) (para. 5.15).
[4]Controlling interest is used to mean control of a majority of the votes in the company: see Finance Act 1975, Sched. 4, para. 13(7).
[5]Proposition 18 (para. 5.20).

think that the prohibition should be extended to cases where certain defined close relatives of the officer have an interest in the business.

8.104 We **recommend:**

(1) Any citation or diligence executed by an officer should be null where the debt sought to be enforced is due to a company or firm and the officer:

(*a*) has a pecuniary interest (however small) in that company or firm and the principal business of that company or firm is the purchase of debts for enforcement; or

(*b*) is a director or partner of that company or firm or holds personally or along with a business associate or a relative a controlling interest.

(2) Any citation or diligence executed by an officer should be null where the debt or obligation sought to be enforced is due to a company or firm and a business associate or a relative of the officer:

(*a*) is a director or partner of that company or firm or holds a controlling interest; or

(*b*) has a pecuniary interest (however small) in that company or firm and the principal business of the company or firm is the purchase of debts for enforcement.

(Recommendation 8.18; clause 109(1)(*b*), (2), (3) and (4).)

Extra-official activities

8.105 Rule 52 of the Rules of the Court of Session prohibits a messenger-at-arms on pain of deprivation from being "the servant of any particular master".[1] There is no equivalent enactment for sheriff officers, and while employment under a contract of service which affects the officer's official functions is prohibited at common law,[2] it is not clear whether such a contract is unlawful if it does not affect those functions. There is no enactment or rule of law prohibiting either a messenger or sheriff officer from engaging in a trade, profession or business as a self-employed person. Most officers of court are engaged more or less full-time in performing their official functions.[3] The main fields outside their official duties in which officers are regularly engaged appear to be debt collection; work as enquiry agents; and the service of statutory notices, such as notices under the Companies Acts, where the officers are not acting in their official capacity but merely as reliable witnesses to establish that the notice has been duly received.

8.106 Leaving aside debt collection to which we revert below,[4] the law is in need of some clarification and reform. First, the same provisions should apply to messengers and sheriff officers. Second, it seems to be merely an historical

[1]We have recommended above that this rule should be changed to allow employment of an officer of court by another officer of court: Recommendation 8.9 (para. 8.61).

[2]See *Stewart* v. *Reid* 1934 S.C. 69 (referred to at para. 8.58 above); *Mackay* v. *Henderson* 20 Dec. 1832, F.C. (contract of employment held unlawful where officer was to act as messenger and sheriff officer for a small salary in lieu of the fees which he was to pay over to the employer).

[3]The survey conducted at the end of 1979 showed that of 121 officers of court who were actively engaged as sheriff officers, 109 stated that they were engaged full-time, 10 worked part-time and two as consultants.

[4]Paras. 8.111 to 8.125.

accident that there is a limitation on officers seeking employment under certain types of contract of service, but apparently no rule as to contracts of services. We do not think that officers of court should be prevented from carrying on all paid extra-official activities. Given that the officers are independent contractors, a complete prohibition of extra-official activities would be an unwarranted restriction on their business freedom and might affect the viability of some officers' businesses especially in rural areas. The Law Society of Scotland observed that "severe practical difficulties would arise in many parts of Scotland if sheriff officers were not entitled to conduct a debt collection business, subject to safeguards; conduct enquiries; and act as certifiers of service of documents".

8.107 On consultation, there was general agreement with our view that there should be restraints on extra-official activities, where they are incompatible with the nature and functions of the office of messenger-at-arms or sheriff officer, (if, for example, they adversely affect the officer's independence and duty to serve all those who instruct diligence to be done[1] or derogate from the dignity of the office or the standing of the officer) or hinder an officer from acting when instructed.[2] We think it would be impracticable, however, to frame comprehensive statutory rules which set out in precise detail what extra-official activities are prohibited; and it is probably undesirable to seek to do so since circumstances vary and what might be permissible in rural areas might be prohibited in cities.

8.108 In Consultative Memorandum No. 51,[3] we proposed therefore that the sheriff principal should have power to authorise in relation to a particular officer any extra-official employment, trade, profession or business, and that the officer should be permitted to engage only in such of these extra-official activities as had been so authorised. There was general agreement with this proposal though one body thought that certain activities should be expressly prohibited. A modification suggested by one body was that officers should have a general authorisation to conduct enquiries as enquiry agents, and to serve and certify service or intimation of legal documents, without applying for a specific authorisation. We accept both of these helpful comments. The scheme we now recommend would consist of three elements. First, the Court of Session should have power (after consulting the proposed Advisory Council on Messengers-at-Arms and Sheriff Officers) to prohibit by act of sederunt specified extra-official activities. Second, the Court of Session should have a similar power to prescribe a list of activities (such as serving statutory notices) that any officer would be allowed to undertake for remuneration without having to seek authority from the sheriff principal. Third, an officer who wishes to undertake for remuneration any activity not specifically prohibited or authorised should be obliged to apply to the sheriff principal from whom the officer holds a commission for authority to do so. With regard to the last category there should be a presumption of freedom so that the sheriff principal should refuse to grant authority only if of the opinion that

[1] *Monro* v. *Ross* (1738) Mor. 8889; *Munro* v. *Macpherson* (1772) Mor. 8891; *Mackay* v. *Henderson* 20 Dec. 1832 F.C.; *McLachlan* v. *Black* (1821) 1 S. 217; *Dalgliesh* v. *Scott* (1822) 1 S. 506; *Stewart* v. *Reid* 1934 S.C. 69.

[2] R.C. 48 (messengers).

[3] Proposition 14 (para. 5.9).

the activity in question would be incompatible with the functions of the office of an officer of court. Both the Court of Session and the sheriffs principal should be able to impose conditions on the undertaking of authorised extra-official activities; for example an officer might be allowed to run a business as an auctioneer provided the officer remained available at all reasonable times to receive and execute instructions for diligence. Since all practising messengers are, and would under our recommendation[1] require to be, sheriff officers, authorisation given by sheriffs principal would suffice without the need for a separate authorisation system for messengers.

8.109 We also proposed[2] that the penalty for performance of prohibited or unauthorised extra-official activities should be at the discretion of the sheriff principal. Only one body, which was in favour of fixed statutory penalties, dissented on consultation. We remain of the view that performance of prohibited or unauthorised extra-official activities is best treated as misconduct which, if established in disciplinary proceedings or admitted in writing, renders the officer liable to penalties ranging from censure to deprivation of office at the discretion of the sheriff principal.

8.110 We **recommend:**

(1) The Court of Session should have power, after consulting the Advisory Council on Messengers-at-Arms and Sheriff Officers, to specify by act of sederunt in relation to officers of court:

  (*a*) extra-official activities which are prohibited; or

  (*b*) extra-official activities undertaken for remuneration which are allowed or allowed subject to conditions specified in the act of sederunt.

(2) An officer of court should be prohibited from undertaking for remuneration any extra-official activity (other than those specified in terms of paragraph (1)(*a*) or (*b*) above) unless the sheriff principal on application by the officer grants authority in respect of the activity in question. The sheriff principal should be required to grant such authority unless it appears that the activity would be incompatible with the nature and functions of the office of officer of court, and such authority may be granted subject to such conditions as the sheriff principal thinks fit.

(3) Records should be kept by sheriff clerks of authorised extra-official activities in respect of each officer.

(4) The performance of prohibited or unauthorised extra-official activities should render the officer concerned liable to disciplinary proceedings for misconduct and the penalty should be within the discretion of the sheriff principal.

(5) If, as we propose at Recommendation 8.8(5), all messengers-at-arms are required to be sheriff officers, it would be unnecessary to provide for separate authorisations by the Court of Session of the extra-official activities of messengers-at-arms.

(Recommendation 8.19; clause 101(1)(*e*) and (*f*), (2) and (3).)

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[1]Recommendation 8.8(5) (para. 8.56).
[2]Proposition 14(5) (para. 5.9).

Debt collection by officers

8.111 As a general rule, debt collection is not part of the official functions of an officer of court.[1] The question whether an officer may act as a debt collector and as officer in the same case has been discussed in judicial decisions. In *British Relay Ltd* v. *Keay*[2] the sheriff held the practice incompetent, but in *Lewis, Petitioner*[3] the sheriff principal took the view that an officer's interest in a debt collection agency does not of itself disqualify the officer from executing diligence to enforce the agency's debts, but may do so if, in the circumstances of a particular case, it gives rise to a loss of public confidence in the officer's independence and impartiality. The sheriffs principal do not in practice treat an interest in a debt collection agency as a disqualification.[4] In considering the question of debt collection, a distinction has to be drawn between debts not yet constituted by decree and debts which have been so constituted and, as regards the category of pre-decree collection, between cases where officers use their official designations in debt collection and cases where they collect as individuals without any use of that designation.

8.112 *Pre-decree debt collection as officers.* In the case of pre-decree debt collection, it appears that an officer is not expressly prohibited by law from demanding payment in the capacity of officer of court, but the Office of Fair Trading has refused to issue licences to officers entitling them to engage in debt collection using their official designations.[5] In Consultative Memorandum No. 51 we proposed[6] that officers of court should be expressly prohibited from using their official designations when collecting pre-decree debts. Only one commentator disagreed, arguing that, by long-standing tradition, sheriff officers had engaged in debt collection and this should not be interfered with. It seems clear, however, that whenever officers use their official designations, the public should be entitled to assume that they are acting in their official capacity. An officer's use of the official designation when collecting debts prior to decree is an abuse of public office: it may deceive debtors into thinking that the demand has the authority of the court or that decree has already been granted in favour of the creditor.

8.113 We **recommend:**

An act of sederunt should be made expressly prohibiting officers of court from purporting to act in that capacity when collecting debts before the debts have been constituted by decree.
(Recommendation 8.20; clause 101(1)(*e*).)

8.114 *Unofficial pre-decree debt collection.* Many officers of court engage in pre-decree debt collection, either without using their official designations, or

[1]Sheriff officers are however empowered to receive payment after poinding on summary warrants for taxes. Taxes Management Act 1970, s. 63(3); Value Added Tax (General) Regulations 1980, reg. 59(*c*).

[2]1976 S.L.T. (Sh.Ct.) 23.

[3]Unreported, 3 February 1978, Sheriffdom of North Strathclyde at Paisley.

[4]A Practice Note has been made in the Sheriffdom of Lothian and Borders (1 November 1978) requiring an applicant for a commission as sheriff officer to disclose any interest (either personal or of a close relative) in a debt collection agency. The applicant must also undertake to inform the sheriff principal of any intention to acquire such an interest in the future.

[5]Consumer Credit Act 1974, Parts III and X.

[6]Proposition 19 (para. 5.27).

they have a substantial interest.[1] In view of criticisms sometimes made of this practice, it may be helpful if we summarised the arguments on both sides.

8.115 The arguments in favour of allowing officers of court to continue to collect debts before decree, or to operate debt collection agencies, are as follows.

(1) Since collection makes the eventual use of diligence unnecessary, it is convenient and practical to allow officers of court to undertake collection.

(2) The business of debt collection being one of the main extra-official activities of officers of court, it indirectly subsidises the official function of executing diligence. If officers were prohibited from undertaking unofficial debt collection, some firms would suffer considerable financial loss and others might cease to be economically viable.

(3) If officers of court who are actually or potentially subject to strict controls cease to undertake debt collection before decree, the business of debt collection might be diverted to other debt collection agencies who might possibly be less scrupulous and less easily controlled.

(4) Debt collection by specialist agencies is not by itself illegal and indeed may well be highly desirable because collection by the agency saves creditors and debtors the high cost of debt actions and diligence, and because such agencies provide a valuable service which the creditors themselves are unwilling or unable to undertake.

(5) In addition to these arguments for allowing officers to engage in debt collection before decree, it may be argued that officers should be allowed to operate a debt collection agency trading under a firm name because they thereby avoid the use (and abuse) of their official status and do not mislead debtors into thinking that demands for payment have the stamp of judicial approval.

8.116 The disadvantages of allowing officers to be involved in pre-decree debt collection may be summarised as follows:

(1) The participation by officers in debt collection agencies may all too easily been seen as an attempt to conceal from debtors and the public the officer's close identification with the creditors' interest. The administration of justice should be open and impartial; the practice of concealing the interest of officers is hardly open and may reflect adversely in the public mind on their impartiality.

(2) Where officers act as debt collectors before decree it can no longer be said that they are merely carrying out a function which they cannot refuse to perform; rather they are voluntarily taking the side of the creditor against the debtor.

(3) The activities of some debt collection agencies have tended to damage the reputation of debt collection agencies generally, and by operating collection agencies officers run the risk of damaging their own reputation.

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[1] See Consultative Memorandum No. 51, para. 5.31.

(4) Where officers collect debts using their own name without their official designations, there is some risk that debtors with local knowledge will think they are acting in their official capacity.

8.117 In Consultative Memorandum No. 51, we invited views as to whether officers should continue to be allowed to collect debts before decree, either as individuals or through debt collection agencies.[1] Almost all of those who commented were of the opinion that officers of court should continue to be allowed to collect pre-decree debts. It seems to us that the disadvantages are more theoretical than real at the present time and are outweighed by the advantages.

8.118 If, as we recommend, an officer's involvement in a debt collection agency is to be subject to scrutiny and authorisation, the question then arises whether authorisation should also be sought where persons closely connected with an officer are involved. In Consultative Memorandum No. 51 we suggested[2] limiting such connected persons to the officer's spouse, near relatives or business associates. Most of those consulted agreed. However, on reconsideration, we have come to the view that authorisation should be sought from the sheriff principal in respect of each and every agency for which the officer proposes to act. Where neither the officer nor any connected persons have an interest in the agency we expect that authorisation would normally be granted, unless for example the volume of work might interfere with the officer's official functions. The officer should be required to disclose in the application for authorisation any personal interest or any interest held by a near relative or business associate in the agency in question.

8.119 Where an officer has been authorised to collect debts on behalf of a particular collection agency, that officer should be entitled to execute citation and diligence on instructions from that agency, provided the agency is interested in the debts only as collector and not as creditor.[3]

8.120 Some debt collection agencies make demands for payment from debtors of collection charges which are not legally enforceable. On consultation,[4] there was no dissent from our view that officers should not be permitted to make such demands.

8.121 We **recommend:**

An act of sederunt should be made to the following effect:

(*a*) Officers of court should be entitled to collect debts not constituted by decree provided they have obtained prior written authorisation from the sheriff principal. An officer should be required to disclose any personal interest or any interest held by a member of his or her family or by a business associate in an organisation when applying for authority

[1]Proposition 20 (para. 5.35) where we suggested that, like any other extra-official activity, debt collection before decree should be permitted if the written authorisation of the sheriff principal were obtained.

[2]Proposition 20 (para. 5.35).

[3]Paras. 8.94 to 8.104 above deal with debt purchase agencies.

[4]Consultative Memorandum No. 51, Proposition 20(5) (para. 5.35).

to collect debts on behalf of that organisation, and any subsequent acquisition of an interest.

(*b*) Sheriff clerks should keep in respect of each officer a register of authorisations granted and the disclosed interests of officers, members of their family and their business associates in organisations whose debts the officers are authorised to collect.

(*c*) An officer who collects debts without authorisation by the sheriff principal, or who demands payment from the debtor of a collection charge which is not legally enforceable, should be liable to disciplinary proceedings for misconduct.
(Recommendation 8.21; clause 101(1)(*f*), (2) and (3).)

8.122 *Post-decree debt collection.* The collection of debts by officers of court after decree has been pronounced against the debtors raises different issues. Since collection makes diligence unnecessary, it is reasonable and practicable to allow officers to collect debts in the course of, or as a preliminary to diligence. It would be absurd to prevent an officer from accepting payment of a debt on the creditor's behalf where the debtor tendered payment in response to, or to prevent, diligence. Moreover, collection by the officer is often convenient for both creditors and debtors. The officer is often in direct contact with the debtor as well as the creditor, and it may be easier for the debtor to make payment to the officer. Post-decree debt collection by officers in their official capacity does not attract the same objections as have been made of pre-decree collection. Thus debtors will not, because of the officer's involvement, be misled into thinking that decree has already been granted since that is in fact the case. Once decree has been granted the officers are merely collecting sums which the court has found to be due, whereas collection of unconstituted debts by officers in their official capacity identifies officers with creditors in a way which is incompatible with the status of officers as holders of a public office. On the other hand, the position is not entirely satisfactory. An officer who receives payment after decree is acting as the creditor's agent and not in an official capacity[1] so that creditors and debtors are not protected by the officer's bond of caution. Probably most debtors and creditors are unaware of this.

8.123 In Consultative Memorandum No. 51, we suggested[2] that post-decree debt collection should become part of the official functions of officers of court, whose bonds of caution would be extended to cover debts collected in pursuance of decrees, and that instructions to an officer to do diligence should be taken to include authority to receive payment, unless the contrary was clearly stated. These proposals were welcomed by all commentators, and we would extend the proposals to cover sums recoverable under a summary warrant for rates or tax arrears. We do not propose, however, that the collection charges payable by the creditor to the officer of court should be recoverable by the creditor from the debtor. Furthermore, our recommendation is not intended to mean that collection charges should be regulated or

[1]In *Ayr County Council* v. *Wyllie* 1935 S.C. 836 Lord Blackburn remarked (at p. 844) that "the determination of whether a sheriff officer is on any particular occasion acting as collector or as sheriff officer may come to depend on distinctions which are almost ludicrous".

[2]Proposition 21 (para. 5.45).

prescribed by act of sederunt. Such regulation seems unnecessary. In these respects collection charges would differ from diligence fees.

8.124 We also invited views on whether it would be sufficient protection for creditors and debtors that in the event of embezzlement by the officer, compensation could be recovered from the officer's cautioner or whether officers should be required, like solicitors and many other professions, to keep separate accounts of clients' money which were subject to regular inspection and audit. Almost all of those consulted were in favour of audited clients' accounts. While debtors and creditors might be adequately protected by officers' bonds of caution, it seems reasonable and desirable that if post-decree debt collection is to be an official function, officers should be required to keep clients' accounts which are regularly audited. The Society of Messengers-at-Arms and Sheriff Officers have for some time advised its members to keep clients' accounts,[1] but cannot enforce this as a requirement since the Society can only make recommendations for good practice by its members. The details of the relevant rules should be settled by act of sederunt made by the Court of Session after consulting the Advisory Council on Messengers-at-Arms and Sheriff Officers. We put forward the suggestion, however, that audits should be carried out annually with reports being made to sheriffs principal, and that generally an inspector appointed to examine the work of specified officers of court[2] should have power to examine their clients' accounts.

8.125 We **recommend:**

An act of sederunt should be made:

(*a*) providing that the collection of debts which have been constituted by decree or are enforceable under a summary warrant for rates or taxes should form part of the official functions of officers of court, and the officer's bond of caution should be extended to cover the collection of such debts as well as diligence. In the absence of contrary instructions, instructions to an officer to execute diligence should be deemed to include a mandate to receive payment of, or on account of, the debt. Charges for collecting such debts should not, however, be recoverable by the creditor from the debtor and should not be regulated by act of sederunt; and

(*b*) requiring officers of court to keep accounts of money collected on behalf of creditors and to have these accounts audited periodically. (Recommendation 8.22; clause 101(1)(*d*), (*i*), (*j*) and (*k*).)

Duty to act when instructed

8.126 As the counterpart of the exclusive privilege of executing diligence, an officer must act impartially for any instructing creditor who tenders the prescribed fees.[3] An officer's duty to execute diligence when instructed ensures

[1]The "Code of Professional Ethics" of the Society provides that all members of the Society "who are self-employed or in partnership must maintain proper business books and a client's account, in accordance with normal accounting procedures".

[2]Recommendation 8.10 (para. 8.66) above.

[3]R.C. 48 (messengers-at-arms); *Stewart* v. *Reid* 1934 S.C. 69 (sheriff officers).

that court orders, however unpopular locally, are executed and it also serves to protect officers from criticism in that:

> "Reasonable persons, however strong their feelings, recognise that the officer is only engaged in the impersonal discharge of an official duty which he cannot refuse to perform."[1]

8.127 An officer may be liable in damages if undue delay occurs in acting on instructions. What constitutes undue delay depends on the circumstances, but in general the officer's duty is to execute diligence at once.[2] An officer instructed to do immediate diligence must act at once, but where the officer is given a discretion (such as when instructed to allow the debtor time to pay), the officer's liability will depend on the extent to which the creditor's instructions were followed. Rule 49 of the Rules of the Court of Session requires a messenger to acknowledge receipt of instructions within 24 hours on pain of a fine of £2. No equivalent enactment applies to sheriff officers.

8.128 Although an officer has a duty to act when instructed, the officer may ask for the fees to be tendered or secured before accepting instructions. It appears that in practice a solicitor instructing an officer may become personally liable in the first instance for the officer's fees,[3] but we propose no change in the law on this topic.

8.129 In Consultative Memorandum No. 51 we proposed[4] that the existing law and practice should be restated in rules of conduct applying uniformly to both messengers and sheriff officers. No adverse comments emerged on consultation. Breach of the rules—for example by failure to carry out diligence without undue delay—should as at present subject the officer to liability to damages at the instance of the creditor. But a breach should, we think, also render the officer concerned liable to disciplinary proceedings.

8.130 We **recommend:**

(1) New rules of conduct should be made by act of sederunt applying to both messengers-at-arms and sheriff officers, requiring them to execute citation and diligence when instructed, but entitling an officer to refuse to act if:

  (*a*) the prescribed expenses, or a reasonable estimate thereof, are not tendered or secured by or on behalf of the instructing creditor; or

  (*b*) disqualified from acting in terms of Recommendations 8.16 to 8.18 above; or

  (*c*) it is not reasonably practicable for the officer to carry out the instructions because of pressure of other business or for other reasonable cause and the officer intimates this forthwith to the instructing solicitor or creditor.

(2) Without prejudice to the existing civil liability of officers to creditors, breach of the rules in paragraph (1) above should render the officer

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[1] *Stewart* v. *Reid supra* per Lord Sands at p. 75.
[2] Graham Stewart, pp. 821–2.
[3] Maclaren, *Court of Session Practice* (1916) p. 1115.
[4] Propositions 13 (para. 5.5) and 24 (para. 5.56).

liable to disciplinary proceedings for misconduct.
(Recommendation 8.23; clause 101(1)(*c*).)

Relationship between officers and solicitors

8.131 In Consultative Memorandum No. 51[1] we drew attention to the danger that the division of functions between officers and solicitors may become blurred, especially where an officer holds a general mandate from a creditor to act as an agent, collect the debt, instruct a solicitor, and execute citation and diligence as necessary. Thus, for example, writs which should be prepared by solicitors might be prepared by officers and merely signed by solicitors whose fees would be charged against the debtor for work in fact done by officers or their staff.[2] This and other potential abuses are struck at by the Solicitors (Scotland) Act 1980.[3] Contraventions of these provisions are more likely to occur where officers and solicitors share the same business premises.

8.132 We sought views on whether officers of court should be prohibited from sharing business premises with solicitors and on whether the provisions of the Solicitors (Scotland) Act were adequate to ensure that the functions of solicitors and officers were kept separate.[4] Most of those who commented thought that the existing provisions were adequate, and no specific abuses were brought to our attention. The sharing of business premises by a solicitor with any other person (including an officer of court) is already a breach of professional practice rules justifying a report to the Scottish Solicitors' Discipline Tribunal. It therefore seems unnecessary for officers' rules of conduct to prohibit them from sharing premises with solicitors.

Misconduct in connection with sales of poinded goods

8.133 Allegations have occasionally been made that officers of court have entered into agreements with second-hand furniture dealers, whereby officers arrange that goods sold at a warrant sale are undervalued, so enabling dealers who buy them to resell them at a profit. None of these serious charges have, as far as we are aware, been substantiated. Rule 51 of the Rules of the Court of Session prohibits a messenger from purchasing poinded goods either personally or through an agent. This enactment does not apply to sheriff officers, although most poindings are executed by sheriff officers.

8.134 On consultation there was general agreement with our suggestion[5] that a new rule, applying to sheriff officers as well as messengers-at-arms, should replace Rule 51 of the Rules of Court. Breach of the rules should render the officer concerned liable to disciplinary proceedings and, although the penalty

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[1]Paras. 5.46 to 5.48.

[2]*John Temple Ltd* v. *Logan* 1973 S.L.T. (Sh.Ct.) 41.

[3]Section 32 makes it an offence for an unqualified person to prepare any writ relating to any legal proceedings unless it is proved that the person prepared it without receiving, or without expecting to receive, either directly or indirectly, any fee, gain or reward; section 33 provides that the expenses of preparing writs which should be prepared by solicitors may not be recovered where the writs have been prepared by unqualified persons in contravention of section 32 (see *Dow* v. *Mitchell and Cram* (1939) 55 Sh.Ct.Reps. 258 construing similar provisions in the Solicitors (Scotland) Act 1933); and section 26 makes it an offence for solicitors to lend their name to writs prepared by unqualified persons.

[4]Proposition 22 (para. 5.49).

[5]Consultative Memorandum No. 51, Proposition 23 (para. 5.52).

would be at the discretion of the Court of Session or the sheriff principal, we suggest that an officer found guilty should normally be deprived of office.

8.135 We **recommend:**

(1) An act of sederunt should be made prohibiting an officer of court:

(*a*) from purchasing personally, or through an agent, goods sold by virtue of diligence in which the officer has acted; and

(*b*) from sharing with the creditor any goods (or their proceeds of sale) adjudged to the creditor by virtue of diligence in which the officer has acted; and

(*c*) from sharing with the purchaser any profit the purchaser makes in re-selling goods bought at a sale carried out by virtue of the diligence in which the officer has acted.

(2) Any breach of the above rules should render the officer concerned liable to disciplinary proceedings for misconduct.
(Recommendation 8.24; clause 101(1)(*c*).)

Advertising by officers

8.136 There are no formal restrictions prohibiting officers or firms of officers from advertising, canvassing or touting for business in contrast to restrictions imposed on many professions. In Consultative Memorandum No. 51 we proposed[1] that the Court of Session should have power to regulate advertising by officers, though regulation seemed unnecessary at present since current practice was and is unexceptionable. All those who commented agreed with both of these points.

8.137 We **recommend:**

The Court of Session should have power to make regulations controlling advertising and soliciting for business by officers of court.
(Recommendation 8.25; clause 101(1)(*c*).)

Child delivery orders and ejections

8.138 Recognising that execution of child delivery orders arouses strong emotions on the part of those concerned, and that the presence of social workers might minimise the risk of inappropriate action by officers, we sought views in Consultative Memorandum No. 51[2] on whether an officer of court should, except in cases of urgency, intimate an intention to execute a child delivery order to the local social work department and request the attendance of a social worker.[3] We also sought views on whether a similar rule should be adopted for ejections. Our proposals evoked a mixed reaction by those consulted. On reflection, we think that, while the involvement of social workers might in cases of child delivery and ejection orders sometimes be beneficial, it would be inappropriate to regulate their involvement by means

[1]Proposition 24 (para. 5.57).
[2]Proposition 26 (para. 5.60).
[3]The Sheriff Officers and Warrant Sales (Scotland) Bill 1980 (introduced under the ten-minute rule Bill procedure by Mr Dennis Canavan, M.P.) provided in clause 5 for a sheriff officer to obtain prior approval of the social work department before taking possession of a child in pursuance of a child delivery order).

of the rules on standards of conduct to be observed by officers of court. Accordingly, we make no recommendations on this topic in the present context.

Section E. Miscellaneous

8.139 We complete this Chapter by considering a number of miscellaneous issues, namely, the liability of officers of court to creditors; the provision of identity cards for officers of court; measures to improve the collection of statistics on diligence; whether membership of the Society of Messengers-at-Arms and Sheriff Officers should be compulsory; and dues payable by officers.

Liability of officer to creditor

8.140 In reviewing the liability of officers of court for wrongful diligence,[1] we drew attention to the harsh rule operating in the case of poindings and civil imprisonment that neglect or failure to carry out instructions subjects the officer to liability for the whole amount of the debt which it was the object of the diligence to recover.[2] This rule has been criticised[3] on the ground that the officer's failure may in fact have caused little or no loss to the creditor and for that reason the rule has, in one case, not been extended to arrestments.[4] In Consultative Memorandum No. 51 we proposed[5] that the measure of damages for negligent delay in executing diligence against property[6] should be the loss suffered by the creditor, represented by the difference in amount between what would have been attached by timeous diligence and what was actually attached. All those who commented agreed with our proposal. On reconsideration we recommend abolition of the harsh rule referred to above, thus leaving the issue to be determined by reference to the general law on the quantification of damages.

8.141 We **recommend:**

> Any rule of law whereby damages recoverable from an officer for failure or delay in the execution of diligence are determined solely by the amount of the debt should be expressly abolished.
> (Recommendation 8.26; clause 110.)

Official identity cards

8.142 A messenger-at-arms, on obtaining a commission, receives as badge of office a wand (or baton) and blazon. The wand is a silver tipped ebony rod about six inches long to which is attached the blazon—a silver disc on which the Royal Arms are embossed. Messengers are required to display the blazon while executing citation or diligence so that people are aware that they are messengers.[7] On appointment, sheriff officers receive written commissions but these are not used to provide identification.

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[1]Consultative Memorandum No. 51, paras. 6.2 to 6.8.
[2]Graham Stewart, p. 821 and following.
[3]*Couper* v. *Bain* (1868) 7 M. 102, Lord Ormidale at p. 104.
[4]*Monteith* v. *Hutton* (1900) 8 S.L.T. 250.
[5]Proposition 27 (para. 6.8).
[6]Our proposal did not apply to civil imprisonment.
[7]Stair, *Institutions*, IV. 47.14.

8.143 In Consultative Memorandum No. 51 we proposed[1] that sheriff officers should be provided with an official identity card in order to prevent disputes which can sometimes arise between officers and debtors over the officer's legal right to enter the debtor's premises. In terms of our proposal, officers would be required to exhibit an identity card on request when executing citation or diligence. All those who commented agreed with our proposal, to which we adhere. It is now commonplace for all officials seeking entry to houses to be provided with identity cards and the general public expect such cards to be produced.

8.144 We also invited views[2] as to whether the wand and blazon of messengers-at-arms should be replaced or supplemented by an official identity card. Some commentators were in favour of an official card replacing the wand and blazon, but others, including the Lyon King of Arms, the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers, thought it would be unfortunate to dispense with the traditional wand and blazon. We do not wish to break with tradition unnecessarily and propose that messengers should be issued, on obtaining a commission as messenger, with an official identity card as well as a messenger's wand and blazon. As mentioned above,[3] the wand and blazon would be presented by the Lord Lyon King of Arms when granting a commission to the messenger. However on being asked to establish their identity as messenger, officers should be required to exhibit their identity card rather than their wand and blazon. We leave the question of what form the identity card or cards should take where an officer holds commissions from more than one sheriff principal, or is both a messenger and a sheriff officer, to the competent authorities.

8.145 We **recommend:**

(1) Sheriff officers should be provided with an official identity card which they should be bound to exhibit on request when performing their official functions.

(2) Messengers-at-arms should be provided with an official identity card in addition to a wand and blazon, and they should be bound to exhibit on request the identity card when performing their official functions. (Recommendation 8.27; clause 111.)

Diligence statistics

8.146 The only statistics on diligence collated on an annual basis are those collected and returned by the sheriff clerks and published in the annual Civil Judicial Statistics for Scotland.[4] This information is fragmentary and incomplete because only those steps in diligence granted by or reported to the court can be included. The only arrestments reported to the court are those arrestments on the dependence of sheriff court actions where the arrestment is served before the summons, a tiny fraction of the total number of arrestments on the dependence and in execution. Actions of furthcoming do not appear separately in the statistics and are aggregated with other actions. As regards

[1]Proposition 28(1) (para. 6.11).
[2]Proposition 28(2) (para. 6.11).
[3]Recommendation 8.4 (para. 8.28).
[4]Judicial Statistics (Scotland) Act 1869, s. 2.

poindings, until recently only reports of sale were covered, though the statistics now cover the three stages of the report of poinding, the grant of warrant of sale and the report of the sale. The number of charges are not shown, however, since these are not reported to the court.

8.147 In Consultative Memorandum No. 51 we proposed[1] that officers of court should be required to make statistical returns as to the steps of diligence performed by them. These returns should be made on a confidential basis at public expense. Only one commentator disagreed on the ground that the benefit would not justify the cost. Though the statistics on poindings have been improved, diligence statistics generally are still inadequate. Only if improved statistics become available will it be possible to obtain a quantitative measure of the way in which the reformed diligences are operating.

8.148 We **recommend:**

(1) The Civil Judicial Statistics for Scotland should include statistical information on all the main steps of diligences. The Judicial Statistics (Scotland) Act 1869 should therefore be amended to enable the competent authorities to require officers of court to make annual returns of the steps of diligence executed by them.

(2) The cost of the work involved in making the returns should be borne by the Exchequer and the administrative machinery for making the returns from officers of court should preserve confidentiality as to the nature and volume of business executed by each officer or firm and as to the parties involved in the diligence process.
(Recommendation 8.28; Schedule 7, para. 7.)

Membership of the Society of Messengers-at-Arms and Sheriff Officers

8.149 We briefly described above the extremely useful role presently played by the Society of Messengers-at-Arms and Sheriff Officers in representing officers of court and in other ways.[2] In Consultative Memorandum No. 51 we suggested[3] that all officers should be required by law to be members of the Society, whose rules, especially those relating to the expulsion of members, would require to be regulated by the Court of Session.

8.150 Our proposal evoked a mixed response from those consulted. On reconsideration we recommend that membership of the Society should not be compulsory. It is, we think, a fundamental principle that officers of court should be controlled by the courts. If membership of the Society were compulsory there would be inevitable conflicts between the Society and the disciplinary authorities over control of officers; compulsory membership of the Society is only compatible with a self-regulating service of officers of court.

Dues payable by officers

8.151 The Rules of the Court of Session impose liability for certain dues on messengers-at-arms. For example messengers are bound to pay annual dues

[1]Proposition 27 (para. 6.15).
[2]See para. 8.17.
[3]Proposition 30 (para. 6.18).

to the Lyon Clerk,[1] pay statutory fees when intimating any change of address to the Lyon Clerk,[2] and pay a fee for lodging a new bond of caution on the death or bankruptcy of the previous cautioner.[3] Schedule B to the Lyon King of Arms Act 1867 also prescribes various dues payable by messengers, and since the amounts in Schedule B have been regularly changed[4] while those in the Rules have not,[5] there are many instances of conflicting provisions.[6] Also both the Rules and the Schedule make different provisions in respect of messengers practising or applying to practise in the "county" or "district" of Edinburgh and other messengers, and furthermore the provisions in the Rules are inconsistent with those in the Schedule.[7] This distinction between Edinburgh messengers and others we understand reflects out-of-date practice, since for some considerable time commissions have been granted entitling the messenger to act throughout Scotland. Another criticism of the existing provisions is that no comparable dues are prescribed for sheriff officers, yet it is difficult to see any rational ground for this difference. We think that the opportunity should be taken, when drawing up new regulations for officers of court, to revise the regulations dealing with the payment of dues by them.

8.152 We **recommend:**

The competent authorities should review the provisions relating to payment of dues by messengers-at-arms and should consider making similar provisions in relation to sheriff officers.
(Recommendation 8.29.)

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[1]R.C. 59.
[2]R.C. 47.
[3]R.C. 55.
[4]By the Secretary of State for Scotland under s. 5 of the Public Expenditure and Receipts Act 1968. The last change was made in 1983 by the Lyon Court and Office Fees (Variation) Order 1983 (S.I. 1983/1072).
[5]Apart from decimalisation by the Decimal Currency Act 1969.
[6]For example fee payable for intimation of change of address 13p. (Rule 47), £2.75 (Sched. B).
[7]Dues payable on admission of a messenger to practise in Edinburgh £95, other messengers £82 (Sched. B). Annual dues for an Edinburgh messenger 85p. (Rule 59), £15 (Sched. B); for other messengers 87p. (Rule 59), £15 (Sched. B).

CHAPTER 9

MISCELLANEOUS

9.1 In this, the final Chapter of our report, we discuss a variety of topics. The main groups of topics relate to the simplification of warrants for diligence including abolition of obsolete proceedings, such as letters of horning; the recovery of diligence expenses; assistance for and representation of debtors and creditors in applications made to the court under our recommendations; and rights of appeal. We also deal with harassment of debtors by creditors or their representatives, illegal collection charges, and the provision of debt counselling.

Warrants for diligence

9.2 The manner in which statutory rules prescribe the styles of warrant to arrest, charge and poind in execution[1] and regulate their legal effect is, for purely historical reasons, rather confusing. Long forms of warrant for use in extract decrees were introduced in 1838[2] and made equivalent to letters of horning, poinding or arrestment;[3] subsequently short forms were introduced superseding (but not abolishing) the long forms.[4] In relation to writs registered for execution in the Books of Council and Session or sheriff court books, the Writs Execution (Scotland) Act 1877 provides for diligence similar to that competent on extract decrees, and sets out a short form of warrant for execution to be inserted in the extract of the writ.[5]

9.3 We think that the present multiplicity of slightly different statutory provisions relating to warrants for diligence in execution should be replaced by provisions in identical terms setting out the authorised diligences. The authorised diligences would include not only the existing diligences of arrestment, charge and poinding but also the new diligences of earnings arrestment, and current maintenance arrestment which we recommend in Chapter 6. In addition to uniform provisions as to the diligences authorised by warrants we think there should be a single short form of warrant appended to extract decrees and other documents on which execution can proceed.

9.4 So far we have considered warrants for diligence in execution of civil debts. Section 411 of the Criminal Procedure (Scotland) Act 1975[6] empowers the court on imposing a fine, or at any time before imposing imprisonment for failure to pay the fine, to authorise recovery of the fine by diligence. The warrant for diligence is granted by the court adding to the finding imposing the fine the words:

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[1]We do not deal with warrants for diligence on the dependence or in security in this report.
[2]Debtors (Scotland) Act 1838, ss. 1 (now repealed) and 9, Scheds. 1 and 6.
[3]*Ibid.*, ss. 2, 3, 4, 9 and 35.
[4]R.C. 64, 65 and 170D(6); Sheriff Courts (Scotland) Extracts Act 1892, s. 7(1) and Sched., Form 1; Summary Cause Rules, rule 89(2) and Forms U1–5, U7–14. Diligence under the Exchequer Court (Scotland) Act 1856 is discussed in Chapter 7.
[5]Ss. 1–3 and Sched.
[6]As amended by the Criminal Justice (Scotland) Act 1980, s. 52 and Sched. 7, para. 66.

"and decerns and ordains instant execution by arrestment and also executio to pass hereon by poinding and sale, after a charge of 14 days."

This appears to authorise a sale without a further application to the court However, section 411 further provides that the diligence may be executed i the same manner as if the proceedings were on an extract decree of the sheri in a summary cause, and this would appear to mean that the procedure in th Debtors (Scotland) Act 1838 including a separate application for warrant c sale is competent and perhaps necessary. Civil diligence is also available t enforce payment of sums due under a compensation order[1] or upon forfeitur of caution.[2]

9.5 We do not intend to discuss in this report the role of civil diligence i the enforcement of fines as this would involve considerations of sentencin policy. In Consultative Memorandum No. 48 we asked[3] for views as to whethe poinding and sale to enforce a criminal fine should continue to be execute in the usual fashion or whether the summary procedure used for rates an taxes[4] should be adopted. The majority of those expressing a view were agains summary procedure and we think the diligences and procedures used shoul be the same as for ordinary civil debts. The new diligence against earnings the earnings arrestment, that we recommend in Chapter 6, could be a ver effective method of collecting fines from offenders who are in stead employment. The short form of warrant for diligence recommended for a civil debts should also be used for fines and other sums ordered to be pai by a criminal court.

9.6 As regards sheriff court civil diligence we note that many of the provision and forms in the Sheriff Courts (Scotland) Extracts Act 1892 contain obsolet material, some, but not all, of which relate to the diligences considered in thi report. Since we understand that the Sheriff Court Rules Council propose t review the 1892 Act in due course with a view to its revision by act of sederunt we have confined the amendments of the 1892 Act recommended in the draf Bill annexed to this report to the minimum necessary to give effect to ou recommendations.

9.7 We **recommend:**

(1) A single form of warrant for diligence in execution of a decree of a civi court, an extract registered writ, or an order of a criminal court shoul be prescribed by act of sederunt or act of adjournal.

(2) The diligences authorised by the prescribed form of warrant should b laid down in statute.
(Recommendation 9.1; clause 112(1) and Schedule 7, paragraphs 8, 1 and 23.)

Letters of horning and poinding

9.8 Before 1838 a creditor wishing to enforce a decree applied to the Bil Chamber of the Court of Session for authority for letters of horning, letter

[1]Criminal Justice (Scotland) Act 1980, s. 66.
[2]Criminal Procedure (Scotland) Act 1975, s. 303(1)(c).
[3]Proposition 63 (para. 7.28).
[4]See Chapter 7, Section A.

of poinding, or letters of horning and poinding to be issued under the Signet. Letters of horning authorised the creditor to charge the debtor to pay on pain of horning. On expiry of the days of charge without payment the debtor or obligant could be denounced rebel—"put to the horn". When the letters of horning, together with the messenger's certificate of execution of the charge and denunciation were registered in a register of hornings, the creditor could apply for letters of caption on which the debtor or obligant could be imprisoned until the debt was paid. Letters of poinding authorised a charge on pain of poinding while letters of horning and poinding were a combination of letters of horning and letters of poinding. The Debtors (Scotland) Act 1838 simplified this procedure: extract decrees became in themselves warrants to charge on pain of poinding or imprisonment;[1] registration of the expired charge in a register of hornings became equivalent to a denunciation;[2] and warrant to imprison was obtainable by a simple minute to a clerk of court rather than by letters of caption.[3] Letters of horning, horning and poinding, and poinding remain competent although the extra expense in obtaining such warrants for diligence can be recovered from the debtor only if no warrant can be obtained under the provisions of the Debtors (Scotland) Act 1838.[4]

9.9 In Consultative Memorandum No. 48 we suggested that such letters were archaic and should be abolished.[5] Resort to these letters is still necessary,[6] first, where there has been a change of creditor after decree has been pronounced but before it has been extracted, or before a deed registrable for execution has been registered, and second, where in addition to the deed registrable for execution which constitutes the obligation, some subsidiary document not by itself registrable for execution is necessary to quantify the obligation or identify the creditor, at least where the deed has already been registered.[7] To deal with these residual cases we proposed that a simpler procedure[8] should be introduced on the lines of the existing statutory procedure, whereby an executor or assignee of the creditor in an extract of a decree or registered writ can obtain a warrant for diligence in his or her own name by endorsing a simple minute on the extract and producing it to a clerk of court, along with the relevant link in title. Such a procedure would also avoid questions arising as to whether the statutory procedure or letters of horning was the appropriate method of obtaining a warrant for diligence.[9]

9.10 Our proposal to abolish these letters was approved on consultation. Diligence forms must disclose at whose instance diligence is done, and it is necessary for the protection of debtors to have some procedure whereby a

[1]Ss. 2–4 and 9.
[2]Ss. 5 and 10.
[3]Ss. 6 and 11.
[4]S. 8.
[5]Proposition 4 (para. 2.8).
[6]Letters of horning may be used to enforce Lyon Court decrees. *Encyclopaedia*, vol. 9 pp. 343–5.
[7]Graham Stewart, pp. 284–6. Where the deed has not been registered, the practice is to register it and the subsidiary document together.
[8]Debtors (Scotland) Act 1838, ss. 7 and 12 and Scheds. 5 and 9.
[9]See *Mitchell* v. *St Mungo Lodge of Ancient Shepherds* 1916 S.C. 689 in which the judges seem to have held different opinions on the question whether the trustees of a friendly society required to deduce title to an extract bond by letters of horning or by the procedure under ss. 7 and 12 of the Debtors (Scotland) Act 1838.

new creditor's entitlement to do diligence is checked.[1] But it was agreed on consultation that the simple and inexpensive administrative procedure operated by clerks of court under sections 7 and 12 of the Debtors (Scotland) Act 1838 was also suitable for the residual cases where the old forms of letters are still required. We therefore recommend the abolition of letters of horning, poinding and horning and poinding. Many old statutes and acts of sederunt authorise letters of horning, in execution of particular decrees or obligations. We believe, however, that these provisions, so far as relating to letters of horning, can either be repealed outright, or repealed and replaced by provisions authorising the ordinary forms of diligence in execution, with little or no change to existing practice. Letters of caption can only be granted if a debtor has been denounced rebel by virtue of letters of horning and are also obsolete. Our recommendation to abolish letters of horning necessarily leads us to recommend the abolition of letters of caption.

9.11 At present, a Court of Session decree of poinding of the ground[2] is not by itself a direct warrant to officers of court to poind the moveables on the ground; instead the decree enables letters of poinding to be issued which grant authority to officers to poind. Our recommendation to abolish letters of poinding will necessitate a change in this practice. We suggest that a Court of Session extract decree should be a direct warrant to poind, as a sheriff court decree of poinding of the ground already is under the present law.[3]

9.12 We **recommend:**

(1) The granting of letters of horning, letters of poinding, letters of horning and poinding, and letters of caption should cease to be competent.

(2) A simple administrative procedure should be available enabling creditors acquiring from another person a right to a decree (including a writ registered for execution), whether before or after extract, to obtain a warrant for diligence in their own name on production of the extract decree and their title to it to a clerk of court. This procedure should also be available to a creditor in a deed registrable for execution where a subsidiary document is needed to quantify the obligation in the deed or identify the creditor.

(3) An extract decree of poinding of the ground should contain a warrant in prescribed form authorising officers of court to poind the ground. (Recommendation 9.2; clauses 112(2), 113 and 114; Schedule 7, paragraphs 1 and 6; and Schedule 9.)

Registration of certificates of execution of charges

9.13 The Debtors (Scotland) Act 1838[4] enables a creditor to register in a register of hornings the certificate of execution of a charge which has expired without payment. We indicated in Chapter 7[5] that registration in a register of hornings is an essential part of the procedure for civil imprisonment of a

[1] *Ibid;* per Lord Salvesen at p. 694.
[2] See para. 3.40 for an explanation of this term.
[3] Graham Stewart, p. 500; *Kennedy* v. *Ramsay's Trs.* (1852) 14 D. 513.
[4] Ss. 5 and 10.
[5] Paras. 7.70 to 7.80.

debtor under a warrant of a clerk of court under the 1838 Act;[1] that as a result of a somewhat complicated legislative history, that procedure is now only competent in the case of rates enforceable under a court decree (not a summary warrant) and civil fines or penalties due to the Crown; and that the procedure is no longer used in such cases and should be abolished. The only residual use of registers of hornings is that registration has the effect of accumulating the debt and interest into a principal sum bearing interest,[2] but creditors do not in practice use registration for that purpose.

9.14 In Consultative Memorandum No. 48 we suggested[3] that the provisions for registration of expired charges in registers of hornings were obsolete and ought to be repealed. The last registration in the Register of Hornings occurred in 1936[4] and we understand that registrations in sheriff court registers of hornings are extremely rare. All those who commented agreed and we recommend accordingly.

9.15 We **recommend:**

It should cease to be competent to register a certificate of execution of a charge for payment, that has expired without payment having been made, in any register of hornings.
(Recommendation 9.3; clause 115(6).)

Obligations *ad factum praestandum*

9.16 We are not concerned in this report to review the whole law on the enforcement of decrees *ad factum praestandum*. Some of the statutory provisions on warrants and charges for payment, however, also govern warrants and charges for performance of obligations *ad factum praestandum*. Our recommendations for re-enactment of the former in a revised form have compelled us to consider the latter and in particular, first, whether extract registered writs should authorise enforcement of an obligation *ad factum praestandum* by imprisonment, and, second, whether a charge to perform on pain of imprisonment is still appropriate having regard to the reforms of the procedure for civil imprisonment already on the statute book.

9.17 Prior to 1940 an obligation *ad factum praestandum* (an obligation to perform a specified act, such as handing over goods) contained in a decree or writ registered for execution could be enforced by imprisonment under the Debtors (Scotland) Act 1838.[5] If the debtor in the obligation failed to perform it within the period allowed in the charge, the certificate of execution of the charge could be registered in a register of hornings and thereafter a warrant of imprisonment could be obtained from the Bill Chamber (later the Petition Department) of the Court of Session or a sheriff clerk. Such a warrant was granted as of right provided the application and supporting documents were in order.

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[1]Ss. 6 and 11. There is a Register of Hornings kept at Edinburgh for the whole of Scotland and a register of hornings in each sheriff court.
[2]1838 Act, ss. 5 and 10.
[3]Proposition 12 (para. 3.24).
[4]*Civil Judicial Statistics, Scotland 1982* (Cmnd. 9235), para. 4.15.
[5]Ss. 5 and 11.

9.18 Section 1 of the Law Reform (Miscellaneous Provisions) (Scotland Act 1940 replaced the administrative procedure by an application to the cour for warrant of imprisonment and gives the court powers to substitute paymer of damages in lieu of the decree *ad factum praestandum*, or to make suc other order as appears to be just and equitable in the circumstances. Sma debt decrees for delivery of moveable goods were enforceable by civ imprisonment following an expired charge to deliver,[1] but in 1932 a procedur requiring an application to the sheriff was introduced[2] which formed the mode for the 1940 Act. This procedure was abolished along with small debt procedure and section 1 of the 1940 Act now applies to all decrees *ad factum praestandum* including summary cause decrees. By an apparent legislative oversight th 1940 Act was limited to decrees so that a warrant for imprisonment to enforc an obligation *ad factum praestandum* contained in a writ registrable fc execution can still be obtained from a clerk of court.

9.19 We do not think it would be sufficient merely to bring obligation contained in writs within the ambit of the 1940 Act. Where the creditor wishe to enforce an obligation *ad factum praestandum* contained in a writ, in ou opinion the creditor should have to bring an action for the purpose of obtainin a decree *ad factum praestandum*. The court would then have power, as it doe in other actions for decrees *ad factum praestandum*, to refuse to grant suc a decree[4] or grant it subject to conditions (such as giving the debtor a reasonabl time within which to perform the obligation.[5])

9.20 Under the present law it is not clear whether a charge to perform a obligation *ad factum praestandum* is an essential prerequisite for furthe enforcement measures. On the one hand, Rule 65 of the Rules of the Cou of Session and the provisions of the Writs Execution (Scotland) Act 1877 dealing with the import of warrants of execution appended to Court of Sessio decrees and extracts of registered writs respectively, can be construed a providing for a charge to be given. On the other hand, the Schedule to th Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 by repealing in so far as they relate to obligations *ad factum praestandum*, section 9 of th Debtors (Scotland) Act 1838 and section 7 of the Sheriff Courts (Scotland Extracts Act 1892 (which deal respectively with the import of long and shor warrants for execution on sheriff court decrees), suggests that a charge t perform an obligation *ad factum praestandum* is not competent under thos warrants.

9.21 In our view, charges to perform obligations *ad factum praestandur* should cease to be competent, (if or to the extent that they are not alread incompetent) whatever the decree or document imposing the obligation ma be. In terms of section 1 of the 1940 Act, the court before granting warran to imprison the debtor must be satisfied that the debtor is wilfully refusin to perform the obligation. The giving of a charge is neither a necessary no a sufficient factor in establishing wilful refusal. It is for the court to decid

[1]Sheriff Courts (Scotland) Act 1907, s. 46.
[2]Hire Purchase and Small Debt (Scotland) Act 1932, s. 7.
[3]Sheriff Courts (Scotland) Act 1971, s. 46(2), Sched. 2.
[4]Gloag and Henderson, *An Introduction to the Law of Scotland* (8th edn.) pp. 129 and 130.
[5]*McKellar* v. *Dallas's Ltd* 1928 S.C. 503.

in any particular application whether failure to perform arose from wilful refusal to comply, or from some other cause, such as ignorance of the terms of the obligation, or inability to comply with those terms.

9.22 We **recommend:**

(1) An obligation *ad factum praestandum* contained in an extract of a writ registered for execution in the Books of Council and Session or sheriff court books should cease to be enforceable by imprisonment by virtue of registration. A creditor who wishes to enforce an obligation *ad factum praestandum* contained in a registered writ should be required to constitute the obligation by decree.

(2) To clarify the law it should be declared to be incompetent to charge a debtor to perform an obligation *ad factum praestandum.* (Recommendation 9.4; clause 125.)

Execution outwith sheriffdom

9.23 Section 13 of the Debtors (Scotland) Act 1838 enables diligence to be done outwith the sheriffdom on an extract decree of the sheriff provided a warrant of concurrence is obtained from the Court of Session or the sheriff clerk of the sheriffdom in which the warrant is to be executed. The Ordinary Cause Rules[1] and the Summary Cause Rules[2] dispense with the need for warrants of concurrence for any warrant granted in these causes. However, warrants of concurrence remain necessary in respect of warrants for diligence contained in extracts of writs registered for execution in sheriff court books, and summary warrants for recovery of rates and taxes.

9.24 In Consultative Memorandum No. 48 we proposed[3] that it should be competent to charge and poind anywhere within Scotland without a warrant of concurrence. All those who commented agreed. Consultation also revealed that practical problems can arise in obtaining warrants of concurrence for rates summary warrants where one warrant may cover many hundreds of defaulters.[4] The McKechnie[5] and Grant[6] Reports expressed the view that warrants of concurrence were an unnecessary formality. We would agree; the need to obtain a warrant of concurrence adds to the delay and expense of enforcing sheriff court warrants in those cases where warrants of concurrence are still required.

9.25 The Ordinary Cause Rules[7] and the Summary Cause Rules[8] provide that a warrant may be executed either by an officer of the court granting the warrant or an officer of the sheriff court district within which it is to be executed. We would extend this to other cases where we recommend that

[1]Rule 16, applied to summary applications by Act of Sederunt (Ordinary Cause Rules, Sheriff Court) 1983, para. 5.
[2]Rule 11.
[3]Proposition 5 (para. 2.10).
[4]See paras. 7.62 to 7.65 above for further discussion of summary warrants.
[5]Paras. 143 and 144.
[6]Para. 648.
[7]Rule 16.
[8]Rule 11.

warrants of concurrence should be unnecessary, to avoid uncertainty as to which officers were entitled to execute such warrants.

9.26 We **recommend:**

(1) Diligence on a warrant inserted in an extract of a writ registered for execution in sheriff court books or contained in any decree of a sheriff should be capable of being executed anywhere in Scotland without endorsement of a warrant of concurrence.

(2) Any such diligence in pursuance of a warrant in a decree, summary warrant or extract registered writ may be executed either by an officer of the court which granted the decree or warrant (or from whose books the extract was issued), or by an officer of the sheriff court district in which the warrant is to be executed.
(Recommendation 9.5; clause 116.)

Encouraging debtors to use the courts

9.27 In Chapter 2 we observed[1] that the procedural rules and other matters relating to applications to the court under our recommendations ought to be framed so as to bring the new safeguards within the reach of those debtors whom they are designed to assist; unless debtors actually make use of the courts' new powers to regulate diligence, our recommendations will remain reforms on paper only. Debtors threatened with diligence do not in general turn to solicitors for help, and the issues involved in our recommended applications will rarely be such as to require legal skills for their resolution. For these reasons procedures should be designed with the unrepresented debtor in mind so that he or she, assisted by court staff or others if necessary, could make an application to the court without legal representation.[2] The major factors which we think deter ordinary people from using the courts are lack of knowledge about the procedures and how to apply, and the fear of being found liable in expenses, the amount of which they cannot estimate in advance.

9.28 Our recommendations concerning debtors' lack of knowledge about what procedures are available and how to apply consist of several elements. First, forms served on debtors in connection with diligence, such as a charge to pay or a poinding schedule, should contain information in simple clear language as to what applications could be made to the court at that stage of the diligence and advice as to whom to contact if they want to make such an application. Secondly, while we are confident that the court staff will continue to be as helpful to applicants as they are at present in providing general help and advice, we propose that the sheriff clerk should have an express statutory duty to complete forms of applications for debtors if requested to do so.[3] Even people who are otherwise able to manage their own affairs may experience difficulties when faced with unfamiliar forms. In making this proposal we are

[1]Paras. 2.134 to 2.139.

[2]Limited legal help should remain available under the Legal Advice and Assistance Scheme, see para. 9.59 below.

[3]The Intestates Widows and Children (Scotland) Act 1875, s. 3 and the Small Testate Estates (Scotland) Act 1876, s. 3 lay a duty on the sheriff clerk to prepare and fill up an inventory and relative oath on request in the case of small estates.

not suggesting that the sheriff clerk should act as the debtor's agent, for that would impair the sheriff clerk's impartiality. The statutory duty would merely extend to completing the form using information provided by the debtor; the choice of remedy sought, or any proposal for payment of the debt, would be that of the debtor alone. To protect sheriff clerks and encourage them to assist debtors they should be immune from actions brought by debtors for failure to comply with the recommended statutory duties. Thirdly, we recommend that applications should be made wherever possible by way of printed forms drafted in simple and clear language. A printed form assists unrepresented people by indicating what information the court needs in order to deal with the application, and if properly completed should allow unopposed applications to be decided without the need for a hearing before the sheriff. Finally, we recommend that if a hearing is necessary, it should normally be possible for the parties to be represented by persons other than a lawyer, such as a friend or a debt counsellor.[1] Provision for lay representation might also benefit corporate creditors in that they could be represented by directors or employees. The possibility of lay representation should be confined to the sheriff court; it would be inappropriate to introduce it into the Court of Session in connection with applications relating to time to pay decrees.

9.29 The second major factor which we think inhibits use of the courts is the cost. We deal later[2] with liability for expenses but an initial monetary barrier to debtors are the court dues which are payable on lodging applications or defences.[3] Although these dues may be modest compared with other expenses, debtors who are subject to diligence could well find difficulty in paying them. We concur with the Law Society of Scotland who expressed the view on consultation that court dues should not be exigible from debtors applying to the courts for orders controlling diligence.

9.30 Documents may have to be served and intimations made to interested parties in connection with an application. For example, where the debtor applies for a time to pay order, a copy of the application and an interim order sisting diligence would be served on the creditor,[4] and a copy of the sheriff's decision on the application would be served on both the debtor and creditor.[5] Throughout our report we have in general recommended that these duties should be carried out by the sheriff clerk, our purpose being to save debtors expense and to encourage them to use the courts.

9.31 We **recommend:**

(1) Sheriff clerks should be under a statutory duty to provide debtors with information as to the procedures available and assist them, if requested, to complete any form required in connection with proceedings under our recommendations. But a sheriff clerk should not be liable to the debtor for any failure in the performance of these duties.

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[1]See Sheriff Courts (Scotland) Act 1971, s. 36(1) and Rule 17 of the Summary Cause Rules permitting lay representation in summary causes undefended on the merits.

[2]Paras. 9.37 to 9.44.

[3]R.C. 346 (for Court of Session); Act of Sederunt (Fees for Sheriff Court) 1982 (for sheriff court).

[4]Para. 3.74.

[5]Para. 3.75.

(2) An act of sederunt should be made permitting a party to proceedings in the sheriff courts under our recommendations to be represented by a person who is neither an advocate nor a solicitor.

(3) Diligence documents served on the debtor, whose form is to be prescribed by an act of sederunt, should contain information as to the applications which the debtor may make to the courts.

(4) The forms prescribed by act of sederunt for use in connection with proceedings under our recommendations should be drafted so as to be capable of being used by unrepresented persons.

(5) No court dues should be payable by debtors in connection with any application under our recommendations.
(Recommendation 9.6; clauses 121 and 122.)

Expenses

9.32 In Chapter 2 we dealt briefly with the issues of the level of diligence expenses generally and in the remote areas of Scotland in particular.[1] Here we consider to what extent the debtor should be liable for the expenses of diligence, including the expenses of any application made to the court in connection with diligence, and by what means such expenses should be recoverable. The diligences we are concerned with are conjoined arrestment orders and diligences directly authorised by warrants for execution appended to extracts of decrees and writs registered in books of court, i.e. charges, poindings, arrestments, earnings arrestments and current maintenance arrestments.

Diligence expenses not involving application to the court

9.33 Under the present law debtors are, with minor exceptions, liable for the expenses of diligence done against them. We think this general rule is sound and should be retained. In the case of an earnings arrestment or a current maintenance arrestment, the expenses are relatively straightforward in that they consist merely of the expense of serving the schedule of arrestment on the debtor, together with, in the case of an earnings arrestment, the expense of serving a prior charge. With poindings several steps are involved in the execution and completion of the diligence, and the steps needed to be taken in a particular poinding may vary according to the situation and nature of the goods and other circumstances. In our view the debtor should generally have to bear the expenses of those steps which the creditor is, in the circumstances of the particular poinding, obliged to take in order to execute or complete the diligence. Thus in the straightforward case the expenses of serving a charge for payment, executing a poinding, reporting it to the court and applying for warrant of sale, making arrangements for the sale and intimating these and the copy warrant to the debtor, attending or conducting the sale and reporting it to the court should be chargeable against the debtor together with any outlays such as advertising and auctioneer's fees. The circumstances of a particular case may, however, justify charging a debtor with more than these basic expenses. Where, for example, the warrant of sale requires the goods to be removed to another place for sale, or the officer has

[1]Para. 2.176.

to notify the debtor of his or her intention to return to poind because the house was unoccupied on the occasion of the officer's first visit, or a report of a payment agreement entered into after warrant of sale has been granted is made to the court, these expenses ought also to be chargeable against the debtor since they will be statutory requirements laid on the officer or creditor which have to be carried out if the diligence is to proceed. In the interests of clarity and to give guidance to those involved in diligence, particularly officers of court and auditors of court taxing diligence expenses, we have set out in Schedule 1 to the draft Bill annexed to this report a list of steps the expenses of which should be chargeable against the debtor. We think it would be useful if this list could be amended in the light of experience by subordinate legislation, and accordingly recommend that the Secretary of State may amend it by statutory instrument subject to affirmative resolution procedure.

9.34 In Chapter 5 we recommended[1] that the creditor should be entitled, without recourse to the court, to cancel arrangements made for sale and make fresh arrangements for sale as long as no amendment of the warrant of sale was necessary and the original arrangements had to be cancelled due to circumstances outwith the control of the creditor or officer. We think that it would be unjust if the debtor had to bear the cost of both arrangements since the circumstances necessitating fresh arrangements for sale might well have arisen through no fault of the debtor either. We therefore recommend that the debtor should have to pay the expenses in making arrangements for and executing the latter sale but not the expenses in making arrangements for the sale which had to be cancelled.

9.35 Where poinded goods are removed, damaged or destroyed in breach of poinding before they can be sold, the creditor can apply to the court for various orders such as an order requiring restoration of poinded items which have been removed, a warrant authorising officers of court to search for and deliver them, or an order for revaluation of damaged items.[2] We recommend that the expenses of executing these orders should be at the discretion of the sheriff, since fixed rules would be unsuitable in view of the wide variety of circumstances in which removal, damage or destruction may occur. This discretionary power should, for the same reasons, also apply to the expenses of executing orders made for the security of poinded goods, or for their immediate disposal.

9.36 We **recommend:**

(1) The expenses chargeable against the debtor in connection with:

   (*a*) an earnings arrestment, should consist of the expenses of serving a charge to pay on the debtor and a schedule of arrestment on the debtor's employer;

   (*b*) a current maintenance arrestment, should consist of the expenses of serving a schedule of arrestment on the debtor's employer.

(2) Provision should be made for the expenses of poinding and sale along the following lines.

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[1]Recommendation 5.40 (para. 5.193).
[2]See paras. 5.121 to 5.125.

The expenses detailed in the list below should be chargeable against the debtor—

(*a*) in serving one charge;

(*b*) in serving a notice and a copy thereof before entering a dwellinghouse for the purpose of executing a poinding;

(*c*) in executing a poinding;

(*d*) in making a report of the redemption by the debtor of any poinded article;

(*e*) in granting a receipt for payment for redemption;

(*f*) in making a report of the execution of a poinding, but not in applying for an extension of time for the making of such a report;

(*g*) in making intimation, serving a copy of the warrant of sale and giving public notice of the sale;

(*h*) in removing any articles for sale in pursuance of a warrant of sale;

(*i*) in making arrangements for, conducting and supervising the sale;

(*j*) in granting a receipt for payment for, or in making a report of, the release or redemption of poinded articles;

(*k*) in making a report of a payment agreement entered into after warrant of sale;

(*l*) in making a report of sale;

(*m*) in granting a receipt for payment for the release from a poinding of any article which is owned in common;

(*n*) in making a report of the release of any such article;

(*o*) in opening shut and lockfast places in the execution of the diligence.

This list should be capable of being altered by the Secretary of State by statutory instrument subject to affirmative resolution procedure.

(3) The debtor's liability for the expenses of executing an order made by the court in connection with the removal, damage or destruction of poinded articles, or their security or immediate disposal, should be at the discretion of the sheriff.

(4) Where new arrangements for sale have to be made but an amendment to the warrant of sale is unnecessary, the debtor should be liable for the expenses of the new arrangements but not for the expenses of the cancelled arrangements.
(Recommendation 9.7; clauses 77(1)(*c*) and 79(3) and Schedule 1, paragraphs 1, 3, 6 and 7(*b*).)

Liability for expenses of applications to the court

9.37 Earlier in this Chapter we have made recommendations[1] designed to ensure that debtors are not discouraged from making applications to the court. One major factor which in our view inhibits their use of the courts is the fear of being found liable for expenses, the amount of which cannot be known in advance. Given that the procedures under our recommendations are designed to be simple and expeditious and that the value of the issues involved are likely to be modest, we would recommend that, subject to certain exceptions noted in the following paragraphs, the debtor and creditor should bear their own expenses in relation to an application. Thus a debtor making an application for say a time to pay order would not be faced with the possibility of having to meet the expenses of a legally represented creditor who successfully opposed it.

9.38 There is a danger that a rule providing for no expenses due to or by either party would encourage debtors to make applications or oppose creditors' applications merely with the object of delaying the progress of diligence. Creditors might also behave in a similar fashion, by opposing as a matter of policy any application by debtors in order to deter such applications. To combat such tendencies we propose that the sheriff should have power to award expenses in connection with an application up to a prescribed limit against a person who acts on grounds that appear to the sheriff to be frivolous. We think that the courts would only exercise this power in clear cases of abuse of process and recommend that, in order not to deter debtors unduly, the prescribed limit should be set at a modest sum, such as £25. The prescribed figure should be capable of being altered as necessary by the Secretary of State by statutory instrument in order to reflect changes in the value of money.

9.39 We have identified four areas where the above general rule should not apply: first, where an appeal is taken from the decision of a sheriff[2] on the application. An appeal is to be competent on a point of law only. The parties would almost invariably be legally represented and legal aid would be available, so that the normal rules about expenses should apply. Secondly, the normal rules about expenses should also apply to third parties, such as employers or owners of goods which have been inadvertently poinded, as it would be unjust if they were to be penalised financially through involvement in litigation about other people's debts. Thirdly, the expenses of the creditor and debtor in connection with a debtor's application for a time to pay direction to be attached to a decree should form part of the expenses of the proceedings in which the decree was granted. The fourth and final category concerns the expenses of applications in connection with the diligence of poinding and sale, and the creditor's expenses in applying for, or applying to join, a conjoined arrestment order. Here different rules should apply to take account of the general principle that the debtor should be liable for the creditor's necessary expenses in doing diligence.

9.40 Although an application to the court for warrant of sale is an essential step in every poinding, in a particular poinding the creditor may find it

[1]Recommendation 9.6 (para. 9.31).

[2]Or a Lord Ordinary in the unusual case of an application relating to a time to pay decree in the Court of Session.

necessary in the circumstances to make other applications in order to proceed with the diligence. To apply the general principle that debtors should be liable for the necessary expenses of the creditor in prosecuting diligence would result in too great an imposition on debtors, and could penalise them for circumstances which had arisen through no fault of their own. It would, however, be equally inequitable to require the creditor and debtor to bear their own expenses in every case. In view of the variety of circumstances in which an application may be made we would recommend that, subject to one exception mentioned below,[1] the award of expenses in connection with an application by a creditor relating to a poinding should be left to the discretion of the sheriff hearing the application. But, so as not to inhibit opposition by the debtor where reasonable grounds exist for opposing the creditor's application, any expenses awarded against the debtor should be limited to those which the creditor would have been entitled to had the application been unopposed. If the debtor opposes the application on frivolous grounds, however, the sheriff should have power to award expenses of up to £25 (or such other figure as may be prescribed) against the debtor, in addition to the "unopposed basis" expenses.

9.41 The exception mentioned in the preceding paragraph concerns a creditor's application for warrant to sell the poinded goods. Because this application is an essential step in every poinding, the debtor should always be liable for the expenses on an unopposed basis, with additional expenses being awarded for frivolous opposition. In Chapter 5 we recommended that the sheriff should have power, on application by the creditor, to amend a warrant of sale provided the need for the amendment was due to circumstances for which neither the creditor nor the officer were responsible.[2] We think it would be unjust if the debtor had to bear the cost of this extra procedure as well as the expenses incurred under the original warrant, since the circumstances might well have arisen through no fault of the debtor either. We therefore recommend that the debtor should have to pay the expenses of the application for the amended warrant and proceedings in execution of that warrant, but should be released from any liability to pay for the expenses of the application for the original warrant[3] and any proceedings which had taken place in pursuance of that warrant. On the other hand, where a pending application for warrant of sale falls on the making of an interim order in connection with a time to pay order[4] or a debt arrangement scheme[5] and the creditor's right to continue with the poinding subsequently revives[6] a second application for warrant of sale will be needed. In these circumstances the debtor should have to bear the expense of both applications since the right to continue with the poinding will have arisen due to some fault on the debtor's part.

9.42 The recommendations we advance in Chapter 5 in relation to poindings will afford debtors increased opportunities to apply to the court for regulation

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[1]Para. 9.41.

[2]Recommendation 5.40 (para 5.193).

[3]Unless an award of expenses had been made against the debtor for frivolous opposition (see para. 9.38) to the creditor's application for that warrant. These expenses should be added to the expenses of executing the amended warrant.

[4]Bill, clause 7(1)(*a*).

[5]Bill, clause 20(3)(*a*).

[6]On default in making payments under the time to pay order, for example (Bill, clause 9).

of the diligence. We think that as a general rule each party should bear their own expenses in connection with an application made by the debtor (for example an application for release of an article from the poinding on the ground that it is exempt from poinding) so as not to deter debtors from making use of the courts. Expenses of up to £25 (or such other sum as may be prescribed), however, should be capable of being awarded against a debtor who makes a frivolous application. A similar sanction should be available against a creditor who opposes a debtor's application on frivolous grounds.

9.43 In the field of arrestments of earnings the general rule should be that the creditor and the debtor would be liable for their own expenses in connection with any application made by them to the court. An exception should be made for the creditor's expenses in applying for a conjoined arrestment order or for inclusion in an existing conjoined arrestment order. Section 2 of the Wages Arrestment Limitation (Scotland) Act 1870 provides that the debtor is not liable for the expenses of any arrestment of wages which fails to recover more than the expenses of executing that arrestment, and we recommend the extension of this rule to earnings arrestments and current maintenance arrestments.[1] Where the creditor serves an arrestment which is abortive because another arrestment or a conjoined arrestment order is being operated against the debtor's earnings, the expenses of that creditor's application for a conjoined arrestment order, or inclusion in the subsisting conjoined arrestment order should be borne by the debtor but the debtor should cease to be liable for the expenses of the abortive arrestment. This produces what in our opinion is an equitable result whereby the creditor is entitled to, and the debtor is liable for, only one set of expenses, so that neither is unduly prejudiced by an application for, or for inclusion in, a conjoined arrestment order being necessary.

9.44 We **recommend:**

(1) No expenses should be awarded against a debtor in favour of a creditor, or against a creditor in favour of a debtor, by a court in connection with any applications to the court under our recommendations. But where a party acts on grounds which appear to the sheriff to be frivolous, the sheriff should have power to award expenses of up to £25 (or such other sum as may be prescribed) against the party so acting. The prescribed sum should be capable of being altered by the Secretary of State by statutory instrument in order to reflect changes in the value of money. This rule should be subject to the exceptions in the following paragraphs.

(2) The rule in paragraph (1) should not apply to appeals from decisions made on applications under our recommendations, to applications involving third parties, or to an application for a time to pay decree. In these cases expenses should be awarded according to the normal rules.

(3) The expenses of an application made by a creditor in connection with the diligence of poinding and sale should be at the discretion of the sheriff, except where the application is for warrant of sale or amendment of the warrant of sale. Where the sheriff awards expenses against the

[1] Recommendation 9.9 (para. 9.58) below.

debtor, these expenses should be calculated as if the application had been unopposed (whether or not the debtor opposed the application), but if the debtor in the opinion of the sheriff opposed on frivolous grounds the sheriff should have power to award additional expenses of up to £25 (or such other sum as may be prescribed) against the debtor.

(4) The debtor should be liable for the creditor's expenses in connection with an application for warrant of sale. However, where a warrant of sale is amended by the sheriff on application by the creditor, the debtor should be liable for the creditor's expenses in applying for and executing the amended warrant but should cease to be liable for the creditor's expenses in connection with the original warrant (except any additional expenses the sheriff had awarded against the debtor on the ground of frivolous opposition to the original warrant).

(5) The debtor should be liable for the creditor's expenses in connection with an application for a conjoined arrestment order or for inclusion in an existing conjoined arrestment order, but should be relieved from liability for that creditor's expenses in serving a prior schedule of arrestment where applicable.
(Recommendation 9.8; clauses 87(6) and 117 and Schedule 1, paragraphs 1, 2, 4 and 7–10.)

Recovery of expenses for which debtor is liable

9.45 We turn now to discuss how the expenses in connection with diligence for which the debtor is liable can be recovered. No general solution is possible, because of the different ways in which the various diligences operate. Moreover, a distinction has to be drawn in some diligences, but not in others, between expenses of execution and expenses awarded against the debtor as a result of an application made to the court in connection with the diligence.

9.46 The present law on the recovery of the expenses of executing and completing a diligence suffers from a number of defects. First, there is no uniform rule governing the question whether the expenses of a particular diligence (chargeable against the debtor[1]) are recoverable from that diligence and the law is in some respects uncertain. The expenses of a poinding and sale are recoverable from the proceeds of the sale.[2] The expenses of a summary cause arrestment and action of furthcoming are recoverable from the arrested funds.[3] There is authority[4] that the expenses of an arrestment in execution of a Court of Session decree or sheriff court ordinary cause decree may be met out of the arrested goods or funds but there is doubt about this.[5] The expenses of an action of furthcoming completing an arrestment on a Court of Session or sheriff court ordinary cause decree are not recoverable from the arrested

[1]The expenses of an arrestment on the dependence are not chargeable against the debtor.

[2]It is competent to poind sufficient goods to cover the expenses of the charge and poinding and the ensuing stages of the diligence: *McNeill* v. *McMurchy, Ralston and Co* (1841) 3 D. 554.

[3]Summary Cause Rules, rule 64.

[4]*Encyclopaedia* vol. 1, p. 548.

[5]Graham Stewart, pp. 133 and 229 states that an arrestment does not attach diligence expenses.

funds,[1] though decree against the common debtor for the arrestment or furthcoming expenses may be granted in the action of furthcoming. It seems desirable that if the arrested property or funds suffice to cover the expenses of the diligence, a further court action and diligence should be unnecessary. Second, while the creditor can poind sufficient to cover the expenses of poinding and sale, the creditor must refrain from completing or taking further steps in the diligence if the debtor makes or tenders payment of the sum due under the decree (principal sum, interest if claimed, and judicial expenses) alone, i.e. excluding diligence expenses chargeable against the debtor already incurred.[2] The same rule would seem to apply in the case of an arrestment and furthcoming. The expenses of the diligence then have to be constituted by decree in a new action for payment of the expenses. This can lead to evasive tactics by debtors and a further action by creditors for payment of the expenses, which action ought to be unnecessary. Indeed, in theory an infinite progression of diligences could result since further court action and diligence would be necessary to recover the expenses of each preceding diligence. Third, with a minor exception,[3] the debtor remains liable for the expenses of abortive or abandoned diligence, which the creditor may recover by means of a further court action and diligence.

9.47 In Consultative Memorandum No. 47 we suggested,[4] following the McKechnie Report,[5] that an extract decree should contain an award of the expenses of diligence used to enforce it, and our suggestion was approved on consultation. We have come to the conclusion, however, that this suggestion, while it might solve the second of the problems mentioned in the preceding paragraph, would not solve the first problem and would exacerbate the third problem, since a creditor could recover the expenses of an abortive or abandoned diligence not only (as at present) by further legal proceedings, but also by further diligence in pursuance of the same warrant. Thus, for example, the expenses of a poinding and sale which were not met out of the proceeds of sale would, under our original suggestion, be recoverable by an arrestment or a poinding of further goods of the debtor. This could be oppressive to debtors and encourage creditors to use diligence in a rash and extravagant manner.

9.48 The solution we now recommend adopts a slightly different approach. We deal first with the mode of recovery of diligence expenses and consider later[6] the extent to which the expenses of related applications to the court should be treated in the same way. First, we propose a uniform rule that the expenses chargeable against the debtor incurred in executing a poinding and sale, an earnings arrestment,[7] an application for, or for inclusion in, a conjoined arrestment order, or an arrestment and action of furthcoming should be

[1] In this respect the existing Ordinary Cause Rules differ from the Sheriff Court Rules (rule 129) as originally enacted.

[2] *Inglis* v. *McIntyre* (1862) 24 D. 541; *Harvie* v. *Luxram Electric Ltd* (1952) 68 Sh.Ct.Reps. 181.

[3] The expenses of an arrestment of wages are only recoverable if, by virtue of the arrestment, the creditor recovers a sum larger than the amount of the expenses; Wages Arrestment Limitation (Scotland) Act 1870, s. 2.

[4] Proposition 6 (para. 3.14).

[5] Para. 179.

[6] Para. 9.54.

[7] See para. 9.50 for the expenses of a current maintenance arrestment.

recoverable from the poinded or arrested property or arrested funds or earnings if they suffice to cover those expenses. This would confirm the common law rule relating to poinding and sale, clarify and unify the law on arrestment and furthcoming, and extend the rule to the new diligences against earnings. Second, we propose that a creditor should be entitled to continue a diligence unless the expenses so far incurred in that diligence are paid as well as the debt (and interest if claimed). The present rule that tender or payment of the sum in the decree alone stops a diligence should be expressly abolished. To deal with the situation where the debtor tenders payment of the full amount due, but the tender is not accepted for some reason, we suggest that the diligence should terminate unless the tender is accepted within a reasonable time. Third, the expenses of any diligence of the types mentioned above should in general be recoverable only by that diligence, so that once a diligence has been completed or has been abandoned by the creditor or recalled by the court,[1] the debtor would cease to be liable for any unrecovered expenses. This rule would prevent the creditor recovering any outstanding expenses, either by bringing fresh legal proceedings for payment or by setting them off against any sum the creditor happened to owe to the debtor—the surplus arising out of a subsequent poinding, for example. We think, however, that an exception should be made to this third rule in the case of the diligence of arrestment and furthcoming. The expenses of an action of furthcoming may be considerable, especially if it is defended, and it would be unfair for creditors to have to bear the expenses if the arrested funds proved insufficient. Furthermore, a rule restricting the recovery of expenses to the amount of the arrested fund could, in cases where the amount was small, lead to debtors defending a furthcoming frivolously in the knowledge that they would not be liable for such expenses. We recommend, therefore, that the court should be required on granting a decree of furthcoming to grant a decree in favour of the creditor for the expenses of the diligence so far as not recovered out of the arrested funds. The warrant for execution contained in that decree would enable the creditor to do further diligence for the unpaid balance of the expenses.

9.49 Section 2 of the Wages Arrestment Limitation (Scotland) Act 1870 provides that the expenses of executing an arrestment of wages are not chargeable against the debtor unless the arrestment recovers a sum larger than those expenses. The object of this provision is to prevent the debt being increased through abortive diligence and perhaps also to prevent creditors indulging in "fishing arrestments". Our recommended rule that the expenses of an earnings arrestment should be recoverable only by means of that diligence reproduces the substance of the above statutory provision.

9.50 For reasons which we set out at length in Chapter 6[2] we have recommended that a current maintenance arrestment should recover only current maintenance. The expenses of serving the schedule of arrestment on the employer would have to be recovered by other diligence (including a simultaneous or subsequent earnings arrestment) by virtue of the warrant in the maintenance decree, although as such expenses will be modest we envisage that most debtors would pay them without other diligence having to be used.

[1]But see para. 9.52 below.
[2]Paras. 6.167 to 6.176.

Current maintenance arrestments would form another exception to the rule that the expenses of a diligence should be recoverable by, and only by, that diligence.

9.51 If, as we recommend, the unrecovered expenses of a diligence cease (with the exceptions of an arrestment which proceeds to a furthcoming and a current maintenance arrestment) to be chargeable against the debtor after the diligence has ceased to have effect, some provision is necessary to regulate whether sums received by the creditor out of the proceeds of diligence,[1] or payments to account made during the subsistence of the diligence, are to be regarded as payments of the debt or the expenses. We think all such payments should be ascribed first to expenses and thereafter to the debt, otherwise the creditor would always be out of pocket through use of diligence, except in those cases where the diligence recovered both the debt and the expenses. A similar rule is adopted in current practice on auditing reports of sale of poinded goods.[2] Although interest is rarely claimed by diligence creditors we think provision should be made for it. Payments made by the debtor under most financial agreements outwith diligence are ascribed first to interest and then to the debt, so that interest continues to accrue on the unpaid debt or balance. We see no reason for adopting a different rule for diligence. The interest ranking before the debt should be limited to that accrued at the date of execution of the poinding or arrestment, since inclusion of interest accruing thereafter could lead to sums which had been ascribed to the debt having to be later ascribed to interest, making the operation of ascription and the calculation of interest extremely complex indeed.

9.52 Our recommended general rule that the expenses of a diligence should be recoverable only out of that diligence would lead to hardship where a diligence is recalled on granting a time to pay order which later lapses on default or is in turn recalled by the court.[3] The creditor should be entitled to recover by means of further diligence under the same warrant not only the debt and accrued interest, but also the outstanding expenses of the recalled diligence. We would extend this recommendation to the similar situations arising where (a) diligence is rendered ineffectual by a sequestration[4] or a debt arrangement scheme,[5] or is rendered unenforceable by the creditor's accession to a trust deed for creditors[6] or by the subsistence of a protected trust deed[7] or where an arrestment of earnings is recalled by a conjoined arrestment order,[8] and (b) the right to do diligence subsequently revives.

9.53 A creditor may execute diligence against a debtor in ignorance of the fact that the debtor is subject to a debt arrangement scheme. We have recommended in Chapter 4 that such diligence is ineffectual,[9] and in order to

[1]This would include the appraised value of poinded goods passing to the creditor in default of sale.
[2]C.R.U. Warrant Sales Survey, para. 41.
[3]See paras. 3.86 to 3.97.
[4]Bankruptcy (Scotland) Act 1913, s. 104; Bankruptcy (Scotland) Bill, clause 36(4).
[5]Para. 4.283.
[6]Bell, *Commentaries* vol. ii, p. 395.
[7]Bankruptcy (Scotland) Bill, clause 56 and Sched. 5.
[8]Para. 6.237.
[9]Recommendation 4.18 (para. 4.148).

allow recovery of the expenses of the diligence such expenses should be added to the debt for which the creditor is entitled to rank in the debt arrangement scheme, or for which diligence may be done after the termination of the debt arrangement scheme.

9.54 Whether the expenses of applications made to the court in connection with diligence can be included in the expenses of a diligence recoverable by that diligence depends for practical reasons on the diligence in question and the time when the application is made. An earnings arrestment is designed to recover a debt due at the date of service of the schedule of arrestment on the employer, the amount of the debt being notified to the employer in the schedule. Expenses awarded against the debtor as a result of an application made after the date of service (such as an application to resolve a dipute about the mode of operation of the arrestment) could not be recovered unless the employer were to be notified of the additional debt. This would complicate matters, and it is simpler in our opinion to provide that post-service expenses should be treated as a new debt enforceable by separate diligence. Similarly the expenses of a post-service application in connection with a conjoined arrestment order should not be directly recoverable by that order since the order specifies the amount of the debt due at the date of service, although the creditor to whom the expenses were due could apply for a variation of the order to include them, or enforce them by diligence against the debtor's assets other than earnings. The expenses of an application for the conjoined arrestment order itself could and should be recoverable by the order since they are known before service of the order on the employer. An ordinary creditor's debt would therefore be increased by the amount of the expenses and the total debt and expenses specified in the order, while a maintenance creditor would become an ordinary creditor for the amount of the expenses, as well as being a creditor in respect of maintenance.

9.55 A poinding under the present law is capable of recovering not only the debt but also the expenses of the diligence. The officer is entitled to poind sufficient goods to recover the estimated future expenses, and, on completion of the diligence by sale, the actual expenses incurred are deducted from the proceeds of sale.[1] It would be practicable and indeed consonant with existing practice for the expenses of any application which have been awarded against the debtor to be recoverable by the poinding. However, this should not be the only method of recovering such expenses, otherwise the officer in executing a poinding would have to poind sufficient goods to cover the expenses of every possible application which could be made. In order to provide an alternative mode of recovery, we recommend that the sheriff in awarding expenses against the debtor should have power to direct that the expenses may be treated as a new debt and to grant a separate decree in respect of them. The creditor could use this separate decree to enforce payment of the expenses by further diligence if the proceeds of sale of the goods in the poinding turned out to be insufficient to meet the debt and all the expenses. But in the absence of any direction by the sheriff the expenses of any application in connection with a poinding should be recoverable only by that poinding.

[1] *McNeill* v. *McMurchy, Ralston and Co.* (1841) 3 D. 554.

9.56 The expenses of an application for, or connected with, a time to pay order or debt arrangement scheme, or for variation or recall of a time to pay decree which were awarded against the debtor have to be treated as new debts since there would be in nearly every case no subsisting diligence by which they could be recovered. We think that it would produce too complicated a scheme to make special rules for the few cases where there is a subsisting diligence—for example where the debtor makes a frivolous and unsuccessful application for a time to pay order after a poinding has been executed.

9.57 The present rule that the expenses of poindings and arrestments are recoverable either out of the proceeds of a sale or furthcoming, or by bringing fresh legal proceedings, means that the correctness of these expenses are subject to a check by the court. The auditor of court taxes the expenses on completion of the diligence by sale or furthcoming, and where diligence expenses are the subject of a separate legal action the action may be dismissed if it appears that the expenses sued for are incorrect.[1] Our recommendation that the expenses of a poinding or an earnings arrestment should be recoverable only out of that diligence removes the right to recover them by further legal proceedings so that a potential check on their correctness is lost. In Chapter 8 we made several recommendations designed to ensure that diligence expenses are properly charged, including requiring forms served on debtors to state and itemise the diligence expenses charged,[2] and empowering the Court of Session or the sheriff principal to order an inspection of the work of an officer, or firm of officers, including the fees charged for diligence carried out.[3] We also recommended that the debtor should have a right to have diligence expenses taxed by the auditor of court.[4] However, because possible liability for the expenses of taxation might deter debtors from applying, we suggest as an informal alternative remedy that a debtor who is dissatisfied with the diligence expenses should be able to complain to the sheriff clerk. The existence of this avenue of complaint should be drawn to the attention of debtors in the diligence forms served on them.

9.58 We **recommend:**

(1) The expenses of a poinding and sale, an earnings arrestment and a conjoined arrestment order should be recoverable by, and only by, that diligence, and any expenses outstanding after the diligence has ceased to have effect should cease to be chargeable against the debtor. For this purpose the expenses of a conjoined arrestment order should include only the expenses of an application for, or for inclusion in, an order.

(2) The expenses chargeable against the debtor in connection with the diligence of arrestment and furthcoming should be recoverable out of the arrested funds, but the court should on granting decree of furthcoming grant a decree in favour of the creditor for the expenses of diligence so far as not recovered from the arrested funds.

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[1] *John Temple Ltd* v. *Logan* 1973 S.L.T. (Sh.Ct.) 41.
[2] Recommendation 8.11 (para. 8.73).
[3] Recommendation 8.10 (para. 8.66).
[4] Recommendation 8.11 (para. 8.73).

(3) The expenses of executing a current maintenance arrestment should not be recoverable by that arrestment, but may be recovered by other diligence under the same warrant.

(4) A poinding and sale, arrestment and furthcoming and an earnings arrestment should cease to have effect on payment of the full amount of the debt, interest and expenses due, or if a tender of such payment is made, on it not being accepted within a reasonable time. A similar rule should apply to ordinary debts included in a conjoined arrestment order. The present rule that payment or tender of the sum in the decree alone will stop diligence should be expressly abolished.

(5) Where a diligence is recalled on making a time to pay order or a conjoined arrestment order, or rendered ineffectual by a sequestration or a debt arrangement scheme, or rendered unenforceable by the creditor's accession to a trust deed for creditors or the subsistence of a protected trust deed, before the expenses recoverable by that diligence have been fully recovered, the outstanding balance of such expenses should be recoverable by further diligence if and when the creditor's right to do diligence subsequently revives unless the debtor's liability for the expenses has been discharged.

(6) In awarding expenses against the debtor in connection with an application made in the course of a poinding or an arrestment of earnings, the sheriff should grant a decree in favour of the creditor for such expenses, so entitling the creditor to recover them by further diligence. This rule, however, should not apply to the expenses of an application (*a*) for warrant of sale which was unopposed or opposed on non-frivolous grounds, or (*b*) for, or for inclusion in, a conjoined arrestment order.

(7) Any sums recovered by a poinding and sale, arrestment and furthcoming, an earnings arrestment or a conjoined arrestment order in so far as it is enforcing an ordinary debt or debts (other than current maintenance), or paid to account while the diligence is in effect, should be ascribed first to the expenses recoverable by the diligence, thereafter to the interest accrued to the date of execution of the diligence, and finally to the debt and interest accrued since the date of execution.

(8) The act of sederunt prescribing diligence forms should provide that forms served on the debtor which contain a statement of diligence expenses chargeable should advise the debtor that he or she may make a complaint to the sheriff clerk if dissatisfied with the amount of the expenses.

(Recommendation 9.9; clauses 77(1)(*d*), 87(6), 118–20.)

Legal aid

9.59 The continued efficiency of the present system of debt enforcement depends on the procedures remaining capable of being operated with reasonable despatch. Our recommendations for entitling debtors to apply for various orders (such as a time to pay order, or an order refusing a creditor's application for warrant of sale) would inevitably slow down the progress of diligence, but as long as these applications can be disposed of promptly the resultant delay will not seriously endanger debt enforcement. These considerations lead us to propose that legal aid should not be available to either

debtors or creditors. Legal aid applications often take many weeks to process because the applicant's means have to be ascertained to determine what contributions (if any) are payable. During this period the proceedings for which legal aid is sought have to be sisted. Furthermore, as we have suggested in paragraph 9.27 above, the issues involved in most applications to the court should not require the professional skills of lawyers and should be capable of being satisfactorily resolved by "party litigant" procedure. Our recommendation that legal aid should not be available would not deprive debtors of all legal help since legal advice and assistance would continue to be available to those who qualified on financial grounds.[1] The availability of legal advice and assistance would not however result in unacceptable delays in the determination of applications, because eligibility is evaluated at the first interview with the solicitor to whom the application for legal advice and assistance is made.

9.60 The recommended unavailability of legal aid should only apply to debtors and creditors. Third parties who become involved through no fault of their own in other persons' diligences—for example where their goods have been poinded in error—should remain eligible for legal aid. Legal aid should also be available to debtors and creditors in connection with appeals. In terms of our recommendations below[2] an appeal from the decision of the sheriff would be competent only on a point of law and only if the sheriff grants leave to appeal. We think it would be unfair to debtors to deny them legal aid in connection with such appeals when their opponents will almost certainly be legally represented. The delays resultant on the availability of legal aid for appeals could, we understand, best be minimised by use of the emergency legal aid certificate procedure whereby a certificate can be issued if desirable in the interests of justice and the applicant appears likely to be eligible for legal aid.[3] Once the sheriff had granted leave to appeal, the way would be open for an emergency legal aid certificate to be granted and the appeal to proceed.

9.61 A legal aid certificate has effect only for the purposes of the proceedings mentioned in the certificate. Other proceedings have to be the subject of a separate legal aid certificate.[4] For the purposes of this rule we think an application for, or objections to, a time to pay decree should be treated as a part of the proceedings in which decree was granted, as they will usually form only a small part of the total proceedings. We think legal aid should also be available to debtors who admit the debt but wish to apply for a time to pay direction to be granted in the decree. However, we would confine this recommendation to cases where the debt action is in the Court of Session or the sheriff's ordinary court, in view of the fact that the procedures are more complex than in summary causes and the creditors will almost invariably be legally represented. To avoid delay arising from a fresh legal aid application, we suggest that a legal aid certificate granted in connection with a time to pay

[1]If s. 2A of the Legal Advice and Assistance Act 1972, which provides for assistance by way of representation in court, were to be brought into force, consideration could be given as to whether such representation should be available for diligence applications.

[2]Recommendation 9.11 (para. 9.70).

[3]Legal Aid (Scotland) (General) Regulations 1960, reg. 9.

[4]Legal Aid (Scotland) Scheme 1958, art. 16(8).

direction, whether separately or as part of the proceedings in which the decree was granted, should remain effective for subsequent proceedings in connection with variation or revocation of that direction.

9.62 Where a creditor is legally aided in proceedings which result in a decree for aliment or periodical allowance granted in his or her favour, the legal aid certificate remains effective for the execution of diligence up to 18 months from the date of the decree.[1] This rule should be retained and its scope clarified in relation to poindings and earnings arrestments. We think that the legal aid certificate should cover any proceedings under our recommendations necessary in the circumstances to complete the diligence, whether initiated or opposed by the assisted creditor, otherwise diligence would have to be held up while a new legal aid certificate was obtained, or the creditor would have to obtain legal advice and assistance for the proceedings.

9.63 Section 3(4) of the Legal Aid (Scotland) Act 1967 entitles the Legal Aid fund to recover sums paid in settlement of the account of the assisted person's solicitor from any property preserved or recovered for the assisted person in the proceedings, where expenses (if any) recovered from the opponent and contributions (if any) paid by the assisted person prove insufficient. Certain sums including awards of aliment, periodical allowance and a capital sum on divorce are exempt.[2] Similar provisions apply where a person has received legal aid and advice[3] but the exempt property also includes the assisted person's dwellinghouse, household goods and tools of trade;[4] in addition the Central Committee can waive this right of recovery where it would cause grave hardship or distress or be unreasonably difficult to operate.[5] These recovery provisions could lead to hardship, for example where a debtor successfully appeals, with the help of legal aid, against the grant of warrant of sale of his or her poinded goods and so preserves them, or where a debtor successfully recovers, with the help of legal advice and assistance, deductions wrongfully made from his or her pay under an earnings arrestment. As the existing exemptions are contained in regulations made by the Secretary of State,[6] we recommend that further regulations should be made exempting in appropriate cases from the recovery provisions property preserved or recovered for an assisted person by means of proceedings under our recommendations or any appeal from a decision in such proceedings.

9.64 We **recommend:**

(1) Creditors and debtors should be ineligible for legal aid in connection with any proceedings at first instance under our recommendations, except in so far as such proceedings are covered by an existing legal aid certificate or consist of an application for a time to pay direction in the Court of Session or the sheriff's ordinary court.

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[1] *Ibid.*, art. 16(9). The Central Committee must however sanction a poinding, while an action of furthcoming and an application for civil imprisonment are separate proceedings.

[2] Legal Aid (Scotland) (General) Regulations 1960 as amended, reg. 3.

[3] Legal Advice and Assistance Act 1972, s. 5.

[4] Legal Advice and Assistance (Scotland) Regulations 1973, reg. 6(1).

[5] *Ibid.*, reg. 6(2).

[6] As regards legal aid, under Legal Aid (Scotland) Act 1967, ss. 3(4) and 15; as regards legal advice and assistance, under Legal Advice and Assistance Act 1972, ss. 5(3) and 6.

(2) A legal aid certificate granted for proceedings leading to a decree for payment should remain effective for the purposes of applying for or opposing a time to pay direction in relation to the decree. Where a certificate is granted for, or is effective for, the purposes of a time to pay direction it should remain effective for the purposes of proceedings for variation or revocation of that direction.

(3) A legal aid certificate which is effective for the purposes of diligence to enforce payment of maintenance should be effective for any proceedings under our recommendations in connection with a poinding and sale or an arrestment of earnings which are necessary in the circumstances for the completion of the diligence.

(4) The Legal Aid fund should have no right of recovery from property preserved or recovered for an assisted person as a result of such proceedings (including appeals) under our recommendations as may be prescribed by regulations made under the powers contained in sections 3 and 15 of the Legal Aid (Scotland) Act 1967 and sections 5 and 6 of the Legal Advice and Assistance Act 1972.
(Recommendation 9.10; clause 123.)

Appeals

9.65 Sections 27 and 28 of the Sheriff Courts (Scotland) Act 1907 govern appeals from the sheriff's ordinary court. An appeal on both fact and law lies to the sheriff principal and thence to the Court of Session, or directly to the Court of Session. Where the value of the cause does not exceed £500 an appeal to the Court of Session is incompetent.[1] Certain appeals (against a final judgment for example) can be made without leave of the judge whose decision is being appealed against, while others require leave. In summary causes a final judgment of the sheriff can be appealed only on a point of law to the sheriff principal.[2] A further appeal to the Court of Session, again only on a point of law, requires the sheriff principal to certify that the case is suitable for appeal.[3] Any final judgment of the Inner House of the Court of Session can be appealed to the House of Lords unless an appeal is excluded by statute.[4]

9.66 We would view with concern an unrestricted right of appeal on fact and law in connection with applications under our recommendations because diligence must remain capable of being completed with reasonable despatch. Furthermore, an appeal on fact would require the evidence heard by the sheriff to be recorded and this would be out of keeping with the summary nature of the application. We would recommend the adoption of the summary cause appeal rules in so far as they restrict appeals to points of law but we think that the leave of the sheriff should also be required. Once leave has been given an appeal should lie at the option of the appellant either to the sheriff principal and thence without any requirement of further leave to the Court of Session, or directly to the Court of Session. An appellant, such as a creditor doing business throughout Scotland, may wish to obtain a ruling

[1]Sheriff Courts (Scotland) Act 1907, s. 7.
[2]Sheriff Courts (Scotland) Act 1971, s. 38.
[3]*Ibid.*
[4]Court of Session Act 1808, s. 15.

which would be binding throughout Scotland, and for this reason we would not wish to exclude direct appeals to the Court of Session.

9.67 In a few groups of cases we think the sheriff's decision should be final. The first group consists of administrative decisions such as refusing authority to an officer to continue poinding after 8 p.m.[1] or making a conjoined arrestment order.[2] Another group concerns matters which have to be settled one way or the other urgently. An example would be an order requiring a poinded consignment of fish to be sold immediately.[3] The last group consists of cases where the position could not be restored if the sheriff's decision were to be reversed on appeal and yet it would be impracticable to suspend the operation of the sheriff's decision pending appeal. Thus if an earnings arrestment is recalled[4] the recall must be allowed to have immediate effect pending an appeal, yet it would be impossible to reinstate the arrestment retrospectively should the recall be reversed on appeal.

9.68 Where the appellant seeks to challenge only the grant or refusal of a time to pay direction rather than the decree itself, we suggest that, in order to avoid expense and delay, rules of court should be made providing a simple method of appeal on this restricted matter. This appeal, like others, should be competent on a point of law only and require the leave of the Lord Ordinary or sheriff whose decision is challenged. On the other hand, if the decree as well as the decision on the time to pay direction is challenged, the normal methods of appeal should apply.

9.69 An appeal from the sheriff to the sheriff principal or the Court of Session must be taken within 14 days of the date of the decision appealed against in an ordinary cause[5] and the same time limit applies to appeals against the decision of a sheriff in a summary cause.[6] In the Court of Session the periods for reclaiming are 21 days if the whole subject matter of the cause is challenged, but if part of the merits is challenged the period is 14 days.[7] The shorter period would therefore apply where the grant or refusal of a time to pay direction rather than the decree itself is to be reclaimed. We see no reason to modify these time limits for any appeal arising out of applications under our recommendations.

9.70 We **recommend:**

(1) It should be competent to appeal from a decision by the Lord Ordinary or sheriff in relation to any application under our recommendations but such an appeal should be on a point of law only and require the leave of the Lord Ordinary or sheriff.

(2) An appeal from the sheriff should lie to the sheriff principal and thence to the Court of Session without further leave, or directly to the Court

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[1]Recommendation 5.17 (para. 5.78).
[2]Recommendation 6.42 (para. 6.236).
[3]Recommendation 5.24 (para. 5.115).
[4]Recommendation 6.12 (para. 6.91).
[5]Ordinary Cause Rules, rule 91.
[6]Summary Cause Rules, rule 81(1).
[7]R.C. 264.

of Session. A further appeal should lie without further leave from the Court of Session to the House of Lords.

(3) An appeal from the Lord Ordinary should lie to the Inner House of the Court of Session and thence without further leave to the House of Lords.

(4) Where the application relates to an administrative direction, an urgent matter or where the original position could not be restored if the decision were to be reversed, no appeal should be competent.

(5) The existing time limits for appeals should apply to an appeal in relation to an application under our recommendations.

(6) An act of sederunt should be made providing a simple method of appeal where only the grant or refusal of a time to pay direction attached to a decree is challenged.

(Recommendation 9.11; clause 128(1)–(3).)

Effect of appealing

9.71 In order to discourage appeals being used as a tactic to delay the progress of diligence, we think that in general a decision should come into effect immediately and remain effective unless and until it is reversed on appeal. The sheriff's decision should remain in effect until all possible appeals have been exhausted, otherwise there could be a series of changes if successive appellate courts reversed the decision of the immediately inferior court. There are, however, a substantial number of decisions whose effect would have to be delayed while appealable or subject to an appeal since they have irreversible legal consequences once they have taken effect, e.g. an order releasing an article from a poinding on the ground that it is exempt from poinding.[1] The sheriff's decision to refuse release should have immediate effect so that the article will remain in the poinding unless and until the decision is reversed on appeal. If, on the other hand, the sheriff's decision is to order release of the article, this ought not to receive effect pending an appeal, since reinstatement of the article in the poinding by an appellate court at a later date might be impossible.

9.72 Additional rules will be necessary in many cases to regulate matters pending an appeal. First, even where a decision is to receive immediate effect, a later irreversible step in the diligence should be made incompetent while an appeal is pending. For example, in a poinding a warrant of sale should not be granted and the goods should not be capable of being sold while there is an outstanding appeal connected with the poinded goods. Second, where the taking of an appeal prevents a creditor proceeding with the diligence, time should not run pending determination of the appeal for the purposes of any time limit, such as our recommended rule that a warrant of sale or an extension of the poinding must be applied for within one year from the date of execution of the poinding.[2] In addition, to cater for all the circumstances which may arise, an appellate court should have power to make such interim orders as

[1]Recommendation 5.13 (para. 5.65).
[2]Recommendation 5.27 (para. 5.130).

seem just and reasonable.[1] It would also be useful to confer on appellate courts powers to make incidental and consequential orders on determination of the appeal.

9.73 It should be clearly provided that where a decision is reversed on appeal, the reversal does not have retrospective effect so as to invalidate acts done before the decision was reversed. Such a rule is in our opinion necessary to protect the interests of third parties who may have acquired rights in the interval. Thus, where a sheriff officer is not suspended as a result of disciplinary proceedings[2] but the appeal court comes to the view that the officer should have been suspended, the suspension should not operate retroactively so as to invalidate diligence executed by the officer pending appeal.

9.74 We **recommend:**

(1) Subject to paragraph (5) below, the sheriff's decision on an application under our recommendations should have immediate effect and remain in effect unless and until it is reversed on final appeal. Any reversal should not have retrospective effect.

(2) The time between the initial decision and the final determination of an appeal should not count for the purposes of any time limit in diligence, where the effect of taking an appeal is to prevent further proceedings.

(3) While an appeal in connection with poinded goods is pending it should be incompetent for a warrant for their sale to be granted or for them to be removed for sale or sold.

(4) An appeal court should have power pending the determination of an appeal to grant interim orders, and on determination of the appeal power to make such incidental and consequential orders as seem just and reasonable.

(5) Where to give immediate effect to the sheriff's decision would render an appeal pointless, the decision should not come into effect unless and until the sheriff refuses leave to appeal, or the period allowed for appeal elapses without an appeal being taken, or if an appeal is taken until it is upheld on a final determination.

(Recommendation 9.12; clauses 68 and 128(4) to (7).)

Application to the Crown

9.75 In many cases a Government Department will be the creditor and we think our recommendations, which lay certain duties on creditors and restrict their rights, should apply to the Crown as they apply to other creditors, subject to the general limitations contained in the Crown Proceedings Act 1947. The 1947 Act prohibits an interdict or an order for specific implement being granted against the Crown and the Crown cannot be subjected to diligence. These provisions should clearly apply to our recommendations but no further restrictions seem necessary.

9.76 Since 1966 the pay of Crown servants, with the exception of the Armed

[1]Rule 95 of the Ordinary Cause Rules gives a similar power to the sheriff or sheriff principal whose decision is under appeal.

[2]Recommendation 8.12 (para. 8.84).

Forces and women's services, has been arrestable. In Chapter 6 we continue this policy by applying our recommended new diligences against pay (earnings arrestments, current maintenance arrestments and conjoined arrestment orders) to civil servants of the Crown.[1] Subject again to the limitations of the Crown Proceedings Act our recommendations have to bind the Crown in its capacity as employer if the pay of Crown servants is to be subject to these new diligences.

9.77 We **recommend:**

Subject to the provisions of the Crown Proceedings Act 1947, the recommendations contained in this report should bind the Crown in its capacity as creditor or employer.
(Recommendation 9.13; clause 129.)

Diligence on extract registered writs

9.78 Under the Administration of Justice (Scotland) Act 1933 the Court of Session has power by act of sederunt to regulate and prescribe the procedures to be followed in diligence on causes in the court and to prescribe the forms of any documents for the purposes of such diligence.[2] The Sheriff Courts (Scotland) Act 1971 confers similar powers on the Court of Session, in respect of civil proceedings in sheriff courts.[3] There are however no corresponding statutory powers to regulate diligence and connected forms proceeding, not on court decrees, but on extracts of writs registered for execution in the Books of Council and Session or in sheriff court books, or proceeding on orders which are enforceable as if they were so registered.[4] We think such powers should be conferred in order to secure uniformity in this domain.

9.79 We **recommend:**

The Court of Session should have power by act of sederunt to regulate the procedure, and to prescribe forms, used in connection with diligence proceeding on an extract of a writ registered for execution in the Books of Council and Session or in sheriff court books, or an order enforceable as if it were an extract of a registered writ.
(Recommendation 9.14; clause 127.)

Harassment of debtors

9.80 In Consultative Memorandum No. 47[5] we drew attention to simulation of legal process and harassment of debtors by debt collectors. Simulation of legal process involves creditors or their agents sending debtors documents intended to look like court documents in order to recover the debt. This practice may mislead debtors into thinking that decree has already been granted or the demand for payment has the authority of the court. Harassment may take the form of repeated personal visits or telephone calls at inconvenient times of the day or night; informing or threatening to inform the debtor's

[1]Para. 6.47.
[2]S. 16(*a*) and (*b*).
[3]S. 32(*a*) and (*c*).
[4]For example, an award of expenses by the comptroller may be enforced in like manner as a recorded decree arbitral; Patents Act 1977, s. 107(3).
[5]Para. 2.28 and Appendix D.

neighbours, employers and others of the debt; or the use of abusive and threatening language when communicating with the debtor. So far as we can ascertain these practices are relatively uncommon in Scotland at present, although instances do occur from time to time.

9.81 Simulation of legal process and harassment of debtors are specific statutory criminal offences in England and Wales[1] and the Younger Report on *Privacy*[2] recommended that the same provisions should apply to Scotland. Although our proposal in support of this recommendation met with approval on consultation, we have come to the view that legislation is unnecessary. Firstly, behaviour which causes embarrassment, alarm or distress could be charged as a breach of the peace.[3] Secondly, threatening a debtor with publicity with the object of making the debtor pay amounts to the crime of extortion.[4] Thirdly, making offensive or threatening telephone calls is an offence under section 49 of the British Telecommunications Act 1981. Fourthly, fraud would be committed if creditors or their agents falsely represented to the debtor that criminal proceedings would ensue on failure to pay, or that they were authorised in some official capacity to collect the debt, or if they sent simulated court documents with the intention of inducing the debtor to pay,[5] if these actions caused the debtor to pay. Attempted fraud would be committed if such a result was intended but did not occur. Civil remedies also exist in the shape of damages for threats of assault or defamation, while behaviour putting a person in a state of distress or alarm can be interdicted. Other possible remedies include making a complaint to the Office of Fair Trading who have power to revoke a debt collection licence issued under the Consumer Credit Act 1974, and where the debt collector is a messenger-at-arms or a sheriff officer making a complaint to the Court of Session or the sheriff principal who could take disciplinary action.[6] The existing law seems adequate to curb the mischief and new legislation would merely duplicate the present common law and statutory remedies.

Collection charges

9.82 A debtor is not liable to pay the creditor or debt collection agency a collection charge, except in the rare case where the contract between the debtor and creditor so provides. Nevertheless, demands are made from time to time by debt collection agencies for collection charges which are not legally enforceable. Making such demands may amount to the crime of fraud if the agency falsely pretends that the collection charges are due knowing that they are not, and, where threats of legal proceedings are used to enforce payment, they may also amount to extortion. Furthermore, demanding unenforceable collection charges might lead to the Office of Fair Trading, on receipt of a complaint, revoking the debt collection licence of the agency in question. If a sheriff officer was involved, the appropriate sheriff principal might discipline the officer. In Consultative Memorandum No. 47 we suggested[7] that specific

[1]Administration of Justice Act 1970, s. 40.
[2]Cmnd. 5012, (1972) para. 278.
[3]*Sinclair* v. *Annan* 1980 S.L.T. (Notes) 55.
[4]*Alexander F. Crawford* (1850) Shaw 309.
[5]Gordon, *Criminal Law* (2nd edn), Chapter 18.
[6]See Chapter 8, paras. 8.74 to 8.84.
[7]Para. 2.29.

legislation should be introduced to prohibit the practice. While this met with approval on consultation, we now consider that any statutory provision would amount to a mere reformulation of the existing common law relating to fraud and extortion. However we do recommend in Chapter 8 that, in order to clarify the law, a demand for unenforceable collection charges by an officer of court should be treated as misconduct rendering that officer liable to suspension or dismissal.[1]

Debt counselling services

9.83 A number of reports by official advisory bodies have pointed to the need to develop the provision of debt counselling and related services in order to give information, advice and assistance free of charge to debtors, particularly to those with low incomes.[2] The provision of such services is related to diligence in at least two ways. First, by acting as a channel of communication between debtor and creditor and by becoming a "broker" for payment arrangements, debt counselling agencies prevent many cases from proceeding to diligence. Second, debt counselling agencies will have an important role to play in advising and assisting debtors to apply for the various types of court orders which sist or preclude diligence which we recommend earlier in this report.[3] The C.R.U. Debt Counselling Survey assessed the nature and extent of such facilities for consumer debtors in Scotland. It suggested that the organisations appearing to offer most potential for expansion were local authority social work departments (for long-term financial problems or debtors enmeshed in a multiplicity of social and financial problems) and voluntary grant-aided "generalist" advice agencies such as Citizens Advice Bureaux and welfare rights organisations (for debtors in an immediate debt crisis). We support the general aims of the Hughes Report in seeking to improve the provision of debt counselling within the framework of "generalist" advisory services.

Central register of court decrees

9.84 In Consultative Memorandum No. 47 we expressed the view[4] that the establishment of a central register of court decrees, in which debt decrees and their satisfaction were recorded, would not be practicable unless civil debts were collected through the courts. Although one body thought that a register of court decrees and satisfaction should be set up, the prevailing view on consultation, with which we concur, is that setting up a register would be expensive and unnecessary. Debts should in general be collected by creditors or their agents rather than the courts or a public agency; we have recommended the intervention of the court in this sphere only in those cases (conjoined arrestment orders[5] and debt arrangement schemes[6]) which involve the sharing of the proceeds of diligence or debtor's payments amongst two or more creditors.

---

[1]Recommendation 8.21 (para. 8.121).

[2]Payne Report, paras. 1213–23; Crowther Report, chapter 9.3; Hughes Report, paras. 12.6 to 12.12.

[3]Time to pay decrees and orders (Chapter 3); debt arrangement schemes (Chapter 4); recall of a poinding and opposing an application for warrant of sale (Chapter 5), for example.

[4]Para. 2.22.

[5]Chapter 6.

[6]Chapter 4.

Diligence-related instalment settlements

9.85 In Consultative Memorandum No. 47 we raised the question of diligence done while an agreement between creditor and debtor for payment of the debt by instalments was in operation.[1] Some debtors interviewed in the Edinburgh University Debtors Survey claimed that diligence had been done while instalments were being paid and the Scottish Council for Civil Liberties drew attention on consultation to this practice.[2]

9.86 Whether the use of diligence is justified where the debtor is complying with an instalment agreement depends on the terms of the agreement. Where the creditor expressly or by implication agrees not to execute diligence for as long as the agreement is complied with, damages can be claimed for diligence done and further proceedings in the diligence can be interdicted.[3] We would agree with those commentators who thought that creditors should remain entitled to reserve the right to do diligence, notwithstanding the debtor's compliance with an instalment agreement, because where a debtor is on the verge of insolvency the creditor may need to execute diligence promptly in order to obtain a preference over other creditors. In terms of our earlier recommendations, diligence will be recalled or frozen on the granting of a time to pay order[4] or on the confirmation of a debt arrangement scheme.[5] In our view these provisions will enable debtors who are unable to negotiate satisfactory agreements with their creditors to obtain protection from diligence while paying off their debts by instalments, and no further recommendations seem necessary.

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[1]Paras. 3.53 to 3.57.

[2]See also *McTaggart* v. *Dalry Co-operative Society Ltd* 1980 S.L.T. (Sh.Ct.) 142.

[3]*Cameron* v. *Mortimer* (1872) 10 M. 461; *Mackersy* v. *Davis & Sons Ltd* (1895) 22 R. 368; *McTaggart* v. *Dalry Co-operative Society Ltd, supra.*

[4]Recommendation 3.19 (para. 3. 93).

[5]Recommendation 4.14 (para. 4.118).

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PART 2.1

Scottish Law Commission

(SCOT. LAW COM. No. 95)

REPORT ON DILIGENCE AND DEBTOR PROTECTION

Volume Two

Appendices

(2 volumes not sold separately)

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by the Lord Advocate
under section 3(2) of the Law Commissions Act 1965

Ordered by The House of Commons *to be printed*
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HER MAJESTY'S STATIONERY OFFICE

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

The Honourable Lord Maxwell, *Chairman*,

Mr. R. D. D. Bertram, W.S.,

Dr. E. M. Clive,

Mr. J. Murray, Q.C.,

Sheriff C. G. B. Nicholson, Q.C.

The Secretary of the Commission is Mr. R. Eadie. Its offices are at 140 Causewayside, Edinburgh EH9 1PR.

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APPENDIX A

Draft

The Debtors (Scotland) Bill

ARRANGEMENT OF CLAUSES

Clause

Earnings arrestments

Current maintenance arrestments

Simultaneous operation of arrestments of earnings and priority among them

Conjoined arrestment orders

Supplementary provisions for Part IV

PART V

RECOVERY OF RATES AND TAXES ETC.

SCHEDULES:

DRAFT

OF A

BILL

TO

Make new provision with regard to Scotland for an extension of time for payment of debts and to enable debts to be paid under debt arrangement schemes; to amend the law relating to certain diligences; to make provision in respect of messengers-at-arms and sheriff officers; 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:— A.D. 1985

PART I

EXTENSION OF TIME TO PAY DEBTS

Extension of time on granting decree

Extension of time on granting decree.

1.—(1) Subject to the provisions of this section and sections 12 and 13 of this Act, the court, on granting decree for payment of a principal sum of money may, on an application by the debtor concerned, direct that any sum of money decerned for in the decree (including any interest claimed in pursuance of subsection (5) below) or any expenses in relation to which the decree contains a finding as to liability, or both that sum and those expenses, shall be paid—

(a) by such instalments, payable at such times; or

(b) as a lump sum at the end of such period,

after the date of intimation by the creditor to the debtor of an extract of the decree containing the direction, as the court may specify in the direction.

Any direction under this subsection shall be known as a"time to pay direction".

(2) Where a court grants decree which contains a finding as to liability for expenses, then (whether or not the decree also decerns for payment of the expenses), it shall be incompetent for the court to make a time to pay direction in relation to those expenses later than at the time when it grants decree containing the finding.

(3) Subsection (1) above shall apply to a time to pay direction in so far as it is made in relation to expenses in a case where the decree containing the direction—

(a) does not decern for payment of the expenses; or

(b) decerns for payment of the expenses as taxed by the auditor of court but does not specify the amount of those expenses;

as if the reference to intimation of an extract of the decree containing the direction were a reference to intimation of an extract of a decree decerning for payment of the expenses, being a decree or extract specifying their amount.

(4) The court shall not be entitled to make a time to pay direction—

(a) where the sum of money (exclusive of any interest and expenses) decerned for in the decree exceeds £10,000 or such amount as may be prescribed in regulations made by the Secretary of State; or

(b) where the decree includes or comprises an award of financial provision payable on divorce or of aliment; or

1968 c. 49.
1973 c. 29.
1976 c. 71.

(c) in relation to an order under section 80 or 81 of the Social Work (Scotland) Act 1968, section 11(3) of the Guardianship Act 1973 or section 18 or 19 of the Supplementary Benefits Act 1976.

EXPLANATORY NOTES

Part I (*clauses* 1 *to* 13) makes provision as to time to pay directions and time to pay orders.

Clauses 1 *to* 3

Clauses 1 *to* 3 introduce time to pay directions in Scots law.

Clause 1

This clause, implementing Recommendations 3.1, 3.3 to 3.6, and 3.10(2), enables the court to make a time to pay direction on granting decree for payment of a principal sum of money.

Subsection (1)

This subsection implements in whole or in part Recommendations 3.1 (para. 3.4); 3.3(1) (para. 3.13); 3.5(2) (para. 3.21); and 3.10(1) (para. 3.45).

Subsection (2)

This subsection implements Recommendation 3.5(1) (para. 3.21).

Subsection (3)

This subsection implements Recommendation 3.10(2) (para. 3.45).

Subsection (4)

Paragraph (*a*) of this subsection implements Recommendation 3.6 (para. 3.25). *Paragraphs* (*b*) *and* (*c*) of the subsection implement Recommendation 3.3(2) (para. 3.13).

(5) Without prejudice to section 3(7) of this Act, the debtor shall not be liable to pay any interest payable under a decree containing a time to pay direction (from whatever date the interest has accrued) unless the creditor not later than the prescribed date occurring-

(a) in the case of a direction under subsection (1)(a) above, before the date when the last instalment is due under the direction;

(b) in the case of a direction under subsection (1)(b) above, before the end of the period specified in the direction,

has served a notice on the debtor stating that he is claiming such interest and specifying the amount of interest claimed:

Provided that this subsection shall not apply in relation to interest accruing before the date of the granting of decree if the interest has been specified in the decree as a sum of money payable thereunder.

(6) Regulations under subsection (4)(a) above shall be made by statutory instrument and shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(7) In this section and sections 2 and 3 of this Act,"the court" means the Court of Session or the sheriff.

Effect of time to pay direction on diligence.

2.—(1) While a time to pay direction is in effect, it shall be incompetent to commence or execute any of the following diligences—

(a) a poinding and sale;

(b) an earnings arrestment;

(c) an arrestment and action of furthcoming or sale;

(d) an adjudication for debt;

(e) a charge for payment,

to enforce payment of the debt concerned:

Provided that an arrestment, used on the dependence of the action or in security of the debt, which has not been recalled, or to the extent that it has not been restricted under subsection (2) below, shall remain in effect but, while the direction is in effect, the raising of an action of furthcoming or sale shall be incompetent.

(2) Where an arrestment has been used on the dependence of the action or in security of the debt, the court may, on making a time to pay direction, recall or restrict the arrestment:

Provided that the court may order that the making of the direction and the recall or restriction of the arrestment shall be subject to the fulfilment by the debtor of such conditions within such period as the court thinks fit; and, where the court so orders, it shall postpone granting decree in that action until such fulfilment or the end of that period, whichever is the earlier.

(3) In subsection (1)(a) above"poinding" does not include poinding of the ground.

Subsection (5)

This subsection implements Recommendation 3.4 (para. 3.16).

Subsection (6)

This subsection implements in part Recommendation 3.6 (para. 3.25).

Subsection (7)

This subsection implements in part Recommendation 3.3(1) (para. 3.13).

Clause 2

This clause, implementing recommendations 3.7 (para. 3.35) and 3.9 (para. 3.42), regulates the effect of time to pay directions on diligence.

Subsection (1)

This subsection implements Recommendation 3.7(1) (para. 3.35).

Subsection (2)

This subsection implements Recommendation 3.7(2) (para. 3.35). The proviso to the subsection implements Recommendation 3.7(3).

Subsection (3)

This subsection implements in part Recommendation 3.9 (para. 3.42).

Lapse, variation and recall of time to pay direction.

3.—(1) Where, on a day on which an instalment payable under a time to pay direction becomes due, there remain unpaid two instalments payable thereunder on previous days, the direction shall cease to have effect on that day.

(2) Where, immediately after the day on which the last instalment payable under a time to pay direction under section 1(1)(a) of this Act becomes due, there remain unpaid any instalments payable thereunder, the direction shall cease to have effect at the end of the period of 3 weeks immediately following that day if the debt has not been fully paid within that period.

(3) Where, at the end of the period specified in a direction under section 1(1)(b) of this Act, any sum payable under the direction has not been paid, the direction shall cease to have effect 24 hours thereafter if any part of that sum remains unpaid.

(4) Where—

(a) a decree for payment of a principal sum of money contains a finding as to liability for expenses and decree for payment of the expenses is subsequently granted; and

(b) a time to pay direction is made both in relation to the principal sum and the expenses,

then, if the direction ceases to have effect under subsection (1), (2) or (3) above in relation to the sum payable under one of the decrees mentioned in paragraph (a) above, the direction shall also cease to have effect in relation to the sum payable under the other decree.

(5) The court which granted a decree containing a time to pay direction may, on an application by the debtor or the creditor—

(a) vary or recall the direction if it is satisfied that it is reasonable to do so; or

(b) if an arrestment in respect of the debt concerned is in effect, recall or restrict the arrestment:

Provided that, if such an arrestment is in effect, the court may order that any variation or recall or restriction under this subsection shall be subject to the fulfilment by the debtor of such conditions as the court thinks fit.

(6) The clerk of court or sheriff clerk shall forthwith intimate a variation under subsection (5) above to the debtor and the creditor, and the variation shall come into effect on the date of such intimation.

(7) Where a time to pay direction is recalled or ceases to have effect, otherwise than under section 10(2)(a) of this Act or by reason of the debt being satisfied, the debt in so far as it remains unpaid and interest thereon, from whatever date it has accrued, shall, subject to

EXPLANATORY NOTES

Clause 3

This clause, implementing Recommendations 3.10 (para. 3.45) and 3.11 (para. 3.48), makes provision as to the lapse, variation and recall of a time to pay direction and as to the recall or restriction of any arrestment securing the debt to which the time to pay direction relates.

Subsection (1)

This subsection, implementing in part Recommendation 3.10(3) (para. 3.45), provides for the lapse of a time to pay direction made under *clause* 1(1)(*a*) where, on the due date for payment of an instalment, the debtor is in arrears with 2 prior instalments.

Subsection (2)

This subsection, implementing in part Recommendation 3.10(3) (para. 3.45), provides for the lapse of a time to pay direction made under *clause* 1(1)(*a*) in a case where, on the date when the last instalment falls due, the debtor is in arrears with only one prior instalment or is not in arrears with any prior instalment but fails to pay the last instalment on the due date. (*Subsection* (1) does not apply to these cases.)

Subsection (3)

This subsection, implementing Recommendation 3.10(4) (para. 3.45), provides for the lapse of a time to pay direction made under *clause* 1(1)(*b*) relating to a deferred lump sum.

Subsection (4)

This subsection implements Recommendation 3.10(5) (para. 3.45).

Subsection (5)

This subsection implements Recommendation 3.11(1) (para. 3.48).

Subsection (6)

This subsection provides for the intimation, and the date of the coming into effect, of a variation of a time to pay direction.

Subsection (7)

This subsection provides for the revival of the creditor's right to do diligence on the termination of a time to pay direction, other than its termination by an award of sequestration in terms of *clause* 10(2).

any enactment or rule of law to the contrary, become enforceable by any of the diligences mentioned in paragraphs (a) to (e) of section 2(1) of this Act.

Order extending time following charge or other diligence or granting of summary warrant

General provision.

4.—(1) Subject to section 12 of this Act, this section applies to a debt due by a debtor in respect of which—

(a) a decree for payment has been granted and—

(i) a charge for payment has been served on the debtor;

(ii) an arrestment (other than an arrestment of the debtor's earnings in the hands of his employer) has been executed; or

(iii) an action of adjudication for debt has been raised; or

(b) a summary warrant has been granted.

(2) Subject to the following provisions of this section and section 13 of this Act, the sheriff, on an application by the debtor, may make an order that a debt to which this section applies (including any interest claimed in pursuance of subsection (5) below) shall be paid—

(a) by such instalments, payable at such times; or

(b) as a lump sum at the end of such period,

after the date of intimation of the order under section 6(4)(a) of this Act, as the sheriff may specify in the order.

Any order under this subsection shall be known as a"time to pay order".

(3) The sheriff shall not be entitled to make a time to pay order where—

(a) the amount of the debt outstanding at the date of the making of the application under subsection (2) above (exclusive of any interest) exceeds £10,000 or such amount as may be prescribed in regulations made by the Secretary of State; or

(b) in relation to the debt, a time to pay direction, or a time to pay order, has previously been made (whether the direction or order is in effect or not).

(4) Where in respect of a debt to which this section applies—

(a) there has been a poinding of articles belonging to the debtor and a warrant of sale has been granted in respect of them but has not been executed; or

(b) in pursuance of a summary warrant, articles belonging to the debtor have been poinded and intimation has been made to the debtor under paragraph 12(1) of Schedule 6 to this Act of the date arranged for the removal of the poinded

EXPLANATORY NOTES

Clauses 4 *to* 9

Clauses 4 *to* 9 introduce time to pay orders in Scots law.

Clause 4

This clause implements in whole or in part Recommendations 3.12 to 3.16.

Subsection (1)

This subsection, implementing Recommendations 3.13(1) (para. 3.58) and 3.14(1) (para. 3.63), sets out certain conditions which have to be satisfied before the sheriff may make a time to pay order in relation to a debt.

Subsection (2)

This subsection, implementing Recommendations 3.12(1) (para. 3.53) and 3.16(1) (para. 3.71) gives the sheriff an exclusive jurisdiction to make a time to pay order providing for payment by instalments or by deferred lump sum.

Subsection (3)

This subsection implements Recommendation 3.15(1) (para. 3.66).

Subsection (4)

This subsection implements Recommendation 3.14(2) (para. 3.63).

articles for sale or, if the articles are to be sold in the premises where they are situated, of the date arranged for the holding of the sale; or

(c) moveable property of the debtor has been arrested and in respect of the arrested property—

(i) a decree in an action of furthcoming has been granted but has not been enforced; or

(ii) a warrant of sale has been granted but the warrant has not been executed; or

(d) a decree in an action of adjudication for debt has been granted and the creditor has, with the debtor's consent or acquiescence, entered into possession of any property adjudged by the decree or has obtained a decree of maills and duties, or a decree of removing or ejection, in relation to any such property;

the sheriff shall not be entitled to make a time to pay order in respect of that debt until the diligence has been completed or has otherwise ceased to have effect.

(5) Without prejudice to section 9(7) of this Act, the debtor shall not be liable to pay any interest on the debt (from whatever date the interest has accrued) unless the creditor not later than the prescribed date occurring—

(a) in the case of an order under subsection (2)(a) above, before the date when the last instalment is due under the order;

(b) in the case of an order under subsection (2)(b) above, before the end of the period specified in the order,

has served a notice on the debtor stating that he is claiming such interest and specifying the amount of interest claimed:

Provided that this subsection shall not apply in relation to interest accruing on the debt concerned before the date of the granting of—

(i) decree; or

1970 c. 9.

(ii) a summary warrant under section 63 of the Taxes Management Act 1970,

if the interest has been specified in the decree, or in the certificate which accompanied the application for the summary warrant, as a sum of money payable under the decree or enforceable under the warrant.

(6) Regulations under subsection (3)(a) above shall be made by statutory instrument and shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(7) For the purposes of this section and the following provisions of this Part of this Act—

"debt" includes any interest accrued theron, any expenses decerned for and any expenses of diligence used to recover

Subsection (5)

This subsection makes provision as to interest on debts subject to time to pay orders broadly corresponding to the provisions of *clause* 1(5) on interest on debts subject to time to pay directions. However, interest accrued before decree and specified therein as a quantified sum will be exigible though not claimed by the procedure introduced by this subsection. Section 63 of the Taxes Management Act 1970 is re-enacted with modifications in *Schedule* 5, *paragraph* 2.

Subsection (7)

This subsection defines certain terms used in *clause* 4 and *clauses* 5 *to* 13.

The definition of "debt" makes it clear that a time to pay order may cover interest (but interest not specified in the decree as a quantified sum must be claimed in the procedure provided for in *subsection* (5)), judicial expenses decerned for in the decree,

the debt which are chargeable against the debtor, but does not include—

(a) any sum due under an order of a court in criminal proceedings;

(b) maintenance, whether due at the date of application for the time to pay order or otherwise, or any capital sum awarded on divorce or any other sum due under a decree awarding maintenance or such a capital sum; or

(c) any fine imposed—

(i) for contempt of court;

(ii) for professional misconduct under any enactment; or

1868 c. 100.

(iii) under section 91 of the Court of Session Act 1868 (orders for restoration of property or specific performance of statutory duty);

"decree" includes—

(a) an extract of a document which is registered for execution in the Books of Council and Session or in sheriff court books;

(b) an order or determination which by virtue of any enactment is enforceable as if it were an extract registered decree arbitral bearing a warrant for execution issued by the sheriff;

(c) a civil judgment granted outside Scotland by a court, tribunal or arbiter which by virtue of any enactment or rule of law is enforceable in Scotland; and

(d) a document or settlement which by virtue of an Order in Council made under section 13 of the Civil Jurisdiction and Judgments Act 1982 is enforceable in Scotland;

"poinding" does not include poinding of the ground, and"poinded" shall be construed accordingly;

"sheriff"—

(a) in relation to a debt constituted by decree, or enforceable by a summary warrant, granted by a sheriff, means that sheriff or another sheriff sitting in the same sheriff court, and in this paragraph"decree" does not include an extract of a document which is registered for execution in sheriff court books;

(b) in any other case, means the sheriff having jurisdiction—

(i) over the place where the debtor is domiciled; or

(ii) if the debtor is not domiciled in Scotland, over a place in Scotland where he carries on business; or

and diligence expenses. As to diligence expenses, see further *clause* 118, especially *subsections* (1), (2) *and* (4)(*a*). The exclusionary provisions of *paragraphs* (*a*) to (*c*) of the definition implement Recommendation 3.13(2) (para. 3.58).

The definition of "decree", implementing in part Recommendation 3.13(1) (para. 3.58), extends the term to cover other documents of debt enforceable by diligence. At the date of the submission of this report (14 June 1985), the Civil Jurisdiction and Judgments Act 1982, s. 13 had not yet come into force.

The definition of "poinding" (which corresponds to *clause* 2(3) on time to pay directions) excludes the heritable creditor's diligence of poinding of the ground from various provisions referring to poindings, notably *clauses* 4(4), 7(1)(*a*), 8(1)(*a*), 8(2)(*d*), 8(3), 8(7), 8(8) *and* 9(4), and ensures *inter alia* that time to pay orders, and interim sists of diligence pending applications for such orders, will not affect poindings of the ground.

The definition of "sheriff" implements Recommendation 3.16(2) (para. 3.71). At the date of the submission of this report (14 June 1985), the Civil Jurisdiction and Judgments Act 1982, s. 41 had not yet come into force.

(iii) if the debtor does not carry on business in Scotland, over a place where he has property which is not exempt from diligence;

and, for the purposes of sub-paragraphs (i) and (ii) above, the debtor's domicile shall be determined in accordance with section 41 of the Civil Jurisdiction and Judgments Act 1982.

1982 c. 27.

Application for time to pay order.

5.—(1) An application for a time to pay order shall—

(a) include an offer to pay the debt—

(i) by instalments of such amount and frequency; or

(ii) after the expiry of such period,

as shall be specified in the application; and

(b) specify, to the best of the debtor's knowledge, the amount of the debt outstanding as at the date of the making of the application.

(2) The sheriff clerk shall, if requested by the debtor, assist him in the completion of the form of application for a time to pay order in accordance with proposals for payment made by the debtor:

Provided that the sheriff clerk shall not be liable for any failure by him in performing the duty imposed on him by this subsection.

(3) On receipt of such an application, the sheriff shall, if the application is properly made and unless it appears to him that the making of a time to pay order would be incompetent, make an interim order sisting diligence by the creditor to enforce the debt.

(4) The sheriff may, where the debtor is unable to furnish the necessary information to him, make an order requiring the creditor, within such period as may be specified in the order, to furnish to the sheriff—

(a) such particulars of his decree as may be prescribed; or

(b) if the application is made by virtue of the granting of a summary warrant, an excerpt from the certificate which accompanied the application for the summary warrant showing the amount due and unpaid by the debtor;

and, if the creditor fails to comply with this subsection, the sheriff may, after giving the creditor an opportunity to make representations, make an order recalling or extinguishing any existing diligence, and interdicting the creditor from executing diligence, for the recovery of the debt concerned.

(5) Where the sheriff makes an interim order under subsection (3) above, the sheriff clerk shall forthwith—

(a) send a copy of the application for the time to pay order to the creditor informing him that he may object to the granting of the application within a period of 14 days after the date of sending the copy; and

Clauses 5 *and* 6

These clauses, implementing Recommendation 3.17(1) (para. 3.76) as read with paras. 3.72 to 3.75, regulate the procedure in applications for time to pay orders and the disposal of such applications.

Clause 5

This clause regulates the initial procedure to be followed in applications for time to pay orders. Further provisions are made in *clauses* 121, 122 *and* 123.

Subsection (3)

This subsection implements Recommendation 3.18(1) (para. 3.85). The effect of an interim order sisting diligence is regulated by *clause* 7.

Subsection (4)

The need for this subsection is discussed at paragraph 3.73.

(b) intimate to the creditor the making of the interim order and any order under subsection (4) above.

Disposal of application.

6.—(1) If no objection is duly made in pursuance of section 5(5)(a) of this Act, the sheriff shall make a time to pay order in accordance with the application.

(2) If such an objection is duly made, the sheriff shall not dispose of the application without first—

(a) giving the debtor an opportunity to make representations; and

(b) if agreement is not reached as to whether a time to pay order should be made or as to its terms, giving the parties an opportunity to be heard.

(3) Where the sheriff refuses to make a time to pay order, he shall recall any interim order under section 5(3) of this Act.

(4) The sheriff clerk shall forthwith—

(a) intimate the decision of the sheriff on an application for a time to pay order (including any recall of an interim order under subsection (3) above) to the debtor and the creditor; and

(b) if the sheriff has made a time to pay order, inform the creditor of the date when he intimated that fact to the debtor.

Effect of interim sist of diligence.

7.—(1) While an interim order under section 5(3) of this Act is in force, it shall render incompetent in respect of the debt concerned—

(a) the granting of an application for warrant of sale of articles which, before or after the making of the interim order, have been poinded, and any such application (other than an application for an order under section 46(2)(b) of, or paragraph 5(2)(b) of Schedule 6 to, this Act) which is pending when the interim order comes into force shall fall ;

(b) where articles belonging to the debtor have been poinded in pursuance of a summary warrant granted before or after the making of the interim order,the intimation under paragraph 12(1) of Schedule 6 to this Act of the date arranged for the removal of the poinded articles for sale or, if the articles are to be sold in the premises where they are situated, of the date arranged for the holding of the sale;

(c) the service of an earnings arrestment schedule;

(d) where an arrestment of property belonging to the debtor (other than an arrestment of earnings in the hands of his employer) has been executed before or after the making of the interim order, the raising of an action of furthcoming

Clause 6

This clause makes further provision as to the procedure in applications for time to pay orders, and regulates the disposal of the application. Appeals are regulated by *clause* 128.

Subsection (4)

On this provision, see paragraph 3.75.

Clause 7

This clause regulates the effect of an interim order under *clause* 5(3) sisting diligence.

Subsection (1)

This subsection governs the effect of the interim sist in precluding or restricting new diligences or the continuation of existing diligences.

or sale, or the granting of a decree in any such action which has already been raised, in pursuance of that arrestment;

(e) the raising of an action of adjudication for debt or, if such an action has already been raised, the taking of any steps other than the registration of a notice of litigiosity in connection with the action, the obtaining and extracting of a decree in the action, the registration of an abbreviate of adjudication and the completion of title to property adjudged by the decree.

(2) Any such interim order shall come into force on its making being intimated to the creditor under section 5(5)(b) of this Act and shall remain in force until intimation is made to the debtor and the creditor under section 6(4)(a) of this Act.

(3) The period during which such an interim order is in force shall be disregarded in calculating the period during which a poinding to which the order applies remains effective.

Effect of time to pay order on diligence.

8.—(1) While a time to pay order is in effect, it shall be incompetent to commence or execute any of the following diligences—

(a) a poinding and sale;

(b) an earnings arrestment;

(c) an arrestment and action of furthcoming or sale;

(d) an adjudication for debt;

(e) a charge for payment,

to enforce payment of the debt concerned.

(2) On making a time to pay order, the sheriff in respect of the debt concerned—

(a) shall make an order recalling any existing earnings arrestment;

(b) where the debt is being enforced by a conjoined arrestment order, shall—

(i) if he, or another sheriff sitting in that sheriff court, made the order, vary it so as to exclude the debt or, where neither any other debt nor maintenance is being enforced by the order, recall the order;

(ii) if a sheriff sitting in another sheriff court made it, require intimation of the time to pay order to be made to a sheriff sitting in that other sheriff court who on receipt of such intimation shall so vary or, as the case may be, recall the conjoined arrestment order;

(c) where an action of adjudication for debt has been raised, shall make an order prohibiting the taking of any steps other than the registration of a notice of litigiosity in connection with the action, the obtaining and extracting of a decree in

Subsection (2)

This subsection regulates the duration of the interim sist.

Subsection (3)

This subsction implements Recommendation 3.18(3) (para. 3.85) so far as relating to poindings; as to the effect of the interim sist on the period of the prescription of arrestments in common form, see *Schedule* 7, *para.* 2.

Clause 8

This clause, implementing Recommendation 3.19 (para. 3.93), regulates the effect of time to pay orders on diligence.

Subsection (1)

This subsection implements Recommendation 3.19(1) (para. 3.93) and deals with new diligences.

Subsections (2) *and* (3)

These subsections implement Recommendation 3.19(2) (para. 3.93).

the action, the registration of an abbreviate of adjudication and the completion of title to property adjudged by the decree;

(d) may make an order recalling a poinding;

(e) may make an order recalling or restricting any arrestment (other than an arrestment of the debtor's earnings in the hands of his employer):

Provided that, if a poinding or such an arrestment as is mentioned in paragraph (e) above is in effect, the sheriff may order that the making of a time to pay order or the recall of the poinding or the recall or restriction of the arrestment shall be subject to the fulfilment by the debtor of such conditions as the sheriff thinks fit.

(3) Where the sheriff does not exercise the powers conferred on him by paragraph (d) or (e) of subsection (2) above to recall a diligence, he shall order that no further steps shall be taken by the creditor in the diligence concerned other than, in the case of a poinding, applying for an order under section 46(2) of, or paragraph 5(2) of Schedule 6 to, this Act, or making a report of the execution of the poinding under section 47 of this Act.

(4) Any order made under subsection (2) or (3) above shall specify the diligence or diligences in relation to which it is made.

(5) The sheriff shall not make an order under paragraph (d) or (e) of subsection (2) above without first giving the creditor an opportunity to make representations.

(6) The sheriff clerk shall intimate, at the same time as intimation under section 6(4)(a) of this Act, any order under—

(a) subsection (2) or (3) above to the debtor and the creditor and the order shall come into effect on such intimation being made to the creditor;

(b) subsection (2)(a) or (b) above to the employer.

(7) Any order under subsection (3) above shall render incompetent the granting of—

(a) a warrant (other than an order under section 46(2)(b) of, or paragraph 5(2)(b) of Schedule 6 to, this Act) to sell articles which have been poinded;

(b) a decree of furthcoming or sale of arrested property.

(8) The period during which an order under subsection (3) above is in force shall be disregarded in calculating the period during which a poinding to which the order applies remains effective.

(9) Where, before the making of a time to pay order in respect of a debt, a charge to pay the debt has been served, then, if the period for payment specified in the charge—

(a) has not expired, the charge shall lapse on the making of the order;

Subsections (4) *to* (7)

These subsections are supplementary to *subsections* (2) *and* (3).

Subsection (7)

An order under *clause* 46(2)(*b*) or *Schedule* 6, *para.* 5(2)(*b*) relates to the immediate disposal of articles which are perishable or likely to deteriorate rapidly.

Subsection (8)

This subsection implements Recommendation 3.19(3) (para. 3.93) insofar as it applies to poindings. As to the effect of a time to pay order on the period of the prescription of arrestments in common form, see *Schedule* 7, *para.* 2.

Subsection (9)

This subsection implements Recommendation 3.19(4) (para. 3.93).

(b) has expired, nothing in the time to pay order nor in any order under this section shall affect retrospectively the effect of the charge in the constitution of apparent insolvency.

(10) If, when a time to pay order in relation to a debt is made, any diligence enforcing the debt is in effect which is not specified in an order under subsection (2) or (3) above, the diligence shall remain in effect unless and until it is recalled under section 9(6) of this Act.

Lapse, variation and recall of order.

9.—(1) Where, on a day on which an instalment payable under a time to pay order becomes due, there remain unpaid two instalments payable thereunder on previous days, the order shall cease to have effect on that day.

(2) Where, immediately after the day on which the last instalment payable under a time to pay order under section 4(2)(a) of this Act becomes due, there remain unpaid any instalments payable thereunder, the order shall cease to have effect at the end of the period of 3 weeks immediately following that day if the debt has not been fully paid within that period.

(3) Where, at the end of the period specified in a time to pay order under section 4(2)(b) of this Act, any sum payable under the order has not been paid, the order shall cease to have effect 24 hours thereafter if any part of that sum remains unpaid.

(4) The sheriff in relation to a time to pay order may, on an application by the debtor or the creditor—

(a) vary or recall it if he is satisfied that it is reasonable to do so; or

(b) if a poinding or an arrestment in respect of the debt concerned is in effect, recall the poinding or recall or restrict the arrestment:

Provided that, if such a poinding or such an arrestment is in effect, the sheriff may order that any variation or recall or restriction under this subsection shall be subject to the fulfilment by the debtor of such conditions as the sheriff thinks fit.

(5) The sheriff clerk shall forthwith intimate a variation under subsection (4) above to the debtor and the creditor, and the variation shall come into effect on the date of such intimation.

(6) Where, after a time to pay order has been made, it comes to the knowledge of the sheriff that the debt to which the order applies is being enforced by any of the diligences mentioned in paragraphs (a) to (d) of section 8(1) of this Act which was in effect when the time to pay order was made, the sheriff, after giving all interested parties an opportunity to be heard, may make—

Subsection (10)

This subsection implements Recommendation 3.19(5) (para. 3.93).

Clause 9

This clause implements Recommendation 3.20 (para. 3.97) and makes provision on the lapse, variation and recall of time to pay orders similar to the provisions in *clause* 3 applying to the lapse, variation and recall of time to pay directions, but with some modifications.

Subsection (1)

This subsection corresponds to *clause* 3(1).

Subsection (2)

This subsection corresponds to *clause* 3(2).

Subsection (3)

This subsection corresponds to *clause* 3(3).

Subsection (4)

This subsection corresponds to *clause* 3(5) but, unlike *clause* 3(5), extends to poindings since a poinding may have been executed prior to the time to pay order and not recalled under *subsection* (2)(*d*) of *clause* 8.

Subsection (5)

This subsection corresponds to *clause* 3(6).

Subsection (6)

This subsection gives the sheriff powers to deal with the situation arising where he ascertains the existence of a diligence of which he was unaware when he made the time to pay order.

(a) an order recalling the time to pay order; or

(b) any of the orders mentioned in subsection (2) or (3) of section 8 of this Act; and the provisions of that section shall, subject to any necessary modifications, apply for the purposes of an order made under this paragraph as they apply for the purposes of an order made under either of those subsections.

(7) Where a time to pay order is recalled or ceases to have effect, otherwise than under section 10(2)(a) of this Act or by reason of the debt being satisfied, the debt in so far as it remains unpaid and interest thereon, from whatever date it has accrued, shall, subject to any enactment or rule of law to the contrary, become enforceable by any of the diligences mentioned in paragraphs (a) to (e) of section 8(1) of this Act; and, notwithstanding section 50 of this Act and paragraph 8 of Schedule 6 to this Act, in this subsection"diligence" includes, where the debt immediately before the time to pay order was made was being enforced by a poinding in any premises, another poinding in those premises.

Provisions applicable to both time to pay directions and orders

Sequestration and insolvency.

10.—(1) While a time to pay direction or a time to pay order is in effect, the creditor shall not be entitled to found on the debt concerned in presenting, or in concurring in the presentation of, a petition for the sequestration of the debtor's estate.

(2) A time to pay direction or a time to pay order shall cease to have effect—

(a) on the granting of an award of sequestration of the debtor's estate; or

(b) on the granting by the debtor of a voluntary trust deed whereby his estate is conveyed to a trustee for the benefit of his creditors generally; or

(c) on the entering by the debtor into a composition contract with his creditors; or

(d) if the sheriff has made an order under section 19(2) of this Act appointing an administrator to prepare a draft of a debt arrangement scheme in relation to the debts of the debtor, on the first notice date as defined in section 15(2)(a) of this Act.

Saving of creditor's other rights or remedies.

11.—(1) No right or remedy of a creditor to enforce his debt shall be affected by—

(a) a time to pay direction; or

(b) a time to pay order; or

(c) an interim order under section 5(3) of this Act,

except as provided by any provision of this Part of this Act.

Subsection (7)

The first part of this subsection, dealing with the revival of the right to do diligence, corresponds to *clause* 3(7). The second part disapplies restrictions on second poindings on the same premises (set out in *clause* 50 and *Schedule* 6, *para.* 8) in cases where the right to do diligence revives.

Clause 10

Subsection (1)

This subsection implements Recommendation 3.21(1) (para. 3.100).

Subsection (2)

This subsection implements Recommendation 3.21(2) (para. 3.100).

Clause 11

Subsection (1)

This subsection implements Recommendation 3.24 (para. 3.118).

(2) The recall—

(a) on the making of a time to pay direction or an order under section 3(5) of this Act, of an arrestment; or

(b) on the making of a time to pay order or an order under section 9(4) of this Act, of an arrestment or a poinding,

shall not prevent the creditor in that arrestment or poinding from being ranked by virtue of that arrestment or poinding *pari passu* under paragraph 10 of Schedule 7 to the Bankruptcy (Scotland) Act 1985 on the proceeds of any other arrestment or poinding.

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Debtors in relation to whom direction or order may have effect.

12.—(1) It shall be competent to make a time to pay direction or a time to pay order only in relation to a debtor who is an individual and only if, and to the extent that, the debtor—

(a) is personally liable for payment of the debt concerned;

(b) is liable for such payment as a tutor of an individual or as a judicial factor loco tutoris, curator bonis or judicial factor loco absentis on an individual's estate; or

(c) is liable both as mentioned in paragraph (a) and paragraph (b) above.

(2) A time to pay direction or a time to pay order shall cease to have effect on the death of the debtor or on the transmission of the obligation to pay the debt during his lifetime to another person.

Direction or order incompetent if time order made under Consumer Credit Act. 1974 c. 39.

13. Where a time order for the payment by instalments of a sum owed under a regulated agreement or a security has been made under section 129 of the Consumer Credit Act 1974 (whether the time order is in operation or not), it shall be incompetent to make a time to pay direction or a time to pay order in relation to the payment of that sum.

Subsection (2)

This subsection implements Recommendation 3.22 (para. 3.102).

Clause 12

Subsection (1)

This subsection implements Recommendations 3.2(1) and (2) (para. 3.9) and 3.12(2) (para. 3.53).

Subsection (2)

This subsection implements Recommendations 3.2(3) (para. 3.9) and 3.12(2) (para. 3.53).

Clause 13

This clause implements Recommendation 3.25(1) (para. 3.127).

PART II

DEBT ARRANGEMENT SCHEMES

Nature, content and effect of schemes

General provision.

14.—(1) A scheme (to be known as a"debt arrangement scheme") providing for the orderly and regular payment of the debts of a debtor who is an individual may be made, on application being made therefor to the sheriff, in accordance with the provisions of this Part of this Act.

(2) A debt arrangement scheme may provide—

(a) for an extension of time for the payment of the debts, whether by instalments or otherwise;

(b) for discharge of the debts on payment only to the extent of a composition; or

(c) both for such an extension of time and for discharge on payment only to the extent of a composition.

(3) A scheme which provides for—

(a) an extension of time for the payment of the debts, shall specify a period within which the payments shall be made, being a period not exceeding 3 years after the date when the scheme comes into force;

(b) payment only to the extent of a composition shall state—

(i) the proportion of the amount of each creditor's debt; and

(ii) the total amount,

to be paid under the scheme:

Provided that this paragraph shall have effect in relation to a debt which is included in the scheme on its variation under section 28(1) of this Act as if after the words"under the scheme" there were added the words"and under a decree granted under section 31(6)(a) of this Act.".

(4) Every scheme shall provide that all sums to be paid thereunder shall be payable to a person appointed under this Part of this Act (to be known as the"administrator") and, subject to sections 36(6)(a)(i) and 37(2) of this Act, shall thereafter be disbursed by him to the creditors whose debts are included in the scheme; and the scheme shall regulate the method and times for the making of such payments to the administrator and for such disbursement by him.

(5) A scheme may include a provision (subject to such conditions as may be specified in the scheme) that the debtor shall, within a period specified in the scheme—

EXPLANATORY NOTES

Part II (*clauses* 14 *to* 42) makes provision introducing and regulating debt arrangement schemes.

Clause 14

This clause makes general provision as to the content and nature of debt arrangement schemes.

Subsection (1)

This subsection introduces debt arrangement schemes in Scots law, implementing Recommendation 4.1 (para. 4.34). The sheriff is to have exclusive jurisdiction in scheme applications in terms of Recommendation 4.7 (para. 4.56) and only debtors who are individuals would have a title to make such applications as proposed by Recommendation 4.9(1) (para. 4.72).

Subsection (2)

This subsection implements Recommendation 4.2(1) (para. 4.41).

Subsection (3)

Paragraph (*a*) of this subsection implements Recommendation 4.2(2) (para. 4.41). *Paragraph* (*b*) of the subsection implements Recommendation 4.2(4) (para. 4.41).

Subsection (4)

This subsection implements Recommendation 4.3(1) (para. 4.44).

Subsection (5)

This subsection implements Recommendation 4.4(1) (para. 4.47).

(a) pay such funds to the administrator as may be so specified;

(b) dispose of such assets (not being articles of moveable property exempt from diligence) as may be so specified and pay the net proceeds of such disposal to the administrator for disbursement to the creditors in accordance with the scheme.

(6) A scheme may include a condition that the debtor shall not be entitled, while the scheme is in force, to obtain credit exceeding an amount or amounts specified in the condition:

Provided that—

(a) no condition so included shall restrict the obtaining of credit by the debtor for the purpose of paying—

(i) rent; or

(ii) debts incurred in obtaining the supply of fuel or energy,

for his residence,

(b) the scheme may exempt from the condition the obtaining of credit for the purposes of paying for such goods or services as may be specified in the condition.

(7) Every scheme shall include a statement that an order may be made under section 25(1) of this Act.

(8) It shall only be competent to include in a scheme debts for the payment of which the debtor is personally liable.

(9) A scheme shall come into force on the date on which an order under section 24 of this Act confirming the scheme takes effect and shall cease to have effect on the death of the debtor or as provided in section 32(1) of this Act.

(10) A scheme may be made only on an application by the debtor and the debtor may withdraw his application at any time before confirmation of the scheme under section 24 of this Act.

Debts to be included in scheme initially.

15.—(1) Subject to the provisions of this section and without prejudice to sections 23(1) and 28(1) of this Act, there shall be included in a debt arrangement scheme all debts which are payable as at—

(a) the date on which the notice is served under section 19(3) of this Act in connection with the scheme; or

(b) if such a notice is served on different creditors on different dates, the earliest date on which such a notice is served.

(2)(a) The date or, as the case may be, the earliest date mentioned in paragraph (a) or (b) of subsection (1) above is referred to in this Part of this Act as"the first notice date"; and

(b) in subsection (1) above, where a notice is served by posting, any reference to the date on which a notice is served shall be construed as a reference to the date on which it is posted.

Subsection (6)

This subsection implements Recommendation 4.5(1) (para. 4.49).

Subsection (7)

This subsection implements Recommendation 4.3(2) (para. 4.44).

Subsection (8)

This subsection implements Recommendation 4.9(2) (para. 4.72).

Subsection (9)

This subsection implements Recommendation 4.2(2) (para. 4.41) in part, and Recommendation 4.45(1) (para. 4.298) as read with paragraph 4.295.

Subsection (10)

This subsection implements Recommendation 4.6 (para. 4.54).

Clause 15

This clause regulates the eligibility of debts for initial inclusion in a scheme. Generally all debts must be included unless an impediment to inclusion provided for in the clause exists at "the first notice date" as defined in *subsection* (2). Where such an impediment to inclusion of a debt ceases to exist after the first notice date, the inclusion or possible inclusion of the debt before confirmation of the scheme is regulated by *clause* 23 and after confirmation by *clause* 28.

Subsections (1) *and* (2)

Subsection (1) provides for inclusion of debts payable as at the date mentioned in *paragraph* (*a*) or, as the case may be, *paragraph* (*b*) of the subsection. *Subsection* (2) defines that date as "the first notice date". Debts which are future or contingent as at the first notice date are not included under *subsection* (1): see Recommendations 4.10(2) (para. 4.80) and 4.16(1)(*a*) (para. 4.138).

(3) There shall be excluded from the scheme any debt—

(a) which at the first notice date has not been constituted by decree and in respect of which the debtor does not admit liability or the amount;

(b) which at the first notice date has been so constituted but in respect of which there is a dispute as to whether the debt or any part thereof remains unpaid.

(4) There shall be excluded from the scheme any debt comprising expenses of court proceedings awarded against the debtor unless at the first notice date—

(a) an extract of a decree decerning for payment of the expenses has been obtained, being a decree or extract specifying their amount; or

(b) the amount of the expenses has been agreed between the creditor and the debtor.

(5) There shall be excluded from the scheme any debt—

(a) due under a hire-purchase agreement or conditional sale agreement—

(i) which is in force at the first notice date; or

(ii) if at the first notice date the debtor is by virtue of section 130(4) of the Consumer Credit Act 1974 treated as a custodier under the terms of the agreement of the goods to which the agreement relates;

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(b) due under a regulated consumer hire agreement, if, at the first notice date in respect of the debt, an application under subsection (1) of section 132 of that Act (financial relief for hirer) is pending or proceedings in which the court may make an order under subsection (2) of that section are pending;

(c) due under a credit agreement in respect of which, at the first notice date, an application under section 139 of that Act (reopening of extortionate agreements) is pending.

(6) There shall be excluded from the scheme any debt, if at the first notice date there are in force both a time order under section 129(2)(a) of the Consumer Credit Act 1974 for the payment of the debt by instalments and another order relating to the debt, or to the agreement under which the debt is owed, made under section 129(2)(b), 131, 133, 135(1) or 136 of that Act.

(7) There shall be excluded from the scheme any debt in respect of which the creditor—

(a) holds a security over property of the debtor, unless the creditor, at the first notice date, has discharged his security, or realised the security subjects or acquired them in partial satisfaction of the debt;

Subsection (3)

This subsection, implementing in part Recommendations 4.10(2) (para. 4.80) and 4.16(1)(*b*) (para. 4.138), excludes debts which are disputed as at the first notice date.

Subsection (4)

This subsection implements Recommendation 4.10(4) (para. 4.80).

Subsection (5)

Paragraph (*a*) of this subsection implements Recommendation 4.28(2) (para. 4.205).
Paragraph (*b*) of the subsection implements Recommendation 4.28(6) (para. 4.205).
Paragraph (*c*) of the subsection implements Recommendation 4.16(1)(*c*) (para. 4.138).

Subsection (6)

This subsection implements Recommendation 4.28(3)(a) (para. 4.205).

Subsection (7)

Paragraph (*a*) of this subsection implements Recommendation 4.23(2) (para. 4.174).
Paragraph (*b*) of the subsection implements Recommendation 4.25(1) (para. 4.178).

(b) has a right of retention or lien over property (other than documents) of the debtor unless the creditor, at the first notice date, has realised the property in partial satisfaction of the debt or the right of retention or lien has otherwise ceased to have effect.

(8) There shall be excluded from the scheme any debt—

(a) in respect of which the creditor has a right to poind the ground; or

(b) comprising rent or feuduty for the recovery of which the creditor as landlord or superior has a hypothec;

unless the creditor at the first notice date has entered into an agreement not to enforce the debt by poinding of the ground or (as the case may be) by sequestration for rent or feuduty.

(9) There shall be excluded from the scheme any debt in respect of which the creditor has raised an action of adjudication for debt, unless the creditor at the first notice date has abandoned the action and has discharged any notice of litigiosity which has been registered in connection with the action, any abbreviate of adjudication which has already been registered and any decree in the action which he has already obtained.

Ranking of creditors whose debts are included in scheme.

16.—(1) Each creditor whose debt is included in a debt arrangement scheme (including any creditor whose debt is included under section 23(1) of this Act or on a variation of the scheme under section 28(1) of this Act) shall be entitled—

(a) under the scheme to receive payment of his full debt or, where payment is being made under the scheme only to the extent of a composition, the same proportion of his debt;

(b) in any disbursement made by the administrator under the scheme, to receive the same proportion of his debt.

(2) For the purposes of subsection (1) above, the amount of a creditor's debt shall be, in the case of a creditor whose debt is included—

(a) in the scheme by virtue of section 15(1) of this Act, the amount payable on the first notice date;

(b) in the scheme by virtue of section 23(1) of this Act, the amount payable on the date when the administrator became satisfied as to the eligibility of the debt for inclusion in the scheme or, as the case may be, as to the amount of the debt;

(c) on a variation of the scheme under section 28(1) of this Act, the amount payable on the date when the application was made for the variation.

Subsection (8)

This subsection implements Recommendation 4.24(2) (para. 4.176).

Subsection (9)

This subsection implements in part Recommendation 4.14(3) (para. 4.118).

Clause 16

Subsection (1)

This subsection implements Recommendations 4.11(1) and (2) (para. 4.96) and 4.12 (para. 4.98).

Subsection (2)

Paragraph (a) of this subsection implements Recommendation 4.10(1) (para. 4.80). *Paragraph (b)* implements Recommendation 4.17(1) (para. 4.143). *Paragraph (c)* implements Recommendation 4.17(2)(a) (para. 4.143).

Circumstances when scheme application is competent and may be entertained.

17.—(1) An application for a debt arrangement scheme (in this Part of this Act referred to as a"scheme application") shall be competent only if the debtor is unable to pay his debts as they fall due and he owes not less than 3 debts and at least one of the debts—

(a) has been constituted by decree and in respect of that debt—

(i) a charge for payment has been served on the debtor;

(ii) an arrestment (other than an arrestment of the debtor's earnings in the hands of his employer) has been executed; or

(iii) an action of adjudication for debt has been raised; or

(b) is a debt in respect of which a summary warrant has been granted.

(2) A scheme application shall be incompetent where at the date of the application—

(a) a petition for the sequestration of the debtor's estate has been presented (whether by a creditor or the debtor) and proceedings in the petition are continuing or an award of sequestration of the debtor's estate has been granted and the debtor has not yet obtained a discharge; or

(b) the debtor has granted a voluntary trust deed whereby his estate has been conveyed to a trustee for the benefit of his creditors generally, and the deed subsists; or

(c) the debtor has entered into a composition contract with his creditors and the contract subsists; or

(d) in relation to the debtor a debt arrangement scheme is already in force or another scheme application is pending.

(3) Without prejudice to subsections (1) and (2) above, a scheme application may be entertained only if it appears to the sheriff that—

(a) the total debts (excluding interest and expenses and any debt secured by a heritable security) do not exceed £10,000 or such amount as may be prescribed in regulations made by the Secretary of State; and

(b) the debtor's resources, by way of income or otherwise, would be likely to be sufficient to produce not less than £600, or such sum as may be prescribed in regulations made by the Secretary of State, over a period of 3 years.

(4) For the purposes of subsection (3)(b) above, the resources of the debtor shall be such resources as are left to him after he has met—

(a) the daily needs of himself and any person whom he is maintaining as a dependant in his household; and

(b) any sum due under an order of a court in criminal proceedings;

and for the purposes of paragraph (a) above"daily needs" may include periodic payments required to be made by the debtor in respect of a security over his residence.

EXPLANATORY NOTES

Clause 17

Subsection (1)

This subsection implements Recommendation 4.9(4) (para. 4.72).

Subsection (2)

This subsection implements Recommendation 4.46(2)(a) (para. 4.311).

Subsection (3)

This subsection implements Recommendation 4.9(5) (para. 4.72).

Subsection (4)

This subsection is supplementary to *subsection* (3). As to the reference to persons maintained by the debtor as dependants in his household, see paragraph 4.163. The extension of the meaning of "daily needs" implements Recommendation 4.23(4) (para. 4.174).

(5) Any regulations under subsection (3)(a) or (b) above shall be made by statutory instrument and any such regulations shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Effect of scheme.

18.—(1) Subject to subsections (2) and (3) below, a debt arrangement scheme, after it has been confirmed under section 24 of this Act and unless and until the decision confirming it is reversed on appeal on the final determination of the case or, if the scheme comes into force, until it has been revoked or has otherwise ceased to have effect, shall render incompetent—

(a) by every creditor of the debtor (whether his debt is included in the scheme or not or was incurred before or after the confirmation of the scheme) the commencement or execution of the following diligences (whether used on the dependence, in security or in execution) in relation to his debt—

(i) a poinding and sale;

(ii) an earnings arrestment;

(iii) a current maintenance arrestment;

(iv) an arrestment and action of furthcoming or sale;

(v) an inhibition;

(vi) an adjudication for debt;

(vii) a charge for payment;

(b) the making and granting of an application by such a creditor under section 4 of the Civil Imprisonment (Scotland) Act 1882 (wilful failure to obey decree for alimentary debt) for a warrant to commit the debtor to prison;

1882 c. 42.

(c) by every such creditor or by the debtor the presentation of a petition for the sequestration of the debtor's estate.

(2) A creditor shall not be liable in damages to the debtor by reason only of commencing or executing any diligence, making an application or presenting a petition for the sequestration of the debtor's estate, rendered incompetent by subsection (1)(a), (b) or (c) above unless the debtor establishes that the creditor was aware that the scheme had been confirmed.

(3) Where a creditor—

(a) executes diligence against the debtor; or

(b) presents, or concurs in, a petition for the sequestration of the debtor's estate,

while such diligence or petition is incompetent by virtue of subsection (1) above but at the time of that execution or presentation the creditor is unaware that the circumstances are such that the diligence or petition is incompetent, then any expenses incurred by him in the execution of the diligence or the presentation of the petition before

EXPLANATORY NOTES

Clause 18

Subsection (1)

Paragraph (*a*) of this subsection implements Recommendations 4.14(1) (para. 4.118) and 4.18(1) (para. 4.148). *Paragraph* (*b*) implements in part Recommendation 4.22(5) (para. 4.168). *Paragraph* (*c*) implements Recommendation 4.46(6) (para. 4.311).

Subsection (2)

This subsection implements Recommendation 4.18(2)(*a*) (para. 4.148).

Subsections (3) *and* (4)

These subsections in their application to diligence expenses implement Recommendation 4.18(2)(*c*) (para. 4.148) and make similar provision in relation to the expenses of sequestration petitions.

he became so aware and which would be chargeable against the debtor if the diligence or petition were competent shall be so chargeable.

(4) The expenses mentioned in subsection (3) above may, notwithstanding section 118(1) or (2) of this Act, be included as a debt in the debt arrangement scheme concerned upon a variation of the scheme under section 28(1) of this Act.

(5) Subject to subsection (6) below, on the coming into force of a debt arrangement scheme—

(a) any charge already served by any creditor (whether or not his debt is included in the scheme), where the period for payment specified therein has not expired, shall lapse;

(b) any diligence mentioned in paragraph (a)(i) to (v) of subsection (1) above, and any conjoined arrestment order, shall become ineffectual; and

(c) there shall cease to have effect any time order under section 129(2)(a) of the Consumer Credit Act 1974 for the payment of the debt by instalments in a case where there is not in force any other order relating to the debt, or to the agreement under which the debt is owed, made under section 129(2)(b), 131, 133, 135(1) or 136 of that Act.

1974 c. 39.

(6) Subsection (5)(b) above shall not apply to any of the following diligences—

(a) a poinding in which a warrant of sale has been granted but has not been executed;

(b) a poinding executed in pursuance of a summary warrant if intimation has been made to the debtor under paragraph 12(1) of Schedule 6 to this Act of the date arranged for the removal of the poinded articles for sale or, if the articles are to be sold in the premises where they are situated, of the date arranged for the holding of the sale;

(c) an arrestment of moveable property of the debtor if in respect of the arrested property—

(i) a decree in an action of furthcoming has been granted but has not been enforced; or

(ii) a warrant of sale has been granted but the warrant has not been executed.

(7) Where a poinding of articles belonging to the debtor has been executed by a creditor in any premises—

(a) which has become ineffectual on the coming into force of a debt arrangement scheme; or

(b) while a scheme was in force at a time when the creditor was unaware that it was in force,

then, notwithstanding section 50 of this Act and paragraph 8 of Schedule 6 to this Act, after the scheme has ceased to have effect,

Subsection (5)

Paragraph (*a*) of the subsection implements Recommendation 4.14(4) (para. 4.118). *Paragraph* (*b*) implements in part Recommendation 4.14(2) (para. 4.118). *Paragraph* (*c*) implements Recommendation 4.28(3)(*b*) (para. 4.205).

Subsection (6)

This subsection implements in part Recommendation 4.14(2)(*a*) to (*c*) (para. 4.118).

Subsection (7)

This subsection implements Recommendation 4.18(3) (para. 4.148).

the creditor may enforce any outstanding part of his debt by a poinding in the same premises.

(8) In this section"a poinding" does not include a poinding of the ground.

Applications for schemes and their disposal

Initial procedure on application.

19.—(1) A scheme application shall be in the prescribed form and shall be accompanied by a statement of the debtor's affairs containing prescribed particulars.

(2) On receipt of a scheme application, the sheriff shall, subject to section 17(1), (2) and (3) of this Act, make an order appointing an administrator to prepare a draft of a debt arrangement scheme.

(3) The administrator shall, within such period after an order has been made under subsection (2) above as may be prescribed, serve on each creditor whose debt appears to the administrator to be eligible for inclusion in the scheme a notice—

(a) stating to the best of the administrator's knowledge, the amount of the creditor's debt as at the date specified in the notice, being the first notice date, and

(b) requiring the creditor within 10 days after the date of the service of the notice on him to inform the administrator in writing—

(i) whether he accepts that the amount of his debt as at the date specified in the notice is correctly stated in the notice and, if not, to state the amount which he claims; and

(ii) whether he is claiming interest on his debt so far as accrued up to that date and, if so, the amount of interest claimed.

(4) If a creditor fails to comply with a requirement of subsection (3)(b) above, he shall not be entitled, except on cause shown, to object to the scheme on the ground that his debt (including any interest) is not included, or is not correctly stated, in the scheme.

(5) Where it appears to the sheriff that it is likely that the statement of the debtor's affairs does not specify all the debts which would qualify under section 15 of this Act for inclusion in the scheme, he may order such advertisement as he thinks fit inviting creditors to submit claims to the administrator for inclusion of their debts in the scheme.

(6) The debtor shall be liable for the expenses incurred in an advertisement under subsection (5) above.

Interim measures pending disposal of application.

20.—(1) The sheriff shall, on making an order under section 19(2) of this Act appointing an administrator, make an interim order sisting diligence against the debtor to enforce debts.

Subsection (8)
This subsection implements in part Recommendation 4.24(1) (para. 4.176).

Clause 19
Subsection (1)
This subsection implements Recommendation 4.32(1) (para. 4.238).

Subsection (2)
This subsection implements Recommendation 4.32(2) (para. 4.238).

Subsections (3) *and* (4)
These subsections implement Recommendation 4.32(3) (para. 4.238).

Subsections (5) *and* (6)
These subsections implement Recommendation 4.32(4) (para. 4.238).

Clause 20
Subsection (1)
This subsection implements Recommendation 4.13(1) (para. 4.109).

(2) The administrator shall as soon as is reasonably practicable serve a copy of an interim order under subsection (1) above on each person who he knows is, or has reasonable cause to believe may be, a creditor of the debtor; and the order shall come into force in relation to such a person on such service being made on him.

(3) While an interim order under subsection (1) above is in force, it shall render incompetent—

(a) the granting of an application for warrant of sale of articles which, before or after the making of the interim order, have been poinded, and any such application (other than an application for an order under section 46(2)(b) of, or paragraph 5(2)(b) of Schedule 6 to, this Act) which is pending when the interim order comes into force shall fall;

(b) where articles belonging to the debtor have been poinded in pursuance of a summary warrant granted before or after the making of the interim order, the intimation under paragraph 12(1) of Schedule 6 to this Act of the date arranged for the removal of the poinded articles for sale, or, if the articles are to be sold in the premises where they are situated, of the date arranged for the holding of the sale;

(c) the service of an earnings arrestment schedule;

(d) where an arrestment of the debtor's property (other than an arrestment of earnings in the hands of his employer) has been executed before or after the making of the interim order, the raising of an action of furthcoming or sale, or the granting of a decree in any such action which has already been raised, in pursuance of that arrestment;

(e) the raising of an action of adjudication for debt or, if such an action has already been raised, the taking of any steps other than the registration of a notice of ligitiosity in connection with the action, the obtaining and extracting of a decree in the action, the registration of an abbreviate of adjudication and the completion of title to property adjudged by the decree;

(f) the making and granting of an application under section 4 of the Civil Imprisonment (Scotland) Act 1882 (wilful failure to obey decree for alimentary debt) for a warrant to commit the debtor to prison.

1882 c. 42.

(4) Subject to sub-paragraph (3) of paragraph 9 of Schedule 3 to the Conveyancing and Feudal Reform (Scotland) Act 1970 (circumstances in which debtor in standard security is held to be in default), for the purposes of any provision of any document which confers rights or imposes duties on the constitution of the apparent insolvency of the debtor, the making of an interim order under subsection (1) above shall, unless the contrary intention appears in the document, be deemed to constitute apparent insolvency.

1970 c. 35.

Subsection (2)

This subsection implements Recommendation 4.13(2) (para. 4.109).

Subsection (3)

This subsection implements Recommendations 4.13(3) (para. 4.109), (in part) 4.22(2), (4) and (5) (para. 4.168) and 4.24(1) (para. 4.176).

Subsection (4)

This subsection implements Recommendation 4.46(1) (para. 4.311). The Conveyancing and Feudal Reform (Scotland) Act 1970, Schedule 3, paragraph 9(3), is set out in *Schedule* 7, *paragraph* 15 with amendments proposed in Recommendation 4.23(3) (para. 4.174).

(5) The period during which such an interim order is in force shall be disregarded in calculating the period during which a poinding to which the order applies remains effective.

(6) The administrator at any time after an order has been made under section 19(2) of this Act may require the debtor, pending the disposal of the scheme application under section 21 or 24 of this Act, to give an undertaking not to dispose of, nor to remove from any place in Scotland, any property belonging to the debtor which is specified by the administrator.

(7) In subsection (3)(a) above"poinded" does not include poinded under a poinding of the ground.

Refusal of scheme application at sheriff's instance or on administrator's application.

21.—(1) The sheriff, at any time between the appointment of the administrator and the confirmation of the debt arrangement scheme, at his own instance or on an application by the administrator—

(a) shall, if he is satisfied as to any of the matters mentioned in subsection (2) below;

(b) may, on either of the grounds mentioned in subsection (3) below,

make an order refusing the scheme application and recalling the interim order under section 20(1) of this Act.

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

(a) that the scheme application was incompetent by virtue of section 17(1) or (2) of this Act;

(b) that the requirements of paragraph (a) or (b) of section 17(3) of this Act are to a substantial extent not met;

(c) that the debtor is unlikely to comply with the requirements of a debt arrangement scheme;

(d) that, since the scheme application was made, an award of the sequestration of the debtor's estate has been granted;

(e) that, since the scheme application was made, the debtor has granted a voluntary trust deed whereby his estate has been conveyed to a trustee for the benefit of his creditors generally;

(f) that, since the scheme application was made, the debtor has entered into a composition contract with his creditors.

(3) The grounds referred to in subsection (1)(b) above are—

(a) that the debtor has failed to disclose information relevant to the preparation of the scheme or has otherwise failed to co-operate with the administrator;

(b) that the debtor is in breach of an undertaking given under section 20(6) of this Act.

(4) The sheriff shall not make an order under subsection (1) above without first giving the debtor an opportunity to make representations.

Subsection (5)

This subsection implements Recommendation 4.13(4) (para. 4.109) so far as applicable to poindings. As to the period of prescription of arrestments, see *Schedule 7, paragraph* 2.

Subsection (6)

This subsection implements in part Recommendation 4.34 (para. 4.249) and consequential provision is made in *clause* 21(3)(*b*).

Subsection (7)

This subsection implements in part Recommendation 4.24(1) (para. 4.176).

Clause 21

Subsections (1) *to* (3)

These subsections implement Recommendations 4.33(1) (para. 4.244), the first part of Recommendation 4.33(3) (same para.) and Recommendation 4.46(2)(*b*) (para. 4.311).

Subsection (4)

This subsection implements Recommendation 4.33(2) (para. 4.244).

(5) The administrator shall intimate an order under subsection (1) above to—

(a) the debtor;

(b) any creditor on whom service has been made under section 20 (2) or 22(1) of this Act; and

(c) any co-obligant on whom service has been made under section 22(1) of this Act.

(6) An order under subsection (1) above in so far as it recalls the interim order under section 20(1) of this Act shall not take effect while the first mentioned order is appealable or subject to an appeal or a further appeal.

Preparation and intimation of draft scheme.

22.—(1) Subject to section 21(1) of this Act, the administrator, after carrying out such enquiries as he thinks necessary and in consultation with the debtor, shall, within such period after an order has been made under section 19(2) of this Act as may be prescribed, prepare a draft of the debt arrangement scheme and serve on each person who he knows is, or has reasonable cause to believe may be, a creditor of the debtor and on any co-obligant—

(a) a copy of the scheme application;

(b) a copy of a statement of the debtor's affairs as lodged under section 19(1) of this Act, or as prepared by the administrator, accompanied by a declaration by the debtor that to the best of his knowledge and belief the statement is a full and accurate statement of his financial affairs;

(c) a copy of the draft scheme; and

(d) a notice stating that objection may be made to the scheme by any creditor or co-obligant by notice in writing to the administrator within 3 weeks, or such other period as may be prescribed, after the date of such service.

(2) The period within which service is required to be made by the administrator by virtue of subsection (1) above may be extended by the sheriff, on cause shown by the administrator, for such further period as the sheriff thinks appropriate.

(3) The sheriff, for the purpose of assisting the administrator to prepare the debt arrangement scheme, may make a remit to a sheriff officer or any other suitable person to make a valuation of any such item, or any such category of items, of the debtor's assets as he shall specify in the remit.

(4) The debtor shall be liable for the expenses incurred in a valuation under subsection (3) above.

Subsection (5)

This subsection is supplementary to *subsection* (1).

Subsection (6)

This subsection implements the second part of Recommendation 4.33(3) (para. 4.244).

Clause 22

Subsections (1) *and* (2)

These subsections implement Recommendation 4.36 (para. 4.256). As to the statement of the debtor's affairs, see paragraph 4.234.

Subsections (3) *and* (4)

These subsections implement Recommendation 4.35 (para. 4.251).

Inclusion of other debts before confirmation of scheme

23.—(1) Without prejudice to section 28(1) of this Act and subject to subsections (2) to (4) below, the administrator shall include in the draft scheme any debt—

(a) which was payable at the first notice date but which—

(i) has only come to the knowledge of the administrator after that date; or

(ii) was omitted from the scheme in error;

(b) which has been incurred since the first notice date and in respect of which the liability and amount are admitted;

(c) which it was incompetent to include in the scheme by reason of section 15(3)(a) of this Act but, since the first notice date—

(i) the debt has become constituted by decree, or

(ii) the liability therefor and the amount thereof have been admitted;

(d) which it was incompetent to include in the scheme by reason of paragraph (b) of section 15(3) of this Act but in respect of which the dispute mentioned in that paragraph has been resolved;

(e) which was incurred before the first notice date but which has become payable only since that date;

(f) which it was incompetent to include in the scheme by reason of section 15(6) of this Act but in respect of which the time order under section 129(2)(a) of the Consumer Credit Act 1974 has been revoked or has otherwise ceased to have effect; or

1974 c. 39.

(g) which, because of the circumstances existing at the first notice date, was excluded from the scheme under section 15(4), (5), (7), (8) or (9) of this Act, if those circumstances no longer exist.

(2) The administrator shall not include a debt mentioned in subsection (1) above in the draft scheme where the sheriff is of the opinion, having regard to all the circumstances including the stage which the proceedings in the scheme application have reached, that it would be more appropriate to consider the question of its inclusion in the scheme on an application being made to him under section 28(1) of this Act for a variation of the scheme.

Clause 23

This clause regulates the inclusion of debts identified, incurred, or becoming eligible for inclusion, between the first notice date (as defined in *clause* 15(2)(*a*)) and the confirmation of the scheme. It complements *clauses* 15 (initial inclusion) and 28 (inclusion after confirmation of scheme).

Subsection (1)

Paragraph (*a*) of the subsection, implementing Recommendation 4.16(3)(*a*)(i) (para. 4.138), relates to debts whose existence is identified after the first notice date or debts omitted from a draft scheme in error.

Paragraph (*b*), implementing Recommendation 4.16(3)(*a*)(ii) (para. 4.138) relates to debts incurred since the first notice date.

Paragraphs (*c*) and (*d*), implementing in part Recommendation 4.16(3)(*a*)(iii) (para. 4.138), relates to debts which were disputed at the first notice date.

Paragraph (*e*), implementing in part Recommendation 4.16(3)(*a*)(iii) (para. 4.138), relates to debts which were future or contingent at the first notice date but have become payable since that date.

Paragraph (*f*), implementing Recommendation 4.28(3)(*a*) (para. 4.205), relates to debts subject at the first notice date to both a time order under the Consumer Credit Act 1974, section 129(2)(a) and to another order under any of the provisions of that Act specified in *clause* 15(6).

Paragraph (*g*) relates to the following types of debts which were ineligible for inclusion at the first notice date, namely court expenses ineligible under *clause* 15(4); hire purchase or conditional sale agreement debts ineligible under *clause* 15(5)(*a*); consumer hire agreement debts ineligible under *clause* 15(5)(*b*); debts challenged under the Consumer Credit Act 1974, section 139 ineligible under *clause* 15(5)(*c*); debts secured by securities, or by liens over goods, ineligible under *clause* 15(7); debts enforceable by poinding of the ground or sequestration under the hypothecs ineligible under *clause* 15(8); and debts being enforced by adjudications ineligible under *clause* 15(9) (see the explanatory notes on *clause* 15(4), (5), (7), (8) *and* (9) for references to the Recommendations concerned).

Subsection (2)

This subsection implements Recommendation 4.16(3)(*b*)(i) (para. 4.138).

(3) There shall not be included in the draft scheme maintenance which has become payable since the first notice date.

(4) If, with the addition of any debt mentioned in subsection (1) above, the total debts (as determined under paragraph (a) of section 17(2) of this Act) exceed to a substantial extent £10,000 or the amount prescribed in regulations made under that paragraph, the administrator shall not include such a debt in the draft scheme but shall instead apply for an order under section 21 of this Act.

(5) If under subsection (1) above the administrator includes a debt in a draft scheme after service under section 22(1) of this Act, he shall serve—

(a) on the creditor whose debt is so included the documents mentioned in section 22(1)(a) and (b) of this Act; and

(b) on that creditor and on each other person who he knows is, or has reasonable cause to believe may be, a creditor of the debtor and on any co-obligant—

(i) a copy of the draft scheme as adjusted to take account of the inclusion of the debt under subsection (1) above; and

(ii) a notice stating that objection may be made to the scheme by any creditor or co-obligant by notice in writing to the administrator within 2 weeks, or such other period as may be prescribed, after the date of such service.

(6) Without prejudice to section 27(1) of this Act, where, before the scheme application has been disposed of, a creditor whose debt is included in the draft scheme has assigned his debt in whole or in part or has died or the debt of such a creditor has been transmitted by or under any enactment, the administrator shall, on an application by the assignee or the person to whom the debt has been transmitted, adjust the draft scheme by subrogating the assignee or the representative or that person (to the extent of the amount assigned or transmitted) for the creditor.

Disposal of scheme application where no order made under s.21.

24.—(1) This section applies where no order has been made under section 21 of this Act.

(2) If no objections are made to the scheme—

(a) in accordance with a notice served under section 22(1)(d), 23(5)(b)(ii) or 33(6)(a)(ii) of this Act, or

(b) by any creditor, or co-obligant, on whom no such notice was served,

Subsection (3)

This subsection implements in part Recommendation 4.22(1) (para. 4.168).

Subsection (4)

This subsection implements Recommendation 4.16(3)(*b*)(ii) (para. 4.138).

Subsection (5)

This subsection implements Recommendation 4.16(3)(*c*) (para. 4.138).

Subsection (6)

This subsection enables the administrator, before disposal of a scheme application, to subrogate an assignee, or other person to whom an included debt has transmitted, in place of the original creditor and corresponds to *clause* 27 (which regulates subrogation after confirmation of a scheme).

Clause 24

This clause primarily implements the proposals on procedure in Recommendation 4.37 (para. 4.265).

Subsection (1)

An order under *clause* 21 is an order refusing a scheme application and recalling an interim sist of diligence.

Subsections (2) *to* (4)

These subsections implement Recommendation 4.37(1) to (4) (para. 4.265).

the sheriff may make an order confirming the scheme or confirming it with such modifications as are necessary to correct any error in it, being modifications which do not materially affect the interests of any creditor.

(3) If any such objection is made to the scheme, the administrator shall intimate it to the debtor and any creditor, and any co-obligant, on whom the scheme application was served, and the sheriff shall not dispose of the scheme application without first giving the persons on whom such intimation has been made—

(a) an opportunity to make representations; and

(b) if agreement is not reached as to whether a scheme should be confirmed or as to its terms, an opportunity to be heard.

(4) If any such objection is made to the scheme, the sheriff—

(a) shall refuse the scheme application if he is satisfied, (either by the objection or by representations made to him)—

(i) that the scheme application was incompetent by virtue of section 17(1) or (2) of this Act;

(ii) that the requirements of paragraph (a) or (b) of section 17(3) of this Act are to a substantial extent not met;

(iii) that the debtor is unlikely to comply with the requirements of a debt arrangement scheme;

(iv) that, since the scheme application was made, an award of the sequestration of the debtor's estate has been granted;

(v) that, since the scheme application was made, the debtor has granted a voluntary trust deed whereby his estate has been conveyed to a trustee for the benefit of his creditors generally; or

(vi) that, since the scheme application was made, the debtor has entered into a composition contract with his creditors;

(b) in any other case, may—

(i) confirm the scheme, with or without modifications; or

(ii) refuse the scheme application.

(5) The sheriff, in determining whether to make an order confirming the scheme, shall disregard any objection by a creditor (being a creditor who, if the debtor's estate were sequestrated, would be entitled to a preference) on the ground that under the scheme he would not obtain the benefit of that preference; and, without prejudice to section 5A of the Bankruptcy (Scotland) Act 1985 (as set out in section 35 of this Act), it shall be incompetent for any creditor to object to the making of the scheme on the ground that he wishes to present a petition for the sequestration of the debtor's estate.

1985 c.

(6) The modifications which the sheriff shall be entitled to make to a scheme on confirming it under subsection (4)(b) above may

Subsection (5)

This subsection implements the first part of Recommendation 4.11(3) (para. 4.96) and Recommendation 4.46(5) (para. 4.311).

Subsection (6)

This subsection implements in part Recommendation 4.2(3) (para. 4.41).

include a provision that the period within which payments under the scheme are required to be made shall be extended to be a period not exceeding 5 years after the date when the scheme comes into force.

(7) Any order under this section shall recall the interim order under section 20(1) of this Act.

(8) The administrator shall—

(a) intimate any order under this section to the following persons—

(i) the debtor;

(ii) all the creditors on whom the scheme application was served; and

(iii) any co-obligant on whom the scheme application was served; and

(b) if an order has been made confirming the scheme (with or without modifications), send a copy of the scheme as confirmed to the aforementioned persons.

(9) The administrator shall intimate the coming into force of a scheme—

(a) to any employer who is operating an earnings arrestment or a current maintenance arrestment against the debtor's earnings; and

(b) if a conjoined arrestment order is being operated by the sheriff clerk of a different sheriff court from the court by which the scheme has been confirmed, to that sheriff clerk.

(10) No order under this section shall take effect while the order is appealable or subject to an appeal or a further appeal:

Provided that an order under this section confirming the scheme (with or without modifications) in so far as it recalls the interim order under section 20(1) of this Act shall have immediate effect.

Operation, variation and termination of schemes

Diversion of debtor's net earnings to administrator.

25.—(1) The sheriff on or after making an order confirming a debt arrangement scheme may, for the purpose of facilitating the operation of the scheme, on an application by the administrator, order an employer of the debtor, on each pay day occurring after the scheme comes into force and until whichever happens first of the following events—

(a) the debtor ceases to be employed by that employer;

(b) the intimation to the employer by the administrator of an order made by the sheriff, on an application by the administrator, requiring the employer to cease making payments under this subsection;

(c) the intimation to the employer by the administrator that the scheme has ceased to have effect,

Subsections (7) *to* (10)

These subsections implement Recommendation 4.37(5) to (7) (para. 4.265).

Clause 25

This clause implements Recommendation 4.39 (para. 4.270).

to pay to the administrator the whole of the debtor's net earnings payable to the debtor on that day or such part thereof as is specified in the order.

(2) The sheriff shall not make an order under subsection (1) above without first giving the debtor an opportunity to make representations.

(3) The administrator shall serve a copy of an order under subsection (1) above on the debtor and the employer; and the employer shall be under no liability for non-compliance with the order until a period of 7 days or such other period as may be prescribed has elapsed since the date of such service on him.

(4) Where the employer fails to comply with an order under subsection (1) above—

(a) the sheriff, on an application by the administrator, may make an order decerning for payment by the employer to the administrator of the sums which appear to the sheriff to be due; and

(b) the employer shall not be entitled to recover from the debtor any sum paid by him to the debtor in contravention of the order.

(5) The administrator shall, from any sum paid to him in pursuance of an order under subsection (1) above, retain for disbursement under the scheme such part as is necessary to satisfy any sum currently due to him by the debtor under the scheme and remit any balance thereof to the debtor.

(6) The sheriff may, on an application by the debtor or any other interested person, by order vary or recall an order under subsection (1) above; and subsections (2) to (5) above shall apply to an order under this subsection as they apply to an order under subsection (1).

(7) The employer shall be entitled, on making payments to the administrator under this section, to charge the debtor the same fee as he would be entitled to charge him under section 97 of this Act if the employer were operating an earnings arrestment; and such fee shall be deductible from the debtor's net earnings.

Other provisions relating to operation of scheme.

26.—(1) While a debt arrangement scheme is in force, the debtor shall disclose to the administrator any material change in his circumstances.

(2) Subject to any direction by the sheriff, the administrator shall, if requested to do so by a creditor whose debt is included in a debt arrangement scheme, report to the creditor on the debtor's performance of his obligations under the scheme.

(3) The sheriff may, on cause shown on an application by the administrator or any creditor or co-obligant, grant an interdict prohibiting the debtor while the scheme is in force from disposing of, or removing from any place in Scotland, any property belonging to the debtor which is specified in the interdict.

Clause 26

Subsection (1)

This subsection implements the first part of Recommendation 4.40(2) (para. 4.274).

Subsection (2)

This subsection implements the second part of Recommendation 4.40(2) (para. 4.274).

Subsection (3)

This subsection implements Recommendation 4.40(3) (para. 4.274).

(4) Where a creditor who holds a security for his debt has exercised his right of sale of the security subjects, the sheriff may make an order decerning for payment by the creditor to the administrator,for disbursement in accordance with the scheme to the creditors whose debts are included in the scheme, of any surplus of the proceeds of sale which, but for an order under this subsection, would be payable to the debtor.

Subrogation to creditor of assignee or representative.

27.—(1) Where a creditor whose debt is included in a debt arrangement scheme has assigned his debt (in whole or in part) or has died, or the debt of such a creditor has been transmitted by or under any enactment, the creditor's assignee or the person to whom the debt has been transmitted or representative who has acquired right to the debt may apply to the administrator to vary the scheme by subrogating the assignee or that person (to the extent of the amount assigned or transmitted) or representative for that creditor.

(2) An applicant under subsection (1) above shall submit to the administrator a document or documents showing how he acquired his right; and the applicant shall send a copy of the application to the creditor if he has not died.

(3) The administrator shall grant an application under subsection (1) above if he is satisfied that the applicant's right is established.

(4) An appeal may be taken by the applicant or the creditor against the decision of the administrator under subsection (3) above to the sheriff.

(5) The decision of the sheriff under subsection (4) above shall be final.

(6) This section shall not apply to an assignation of the debt to a co-obligant.

Variation of scheme.

28.—(1) Subject to subsections (2) to (4) and (8) below, the sheriff, on an application by any creditor, may vary a debt arrangement scheme by including in it any debt of the creditor—

(a) which was omitted from the scheme in error;

(b) which has been incurred since the first notice date and in respect of which the liability and amount are admitted;

(c) which it was incompetent to include in the scheme by reason of section 15(3)(a) of this Act but, since the first notice date—

Subsection (4)

This subsection implements Recommendation 4.23(5) (para. 4.174).

Clause 27

The main provisions of this clause implement Recommendation 4.41(3) (para. 4.279).

Subsection (6)

This subsection implements in part Recommendation 4.27(2) second sentence (para. 4.193). The inclusion of a debt assigned to a co-obligant is governed by *clause* 34.

Clause 28

Subsections (1) *to* (5)

These subsections deal with the power of the sheriff to vary a confirmed scheme so as to include a debt in the scheme. The subsections complement *clauses* 15 (initial inclusion) and 23 (inclusion before confirmation of scheme).

Subsection (1)

This subsection confers on the sheriff a discretionary power to vary a scheme by including in it debts omitted from it in error, or incurred, or becoming eligible for inclusion, after the first notice date (as defined in *clause* 15(2)).

Paragraph (*a*) of the subsection, implementing Recommendation 4.16(4)(*a*) (para. 4.138), relates to debts omitted from the scheme in error.

Paragraph (*b*), implementing Recommendation 4.16(4)(*b*) (para. 4.138), relates to newly incurred and undisputed debts.

Paragraphs (*c*) *and* (*d*), implementing in part Recommendation 4.16(4)(*c*) (para. 4.138), relates to debts which were disputed on the first notice date.

(i) the debt has become constituted by decree, or

(ii) the liability therefor and the amount thereof have been admitted;

(d) which it was incompetent to include in the scheme by reason of paragraph (b) of section 15(3) of this Act but in respect of which the dispute mentioned in that paragraph has been resolved;

(e) which was incurred before the first notice date but which has become payable only since that date;

(f) which it was incompetent to include in the scheme by reason of section 15(6) of this Act but in respect of which the time order under section 129(2)(a) of the Consumer Credit Act 1974 has been revoked or has otherwise ceased to have effect; or

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(g) which, because of the circumstances existing at the first notice date, was excluded from the scheme under section 15(4), (5), (7), (8) or (9) of this Act, if those circumstances no longer exist.

(2) The sheriff shall not vary a scheme under subsection (1) above so as to include maintenance which has become payable since the first notice date.

(3) If the inclusion in the scheme of any debt mentioned in subsection (1) above would result in the total debts (as determined under paragraph (a) of section 17(3) of this Act) so included exceeding to a substantial extent £10,000 or the amount prescribed in regulations made under that paragraph, the sheriff shall not vary the scheme so as to include such a debt.

(4) An application under subsection (1) above to vary a scheme so as to include a debt shall be incompetent if the debt is a debt—

(a) in relation to which it would be competent to apply for variation of the scheme under section 27(1) of this Act; or

(b) which is due by the debtor to a co-obligant to discharge the co-obligant's right of relief.

(5) On the variation of a scheme under subsection (1) above to include a debt, there shall cease to have effect any time order under section 129(2)(a) of the Consumer Credit Act 1974 for the payment of the debt by instalments in a case where there is not in force any other order relating to the debt, or to the agreement under which the

Paragraph (*e*), implementing in part Recommendation 4.16(4)(*c*) (para. 4.138), relates to debts which were future or contingent at the first notice date but have become payable since that date.

Paragraph (*f*), implementing Recommendation 4.28(3)(*a*) (para. 4.205), relates to debts subject at the first notice date to both a time order under the Consumer Credit Act 1974, section 129(2)(*a*) and to another order under any of the provisions of that Act specified in *clause* 15(6).

Paragraph (*g*) relates to the following types of debts which were ineligible for inclusion at the first notice date, namely, court expenses ineligible under *clause* 15(4); hire purchase or conditional sale agreement debts ineligible under *clause* 15(5)(a); consumer hire agreement debts ineligible under *clause* 15(5)(*b*); debts challenged under the Consumer Credit Act 1974, section 139 ineligible under *clause* 15(5)(*c*); debts secured by securities, or liens over goods, ineligible under *clause* 15(7); debts enforceable by poinding of the ground or sequestration under the hypothecs ineligible under *clause* 15(8); and debts being enforced by adjudications ineligible under *clause* 15(9): (see explanatory notes on clause 15(4), (5), (7), (8) and (9) for references to the Recommendations concerned).

Subsection (2)

This subsection implements in part Recommendation 4.22(1) (para. 4.168).

Subsection (3)

This subsection implements Recommendation 4.16(4), second sentence (para. 4.138).

Subsection (4)

Paragraph (*a*) of the subsection precludes an application to the sheriff under this clause where the simple procedure of subrogation under *clause* 27 (relating to debts assigned or transmitted from the original included creditor to another person) is competent.

Paragraph (*b*), implementing Recommendation 4.27(2), last sentence, (para. 4.193), precludes an application under this clause for inclusion of a debt due to a co-obligant, which is regulated by *clause* 34.

Subsection (5)

This subsection implements in part Recommendation 4.28(3)(*b*) (para. 4.205).

debt is owed, made under section 129(2)(b), 131, 133, 135(1) or 136 of that Act.

(6) The sheriff, on an application by the debtor, the administrator or any creditor whose debt is included in the scheme, may vary it by directing that the period within which payments under the scheme are required to be made shall be extended to be a period not exceeding 5 years after the date when the scheme came into force.

(7) The sheriff may on cause shown, on an application by any creditor (whether or not his debt is included in the scheme), the debtor or the administrator, vary a debt arrangement scheme:

Provided that an application under this subsection shall be incompetent for the purpose of including a debt in the scheme or subrogating a creditor or a co-obligant for a creditor.

(8) The sheriff shall not vary a scheme under this section where the variation would result in the amount payable under the scheme to any creditor being reduced below the amount which he has already received in disbursements thereunder.

(9) The sheriff shall not vary a scheme under this section without first giving the debtor and the creditors whose debts are included in the scheme an opportunity to make representations.

Interest accruing after first notice date.

29. A creditor whose debt is included in a debt arrangement scheme, or was so included but has since been satisfied to the extent of his entitlement under the scheme, shall not be entitled to any interest which has accrued on his debt after the first notice date unless—

(a) the debts included in the scheme are being paid in full, and he has claimed such interest in accordance with a notice served on him under section 31(2)(b) of this Act and the claim has been allowed; or

(b) the scheme has ceased to have effect without a discharge of any of the debts included in the scheme being granted under section 31(1) of this Act.

Revocation of scheme.

30.—(1) The sheriff may on cause shown make an order revoking a debt arrangement scheme on an application by any creditor (whether or not his debt is included in the scheme), the debtor or the administrator.

(2) The sheriff in determining whether to make an order revoking a scheme shall disregard any contention by the creditor applying for the revocation (being a creditor who, if the debtor's estate were sequestrated, would be entitled to a preference) that under the scheme he is not obtaining, or would not obtain, the benefit of that preference.

Subsection (6)

This subsection implements in part Recommendation 4.2(3) (para. 4.41).

Subsection (7)

This subsection, implementing Recommendation 4.41(1) (para. 4.279), confers on the sheriff a general discretionary power to vary a scheme subject to the restrictions in the proviso. As to subrogation of a new creditor (e.g. an assignee) for an existing creditor, see *clause* 27; as to subrogation of a co-obligant, see *clause* 34.

Subsection (8)

This subsection implements Recommendation 4.41(2) (para. 4.279).

Subsection (9)

This subsection implements in part Recommendation 4.41(1) (para. 4.279).

Clause 29

This clause implements Recommendations 4.10(3) (para. 4.80) and 4.44(1)(*b*) (para. 4.294).

Clause 30

Subsection (1)

This subsection implements the main proposal in Recommendation 4.42(1) (para. 4.285). See also Recommendations 4.7 (para. 4.56) and 4.16(5) (para. 4.138).

Subsection (2)

This subsection implements in part Recommendation 4.11(3) (para. 4.96); see also *clause* 24(5).

(3) The sheriff shall not make an order under subsection (1) above revoking a scheme without first giving the debtor and the creditors whose debts are included in the scheme an opportunity to make representations.

(4) Where a scheme includes a provision mentioned in section 14(5) of this Act, the administrator shall ascertain whether the debtor has complied with the provision and any condition attaching thereto and shall make a report thereon to the sheriff.

(5) If the sheriff, after considering a report under subsection (4) above and after giving the debtor an opportunity to be heard, is satisfied that the debtor has not complied as aforesaid, he shall make an order revoking the scheme.

(6) On revocation of a debt arrangement scheme, the debts which were included in the scheme shall, without composition and to the extent that they remain unpaid, become enforceable—

(a) by diligence in the case of debts already constituted by decree; or

(b) by obtaining decree and by diligence in the case of debts not so constituted,

and, notwithstanding section 50 of this Act and paragraph 8 of Schedule 6 to this Act, in this subsection"diligence" includes, where the debt immediately before the scheme was confirmed was being enforced by a poinding in any premises, another poinding in those premises.

(7) No order under this section revoking a scheme shall take effect while the order is appealable or subject to an appeal or a further appeal.

Discharge of debts and decrees for undischarged debts or interest.

31.—(1) Without prejudice to subsection (5) below, the sheriff, on an application by the administrator or the debtor, shall grant a discharge of all the debts which were included in the scheme when it was confirmed if it appears to the sheriff that all the sums required to be paid under the scheme to the administrator for disbursement to the creditors in those debts have been so paid.

(2) The administrator shall—

(a) intimate any application under subsection (1) above to the creditors whose debts are included in the scheme, or were so included but have since been satisfied to the extent of their entitlement under the scheme; and

(b) where under the scheme the debts are being paid in full, serve on each creditor as aforesaid along with the intimation a notice inviting him to state within 2 weeks, or such period as may be prescribed, after the date of such service whether he is claiming interest on his debt so far as accrued since the first notice date and, if so, the amount of interest

Subsection (3)

This subsection implements in part Recommendation 4.42(1) (para. 4.285).

Subsections (4) *and* (5)

These subsections implement Recommendation 4.4(2) (para. 4.47).

Subsection (6)

This subsection implements Recommendation 4.42(2) (para. 4.285).

Subsection (7)

This subsection implements Recommendation 4.42(3) (para. 4.285).

Clause 31

This clause deals with applications for discharge of debts (*subsections* (1), (2)(*a*), (4), (5), (11) and (12)); claims and decrees for interest (*subsections* (2)(*b*), (3), (9), (10), (12) and (13)); and decrees for undischarged debts included in a scheme late (*subsections* (6) to (8), (10) and (13)).

Subsection (1)

This subsection implements Recommendation 4.43(1) (para. 4.289).

Subsection (2)

Paragraph (*a*) of this subsection implements Recommendation 4.43(2) (para. 4.289).

Paragraph (*b*) of the subsection implements in part Recommendation 4.44(1)(*a*) (para. 4.294).

claimed; and the administrator shall notify the debtor of any such claim.

(3) Any dispute as to whether interest claimed in pursuance of subsection (2)(b) above is payable or as to the amount thereof which is payable shall be determined by the sheriff after such enquiry as he thinks fit.

(4) Where—

(a) the scheme (whether as originally confirmed or as varied) provides that the period within which payments thereunder are required to be made shall be 5 years; and

(b) the sheriff refuses to grant a discharge under subsection (1) above but it appears to him to be likely that, if the period mentioned in paragraph (a) above were extended for a period not exceeding 3 months, all the sums required to be paid under the scheme to the administrator would be so paid,

he shall make an order extending the period mentioned in paragraph (a) above for a period specified in the order, being a period not exceeding 3 months:

Provided that the sheriff shall not make an order under this subsection on more than one occasion.

(5) An application under subsection (1) above shall be competent within a period of one month, or such longer period as the sheriff may allow, after the date of expiry of the period within which under section 14(3)(a) of this Act (including that period as extended under section 24(6) or 28(7) of this Act or subsection (4) above) payments under the scheme are required to be made:

Provided that this subsection is without prejudice to the competency of such an application before such expiry.

(6) Where, at the time when the sheriff grants a discharge of debt under subsection (1) above, there has been included in the schedule any other debt under section 28(1) of this Act in relation to which the amount as provided by the scheme has not been fully paid, the sheriff shall, notwithstanding that the debt may previously have been constituted by decree, grant an interlocutor in favour of the creditor comprising—

(a) a decree containing a time to pay direction for the payment of the unpaid balance of the amount to which he is entitled under the scheme and any interest claimed in pursuance of subsection (2)(b) above in so far as it has been allowed; and

(b) if the scheme provided for payment only to the extent of a composition, a decree, in the event of the direction ceasing to have effect under section 3(1), (2) or (3) of this Act, for payment of the unpaid balance of the debt.

Subsection (3)

This subsection implements in part Recommendation 4.44(1)(*a*) (para. 4.294).

Subsection (4)

This subsection implements Recommendation 4.43(4) (para. 4.289).

Subsection (5)

This subsection implements Recommendation 4.43(5) (para. 4.289).

Subsections (6) *to* (8)

These subsections implement the main proposals in Recommendation 4.17(3) (para. 4.143).

(7) Where—

(a) the scheme provided for payment only to the extent of a composition;

(b) in relation to a debt a decree is granted under subsection (6)(a) above; and

(c) the debtor pays the full amount payable by him under that decree,

the unpaid balance of that debt shall be treated as discharged.

(8) No direction under subsection (6)(a) above shall be capable of being recalled under section 3(5) of this Act.

(9) Where all the debts which have been included in the scheme are discharged under subsection (1) above but interest claimed in pursuance of subsection (2)(b) above has been allowed and has not been fully paid, the sheriff on granting such a discharge shall grant a decree in favour of the creditor for payment of that interest and such a decree may contain a time to pay direction.

(10) On the coming into force of a decree under subsection (6)(a) or (9) above in respect of a debt, any previous decree relating thereto shall cease to have effect; and, on the coming into force of a decree mentioned in paragraph (b) of subsection (6), the decree mentioned in paragraph (a) of that subsection shall cease to have effect.

(11) The sheriff shall not dispose of an application under subsection (1) above without first giving the debtor and the creditors whose debts are included in the scheme—

(a) an opportunity to make representations; and

(b) if agreement is not reached as to whether discharge of the debts should be granted, an opportunity to be heard.

(12) No discharge under subsection (1) above or no determination under subsection (3) above shall take effect while the discharge or determination is appealable or subject to an appeal or a further appeal.

(13) A decree granted under subsection (6) or (9) above shall not come into force unless and until a discharge under subsection (1) above or a determination under subsection (3) above, as the case may be, takes effect.

Termination of scheme.

32.—(1) A debt arrangement scheme shall cease to have effect—

(a) on its revocation under section 30(1) or (5) of this Act;

(b) on a discharge of debts under section 31(1) of this Act;

(c) if—

(i) it has not ceased to have effect under paragraph (a) or (b) above; and

(ii) before the expiry of the period within which under

Subsection (9)

This subsection implements in part Recommendation 4.44(1)(*a*) (para. 4.294).

Subsection (10)

This subsection is supplementary to *subsections* (6) and (9).

Subsection (11)

This subsection implements Recommendation 4.43(3) (para. 4.289).

Subsection (12)

This subsection implements Recommendation 4.43(6) (para. 4.289) and in part Recommendation 4.44(2) (para. 4.294).

Subsection (13)

This subsection implements in part Recommendation 4.44(2) (para. 4.294).

Clause 32

Subsection (1)

This subsection implementing Recommendation 4.45(1) (para. 4.298) as read with para. 4.295, regulates the termination of a scheme. See also *clause* 14(9) (termination of scheme on debtor's death).

section 31(5) of this Act an application for discha is competent ("the competent period"), no applica for discharge or for the variation of the scheme un section 28(6) of this Act has been made or such application has been refused,

on the expiry of the competent period;

(d) if it has not ceased to have effect under paragraph (a) (b) above and at the end of the competent period application for the variation of the scheme under sect 28(6) of this Act is pending, on the refusal of the applicati or

(e) if it has not ceased to have effect under paragraph (a) (b) above and at the end of the competent period application for discharge under section 31(1) of this Ac pending, on the disposal of the application except wh the sheriff refuses the application and makes an order un subsection (4) of that section.

(2) On a debt arrangement scheme ceasing to have effect, administrator shall deposit any unclaimed dividends in an appropr bank or institution and send a receipt for the deposit of those divide to the Accountant in Bankruptcy.

(3) Any person, producing evidence of his right, may apply to Accountant in Bankruptcy to receive a dividend deposited as afores if the application is made not later than 7 years after the date w the scheme ceased to have effect.

(4) If the Accountant in Bankruptcy is satisfied of the applica right to the dividend, he shall authorise the appropriate bank institution to pay to the applicant the amount of that dividend any interest which has accrued thereon.

(5) The Accountant in Bankruptcy shall, at the expiry of 7 ye from the date when the scheme ceased to have effect, hand over deposit receipt or other voucher relating to any dividend remain unclaimed to the Secretary of State, who shall thereupon be entit to payment of the amount of that dividend and any interest wh had accrued thereon from the bank or institution in which the dep was made.

(6) Any payments received by the Secretary of State by virtue subsection (5) above shall be paid by him into the Consolidated Fu

Miscellaneous

Payments to creditor outside scheme.

33.—(1) The sheriff may, on an application made by the adm istrator while the scheme application is pending or while the sche is in force, make an order requiring a creditor to give informat to the administrator as to any payments made to the creditor outs the scheme.

EXPLANATORY NOTES

Subsections (2) *to* (6)

These subsections implement Recommendation 4.45(2) (para. 4.298).

Clause 33

This clause implements Recommendations 4.19 (para. 4.153) and 4.20 (para. 4.155).

(2) A creditor—

(a) whose debt is included in a debt arrangement scheme or a draft scheme; and

(b) who has received payment of the amount of his debt to which he is entitled under the scheme either wholly from payments made, or sums recovered, outside the scheme or partly from such payments, or sums, and partly from disbursements under the scheme,

shall as soon as reasonably practicable intimate to the administrator of the scheme the fact of the receipt of such payment.

(3) For the purposes of this section, where a creditor's entitlement under the scheme is only to the extent of a composition, then, in calculating whether the creditor has received the amount of his debt to which he is so entitled, there shall be disregarded any payment made to him by, or sum recovered by him from, a co-obligant unless in consequence of such payment or sum the whole debt, or the outstanding amount thereof, due to the creditor (without composition) has been satisfied.

(4) The sheriff, on an application by the administrator, may make an order decerning for payment by a creditor to the administrator of any sum received by the creditor from the administrator after the amount of his debt to which he is entitled under the scheme has been satisfied with interest on that sum at the same rate as that which is applicable, unless otherwise stated, under section 9 of the Sheriff Courts (Scotland) Extracts Act 1892 in respect of interest on a decree.

1892 c. 17.

(5) Where the administrator receives intimation under subsection (2) above, or is otherwise satisfied, that the creditor has received payment of the amount of his debt to which he is entitled under the scheme—

(a) before confirmation of the scheme under section 24 of this Act, the administrator shall, without prejudice to section 21 of this Act, exclude the debt of that creditor from the draft scheme and make any other necessary adjustments to it and, if the adjustments are made after service has been made under section 22 (1) of this Act, serve on the creditor who has received such payment, on each other person who he knows is, or has reasonable cause to believe may be, a creditor of the debtor and on any co-obligant on whom the scheme application was served—

(i) a copy of the draft scheme as so adjusted; and

(ii) a notice stating that an objection may be made to the scheme by any creditor or co-obligant by notice in writing to the administrator within 2 weeks, or such other period as may be prescribed, after such service;

(b) after such confirmation—

(i) the administrator shall cease to make disbursements to that creditor under the scheme; and

EXPLANATORY NOTES

(ii) subject to subsection (6) below and section 34(6)(of this Act, the sheriff, on an application by t administrator, shall vary the scheme by excluding frc it the debt of that creditor, increasing the amounts pa in disbursements under the scheme to the remaini creditors and requiring disbursement under the scher to those creditors of any sums paid to the administrat under subsection (4) above.

(6) Where the administrator has—

(a) received intimation under subsection (2) above, the sher shall not vary the scheme under subsection (5)(b)(ii) abo until the expiry of 14 days after the date of such intimatio

(b) been satisfied otherwise than on intimation under subsecti (2) above that the creditor has received payment of t amount of his debt to which he is entitled under the schem

the sheriff shall not vary the scheme as aforesaid until a period of least 14 days has elapsed since the date when the administrator w so satisfied and in any event unless, after giving the creditor opportunity to be heard, the sheriff is also so satisfied.

(7) Subsection (5)(b) above shall have effect where the administrat has received intimation, or has been otherwise satisfied, as aforesa after confirmation of the scheme but before it comes into force as in sub-paragraph (i) for the words"cease to" there were substitut the words"not on the coming into force of the scheme".

Co-obligants.

34.—(1) A co-obligant for the whole or part of a debt shall not freed from his liability therefor by virtue of the inclusion of the de in a debt arrangement scheme or the acceptance by the creditor a disbursement under the scheme.

(2) A discharge granted under section 31(1) of this Act shall n operate as a discharge of a co-obligant.

(3) Where a co-obligant, after the first notice date, pays the whc amount of the debt for which he is liable and thereby acquires a rig of relief, he may, within 14 days after the date when he made, completed making, that payment, (subject to any agreement to t contrary) apply to the administrator to vary the scheme or dr scheme by subrogating him for the creditor to the extent of the amou to which he is entitled under his right of relief.

(4) An applicant under subsection (3) above shall submit to tl administrator a document or documents showing how he acquired h right; and the applicant shall send a copy of the application to tl creditor.

(5) The administrator shall grant an application duly made und subsection (3) above if he is satisfied that the applicant's right established.

EXPLANATORY NOTES

Clause 34

This clause implements Recommendation 4.27 (para. 4.193).

(6) If the administrator grants an application under subsection (3 above—

(a) before confirmation of the scheme, he shall make an necessary adjustment to the draft scheme and, if th adjustment is made after service has been made unde section 22(1) of this Act, shall serve the draft scheme as s adjusted on the co-obligant and the creditor for whom th co-obligant has been subrogated;

(b) after such confirmation, he shall vary the scheme b subrogating the co-obligant for the creditor to the exten of the amount to which the co-obligant is entitled under hi right of relief.

(7) Where the co-obligant has paid the whole amount of the deb for which he is liable but that payment is insufficient to satisfy th whole debt due to the creditor (without composition), any variatio under subsection (6)(b) above shall so far as practicable ensure tha future disbursements of the creditor's share in the scheme are s apportioned between the creditor and the co-obligant that the amoun to which each is entitled under the scheme is satisfied at the sam time.

(8) An appeal may be taken by the applicant or the creditor agains the decision of the administrator under subsection (5) above to th sheriff.

(9) The decision of the sheriff under subsection (8) above shall b final.

Petitions for sequestration when scheme application is pending or scheme in force. 1985 c.

35. After section 5 of the Bankruptcy (Scotland) Act 1985 ther shall be inserted the following section—

"Sequestration when application for debt arrangement scheme is pending or scheme in force.

5A.—(1) Where a debtor has applied to the sheriff for a debt arrangement scheme, it shall be incompetent—

(a) for the debtor to present a petition for the sequestration of his estate; or

(b) for a creditor after a copy of an interim order has been served on him under section 20(2) of the Debtors (Scotland) Act 1985 to present a petition for the sequestration of the debtor's estate except with the leave of the sheriff,

during a relevant period.

(2) The sheriff shall grant leave under subsection (1)(b) above only if it appears to him—

Clause 35

The reference to the Bankruptcy (Scotland) Act 1985 is a reference to the Bankruptcy (Scotland) Bill 1984 (H.C. Bill 48) presently before Parliament, being the Bill as brought from the House of Lords to the House of Commons, and ordered to be printed, on 18 December 1984.

In the *new section* 5A introduced by this clause, *subsections* (1) to (3) implement paragraph (4) of Recommendation 4.46 (para. 4.311) and *subsection* (4) implements paragraph (3) of that Recommendation. *Subsection* (5) contains a definition.

(a) that an award of sequestration would be
the best interests of the creditors generall
or

(b) that a debt arrangement scheme would b
likely to be unduly prejudicial to a credit
or class of creditors.

(3) Where the sheriff grants leave under subsectic
(1)(b) above, he shall sist the application for the del
arrangement scheme; and, if for any reason an awa
of sequestration is not granted, the sheriff may rec
such leave and the sist and may make any such ord
as he considers necessary or expedient (including th
retaking of any step in procedure which has alreac
been taken) to enable the said application to proce

(4) Where a copy of an interim order has bee
served on a creditor under section 20(2) of the Debto
(Scotland) Act 1985 in connection with an applicatic
for a debt arrangement scheme, it shall be unnecessa
for a creditor petitioning during a relevant period f
the sequestration of the estate of the debtor concerne
to establish that the debtor is apparently insolven

(5) In this section"a relevant period" means any
the following periods—

(a) the period while the application for the del
arrangement scheme is pending;

(b) any period during which the decision of th
sheriff disposing of that application is appea
able or subject to an appeal or a furth
appeal;

(c) any period while the scheme is in force.".

The administrator.

36.—(1) The administrator appointed by the sheriff under sectic 19(2) of this Act shall be the sheriff clerk, a sheriff clerk depute a whole-time clerk or other whole-time assistant to the sheriff cle appointed under section 5 of the Sheriff Courts and Legal Office (Scotland) Act 1927 or a person appointed from a list of perso mentioned in subsection (2) below.

1927 c. 35.

(2) The Secretary of State may by order made by statuto instrument require a sheriff principal, after consultation with suc persons as the sheriff principal thinks fit, to compile and maintain list of persons from among whom the sheriff may make an appointme to the office of administrator.

(3) An order may be made under subsection (2) above applyin throughout Scotland or only to such sheriff court district or distric as may be specified in the order.

Clause 36

This clause implements Recommendation 4.31 (para. 4.229).

(4) The sheriff principal may revise the list compiled by virtue o subsection (2) above.

(5) The Secretary of State may, with the consent of the Treasury by regulations made by statutory instrument, make provision i respect of—

(a) persons appointed to the office of administrator from th list compiled by virtue of subsection (2) above—

(i) for the finding of caution by them; and

(ii) for their remuneration if remuneration is a conditio of their acceptance of office; and

(b) all persons appointed to the office of administrator—

(i) relating to their resignation, removal from office an discharge;

(ii) relating to their temporary or permanent replacemen in the event of their illness, death or for any othe necessary cause; and

(iii) relating to such other matters as are incidental to th discharge of their functions.

(6) Regulations under subsection (5) above may provide that an premium or remuneration paid by virtue of paragraph (a)(i) or (ii of that subsection shall—

(a) where the scheme is confirmed by an order under sectio 24 of this Act, be met—

(i) out of sums paid by the debtor to the administrator i priority to the claims of the creditors whose debts ar included in the scheme; or

(ii) out of money provided by Parliament;

(b) where the scheme application is refused, be met out o money provided by Parliament.

(7) Regulations under subsection (5) above shall be subject t annulment in pursuance of a resolution of either House of Parliament

(8) An administrator shall not be liable for any expenses incurre by any other person under any provision of this Part of this Act.

Recovery of certain sums due to administrator.

37.—(1) An order under subsection (4)(a) of section 25 (includin that provision as applied by subsection (6) of that section), sectio 26(4) or section 33(4) of this Act shall be enforceable by diligenc as if any sums payable under the order were a debt due to th administrator.

(2) The expenses of any diligence used in pursuance of subsectio (1) above, in so far as they are not recovered by that diligence, shal be met out of the scheme in priority to the claims of the creditor whose debts are included in the scheme or, if not so met, out o money provided by Parliament.

Subsection (5)

Paragraph (*b*)(i), so far as relating to discharge of the administrator, implements Recommendation 4.45(3) (para. 4.298).

Clause 37

This clause makes provision supplementary to *clauses* 25(4)(*a*), 26(4) *and* 33(4).

Registration of particulars of schemes and of their termination.

38.—(1) The sheriff clerk shall—

(a) keep a register in which he shall enter; and

(b) send to the Accountant in Bankruptcy for entry in tl register of insolvencies;

prescribed particulars of—

(i) debt arrangement schemes;

(ii) discharges granted under section 31(1) of this Act; and

(iii) termination of schemes either on the death of the debt or under section 32 of this Act.

(2) A creditor shall not be treated as being aware that a schen is in force by reason only that prescribed particulars of the schen have been registered under paragraph (a) or (b) of subsection (above.

(3) The register kept by the sheriff clerk under subsection (1)(a above shall be open for inspection at all reasonable hours on payme of such fee as may be prescribed in an order made under section 1895 c. 14. of the Courts of Law Fees (Scotland) Act 1895.

Expenses of action to recover debt.

39.—(1) Notwithstanding anything in the foregoing provisions this Part of this Act, where a scheme application has been made, ar expenses awarded against the debtor of an action for payment of principal sum raised by a creditor during a relevant period shall b excluded from the scheme if—

(a) at the time of the raising of the action, the principal su has been included in the scheme; or

(b) the principal sum is included in the scheme subsequent t the raising of the action unless—

(i) the creditor at the time when he raised the action wa unaware that he was raising it during a relevant perio or

(ii) it was necessary to raise the action for the purpose resolving a dispute as to liability for the principal su or as to the amount of that sum.

(2) The debtor shall, on the discharge of any debts under sectic 31 of this Act, be discharged of any liability for any expenses whic are excluded from the scheme concerned by virtue of subsection (above.

(3) In subsection (1) above"a relevant period" means any of th following periods—

(a) the period while the scheme application is pending;

(b) any period during which the decision of the sheriff disposin of the scheme application is appealable or subject to a appeal or a further appeal;

(c) any period while the scheme is in force.

EXPLANATORY NOTES

Clause 38

Subsection (1)

This subsection implements in part Recommendation 4.38 (para. 4.267).

Subsection (2)

This subsection implements Recommendation 4.18(2)(*b*) (para. 4.148). And see Recommendation 4.26(2) (para. 4.182).

Subsection (3)

This subsection implements in part Recommendation 4.38 (para. 4.267).

Clause 39

This clause implements Recommendation 4.10(5) (para. 4.80).

Debtor's remedies against ineffectual inhibitions and adjudications.

40.—(1) Where an inhibition has become ineffectual by virtue of section 18(5)(b) of this Act on the coming into force of a debt arrangement scheme, a notice in the prescribed form showing that the scheme has been confirmed may be registered by the debtor in the Register of Inhibitions and Adjudications.

(2) The sheriff may, on an application made by the debtor on or after the confirmation of a debt arrangement scheme, make an order declaring ineffectual—

(a) any inhibition registered in the Register of Inhibitions and Adjudications after the confirmation of the scheme;

(b) any notice of litigiosity or abbreviate of adjudication registered in that register, or any decree of adjudication for debt registrable in that register or in the Register of Sasines or the Land Register, in connection with an action of adjudication for debt rendered incompetent by virtue of section 18(1)(a)(vi) or 20(3)(e) of this Act;

and a certified copy of an order under this subsection may be registered in the same register as the document to which the order relates was registered or is registrable.

(3) An order under subsection (2) above shall be final.

(4) An order under subsection (2) above shall not take effect while the order confirming the scheme is appealable or subject to an appeal or a further appeal.

(5) Any expense incurred by the debtor under this section shall be borne by him:

Provided that he shall be entitled to recover from the creditor any expense incurred by the debtor in obtaining an order under subsection (2) above and in registering a certified copy thereof relating to—

(a) any document mentioned in paragraph (b) of that subsection in connection with an action of adjudication for debt rendered incompetent by virtue of section 20(3)(e) of this Act; or

(b) any inhibition registered in the Register of Inhibitions and Adjudications, or any document mentioned in the said paragraph (b) in connection with an action of adjudication for debt raised, after the confirmation of the scheme, if the creditor—

(i) was aware at the time of registration by him in the Register of Inhibitions and Adjudications, the Register of Sasines or the Land Register that the scheme was in force and he refused to discharge, or unduly delayed in discharging, the registration; or

(ii) was aware at the time when he raised the action of adjudication for debt that the scheme was in force.

EXPLANATORY NOTES

Clause 40

This clause implements Recommendation 4.15 (para. 4.124).

Saving of other rights or remedies of creditors.

41.—(1) No right or remedy of a creditor to enforce his debt shall be affected by—

(a) a debt arrangement scheme; or

(b) an interim order under section 20(1) of this Act;

except as provided by subsection (2) below and any other provision of this Part of this Act.

(2) A creditor whose debt—

(a) is included in a debt arrangement scheme; and

(b) is secured by a right of retention or lien over documents of the debtor,

shall not be entitled in pursuance of that right to retain possession of those documents if, and after, the debt has been discharged in a discharge of debts under subsection (1) of section 31 of this Act or the creditor has received payment of the amount to which he is entitled under a time to pay direction contained in a decree granted under subsection (6)(a) of that section.

Interpretation of Part II.

42.—(1) In this Part of this Act, unless the context otherwise requires—

"co-obligant" means an obligant who is bound to a creditor along with the debtor, being an obligant who if he pays the debt in whole or in part to the creditor will acquire a right of relief against the debtor, and includes a cautioner;

"creditor" includes a creditor whose debt is payable at a future date or depends on a contingency;

"debt" has the same meaning as in section 4(7) of this Act except that it includes maintenance, any capital sum awarded on divorce and any other sum due under a decree awarding maintenance or such a capital sum;

"decree", subject to subsection (3) below, has the same meaning as in section 4(7) of this Act;

"the first notice date" has the meaning assigned by section 15(2)(a) of this Act;

"scheme application" means an application for a debt arrangement scheme;

"the sheriff" means the sheriff having jurisdiction—

(a) over the place where the debtor is domiciled; or

(b) if the debtor is not domiciled in Scotland, over a place in Scotland where he has an established place of business;

and, for the purposes of paragraphs (a) and (b) above, the debtor's domicile shall be determined in accordance with section 41 of the Civil Jurisdiction and Judgments Act 1982.

1982 c. 27.

EXPLANATORY NOTES

Clause 41

Subsection (1)

This subsection implements Recommendation 4.29(1) (para. 4.213).

Subsection (2)

This subsection implements Recommendation 4.25(2) (para. 4.178).

Clause 42

Subsection (1)

This subsection contains certain definitions used in Part II of the Bill.

The definition of "debt" as read with *clause* 4(7) excludes fines and other sums due under an order of court in criminal proceedings; this implements Recommendation 4.21 (para.4.160). As to maintenance, see Recommendation 4.22 (para. 4.168).

The definition of "sheriff" implements Recommendation 4.8 (para. 4.60). At the time of the submission of this report (14 June 1985), section 41 of the Civil Jurisdiction and Judgments Act 1982 had not yet come into force.

(2) Where the debtor has two or more residences, any reference in this Part of this Act to his residence shall be construed as a reference to his principal residence.

(3) Any reference in this Part of this Act to a debt being constituted by decree shall be construed as a reference to a debt so constituted where—

(a) the period within which an appeal may be taken against the decree has expired without an appeal being taken; or

(b) if such an appeal has been taken, the matter at issue has been finally determined.

(4) Any reference in this Part of this Act to entitlement, or the amount to which a person is entitled, under the scheme, in relation to a debt which is included in the scheme on its variation under section 28(1) of this Act, shall include a reference to entitlement, or the amount to which the person is entitled, under a decree granted under section 31(6)(a) of this Act.

Subsection (2)

This subsection is relevant to the construction of *clause* 14(6), *proviso* (*a*) and *clause* 17(4).

Subsection (3)

This subsection is relevant to the construction of *clauses* 15(3), 23(1)(*c*), 28(1)(*c*) *and* 31(6).

Subsection (4)

This subsection is primarily relevant to the construction of *clauses* 16(1), 31(2)(*a*), 31(6) *and* 33(2), (3) *and* (5). See also *clause* 14(3).

PART III

POINDINGS AND WARRANT SALES

Poinding

Exemptions from poinding.

43.—(1) Articles belonging to a debtor of any of the following descriptions shall be exempt from poinding at the instance of a creditor in respect of a debt due to him by the debtor—

(a) clothing reasonably required for the use of the debtor or any member of his household;

(b) implements, tools of trade, books or other equipment reasonably required for the use of the debtor or any member of his household in the practice of the debtor's or such member's profession, trade or business, not exceeding in aggregate value £500 or such other sum as may be prescribed in regulations made by the Secretary of State;

(c) medical aids or medical equipment reasonably required for the use of the debtor or any member of his household;

(d) books or other articles reasonably required for the education or training of the debtor or any member of his household not exceeding in aggregate value £500 or such other sum as may be prescribed in regulations made by the Secretary of State;

(e) toys for the use of any child who is a member of the debtor's household;

(f) articles reasonably required for the care or upbringing of any child who is a member of the debtor's household.

(2) Articles belonging to a debtor of any of the descriptions set out in the list at the end of this subsection shall be exempt from such poinding if the article at the time of the poinding is in a dwellinghouse in which—

(a) the debtor is residing; or

(b) the debtor is not residing, but another person is residing,

and the article is reasonably required for the use in the dwellinghouse of the person residing there or any member of that person's household.

LIST

(i) beds or bedding;

(ii) household linen;

(iii) chairs or settees;

(iv) tables;

(v) food;

(vi) lights or light fittings;

EXPLANATORY NOTES

Clause 43

This clause sets out the various categories of articles which are exempt from poinding and provides for applications to the court for release of exempt articles which have been poinded.

Subsection (1)

Paragraphs (*a*), (*e*) and (*f*) implement Recommendation 5.10 (para. 5.51), *paragraph* (*b*) implements Recommendation 5.11(1) (para. 5.57), *paragraph* (*c*) implements Recommendation 5.11(4) (para. 5.57), and *paragraph* (*d*) implements Recommendation 5.11(3) (para. 5.57).

Subsection (2)

This subsection implements Recommendations 5.9(1) (para. 5.48) and 5.51(2) (para. 5.244).

(vii) heating appliances;

(viii) curtains;

(ix) floor coverings;

(x) furniture, equipment or utensils used for cooking, storing or eating food;

(xi) one refrigerator;

(xii) articles used for cleaning, mending or pressing clothes;

(xiii) articles used for cleaning the dwellinghouse;

(xiv) furniture used for storing clothing, bedding or household linen or storing articles used for cleaning the dwellinghouse;

(xv) articles used for safety in the dwellinghouse.

(3) The Secretary of State may by regulations add to, delete or vary any of the items contained in the list set out in subsection (2) above.

(4) Subject to subsections (5) and (6) below, the sheriff shall—

(a) on an application by the debtor (whether or not the pointed article is in a dwellinghouse in which the debtor is residing), make an order releasing such an article from the poinding, if the sheriff is satisfied that the article is exempt therefrom under subsection (1) or (2) above;

(b) if a pointed article is in a dwellinghouse in which the debtor is not residing, but another person is residing, on an application by that person, make such an order as aforesaid, if the sheriff is satisfied that the article is exempt therefrom under subsection (2) above.

(5) No application under subsection (4) above shall be competent unless it is made within a period of 14 days after the date of the execution of the poinding.

(6) No order under subsection (4) above releasing an article from the poinding shall take effect while the order is appealable or subject to an appeal or a further appeal.

(7) Regulations under subsection (1)(b) or (d) or (3) above shall be made by statutory instrument and shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Restrictions on time when poinding is allowed.

44.—(1) No poinding shall be executed on a Sunday, Christmas Day, New Year's Day or Good Friday nor on such other day as may be prescribed.

(2) The execution of a poinding shall not—

(a) be commenced before 8 a.m. or after 8 p.m.; or

(b) be continued after 8 p.m.,

unless prior authority for such commencement or continuation has been obtained from the sheriff; and any rule of law which prohibits poindings outwith the hours of daylight shall cease to have effect.

Subsections (3) *and* (7)

These subsections implement Recommendation 5.9(2) (para. 5.48).

Subsections (4) *and* (5)

These subsections implement Recommendation 5.13(1) (para. 5.65).

Subsection (6)

This subsection implements Recommendation 9.12(5) (para. 9.74).

Clause 44

This clause implements Recommendation 5.17 (para. 5.78). It clarifies the existing law as to the days on which a poinding may be executed and makes new provision for the hours during which a poinding may be executed.

Powers of entry in connection with poinding.

45.—Notwithstanding that an officer of court is in possession of a warrant authorising him to open shut and lockfast places for the purpose of executing a poinding, he shall not enter a dwellinghouse for that purpose where, at the time of his intended entry, there appears to him to be nobody, or only children under the age of 16 years, present in the dwellinghouse unless at least 4 days before the date of his intended entry he has served—

(a) notice on the debtor specifying that date; and

(b) in the case where there appears to him to be only children under the age of 16 years present in the dwellinghouse, a copy of that notice on the director of social work of the local authority:

Provided that the sheriff, on an application made to him by the officer of court which shall not require to be intimated to the debtor or to the director of social work, may dispense with service under this section, if it appears to the sheriff that such service would be likely to prejudice the execution of the poinding.

Poinding procedure.

46.—(1) The procedure relating to a poinding shall be as follows—

(a) before executing the poinding, the officer of court shall—

(i) exhibit the warrant to poind and the certificate of execution of the charge relating thereto;

(ii) demand payment, from the debtor or any other person present who is authorised to act for him, of the debt, including any interest due thereon if claimed by the creditor and any expenses which have been incurred and which are chargeable against the debtor in the poinding process;

(iii) make enquiry of any person present as to the ownership of the articles proposed to be poinded;

but it shall not be necessary for the officer of court before such execution to make public proclamation of the poinding nor to read publicly the extract decree containing the warrant to poind and the execution of the charge relating thereto;

(b) the officer of court shall be attended at the poinding by one witness;

(c) the poinded articles shall be valued by the officer of court according to the price which they would be likely to fetch if sold on the open market, but, if he considers that the articles are such that a valuation by a professional valuator or other suitably skilled person is advisable, he may arrange for such a valuation;

(d) the officer of court shall be entitled to poind only such number of articles as, if sold at the valuations made under paragraph (c) above, would satisfy the sums recoverable by the creditor out of the proceeds of sale;

Clause 45

This clause implements Recommendation 5.18 (para. 5.85). It imposes restrictions on an officer of court's power of forcible entry to a dwellinghouse in connection with the execution of a poinding.

Clause 46

This clause sets out the procedure to be followed in executing a poinding and confers on the debtor an entitlement to redeem poinded articles on payment of their appraised value.

Subsection (1)

This subsection implements Recommendations 5.19(1) (para. 5.95) and 5.20 (para. 5.101).

(e) the officer of court shall prepare a schedule ("the poinding schedule") in the prescribed form which shall specify—

(i) the poinded articles, at whose instance they have been poinded and their respective values; and

(ii) the amount of the debt, including any interest due thereon if claimed by the creditor and any expenses which have been incurred and which are chargeable against the debtor in the poinding process;

(f) on completion of the valuation of the poinded articles, the officer of court shall—

(i) inform the debtor (if present) of his right to redeem any of the poinded articles under subsection (5) below; and

(ii) along with the witness sign the poinding schedule and deliver it to the person in whose possession the articles were poinded (and, if the possessor is not the debtor and it is reasonably practicable, send a copy of it to the debtor) or leave it on the premises in which the poinding took place;

(g) the officer of court shall leave the poinded articles at the place where they were poinded.

(2) The sheriff, on an application by the creditor, an officer of court or the debtor, may at any time after the execution of a poinding make an order—

(a) for the security of any of the poinded articles; or

(b) in relation to any of the articles which are of a perishable nature or which are likely to deteriorate substantially and rapidly in condition or value, for their immediate disposal and, in the event of their disposal by sale, for payment of the proceeds of sale to the creditor or for consignation of the proceeds in court until the diligence is completed or otherwise ceases to have effect;

and a decision of the sheriff under paragraph (b) above for the immediate disposal of articles shall be final.

(3) It shall not be competent for an officer of court in executing a poinding to examine a person on oath as to the ownership of any article.

(4) An officer of court in executing a poinding shall be entitled to proceed on the assumption that any article in the possession of the debtor is owned by him unless the officer of court knows or ought to know that the contrary is the case:

Provided that the officer of court shall not be precluded from relying on that assumption by reason only—

(a) that the article belongs to a class which is commonly held under a hire, hire-purchase or conditional sale agreement or on some other limited title of possession; or

Subsection (2)

This subsection implements Recommendation 5.24 (para. 5.115).

Subsections (3) *and* (4)

These subsections implement Recommendation 5.47(1) (para. 5.223).

(b) that an assertion has been made that the article is not owned by the debtor.

(5) The debtor shall be entitled, within 14 days after the date of execution of the poinding, to redeem any of the poinded articles at the valuations made under subsection (1)(c) above; and the officer of court shall mention any such redemption in his report under section 47 of this Act or, if he has already made that report, shall report the redemption forthwith to the sheriff.

(6) The officer of court shall, on receiving payment from the debtor for the redemption under subsection (5) above of a poinded article, grant a receipt in the prescribed form to the debtor; and the receipt shall operate as a release of the article from the poinding.

(7) Subject to section 65(2)(b) of this Act, the revaluation in the same poinding of an article which has been valued under subsection (1)(c) above shall be incompetent.

(8) For the purposes of this Act or any other enactment or any rule of law, a poinding shall be deemed to have been executed on the date when the poinding schedule has been delivered to the possessor of the poinded articles, or left on the premises in which the poinding took place, in pursuance of subsection (1)(f)(ii) above.

(9) At any time before an officer of court has executed a poinding on behalf of a creditor, he shall, if requested to do so by any other creditor who has delivered to him a warrant to poind, conjoin that creditor in the poinding:

Provided that it shall be incompetent for any officer of court to conjoin in a poinding a creditor holding a summary warrant in respect of the debt for which he holds that warrant.

Report of execution of poinding.

47.—(1) The officer of court shall, within a period of 14 days after the date of execution of the poinding (or such longer period after the date of execution as the sheriff on cause shown may allow on an application by the officer of court) make a report in the prescribed form of the execution of the poinding to the sheriff; and the report shall be signed by the officer of court and the witness who attended at the poinding.

(2) The officer of court shall note in the report under this section any assertion made before the submission of the report that any of the poinded articles does not belong to the debtor.

(3) The sheriff may refuse to receive a report on the ground that it has not been made within the period, or has not been signed, as required by subsection (1) above and the sheriff clerk shall intimate any such refusal to the debtor and, if he is a different person from the debtor, the possessor of the poinded articles.

(4) If the sheriff refuses under subsection (3) above to receive a report, the poinding shall cease to have effect.

EXPLANATORY NOTES

Subsections (5) *and* (6)

These subsections implement Recommendation 5.19(2) (para. 5.95).

Subsection (7)

This subsection implements Recommendation 5.21 (para. 5.104).

Subsection (8)

This subsection implements Recommendation 5.19(1)(*h*) (para. 5.95).

Subsection (9)

This subsection implements Recommendation 5.22 (para. 5.109).

Clause 47

This clause restates with some modifications the existing law on reporting the execution of a poinding to the sheriff within whose court district it was executed. It implements Recommendations 5.23 (para. 5.113) and 5.47(1)(*b*) (para. 5.223).

(5) Any rule of law whereby the sheriff may refuse to receive a report of the execution of a poinding on a ground other than one specified in subsection (3) above shall cease to have effect.

Release of poinded article on ground of undue harshness.

48.—(1) The sheriff may, on an application by the debtor made within 14 days after the date of execution of a poinding, make an order releasing an article from the poinding if it appears to the sheriff that the continuation of the poinding of that article or its sale under warrant of sale would be unduly harsh in the circumstances.

(2) Where the sheriff has made an order under this section releasing an article from a poinding, then, notwithstanding section 50 of this Act, he may, on an application by the creditor, authorise the poinding of other articles belonging to the debtor in the same premises.

(3) An order under this section releasing an article from a poinding shall not take effect while the order is appealable or subject to an appeal or a further appeal.

Recall of poinding.

49.—(1) The sheriff shall recall a poinding at any time before the sale of the poinded articles, at his own instance or on an application by the debtor, if he is satisfied that the poinding is invalid or has ceased to have effect:

Provided that, without prejudice to subsection (4) of section 43 of this Act, it shall be incompetent for the sheriff to recall a poinding on the ground that the poinded articles are, or any of them is, exempt from the poinding under that section.

(2) The sheriff may recall a poinding at any time before the creditor applies for a warrant of sale under section 52 of this Act, on an application by the debtor, on any of the following grounds—

(a) that it would be unduly harsh in the circumstances for a warrant of sale of the poinded articles to be granted;

(b) that the aggregate of the valuations of the poinded articles made under section 46(1)(c) of this Act were substantially below the aggregate of the prices which they would have been likely to fetch if sold on the open market; or

(c) that the likely proceeds of sale of the articles would not exceed the expenses likely to be incurred in the application for warrant of sale and in any steps required to be taken under this Part of this Act in execution of the warrant on the assumption that that application and such steps are unopposed.

(3) The sheriff shall not grant an application for recall of a poinding of articles belonging to the debtor on the ground mentioned in subsection (2)(c) above if, at the time when he is considering the making of an order for such recall, a further poinding of articles belonging to that debtor has been authorised under section 48(2),

Clause 48

This clause confers upon the sheriff a new power to release goods from a poinding where to continue to subject them to diligence would be unduly harsh.

Subsections (1) *and* (2)

These subsections implement Recommendation 5.13 (para. 5.65).

Subsection (3)

This subsection implements Recommendation 9.12(5) (para. 9.74).

Clause 49

This clause confers new powers on the sheriff to recall a poinding in certain circumstances.

Subsections (1), (2) *and* (4)

These subsections implement Recommendation 5.29 (para. 5.137).

Subsection (3)

This subsection prevents recall where a second poinding by the same creditor is pending so as to give the creditor an opportunity to have the poindings conjoined (see *clause* 69).

64(5) or 65(2), or has become competent by reason of section 9(7), 18(7), 30(6), 63(3), 66(6) or 67(7), of this Act.

(4) The sheriff shall not recall a poinding under this section at his own instance or dispose of an application thereunder without first giving the parties—

(a) an opportunity to make representations; and

(b) if either party wishes to be heard, an opportunity to be heard.

(5) The sheriff clerk shall intimate to the debtor the recall at the instance of the sheriff of a poinding under subsection (1) above.

(6) An order under this section recalling a poinding shall not take effect while the order is appealable or subject to an appeal or a further appeal.

Second poinding in same premises.

50. Subject to sections 9(7), 18(7), 30(6), 48(2), 63(3), 64(5), 65(2), 66(6) and 67(7) of this Act, where articles are poinded in any premises (whether or not the poinding is valid), another poinding in those premises to enforce the same debt shall be incompetent except in relation to poindable articles which have been brought on to the premises since the execution of the first poinding.

Sist of proceedings in poinding of mobile homes.

51.—(1) Where a caravan, houseboat or other moveable structure is the only or principal residence of a debtor or another person and it has been poinded, the sheriff, on an application by the debtor or that other person made at any time after the execution of the poinding and before the granting of a warrant of sale, may order that for such period as he may determine no further steps shall be taken in the poinding.

(2) In calculating under section 62(1) or (2) of this Act the period during which a poinding under subsection (1) above shall remain effective, there shall be disregarded any such period as is mentioned in that subsection.

Provisions relating to sale

Application for warrant of sale.

52.—(1) A creditor shall not be entitled to sell articles poinded by him unless, on an application by him or an officer of court, the sheriff has granted a warrant of sale.

(2) The sheriff may refuse to grant a warrant of sale under subsection (1) above—

(a) at his own instance or on an objection by the debtor—

Subsection (6)

This subsection implements Recommendation 9.12(5) (para. 9.74).

Clause 50

This clause deals with the restrictions on a second poinding in the same premises to enforce the same debt. It implements Recommendation 5.28(1) (para. 5.134).

Clause 51

This clause confers upon the sheriff a new power to sist a poinding of a caravan or other mobile home so as to give the debtor time to find alternative accommodation.

Subsection (1)

This subsection implements Recommendation 5.12 (para. 5.60).

Subsection (2)

This subsection provides that any period of sist does not count for the purposes of the rule (see *clause* 62) that a poinding lapses at the end of a year after execution or such extension as the sheriff may grant.

Clause 52

This clause deals with the application to the sheriff for a warrant to sell the poinded goods.

Subsection (1)

This subsection restates the existing law.

Subsections (2), (3) *and* (5)

These subsections implement Recommendation 5.30 (para. 5.146).

(i) on the ground that the poinding is invalid or has ceased to have effect; or

(ii) on either of the grounds mentioned in paragraphs (b) and (c) of section 49(2) of this Act;

(b) on an objection by the debtor, on the grounds that the granting of the application would be unduly harsh in the circumstances:

Provided that, without prejudice to subsection (4) of section 43 of this Act, it shall be incompetent for the sheriff to refuse to grant a warrant of sale under subsection (1) above on the ground that any of the poinded articles is exempt from the poinding under that section.

(3) The creditor, when making an application under subsection (1) above, shall serve a copy thereof on the debtor together with a notice in the prescribed form informing the debtor—

(a) of his right to redeem any or all of the poinded articles under section 53 of this Act; and

(b) that he may object to the granting of the application within 14 days after the date when the application was made.

(4) The sheriff shall not—

(a) refuse at his own instance to grant a warrant of sale under subsection (1) above; or

(b) dispose of an application under that subsection where the debtor has objected to its granting in accordance with subsection (3)(b) above,

without first giving the parties an opportunity to be heard.

(5) Where the sheriff refuses to grant a warrant of sale under subsection (1) above, the sheriff clerk shall intimate that refusal to the debtor and, if he is a different person from the debtor, the possessor of the poinded articles.

(6) An order under this section granting a warrant of sale shall not take effect while the order is appealable or subject to an appeal or a further appeal.

Certain circumstances in which poinded articles belonging to debtor may be released or redeemed.

53.—(1) Where a sale of poinded articles is to be held in premises other than where they are situated, the officer of court shall in pursuance of section 55(3) of this Act—

(a) be entitled to remove to those premises only such number of the poinded articles as, if sold at the valuations made under section 46(1)(c) of this Act, would satisfy the sums recoverable by the creditor out of the proceeds of sale; and

(b) release the remaining poinded articles from the poinding.

(2) Subject to subsection (3) below, the debtor may, within 7 days after the date when a copy of an application for warrant of sale has been served on him, redeem any poinded article by paying to the

Subsection (6)

This subsection implements Recommendation 9.12(5) (para. 9.74).

Clause 53

This clause deals with the release of goods from a poinding by redemption, agreement or otherwise.

Subsection (1)

This subsection implements Recommendation 5.39 (para. 5.187).

Subsections (2), (3) *and* (5)

These subsections implement Recommendation 5.31 (para. 5.150).

officer of court a sum equal to the valuation of the article made under section 46(1)(c) of this Act.

(3) The officer of court shall, on receiving payment from the debtor under subsection (2) above, grant a receipt in the prescribed form to the debtor; and the receipt shall operate as a release of the article from the poinding.

(4) The creditor and the debtor may by agreement release articles from a poinding.

(5) Any release or redemption of poinded articles under this section or as a result of an agreement between the creditor and the debtor—

(a) before the making of an application for warrant of sale, shall be mentioned in that application;

(b) after the application has been made but before it has been disposed of, shall be reported forthwith by the officer of court to the sheriff;

(c) after the application has been granted in a case where some articles remain poinded, shall be specified in the report under section 61 of this Act.

Location of sale.

54.—(1) Subject to the following provisions of this section, the location for the sale of poinded articles shall be as ordered by the sheriff in the warrant of sale.

(2) The warrant of sale shall not provide for the sale to be held in a dwellinghouse except with the consent in writing of the occupier thereof and, if he is not the occupier, the debtor.

(3) Subject to subsection (4) below, where articles are poinded in a dwellinghouse and any consent required under subsection (2) above is not given, the warrant of sale shall provide for the sale of the poinded articles to be held in an auction room specified in the warrant.

(4) Where—

(a) articles are poinded in a dwellinghouse and any consent required under subsection (2) above is not given; and

(b) it appears to the sheriff that, if the sale were to be held in an auction room, the likely proceeds of sale of the articles would not exceed the expenses of the application for warrant of sale and the expenses likely to be incurred in any steps required to be taken under this Part of this Act in the execution of the warrant on the assumption that that application and such steps are unopposed,

then, subject to subsection (5) below, if the creditor is able to offer suitable premises in which the sale could be held, the warrant of sale shall provide for the sale to be held in those premises, but otherwise the sheriff shall refuse to grant a warrant of sale.

Subsection (4)
This subsection restates the existing law.

Clause 54
This clause regulates the place where sales of poinded goods are to be held.

Subsection (1)
This subsection restates the existing law.

Subsection (2)
This subsection implements Recommendation 5.32(1) (para. 5.161).

Subsections (3) *and* (4)
These subsections implement Recommendation 5.32(2) (para. 5.161).

(5) The warrant of sale shall not provide for the sale to be held in premises (not being a dwellinghouse or an auction room) which are occupied by a person other than the debtor or the creditor except with the consent in writing of the occupier thereof:

Provided that, where the pointed articles are situated in the premises of the occupier and the occupier does not give his consent under this subsection to the holding of the sale in those premises, the warrant of sale, where the sheriff considers that it would be unduly costly to require the removal of the pointed articles to other premises for sale, may provide that the sale shall be held in the premises where they are situated.

(6) In this section "occupier", in relation to a dwellinghouse or other premises, means the person named in the valuation roll as the occupier of the dwellinghouse or premises; and, if there are two or more such occupiers, means any one of them.

Other arrangements for sale made in warrant of sale.

55.—(1) Every warrant of sale shall provide that the sale shall be by public auction.

(2) Every warrant of sale shall empower officers of court to open shut and lockfast places for the purpose of executing the warrant.

(3) A warrant of sale, which provides for the sale of pointed articles to be held in premises other than where they are situated, shall also empower the officer of court authorised to execute the warrant to remove those articles to such premises for the sale.

(4) Every warrant of sale shall specify a period within which the sale of the pointed articles shall take place.

(5) Every warrant of sale shall appoint an officer of court to make arrangements for the sale in accordance with the warrant, and that officer of court may be the officer of court who executed the pointing or another officer of court.

(6) Where the warrant of sale provides for the sale to be held in premises other than an auction room, then, if the valuations under section 46(1)(c) of this Act of the pointed articles to be sold—

(a) exceed in aggregate £1,000 or such other sum as may be prescribed, it shall appoint to conduct the sale a person who carries on business as an auctioneer or, if no such person is available, the officer of court appointed under subsection (5) above or another suitable person;

(b) do not exceed in aggregate that sum, it may appoint that officer of court or another suitable person to conduct the sale.

Subsection (5)

This subsection implements Recommendation 5.32(4) (para. 5.161).

Clause 55

This clause restates with some modifications the existing law and practice regarding the form and effect of warrants of sale.

Subsection (1)

This subsection restates the existing law.

Subsections (2) *and* (3)

These subsections implement Recommendation 5.38 (para. 5.185).

Subsection (4)

This subsection implements Recommendation 5.34 (para. 5.169).

Subsection (5)

This subsection implements Recommendation 5.35 (para. 5.172).

Subsection (6)

This subsection implements Recommendation 5.36 (para. 5.178).

Intimation and publication of forthcoming sale.

56.—(1) The officer of court appointed under section 55(5) of this Act to make arrangements for the sale shall—

(a) as soon as possible intimate to the debtor and, if he is a different person from the debtor, the possessor of the poinded articles, the date arranged for the holding of the sale; and

(b) not later than the date of intimation under paragraph (a) above, serve a copy of the warrant of sale on the debtor and possessor.

(2) Where the sale of the poinded articles is to be held in premises other than where they are situated, the said officer shall intimate to the debtor and, if he is a different person from the debtor, the possessor of the poinded articles—

(a) the place where the sale is to be held; and

(b) the date arranged for the removal of the articles from the premises in which they are situated,

and any intimation under this subsection shall be given not less than 7 days before the date fixed for the removal.

(3) In whatever premises the sale is to be held, the sheriff clerk shall arrange for prescribed particulars of the warrant of sale to be displayed on a public notice board within the court which granted the warrant.

(4) All sales shall be advertised by public notice, and, where the sale is to be held otherwise than in an auction room, the public notice shall be as directed by the warrant of sale.

(5) No public notice under subsection (4) above of a sale of poinded articles to be held in premises other than the debtor's premises shall name him or disclose that the articles for sale are poinded articles.

(6) Where the sale is to be held in premises other than the debtor's premises or an auction room, any public notice of the sale shall state that the articles to be sold do not belong to the occupier of those premises.

Alteration of arrangements for sale.

57.—(1) Where, for any reason for which the creditor or officer of court cannot be held responsible, the arrangements made for the sale of poinded articles cannot be implemented in accordance with the provisions of the warrant of sale, the sheriff may, on an application by the creditor or officer of court, grant a variation of the warrant of sale.

(2) The sheriff may, at his own instance or on an objection by the debtor, refuse to grant a variation of the warrant of sale under subsection (1) above on the ground that the poinding is invalid or has ceased to have effect:

Provided that, without prejudice to subsection (4) of section 43 of this Act, it shall be incompetent for the sheriff to refuse to grant such

EXPLANATORY NOTES

Clause 56

This clause deals with intimation of the arrangements made for sale of the poinded goods to the debtor and public advertisement of the sale.

Subsection (1)

This subsection implements Recommendation 5.37(1) (para. 5.183).

Subsection (2)

This subsection implements Recommendation 5.37(2) (para. 5.183).

Subsection (3)

This subsection implements Recommendation 5.33(4) (para. 5.166).

Subsections (4) *and* (5)

These subsections implement Recommendation 5.33(1) and (3) (para. 5.166).

Subsection (6)

This subsection implements Recommendation 5.33(2) (para. 5.166).

Clause 57

This clause provides for the variation of a warrant of sale where the original warrant of sale cannot be implemented due to subsequent events.

Subsection (1)

This subsection implements Recommendation 5.40(2) (para. 5.193).

Subsection (2)

This subsection implements Recommendation 5.40(3) (para. 5.193).

a variation on the ground that any of the poinded articles is exempt from the poinding under that section.

(3) The provisions of section 54 of this Act relating to consent shall apply in relation to a warrant of sale varied under this section as they apply to the original warrant of sale.

(4) The creditor, when making an application under subsection (1) above, shall serve a copy thereof on the debtor together with a notice in the prescribed form informing the debtor that he may object to the granting of the application within 7 days after the date when the application was made.

(5) The sheriff shall not—

(a) refuse at his own instance to grant a variation under subsection (1) above; or

(b) dispose of an application under that subsection where the debtor has objected to its granting under subsection (4) above,

without first giving the parties an opportunity to be heard.

(6) On granting a variation under subsection (1) above, the sheriff may make such consequential orders as he thinks fit, including, where appropriate, an order requiring the intimation to the debtor of the warrant of sale as varied or the retaking of any steps in the diligence which have already been taken.

(7) Where the sheriff refuses to grant a variation under subsection (1) above, the sheriff clerk shall intimate that refusal to the debtor and, if he is a different person from the debtor, the possessor of the poinded articles.

(8) Subject to subsection (9) below and without prejudice to section 58(4) of this Act, after intimation has been given under section 56 of this Act to the debtor of the date arranged for the holding of the sale or for the removal of the articles for sale, the creditor or officer of court shall not be entitled to arrange a new date for the holding of the sale or for such removal.

(9) The creditor shall be entitled to instruct an officer of court to arrange such a new date as is mentioned in subsection (8) above where, for any reason for which the creditor or officer of court cannot be held responsible, it is not possible to adhere to the date which has been arranged, and the officer of court shall intimate that new date to the debtor:

Provided that no date—

(a) arranged under this subsection shall be less than 7 days after the date of such intimation;

(b) so arranged for the holding of the sale shall be a date occurring after the end of the period specified in the warrant of sale, being the period within which the sale is required to be held.

Subsection (4)
This subsection implements Recommendation 5.40(3) (para. 5.193).

Subsection (6)
This subsection implements Recommendation 5.40(2) (para. 5.193).

Subsection (7)
This subsection implements Recommendation 5.40(4) (para. 5.193).

Subsections (8) *and* (9)
These subsections implement Recommendation 5.40(1) (para. 5.193).

(10) An order under this section granting a variation of a warrant of sale shall not take effect while the order is appealable or subject to an appeal or a further appeal.

Payment agreements after warrant of sale.

58.—(1) Without prejudice to section 57(1) and (9) of this Act, in order to enable the debt to be paid by instalments or otherwise in accordance with an agreement between the creditor and the debtor, the creditor may, subject to subsection (2) below, on one occasion only after the granting of a warrant of sale, cancel any arrangements made for the sale of the poinded articles in pursuance of that warrant.

(2) Where the warrant of sale provides for the sale of poinded articles to be held in premises other than where they are situated, the creditor shall not for the purposes of subsection (1) above be entitled to cancel the arrangements made for the sale after the poinded articles have been removed for sale from the premises where they are situated.

(3) The creditor or an officer of court shall forthwith after an agreement mentioned in subsection (1) above has been entered into make a report of the agreement to the sheriff.

(4) Where the debtor is in breach of an agreement mentioned in subsection (1) above, then—

(a) if the provisions of the original warrant still allow, the creditor may instruct an officer of court to make arrangements for the sale of the poinded articles in accordance with those provisions; or

(b) if, for any reason for which the creditor or officer of court cannot be held responsible, the arrangements made for the sale of the poinded articles cannot be implemented in accordance with the provisions of the original warrant of sale, the sheriff may, on an application by the creditor or officer of court made within a period of 6 months after the date when the report was made under subsection (3) above, grant a variation of the warrant of sale under section 57 of this Act.

(5) For the purposes of paragraphs (a) and (b) of subsection (4) above, the original warrant of sale shall be deemed to have specified that the sale shall be held within the period of 6 months after the date when the report was made under subsection (3) above.

The sale.

59.—(1) Where the warrant of sale does not appoint as auctioneer to conduct the sale the officer of court appointed under section 55(5) of this Act to make arrangements for the sale, that officer—

(a) shall attend the sale and keep a record of any articles which are sold and the amount for which they are sold and of any articles whose ownership passes to the creditor in default of sale; and

Subsection (10)

This subsection implements Recommendation 9.12(5) (para. 9.74).

Clause 58

This clause permits the creditor to cancel a sale of the poinded goods in order to allow the debtor time to pay the debt by instalments or otherwise.

Subsection (1)

This subsection implements Recommendation 5.41(1) (para. 5.197).

Subsection (2)

This subsection implements Recommendation 5.41(2) (para. 5.197).

Subsections (3) *and* (5)

These subsections implement Recommendation 5.41(3) (para. 5.197).

Subsection (4)

This subsection implements Recommendation 5.41(4) (para. 5.197).

Clause 59

This clause is concerned with the execution of the sale of poinded goods and the ownership of goods that are not sold.

Subsection (1)

This subsection restates the existing law and practice.

(b) if the sale is to be held in premises other than an auction room, shall supervise the sale.

(2) Where the officer of court appointed under section 55(5) of this Act to make arrangements for the sale is appointed as auctioneer to conduct the sale, he shall be attended at the sale by one witness.

(3) No bid for the purchase of a poinded article at the auction shall be accepted unless it is at least equal to—

(a) the valuation of the article made under section 46(1)(c) of this Act; or

(b) such smaller amount as the creditor may have authorised as acceptable:

Provided that the valuation and amount mentioned in paragraphs (a) and (b) above need not be disclosed to anyone bidding for such purchase.

(4) Any poinded article exposed for sale may be purchased by—

(a) any creditor, including the creditor on whose behalf the poinding was executed; or

(b) a person who owns the article in common with the debtor.

(5) Without prejudice to subsection (6) below, ownership of a poinded article which remains unsold after being exposed for sale shall pass to the creditor after it ceases to be exposed for sale.

(6) The ownership of a poinded article which has passed to the creditor under subsection (5) above, in a case where the sale is held in premises of the debtor, shall revert to the debtor unless—

(a) if the sale is held in a dwellinghouse in which the debtor is residing, the creditor uplifts the article by 8 p.m., or such time as may be prescribed, on the same day as the sale was completed;

(b) if the sale is held in other premises of the debtor, the creditor uplifts the article before 8 p.m., or such time as may be prescribed, on the third day following the date of the completion of the sale;

and an officer of court may remain on or re-enter any premises for the purpose of enabling the creditor to uplift any article under paragraph (a) or (b) above.

(7) Subsections (5) and (6) above are without prejudice to the rights of any third party in any of the poinded articles.

(8) Where at the sale any article is unsold or is sold at a price below the valuation made under section 46(1)(c) of this Act, the debtor shall be credited with an amount equal to that valuation.

Subsection (2)

This subsection implements Recommendation 5.36(2) (para. 5.178).

Subsection (3)

This subsection implements Recommendations 5.42 (para. 5.199) and 5.43(1) (para. 5.203).

Subsection (4)

Paragraph (*a*) restates the existing law while *paragraph* (*b*) makes it clear that a third party co-owner is entitled to bid.

Subsection (5)

This subsection restates the existing law.

Subsection (6)

This subsection implements Recommendation 5.43(2) and (3) (para. 5.203).

Subsection (8)

This subsection implements Recommendation 5.43(1) (para. 5.203).

Disposal of proceeds of sale.

60.—The officer of court appointed under section 55(5) of this A to make arrangements for the sale shall dispose of the proceeds the sale—

(a) by handing over to the creditor or his agent the proceed so far as necessary to meet the debt and any interest an expenses chargeable against the debtor (subject to an agreement between the officer of court and the creditor his agent relating to the fees or outlays of the officer court) or, if the sheriff so directs, by consigning suc proceeds in court; and

(b) by handing over to the debtor or his agent any surplu remaining after the debt and any interest and expens chargeable against the debtor have been met or, if th debtor or agent cannot be found, by consigning that su in court.

Report of sale.

61.—(1) In all sales of poinded articles, the officer of court appointe under section 55(5) of this Act to make arrangements for the sa shall within a period of 14 days after the date of completion of th sale make to the sheriff a report in the prescribed form ("the repo of sale") setting out—

(a) any articles which have been sold and the amount for whic they have been sold;

(b) any articles which remain unsold;

(c) the expenses of the diligence; and

(d) any balance due by, or surplus handed over or due to, th debtor.

(2) If an officer of court—

(a) without reasonable excuse makes a report of sale to th sheriff after the expiry of the period of 14 days mentione in subsection (1) above; or

(b) wilfully refuses or delays to make a report of sale after th expiry of that period,

the sheriff may, without prejudice to his right to report the matte to the Court of Session or the sheriff principal as mentioned in sectio 105(1)(b) of this Act, make an order that the officer of court sha be liable for the expenses of the diligence, either in whole or in par

(3) The report of sale shall be signed by the officer of cou appointed as aforesaid and, if a witness was required to attend at th sale under section 59(2) of this Act, by that witness.

(4) The report of sale shall be remitted by the sheriff to the auditc of court who shall—

(a) tax the expenses of the diligence;

Clause 60

This clause by and large restates the existing law and practice regarding the disposal of the proceeds of sale. *Paragraph* (*b*) implementing Recommendation 5.46 (para. 5.214) clarifies the procedure to be followed where a sale produces a surplus.

Clause 61

This clause deals with the report of the sale which the officer of court is required to submit to the sheriff.

Subsection (1)

This subsection re-enacts the existing law with the modifications contained in Recommendation 5.44 (para. 5.207).

Subsection (2)

This subsection implements Recommendation 5.45(2) (para. 5.210).

Subsection (4)

This subsection implements Recommendation 5.45(1) (para. 5.210) by embodying in statute the present procedure for auditing reports contained in the Practice Notes of the sheriffs principal.

(b) certify the balance due by or to the debtor following on the diligence; and

(c) make a report to the sheriff:

Provided that the auditor of court shall not alter the expenses of the diligence or the aforesaid balance without first giving all interested persons an opportunity to make representations.

(5) On receipt of the auditor's report on the report of sale, the sheriff may make an order—

(a) declaring the balance due by or to the debtor, as certified by the auditor in his report;

(b) declaring such a balance after making modifications to the auditor's balance as so certified; or

(c) if he is satisfied that there has been a substantial irregularity in the diligence (other than the making of the report of sale to the sheriff after the expiry of the period of 14 days mentioned in subsection (1) above), declaring the diligence to be null and may make any such consequential order as appears to him to be necessary in the circumstances,

and the sheriff clerk shall intimate the sheriff's decision under this subsection to the debtor.

(6) The sheriff shall not make an order under subsection (5)(b) or (c) above without first giving all interested persons an opportunity to be heard, and no such order shall take effect while the order is appealable or subject to an appeal or a further appeal.

(7) The auditor of court shall not be entitled to charge a fee in respect of his report on the report of sale.

(8) The report of sale and the auditor's report on it shall be retained by the sheriff clerk for the prescribed period and during that period they shall be open for inspection in the sheriff clerk's office by any interested person on payment of such fee as may be prescribed in an order made under section 2 of the Courts of Law Fees (Scotland) Act 1895.

1895 c. 14.

(9) The making of an order under subsection (5)(c) above shall not affect the title of a person to any article acquired by him at the sale, or subsequently, in good faith and for value.

(10) Any rule of law whereby the sheriff may refuse to receive a report of sale shall cease to have effect.

Duration of poinding

Period for which poinding remains effective.

62.—(1) Subject to subsections (2) and (3)(a) below, a poinding shall cease to have effect on the expiry of a period of one year after the date of execution of the poinding, unless before that expiry an application has been made under section 52(1) of this Act for a warrant of sale in relation to the poinded articles.

Subsection (5)
This subsection implements Recommendation 5.45(3) and (4) (para. 5.210).

Subsection (6)
This subsection implements Recommendation 9.12(5) (para. 9.74).

Subsection (7)
This subsection implements Recommendation 8.11(2) (para. 8.73).

Subsection (9)
This subsection implements Recommendation 5.45(3) (para. 5.210).

Subsection (10)
This subsection implements Recommendation 5.45(2) (para. 5.210).

Clause 62
This clause regulates the duration of a poinding.

Subsection (1)
This subsection implements Recommendation 5.27(1) (para. 5.130).

(2) The sheriff, on an application by the creditor or an officer of court made before the expiry of the said period and before an application has been made under section 52(1) of this Act for a warrant of sale in relation to the poinded articles—

(a) may, where he thinks that, by extending the period during which the poinding shall remain effective, the debtor is likely to comply with an agreement between the creditor and the debtor for the payment of the debt by instalments or otherwise, extend the period for such further period as he considers may reasonably be required to give effect to the agreement; or

(b) may extend the period to enable further proceedings to be taken in the diligence where the termination of the poinding would prejudice the creditor and the creditor cannot be held responsible for the circumstances giving rise to the need for the extension,

and the sheriff may grant a further extension or further extensions under this subsection on an application made to him before the expiry of the previously extended period.

(3) Where, within the period of one year mentioned in subsection (1) above or within that period as extended under subsection (2) above, an application is made—

(a) under the said subsection (2), the poinding shall continue to have effect until the disposal of the application; or

(b) under section 52(1) of this Act for a warrant of sale in relation to the poinded articles, the poinding shall continue to have effect—

(i) if the sheriff decides to refuse to grant a warrant of sale, until the date when that decision ceases to be appealable or subject to an appeal or a further appeal;

(ii) if the sheriff grants a warrant of sale and the articles are sold, or ownership passes to the creditor in default of sale, within the period specified for the sale of the articles in the warrant of sale, until the date of such sale or such ownership passing; or

(iii) if the sheriff grants a warrant of sale and the articles are not sold, or ownership does not pass to the creditor, within the aforesaid period, until the expiry of that period.

(4) Without prejudice to subsection (5) below, if a report has been made to the sheriff under section 58(3) of this Act, the poinding shall continue to have effect for a period of 6 months after the date when the report was made.

(5) Where, within the period specified in the warrant of sale, being the period within which the sale is required to be held, or within the period of 6 months mentioned in subsection (4) above, an application

Subsection (2)

Paragraph (*a*) implements Recommendation 5.27(1) and (2) (para. 5.130). *Paragraph* (*b*) provides the creditor with a remedy where the poinding lapses due to unforeseen or unavoidable circumstances.

Subsection (3)

Paragraph (*a*) implements Recommendation 5.27(2) (para. 5.130). *Paragraph* (*b*) implements Recommendations 5.30(4) (para. 5.146) and 5.34 (para. 5.169).

Subsection (4)

This subsection implements Recommendation 5.41(3) (para. 5.197).

Subsection (5)

This subsection implements Recommendation 5.40(4) (para. 5.193).

is made under section 57 of this Act for a variation of the warrant of sale, the poinding shall cease to have effect—

(a) if the sheriff decides to refuse to grant such a variation, on the date when that decision ceases to be appealable or subject to an appeal or a further appeal or on such later date as the sheriff may direct;

(b) if the sheriff grants such a variation and the articles are sold, or ownership passes to the creditor in default of sale, within the period specified for the sale of the articles in the warrant of sale as so varied, on the date of such sale or such ownership passing; or

(c) if the sheriff grants such a variation and the articles are not sold, or ownership does not pass to the creditor, within the aforesaid period, on the expiry of that period.

(6) The decision of the sheriff under subsection (2) above shall be final and shall be intimated to the debtor by the sheriff clerk.

Removal, damage or destruction of poinded articles

Authorised removal of poinded articles.

63.—(1) The debtor or the possessor of poinded articles may remove them to another location if—

(a) the creditor or officer of court has consented to their removal; or

(b) the sheriff, on an application by the debtor or the possessor, has authorised their removal.

(2) The removal of poinded articles to another location in accordance with subsection (1) above shall not by itself have the effect of releasing the articles from the poinding.

(3) Where poinded articles have been removed from the debtor's premises to another location under subsection (1) above, the creditor may, under the same warrant to poind, again poind any of the articles so removed and, notwithstanding section 50 of this Act, any articles which were not so removed, whether or not they were previously poinded; and, on the execution of any such further poinding, the original poinding shall be deemed to have been abandoned.

Removal of poinded articles in breach of poinding.

64.—(1) The removal from premises of poinded articles by the debtor or a third party, without consent or authority under section 63(1)(a) or (b) of this Act, shall be a breach of the poinding and, if the debtor or third party at the time of such removal knew that the articles had been poinded, the removal may be dealt with as a contempt of court.

(2) The removal of poinded articles to another location in breach of the poinding shall not by itself have the effect of releasing the articles from the poinding.

Subsection (6)

This subsection implements Recommendation 9.11(4) (para. 9.70).

Clause 63

This clause provides for the sheriff or the creditor to authorise the debtor to remove some or all of the poinded goods to another location.

Subsection (1)

This subsection implements Recommendation 5.25(1) (para. 5.120).

Subsection (2)

This subsection makes it clear that articles which are moved to another location remain subject to the poinding.

Subsection (3)

This subsection implements Recommendation 5.25(2) (para. 5.120).

Clause 64

This clause sets out the various orders the court may make following unauthorised removal of poinded goods.

Subsection (1)

This subsection implements Recommendation 5.26(5) (para. 5.125).

Subsection (2)

This subsection makes it clear that articles which are removed to another location remain subject to the poinding.

(3) Subject to subsection (4) below, where in breach of a poinding articles have been removed from premises by the debtor or by a third party, the sheriff, on an application in the poinding process by the creditor or the officer of court,—

(a) may make an order requiring the debtor or third party or such other person as is in possession of those articles to restore them to the premises from which they have been removed within a period specified in the order; and

(b) if a requirement under paragraph (a) above is not complied with and it appears to the sheriff that the articles are likely to be found in premises specified in the application, may grant a warrant to officers of court—

(i) to search for the articles in the premises so specified; and

(ii) to restore the articles to the premises from which they have been removed or to make such other arrangements for their security as the sheriff may direct,

and any such warrant shall be deemed to include authority to open shut and lockfast places for the purpose of its execution.

(4) Where it appears to the sheriff, on an application made to him in the poinding process, that any article which has been removed as mentioned in subsection (3) above has been acquired for value and without knowledge of the poinding, he shall not make an order under paragraph (a) of that subsection relating to that article and shall recall any such order which he has already made.

(5) Where in breach of a poinding poinded articles have been removed from premises in circumstances in which the debtor is at fault, the sheriff, on an application in the poinding process by the creditor, may, notwithstanding section 50 of this Act, authorise the poinding of other articles belonging to the debtor in the same premises.

(6) Where a third party knowing that an article has been poinded removes it from premises in breach of the poinding and the article—

(a) in the course of the removal or subsequently, is damaged or destroyed;

(b) is subsequently lost or stolen; or

(c) is acquired from or through that third party by another person without knowledge of the poinding and for value,

the sheriff may order the third party to consign in court until the completion of the sale or until the poinding otherwise ceases to have effect—

(i) where the article has been damaged but not so damaged as to make it worthless, a sum equal to the difference between the valuation of the article made under section 46(1)(c) of this Act and the value of the article as damaged;

(ii) in any other case, a sum equal to the valuation made under that section.

Subsection (3)

This subsection implements Recommendation 5.26(1) (para. 5.125).

Subsection (4)

This subsection implements Recommendation 5.26(2) (para. 5.125).

Subsection (5)

This subsection implements Recommendation 5.26(3) (para. 5.125).

Subsections (6) *and* (7)

These subsections implement Recommendation 5.26(4) (para. 5.125).

(7) Any sum consigned in court under subsection (6) above shall, on completion of the sale or on the poinding otherwise ceasing to have effect, be paid to the creditor to the extent that may be necessary to satisfy his debt, any surplus thereof being paid to the debtor.

Damage or destruction of poinded articles.

65.—(1) The wilful damage or destruction of poinded articles by the debtor or a third party who knows that the articles have been poinded shall be a breach of the poinding and may be dealt with as a contempt of court.

(2) Where poinded articles have been damaged or destroyed in circumstances in which the debtor is at fault, the sheriff, on an application by the creditor or officer of court in the poinding process, may—

(a) authorise, notwithstanding section 50 of this Act, the poinding of other articles belonging to the debtor in the premises in which the original poinding took place; or

(b) authorise the revaluation of any damaged article in accordance with section 46(1)(c) of this Act.

(3) Where a third party knowing that an article has been poinded wilfully damages or destroys it, the sheriff may order the third party to consign in court until the completion of the sale or until the poinding otherwise ceases to have effect—

(a) where the article has been damaged but not so damaged as to make it worthless, a sum equal to the difference between the valuation of the article made under section 46(1)(c) of this Act and the value of the article as damaged;

(b) where the article has been destroyed or so damaged as to make it worthless, a sum equal to the valuation made under that section.

(4) Any sum consigned in court under subsection (3) above shall, on the completion of the sale or on the poinding otherwise ceasing to have effect, be paid to the creditor to the extent that may be necessary to satisfy his debt, any surplus thereof being paid to the debtor.

Articles belonging to third party or in common ownership

Release from poinding of articles belonging to third party.

66.—(1) An officer of court may, at any time after the execution of a poinding and before the sale of the poinded articles, release an article from the poinding if a third party or a person acting on his behalf claims that it belongs to the third party, unless the debtor or the possessor of the article, if different from the debtor, denies the claim.

Clause 65

This clause deals with the situation where poinded goods are damaged or destroyed through unauthorised interference.

Subsection (1)

This subsection implements Recommendation 5.26(5) (para. 5.125).

Subsection (2)

This subsection implements Recommendation 5.26(3) (para. 5.125).

Subsections (3) *and* (4)

These subsections implement Recommendation 5.26(4) (para. 5.125).

Clause 66

This clause sets out the procedures whereby a third party can obtain release of his or her goods which have been poinded.

Subsection (1)

This subsection implements Recommendation 5.48(1) (para. 5.229).

(2) The sheriff shall, at any time after the execution of a poinding and before the sale of the pointed articles, on an application made to him by a third party, make an order releasing an article from a poinding where he is satisfied that the article belongs to that third party.

(3) The making of an application under subsection (2) above is without prejudice to the taking of other proceedings by the third party for the recovery of pointed articles belonging to him, and a determination of the sheriff under that subsection shall not be binding in any other proceedings.

(4) An order under subsection (2) above releasing articles from a poinding shall not take effect while the order is appealable or subject to an appeal or a further appeal.

(5) Any release of a pointed article under subsection (1) above—

(a) before the making of an application for warrant of sale, shall be mentioned in that application;

(b) after the application has been made but before it has been disposed of, shall be reported forthwith by the officer of court to the sheriff;

(c) after the application has been granted in a case where some articles remain pointed, shall be specified in the report under section 61 of this Act.

(6) Where any article has been released under subsection (1) or (2) above from a poinding, the creditor may, notwithstanding section 50 of this Act, poind other articles belonging to the debtor in the same premises.

Poinding and sale of articles in common ownership.

67.—(1) Articles which are owned in common by a debtor and a third party may be pointed and disposed of in accordance with the provisions of this Part of this Act in satisfaction of the debts of that debtor.

(2) Where a third party or a person acting on his behalf, at any time after the execution of a poinding and before the sale of the pointed articles—

(a) claims that any such article is owned in common by the debtor and the third party; and

(b) pays to the officer of court a sum equal to the value of the debtor's interest in the article,

the officer of court may, unless the debtor or the possessor of the article, if different from the debtor, denies the claim, release the article from the poinding.

(3) The sheriff shall, at any time after the execution of a poinding and before the sale of the pointed articles, on an application made

Subsections (2) *and* (3)
These subsections implement Recommendation 5.48(3) (para. 5.229).

Subsection (4)
This subsection implements Recommendation 9.12(5) (para. 9.74).

Subsection (5)
This subsection implements Recommendation 5.48(2) (para. 5.229).

Subsection (6)
This subsection implements Recommendation 5.48(4) (para. 5.229).

Clause 67
This clause makes it competent to poind goods owned in common by the debtor and a third party, and sets out procedures whereby the third party can obtain release of the poinded goods or be credited with the value of his or her interest.

Subsection (1)
This subsection implements Recommendation 5.49(1) (para. 5.235).

Subsection (2)
This subsection implements Recommendation 5.49(2) (para. 5.235).

Subsection (3)
This subsection implements Recommendation 5.49(3) and (4) (para. 5.235).

to him by a third party, make an order releasing any article from a poinding where he is satisfied that the article is owned in common by the debtor and that third party and either—

(a) the third party pays to the officer of court a sum equal to the value of the debtor's interest in the article; or

(b) the sheriff is satisfied that the continuation of the poinding of that article or its sale under warrant of sale would be unduly harsh to the third party in the circumstances.

(4) A release under subsection (2) above or, where payment is made under paragraph (a) of subsection (3) above, a release under that subsection, shall become effective on the granting of a receipt for payment thereunder; and, on such a receipt being granted, the debtor's interest in the released article shall be deemed to be transferred to the third party.

(5) An order under subsection (3) above releasing articles from a poinding shall not take effect while the order is appealable or subject to an appeal or a further appeal.

(6) Any release of a poinded article under subsection (2) above—

(a) before the making of an application for warrant of sale shall be mentioned in that application;

(b) after the application has been made but before it has been disposed of, shall be reported forthwith by the officer of court to the sheriff;

(c) after the application has been granted in a case where some articles remain poinded, shall be specified in the report under section 61 of this Act.

(7) Where any article is released in pursuance of subsection (3)(b) above from a poinding, the creditor may, notwithstanding section 50 of this Act, poind other articles belonging to the debtor in the same premises.

(8) This subsection applies where—

(a) at any time after the execution of a poinding, a third party claims that any of the poinded articles is owned in common by the debtor and himself but does not seek release of the article from the poinding, and either

(b) the claim is admitted by the creditor and the debtor; or

(c) the claim is not admitted by the creditor or the debtor, but the sheriff, on an application made to him, is satisfied that the claim is valid.

(9) Where subsection (8) above applies, then the creditor shall pay to the third party—

(a) if the article is or has been sold, a sum out of the proceeds of sale or out of the valuation of that article under section 46(1)(c) of this Act (whichever is the greater) which bears the same relation to those proceeds or that valuation as the

Subsection (5)

This subsection implements Recommendation 9.12(5) (para. 9.74).

Subsection (7)

This subsection implements Recommendation 5.49(5) (para. 5.235).

Subsections (8) *and* (9)

These subsections implement Recommendation 5.49(6) (para. 5.235).

value of the third party's interest in the article bears to the value of the total interest of all those who own the article in common;

(b) if ownership of the article passes or has passed to the creditor in default of sale, a sum which bears the same relation to the valuation of the article under section 46(1)(c) of this Act as the value of the third party's interest in the article bears to the value of the total interest of all those who own the article in common.

Supplementary

Certain proceedings under Part III to sist further steps in the diligence.

68. Where, in relation to a poinding, an application under this Part of this Act mentioned in subsection (2) below has been made, then—

(a) during a relevant period it shall be incompetent—

(i) to grant a warrant of sale of the pointed articles; or

(ii) to remove the pointed articles for sale, or to hold a sale of them, in pursuance of a warrant of sale; and

(b) a relevant period shall be disregarded in calculating the period—

(i) within which a sale of the pointed articles is required to be held by virtue of section 55 of this Act; or

(ii) during which the poinding remains effective by virtue of section 62 of this Act.

(2) The applications referred to in subsection (1) above are an application under—

(a) section 43(4), 48(1), 66(2) or 67(3) (release of pointed articles);

(b) section 49(1) or (2) (recall of poinding);

(c) section 51(1) (sist of proceedings in poinding of mobile homes);

(d) section 64(3) (restoration of articles removed in breach of a poinding);

(e) section 64(4) (recall of order under section 64(3)).

(3) In this section "a relevant period" means any of the following periods—

(a) the period while the application concerned is pending;

(b) any period during which the decision of the sheriff disposing of that application is appealable or subject to an appeal or a further appeal.

Conjoining of further poinding with original poinding.

69.—(1) Subject to subsection (2) below, where a report of a poinding executed in pursuance of section 48(2), 64(5) or 65(2), or under section 9(7), 18(7), 30(6), 63(3), 66(6) or 67(7), of this Act ("the further poinding") has been received under section 47 of this

Clause 68

This clause implements Recommendation 9.12(3) (para. 9.74). It prevents a warrant of sale being granted or goods being removed for sale pending the determination of certain applications relating to the poinded goods.

Clause 69

This clause implements Recommendation 5.28(2) (para. 5.134). It provides for the sheriff to conjoin into a single poinding two or more poindings by the same creditor to enforce the same debt.

Act before an application for warrant of sale has been granted in the original poinding, then the sheriff, on an application being made to him by the creditor, shall, at any time before granting a warrant of sale of the articles poinded by the original poinding or the further poinding, make an order conjoining the further poinding with the original poinding.

(2) The making of an order under subsection (1) above shall be competent if and only if—

(a) at least 14 days have elapsed since the date of execution of the further poinding; and

(b) at the time when the sheriff is considering the making of the order, an application under this Part of this Act in relation to the further poinding is not pending or, if such an application has been duly made and disposed of by the sheriff, his decision in that disposal is no longer appealable or is not subject to an appeal or a further appeal.

(3) Where the sheriff makes an order under subsection (1) above, it shall be incompetent for him to grant an application for warrant of sale made in pursuance of the original poinding which is pending when the order is made.

(4) The effect of an order under subsection (1) above shall be that thereafter the further poinding shall be treated for all purposes as if it were part of the original poinding:

Provided that where such an order has been made—

(a) the references to the poinding in sections 49(1) and 52(2)(a)(i) of this Act shall be construed as references to the original poinding or the further poinding; and

(b) the reference to the poinded articles in section 52(3)(a) of this Act shall be construed as a reference to the articles poinded under the original poinding and the further poinding.

(5) The decision of the sheriff under subsection (1) above shall be final.

Expenses of poinding and sale.

70.—Schedule 1 to this Act shall have effect for the purpose of determining the liability for expenses between the creditor and the debtor incurred in a process of poinding and sale.

Interpretation of "dwelling-house" in Part III.

71.—In this Part of this Act "dwellinghouse" includes a caravan or a houseboat or any structure adapted for use as a residence.

EXPLANATORY NOTES

Clause 71

This clause makes it clear that the provisions relating to the exemptions from poinding of goods contained in a dwellinghouse apply to a caravan or other mobile home in which the debtor resides.

PART IV

ARRESTMENT OF EARNINGS

General provisions

New diligences against earnings.

72.—(1)The diligences against earnings of a debtor in the hands of his employer mentioned in subsection (2) below shall replace the diligence of arrestment and action of furthcoming against such earnings.

(2) The diligences against earnings referred to in subsection (1) above are—

(a) a diligence to be known as an "earnings arrestment", to enforce the payment of any debt (including maintenance) which is due as at the date of the execution of the diligence;

(b) a diligence to be known as a "current maintenance arrestment", the purpose of which is (as nearly as may be) to enforce the payment of maintenance as it falls due;

(c) an order to be known as a "conjoined arrestment order", to enforce the payment of two or more debts at the same time against the same earnings.

(3) The provisions of this Part of this Act shall replace any rule of law whereby there is exempted from arrestment a reasonable amount for the subsistence of the debtor and his dependants in relation to the arrestment of the debtor's earnings in the hands of his employer.

Meaning of "earnings", "net earnings" and "employer" in Part IV.

73.—(1) Subject to subsection (2) below, in this Part of this Act "earnings" means any sums payable to the debtor—

(a) by way of wages or salary (including any overtime pay);

(b) by way of fees, bonus, commission or other emoluments payable—

(i) in addition to wages or salary by the person paying the wages or salary; or

(ii) under a contract of service; or

(c) by way of pension (including a pension declared to be alimentary, an annuity in respect of past services, whether or not the services were rendered to the person paying the annuity, and any periodical payments by way of compensation for the loss, abolition or relinquishment, or diminution in the emoluments, of any office or employment).

EXPLANATORY NOTES

Clause 72

This clause introduces the three new diligences against earnings which are to replace the existing diligence of arrestment and furthcoming of wages.

Subsection (1)

This subsection implements Recommendation 6.1(1) (para. 6.30).

Subsection (2)

Paragraph (*a*) implements Recommendations 6.1(1) (para. 6.30) and 6.5 (para. 6.51).

Paragraph (*b*) implements Recommendation 6.23 (para. 6.148).

Paragraph (*c*) implements Recommendations 6.41(1) (para. 6.228) and 6.46(1) (para. 6.252).

Subsection (3)

This subsection implements Recommendation 6.10 (para. 6.79).

Clause 73

This clause defines certain terms used in this Part of the Bill.

Subsection (1)

Paragraphs (*a*) and (*b*) implement Recommendation 6.2(2) (para. 6.39). *Paragraph* (*c*) implements Recommendation 6.3(1) and (3) (para. 6.45).

(2) The following shall not be treated as earnings—

(a) a pension or allowance payable in respect of disablement or disability;

(b) any sum the assignation of which is precluded by virtue of section 203 of the Army Act 1955 or of section 203 of the Air Force Act 1955, or any like sum payable to a member of the naval forces of the Crown, or to a member of any women's service administered by the Defence Council;

1955 c. 18.
1955 c. 19.

(c) in relation to the enforcement by an earnings arrestment of a debt, not being maintenance, the wages of a seaman other than a seaman of a fishing boat;

(d) any occupational pension payable under any enactment if the enactment precludes the assignation of the pension or exempts it from diligence;

(e) a pension, allowance or benefit payable under any of the enactments specified in Schedule 2 to this Act (being enactments relating to social security);

(f) a guaranteed minimum pension within the meaning of the Social Security Pensions Act 1975;

1975 c. 60.

(g) a redundancy payment within the meaning of section 81(1) of the Employment Protection (Consolidation) Act 1978.

1978 c. 44.

(3) In this Act "net earnings" means the earnings which remain payable to the debtor after the employer has deducted any sum which he is required to deduct in respect of—

(a) income tax,

(b) primary class 1 contributions under Part I of the Social Security Act 1975, and

1975 c. 14.

(c) amounts deductible under any enactment, or in pursuance of a request in writing by the debtor, for the purposes of a superannuation scheme within the meaning of the Wages Councils Act 1979.

1979 c. 12.

(4) In this Act "employer", in relation to any sum payable by way of pension, means the person paying that sum and, where the employee is an officer of the Crown, means such person as may be prescribed in regulations made by the Secretary of State by statutory instrument, and "employee", "employed" and "employment" shall be construed accordingly.

(5) In subsection (2)(c) above, expressions used in the Merchant Shipping Act 1894 have the same meanings as in that Act.

1894 c. 60.

Subsection (2)

Paragraph (*a*) implements Recommendation 6.3(2) (para. 6.45), *paragraphs* (*b*) and (*c*) implement Recommendation 6.4 (para. 6.48), *paragraph* (*d*) implements Recommendation 6.3(4) (para. 6.45) and *paragraphs* (*e*) and (*f*) implement Recommendation 6.3(5) (para. 6.45).

Subsection (3)

This subsection implements Recommendations 6.9(2) (para. 6.76) and 6.27(1) (para. 6.166).

Meaning of "maintenance" and "maintenance order".

74. In this Act—

"maintenance" means periodical sums payable under a maintenance order;

"maintenance order" means—

(a) an order granted by a court in Scotland for payment of a periodical allowance on divorce or aliment;

(b) an order under section 80 or 81 of the Social Work (Scotland) Act 1968, section 11(3) of the Guardianship Act 1973 or section 18 or 19 of the Supplementary Benefits Act 1976;

1968 c. 49.
1973 c. 29.
1976 c. 71.

(c) an order of a court in England and Wales or Northern Ireland registered in Scotland under Part II of the Maintenance Orders Act 1950;

1950 c. 37.

(d) a provisional order of a reciprocating country which is confirmed by a court in Scotland under Part I of the Maintenance Orders (Reciprocal Enforcement) Act 1972;

1972 c. 18.

(e) an order of a reciprocating country which is registered in Scotland under the said Part I;

(f) an order registered in Scotland under Part II, or under an Order in Council made in pursuance of Part III, of the said Act of 1972;

(g) an order registered in Scotland under section 5 of the Civil Jurisdiction and Judgments Act 1982; or

1982 c. 27.

(h) an alimentary bond or agreement (including a document providing for the maintenance of one party to a marriage by the other after the marriage has been dissolved or annulled)—

(i) registered for execution in the Books of Council and Session or sheriff court books, or

(ii) registered in Scotland under an Order in Council made under section 13 of the Civil Jurisdiction and Judgments Act 1982.

Earnings arrestments

General effect of earnings arrestment.

75.—(1) An earnings arrestment shall have the effect of requiring the employer of the debtor while the arrestment is in operation to deduct a sum calculated in accordance with section 76 of this Act from the debtor's net earnings on any day (in this Part of this Act referred to as a"pay-day") on which he pays earnings to the debtor and forthwith to pay any sum so deducted to the creditor.

(2) Subject to section 86 of this Act, an earnings arrestment—

(a) shall come into operation on the date of its execution, being the date on which a schedule in the prescribed form (to be

Clause 74

This clause implements Recommendations 6.24 (para. 6.151) and 6.35 (para. 6.207).

Clause 75

This clause sets out the effect of an earnings arrestment and deals with the situation where payments are made under the arrestment after the debt that it enforces has been satisfied.

Subsection (1)

This subsection implements Recommendations 6.1(2) and (3) (para. 6.30), 6.12(1) (para. 6.91) and 6.22(1) (para. 6.130).

Subsection (2)

This subsection implements Recommendations 6.2(1) (para. 6.39), 6.8 (para. 6.66), 6.13(1) and (2) (para. 6.97) and 6.16(1) (para. 6.110).

known as an"earnings arrestment schedule") is served on the employer of the debtor; and

(b) shall remain in operation until the debt recoverable by the arrestment has been fully recovered, the debtor has ceased to be employed by the employer concerned, or the arrestment has been recalled or has for any other reason ceased to have effect.

(3) Subject to section 95 of this Act, where an employer fails to comply with an earnings arrestment, he—

(a) shall be liable to pay to the creditor any sum which would have been paid by the employer if he had so complied;

(b) shall not be entitled to recover from the debtor any sum paid by him to the debtor in contravention of the arrestment.

(4) The creditor shall not be entitled to refuse to accept payment under subsection (1) above which is tendered by cheque or by such other method (apart from payment in cash) as may be prescribed:

Provided that, if any such cheque is dishonoured, the creditor may insist that the payment in relation to which the cheque was dishonoured and any future payment under that subsection shall be tendered in cash.

(5) A creditor whose debt is being enforced by an earnings arrestment shall, as soon as is reasonably practicable after he has received payment of the full amount of his debt, whether by payments under the arrestment or otherwise, or his debt has ceased to be enforceable by diligence, intimate that fact to the employer.

(6) Any sum paid by an employer under an earnings arrestment after the debt has been satisfied or has ceased to be enforceable by diligence shall be recoverable by the debtor from the creditor with interest on that sum at the prescribed rate.

(7) Without prejudice to subsection (6) above, where the creditor has failed to comply with subsection (5) above, the sheriff, on an application by the debtor, may make an order requiring the creditor to pay to the debtor an amount not exceeding twice the amount recoverable by the debtor under the said subsection (6).

Deductions from net earnings to be made by employer.

76.—(1) Where the debtor's earnings are payable at regular intervals, the sum to be deducted from his net earnings on a pay day under section 75 of this Act shall be the sum specified in column 2 of—

(a) Table A in Schedule 3 to this Act, if the earnings are payable weekly; or

(b) Table B in that Schedule, if the earnings are payable monthly,

being the sum which is applicable to the bracket specified in column 1 of the Table within which his net earnings on that pay day fall.

Subsection (3)

This subsection implements Recommendation 6.14 (para. 6.100).

Subsection (4)

This subsection implements Recommendations 6.22(2) and (3) (para. 6.130).

Subsections (5), (6) *and* (7)

These subsections implement Recommendation 6.16(1), (3) and (5) (para. 6.110).

Clause 76

This clause sets out the rules for calculating the deductions to be made in pursuance of an earnings arrestment by the employer from the debtor's net earnings. It implements Recommendation 6.9 (para. 6.76).

(2) Where the debtor's earnings are payable at regular intervals, being intervals of a whole number of weeks or months, the sum to be deducted as aforesaid shall be the sum arrived at by—

(a) calculating what would be his weekly or monthly net earnings by dividing the net earnings payable to him on the pay day by the number of weeks or months in the regular interval;

(b) ascertaining by reference to column 2 of the said Table A or B the sum which is applicable to the bracket specified in column 1 of the Table within which his net earnings calculated as aforesaid fall; and

(c) multiplying the sum ascertained under paragraph (b) above by the number of weeks or months in the regular interval.

(3) Where the debtor's earnings are payable at regular intervals other than at intervals to which subsection (1) or (2) above applies, the sum to be deducted as aforesaid shall be arrived at by—

(a) calculating the daily rate of his net earnings by dividing the net earnings payable to him on the pay day by the number of days in the regular interval;

(b) ascertaining by reference to column 2 of Table C in the said Schedule the sum which is applicable to the bracket specified in column 1 of that Table within which his net daily earnings calculated as aforesaid fall; and

(c) multiplying the sum ascertained under paragraph (b) above by the number of days in the regular interval.

(4) Where the debtor's earnings are payable only at irregular intervals, the sum to be deducted as aforesaid shall be arrived at by—

(a) calculating the daily rate of his net earnings by dividing the net earnings payable to him on the pay day—

(i) by the number of days since earnings were last paid to him; or

(ii) if the earnings are the first earnings to be paid to him by the employer, by the number of days since he commenced such employment;

(b) ascertaining by reference to column 2 of Table C in the said Schedule the sum which is applicable to the bracket specified in column 1 of the Table within which his net daily earnings calculated as aforesaid fall; and

(c) multiplying the sum ascertained under paragraph (b) above by the number of days mentioned in paragraph (a)(i) or (ii) above.

(5) Where on the same day there are paid to the debtor both earnings payable at regular intervals and other earnings which are not payable at regular intervals, then, for the purpose of arriving at the sum to be deducted as aforesaid, all those earnings shall be aggregated and treated as the amount of the earnings payable at that regular interval.

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(6) Where earnings payable to a debtor at regular intervals are paid to him on one day and other earnings which are not payable at regular intervals are paid to him on a different day, the sum to be deducted as aforesaid in respect of those other earnings shall be 20 per cent of the net earnings.

(7) Notwithstanding subsections (1) to (3) above, where earnings are paid to a debtor by two or more series of payments—

(a) at regular intervals of different lengths, then—

(i) for the purpose of arriving at the sum to be deducted as aforesaid, subsection (1), (2) or (3) above shall apply to the series with the shorter or shortest interval; and

(ii) in relation to the earnings paid in any other series, the said sum shall be 20 per cent of the net earnings;

(b) at regular intervals of the same length, sub-paragraph (i) of paragraph (a) above shall apply to such series as the employer may choose, and sub-paragraph (ii) thereof shall apply to any other series:

Provided that, if payments in more than one series fall on the same day, the payments in those series shall be aggregated and treated as falling under subsection (1), (2) or (3) above, as the case may be.

(8) There may be varied by regulations—

(a) in order to take account of changes in the value of money, Tables A, B and C in Schedule 3 to this Act; or

(b) the percentage specified in subsections (6) and (7)(a)(ii) above;

and regulations under this subsection shall be made by the Secretary of State by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(9) Regulations under subsection (8) above shall not come into force in relation to an existing earnings arrestment unless and until the creditor or the debtor intimates in the prescribed form the making of the regulations to the employer.

(10) This section is subject to section 95 of this Act.

Debt recoverable by earnings arrestment.

77.—(1) Subject to subsection (2) below, the debt recoverable by an earnings arrestment shall, in so far as not otherwise paid, consist of the following sums—

(a) any sum (including any expenses) due under the decree or other document on which the earnings arrestment proceeds;

(b) any interest on the sum and on the expenses mentioned in paragraph (a) above which has accrued at the date of service of the earnings arrestment schedule;

(c) the expenses incurred in executing the earnings arrestment and the charge which preceded it; and

Clause 77

This clause specifies the component parts of a debt or debts which an earnings arrestment can competently enforce.

Subsection (1)

This subsection implements Recommendations 6.6 (para. 6.54), and 9.9(1) and (3) (para. 9.58).

(d) the expenses incurred in executing a current maintenance arrestment.

(2) Any sum mentioned in subsection (1) above shall be recoverable by an earnings arrestment only if, and to the extent that, it is specified in the earnings arrestment schedule.

(3) Notwithstanding section 72(2)(c) of this Act, it shall be competent for a creditor to enforce payment of more than one debt payable to him by the same debtor by means of one earnings arrestment, whether the arrestment is executed in pursuance of the same warrant, or two or more different warrants, authorising diligence.

Review of earnings arrestment.

78.—(1) The sheriff, on an application by the debtor or the person on whom the earnings arrestment schedule was served ("the arrestee"), may make an order recalling an earnings arrestment on the ground that the arrestment is invalid or has ceased to have effect; and the sheriff clerk shall intimate any such order to the arrestee, the debtor and the creditor in the arrestment.

(2) The sheriff, on an application by the debtor, the creditor or the arrestee, may make an order determining any dispute as to the operation of an earnings arrestment.

(3) Without prejudice to section 75(6) of this Act, the sheriff, in making an order under subsection (2) above, may order—

(a) the reimbursement of any payment made in the operation of the arrestment which ought not to have been made; or

(b) the payment of any sum which ought to have been paid in the operation of the arrestment but which has not been paid.

(4) Any order under subsection (3) above shall require the person against whom the order is made to pay interest on the sum to be paid by him under the order at the prescribed rate and such interest shall be payable as from such date as the sheriff shall specify in the order.

(5) An order under subsection (1) above recalling an earnings arrestment shall be final.

(6) No order under subsection (3) above for payment shall take effect while the order is appealable or subject to an appeal or a further appeal.

Current maintenance arrestments

General effect of current maintenance arrestment.

79.—(1) Subject to section 85(2) of this Act, a current maintenance arrestment shall have the effect of requiring the employer of the debtor while the arrestment is in operation to deduct a sum calculated in accordance with section 81 of this Act from the debtor's net earnings on any pay day and forthwith to pay any sum so deducted to the creditor.

Subsection (2)

This subsection implements Recommendation 6.6 (para. 6.54).

Subsection (3)

This subsection implements Recommendation 6.7(3) (para. 6.59).

Clause 78

This clause makes provision for challenging the validity of an earnings arrestment or the way in which it is being operated.

Subsection (1)

This subsection implements Recommendations 6.1(3) (para. 6.30) and 6.12(2) (para. 6.91).

Subsections (2), (3) *and* (4)

These subsections implement Recommendation 6.12(2) (para. 6.91).

Subsection (5)

This subsection implements Recommendation 9.11(4) (para. 9.70).

Subsection (6)

This subsection implements Recommendation 9.12(5) (para. 9.74).

Clause 79

This clause deals with the form and effect of a current maintenance arrestment.

Subsections (1) *and* (2)

These subsections implement Recommendation 6.23 (para. 6.148).

(2) Subject to section 86 of this Act, a current maintenance arrestment—

(a) shall come into operation on the date of its execution, being the date on which a schedule in the prescribed form (to be known as a "current maintenance arrestment schedule") is served on the employer of the debtor; and

(b) shall remain in operation until the debtor has ceased to be employed by the employer concerned or the arrestment has been recalled or for any other reason has ceased to have effect.

(3) The expenses incurred in the service of a current maintenance arrestment schedule shall be chargeable against the debtor.

(4) The current maintenance arrestment schedule shall specify the maintenance payable by the debtor expressed as a daily rate.

(5) For the purposes of subsection (4) above—

(a) the maintenance payable by the debtor shall be the gross amount payable under a maintenance order before deduction of tax; and

(b) the daily rate of maintenance shall be arrived at where the maintenance is paid—

(i) monthly, by multiplying the monthly rate by 12 and dividing it by 365;

(ii) quarterly, by multiplying the quarterly rate by 4 and dividing it by 365.

(6) Subsections (3) and (4) of section 75 of this Act shall apply in relation to a current maintenance arrestment as they apply in relation to an earnings arrestment.

(7) Where an obligation to pay maintenance is enforced by a current maintenance arrestment, no interest shall accrue on any arrears of maintenance which arise while the arrestment is in operation.

Enforcement of two or more obligations to pay maintenance.

80.—(1) This section applies where—

(a) there is in effect a maintenance order which provides; or

(b) there are in effect two or more maintenance orders which provide;

for the payment by one debtor of maintenance—

(i) to an individual, whether the maintenance is payable to that individual for the individual's own benefit or in a fiduciary capacity for the benefit of another individual or other individuals; or

(ii) where the payee is the Secretary of State or a local authority or any other authority or official.

(2) Where this section applies—

(a) all or any of the obligations to pay maintenance may be

Subsection (3)

This subsection implements Recommendation 9.7(1) (para. 9.36).

Subsections (4) *and* (5)

These subsections implement Recommendation 6.26(1) (para. 6.161).

Subsection (6)

This subsection implements Recommendation 6.34 (para. 6.202).

Subsection (7)

This subsection implements Recommendation 6.28(2) (para. 6.176).

Clause 80

This clause allows a person to enforce two or more maintenance obligations in which he or she is the payee by means of a single current maintenance arrestment and prohibits their enforcement by several current maintenance arrestments concurrently. It implements Recommendations 6.46(3) (para. 6.252) and 6.48 (para. 6.259).

enforced by one current maintenance arrestment against the same earnings;

(b) it shall be incompetent to enforce the obligations by two or more current maintenance arrestments simultaneously against the same earnings; and

(c) if more than one of the obligations is being enforced by one current maintenance arrestment, the current maintenance arrestment schedule shall specify one daily rate of maintenance, being the aggregate of the daily rates at which the obligations being so enforced are payable.

(3) In this Part of this Act"creditor", in relation to maintenance, means the payee specified in the maintenance order or orders or anyone deriving title from the payee.

Deductions from net earnings to be made by employer.

81.—(1) The sum to be deducted from a debtor's net earnings on a pay day under section 79 of this Act shall be whichever is the lesser of the following amounts—

(a) subject to subsection (2) below, a sum arrived at by multiplying the daily rate of maintenance (as specified in the current maintenance arrestment schedule) by the number of days—

(i) since the date when earnings were last paid to the debtor by the employer concerned; or

(ii) if there were no such previous earnings, since the date when the schedule was served on that employer; or

(b) any net earnings in so far as they exceed the sum of £5 per day for the number of days mentioned in sub-paragraph (i) or (ii) of paragraph (a) above.

(2) In order to take account of changes in the value of money, the sum specified in subsection (1)(b) above may be varied by regulations made by the Secretary of State by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(3) Regulations under subsection (2) above shall not come into force in relation to an existing current maintenance arrestment unless and until the creditor or the debtor intimates in the prescribed form the making of the regulations to the employer.

(4) This section is subject to section 95 of this Act.

Current maintenance arrestment to be preceded by default.

82.—(1) Subject to subsections (2) and (3) below, a current maintenance arrestment schedule may be served in pursuance of a maintenance order only if—

(a) the creditor has in the prescribed manner intimated to the debtor—

(i) in the case of an order mentioned in paragraph (a) or

Clause 81

This clause sets out the rules for calculating the deductions to be made in pursuance of a current maintenance arrestment by the employer from the debtor's net earnings.

Subsection (1)

This subsection implements Recommendations 6.26(2) (para. 6.161) and 6.27(1) (para. 6.166).

Subsections (2) *and* (3)

These subsections implement Recommendation 6.27(2) (para. 6.166).

Clause 82

This clause provides that the terms of the maintenance order sought to be enforced must be intimated to the maintenance debtor and default must thereafter occur in the payment of maintenance before a current maintenance arrestment can competently be served.

Subsection (1)

This subsection implements Recommendation 6.25 (para. 6.155).

(b) of the definition of"maintenance order" in section 74 of this Act, the making of the order;

(ii) in the case of an order mentioned in paragraph (c), (e), (f), (g) or (h) of that definition, the registration as mentioned in the paragraph concerned;

(iii) in the case of an order mentioned in paragraph (d) of that definition, the confirmation of the order as mentioned in that paragraph;

(b) at least 4 weeks have elapsed since the date of intimation under paragraph (a) above; and

(c) at the time when it is proposed to serve the schedule, 3 or more instalments of maintenance remain unpaid.

(2) Subsection (1) above shall not apply where—

(a) the maintenance order is one that has been registered in Scotland as mentioned in paragraph (c), (e), (f) or (g) of the said definition; and

(b) a certificate by an official of another court was produced to the court in Scotland which registered the order that at the time at which the certificate was issued the debtor was in arrears in his payment of instalments under the order.

(3) Where a current maintenance arrestment which has been validly executed has ceased to have effect otherwise than by virtue of its recall under section 83(1)(b) of this Act, the creditor may within 3 months after the date when the arrestment ceased to have effect execute another current maintenance arrestment without first complying with paragraphs (a), (b) and (c) of subsection (1) above.

Review and termination of current maintenance arrestment.

83.—(1) The sheriff may make an order recalling a current maintenance arrestment where he is satisfied—

(a) on an application by the debtor or the person on whom the current maintenance arrestment schedule was served ("the arrestee"), that the arrestment is invalid or has ceased to have effect;

(b) on an application by the debtor, that the debtor is unlikely to default again in paying maintenance;

and the sheriff clerk shall intimate any such order to the arrestee, the debtor and the creditor in the arrestment.

(2) The sheriff, on an application by the debtor, the creditor or the arrestee, may make an order determining any dispute as to the operation of a current maintenance arrestment.

(3) Subsections (3) to (6) of section 78 of this Act shall, subject to any necessary modifications, apply to a current maintenance arrestment as they apply to an earnings arrestment.

(4) A current maintenance arrestment shall cease to have effect—

(a) on the coming into operation of an order or decree which

Subsection (2)

This subsection implements Recommendation 6.36 (para. 6.209).

Subsection (3)

This subsection implements Recommendation 6.32(2) and (3) (para. 6.198).

Clause 83

This clause sets out the circumstances in which a current maintenance arrestment is to cease to have effect and empowers the sheriff to recall a current maintenance arrestment on the ground of its invalidity and to determine any disputes about the manner in which it is being operated.

Subsections (1), (2) and (3)

These subsections implement Recommendation 6.30 (para. 6.183).

Subsections (4) and (5)

These subsections implement Recommendation 6.31(1) (para. 6.189).

varies, supersedes or recalls the maintenance order which is being enforced by the arrestment;

(b) on the obligation to pay maintenance under the maintenance order being so enforced ceasing otherwise than by virtue of paragraph (a) above;

(c) in the case of two or more such obligations being so enforced, on any such obligation ceasing;

(d) in the case of one or more such obligations being so enforced, on any of the obligations ceasing to be enforceable in Scotland.

(5) In the case of an order mentioned in paragraph (c), (e), (f) or (g) of the definition of"maintenance order" in section 74 of this Act, the reference in subsection (4)(a) above to the coming into operation of an order or decree shall be construed as a reference to the registration of the order in Scotland.

(6) A creditor whose debt is being enforced by a current maintenance arrestment shall, as soon as is reasonably practicable after the arrestment has ceased to have effect by virtue of subsection (4) above, intimate that fact to the arrestee.

(7) Any sum paid by an employer under a current maintenance arrestment after it has ceased to have effect by virtue of subsection (4) above shall be recoverable by the debtor from the creditor with interest on that sum at the prescribed rate.

(8) Without prejudice to subsection (7) above, where the creditor has failed to comply with subsection (6) above, the sheriff, on an application by the debtor, may make an order requiring the creditor to pay to the debtor an amount not exceeding twice the amount recoverable by the debtor under the said subsection (7).

Effect of new maintenance order on existing current maintenance arrestment.

84. Where a maintenance order which is being enforced by a current maintenance arrestment ("the earlier order") is varied or superseded by an order or decree granted by a court in Scotland ("the subsequent order"), the subsequent order may include a condition that the provisions thereof (other than the warrant for diligence in so far as it authorises the service of a current maintenance arrestment schedule) shall not come into operation until the expiry of such period specified in the order as it considers necessary to inform the employer that the earlier order has been varied or superseded and to serve such a schedule in pursuance of the subsequent order:

Provided that this section shall not apply where the earlier order consists of or includes an order for the payment of aliment for the benefit of a spouse and the subsequent order consists of or includes an order for the payment of a periodical allowance on divorce for the benefit of that spouse.

Subsections (6), (7) and (8)

These subsections implement Recommendations 6.31(3), (4) and (5) (para. 6.189) and 6.39(2) (para. 6.217).

Clause 84

This clause, implementing Recommendations 6.32(2) (para. 6.198) and 6.38 (para. 6.214), empowers a Scottish court on varying a maintenance order to delay the coming into force of the variation so as to allow the creditor to serve a fresh current maintenance arrestment in respect of the varied order at the same time as intimating the cessation of the subsisting current maintenance arrestment.

Simultaneous operation of arrestments of earnings and priority among them

Simultaneous operation of earnings and current maintenance arrestment.

85.—(1) Subject to subsection (2) below, one earnings arrestment and one current maintenance arrestment may be operated simultaneously against earnings payable to the same debtor by the same employer.

(2) If an employer in operating an earnings arrestment and a current maintenance arrestment on any pay day is unable to meet the sum required to be deducted both under section 75 and section 79 of this Act, he shall first operate the earnings arrestment and shall then operate the current maintenance arrestment in accordance with section 81 of this Act out of any remaining net earnings of the debtor.

Priority among arrestments.

86.—(1) While an earnings arrestment against a debtor's earnings payable by an employer is in operation, any other earnings arrestment against his earnings payable by that employer shall be incompetent.

(2) While a current maintenance arrestment against a debtor's earnings payable by an employer is in operation, any other current maintenance arrestment against his earnings payable by that employer shall be incompetent.

(3) Without prejudice to section 85 of this Act, where an employer receives on the same day two or more earnings arrestment schedules or two or more current maintenance arrestment schedules relating to earnings payable by him to the same debtor, then the employer shall—

(a) if he receives the schedules at different times and he is aware of the respective times of receipt, give effect only to the arrestment of which the schedule was the first to be received by him;

(b) in any other case, give effect only to such one of the arrestments as he shall choose.

(4) Where—

(a) an employer is operating, or has under subsection (3) above given effect to, an arrestment or arrestments of earnings against a debtor's earnings ("the existing arrestment or arrestments"); and

(b) another creditor serves or has served an arrestment schedule on the employer relating to earnings payable by him to the same debtor which by virtue of subsection (1), (2) or (3) above he cannot operate,

the employer shall as soon as is reasonably practicable give the following information to that other creditor—

(i) the name and address of the creditor in the existing arrestment or arrestments;

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Clause 85

This clause allows for the concurrent operation of an earnings arrestment and a current maintenance arrestment; the former having priority in the event of the debtor's net earnings being insufficient to satisfy both. It implements Recommendation 6.45 (para. 6.249).

Clause 86

This clause deals with the situations arising where the employer is served with more than one schedule of arrestment.

Subsection (1)

This subsection implements Recommendation 6.40 (para. 6.222).

Subsection (2)

This subsection implements Recommendation 6.46(1) (para. 6.252).

Subsection (3)

This subsection implements Recommendations 6.18(5) (para. 6.117) and 6.34 (para. 6.202).

Subsection (4)

This subsection implements Recommendations 6.42(1) (para. 6.236) and 6.46(1) (para. 6.252).

(ii) the date and place of execution of the existing arrestment or arrestments;

(iii) in relation to an existing earnings arrestment, the total amount specified as being recoverable in the earnings arrestment schedule when the schedule was served; and

(iv) in relation to an existing current maintenance arrestment, the daily rate of maintenance specified in the current maintenance arrestment schedule.

(5) If the employer fails without reasonable excuse to give information to a creditor under subsection (4) above, the sheriff, on an application by the creditor, may order the employer to give the required information to the creditor.

Conjoined arrestment orders

Conjoined arrestment order: general provision.

87.—(1) Subject to subsections (4) and (5) below, where, against the earnings of a debtor—

(a) either an earnings arrestment or a current maintenance arrestment is in operation; or

(b) both an earnings arrestment and a current maintenance arrestment are being operated by one employer;

the sheriff, on an application properly made by any creditor (including any creditor already enforcing his debt by one of the arrestments mentioned in paragraph (a) or (b) above) who is qualified, shall make a conjoined arrestment order requiring the employer concerned—

(i) on the coming into operation of the order, to cease making payments under any subsisting earnings arrestment or current maintenance arrestment; and

(ii) while the order is in operation, to deduct a sum calculated in accordance with section 89 of this Act from the debtor's net earnings on any pay day and forthwith to pay any sum so deducted to the sheriff clerk.

(2) For the purposes of subsection (1) above, a creditor is qualified if at the date when he applies under that subsection he would, but for section 86(1) or (2) of this Act, be entitled to enforce his debt by executing an earnings arrestment or, as the case may be, a current maintenance arrestment.

(3) A conjoined arrestment order shall recall any subsisting earnings arrestment or current maintenance arrestment and such recall shall take effect as from the date of the coming into operation of the order.

(4) It shall be incompetent to make a conjoined arrestment order to enforce two debts where the one debt is a debt enforceable by an earnings arrestment and the other debt is maintenance enforceable by a current maintenance arrestment.

Subsection (5)

This subsection implements Recommendations 6.42(9) (para. 6.236) and 6.46(1) (para. 6.252).

Clause 87

This clause deals with the making and effect of conjoined arrestment orders.

Subsection (1)

This subsection implements Recommendations 6.41(1) (para. 6.228), 6.42(3) (para. 6.236) and 6.43(1) and (3) (para. 6.241).

Subsection (2)

This subsection implements Recommendations 6.42(2) (para. 6.236) and 6.46(1) (para. 6.252).

Subsection (3)

This subsection implements Recommendation 6.43(3) (para. 6.241).

Subsection (4)

This subsection implements Recommendation 6.45 (para. 6.249).

(5) While a creditor is enforcing by a current maintenance arrestment one or more obligations by a debtor to pay maintenance, it shall be incompetent for the creditor to make an application under subsection (1) above in relation to any other obligation by the debtor to pay maintenance which along with any obligation being already enforced by a current maintenance arrestment would be enforceable by one current maintenance arrestment if the existing arrestment were abandoned.

(6) There shall be recoverable under a conjoined arrestment order by the applicant for the order the expenses incurred by him in the application:

Provided that—

(a) the expenses shall be so recoverable only if, and to the extent that, they are specified in the application; and

(b) there shall not be so recoverable by an applicant, who at the date of the application—

(i) was already enforcing a debt against the debtor by an earnings arrestment or a current maintenance arrestment, any expenses incurred by him in executing a further earnings arrestment or a further current maintenance arrestment; or

(ii) was not already enforcing a debt as mentioned in paragraph (ii) above, any expenses incurred by him in executing an earnings arrestment or a current maintenance arrestment to enforce his debt against the debtor.

(7) Where a debt in respect of which an application is made under this section is a debt enforceable by an earnings arrestment, any sum mentioned in paragraph (a) or (b) of section 77(1) of this Act shall be recoverable by the conjoined arrestment order only if, and to the extent that, it is specified in that application.

(8) Where an obligation to pay maintenance is enforced by a conjoined arrestment order, no interest shall accrue on any arrears of that maintenance which arise while the order is in operation.

(9) The sheriff clerk shall as soon as is reasonably practicable serve a copy of the conjoined arrestment order on the employer, the debtor and the creditor or creditors in the arrestment or arrestments mentioned in subsection (1) above.

(10) A conjoined arrestment order—

(a) shall come into operation as soon as a copy of it has been served on the employer under subsection (9) above; and

(b) shall remain in operation until a copy of an order recalling the conjoined arrestment order has been served on the employer under section 92(5) of this Act or the debtor ceases to be employed by him.

Subsection (5)

This subsection implements Recommendation 6.46(3) (para. 6.252).

Subsection (6)

This subsection implements Recommendations 9.8(5) (para. 9.44) and 9.9(1) (para. 9.58).

Subsection (7)

This subsection implements Recommendation 6.42(4) (para. 6.236).

Subsection (8)

This subsection implements Recommendation 6.49(2) (para. 6.262).

Subsection (9)

This subsection implements Recommendations 6.42(7) (para. 6.236) and 6.46(1) (para. 6.252).

Subsection (10)

This subsection implements Recommendations 6.43(1) and (2) (para. 6.241) and 6.50(1) (para. 6.270).

(11) A conjoined arrestment order shall be in the prescribed forı and, if one or more of the debts being enforced by the order is-

(a) an ordinary debt, the order shall specify the amount of th debt or debts recoverable under the order; or

(b) current maintenance, the order shall specify the maintenanc payable by the debtor which is being so enforced expresse as a daily rate or, as the case may be, as an aggregate dail rate; and subsection (5) of section 79 of this Act shall appl for the purposes of this paragraph as it applies for th purposes of subsection (4) of that section.

(12) Without prejudice to section 92(1) of this Act, a decision (the sheriff making a conjoined arrestment order shall be final.

(13) Subject to section 95 of this Act, where an employer fails t comply with a conjoined arrestment order—

(a) the employer shall be liable to pay to the sheriff clerk ar sum which would have been paid by him if he had s complied;

(b) the employer shall not be entitled to recover from the debtc any sum paid by him to the debtor in contravention of th order; and

(c) the sheriff, on an application by the sheriff clerk, may grar warrant for diligence against the employer for recovery (the sums which appear to the sheriff to be due.

Relationship of conjoined arrestment order with earnings and current maintenance arrestments.

88.—(1) While a conjoined arrestment order against a debtor earnings payable by an employer is in operation, any earnin arrestment, current maintenance arrestment or other conjoine arrestment order against his earnings payable by that employer sha be incompetent.

(2) If, while a conjoined arrestment order against a debtor's earnin payable by an employer is in operation, a creditor whose debt is n being enforced by the conjoined arrestment order serves an earnin arrestment schedule or a current maintenance arrestment schedu on the employer against earnings payable to the same debtor, th employer shall as soon as is reasonably practicable inform that creditc of the court which made the order.

(3) If, after an application is made under section 87 of this Act f a conjoined arrestment order against any earnings payable by a employer to a debtor and before that order comes into operation, a arrestment against earnings payable by the employer to the sam debtor comes into operation by virtue of section 85(1) of this Ac then—

(a) as soon as a copy of the conjoined arrestment order is serve on the employer by the sheriff clerk, the arrestment sha cease to have effect; and

Subsection (11)

This subsection implements Recommendations 6.42(4) (para. 6.236) and 6.46(2) (para. 6.252).

Subsection (12)

This subsection implements Recommendation 9.11(4) (para. 9.70).

Subsection (13)

This subsection implements Recommendation 6.43(6) (para. 6.241).

Clause 88

This clause is concerned with the situations that arise where an earnings arrestment or a current maintenance arrestment is served during the currency of a conjoined arrestment order.

Subsections (1) *and* (2)

These subsections implement Recommendations 6.42(8) (para. 6.236) and 6.46(1) (para. 6.252).

Subsection (3)

This subsection deals with the unusual case where an arrestment is served and is put into operation in the interval between another creditor's application for a conjoined arrestment order and the service of that order on the employer. The conjoined arrestment order is put into operation instead and the subsisting arrestment recalled.

(b) the employer shall, as soon as is reasonably practicable after such service, inform the creditor in the aforesaid arrestment of the court which made the order.

(4) If the employer fails without reasonable excuse to give information to a creditor under subsection (2) or (3) above, the sheriff, on an application by the creditor, may order the employer to give the required information to the creditor.

(5) Where a conjoined arrestment order against a debtor's earnings is in operation, the sheriff, on an application properly made by a creditor whose debt is not being enforced by the conjoined arrestment order and who, but for the conjoined arrestment order, would be entitled to enforce his debt by executing an earnings arrestment or, as the case may be, a current maintenance arrestment, shall make an order so varying the conjoined arrestment order that the creditor's debt shall be included among the debts enforced by the conjoined arrestment order; and subsections (6) and (7) of section 87 of this Act shall apply in relation to an application under this subsection as they apply in relation to an application under that section.

(6) The sheriff clerk shall as soon as is reasonably practicable serve a copy of an order under subsection (5) above on the employer, the debtor and the other creditors whose debts are being enforced by the conjoined arrestment order.

(7) An order under subsection (5) above shall come into operation as soon as a copy has been served on the employer under subsection (6) above.

(8) Subsection (11) of section 87 of this Act shall apply to a conjoined arrestment order as varied under subsection (5) above as it applies to a conjoined arrestment order mentioned in that section.

(9) A decision of the sheriff under subsection (5) above varying a conjoined arrestment order shall be final.

Sum payable by employer under conjoined arrestment order.

89.—(1) Subject to section 95(3) of this Act, this section shall have effect for the purpose of determining the sum to be deducted on a pay day and paid to the sheriff clerk under a conjoined arrestment order.

(2) Where all the debts are ordinary debts, the said sum shall be the sum which the employer would pay under section 75(1) of this Act if the debts were one debt being enforced on the pay day by an earnings arrestment.

(3) Where all the debts are current maintenance, the sum shall be whichever is the lesser of the following amounts—

(a) a sum arrived at by multiplying the aggregate daily rate of maintenance (as specified in the conjoined arrestment order or order under section 88(5) of this Act, as the case may be) by the number of days—

Subsection (4)

This subsection implements Recommendations 6.42(9) (para. 6.236) and 6.46(1) (para. 6.252).

Subsection (5)

This subsection implements Recommendations 6.42(8) (para. 6.236) and 6.46(1) (para. 6.252).

Subsection (9)

This subsection implements Recommendation 9.11(4) (para. 9.70).

Clause 89

This clause regulates the amount deductable by the employer from the debtor's net earnings in pursuance of a conjoined arrestment order and payable by the employer to the sheriff clerk.

Subsection (2)

This subsection implements Recommendation 6.43(3) (para. 6.241).

Subsection (3)

This subsection implements Recommendation 6.46(2) (para. 6.252).

(i) since the date when earnings were last paid to the debtor by the employer concerned; or

(ii) if there were no such previous earnings, since the date when the sheriff clerk served a copy of the conjoined arrestment order or order under section 88(5) of this Act on the employer; or

(b) any net earnings in so far as they exceed the sum of £5 per day for the number of days mentioned in sub-paragraph (i) or (ii) of paragraph (a) above.

(4) Where one or more of the debts are ordinary debts, and one or more are current maintenance, the sum shall be the aggregate of the following—

(a) the sum which the employer would pay under section 75(1) of this Act if the ordinary debt or ordinary debts were one debt being enforced on the pay day by such an arrestment; and

(b) in respect of the sum remaining after making payment under paragraph (a) above and in so far as the debts are current maintenance, the lesser of the amounts specified in paragraphs (a) and (b) of subsection (3) above.

(5) In order to take account of changes in the value of money, the sum specified in subsection (3)(b) above may be varied by an order made by the Secretary of State by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(6) The sheriff clerk operating a conjoined arrestment order shall intimate in the prescribed form to the employer concerned the making of regulations under section 76(8) of this Act or subsection (5) above; and, without prejudice to section 95 of this Act, no such regulations shall come into force in relation to the conjoined arrestment order before such intimation.

(7) The sheriff clerk shall not be entitled to refuse to accept payment by the employer under the conjoined arrestment order which is tendered by cheque or by such other method (apart from payment in cash) as may be prescribed:

Provided that, if any such cheque is dishonoured, the sheriff clerk may insist that the payment in relation to which the cheque was dishonoured and any future payment by the employer under the conjoined arrestment order shall be tendered in cash.

Disbursement by sheriff clerk of sums received from employer.

90. Sums paid to the sheriff clerk under section 89 of this Act shall be disbursed by him to the creditors whose debts are being enforced by the conjoined arrestment order in accordance with Schedule 4 to this Act.

Subsection (4)

This subsection implements Recommendation 6.47 (para. 6.255).

Subsection (6)

This subsection implements Recommendation 6.53 (para. 6.280).

Subsection (7)

This subsection contains provisions equivalent to clause 75(4).

Clause 90

This clause and *Schedule 4* make provision for the amounts receivable by the conjoined creditors from amounts collected under a conjoined arrestment order by the sheriff clerk. It implements Recommendation 6.47 (para. 6.255).

PART 2.2

Scottish Law Commission

(SCOT. LAW COM. No. 95)

REPORT ON DILIGENCE AND DEBTOR PROTECTION

Volume Two

Appendices

(*2 volumes not sold separately*)

Laid before Parliament
by the Lord Advocate
under section 3(2) of the Law Commissions Act 1965

Ordered by The House of Commons *to be printed*
13th November 1985

EDINBURGH
HER MAJESTY'S STATIONERY OFFICE

Operation of conjoined arrestment order.

91.—(1) The sheriff, on an application by—

(a) the debtor;

(b) a creditor whose debt is being enforced by the conjoined arrestment order;

(c) the person on whom a copy of the order or an order varying that order was served under section 87(9) or 88(5) of this Act as employer ("the arrestee"); or

(d) the sheriff clerk,

may make an order determining any dispute as to the operation by the arrestee or the sheriff clerk of the conjoined arrestment order.

(2) Without prejudice to subsection (6) below, the sheriff, in making an order under subsection (1) above, may order—

(a) the reimbursement of any payment made in the operation of the conjoined arrestment order which ought not to have been made; or

(b) the payment of any sum which ought to have been paid in the operation of the conjoined arrestment order but which has not been paid;

and subsection (4) of section 78 of this Act shall apply to any order under this subsection as it applies to any order under subsection (3) of that section.

(3) No order under subsection (2) above for payment shall take effect while the order is appealable or subject to an appeal or a further appeal.

(4) Where an ordinary debt is being enforced by a conjoined arrestment order, the creditor in that debt shall, as soon as is reasonably practicable after he has received payment of the full amount of the debt, whether by payments under the order or otherwise, or the debt has ceased to be enforceable by diligence, intimate that fact to the sheriff clerk.

(5) Where current maintenance is being enforced by a conjoined arrestment order, the creditor in that debt shall, as soon as is reasonably practicable after any obligation to pay such maintenance has ceased or has ceased to be enforceable by diligence, intimate that fact to the sheriff clerk.

(6) Any sum received by a creditor under a conjoined arrestment order in respect of—

(a) an ordinary debt after the debt has been satisfied or has ceased to be enforceable by diligence; or

(b) current maintenance after the obligation to pay such maintenance has ceased or has ceased to be enforceable by diligence;

shall be recoverable by the sheriff clerk from the creditor with interest on that sum at the prescribed rate.

EXPLANATORY NOTES

Clause 91

This clause empowers the sheriff to determine a dispute as to the mode of operation of a conjoined arrestment order and requires creditors whose debts have been satisfied to inform the sheriff clerk of this fact.

Subsections (1) *and* (2)

These subsections implement Recommendation 6.52 (para. 6.278).

Subsection (3)

This subsection implements Recommendation 9.12(5) (para. 9.74).

Subsections (4) *to* (8)

These subsections implement Recommendation 6.51(1) and (2) (para. 6.276).

(7) Without prejudice to subsection (6) above, where the creditor has failed to comply with subsection (4) or (5) above, the sheriff, on an application by the debtor, may make an order requiring the creditor to pay to the debtor an amount not exceeding twice the amount recoverable by the sheriff clerk under the said subsection (6).

(8) Any amount recovered from a creditor by the sheriff clerk in pursuance of subsection (6) above shall be disbursed by him in accordance with Schedule 4 to this Act as if, at the time when the creditor received a sum as mentioned in that subsection, the creditor's debt was not being enforced by the conjoined arrestment order concerned.

Recall and variation of conjoined arrestment order.

92.—(1) The sheriff shall make an order recalling a conjoined arrestment order—

(a) on an application by any of the persons mentioned in subsection (2) below, if he is satisfied—

(i) that the conjoined arrestment order is invalid;

(ii) that all the debts being enforced by the order have been satisfied or have become unenforceable by diligence and that all obligations to pay maintenance being enforced by the order have ceased or have become unenforceable by diligence;

(iii) that the debtor's estate has been sequestrated; or

(iv) that the coming into force of a debt arrangement scheme has rendered the order ineffectual; or

(b) if recall of the order is requested by all the creditors whose debts are being enforced by the order or by the only creditor whose debt is being so enforced.

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

(a) the debtor;

(b) any creditor;

(c) the person on whom a copy of the order or an order varying that order was served under section 87(9) or 88(5) of this Act as employer ("the arrestee");

(d) the sheriff clerk;

(e) if the debtor's estate has been sequestrated, the interim trustee appointed under section 13 of the Bankruptcy (Scotland) Act 1985 or the permanent trustee in the sequestration;

1985 c.

(f) if a debt arrangement scheme has come into force in respect of the debtor's debts, the administrator of the scheme.

Clause 92

This clause deals with the recall or variation of a conjoined arrestment order.

Subsections (1) *and* (2)

These subsections implement Recommendations 6.50(2) and (3) (para. 6.270) and 6.51(3) (para. 6.276).

The reference to the Bankruptcy (Scotland) Act 1985 is a reference to the Bankruptcy (Scotland) Bill 1984 (H.C. Bill 48) as brought from the House of Lords to the House of Commons, and ordered to be printed, on 18 December 1984.

(3) Where any of the following events occurs—

(a) the satisfaction, or the cessation of enforceability, of a debt being enforced by a conjoined arrestment order; or

(b) the variation, cessation, supersession or recall of a maintenance obligation being so enforced;

the sheriff, on an application by the debtor, any creditor whose debt is being enforced by the order, the arrestee or the sheriff clerk, may make an order varying the conjoined arrestment order to give effect to that event.

(4) The sheriff may vary a conjoined arrestment order to give effect to a request by a creditor whose debt is being enforced by the order that it should cease to be so enforced.

(5) The sheriff clerk shall as soon as is reasonably practicable serve a copy of any order under subsection (1), (3) or (4) above on the debtor, the arrestee, any creditor whose debt is being enforced by the conjoined arrestment order and, if that order has been recalled on the ground of the sequestration of the debtor's estate, the interim trustee or the permanent trustee in the sequestration, if known to the sheriff clerk.

(6) An order under subsection (1), (3) or (4) above shall come into operation as soon as a copy of the order has been served on the arrestee under subsection (5) above.

(7) An order under subsection (1) above recalling a conjoined arrestment order shall be final.

Supplementary provisions for Part IV

Disapplication of para. 10 of Sch. 7 to Bankruptcy (Scotland) Act 1985 from diligence against earnings.

1985 c.

93. Paragraph 10 of Schedule 7 to the Bankruptcy (Scotland) Act 1985 (equalisation of arrestments and poindings used within 60 days before, and 4 months after, apparent insolvency) shall not apply in relation to the arrestment of earnings of a debtor in the hands of his employer.

Diversion of arrested earnings to Secretary of State.

1976 c. 71

94. After section 19 of the Supplementary Benefits Act 1976 there shall be inserted the following section—

"Diversion of arrested earnings to Secretary of State.

19A.—(1) Where in Scotland a creditor who is enforcing a maintenance order or an alimentary bond or agreement by a current maintenance arrestment or a conjoined arrestment order is in receipt of supplementary benefit, the creditor may in writing authorise the Secretary of State to receive any sums payable under the arrestment or order until the creditor ceases to be in receipt of supplementary benefit or in writing withdraws the authorisation, whichever occurs first.

Subsections (3) *and* (4)

These subsections implement Recommendations 6.50(4) (para. 6.270) and 6.51(3) (para. 6.276).

Subsection (5)

This subsection implements Recommendation 6.51(4) (para. 6.276).

Subsection (7)

This subsection implements Recommendation 9.11(4) (para. 9.70).

Clause 93

This clause prevents earnings arrestments and current maintenance arrestments from being equalised with other arrestments or poindings on the debtor's apparent insolvency. It implements Recommendations 6.41(2) (para. 6.228) and 6.46(1) (para. 6.252). The reference to the Bankruptcy (Scotland) Act 1985 is a reference to the Bankruptcy (Scotland) Bill 1984 (H.C. Bill 48), as brought from the House of Lords to the House of Commons, and ordered to be printed, on 18 December 1984.

Clause 94

This clause allows a maintenance creditor in a current maintenance arrestment or conjoined in a conjoined arrestment order who is in receipt of supplementary benefit to divert sums receivable by him or her to the Department of Health and Social Security. It implements Recommendation 6.33 (para. 6.200).

(2) On intimation by the Secretary of State—

(a) to the employer operating the current maintenance arrestment; or

(b) to the sheriff clerk operating the conjoined arrestment order;

of an authorisation under subsection (1) above, the employer or sheriff clerk shall, until notified by the Secretary of State that the authorisation has ceased to have effect, pay to the Secretary of State any sums which would otherwise be payable under the arrestment or order to the creditor.".

Restriction on liabililty of employer in operating diligence against earnings.

95.—(1) An employer operating an earnings arrestment or a current maintenance arrestment shall be entitled to give effect to regulations made under section 76(8) or 81(2) of this Act before receiving intimation under section 76(9) or 81(3) of this Act of the making of the regulations.

(2) Where a pay day occurs within a period of 7 days after the date of—

(a) service on the employer of an earnings arrestment schedule or a current maintenance arrestment schedule or a copy of a conjoined arrestment order; or

(b) intimation under section 76(9), 81(3) or 89(6) of this Act to the employer operating an earnings arrestment, a current maintenance arrestment or a conjoined arrestment order of the making of regulations;

the employer shall be entitled, but shall not be required, on that day to operate the arrestment or order or, as the case may be, to give effect to the regulations.

(3) Where the employer does not operate an arrestment or a conjoined arrestment order, or give effect to regulations, on a pay day occurring within the period mentioned in subsection (2) above ("the earliest pay day"), he shall not, in calculating any amount to be deducted from the net earnings of the debtor on any subsequent pay day and to be paid under the arrestment or order, take account of any amount which would have been so deductible and payable by him on the earliest pay day if he had been operating the arrestment or order, or had given effect to the regulations, on that day.

(4) No claim may be made by-

(a) the debtor or the creditor against the employer in respect of any deduction which has, or ought to have, been made by the employer from the debtor's net earnings, or any payment which has, or ought to have, been made by him,

Clause 95

This clause deals with the duties of employers on receiving schedules of arrestment or orders varying or recalling them.

Subsection (1)

This subsection implements Recommendations 6.9(4) (para. 6.76) and 6.27 (para. 6.166).

Subsection (2)

This subsection implements Recommendations 6.13(2) (para. 6.97), 6.34 (para. 6.202), 6.43(2) (para. 6.241) and 6.53 (para. 6.280).

Subsection (3)

This subsection implements Recommendations 6.13(3) (para. 6.97) and 6.34 (para. 6.202).

Subsection (4)

This subsection implements Recommendations 6.12(3) (para. 6.91) and 6.34 (para. 6.202).

under an earnings arrestment or a current maintenance arrestment; or

(b) the debtor, the sheriff clerk or any creditor against the employer in respect of any such deduction or payment which has, or ought to have, been made under a conjoined arrestment order,

more than one year after the date when the deduction or payment has, or ought to have, been made.

(5) The employer shall not be liable to the debtor for any deduction made by him from the debtor's net earnings—

(a) under an earnings arrestment unless and until he receives intimation—

(i) from the creditor under section 75(5) of this Act that he has received payment of the full amount of his debt or that his debt has ceased to be enforceable by diligence;

(ii) from the sheriff clerk under section 8(6)(b) or 78(1) of this Act that an order has been made recalling the arrestment;

(iii) from the administrator under section 24(9)(a) of this Act that a debt arrangement scheme has come into force in respect of the debts of the debtor;

(iv) that the debtor's estate has been sequestrated; or

(v) from the creditor that he has abandoned the arrestment;

(b) under a current maintenance arrestment unless and until he receives intimation—

(i) from the creditor under section 83(6) of this Act that the arrestment has ceased to have effect;

(ii) from the sheriff clerk under section 83(1) of this Act that an order has been made recalling the arrestment;

(iii) from the administrator as mentioned in paragraph (a)(iii) above;

(iv) that the debtor's estate has been sequestrated; or

(v) from the creditor that he has abandoned the arrestment.

Provisions relating to execution of diligence against earnings.

96.—(1) When an officer of court serves an earnings arrestment schedule or a current maintenance arrestment schedule on the employer of the debtor, he shall, if practicable, serve a copy of the schedule on the debtor:

Provided that failure to serve a copy of the schedule on the debtor shall not by itself render the arrestment invalid.

(2) Service of any such schedule or copy thereof shall be by registered or recorded delivery letter or, if such a letter cannot be delivered, by any other competent mode of service and such service need not be attested by a witness.

Subsection (5)

Paragraph (*a*) implements Recommendation 6.16(4) (para. 6.110) and *paragraph* (*b*) implements Recommendation 6.31(4) (para. 6.189).

Clause 96

This clause makes provision for the service by an officer of court of a schedule of arrestment on the employer.

Subsection (1)

This subsection implements Recommendations 6.19 (para. 6.119) and 6.34 (para. 6.202).

Subsection (2)

This subsection implements Recommendations 6.18(1), (3) and (4) (para. 6.117), 6.19 (para. 6.119) and 6.34 (para. 6.202).

(3) The certificate of execution of an earnings arrestment or a current maintenance arrestment shall be signed by the officer of court who effected the service.

(4) Section 44(1) of this Act shall apply to the execution of an earnings arrestment or a current maintenance arrestment or the service of a conjoined arrestment order as it applies to the execution of a poinding except where such execution or service is by post.

Employer's fee for operating diligence against earnings.

97.—(1) On any occasion on which an employer makes a payment to a creditor under an earnings arrestment or a current maintenance arrestment or to the sheriff clerk under a conjoined arrestment order he may charge the debtor a fee of 50 pence or such other sum as may be prescribed in regulations made by the Secretary of State which shall be deductible from the amount of the debtor's net earnings after any deduction has been made from them under section 75, 79 or 87 of this Act.

(2) Regulations under subsection (1) above shall be made by statutory instrument and shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Effect of sequestration on diligence against earnings.

98.—(1) The following provisions of this section shall have effect where a debtor's estate is sequestrated.

(2) Any existing earnings arrestment, current maintenance arrestment or, subject to subsection (3) below, conjoined arrestment order shall cease to have effect on the date of sequestration.

(3) Any sum paid by the employer to the sheriff clerk under a conjoined arrestment order on a pay day occurring before the date of sequestration shall be disbursed by the sheriff clerk under section 90 of this Act notwithstanding that the date of disbursement is after the date of sequestration.

(4) The execution of an earnings arrestment or the making of a conjoined arrestment order shall be incompetent after the date of sequestration to enforce a debt in respect of which the creditor is entitled to make a claim in the sequestration.

(5) In this section "date of sequestration" has the same meaning as in section 12(4) of the Bankruptcy (Scotland) Act 1985.

1985 c.

Subsection (4)

This subsection provides that no service (other than postal service) of the specified documents is competent on a Sunday, Christmas Day, New Year's Day, Good Friday or on such other day as may be specified by act of sederunt.

Clause 97

This clause entitles an employer to charge a fee every time a deduction is made from the debtor's earnings in pursuance of an arrestment of earnings. It implements Recommendations 6.21 (para. 6.125), 6.34 (para. 6.202) and 6.43(5) (para. 6.241).

Clause 98

This clause deals with the situation where a debtor whose earnings are subject to an arrestment of earnings is sequestrated. The reference to the Bankruptcy (Scotland) Act 1985 is a reference to the Bankruptcy (Scotland) Bill 1984 (Bill 48) as brought from the House of Lords to the House of Commons, and ordered to be printed, on 18 December 1984.

Subsection (2)

This subsection implements Recommendations 6.15 (para. 6.103), 6.31(1) (para. 6.189) and 6.50(3) (para. 6.270).

Interpretation of Part IV.

99. In this Part of this Act, unless the context otherwise requires—

"creditor", in relation to maintenance, has the meaning assigned by section 80(3) of this Act;

"current maintenance", in relation to a conjoined arrestment order, means maintenance which, but for the order, would be enforceable by a current maintenance arrestment;

"ordinary debt", in relation to a conjoined arrestment order, means, subject to subsection (6) of section 87 of this Act (including that subsection as applied by section 88(5) of this Act) a debt which, but for the order, would be enforceable by an earnings arrestment;

"the prescribed rate", in relation to interest, means the rate of interest prescribed for the purposes of section 9 of the Sheriff Courts (Scotland) Extracts Act 1892;

1892 c. 17.

"sheriff", in relation to an application—

(a) under section 75(7), 78(1) or (2) or 83(1), (2) or (8), means the sheriff having jurisdiction—

(i) over the place where the earnings arrestment or the current maintenance arrestment to which the application relates was executed; or

(ii) if that place is unknown to the applicant, over an established place of business of the debtor's employer;

(b) under section 86(5) or 88(4), means the sheriff having jurisdiction over the place where the creditor mentioned in the provision concerned executed an earnings arrestment or a current maintenance arrestment;

(c) under section 87(1), means the sheriff having jurisdiction over a place where an existing earnings arrestment or current maintenance arrestment of the debtor's earnings in the hands of the employer concerned was executed;

(d) under section 87(13)(c), 88(5), 91 or 92, means the sheriff who made the conjoined arrestment order.

EXPLANATORY NOTES

Clause 99

"sheriff". This definition implements Recommendation 6.54 (para. 6.291).

PART V

RECOVERY OF RATES AND TAXES ETC.

Recovery of rates and taxes etc.

100.—(1) The enactments mentioned in Schedule 5 to this Act shall have effect subject to the amendments specified therein.

(2) A poinding and sale in pursuance of a summary warrant granted under or by virtue of any of the following enactments—

1947 c. 43 (a) section 247 of the Local Government (Scotland) Act 1947;

1970 c. 9 (b) section 63 of the Taxes Management Act 1970;

1983 c. 53 (c) paragraph 3 of Schedule 1 to the Car Tax Act 1983;

1983 c. 55 (d) paragraph 6 of Schedule 7 to the Value Added Tax Act 1983;

shall be proceeded with in accordance with Schedule 6 to this Act.

(3) No person shall be imprisoned for failure to pay rates or any tax.

(4) Section 248 of the Local Government (Scotland) Act 1947 and section 64 of the Taxes Management Act 1970 (priority of claims for rates and taxes over other claims) are hereby repealed.

(5) The following provisions of the Exchequer Court (Scotland) Act 1856 are hereby repealed— 1856 c. 56

(a) in section 28 (extracts of exchequer decrees), the words from "except that" to the end;

(b) sections 29 to 34 (special modes of diligence for the enforcement of Crown debts);

(c) section 36 (effects of deceased Crown debtor may be attached by arrestment or poinding);

(d) section 42 (preference of Crown over other creditors).

Clause 100

This clause deals with diligence on summary warrants granted for the recovery of rates and taxes and abolishes Exchequer diligence and imprisonment for non-payment of rates and taxes.

Subsection (2)

This subsection implements Recommendations 7.4 (para. 7.20) and 7.5 (para. 7.22).

Subsection (3)

This subsection implements Recommendation 7.17(1) (para. 7.80).

Subsection (4)

This subsection implements Recommendation 7.19 (para. 7.106).

Subsection (5)

This subsection implements Recommendation 7.18 (para. 7.92).

PART VI
MESSENGERS-AT-ARMS AND SHERIFF OFFICERS

Regulation of organisation, training, conduct and procedure.

101.—(1) The Court of Session may by act of sederunt in respect of officers of court—

(a) regulate their organisation;

(b) regulate their training and the qualifications required to obtain a commission as messenger-at-arms or sheriff officer;

(c) regulate their conduct in exercising their functions;

(d) regulate the scope of their official functions;

(e) make provision prohibiting the undertaking by them of extra-official activities which appear to the Court to be incompatible with their official functions;

(f) make provision permitting the undertaking by them of other extra-official activities, not appearing to the Court to be incompatible as aforesaid, which are undertaken by them for remuneration, and the act of sederunt may attach conditions to any such permission;

(g) prescribe the procedure in respect of applications for a commission as messenger-at-arms under section 103 of this Act or as sheriff officer;

(h) prescribe the procedure in disciplinary proceedings against them under section 105 of this Act, and provide for the remit of any such proceedings from the Court of Session to a sheriff principal, from one sheriff principal to another sheriff principal and from a sheriff principal to the Court of Session;

(i) make provision for the keeping of accounts by them and the auditing of those accounts;

(j) make provision for the keeping of records by them and the inspection of those records;

(k) make provision in respect of the finding of caution by them;

(l) make such other provision as may appear to the Court to be necessary or proper.

(2) No extra-official activity (not being an activity prohibited or regulated by an act of sederunt made under subsection (1)(e) or (f) above) may be undertaken by an officer of court for remuneration unless the officer of court obtains the permission of the sheriff principal from whom he holds a commission to his undertaking the activity, but the sheriff principal shall not withhold such permission unless it appears to him that the undertaking by the officer of court of the activity would be incompatible with the officer of court's official functions.

Clause 101

This clause considerably extends the Court of Session's powers to make regulations concerning officers of court, thus implementing Recommendation 8.5 (para. 8.34).

Subsection (1)

Paragraph (*a*) implements Recommendation 8.9 (para. 8.61).

Paragraph (*b*) implements Recommendation 8.8(1) (para. 8.56).

Paragraph (*c*) implements Recommendations 8.23 (para. 8.130), 8.24 (para. 8.135) and 8.25 (para. 8.137).

Paragraph (*d*) implements Recommendation 8.22(*a*) (para. 8.125).

Paragraph (*e*) implements Recommendations 8.19 (para. 8.110) and 8.20 (para. 8.113).

Paragraph (*f*) implements Recommendations 8.19 (para. 8.110), 8.20 (para. 8.113) and 8.21 (para. 8.121).

Paragraph (*g*) implements Recommendation 8.8(3) (para. 8.56).

Paragraph (*h*) implements Recommendations 8.12(6) (para. 8.84) and 8.13 (para. 8.87).

Paragraphs (*i*), (*j*) and (*k*) implement Recommendation 8.22 (para. 8.125).

Subsections (2) *and* (3)

These subsections implement Recommendations 8.19 (para. 8.110) and 8.21 (para. 8.121).

(3) The sheriff principal may attach conditions to any permission granted by him under subsection (2) above.

Advisory Council.

102.—(1) There shall be a body, (to be known as"the Advisory Council on Messengers-at-Arms and Sheriff Officers" and in this section called"the Advisory Council") whose duties shall be to advise the Court of Session on the making of any act of sederunt under section 101 of this Act and generally to keep under review all matters relating to officers of court.

(2) The Advisory Council shall consist of—

(a) the following persons appointed by the Lord President of the Court of Session—

(i) a judge of the Court of Session who shall act as chairman;

(ii) 2 sheriffs principal;

(iii) 2 officers of court; and

(iv) a solicitor; and

(b) one person appointed by the Secretary of State.

(3) The secretary of the Advisory Council shall be a full-time clerk of court or sheriff clerk appointed by the Secretary of State.

(4) The members of the Advisory Council shall, so long as they retain the respective qualifications specified in subsection (2) above, hold office for 3 years and be eligible for reappointment.

(5) Any vacancy in the membership of the Advisory Council occurring by death, resignation or other cause prior to the expiry of 3 years after the date of appointment of the member whose office is so vacated shall be filled by the appointment by the person by whom that member was appointed of another person possessing the same qualification:

Provided that any person appointed in pursuance of this subsection to fill a vacancy shall remain a member of the Council only until the expiry of 3 years after the date of the appointment of the member whose office is so vacated, but shall be eligible for reappointment.

(6) The Advisory Council shall have power to regulate the summoning of meetings of the Council and the procedure at such meetings; and at any such meeting 3 members shall be a quorum.

Appointment of messenger-at-arms.

103.—(1) The Court of Session, on an application made to it, may find the applicant suitable to be appointed as a messenger-at-arms and recommend such appointment to the Lyon King of Arms; and, on receipt of such a recommendation, the Lyon King of Arms may grant the applicant a commission as a messenger-at-arms.

Clause 102

This clause establishes the Advisory Council on Messengers-at-Arms and Sheriff Officers with the functions of advising the Court of Session on making acts of sederunt affecting officers of court and of keeping matters relating to officers under review. Subsections (1) and (2) implement Recommendation 8.5(2) and (3) (para. 8.34).

Clause 103

This clause introduces a new procedure for appointment of messengers-at-arms and regulates their functions. By retaining the separate office of messenger-at-arms it implements Recommendation 8.2 (para. 8.16).

Subsections (1) *and* (5)

These subsections implement Recommendation 8.4 (para. 8.28).

(2) An application under this section shall be incompetent unless the applicant holds a commission as a sheriff officer.

(3) A messenger-at-arms shall not be authorised by his commission as messenger-at-arms to execute a warrant granted by a sheriff or sheriff clerk.

(4) A messenger-at-arms shall cease to be entitled to hold a commission as messenger-at-arms if he no longer holds a commission as a sheriff officer.

(5) Any rule of law and any other enactment regulating the appointment of messengers-at-arms shall cease to have effect.

Inspection of work.

104.—(1) The sheriff principal—

(a) may from time to time in relation to any sheriff officer who hold a commission from him, and

(b) shall, if directed to do so by the Court of Session in relation to any sheriff officer who also holds a commission as messenger-at-arms,

appoint such a person as he thinks fit to inspect the work or particular aspects of the work of that officer in his capacity as sheriff officer and, if he also holds a commission as a messenger-at-arms, in his capacity as a messenger-at-arms.

(2) A person appointed under subsection (1) above may, and, if the Court of Session directs the sheriff principal so to require shall, be required by the sheriff principal to make enquiry as to extra-official activities undertaken for remuneration by any officer of court concerned.

(3) A person appointed as aforesaid shall make a report of his inspection and of any enquiry under subsection (2) above to the sheriff principal and, if the report is concerned with the work or extra-official activities of any messenger-at-arms, shall send a copy thereof to the Court of Session.

(4) A person appointed as aforesaid shall be entitled—

(a) to a fee, unless he is employed full-time in the civil service of the Crown; and

(b) to payment of his outlays incurred,

in connection with an inspection and report under this section, such fee and outlays being payable out of money provided by Parliament.

Investigation of alleged misconduct.

105.—(1) This section applies where—

(a) a report under section 104(3) of this Act discloses that an officer of court may have been guilty of misconduct;

Subsections (2) *and* (4)

These subsections implement Recommendation 8.8(5) (para. 8.56).

Subsection (3)

This subsection implements Recommendations 7.2 (para. 7.11) and 8.6(1) (para. 8.40).

Clause 104

This clause empowers the Court of Session or a sheriff principal to appoint a person to inspect the work of an officer of court or a firm of officers. It implements Recommendations 8.10 (para. 8.66) and 8.11(1) (para. 8.73).

Clause 105

This clause deals with proceedings against officers of court in respect of alleged misconduct. It implements Recommendation 8.12(1) to (3) and (7) (para. 8.84).

(b) a report by a sheriff or a complaint by any other person is made—

(i) to the Court of Session alleging misconduct by a messenger-at-arms;

(ii) to the sheriff principal from whom a sheriff officer holds a commission alleging misconduct by the officer; or

(c) any judge of the Court of Session, or a sheriff principal, has reason to believe that an officer of court may have been guilty of misconduct.

(2) Where this section applies, a judge nominated by the Lord President of the Court of Session, or the sheriff principal, after giving the officer of court an opportunity to admit or deny the misconduct or to give an explanation of the matter, may appoint a solicitor to investigate the matter unless the officer of court—

(a) admits the misconduct in writing, or

(b) gives a satisfactory explanation of the matter.

(3) Where the solicitor after carrying out an investigation in pursuance of subsection (2) above is of the opinion—

(a) that there is a probable case of misconduct and that there is sufficient evidence to support such a case, disciplinary proceedings shall be brought at his instance against the officer of court before the relevant court; or

(b) that there is not a probable case of misconduct or that there is insufficient evidence to support such a case, he shall report that fact to the relevant court.

(4) The solicitor shall be entitled to a fee, and to payment of his outlays incurred, in connection with an investigation and disciplinary proceedings brought by him under this section, such fee and outlays being payable out of money provided by Parliament.

(5) The relevant court may award expenses in any disciplinary proceedings brought under this section in favour of or against either party to the proceedings; and for the purposes of this subsection the party bringing the proceedings shall be deemed to be the Secretary of State.

(6) Where expenses are awarded under subsection (5) above in favour of—

(a) the officer of court, the expenses shall be recoverable by him from the Secretary of State;

(b) the Secretary of State, the expenses shall be recoverable from the officer of court by the Secretary of State, who shall pay any expenses so recovered into the Consolidated Fund:

Provided that it shall be incompetent to enforce payment of expenses recoverable under paragraph (a) above by any diligence.

EXPLANATORY NOTES

(7) If the person appointed under section 104(1) of this Act is a solicitor, that person may be appointed as solicitor under subsection (2) above.

(8) In this section "the relevant court" means whichever of the Court of Session or the sheriff principal made the appointment under subsection (2) above.

(9) In this section and section 106 of this Act "misconduct" includes conduct tending to bring the office of messenger-at-arms or sheriff officer into disrepute.

Courts' powers in relation to offences or misconduct.

106.—(1) Where the Court of Session becomes aware that a messenger-at-arms has been convicted by a court of any crime or offence, it may make an order finding that the messenger-at-arms should be suspended from practice or deprived of office.

(2) Where the sheriff principal from whom a sheriff officer holds a commission becomes aware that the sheriff officer has been convicted by a court of any crime or offence, the sheriff principal may make an order suspending the sheriff officer from practice, or depriving him of office, in that sheriffdom.

1974 c. 53

(3) Subsections (1) and (2) above are without prejudice to section 4(3)(b) of the Rehabilitation of Offenders Act 1974; and in those subsections "crime or offence" means any crime or offence of which the officer of court has been convicted before or after he was granted a commission as an officer of court, other than any crime or offence disclosed in his application for such a commission.

(4) Where—

(a) a messenger-at-arms at any time admits in writing that he is guilty of misconduct; or

(b) the Court of Session at the end of disciplinary proceedings under section 105(3)(a) of this Act is satisfied that a messenger-at-arms is guilty of misconduct,

the Court of Session may make one or more of the following orders—

(i) an order finding that the messenger-at-arms should be suspended from practice or deprived of office;

(ii) an order imposing a fine on the officer of court not exceeding £2,500 or such sum as may be prescribed;

(iii) an order censuring him;

(iv) if the misconduct consists of, or includes, the charging of excessive fees or outlays, an order decerning for repayment by the officer of court of the fees or outlays, to the extent that they were excessive, to the person who paid them.

(5) Where—

(a) a sheriff officer at any time admits in writing that he is guilty of misconduct; or

Clause 106

This clause confers certain powers on the Court of Session and the sheriffs principal as disciplinary authorities in dealing with offences or misconduct committed by officers of court.

Subsections (1) *to* (3)

These subsections implement Recommendation 8.14 (para. 8.89).

Subsections (4) *to* (8)

These subsections implement Recommendation 8.12(4), (5) and (8) (para. 8.84).

(b) the sheriff principal at the end of disciplinary proceedings under section 105(3)(a) of this Act is satisfied that a sheriff officer is guilty of misconduct,

the sheriff principal may make one or more of the following orders—

(i) an order suspending the sheriff officer from practice, or depriving him of office, in that sheriffdom;

(ii) an order mentioned in subsection (4)(ii), (iii) or (iv) above.

(6) Where an officer of court fails to comply with an order under this section imposing a fine on him, the Court of Session or, as the case may be, the sheriff principal may make an order—

(a) decerning for payment of the fine an extract of which shall contain a warrant in the prescribed form which shall have the same effect as an extract of a decree mentioned in section 112 of this Act; or

(b) under subsection (4)(i) or (5)(i) above.

(7) In subsection (4)(ii) above"prescribed" means prescribed in regulations made by the Secretary of State by statutory instrument, and any such regulations shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(8) Any fine imposed under this section shall be recoverable by the Secretary of State and shall be paid by him into the Consolidated Fund.

Provisions supplementary to s.106.

107.—(1) The Court of Session shall cause intimation to be made of any order under subsection (1) or (4) of section 105 of this Act to—

(a) every sheriff principal from whom the messenger-at-arms holds a commission as a sheriff officer;

(b) the Lyon King of Arms.

(2) The sheriff principal shall cause intimation to be made of any order under subsection (2) or (5) of that section—

(a) to every other sheriff principal from whom the sheriff officer holds a commission as a sheriff officer; and

(b) if the sheriff officer holds a commission as a messenger-at-arms, to the Court of Session and the Lyon King of Arms.

(3) On intimation under this section of an order under subsection (1), (2), (4)(i) or (5)(i) of the said section 106—

(a) to a sheriff principal, the sheriff principal shall make an order suspending the sheriff officer concerned from practice, or (as the case may be) depriving him of office, in the sheriffdom;

(b) to the Lyon King of Arms, the Lyon King of Arms shall suspend the messenger-at-arms concerned from practice or (as the case may be) deprive him of office.

EXPLANATORY NOTES

Clause 107

This clause details the effect which a penalty imposed by one disciplinary authority has on other commissions held by the officer. It implements Recommendation 8.15 (para. 8.91).

(4) Subject to subsection (3)(b) above, it shall be incompetent for the Lyon King of Arms to discipline a messenger-at-arms or suspend him from practice or deprive him of office.

Appeals from decisions under ss.105(5) and 106.

108. Any decision of a Lord Ordinary or a sheriff principal under section 105(5) or section 106(1), (2), (4) or (5) of this Act shall be appealable to the Inner House of the Court of Session, but the decision of the Inner House on any such appeal shall be final.

Execution of diligence or warrant null where officer of court has interest.

109.—(1) The execution by an officer of court of diligence, or of a warrant in any proceedings, shall be null if the subject matter of the diligence or proceedings—

(a) is one in which the officer of court has an interest as an individual; or

(b) consists of or includes a debt to which any of the circumstances mentioned in subsection (2) below apply.

(2) This subsection applies to the circumstances where the debt is due to—

(a) a company or firm, and the officer of court—

(i) is a director or partner of that company or firm or holds by himself, or along with a business associate or with a member of his family, a controlling interest therein; or

(ii) has a pecuniary interest in that company or firm and the principal business of the company or firm is the purchase of debts for enforcement;

(b) a business associate of the officer of court, or to a member of the officer of court's family;

(c) a company or firm, and a business associate of the officer of court or a member of the officer of court's family—

(i) is a director or partner of that company or firm or holds a controlling interest therein; or

(ii) has a pecuniary interest in that company or firm and the principal business of the company or firm is the purchase of debts for enforcement.

(3) Any reference in subsection (2) above to—

(a) a business associate of an officer of court shall be construed as a reference to a co-director, partner, employer, employee, agent or principal of the officer of court;

(b) a member of an officer of court's family shall be construed as a reference to the wife or husband, a parent or child, a grandparent or grandchild, or a brother or sister of the officer of court (whether of the full blood or the half-blood or by affinity) and in this paragraph shall include any relative

Clause 108

This clause regulates appeals arising out of disciplinary proceedings.

Clause 109

This clause makes the execution of a court warrant (connected with diligence, citation or otherwise) null if the officer or a closely connected person, company or firm has an interest in the subject matter of the warrant. It implements Recommendations 8.16 (para. 8.96), 8.17 (para. 8.100) and 8.18 (para. 8.104).

of the officer of court mentioned therein whether or not the relative's parents are or were married to each other;

(c) a controlling interest in a company shall be construed in accordance with paragraph 13(7) of Schedule 4 to the Finance Act 1975.

1975 c. 7.

(4) In subsection (3)(a) above "principal" does not include a principal in a contract for the execution of diligence or of a warrant in relation to the debt concerned.

Measure of damages payable by officer of court for negligence or other fault.

110. There shall cease to have effect any rule of law whereby, if an officer of court has been found liable to a creditor for negligent delay or failure to execute diligence, or for other fault in the execution of diligence, the damages payable by the officer of court are determined solely by reference to the amount of the debt.

Official identity card.

111.—(1) An official identity card shall be issued to—

(a) every messenger-at-arms;

(b) every sheriff officer,

by or on behalf of the person from whom he holds his commission.

(2) On being requested to show his credentials while performing his official functions, a messenger-at-arms or a sheriff officer shall exhibit his identity card.

EXPLANATORY NOTES

Clause 110

This clause amends the law relating to the quantification of damages claimable by a creditor against an officer for negligent failure or delay to execute diligence. It implements Recommendation 8.26 (para. 8.141).

Clause 111

This clause makes provision for identity cards for officers of court. It implements Recommendation 8.27 (para. 8.145).

PART VII

WARRANTS FOR DILIGENCE AND CHARGES FOR PAYMENT

Warrants for diligence in extract decrees of certain courts.

112.—(1) Every extract of a decree for the payment of money, or amongst other things for the payment of money, which is pronounced by—

(a) the Court of Session;

(b) the High Court of Justiciary; or

(c) the Court of Teinds,

shall contain a warrant in a form prescribed by act of sederunt or, as the case may be, by act of adjournal which shall have the effect of authorising—

(i) the charging of the debtor to pay to the creditor within a period specified in the charge the sum or sums specified in the extract and any interest accrued on the sum or sums and, in the event of failure to make such payment within that period, the execution of an earnings arrestment against the debtor's earnings and the poinding of articles belonging to the debtor and, if necessary for the purpose of executing the poinding, the opening of shut and lockfast places;

(ii) an arrestment other than an arrestment of the debtor's earnings in the hands of his employer; and

(iii) subject to section 82 of this Act, if the decree consists of or includes a maintenance order, a current maintenance arrestment against the debtor's earnings.

(2) An extract of a decree in an action of poinding of the ground shall contain a warrant in the prescribed form which shall have the effect of authorising a poinding of the ground.

Warrants for diligence: special cases.

113.—(1) This section applies where a creditor has acquired by assignation intimated to the debtor, confirmation as executor, or otherwise a right to—

(a) a decree after it has been extracted; or

(b) an obligation contained in a document (an extract of which, after the document has been registered in the Books of Council and Session or in sheriff court books, may be obtained containing warrant for execution) after the document has been so extracted; or

(c) a decree, or such document as is mentioned in paragraph (b) above, before it has been extracted if the creditor has subsequently obtained such an extract; or

(d) an order or determination which by virtue of any enactment is enforceable as if it were an extract registered decree arbitral bearing a warrant for execution issued by a sheriff;

Clause 112

This clause regulates the form and effect of warrants for diligence which are appended to extract decrees of various courts (see also Schedule 7, paras. 8, 10 and 23).

Subsection (1)

This subsection implements Recommendation 9.1 (para. 9.7), and in so far as it makes the expiry of a charge for payment of money a precondition of an earnings arrestment implements Recommendation 6.7(1) and (2) (para. 6.59).

Subsection (2)

This subsection implements Recommendation 9.2(3) (para. 9.12).

Clause 113

This clause provides a procedure whereby creditors who acquire rights to a decree or other document containing a warrant for diligence can be authorised to do diligence in their own names. It implements Recommendation 9.2(2) (para. 9.12).

(either directly or through a third party) from a person in whose favour the decree, order or determination was granted or who was the creditor in the obligation contained in the document.

(2) Where this section applies, the creditor who has acquired a right as aforesaid may apply to the appropriate clerk for a warrant having the effect of authorising the execution at the instance of that creditor of any diligence authorised by the extract of the decree or document or by the order or determination, as the case may be.

(3) The applicant under subsection (2) above shall submit to the appropriate clerk—

(a) an extract of the decree or of the document registered as aforesaid or a certified copy of the order or determination;

(b) the assignation (along with evidence of intimation to the debtor of the assignation), confirmation as executor or other document establishing the applicant's right.

(4) Where a charge has already been served in pursuance of the decree, order, determination or registered document, then the applicant may, if—

(a) with his application, he submits the certificate of execution of the charge in addition to the documents mentioned in subsection (3); and

(b) his application is granted,

execute diligence in pursuance of that charge.

(5) The appropriate clerk shall grant the warrant applied for under subsection (2) above if he is satisfied that the applicant's right is established.

(6) For the purposes of this section,"the appropriate clerk" shall be, where the applicant has acquired a right to—

(a) a decree granted by the Court of Session or to a document registered (whether before or after such acquisition) in the Books of Council and Session, a clerk of court of the Court of Session;

(b) a decree granted by the High Court of Justiciary, a clerk of Justiciary;

(c) a decree granted by a sheriff or to a document registered (whether before or after such acquisition) in the books of a sheriff court, the sheriff clerk of that sheriff court;

(d) such an order or determination as is mentioned in subsection (1)(d) above, any sheriff clerk.

Abolition of letters of horning, horning and poinding, poinding, and caption.

114. The granting of letters of horning, letters of horning and poinding, letters of poinding and letters of caption shall cease to be competent.

EXPLANATORY NOTES

Clause 114

This clause implements Recommendation 9.2(1) (para. 9.12).

Provisions relating to charges for payment.

115.—(1) The execution of a poinding or an earnings arrestment shall be incompetent unless a charge for payment has been served on the debtor and the period for payment specified in the charge has expired without payment being made:

Provided that this subsection shall not apply to a poinding or an earnings arrestment executed in pursuance of a summary warrant.

(2) The period for payment specified in any charge for payment served in pursuance of a warrant for execution shall be 14 days if the person on whom it is served is within the United Kingdom and 28 days if he is outside the United Kingdom or his whereabouts are unknown.

(3) Any such charge shall be in a form prescribed by act of sederunt or act of adjournal.

(4) Where any such charge has been served, it shall be incompetent to execute a poinding or an earnings arrestment by virtue of that charge more than 2 years after the date of such service:

Provided that a creditor may reconstitute his right to execute a poinding or an earnings arrestment by the service of a further charge for payment.

(5) No expenses incurred in the service of a further charge for payment shall be chargeable against the debtor.

(6) Registration of certificates of execution of charges for payment in a register of hornings shall cease to be competent.

Enforcement of certain warrants and precepts of sheriff anywhere in Scotland.

116. The following may be executed anywhere in Scotland—

(a) a warrant for execution contained in an extract of a decree granted by a sheriff;

(b) a warrant for execution inserted in an extract of a document registered in sheriff court books;

(c) a summary warrant;

(d) a warrant of a sheriff for arrestment on the dependence of an action or in security;

(e) a precept (issued by a sheriff clerk) of arrestment in security of a liquid debt the term of payment of which has not arrived;

and the warrant or precept may be executed by a sheriff officer of—

(i) the court which granted it; or

(ii) the sheriff court district in which it is to be executed.

EXPLANATORY NOTES

Clause 115

This clause regulates the form and effect of charges for payment of money.

Subsection (1)

This subsection implements Recommendations 5.1 (para. 5.9) and 6.7(2) (para. 6.59).

Subsection (2)

This subsection implements Recommendation 5.2 (para. 5.12).

Subsection (3)

The subsection implements Recommendation 5.7(1) (para. 5.32).

Subsections (4) *and* (5)

These subsections implement Recommendation 5.6 (para. 5.29).

Subsection (6)

This subsection implements Recommendation 9.3 (para. 9.15).

Clause 116

This clause removes the need for warrants of concurrence where the warrant is to be executed in a different sheriffdom from that in which it was granted. It implements Recommendations 7.15 (para. 7.65) and 9.5 (para. 9.26).

PART VIII

MISCELLANEOUS AND GENERAL

General provision relating to liability for expenses in court proceedings.

117.—(1) Subject to subsection (2) below, a debtor shall not be liable to a creditor, nor a creditor to a debtor, for any expenses incurred by the other party in connection with an application, any objections to an application, or a hearing held, under any provision of this Act:

Provided that if—

(a) any such application is frivolous;

(b) the application is opposed on frivolous grounds; or

(c) a party requires a hearing to be held on frivolous grounds,

the sheriff may award a sum of expenses, not exceeding £25 or such amount as may be prescribed, against the party acting frivolously in favour of the other party.

(2) This section is without prejudice to Schedule 1 and paragraphs 25 to 33 of Schedule 6 to this Act (expenses of poinding and sale), and does not apply to any question as to liability for expenses incurred—

(a) under section 1 of this Act;

(b) in connection with an appeal under any provision of this Act; or

(c) by or against a person other than the debtor or a creditor in connection with an application under any provision of this Act.

(3) In subsection (1) above"prescribed" means prescribed in regulations made by the Secretary of State by statutory instrument; and any such regulations shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Recovery from debtor of expenses of certain diligences.

118.—(1) Subject to subsections (3) to (5) below, any expenses chargeable against the debtor which are incurred in—

(a) a poinding and sale;

(b) the service of an earnings arrestment schedule;

(c) an application for, or for inclusion in, a conjoined arrestment order under section 87(1) or 88(5) of this Act;

shall be recoverable from the debtor by the diligence concerned but not by any other legal process; and any such expenses which have not been recovered by the time the diligence is completed or otherwise ceases to have effect shall cease to be chargeable against the debtor.

(2) Subject to subsections (4) and (5) below, any expenses chargeable against the debtor which are incurred in the service of a schedule of arrestment and in an action of furthcoming or sale shall be recoverable

Clause 117

This clause regulates the liability of debtors and creditors for the expenses of any court proceedings under the Bill. It implements Recommendation 9.8(1) to (3) (para. 9.44).

Clause 118

This clause makes provision for the recovery from the debtor of diligence expenses which are chargeable against the debtor.

Subsection (1)

This subsection implements Recommendation 9.9(1) (para. 9.58).

Subsection (2)

This subsection implements Recommendation 9.9(2) (para. 9.58).

from the debtor out of the arrested property; and the court shall grant a decree in the action of furthcoming for the balance of any expenses not so recovered.

(3) The sheriff shall, in relation to—

(a) any expenses awarded by him under paragraph 7 of Schedule 1 or paragraph 29 of Schedule 6 to this Act; or

(b) any additional sum of expenses awarded by him under paragraph 8 of Schedule 1 or paragraph 30 of Schedule 6 to this Act,

against the debtor in favour of the creditor, grant a decree for those expenses.

(4) Where any diligence mentioned in subsection (1) or (2) above is—

(a) recalled under section 8(2)(a), (d) or (e) of this Act in relation to a time to pay order;

(b) rendered ineffectual by a sequestration of the debtor's estate or a debt arrangement scheme;

(c) rendered unenforceable by virtue of the creditor entering into a composition contract or acceding to a trust deed for creditors or by virtue of the subsistence of a protected trust deed within the meaning of Schedule 5 to the Bankruptcy (Scotland) Act 1985; or

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(d) recalled by a conjoined arrestment order;

then—

(i) the expenses thereof which were chargeable against the debtor shall remain so chargeable; and

(ii) if the debtor's obligation to pay the expenses is not discharged under or by virtue of the time to pay order, sequestration, debt arrangement scheme, composition contract, trust deed for creditors or conjoined arrestment order, those expenses shall be recoverable by further diligence in pursuance of the warrant which authorised the original diligence.

(5) Any expenses incurred in the execution of diligence and chargeable against the debtor by virtue of section 18(3) of this Act—

(a) which are not included in the scheme in pursuance of section 18(4) of this Act; or

(b) which are so included in a case where—

(i) the scheme comes into force but ceases to have effect without a discharge of any of the debts included in the scheme being granted under section 31(1) of this Act, or

(ii) the decision confirming the scheme is reversed on appeal on the final determination of the case,

Subsection (3)

This subsection implements Recommendation 9.9(6) (para. 9.58).

Subsections (4) *and* (5)

These subsections implement Recommendation 9.9(5) (para. 9.58).

shall be recoverable by further diligence in pursuance of the warrant which authorised the original diligence.

(6) The expenses incurred in the execution of a current maintenance arrestment shall be recoverable by any diligence other than a current maintenance arrestment, and shall be so recoverable in pursuance of the warrant which authorised the current maintenance arrestment.

Ascription of sums recovered by diligence or while diligence is in effect.

119. Any sums recovered by any of the following diligences—

(a) a poinding and sale;

(b) an earnings arrestment;

(c) an arrestment and action of furthcoming or sale; or

(d) a conjoined arrestment order in so far as it enforces an ordinary debt;

or paid to account of the sums recoverable by the diligence while the diligence is in effect, shall be ascribed to the following in the order in which they are mentioned—

(i) the expenses of the diligence already incurred;

(ii) any interest, due under the decree or other document of debt on which the diligence proceeds, which has accrued at the date of execution of the poinding, earnings arrestment or arrestment, or in the case of an ordinary debt included in a conjoined arrestment order which has accrued at the date of application under section 87(1) or 88(5) of this Act;

(iii) any sum (including any expenses) due under the decree or such document, other than any expenses or interest mentioned in paragraphs (i) and (ii) above.

Certain diligences terminated by payment or tender of full amount owing.

120. Any of the following diligences—

(a) a poinding and sale;

(b) an arrestment and action of furthcoming or sale;

shall cease to have effect if the full amount recoverable thereby—

(i) is paid to the creditor, an officer of court, or any other person who has authority to receive payment on behalf of the creditor; or

(ii) is tendered to anyone mentioned in paragraph (a) above and the tender is not accepted within a reasonable time;

and any rule of law whereby the diligence mentioned in paragraph (a) or (b) above ceases to have effect on payment or tender of the principal sum of the debt is hereby abolished.

Subsection (6)

The subsection implements Recommendation 9.9(3) (para. 9.58).

Clause 119

This clause regulates how sums recovered by diligence or paid while the diligence is in effect are to be ascribed. It implements Recommendation 9.9(7) (para. 9.58).

Clause 120

This clause abolishes the present rule that payment of the amount due under the decree prevents further steps in the diligence from being taken to recover the expenses of diligence. It implements Recommendation 9.9(4) (para. 9.58).

Provisions to assist debtor in proceedings under Act.

121.—(1) No fees shall be payable by a debtor, in connection with—

(a) any application by him;

(b) objections by him to an application by any other person; or

(c) a hearing held,

under any provision of this Act, to any officer of any office or department connected with the sheriff court the expenses of which are paid wholly or partly out of the Consolidated Fund or out of money provided by Parliament.

(2) The sheriff clerk shall, if requested by the debtor—

(a) provide him with information as to the procedures available to him under this Act;

(b) assist him in the completion of any form required in connection with any proceedings under this Act:

Provided that the sheriff clerk shall not be liable to the debtor for any failure by him in performing the duties imposed on him by this subsection.

(3) Subsection (2) above is without prejudice to section 5(2) of this Act.

Lay representation.

1971 c. 58.

122. In relation to any proceedings before the sheriff under any provision of this Act, the power conferred on the Court of Session by section 32 of the Sheriff Courts (Scotland) Act 1971 (power of Court of Session to regulate civil procedure in sheriff court) shall extend to the making of rules permitting a party to such proceedings, in such circumstances as may be specified in the rules, to be represented by a person who is neither an advocate nor a solicitor.

Legal aid.

1967 c. 43.

123. At the end of Part II of Schedule 1 to the Legal Aid (Scotland) Act 1967 (proceedings for which legal aid shall not be given) there shall be added the following paragraph—

"5. Proceedings at first instance under the Debtors (Scotland) Act 1985, other than proceedings in connection with an application under section 1 or 3 of that Act to a Lord Ordinary or to the sheriff in an ordinary cause:

Provided that nothing in this paragraph shall preclude any third party to proceedings under that Act from obtaining legal aid in connection with those proceedings.".

Sequestration for rent or feuduty and arrestments other than earnings arrestments.

124.—(1) Sections 43 to 45, 48 and 51 of this Act shall apply to a landlord's or superior's right of hypothec and its enforcement by a sequestration for rent or feuduty as they apply to a poinding.

(2) Section 43 of this Act shall apply to an arrestment other than an arrestment of a debtor's earnings in the hands of his employer as it applies to a poinding.

EXPLANATORY NOTES

Clause 121

This clause contains provisions designed to encourage debtors to make use of the courts in connection with applications under this Bill.

Subsection (1)

This subsection implements Recommendation 9.6(5) (para. 9.31).

Subsection (2)

This subsection implements Recommendation 9.6(1) (para. 9.31).

Clause 122

This clause makes provision for lay representation in connection with applications under this Bill. It implements Recommendation 9.6(2) (para. 9.31).

Clause 123

This clause makes provision for legal aid in connection with applications under this Bill and appeals against the granting or refusal of such applications. It implements Recommendation 9.10(1) (para. 9.64).

Clause 124

This clause extends certain new restrictions on poindings to sequestrations for rent or feuduty and arrestments. It implements Recommendation 5.51 (para. 5.244).

Obligations *ad factum praestandum*.

125.—(1) An obligation *ad factum praestandum* which is contained in a document registered in the Books of Council and Session or in sheriff court books shall not by virtue of that registration be enforceable by imprisonment.

(2) A charge of the purpose of enforcing an obligation *ad factum praestandum* which is contained in an extract of a decree or of a document registered as aforesaid shall be incompetent.

Adjudication for debt.

126. It shall be incompetent for a creditor to raise an action of adjudication for debt to enforce a debt payable under a liquid document of debt unless—

(a) the debt has been constituted by decree; or

(b) the document of debt or, if the document is a bill of exchange or a promissory note, a protest of the bill or note, has been registered for execution in the Books of Council and Session or in sheriff court books.

Procedure in diligence proceeding on extract of registered document etc.

127. The Court of Session may by act of sederunt—

(a) regulate and prescribe the procedure and practice in; and

(b) prescribe the form of any document to be used in, or for the purposes of—

diligence proceeding—

(i) on an extract of a document which has been registered for execution in the Books of Council and Session or in sheriff court books; or

(ii) on an order or a determination which by virtue of any enactment is to be treated as if it were so registered.

Appeals.

128.—(1) Subject to subsection (7) below and sections 27(5), 34(9), 40(3), 46(2), 62(6), 69(5), 78(5), 87(12), 88(9) and 92(7) of this Act and paragraphs 5(2), 10(4) and 17(3) of Schedule 6 thereto, an appeal may be taken against any decision of the sheriff under this Act but only on a question of law and with the leave of the sheriff; and section 38 of the Sheriff Courts (Scotland) Act 1971 (appeal in summary causes) shall not apply to any appeal or any further appeal taken under this Act.

1971 c. 58.

(2) Any appeal against a decision of the sheriff under subsection (1) above must be taken within a period of 14 days after the date when the decision which is appealed against was made.

(3) Any decision of the Lord Ordinary on an application under section 1 or 3(4) of this Act shall be appealable but only on a question of law and with the leave of the Lord Ordinary.

(4) Except in so far as any provision of this Act otherwise provides, any decision of the sheriff under this Act or of the Lord Ordinary

Clause 125

This clause modifies the law relating to the enforcement of obligations *ad factum praestandum* contained in decrees and documents registrable for execution. It implements Recommendation 9.4 (para. 9.22).

Clause 126

This clause amends the law relating to actions of adjudication. It implements Recommendation 3.8 (para. 3.37).

Clause 127

This clause empowers the Court of Session to regulate diligence and diligence forms proceeding on extracts from books of court. It implements Recommendation 9.14 (para. 9.79).

Clause 128

This clause deals with appeals taken against any decision on an application made under this Bill.

Subsections (1) *to* (3)

These subsections implement Recommendation 9.11 (para. 9.70).

Subsections (4) *to* (7)

These subsections implement Recommendation 9.12 (para. 9.74).

shall take effect as soon as it is made and shall remain in effect unless and until—

(a) it is reversed on appeal; and either

(b) the period allowed for further appeal has expired without an appeal being taken; or

(c) if such a further appeal has been taken, the matter has been finally determined in favour of the reversal of the sheriff's or Lord Ordinary's decision.

(5) No decision reversing a decision of the sheriff or Lord Ordinary under this Act shall have retrospective effect.

(6) A court to which an appeal under this Act or a further appeal is taken may—

(a) before it disposes of the appeal, make such interim order; and

(b) on determining the appeal, make such supplementary order,

as it thinks necessary or reasonable in the circumstances.

(7) Nothing in this section shall apply in relation to any decision of a court under Part VI of this Act.

Application to Crown. 1947 c. 44

129. Without prejudice to the Crown Proceedings Act 1947, this Act shall bind the Crown acting in its capacity as a creditor or employer.

General Interpretation.

130. In this Act, unless the context otherwise requires—

"earnings" has the meaning assigned by section 73 of this Act;

"employer" has the meaning assigned by section 73(4) of this Act;

"maintenance" has the meaning assigned by section 74 of this Act;

"maintenance order" has the meaning assigned by section 74 of this Act;

"net earnings" has the meaning assigned by section 73(3) of this Act;

"officer of court" means a messenger-at-arms or a sheriff officer;

"ordinary debt" has the meaning assigned by section 99 of this Act;

"pay day" has the meaning assigned by section 75 of this Act;

"prescribed" means prescribed by act of sederunt;

"summary warrant" means a summary warrant granted under any of the enactments mentioned in Schedule 5 to this Act.

EXPLANATORY NOTES

Clause 129

This clause implements Recommendation 9.13 (para. 9.77).

Minor and consequential amendments, transitional provisions and repeals.

131.—(1) The enactments mentioned in Schedule 7 to this Act sha have effect subject to the amendments respectively specified in tha Schedule, being minor amendments or amendments consequentia on the provisions of this Act.

(2) The transitional provisions contained in Schedule 8 to this Ac shall have effect.

(3) The enactments set out in Schedule 9 to this Act are hereb repealed to the extent specified in the third column of that Schedule

Short title, commencement and extent.

132.—(1) This Act may be cited as the Debtors (Scotland) Ac 1985.

(2) This Act (except section 102 and this section) shall come int force on such day as the Secretary of State may by order made b statutory instrument appoint.

(3) This Act extends to Scotland only.

EXPLANATORY NOTES

SCHEDULES

Section 70.

SCHEDULE 1

EXPENSES OF POINDING AND SALE

Expenses chargeable against the debtor

1.—(1) Subject to paragraphs 2, 3, 5 and 6 of this Schedule, there shall be chargeable against the debtor any expenses incurred in taking any of the following steps—

(a) in serving one charge;

(b) in serving a notice and a copy thereof under section 45 of this Act before entering a dwellinghouse for the purpose of executing a poinding;

(c) in executing a poinding under section 46(1) of this Act;

(d) in making a report under section 46(5) of this Act of the redemption by the debtor of any poinded article;

(e) in granting a receipt under subsection (6) of section 46 of this Act for payment for redemption under subsection (5) of that section;

(f) in making a report under section 47 of this Act of the execution of a poinding, but not in applying for an extension of time for the making of such a report;

(g) in applying for a warrant of sale under section 52(1) of this Act;

(h) in making intimation, serving a copy of the warrant of sale and giving public notice under section 56 of this Act;

(i) in removing any articles for sale in pursuance of a warrant of sale;

(j) in making arrangements for, conducting and supervising the sale;

(k) in granting a receipt under section 53(3) of this Act for payment for the release or redemption of poinded articles;

(l) in making a report under section 53(5)(b) of this Act of the release or redemption of poinded articles;

(m) in making a report of an agreement under section 58(3) of this Act;

(n) subject to subsection (2) of section 61 of this Act, in making a report of sale under that section;

(o) in granting a receipt under section 67(4) of this Act for payment for the release from a poinding of any article which is owned in common;

(p) in making a report under section 67(6)(b) of this Act of the release of any such article;

(q) in opening shut and lockfast places in the execution of the diligence.

EXPLANATORY NOTES

Schedule 1

This schedule regulates liability for expenses in connection with the diligence of poinding and sale.

Paragraph 1

This paragraph implements Recommendations 9.7(2) (para. 9.36) and 9.8(4) (para. 9.44).

(2) The Secretary of State may by regulations made by statutory instrument amend any of paragraphs (a) to (q) of sub-paragraph (1) above or may delete any of, or add to, the steps specified therein.

(3) No regulations shall be made under sub-paragraph (2) above unless a draft of the regulations has been laid before Parliament and approved by resolution of each House of Parliament.

2. Where a warrant of sale is varied under section 57 of this Act, there shall be chargeable against the debtor the expenses incurred in the application for the variation and the execution of the warrant of sale as varied but, subject to paragraph 4 of this Schedule, not in the application for, and the execution of, the original warrant of sale.

3. Where arrangements for a sale are cancelled under subsection (1) of section 58 of this Act, then, if new arrangements are made for the sale in the circumstances mentioned in subsection (4)(a) of that section, there shall be chargeable against the debtor the expenses incurred in the making of the new arrangements but not in the making of the arrangements which have been cancelled.

4. Where a warrant of sale is varied under section 57 of this Act and the sheriff has awarded an additional sum of expenses under paragraph 8 of this Schedule in the application for the original warrant of sale, that sum shall be chargeable against the debtor.

5. Where any such further poinding as is mentioned in section 63(3) of this Act has been executed, there shall be chargeable against the debtor the expenses incurred in that poinding process but not the expenses incurred in the original poinding process.

6. Where a new date is arranged under section 57(9) of this Act for the holding of the sale or for the removal of the articles for sale, there shall be chargeable against the debtor the expenses incurred in connection with arranging the new date but not those incurred in connection with arranging the original date.

Circumstances where liability for expenses is at the discretion of the sheriff

7. The liability for any expenses incurred by the creditor or the debtor—

(a) in an application by the creditor or an officer of court to the sheriff under any provision of Part III of this Act, other than an application for a warrant of sale under section 52(1) of this Act or an application for variation of a warrant of sale under section 57(1) of this Act; or

(b) in implementing an order under—

(i) section 46(2) of this Act (order for security or immediate disposal of poinded articles); or

(ii) section 64 or 65 of this Act (orders dealing with breach of poinding),

shall be as determined by the sheriff.

EXPLANATORY NOTES

Paragraphs 2 *and* 4

These paragraphs implement Recommendation 9.8(4) (para. 9.44).

Paragraphs 3 *and* 6

These paragraphs implement Recommendation 9.7(4) (para. 9.36).

Paragraph 5

This paragraph implements Recommendation 5.25(3) (para. 5.120).

Paragraph 7

Sub-paragraph (*a*) implements Recommendation 9.8(3) (para. 9.44) and *sub-paragraph* (*b*) implements Recommendation 9.7(3) (para. 9.36).

Calculation of amount chargeable against debtor under the foregoing provisions

8. Expenses—

(a) chargeable against the debtor by virtue of any of paragrapl 1 to 5 of this Schedule in respect of an application unde Part III of this Act; or

(b) awarded by the sheriff against the debtor in favour of th creditor in a determination under paragraph 7 of th Schedule in respect of an application other than an appl cation under section 64 or 65 of this Act,

shall be calculated, whether or not the application is opposed by th debtor, as if it were unopposed, except that, if the debtor oppose the application on grounds which appear to the sheriff to be frivolou the sheriff may award an additional sum of expenses, not exceedin £25 or such amount as may be prescribed, against the debtor.

Circumstances where no expenses are due to or by either party

9. The debtor shall not be liable to the creditor nor the credito to the debtor for any expenses incurred by the other party—

(a) in an application by the debtor to the sheriff under an provision of Part III of this Act;

(b) in connection with a hearing held by virtue of sectio 49(4)(b), 52(4), 57(5) or 61(6) of this Act:

Provided that if—

(i) the application or the opposition to the application appea to the sheriff to be frivolous; or

(ii) a party requires a hearing to be held on grounds whic appear to the sheriff to be frivolous,

the sheriff may award a sum of expenses, not exceeding £25 or suc amount as may be prescribed, against the party acting frivolously i favour of the other party.

Supplementary

10.—(1) Any expenses chargeable against the debtor by virtue o any provision of this Schedule shall be recoverable out of the proceec of sale.

(2) In paragraph 8, and in the proviso to paragraph 9, of th Schedule, "prescribed" means prescribed in regulations made by th Secretary of State by statutory instrument; and any such regulatior shall be subject to annulment in pursuance of a resolution of eithe House of Parliament.

EXPLANATORY NOTES

Paragraphs 8 *to* 10

These paragraphs implement Recommendation 9.8(3) (para. 9.44).

Section 73(2)(e).

SCHEDULE 2

ENACTMENTS PROVIDING BENEFITS WHICH ARE NOT TO BE TREATED AS DEBTOR'S EARNINGS

1. The Family Income Supplements Act 1970 (c.55)
2. The Social Security Acts 1975 (cc.14 and 60)
3. The Industrial Injuries and Diseases (Old Cases) Act 1975 (c.16)
4. The Child Benefit Act 1975 (c.61)
5. The Supplementary Benefits Act 1976 (c.71)

EXPLANATORY NOTES

Schedule 2

This schedule implements Recommendation 6.3(5) (para. 6.45).

Section 76.

SCHEDULE 3

DEDUCTIONS TO BE MADE UNDER EARNINGS ARRESTMENT

TABLE A—DEDUCTIONS WHERE EMPLOYEE PAID WEEKLY

Net Earnings	Deduction £
£0.00-35	Nil
£35.01-40	1
£40.01-45	2
£45.01-50	3
£50.01-55	4
£55.01-60	5
£60.01-65	6
£65.01-70	7
£70.01-75	8
£75.01-80	9
£80.01-85	10
£85.01-90	11
£90.01-95	12
£95.01-100	13
£100.01-110	15
£110.01-120	17
£120.01-130	19
£130.01-140	21
£140.01-150	23
£150.01-160	26
£160.01-170	29
£170.01-180	32
£180.01-190	35
£190.01-200	38
£200.01-220	46
£220.01-240	54
£240.01-260	63
£260.01-280	73
£280.01-300	83
Over £300	£83 in respect of first £300 plus 50 per cent. of remaining balance.

EXPLANATORY NOTES

Schedule 3

This schedule implements Recommendation 6.9 (para. 6.76).

TABLE B—DEDUCTIONS WHERE EMPLOYEE PAID MONTHLY

Net Earnings	Deduction £
£0.00-152	Nil
£152.01-170	5
£170.01-185	8
£185.01-200	11
£200.01-220	14
£220.01-240	18
£240.01-260	22
£260.01-280	26
£280.01-300	30
£300.01-320	34
£320.01-340	38
£340.01-360	42
£360.01-380	46
£380.01-400	50
£400.01.440	58
£440.01-480	66
£480.01-520	74
£520.01-560	82
£560.01-600	90
£600.01-640	98
£640.01-680	109
£680.01-720	121
£720.01-760	133
£760.01-800	145
£800.01-900	180
£900.01-1,000	220
£1,000.01-1,100	262
£1,100.01-1,200	312
£1,200.01-1,300	362
Over £1,300	£362 in respect of first £1,300 plus 50 per cent. of the remaining balance.

EXPLANATORY NOTES

TABLE C—DAILY DEDUCTIONS WHERE NET EARNINGS REQUIRE TO BE CALCULATED ON A DAILY BASIS

Net Daily Earnings	Deduction £ p
£0.00-5	Nil
£5.01-6	0.15
£6.01-7	0.30
£7.01-8	0.45
£8.01-9	0.60
£9.01-10	1.00
£10.01-11	1.20
£11.01-12	1.40
£12.01-13	1.60
£13.01-14	1.80
£14.01-15	2.00
£15.01-17	2.40
£17.01-19	2.70
£19.01-21	3.20
£21.01-23	3.70
£23.01.25	4.30
£25.01-27	5.00
£27.01-30	6.00
£30.01-33	7.00
£33.01-36	8.50
£36.01-39	10.00
£39.01-42	11.50
Over £42	£11.50 per day in respect of first £42 plus 50 per cent. of the remaining balance.

EXPLANATORY NOTES

Section 90.

SCHEDULE 4

DISBURSEMENTS BY SHERIFF CLERKS UNDER CONJOINED ARRESTMENT ORDER

1. Where all the debts are ordinary debts, in every disbursement by the sheriff clerk, each creditor shall be paid the same proportion of the amount of his debt.

2. Where all the debts are current maintenance, then, in any such disbursement, if the sum available for disbursement is—

(a) sufficient to satisfy every creditor in respect of the amount of maintenance payable to every creditor for the number of days between the pay day in respect of which the sum to be disbursed was received by the sheriff clerk and the immediately preceding pay day, each creditor shall be paid that amount;

(b) insufficient to satisfy every creditor in respect of the amount of maintenance specified in paragraph (a) above, each creditor shall be paid the same proportion of that amount.

3. Where the debts comprise both ordinary debts and current maintenance, then, in any such disbursement—

(a) if only one of the debts is an ordinary debt, the creditor in that debt shall be paid the sum which would be payable to him if the debt were being enforced by an earnings arrestment;

(b) if more than one of the debts is an ordinary debt, each of the creditors in those debts, out of the sum which would be payable to a creditor if the debt were a single debt being enforced by an earnings arrestment, shall be paid the same proportion of the amount of his debt;

(c) if only one of the debts is current maintenance, the creditor in that debt shall be paid the sum which would be payable to him under section 79 of this Act if the debt were being enforced by a current maintenance arrestment;

(d) if more than one of the debts is current maintenance, each of the creditors in those debts shall receive a payment in accordance with paragraph 2 of this Schedule:

Provided that, if the sum available for any disbursement is insufficient to enable the provisions of this paragraph to operate both in relation to the ordinary debts and the current maintenance, priority shall be given in the disbursement to the ordinary debts.

4. For the purposes of this Schedule, the amount of an ordinary debt—

(a) of a creditor whose debt was being enforced by an earnings arrestment which was recalled under section 87(3) of this Act, shall be the amount specified in the earnings arrestment schedule;

EXPLANATORY NOTES

Schedule 4

This schedule regulates the apportionment amongst the conjoined creditors of sums received by the sheriff clerk from the debtor's employer under a conjoined arrestment order.

Paragraphs 1 *and* 4

These paragraphs implement Recommendation 6.44(1) to (3) (para. 6.244).

Paragraph 2

This paragraph implements Recommendation 6.46(2) (para. 6.252).

Paragraph 3

This paragraph implements Recommendation 6.47 (para. 6.255).

(b) of any other creditor, shall be the amount specified in the conjoined arrestment order or the order under section 88(5) of this Act.

5. In paragraph 2(a) of this Schedule, the reference to the immediately preceding pay day, in a case where the pay day in respect of which the sum is to be disbursed was the first day on which the employer concerned paid earnings to the debtor, shall be construed as a reference to the date on which the sheriff clerk served a copy of the conjoined arrestment order on that employer.

EXPLANATORY NOTES

Section 100(1).

SCHEDULE 5

RECOVERY OF RATES AND TAXES ETC.

The Local Government (Scotland) Act 1947 (c.43)

1. For section 247 there shall be substituted the following sections—

"Recovery of rates.

247.—(1) Subject to subsections (4) and (5) below, arrears of rates may be recoverable by the collector of rates of a rating authority by diligence—

(a) authorised by a summary warrant granted under subsection (2) below; or

(b) in pursuance of a decree granted in an action of payment.

(2) Subject to subsection (4) below, the sheriff, on an application by the collector of rates accompanied by a certificate by the collector of rates—

(a) stating that none of the persons specified in the application has paid the rates due by him;

(b) stating that the collector has given written notice to each such person requiring him to make payment of the amount due by him within a period of 14 days after the date of the giving of the notice;

(c) stating that the said period of 14 days has expired without payment of the said amount; and

(d) specifying the amount due and unpaid by each such person,

shall grant a summary warrant in a form prescribed by act of sederunt authorising the recovery by any of the diligences mentioned in subsection (3) below of the amount remaining due and unpaid along with a surcharge of 10 per cent. (or such percentage as may be prescribed) of that amount.

(3) The diligences referred to in subsection (2) above are—

(a) a poinding and sale in accordance with Schedule 6 to the Debtors (Scotland) Act 1985;

(b) an earnings arrestment;

(c) an arrestment and action of furthcoming or sale.

(4) It shall be incompetent for the sheriff to grant a summary warrant under subsection (2) above in

Schedule 5

This schedule amends the various statutes dealing with the recovery of rates and taxes by means of summary warrants. The technique used is to insert new provisions in place of the existing provisions.

Paragraph 1

This paragraph deals with local government rates. *New section* 247(1) and (2) restate the existing law in a different form. *New section* 247(3) implements Recommendations 7.3 (para. 7.18) and 7.4 (para. 7.20). *New section* 247(4) and (5) implement Recommendation 7.1 (para. 7.8). *New section* 247(6) restates the existing law. New section 247(7), authorising the variation by regulations of the amount of the surcharge (currently 10%) contained in subsection (2) above, implements Recommendation 7.13 (para. 7.57). *New section* 247A implements Recommendations 7.2 (para. 7.11) and 7.14 (para. 7.61).

respect of rates due by a debtor if an action has already been raised for the recovery of those rates; and, without prejudice to subsection (5) below, on the raising of an action for the recovery of rates, any existing summary warrant in so far as it relates to the recovery of those rates shall cease to have effect.

(5) It shall be incompetent to raise an action for the recovery of rates if, in pursuance of a summary warrant, any of the diligences mentioned in subsection (3) above for the recovery of those rates has been executed.

(6) In any proceedings for the recovery of rates, whether by summary warrant or otherwise, no person shall be entitled to found upon failure of the rating authority or any other authority to comply with any provision of this Part of this Act relating to the date by which something shall be done, not being a provision in this section or a provision regulating the diligence.

(7) Regulations under subsection (2) above shall be made by statutory instrument and shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Sheriff officer's fees and outlays.

247A.—(1) Subject to subsection (2) below and without prejudice to paragraphs 25 to 33 of Schedule 6 to the Debtors (Scotland) Act 1985 (expenses of poinding and sale), the sheriff officer's fees, together with the outlays necessarily incurred by him, in connection with the execution of a summary warrant shall be chargeable against the debtor.

(2) No fee shall be chargeable by the sheriff officer against the debtor for collecting, and accounting to the collector of rates for, sums paid to him by the debtor in satisfaction of the amount owing to the creditor.".

The Taxes Management Act 1970 (c.9)

2. For section 63 there shall be substituted the following sections—

"Recovery of tax in Scotland.

63.—(1) Subject to subsection (3) below, in Scotland, where any tax is due and has not been paid, the sheriff, on an application by the collector accompanied by a certificate by the collector—

(a) stating that none of the persons specified in the application has paid the tax due by him;

EXPLANATORY NOTES

Paragraphs 2 *to* 4

These paragraphs make provision for recovery of tax similar to the provisions of paragraph 1 on recovery of rates. They implement, in addition to the recommendations noted above, Recommendation 7.11 (para. 7.48).

(b) stating that the collector has demanded payment under section 60 of this Act from each such person of the amount due by him;

(c) stating that 14 days have elapsed since the date of such demand without payment of the said amount; and

(d) specifying the amount due and unpaid by each such person,

shall grant a summary warrant in a form prescribed by act of sederunt authorising, by any of the diligences mentioned in subsection (2) below, the recovery of the amount remaining due and unpaid.

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

(a) a poinding and sale in accordance with Schedule 6 to the Debtors (Scotland) Act 1985;

(b) an earnings arrestment;

(c) an arrestment and action of furthcoming or sale.

(3) It shall be incompetent for the sheriff to grant a summary warrant under subsection (1) above in respect of tax due by a debtor if an action has already been raised for the recovery of that tax; and, without prejudice to section 68A of this Act, on the raising of an action for the recovery of tax, any existing summary warrant in so far as it relates to the recovery of that tax shall cease to have effect.

Sheriff officer's fees and outlays.

63A.—(1) Subject to subsection (2) below and without prejudice to paragraphs 25 to 33 of Schedule 6 to the Debtors (Scotland) Act 1985 (expenses of poinding and sale), the sheriff officer's fees, together with the outlays necessarily incurred by him, in connection with the execution of a summary warrant shall be chargeable against the debtor.

(2) No fee shall be chargeable by the sheriff officer against the debtor for collecting, and accounting to the collector for, sums paid to him by the debtor in satisfaction of the amount owing to the creditor.".

3. At the end of section 68 there shall be added the following subsection —

"(3) As respects Scotland, this section is subject to section 68A of this Act.".

4. After section 68 there shall be inserted the following section—

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"Execution of diligence under summary warrant to preclude action for payment in Scotland.

68A. As respects Scotland, it shall be incompetent to raise an action for the recovery of tax if, in pursuance of a summary warrant, any of the diligences mentioned in section 63(2) of this Act for the recovery of that tax has been executed.".

5. In section 69(a) for "68" there shall be substituted "68A".

The Car Tax Act 1983 (c.53)

6. In paragraph 3(2) of Schedule 1 (recovery of car tax), for the words from "and (b)" to the end there shall be substituted the following sub-paragraph—

"(3) In respect of Scotland, the following provisions of the Taxes Management Act 1970— 1970 c. 9.

(a) section 63 (recovery of tax in Scotland);

(b) section 63A (sheriff officer's fees and outlays); and

(c) section 68A (execution of diligence under summary warrant to preclude action for payment in Scotland);

shall apply for the purpose of the recovery of car tax as they apply for the purpose of the recovery of tax under that Act subject to the substitution for any reference to the collector of a reference to the proper officer within the meaning of the Customs and Excise Management Act 1979 and any other necessary modifications.". 1979 c. 2.

The Value Added Tax Act 1983 (c.55)

7. In paragraph 6(4) of Schedule 7 (recovery of value added tax), for the words from "and (b)" to the end there shall be substituted the following sub-paragraph—

"(5) In respect of Scotland, the following provisions of the Taxes Management Act 1970—

(a) section 63 (recovery of tax in Scotland);

(b) section 63A (sheriff officer's fees and outlays); and

(c) section 68A (execution of diligence under summary warrant to preclude action for payment in Scotland);

shall apply for the purpose of the recovery of value added tax as they apply for the purpose of recovery

Paragraphs 6 and 7

These paragraphs apply the provisions for recovery of income tax set out in paragraphs 2 to 4 above to car tax and value added tax respectively.

of tax under that Act subject to the substitution for any reference to the collector of a reference to the proper officer within the meaning of the Customs and Excise Management Act 1979 and any other necessary modifications.".

1979 c. 2.

EXPLANATORY NOTES

Section 100(2).

SCHEDULE 6

POINDINGS AND SALES IN PURSUANCE OF SUMMARY WARRANTS

Exemptions from poinding

1.—(1) Articles belonging to a debtor of any of the following descriptions shall be exempt from poinding at the instance of a creditor in respect of a debt due to him by the debtor—

(a) clothing reasonably required for the use of the debtor or any member of his household;

(b) implements, tools of trade, books or other equipment reasonably required for the use of the debtor or any member of his household in the practice of the debtor's or such member's profession, trade or business, not exceeding in aggregate value £500 or such other sum as may be prescribed in regulations made by the Secretary of State;

(c) medical aids or medical equipment reasonably required for the use of the debtor or any member of his household;

(d) books or other articles reasonably required for the education or training of the debtor or any member of his household not exceeding in aggregate value £500 or such other sum as may be prescribed in regulations made by the Secretary of State;

(e) toys for the use of any child who is a member of the debtor's household;

(f) articles reasonably required for the care or upbringing of any child who is a member of the debtor's household.

(2) Articles belonging to a debtor of any of the descriptions set out in the list at the end of this sub-paragraph shall be exempt from such poinding if the article at the time of the poinding is in a dwellinghouse in which—

(a) the debtor is residing; or

(b) the debtor is not residing, but another person is residing,

and the article is reasonably required for the use in the dwellinghouse of the person residing there or any member of that person's household.

LIST

(i) beds or bedding;

(ii) household linen;

(iii) chairs or settees;

(iv) tables;

(v) food;

(vi) lights or light fittings;

Schedule 6

This schedule sets out a uniform procedure applicable to all summary warrant poindings. It incorporates many of the changes made in Part III of the Bill to ordinary poindings but retains the summary character of the existing poinding procedures used to enforce rates and taxes. The schedule generally implements Recommendations 7.4 (para. 7.20) and 7.5 (para. 7.22).

Paragraph 1

This paragraph is the equivalent of *clause* 43. *Sub-paragraph* (4) empowers the sheriff to release articles on the ground that they are exempt from poinding and implements Recommendation 7.8 (para. 7.39).

(vii) heating appliances;

(viii) curtains;

(ix) floor coverings;

(x) furniture, equipment or utensils used for cooking, storing or eating food;

(xi) one refrigerator;

(xii) articles used for cleaning, mending or pressing clothes;

(xiii) articles used for cleaning the dwellinghouse;

(xiv) furniture used for storing clothing, bedding or household linen or storing articles used for cleaning the dwellinghouse;

(xv) articles used for safety in the dwellinghouse.

(3) The Secretary of State may by regulations add to, delete or vary any of the items contained in the list set out in sub-paragraph (2) above.

(4) Subject to sub-paragraphs (5) and (6) below, the sheriff shall—

(a) on an application by the debtor (whether or not the poinded article is in a dwellinghouse in which the debtor is residing), make an order releasing such an article from the poinding, if the sheriff is satisfied that the article is exempt therefrom under sub-paragraph (1) or (2) above;

(b) if a poinded article is in a dwellinghouse in which the debtor is not residing, but another person is residing, on an application by that person, make such an order as aforesaid, if the sheriff is satisfied that the article is exempt therefrom under sub-paragraph (2) above.

(5) No application under sub-paragraph (4) above shall be competent unless it is made within a period of 14 days after the date of the execution of the poinding.

(6) No order under sub-paragraph (4) above releasing an article from the poinding shall take effect while the order is appealable or subject to an appeal or a further appeal.

(7) Regulations under sub-paragraph (1)(b) or (d) or (3) above shall be made by statutory instrument and shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Restrictions on the number of articles which may be poinded

2. The sheriff officer shall be entitled to poind under a summary warrant only such number of articles belonging to the debtor as, if sold at the valuations made under paragraph 5(1)(b) of this Schedule, would satisfy the unpaid debt and the likely fees of the sheriff officer and the outlays likely to be incurred by him in the execution of the warrant.

Paragraph 2

This paragraph applies the common law restriction as to the extent of a poinding to all summary warrant poindings.

Restrictions on time when poinding is allowed

3.—(1) No poinding shall be executed on a Sunday, Christmas Day, New Year's Day or Good Friday nor on such other day as may be prescribed.

(2) The execution of a poinding shall not—

(a) be commenced before 8 a.m. or after 8 p.m.; or

(b) be continued after 8 p.m.;

unless prior authority for such commencement or continuation has been obtained from the sheriff; and any rule of law which prohibits poindings outwith the hours of daylight shall cease to have effect.

Powers of entry in connection with poinding

4. Notwithstanding that a sheriff officer is in possession of a warrant authorising him to open shut and lockfast places for the purpose of executing a poinding, he shall not enter a dwellinghouse for that purpose where, at the time of his intended entry, there appears to him to be nobody, or only children under the age of 16 years, present in the dwellinghouse unless at least 4 days before the date of his intended entry he has served—

(a) notice on the debtor specifying that date; and

(b) in the case where there appears to him to be only children under the age of 16 years present in the dwellinghouse, a copy of that notice on the director of social work of the local authority:

Provided that the sheriff, on an application made to him by the sheriff officer which shall not require to be intimated to the debtor or to the director of social work, may dispense with service under this paragraph, if it appears to the sheriff that such service would be likely to prejudice the execution of the poinding.

Poinding procedure

5.—(1) The procedure relating to a poinding shall be as follows—

(a) before executing the poinding, the sheriff officer shall—

(i) exhibit the summary warrant or, if the warrant does not identify the debtor, a certified copy of the warrant together with a statement certified by the creditor that the summary warrant applies to the debtor in question;

(ii) demand payment, from the debtor or any other person present who is authorised to act for him, of the debt, including any expenses which have been incurred and which are chargeable against the debtor in the poinding;

(iii) make enquiry of any person present as to the ownership of the articles proposed to be poinded;

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Paragraph 3

This paragraph is the equivalent of *clause* 44.

Paragraph 4

This paragraph is the equivalent of *clause* 45. It implements Recommendation 7.10 (para. 7.45).

Paragraph 5

This paragraph is the equivalent of *clause* 46. In providing for a valuation at the time of poinding and giving the debtor an entitlement to redeem articles at their appraised values it implements Recommendation 7.6(1) and (2) (para. 7.30).

(b) the pointed articles shall be valued by the sheriff officer according to the price which they would be likely to fetch if sold on the open market, but, if he considers that the articles are such that a valuation by a professional valuator or other suitably skilled person is advisable, he may arrange for such a valuation;

(c) the sheriff officer shall prepare a schedule ("the poinding schedule") in the prescribed form which shall specify—

(i) the pointed articles, at whose instance they have been pointed and their respective values; and

(ii) the amount of the debt and any expenses which have been incurred and which are chargeable against the debtor in the poinding;

(d) on completion of the valuation of the pointed articles, the sheriff officer shall—

(i) inform the debtor (if present) of his right to redeem any of the pointed articles under sub-paragraph (5) below; and

(ii) sign the poinding schedule and deliver it to the person in whose possession the articles were pointed (and, if the possessor is not the debtor and it is reasonably practicable, send a copy of it to the debtor) or leave it on the premises in which the poinding took place;

(e) the sheriff officer shall leave the pointed articles at the place where they were pointed.

(2) The sheriff, on an application by the creditor, a sheriff officer or the debtor, may at any time after the execution of a poinding make an order—

(a) for the security of any of the pointed articles; or

(b) in relation to any of the articles which are of a perishable nature or which are likely to deteriorate substantially and rapidly in condition or value, for their immediate disposal and, in the event of their disposal by sale, for payment of the proceeds of sale to the creditor or for consignation of the proceeds in court until the diligence is completed or otherwise ceases to have effect;

and a decision of the sheriff under paragraph (b) above for the immediate disposal of articles shall be final.

(3) It shall not be competent for a sheriff officer in executing a poinding to examine a person on oath as to the ownership of any article.

(4) A sheriff officer in executing a poinding shall be entitled to proceed on the assumption that any article in the possession of the debtor is owned by him unless the sheriff officer knows or ought to know that the contrary is the case:

EXPLANATORY NOTES

Provided that the sheriff officer shall not be precluded from relying on that assumption by reason only—

(a) that the article belongs to a class which is commonly held under a hire, hire-purchase or conditional sale agreement or on some other limited title of possession; or

(b) that an assertion has been made that the article is not owned by the debtor.

(5) The debtor shall be entitled, within 14 days after the date of execution of the poinding, to redeem any of the poinded articles at the valuations made under sub-paragraph (1)(b) above.

(6) The sheriff officer shall, on receiving payment from the debtor for the redemption under sub-paragraph (5) above of a poinded article, grant a receipt in the prescribed form to the debtor; and the receipt shall operate as a release of the article from the poinding.

(7) Subject to paragraph 20(2)(b) of this Schedule, the revaluation in the same poinding of an article which has been valued under sub-paragraph (1)(b) above shall be incompetent.

(8) For the purposes of this Schedule and any other enactment or any rule of law, a poinding shall be deemed to have been executed when the poinding schedule has been delivered to the possessor of the poinded articles, or left on the premises in which the poinding took place, in pursuance of sub-paragraph (1)(d)(ii) above.

(9) At any time before a sheriff officer has executed a poinding on behalf of a creditor, he shall, if requested to do so by any other creditor who has exhibited to him a summary warrant authorising the poinding of articles belonging to the debtor concerned, conjoin that creditor in the poinding in respect of the debt for which he holds that warrant.

Release of poinded article on ground of undue harshness

6.—(1) The sheriff may, on an application by the debtor made within 14 days after the date of execution of a poinding, make an order releasing an article from the poinding if it appears to the sheriff that the continuation of the poinding of that article or its sale under the summary warrant would be unduly harsh in the circumstances.

(2) Where the sheriff has made an order under this paragraph releasing an article from a poinding, then, notwithstanding paragraph 8 of this Schedule, he may, on an application by the creditor, authorise the poinding of other articles belonging to the debtor in the same premises.

(3) An order under this paragraph releasing an article from a poinding shall not take effect while the order is appealable or subject to an appeal or a further appeal.

EXPLANATORY NOTES

Paragraph 6

This paragraph is the equivalent of *clause* 48. It implements Recommendations 7.8 (para. 7.39) and 7.12 (para. 7.53).

Recall of poinding

7.—(1) The sheriff shall recall a poinding at any time before the sale of the poinded articles, at his own instance or on an application by the debtor, if he is satisfied that the poinding is invalid or has ceased to have effect:

Provided that, without prejudice to sub-paragraph (4) of paragraph 1 of this Schedule, it shall be incompetent for the sheriff to recall a poinding on the ground that the poinded articles are, or any of them is, exempt from the poinding under that paragraph.

(2) The sheriff may, on an application by the debtor, recall a poinding at any time before the sheriff officer intimates to the debtor under paragraph 12 of this Schedule the date arranged for the removal of the poinded articles for sale or, if the articles are to be sold in the premises where they are situated, the date arranged for the holding of the sale, on any of the following grounds—

(a) that it would be unduly harsh in the circumstances for the poinded articles to be sold under the summary warrant;

(b) that the aggregate of the valuations of the poinded articles made under paragraph 5(1)(b) of this Schedule were substantially below the aggregate of the prices which they would have been likely to fetch if sold on the open market;

(c) that the likely proceeds of sale of those articles and any articles which have been poinded under any further poinding would not exceed the expenses likely to be incurred in the taking of further steps in the diligence and any such further diligence on the assumption that those steps are unopposed.

(3) The sheriff, on an application by the creditor, may continue an application under sub-paragraph (2)(c) above to enable the creditor to execute a further poinding.

(4) In sub-paragraphs (2)(c) and (3) above, "a further poinding" means a poinding in respect of the same debt which has been authorised under paragraph 6(2), 19(5) or 20(2), or has become competent by reason of paragraph 18(3), 21(5) or 22(6), of this Schedule or section 9(7), 18(7) or 30(6) of this Act.

(5) The sheriff shall not recall a poinding under this paragraph at his own instance or dispose of an application thereunder without first giving the parties—

(a) an opportunity to make representations; and

(b) if either party wishes to be heard, an opportunity to be heard.

(6) The sheriff clerk shall intimate to the debtor the recall at the instance of the sheriff of a poinding under sub-paragraph (1) above.

(7) An order under this paragraph recalling a poinding shall not take effect while the order is appealable or subject to an appeal or a further appeal.

Paragraph 7

This paragraph is the equivalent of *clause* 49. It implements Recommendations 7.6(3) (para. 7.30), 7.9 (para. 7.42) and 7.12 (para. 7.53).

Second poinding in same premises

8. Subject to sections 9(7), 18(7) and 30(6) of this Act and paragraphs 6(2), 18(3), 19(5), 20(2), 21(5) and 22(6) of this Schedule, where articles are poinded in any premises (whether or not the poinding is valid) another poinding in those premises to enforce the same debt shall be incompetent except in relation to poindable articles which have been brought on to the premises since the execution of the first poinding.

Sist of proceedings in poinding of mobile homes

9.—(1) Where a caravan, houseboat or other moveable structure is the only or principal residence of a debtor or another person and it has been poinded, the sheriff, on an application by the debtor or that other person made at any time after the execution of the poinding and before the sheriff officer intimates to the debtor under paragraph 12 of this Schedule the date arranged for the removal of the poinded articles for sale or, if the articles are to be sold in the premises where they are situated, the date arranged for the holding of the sale, may order that for such period as he may determine no further steps shall be taken in the poinding.

(2) In calculating under paragraph 17(1) or (2) of this Schedule the period during which a poinding under sub-paragraph (1) above shall remain effective, there shall be disregarded any such period as is mentioned in that sub-paragraph.

Arrangements for sale

10.—(1) Every sale in pursuance of a summary warrant shall be by public auction.

(2) No sale in pursuance of a summary warrant shall be held in a dwellinghouse except with the consent in writing of the occupier thereof and, if he is not the occupier, the debtor.

(3) No such sale shall be held in premises (not being a dwellinghouse or an auction room) which are occupied by a person other than the debtor or the creditor except with the consent in writing of the occupier thereof:

Provided that, where the poinded articles are situated in the premises of the occupier and the occupier does not give his consent under this sub-paragraph to the holding of the sale in those premises, then the sheriff, on an application being made to him by the creditor or the sheriff officer, if the sheriff considers that it would be unduly costly to require the removal of the poinded articles to other premises for sale, may direct that the sale shall be held in the premises where they are situated.

(4) The decision of the sheriff under the proviso to sub-paragraph (3) above shall be final.

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Paragraph 8

This paragraph is the equivalent of *clause* 50.

Paragraph 9

This paragraph is the equivalent of *clause* 51.

Paragraph 10

Sub-paragraph (1) is the equivalent of *clause* 55(1), *sub-paragraph* (2) is the equivalent of *clause* 54(2), *sub-paragraph* (3) is the equivalent of *clause* 54(5), *sub-paragraph* (5) is the equivalent of *clause* 55(3) and *sub-paragraph* (6) is the equivalent of *clause* 54(6).

(5) Where a sale of poinded articles is to be held in premises other than where they are situated, the sheriff officer shall be empowered to remove the articles to those premises for the purpose of the sale.

(6) In this paragraph "occupier", in relation to a dwellinghouse or other premises, means the person named in the valuation roll as the occupier of the dwellinghouse or premises; and, if there are two or more such occupiers, means any one of them.

Circumstances in which poinded articles belonging to debtor may be released or redeemed

11.—(1) Where a sale of poinded articles is to be held in premises other than where they are situated, the sheriff officer shall—

(a) be entitled to remove to those premises only such number of the poinded articles as, if sold at the valuations made under paragraph 5(1)(b) of this Schedule, would satisfy the sums recoverable by the creditor out of the proceeds of sale; and

(b) release the remaining poinded articles from the poinding.

(2) Subject to sub-paragraph (3) below, the debtor may, within 7 days after the date when the sheriff officer intimates under paragraph 12 of this Schedule the date arranged for the removal of the poinded articles for sale or, if the articles are to be sold in the premises where they are situated, the date arranged for the holding of the sale, redeem any poinded article by paying to the sheriff officer a sum equal to the valuation of the article made under paragraph 5(1)(b) of this Schedule.

(3) The sheriff officer shall, on receiving payment from the debtor under sub-paragraph (2) above, grant a receipt in the prescribed form to the debtor, and the receipt shall operate as a release of the article from the poinding.

(4) The creditor and the debtor may by agreement release articles from a poinding.

Intimation and publication of forthcoming sale

12.—(1) The sheriff officer who is arranging the sale of the poinded articles shall intimate to the debtor and, if he is a different person from the debtor, the possessor of the articles—

(a) the date and place arranged for the holding of the sale; and

(b) if the sale is to be held in premises other than where they are situated, the date arranged for the removal of the articles for the purposes of sale;

and intimation under this sub-paragraph shall be given not less than 14 days before the date arranged for the sale or such removal.

(2) In whatever premises the sale is to be held, the sheriff officer shall, at the same time as he intimates to the debtor the date arranged for the holding of the sale, send prescribed particulars of the

EXPLANATORY NOTES

Paragraph 11

This paragraph is the equivalent of *clause* 53. *Sub-paragraph* (2) implements Recommendation 7.6(2) (para. 7.30).

Paragraph 12

This paragraph is the equivalent of *clause* 56.

arrangements for the sale to the sheriff clerk of the sheriff court within whose jurisdiction the articles were poinded; and the sheriff clerk shall arrange for those particulars to be displayed on a public notice board within the court.

(3) All sales shall be advertised by public notice.

(4) No public notice of a sale of poinded articles to be held in premises other than the debtor's premises (except a public notice under sub-paragraph (2) above) shall name him or disclose that the articles for sale are poinded articles.

(5) Where the sale is to be held in premises other than the debtor's premises or an auction room, any public notice of the sale shall state that the articles to be sold do not belong to the occupier of those premises.

Cancellation of arrangements and new arrangements for sale

13.—(1) Except as provided in the following provisions of this paragraph, after intimation has been given under paragraph 12 of this Schedule to the debtor of the date arranged for the holding of a sale or for the removal of the poinded articles for the purposes of sale, the creditor or officer of court shall not be entitled to arrange a new date for the holding of the sale or for such removal.

(2) The creditor shall be entitled to instruct a sheriff officer to arrange such a new date as is mentioned in sub-paragraph (1) above where, for any reason for which the creditor or officer of court cannot be held responsible, it is not possible to adhere to the date which has been arranged, and the officer of court shall intimate that new date to the debtor:

Provided that no date arranged under this sub-paragraph shall be less than 7 days after the date of such intimation.

(3) Without prejudice to sub-paragraph (2) above, in order to enable the debt to be paid by instalments or otherwise in accordance with an agreement between the creditor and the debtor, the creditor may, subject to sub-paragraph (4) below, on one occasion only after intimation has been given under paragraph 12 of this Schedule to the debtor of the date arranged for the sale, cancel the arrangements made for the sale.

(4) Where the sale is to be held in premises other than where they are situated, the creditor shall not for the purposes of sub-paragraph (3) above be entitled to cancel the arrangements made for the sale after the poinded articles have been removed for sale from the premises where they are situated.

(5) Where the debtor is in breach of an agreement mentioned in sub-paragraph (3) above, the creditor may instruct a sheriff officer to make new arrangements for the sale of the poinded articles at any time while the articles remain poinded.

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Paragraph 13

Sub-paragraphs (1) and (2) are the equivalent of *subsections* (8) and (9) of *clause* 57. *Sub-paragraphs* (3) to (5) are the equivalent of *clause* 58.

The sale

14.—(1) No bid for the purchase of a poinded article at the auction shall be accepted unless it is at least equal to—

(a) the valuation of the article made under paragraph 5(1)(b) of this Schedule; or

(b) such smaller amount as the creditor may have authorised as acceptable:

Provided that the valuation and amount mentioned in paragraphs (a) and (b) above need not be disclosed to anyone bidding for such purchase.

(2) Any poinded article exposed for sale may be purchased by—

(a) any creditor, including the creditor on whose behalf the poinding was executed; or

(b) a person who owns the article in common with the debtor.

(3) Without prejudice to sub-paragraph (4) below, ownership of a poinded article which remains unsold after being exposed for sale shall pass to the creditor after it ceases to be exposed for sale.

(4) The ownership of a poinded article which has passed to the creditor under sub-paragraph (3) above, in a case where the sale is held in premises of the debtor, shall revert to the debtor unless—

(a) if the sale is held in a dwellinghouse in which the debtor is residing, the creditor uplifts the article by 8 p.m., or such time as may be prescribed, on the same day as the sale was completed;

(b) if the sale is held in other premises of the debtor, the creditor uplifts the article before 8 p.m., or such time as may be prescribed, on the third day following the date of the completion of the sale;

and a sheriff officer may remain on or re-enter any premises for the purpose of enabling the creditor to uplift any article under paragraph (a) or (b) above.

(5) Sub-paragraphs (3) and (4) above are without prejudice to the rights of any third party in any of the poinded articles.

(6) Where at the auction any article is unsold or is sold at a price below the valuation made under paragraph 5(1)(b) of this Schedule, the debtor shall be credited with an amount equal to that valuation.

Disposal of proceeds of sale

15. The sheriff officer who arranges the sale shall dispose of the proceeds of the sale—

(a) by handing over to the creditor or his agent the proceeds so far as necessary to meet the debt and any expenses chargeable against the debtor (subject to any agreement

Paragraph 14

Sub-paragraph (1) is the equivalent of *clause* 59(3). It implements Recommendation 7.6(4) (para. 7.30).

Sub-paragraph (2) is the equivalent of *clause* 59(4).

Sub-paragraphs (3) to (6) are the equivalent of *subsections* (5) to (8) of *clause* 59. They implement Recommendation 7.7 (para. 7.36).

Paragraph 15

This paragraph is the equivalent of *clause* 60.

between the sheriff officer and the creditor or his agent relating to the fees or outlays of the sheriff officer); and

(b) by handing over to the debtor or his agent any surplus remaining after the debt and any expenses chargeable against the debtor have been met or, if the debtor or agent cannot be found, by consigning that sum in court.

Report of sale to the creditor and debtor

16.—(1) The sheriff officer who arranged the sale shall send a report of the sale in the prescribed form to the creditor setting out—

(a) any articles which have been sold and the amount for which they have been sold;

(b) any articles which remain unsold;

(c) the expenses of the diligence; and

(d) any balance due by, or surplus handed over or due to, the debtor;

and the sheriff officer shall send a copy of the report to the debtor.

(2) The creditor or the debtor shall be entitled to have the report of sale taxed by the auditor of court of the sheriff court within whose jurisdiction the articles were poinded.

Period for which poinding remains effective

17.—(1) Subject to the following provisions of this paragraph, a poinding shall cease to have effect on the expiry of a period of one year after the date of execution of the poinding.

(2) The sheriff, on an application by the creditor or a sheriff officer made before the expiry of the said period of one year—

(a) may, where he thinks that, by extending the period during which the poinding shall remain effective, the debtor is likely to comply with an agreement between the creditor and the debtor for the payment of the debt by instalments or otherwise, extend the period for such further period as he considers may reasonably be required to give effect to the agreement; or

(b) may extend the period to enable further proceedings to be taken in the diligence where the termination of the poinding would prejudice the creditor and the creditor cannot be held responsible for the circumstances giving rise to the need for the extension;

and the sheriff may grant a further extension or further extensions under this sub-paragraph on an application made to him before the expiry of the previously extended period.

(3) The decision of the sheriff under sub-paragraph (2) above shall be final and shall be intimated to the debtor by the sheriff clerk.

Paragraph 16

This paragraph provides for the result of sale to be intimated to the creditor and debtor without requiring the officer to make a report of the sale to the sheriff as in ordinary poinding procedure (see *clause* 61).

Paragraph 17

This paragraph is the equivalent of *subsections* (1), (2), (3)(*a*) and (6) of *clause* 62.

(4) Where, within the period mentioned in sub-paragraph (1) above or within that period as extended under sub-paragraph (2) above, an application is made under sub-paragraph (2) above, the poinding shall continue to have effect until the disposal of the application.

Authorised removal of poinded articles

18.—(1) The debtor or the possessor of poinded articles may remove them to another location if—

(a) the creditor or sheriff officer has consented to their removal; or

(b) the sheriff, on an application by the debtor or the possessor, has authorised their removal.

(2) The removal of poinded articles to another location in accordance with sub-paragraph (1) above shall not by itself have the effect of releasing the articles from the poinding.

(3) Where poinded articles have been removed from the debtor's premises to another location under sub-paragraph (1) above, the creditor may, under the same warrant to poind, again poind any of the articles so removed and, notwithstanding paragraph 8 of this Schedule, any articles which were not so removed, whether or not they were previously poinded; and, on the execution of any such further poinding, the original poinding shall be deemed to have been abandoned.

Removal of poinded articles in breach of poinding

19.—(1) The removal from premises of poinded articles by the debtor or a third party, without consent or authority under paragraph 18(1)(a) or (b) of this Schedule, shall be a breach of the poinding and, if the debtor or third party at the time of such removal knew that the articles had been poinded, the removal may be dealt with as a contempt of court.

(2) The removal of poinded articles to another location in breach of the poinding shall not by itself have the effect of releasing the articles from the poinding.

(3) Subject to sub-paragraph (4) below, where in breach of a poinding articles have been removed from premises by the debtor or by a third party, the sheriff, on an application by the creditor or the sheriff officer—

(a) may make an order requiring the debtor or third party or such other person as is in possession of those articles to restore them to the premises from which they have been removed within a period specified in the order; and

(b) if a requirement under paragraph (a) above is not complied with and it appears to the sheriff that the articles are likely to be found in premises specified in the application, may grant a warrant to sheriff officers—

EXPLANATORY NOTES

Paragraph 18

This paragraph is the equivalent of *clause* 63.

Paragraph 19

This paragraph is the equivalent of *clause* 64.

(i) to search for the articles in the premises so specifie and

(ii) to restore the articles to the premises from which th have been removed or to make such other arrangemen for their security as the sheriff may direct,

and any such warrant shall be deemed to include authority to op shut and lockfast places for the purpose of its execution.

(4) Where it appears to the sheriff, on an application made to hir that any article which has been removed as mentioned in su paragraph (3) above has been acquired for value and witho knowledge of the poinding, he shall not make an order und paragraph (a) of that sub-paragraph relating to that article and sh recall any such order which he has already made.

(5) Where in breach of a poinding poinded articles have be removed from premises in circumstances in which the debtor is fault, the sheriff, on an application by the creditor, may, notwit standing paragraph 8 of this Schedule, authorise the poinding of oth articles belonging to the debtor in the same premises.

(6) Where a third party knowing that an article has been poind removes it from premises in breach of the poinding and the article-

(a) in the course of the removal or subsequently, is damag or destroyed;

(b) is subsequently lost or stolen; or

(c) is acquired from or through that third party by anoth person without knowledge of the poinding and for valu

the sheriff may order the third party to consign in court until tl completion of the sale or until the poinding otherwise ceases to ha effect—

(i) where the article has been damaged but not so damaged to make it worthless, a sum equal to the difference betwe the valuation of the article made under paragraph 5(1)(of this Schedule and the value of the article as damage

(ii) in any other case, a sum equal to the valuation made und that paragraph.

(7) Any sum consigned in court under sub-paragraph (6) abo shall, on completion of the sale or on the poinding otherwise ceasi to have effect, be paid to the creditor to the extent that may b necessary to satisfy his debt, any surplus thereof being paid to th debtor.

Damage or destruction of poinded articles

20.—(1) The wilful damage or destruction of poinded articles b the debtor or a third party who knows that the articles have be poinded shall be a breach of the poinding and may be dealt with a contempt of court.

EXPLANATORY NOTES

Paragraph 20

This paragraph is the equivalent of *clause* 65.

(2) Where poinded articles have been damaged or destroyed i circumstances in which the debtor is at fault, the sheriff, on a application by the creditor or sheriff officer may—

(a) authorise, notwithstanding paragraph 8 of this Schedule the poinding of other articles belonging to the debtor in th premises in which the original poinding took place; or

(b) authorise the revaluation of any damaged article in accord ance with paragraph 5(1)(b) of this Schedule.

(3) Where a third party knowing that an article has been poinde wilfully damages or destroys it, the sheriff may order the third part to consign in court until the completion of the sale or until th poinding otherwise ceases to have effect—

(a) where the article has been damaged but not so damaged a to make it worthless, a sum equal to the difference betwee the valuation of the article made under paragraph 5(1)(b of this Schedule and the value of the article as damaged

(b) where the article has been destroyed or so damaged as t make it worthless, a sum equal to the valuation made unde that paragraph.

(4) Any sum consigned in court under sub-paragraph (3) abov shall, on the completion of the sale or on the poinding otherwis ceasing to have effect, be paid to the creditor to the extent that ma be necessary to satisfy his debt, any surplus thereof being paid to th debtor.

Release from poinding of articles belonging to third party

21.—(1) A sheriff officer may, at any time after the execution o a poinding and before the sale of the poinded articles, release a article from the poinding if a third party or a person acting on hi behalf claims that it belongs to the third party, unless the debtor o the possessor of the article, if different from the debtor, denies th claim.

(2) The sheriff shall, at any time after the execution of a poindin and before the sale of the poinded articles, on an application mad to him by a third party, make an order releasing an article from poinding where he is satisfied that the article belongs to that thir party.

(3) The making of an application under sub-paragraph (2) abov is without prejudice to the taking of other proceedings by the thir party for the recovery of poinded articles belonging to him, and determination of the sheriff under that sub-paragraph shall not b binding in any other proceedings.

(4) An order under sub-paragraph (2) above releasing articles fron a poinding shall not take effect while the order is appealable or subjec to an appeal or a further appeal.

EXPLANATORY NOTES

Paragraph 21

This paragraph is the equivalent of *clause* 66. It implements Recommendation 7.12(2)(*a*) (para. 7.53).

(5) Where any article has been released under sub-paragraph (1) or (2) above from a poinding, the creditor may, notwithstanding paragraph 8 of this Schedule, poind other articles belonging to the debtor in the same premises.

Poinding and sale of articles in common ownership

22.—(1) Articles which are owned in common by a debtor and a third party may be pointed and disposed of in accordance with the provisions of this Schedule in satisfaction of the debts of that debtor.

(2) Where a third party or a person acting on his behalf, at any time after the execution of a poinding and before the sale of the pointed articles—

(a) claims that any such article is owned in common by the debtor and the third party; and

(b) pays to the sheriff officer a sum equal to the value of the debtor's interest in the article,

the sheriff officer may, unless the debtor or the possesor of the article, if different from the debtor, denies the claim, release the article from the poinding.

(3) The sheriff shall, at any time after the execution of a poinding and before the sale of the pointed articles, on an application made to him by a third party, make an order releasing any article from a poinding where he is satisfied that the article is owned in common by the debtor and that third party and either—

(a) the third party pays to the sheriff officer a sum equal to the value of the debtor's interest in the article; or

(b) the sheriff is satisfied that the continuation of the poinding of that article or its sale under summary warrant would be unduly harsh to the third party in the circumstances.

(4) A release under sub-paragraph (2) above or, where payment is made under paragraph (a) of sub-paragraph (3) above, a release under that sub-paragraph, shall become effective on the granting of a receipt for payment thereunder; and, on such a receipt being granted, the debtor's interest in the released article shall be deemed to be transferred to the third party.

(5) An order under sub-paragraph (3) above releasing articles from a poinding shall not take effect while the order is appealable or subject to an appeal or a further appeal.

(6) Where any article is released in pursuance of sub-paragraph (3)(b) above from a poinding, the creditor may, notwithstanding paragraph 8 of this Schedule, poind other articles belonging to the debtor in the same premises.

(7) This sub-paragraph applies where—

(a) at any time after the execution of a poinding, a third party claims that any of the pointed articles is owned in common

EXPLANATORY NOTES

Paragraph 22

This paragraph is the equivalent of *clause* 67.

by the debtor and himself but does not seek release of the article from the poinding, and either

(b) the claim is admitted by the creditor and the debtor; or

(c) the claim is not admitted by the creditor or the debtor, but the sheriff, on an application made to him, is satisfied that the claim is valid.

(8) Where sub-paragraph (7) above applies, then the creditor shall pay to the third party—

(a) if the article is or has been sold, a sum out of the proceeds of sale or out of the valuation of that article under paragraph 5(1)(b) of this Schedule (whichever is the greater) which bears the same relation to those proceeds or that valuation as the value of the third party's interest in the article bears to the value of the total interest of all those who own the article in common;

(b) if ownership of the article passes or has passed to the creditor in default of sale, a sum which bears the same relation to the valuation of the article under paragraph 5(1)(b) of this Schedule as the value of the third party's interest in the article bears to the value of the total interest of all those who own the article in common.

Certain proceedings under Schedule 6 to sist further steps in the diligence

23.—(1) Where, in relation to a poinding, an application under this Schedule mentioned in sub-paragraph (2) below has been made, then—

(a) during a relevant period it shall be incompetent to remove the poinded articles for sale, or to hold a sale of them, in pursuance of the summary warrant; and

(b) a relevant period shall be disregarded in calculating the period during which the poinding remains effective by virtue of paragraph 17 of this Schedule.

(2) The applications referred to in sub-paragraph (1) above are an application under—

(a) paragraph 1(4), 6(1), 21(2) or 22(3) (release of poinded articles);

(b) paragraph 7(1) or (2) (recall of poinding);

(c) paragraph 9(1) (sist of proceedings in poinding of mobile homes);

(d) paragraph 19(3) (restoration of articles removed in breach of a poinding);

(e) paragraph 19(4) (recall of order under paragraph 19(3)).

EXPLANATORY NOTES

Paragraph 23

This paragraph is the equivalent of *clause* 68.

(3) In this paragraph"a relevant period" means any of the following periods—

(a) the period while the application concerned is pending;

(b) any period during which the decision of the sheriff disposing of that application is appealable or subject to an appeal or a further appeal.

Power to enter premises and open shut and lockfast places

24. A summary warrant shall contain a warrant authorising a sheriff officer to enter premises in the occupancy of the debtor in order to execute the poinding or the sale, or the removal and sale of the poinded articles and, for any of those purposes, to open shut and lockfast places.

Expenses of poinding and sale

25.—(1) Subject to paragraphs 26, 27 and 28 of this Schedule, there shall be chargeable against the debtor any expenses incurred in taking any of the following steps—

(a) in serving a notice and a copy thereof under paragraph 4 of this Schedule before entering a dwellinghouse for the purpose of executing a poinding;

(b) in executing a poinding under paragraph 5(1) of this Schedule;

(c) in granting a receipt under sub-paragraph (6) of paragraph 5 of this Schedule for payment for redemption under sub-paragraph (5) of that paragraph by the debtor of any poinded article;

(d) in making intimation, sending prescribed particulars of the arrangements for the sale to the sheriff clerk and giving public notice under paragraph 12 of this Schedule;

(e) in removing any poinded articles for sale;

(f) in making arrangements for, and holding, the sale;

(g) in granting a receipt under sub-paragraph (3) of paragraph 11 of this Schedule for payment for the redemption of poinded articles;

(h) in making a report of sale under paragraph 16 of this Schedule;

(i) in granting a receipt under paragraph 22(4) of this Schedule for payment for the release from a poinding of any article which is owned in common;

(j) in opening shut and lockfast places in the execution of the diligence.

Paragraph 24

This paragraph makes it clear that a summary warrant includes a warrant to open shut and lockfast places. It implements Recommendation 7.10(1) (para. 7.45).

Paragraphs 25 *to* 33

These paragraphs reproduce *Schedule* 1 (expenses of poinding and sale) with such modifications as are necessary in view of the different procedure.

(2) The Secretary of State may by regulations made by statutory instrument amend any of paragraphs (a) to (j) of sub-paragraph (1) above or may delete any of, or add to, the steps specified therein.

(3) No regulations shall be made under sub-paragraph (2) above unless a draft of the regulations has been laid before Parliament and approved by resolution of each House of Parliament.

26. Where a new date is arranged under paragraph 13(2) of this Schedule for the holding of the sale or for the removal of the articles for sale, there shall be chargeable against the debtor the expenses incurred in connection with arranging the new date but not those incurred in connection with arranging the original date.

27. Where arrangements for a sale are cancelled under sub-paragraph (3) of paragraph 13 of this Schedule, then, if new arrangements are made for the sale in the circumstances mentioned in sub-paragraph (5) of that paragraph, there shall be chargeable against the debtor the expenses incurred in the making of the new arrangements but not in the making of the arrangements which have been cancelled.

28. Where any such further poinding as is mentioned in paragraph 18(3) of this Schedule has been executed, there shall be chargeable against the debtor the expenses incurred in that poinding but not the expenses incurred in the original poinding.

29. Subject to paragraph 32 of this Schedule, the liability for any expenses incurred by the creditor or the debtor—

(a) in an application by the creditor or an officer of court to the sheriff under any provision of this Schedule; or

(b) in implementing an order under—

(i) paragraph 5(2) of this Schedule (order for security or immediate disposal of poinded articles); or

(ii) paragraph 19 or 20 of this Schedule (orders dealing with breach of poinding),

shall be as determined by the sheriff.

30. Expenses awarded by the sheriff against the debtor in favour of the creditor in a determination under paragraph 29 of this Schedule in respect of an application other than an application under paragraph 19 or 20 of this Schedule, shall be calculated, whether or not the application is opposed by the debtor, as if it were unopposed, except that, if the debtor opposes the application on grounds which appear to the sheriff to be frivolous, the sheriff may award an additional sum of expenses, not exceeding £25 or such amount as may be prescribed, against the debtor.

31. The debtor shall not be liable to the creditor nor the creditor to the debtor for any expenses incurred by the other party—

(a) in an application by the debtor to the sheriff under any provision of this Schedule;

EXPLANATORY NOTES

(b) in connection with a hearing held by virtue of paragraph 7(5)(b) of this Schedule:

Provided that if—

(i) the application or the opposition to the application appears to the sheriff to be frivolous; or

(ii) a party requires a hearing to be held on grounds which appear to the sheriff to be frivolous,

the sheriff may award a sum of expenses, not exceeding £25 or such amount as may be prescribed, against the party acting frivolously in favour of the other party.

32. The creditor shall be liable for any expenses incurred by the debtor or himself in connection with an application by the creditor or the officer of court under paragraph 10(3)(b) of this Schedule.

33.—(1) Any expenses chargeable against the debtor by virtue of any of paragraphs 25 to 31 of this Schedule shall be recoverable out of the proceeds of sale.

(2) In paragraph 30, and in the proviso to paragraph 31, of this Schedule, "prescribed" means prescribed in regulations made by the Secretary of State by statutory instrument; and any such regulations shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Interpretation of "dwellinghouse" in Schedule 6

34. In this Schedule"dwellinghouse" includes a caravan or a houseboat or any structure adapted for use as a residence.

Adaptation of Schedule 6 for purposes of different enactments

35.—(1) In this Schedule, "creditor" means for the purposes of—

1947 c. 43. (a) section 247 of the Local Government (Scotland) Act 1947, the collector of rates of a rating authority;

1970 c. 9. (b) section 63 of the Taxes Management Act 1970, any collector of taxes;

1983 c. 53. (c) paragraph 3 of Schedule 1 to the Car Tax Act 1983 and paragraph 6 of Schedule 7 to the Value Added Tax Act 1983, the proper officer within the meaning of the Customs and Excise Management Act 1979.

1983 c. 55.
1979 c. 2.

(2) In this Schedule, "debt" for the purposes of—

(a) the said section 247, includes the surcharge recoverable thereunder but excludes interest;

(b) the said section 63, includes interest.

EXPLANATORY NOTES

Paragraph 34

This paragraph is the equivalent of *clause* 71.

Section 131(1).

SCHEDULE 7

MINOR AND CONSEQUENTIAL AMENDMENTS

General amendment

Any reference in any enactment to an order being enforceable in like manner as a recorded decree arbitral shall be construed as a reference to such an order being enforceable in like manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

Specific amendments

The Bank Notes (Scotland) Act 1765 (c.49)

1. In section 4 (summary execution on banker's notes), for the words from "letters of horning" to "the other" there shall be substituted the word "the".

The Debtors (Scotland) Act 1838 (c.114)

2. At the end of section 22 (arrestments to prescribe in three years), there shall be added the following subsections—

"(2) In the case of an arrestment which—

(a) secures a debt which is subject to a time to pay direction or a time to pay order; or

(b) is subject to an interim order under section 5(3) or 20(1) of the Debtors (Scotland) Act 1985 (order pending disposal of application for time to pay order or debt arrangement scheme),

there shall be disregarded, in computing the period at the end of which the arrestment prescribes, the period during which the direction, time to pay order or interim order is in effect.

(3) Nothing in this section shall apply to an arrestment of earnings in the hands of a debtor's employer.".

The Harbours, Docks, and Piers Clauses Act 1847 (c.27)

3. In section 57 (unserviceable vessels to be altogether removed from harbour), for the word "poinding" there shall be substituted the word "arrestment".

The Lyon King of Arms Act 1867 (c.17)

4. In section 2 (admittance to office of messenger-at-arms), for the words "according to the present law and practice" there shall be substituted the words "in accordance with Part VI of the Debtors (Scotland) Act 1985 and any act of sederunt made thereunder".

EXPLANATORY NOTES

Schedule 7

General amendment

This amendment implements Recommendation 8.6(2) (para. 8.40).

Paragraph 1

This paragraph implements Recommendation 9.2(1) (para. 9.12).

Paragraph 2

This paragraph implements Recommendations 3.18(3) (para. 3.85), 4.13(4) (para. 4.109) and 6.17 (para. 6.112).

Paragraph 3

This paragraph implements Recommendation 5.52 (para. 5.246).

Paragraph 4

This paragraph implements Recommendation 8.4 (para. 8.28).

The Court of Session Act 1868 (c.100)

5. At the end of section 14 (induciae of summonses and other writs passsing the signet), there shall be added the following subsection—

"(2) Nothing in this section shall apply to a charge for payment.".

The Titles to Land Consolidation (Scotland) Act 1868 (c.101)

6. In section 138 (import of short clauses of consent to registration), for the words from "letters of horning" to the end there shall be substituted the words ", upon the issue of an extract containing a warrant for execution, all lawful execution shall pass thereon".

The Judicial Statistics (Scotland) Act 1869 (c.33)

7. In section 2 (returns to be made by clerks of court and other public officers)—

(a) after the words "Her Majesty" there shall be inserted the words "and third, messengers-at-arms and sheriff officers";

(b) at the end there shall be added the following subsection—

"(2) All expenses incurred by messengers-at-arms and sheriff officers under this section shall be defrayed out of money provided by Parliament.".

The Writs Execution (Scotland) Act 1877 (c.40)

8. For section 3 there shall be substituted the following section—

"Power to execute diligence by virtue of warrant.

3. The warrant inserted in an extract of a document registered in the Books of Council and Session or in sheriff court books which contains an obligation to pay a sum or sums of money shall have the effect of authorising—

(a) the charging of the debtor to pay to the creditor within a period specified in the charge the sum or sums specified in the extract and any interest accrued on the sum or sums and, in the event of failure to make such payment within that period, the execution of an earnings arrestment against the debtor's earnings and the poinding of articles belonging to the debtor and, if necessary for the purpose of executing the poinding, the opening of shut and lockfast places;

(b) an arrestment other than an arrestment of the debtor's earnings in the hands of his employer;

(c) subject to section 82 of the Debtors (Scotland) Act 1985, a current maintenance arrestment against the debtor's earnings.".

EXPLANATORY NOTES

Paragraph 5

This paragraph implements Recommendation 5.2 (para. 5.12).

Paragraph 6

This paragraph implements Recommendation 9.2(1) (para. 9.12).

Paragraph 7

This paragraph implements Recommendation 8.28 (para. 8.148).

Paragraph 8

This paragraph reproduces *clause* 112 for extracts of documents registered in books of court.

The Debtors (Scotland) Act 1880 (c.34)

9. In section 4 (abolition of imprisonment for debt, with certain exceptions), for paragraph 1 there shall be substituted the following paragraph—

"1. Fines imposed for contempt of court or under section 91 of the Court of Session Act 1868.".

The Sheriff Courts (Scotland) Extracts Act 1892 (c.17)

10. In section 7(1) (import of the warrant for execution), for the words from "it shall" to the end there shall be substituted the following words—

" the said warrant shall have the effect of authorising—

(a) the charging of the debtor to pay to the creditor within a period specified in the charge the sum or sums specified in the extract and any interest accrued on the sum or sums and, in the event of failure to make such payment within that period, the execution of an earnings arrestment against the debtor's earnings and the poinding of articles belonging to the debtor and, if necessary for the purpose of executing the poinding, the opening of shut and lockfast places;

(b) an arrestment other than an arrestment of the debtor's earnings in the hands of his employer; and

(c) subject to section 82 of the Debtors (Scotland) Act 1985, a current maintenance arrestment against the debtor's earnings.".

The Merchant Shipping Act 1894 (c.60)

11. In section 693 (sums ordered to be leviable by poinding and sale of ship), for the word "poinding" there shall be substituted the word "arrestment".

The Execution of Diligence (Scotland) Act 1926 (c.16)

12. In section 1 (sheriff officer to have the powers of a messenger-at-arms in certain places), for the word "county" in both places where it occurs there shall be substituted the words "sheriff court district".

13. In section 2(1)(b) (execution of arrestment or charge by registered letter in certain cases), for the word "county" there shall be substituted the words "sheriff court district".

EXPLANATORY NOTES

Paragraph 9

This paragraph implements Recommendation 7.17(1) and (2) (para. 7.80).

Paragraph 10

This paragraph reproduces *clause* 112 for extracts of sheriff court decrees.

Paragraph 11

This paragraph implements Recommendation 5.52 (para. 5.246).

The Illegal Trawling (Scotland) Act 1934 (c.18)

14. In section 1(4) (penalties for illegal trawling), for the word "poinding" there shall be substituted the word "arrestment".

The Conveyancing and Feudal Reform (Scotland) Act 1970 (c.35)

15. In Schedule 3 (standard conditions incorporated in standard security), at the end of paragraph 9 there shall be added the following sub-paragraph—

"(3) For the purposes of this condition, a proprietor shall not be taken to be insolvent by reason only that in respect of him an interim order has been made under section 5(3) or 20(1) of the Debtors (Scotland) Act 1985 or a time to pay decree or a time to pay order has been granted or that he has applied for or has been made subject to a debt arrangement scheme.".

The Prevention of Oil Pollution Act 1971 (c.60)

16. In section 20(1) (enforcement and application of fines), for the word"poinding" there shall be substituted the word "arrestment".

The Town and Country Planning (Scotland) Act 1972 (c.52)

17. In section 267(8) (local inquiries), for the words "a recorded decree arbitral" there shall be substituted the words "an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland".

The Prescription and Limitation (Scotland) Act 1973 (c.52)

18. After section 7 there shall be inserted the following section—

"Debt arrangement scheme to preclude running of prescriptive period.

7A.—(1) Where a debtor in an obligation to which section 6 or 7 of this Act applies has applied for a debt arrangement scheme, then, in the computation for the purposes of section 6 or 7 of a prescriptive period in relation to any such obligation, there shall be disregarded any of the following periods—

(a) the period after the first notice date as defined in section 15(2)(a) of the Debtors (Scotland) Act 1985 while the application for the scheme is pending;

(b) any period during which the decision of the sheriff disposing of the application for the scheme is appealable or subject to an appeal or a further appeal;

(c) any period while the scheme is in force.

(2) The period to be disregarded under subsection (1) above shall not be treated as separating the time immediately before it from the time immediately after it.".

EXPLANATORY NOTES

Paragraph 14

This paragraph implements Recommendation 5.52 (para. 5.246).

Paragraph 15

This paragraph implements Recommendation 4.23(3) (para. 4.174).

Paragraph 16

This paragraph implements Recommendation 5.52 (para. 5.246).

Paragraph 17

This paragraph implements Recommendation 8.6(2) (para. 8.40).

Paragraph 18

This paragraph implements Recommendation 4.30 (para. 4.216).

The Consumer Credit Act 1974 (c.39)

19. After section 93 there shall be inserted the following section—

"Summary diligence incompetent in Scotland.

93A. Summary diligence shall be incompetent in Scotland to enforce payment of a debt due under a regulated agreement or under any security related thereto.".

20. In section 129 (time orders)—

(a) at the beginning of subsection (1) there shall be added the words "Subject to subsection (3) below,";

(b) at the end there shall be added the following subsection—

"(3) Where in Scotland a time to pay direction or a time to pay order has been made in relation to a debt, then (whether the direction or order is in effect or not) it shall be incompetent to make a time order in relation to the same debt.".

21. At the end of section 130 (supplemental provisions about time orders), there shall be added the following subsection—

"(7) In Scotland, where—

(a) an application by a debtor for a debt arrangement scheme is pending or such a scheme has been confirmed under section 24 of the Debtors (Scotland) Act 1985, and

(b) there are in force both a time order under section 129(2)(a) of this Act relating to a debt of that debtor and another order relating to that debt, or to the agreement under which the debt is owed, made under section 129(2)(b), 131, 133, 135(1) or 136 of this Act,

then, the court may, if it revokes the time order, vary or revoke any of those other orders.".

22. At the end of section 139 (reopening of extortionate agreements), there shall be added the following subsection—

"(8) In Scotland—

(a) where a debtor has applied for a debt arrangement scheme, it shall be incompetent for him to make an application under this section at any time during any of the following periods—

(i) the period after the first notice date as defined in section 15(2)(a) of the Debtors (Scotland) Act 1985 while the application for the scheme is pending;

EXPLANATORY NOTES

Paragraphs 19 *and* 20

These paragraphs implement Recommendation 3.25 (para. 3.127).

Paragraph 21

This paragraph implements Recommendation 4.28 (para. 4.205).

Paragraph 22

This paragraph implements Recommendation 4.16 (para. 4.138).

(ii) any period during which the decision of the sheriff disposing of the application for the scheme is appealable or subject to an appeal or a further appeal;

(iii) any period while the scheme is in force;

(b) in subsection (1)(b) and (c) above, "proceedings" do not include proceedings on an application for a debt arrangement scheme.".

The Criminal Procedure (Scotland) Act 1975 (c.21)

23. In section 411 (recovery by civil diligence), in subsection (1) for the words from "the words" to "14 days" there shall be substituted the words "a warrant for civil diligence in a form prescribed by act of adjournal which shall have the effect of authorising—

(a) the charging of the person who has been fined to pay the fine within a period specified in the charge and, in the event of failure to make such payment within that period, the execution of an earnings arrestment against his earnings and the poinding of articles belonging to him and, if necessary for the purpose of executing the poinding, the opening of shut and lockfast places;

(b) an arrestment other than an arrestment of earnings in the hands of his employer;".

The Crofting Reform (Scotland) Act 1976 (c.21)

24. In section 17(1) (extension of powers of Land Court), for the words from "as if" to "to be enforced" there shall be substituted the words "in like manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland".

The Patents Act 1977 (c.37)

25. In sections 93(b) and 107(3) (orders for expenses), for the words "a recorded decree arbitral" there shall be substituted the words "an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland."

The Employment Protection (Consolidation) Act 1978 (c.44)

26. In section 122 (employee's rights on insolvency of employer)—

(a) in subsection (8)—

(i) after the words "subsection (3)(e)" there shall be inserted the word "(a)";

(ii) at the end there shall be added the words "or

(b) in a case where the employer is subject to a debt arrangement scheme, if it is included in the scheme";

EXPLANATORY NOTES

Paragraph 23

This paragraph reproduces *clause* 112 in relation to fines and other sums ordered to be paid by a criminal court.

Paragraphs 24 *and* 25

These paragraphs implement Recommendation 8.6(2) (para. 8.40).

Paragraphs 26 *to* 28

These paragraphs implement Recommendation 4.11(4) (para. 4.96).

(b) in subsection (9), after the word "manager" there shall be inserted the words "an administrator of a debt arrangement scheme,".

27. In section 123(6) (payment of unpaid contributions to occupational pension scheme), after the word "manager" there shall be inserted the words "an administrator of a debt arrangement scheme,".

28. In section 127(2) (interpretation of sections 122 to 126), after paragraph (a) there shall be inserted the following paragraph—

"(aa) he has become subject to a debt arrangement scheme;".

The Customs and Excise Management Act 1979 (c.2)

29. In section 117 (execution and diligence against revenue traders) for subsection (9) there shall be substituted the following subsection—

"(9) This section shall apply to Scotland subject to the following modifications—

(a) in subsection (3) for the words from "issue" to the end there shall be substituted the words "granting of a warrant for the recovery of a sum owing by the revenue trader, those goods shall not be liable to be taken in execution under this section.";

(b) in subsection (4) for the word "seized" in both places where it occurs there shall be substituted the words "taken in execution"

(c) for subsection (5) there shall be substituted the following subsection—

"(5) The sheriff, on an application by the proper officer accompanied by a certificate by him that relevant excise duty payable by a revenue trader remains unpaid after the time within which it is payable, may grant a warrant authorising a sheriff officer—

(a) to take possession, by force if necessary, of anything liable to be taken in execution under this section and for that purpose to open shut and lockfast places; and

(b) to sell anything so taken possession of by public auction after giving 6 days notice of the sale.";

(d) in subsection (6) for the word "distrained" in both places where it occurs there shall be substituted the words "taken possession of";

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Paragraph 29

This paragraph implements Recommendation 7.16 (para. 7.69).

(e) in subsection (7) for the words "of the distress and sale" there shall be substituted the words "incurred in the taking possession and sale of the things under that subsection.".

The Education (Scotland) Act 1980 (c.44)

30. In paragraph 8 of Schedule 1 (local inquiries), for the words "a recorded decree arbitral" there shall be substituted the words "an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.".

The Betting and Gaming Duties Act 1981 (c.63)

31. Section 29 (recovery of duty in Scotland), shall have effect subject to the following modifications—

(a) for subsection (1) there shall be substituted the following subsection—

"(1) The sheriff, on an application by the proper officer accompanied by a certificate by him that a person, on written demand by the proper officer, has refused or neglected to pay any amount recoverable from him by way of general betting duty or bingo duty or by virtue of section 12(1) or 14 above or of Schedule 2 to this Act, may grant a warrant authorising a sheriff officer—

(a) to take possession, by force if necessary, of any of that person's corporeal moveables which would not be exempted from poinding and for that purpose to open shut and lockfast places; and

(b) to sell anything so taken possession of by public auction after giving 6 days' notice of the sale";

(b) in subsection (2) for the word "poinded" in both places where it occurs there shall be substituted the words "taken possession of";

(c) in subsection (3)—

(i) for the words "the poinding and" there shall be substituted the words "incurred in taking possession of the corporeal moveables and their";

(ii) in paragraph (a) for the word "poinded" there shall be substituted the words "taken possession of";

(iii) in paragraph (b) for the word "poinded" there shall be substituted the words "when they were taken possession of by the sheriff officer";

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Paragraph 30

This paragraph implements Recommendation 8.6(2) (para. 8.40).

Paragraph 31

This paragraph implements Recommendation 7.16 (para. 7.69).

(d) in subsection (4) for the words "poinded" and "poinding" there shall be substituted respectively the words "taken possession of" and "taking possession of the corporeal moveables".

The Civil Jurisdiction and Judgments Act 1982 (c.27)

32. At the end of paragraph 4 of Schedule 9 (continuance of certain existing jurisdictions), there shall be added the words "or a debt arrangement scheme.".

The British Fishing Boats Act 1983 (c.8)

33. In section 5(2)(a) (recovery of fines), for the word "poinding" there shall be substituted the word "arrestment".

The Rent (Scotland) Act 1984 (c.58)

34. For section 110 (restriction on diligence), there shall be substituted the following section—

"Restriction on sequestration for rent.

110. At any stage before the grant of a warrant of sale in an action of sequestration for payment, or in security, of rent of any dwelling-house let on a protected tenancy or subject to a statutory tenancy, the sheriff may sist the proceedings or adjourn them for such period or periods as he thinks fit, in order to enable the tenant to pay the rent in such manner as the sheriff may determine (whether by instalments or otherwise).".

The Bankruptcy (Scotland) Act 1985 (c.)

35. At the end of section 8 (further provisions relating to presentation of petitions), there shall be added the following subsection—

"(7) Every petition for sequestration presented by—

(a) a living debtor, shall contain a statement that he is not subject to a debt arrangement scheme; or

(b) a creditor, shall contain a statement that, to the best of his knowledge and belief, the debtor is not subject to a debt arrangement scheme.".

36. After section 32 there shall be inserted the following section—

"Sist of sequestration in relation to mobile homes.

32A. Where a caravan, houseboat or other moveable structure is the only or principal residence of the debtor, the Court of Session or the sheriff, on an application by the debtor made at any time after the date of sequestration, may order that, for such period as the Court of Session or sheriff may determine, no

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Paragraph 32

This paragraph is a consequential of Recommendation 4.8 (para. 4.60).

Paragraph 33

This paragraph implements Recommendation 5.52 (para. 5.246).

Paragraph 34

This paragraph implements Recommendation 3.23 (para. 3.114).

Paragraph 35

This paragraph is a consequential of Recommendation 4.46(3) (para. 4.311). In *paragraphs* 35 to 39 references to the Bankruptcy (Scotland) Act 1985 are references to the Bankruptcy (Scotland) Bill 1984 (Bill 48) as brought from the House of Lords to the House of Commons, and ordered to be printed, on 18 December 1984.

Paragraph 36

This paragraph implements Recommendation 5.51(3) (para. 5.244).

futher steps shall be taken in the sequestration in relation to such caravan, houseboat or structure.".

37. In section 36 (effect of sequestration on diligence), after subsection (5) there shall be inserted the following subsection—

"(5A) Nothing in subsection (4) or (5) above shall apply to an earnings arrestment, a current maintenance arrestment or a conjoined arrestment order.".

38. In paragraph 10 of Schedule 7 (arrestments and poindings)—

(a) in sub-paragraph (3) after the words "a sale" there shall be inserted the words "or receives payment in respect of a poinded article upon its redemption by the debtor";

(b) at the end there shall be added the following sub-paragraph—

"(5) Nothing in this paragraph shall apply to an earnings arrestment, a current maintenance arrestment or a conjoined arrestment order.".

39. In paragraph 11(a) of Schedule 7 (application of section 32 of Bankruptcy Act 1883 to Scotland), after the word "Act" there shall be inserted the words "but shall not include the case of a person the payment of whose debts is regulated by a debt arrangement scheme".

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Paragraph 37

This paragraph implements Recommendations 6.15 (para. 6.103), 6.31(1) (para. 6.189) and 6.50(3) (para. 6.270).

Paragraph 38

Sub-paragraph (*b*) implements Recommendations 6.41(2) (para. 6.228) and 6.46(1) (para. 6.252).

Paragraph 39

This paragraph implements Recommendation 4.47 (para. 4.314).

Section 131(2).

SCHEDULE 8

TRANSITIONAL PROVISIONS

1. Notwithstanding the repeal by this Act of subsection (4) of section 36 of the Sheriff Courts (Scotland) Act 1971— 1971 c. 58.

(a) any direction made under that subsection, which is in force immediately before the commencement of this Act, shall continue in force; and

(b) any summary cause action for payment, which is pending immediately before such commencement, shall proceed and be disposed of,

as if this Act had not been passed.

2. The sheriff may refuse to make a time to pay order if, on an objection being duly made in pursuance of section 5(5)(a) of this Act, he is satisfied that a direction has been made under section 36(4) of the said Act of 1971 whereby the debt concerned was payable by instalments, but the right to pay by instalments has ceased by reason of failure to pay an instalment.

3. Without prejudice to paragraphs 4 to 6 of this Schedule, a warrant issued before the commencement of this Act, for the enforcement by diligence of an obligation to pay money, contained in an extract of a decree or of a document which has been registered in the Books of Council and Session or in sheriff court books shall be treated as if it were a warrant contained in a decree granted after the commencement of this Act.

4. Nothing in Part III of this Act shall affect a poinding which is in effect immediately before the commencement of this Act; and further proceedings in such a poinding and in any sale to follow thereon shall be in accordance with the law in force immediately before such commencment.

5. Nothing in this Act shall affect an arrestment of earnings in the hands of an employer which has been executed before the commencement of this Act nor preclude the raising of an action of furthcoming in pursuance of such an arrestment or the granting of a decree in any such action.

6. Where an arrestment of a debtor's earnings in the hands of an employer which has been executed before the commencement of this Act has or shall have effect in relation to earnings payable on the first pay day occurring after such commencement, the execution of an earnings arrestment or a current maintenance arrestment during the period between such commencement and that pay day against earnings payable to the debtor by the employer shall be incompetent.

7.—(1) A summary warrant granted before the commencement of this Act under or by virtue of any of the enactments to which this paragraph applies shall be deemed to authorise, and authorise only—

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(a) a poinding and sale in accordance with Schedule 6 to this Act;

(b) an earnings arrestment; and

(c) an arrestment other than an arrestment of the debtor's earnings in the hands of his employer:

Provided that, if at the commencement of this Act diligence executed in pursuance of such a warrant is pending, that diligence shall proceed as if this Act had not been passed.

(2) This paragraph applies to the following enactments—

1947 c. 43. (a) section 247 of the Local Government (Scotland) Act 1947;

1970 c. 9 (b) section 63 of the Taxes Management Act 1970;

1972 c. 41. (c) paragraph 13 of Schedule 1 to the Finance Act 1972;

(d) paragraph 16(2) of Schedule 7 to the Finance Act 1972;

1983 c. 53. (e) paragraph 3 of Schedule 1 to the Car Tax Act 1983;

1983 c. 55. (f) paragraph 6 of Schedule 7 to the Value Added Tax Act 1983.

8.—(1) Where before the commencement of this Act—

(a) a warrant has been granted under any of the enactments to which this paragraph applies, but

(b) no diligence has been executed in pursuance of the warrant,

the warrant shall cease to have effect.

(2) Where before the commencement of this Act—

(a) a warrant has been granted under any of the enactments to which this paragraph applies; and

(b) diligence has been executed in pursuance of the warrant,

the diligence shall proceed as if this Act has not been passed.

(3) This paragraph applies to the following enactments—

1952 c. 44. (a) section 253 of the Customs and Excise Act 1952;

1972 c. 25. (b) paragraph 10 of Schedule 2 to the Betting and Gaming Duties Act 1972;

1979 c. 2. (c) section 117 of the Customs and Excise Management Act 1979;

1981 c. 63. (d) section 29 of the Betting and Gaming Duties Act 1981.

9.—(1) This paragraph applies to the following diligences—

(a) a poinding and sale;

(b) an arrestment and action of furthcoming or sale;

being diligences which are pending at the commencement of this Act.

(2) The provisions of this Act relating to the liability for the expenses of a diligence shall not apply in relation to a diligence to which this paragraph applies.

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(3) Section 118(1) or (2) of this Act shall not prevent a creditor from taking proceedings in court to recover any expenses chargeable against the debtor of a diligence to which this paragraph applies.

(4) Notwithstanding section 120 of this Act, a diligence to which this paragraph applies shall cease to have effect on payment or tender of the debt other than the expenses of the diligence.

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Section 131(3).

SCHEDULE 9

Repeals

Chapter	*Short Title*	*Extent of Repeal*
1503 c.45.	The Diligence Act 1503.	The whole Act.
1579 c.13.	The Registration Act 1579.	The whole Act.
1579 c.45.	The Hornings Act 1579.	The whole Act.
1584 c.15.	The Execution of Decrees Act 1584.	The whole Act.
1587 c.30.	The Officers of Arms Act 1587.	The whole Act.
1592 c.29.	The Lyon King of Arms Act 1592.	Section (3). In section (5) the words from "As alsua" to the end.
1593 c.34.	The Hornings Act 1593.	The whole Act.
1600 c.22.	The Hornings Act 1600.	The whole Act.
1607 c.13.	The Convention of Burghs Act 1607.	The whole Act.
1621 c.20.	The Hornings Act 1621.	The whole Act.
1661 c.218.	The Poinding Act 1661.	The whole Act.
1669 c.5.	The Poinding Act 1669.	The whole Act.
1669 c.95.	The Lyon King of Arms Act 1669.	The words from "the fourtie sext" to "Together also with".
1672 c.47.	The Lyon King of Arms Act 1672.	The words from "are judges" to "office and".
1681 c.5.	The Subscription of Deeds Act 1681.	The word "hornings".
1681 c.86.	The Bills of Exchange Act 1681.	The words from "Letters of horning" to "and other".

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Chapter	*Short Title*	*Extent of Repeal*
20 Geo. 2 c.43.	The Heritable Jurisdictions (Scotland) Act 1746.	Section 28.
20 Geo. 2 c.50.	The Tenures Abolition Act 1746.	Sections 12 and 13.
5 Geo. 3 c.49.	The Bank Notes (Scotland) Act 1765.	In section 6 the words from "issuing" to "all other".
12 Geo. 3 c.72.	The Bills of Exchange (Scotland) Act 1772.	In section 42 the words "by horning or other diligence". In section 43 the words "by horning or other diligence".
1 & 2 Vict. c.114.	The Debtors (Scotland) Act 1838.	Sections 2 to 15. Sections 23 to 31. In section 32 the words "excepting in the case of poindings". Section 35. All the Schedules.
9 & 10 Vict. c.67.	The Citations (Scotland) Act 1846.	In section 1 the words "excepting only in cases of poinding as aforesaid".
19 & 20 Vict. c.56.	The Exchequer Court (Scotland) Act 1856.	In section 28 the words from "except that" to the end. Sections 29 to 34. Section 36. Schedules G to K.
19 & 20 Vict. c.91.	The Debts Securities (Scotland) Act 1856.	In section 6, the words "of hornings".

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Chapter	*Short Title*	*Extent of Repeal*
33 & 34 Vict. c.63.	The Wages Arrestment Limitation (Scotland) Act 1870.	The whole Act.
43 & 44 Vict. c.34	The Debtors (Scotland) Act 1880.	In section 4, the proviso, the words from "a warrant" to "or under" and the words "or obligation".
45 & 46 Vict. c.42.	The Civil Imprisonment (Scotland) Act 1882.	Section 5.
55 & 56 Vict. c.17.	The Sheriff Courts (Scotland) Extracts Act 1892.	Section 7(6).
10 & 11 Geo. 6 c.43.	The Local Government (Scotland) Act 1947.	Sections 248, 249 and 251.
10 & 11 Geo. 6 c.44.	The Crown Proceedings Act 1947.	In section 46, proviso (a).
8 & 9 Eliz. 2 c.21.	The Wages Arrestment Limitation Amendment (Scotland) Act 1960.	The whole Act.
1966 c.19.	The Law Reform (Miscellaneous Provisions) (Scotland) Act 1966.	Sections 2 and 3.
1968 c.49.	The Social Work (Scotland) Act 1968.	In section 80, subsections (2) and (3).
1970 c.9.	The Taxes Management Act 1970.	Section 64.
1970 c.36.	The Merchant Shipping Act 1970.	In section 11(1)(a), the words "or arrestment".
1971 c.58.	The Sheriff Courts (Scotland) Act 1971.	Section 36(4).

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Chapter	*Short Title*	*Extent of Repeal*
1979 c.39.	The Merchant Shipping Act 1979.	In section 39, subsection (2) and in subsection (3) the words "or arrestment" and the words from "and, as" to the end.
1979 c.54.	The Sale of Goods Act 1979.	Section 40.
1984 c.43.	The Finance Act 1984.	Section 16.

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APPENDIX B

SUMMARY OF RECOMMENDATIONS

This Appendix contains a summary of the recommendations made in this report. Most of the recommendations are implemented by the draft Bill in Appendix A. Some recommendations, however, would require to be implemented by subordinate legislation or administrative action. These are marked with an asterisk and consist of the following, namely, Recommendations 3.11(2), 3.15(2), 3.17(2), 3.25(3), 4.46(7), 5.7, 5.8, 5.19(1)(g), 5.32(3), 5.47(2), 5.48(3), 6.3(4), 6.18(2), 6.20, 6.32(1), 6.37, 6.39(1), 6.42 (5) and (6), 6.44(4), 7.13, 7.17(2) and (4), 8.8(1) to (3), 8.9, 8.11(1), (3), (4) and (5), 8.12(6), 8.13, 8.19(3), 8.20, 8.21, 8.22, 8.23(8), 8.24(8), 8.28(2), 8.29, 9.1(1), 9.6(2) to (4), 9.9(8), 9.10(4) and 9.11(6).

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TIME TO PAY DECREES AND ORDERS

Time to pay decrees

3.1 The present jurisdiction of the courts to grant instalment decrees in summary cause actions should be replaced by a jurisdiction to grant decrees containing directions (called time to pay directions) providing for payment of the debt by instalments or by a deferred lump sum.

(Paragraph 3.4; clause 1(1).)

3.2 (1) Title to apply for a time to pay direction should be conferred on a debtor who is an individual and who is either (*a*) personally liable under the decree or (*b*) liable in a fiduciary or representative capacity as tutor of an individual or as judicial factor *loco tutoris*, curator *bonis* or judicial factor *loco absentis* on an individual's property.

(2) Where an individual is liable to make payments under a decree both in a personal capacity and in a fiduciary or representative capacity, (e.g. as a trustee, executor or office-bearer of a voluntary association), it should be competent for the court to include in the decree a time to pay direction applying to the individual's personal liability, but not to his liability in his other capacity unless that other capacity is one of those mentioned in paragraph (1)(*b*) above.

(3) A time to pay direction should cease to have effect on the debtor's death or on the *inter vivos* transmission of his obligation to pay the debt.

(Paragraph 3.9; clause 12.)

3.3 (1) Subject to the monetary limit proposed in Recommendation 3.6 (paragraph 3.25), time to pay decrees should be competent not only in sheriff court summary cause actions

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for payment of a principal sum but also in other actions in the sheriff court or Court of Session for payment of a principal sum.

(2) Time to pay decrees should not be competent, however, where:

(a) the sum due under the decree consists of or includes an award of financial provision on divorce or aliment; or

(b) the decree provides for the recovery by periodic payments of the cost of supplementary benefit from a relative liable to maintain the recipient of the benefit or is a contribution order or similar order against the relative of a child in the care of a local authority.

(Paragraph 3.13; clause 1(1), (4)(*b*) and (*c*), and (7).)

3.4 A creditor in a time to pay decree should be entitled to claim interest not quantified in the decree only if he intimates the amount of interest claimed to the debtor not later than a date prescribed by act of sederunt occurring before the date when payment of the last instalment or of the deferred lump sum falls due.

(Paragraph 3.16; clause 1(5).)

3.5 (1) In an action for payment of a principal sum, the court's power to make a time to pay direction relating to the expenses of the action should be exercisable only when it grants decree decerning for payment of the principal sum and either decerning for payment of the expenses or making a finding as to liability for the expenses; and accordingly where the expenses are taxed by the auditor of court at a later stage, a time to pay direction relating to those expenses should not be competent at that stage.

(2) Where the court grants a decree not decerning for payment of a principal sum but making a finding as to liability for expenses (whether or not the decree also decerns for payment of the expenses), it should not be competent for the court to make a time to pay direction relating to those expenses.

(Paragraph 3.21; clause 1(1) and (2).)

3.6 The court's power to make a time to pay direction should be exercisable only if the principal sum (i.e. disregarding interest and expenses) does not exceed a monetary limit fixed by statute at £10,000 initially but variable by statutory instrument.

(Paragraph 3.25; clause 1(4)(*a*) and (6).)

3.7 (1) A time to pay decree, while it is in operation, should render the debt unenforceable by a charge for payment and by the

diligences used for enforcing payment of ordinary unsecured debts, namely, poinding and warrant sale, earnings arrestment (recommended below), arrestment and action of furthcoming, arrestment and action of sale (of vessels), and adjudication for debt, but should not prevent the registration of an inhibition based on the debt.

(2) On making a time to pay decree, the court should have a new discretionary power to make an ancillary order recalling or restricting an existing arrestment on the dependence of the action in which the decree was granted, or an existing arrestment in security of the debt to which the decree relates. This ancillary power should be additional to its common law powers to recall or restrict arrestments on the dependence or in security.

(3) The court should be empowered to impose on the debtor conditions which must be fulfilled before the making of the ancillary order, and to defer pronouncing decree to allow time for the debtor to fulfil the conditions.

(4) The foregoing ancillary power should not apply to inhibitions on the dependence or in security or adjudications in security.

(Paragraph 3.35; clause 2.)

3.8 It should not be competent for a creditor to raise an action of adjudication to enforce a debt payable under a liquid document of debt or a bill of exchange or promissory note unless:

(a) the debt has been constituted by a decree; or

(b) the document of debt, or a protest of the bill of exchange or the promissory note, as the case may be, has been registered for execution in the books of court.

(Paragraph 3.37; clause 126.)

3.9 The diligences to be rendered unenforceable by a time to pay decree or subject to recall by an order ancillary to such a decree, should not include a sequestration for rent or feuduty under the landlord's or superior's hypothec, a poinding of the ground or an action of maills and duties.

(Paragraph 3.42; clauses 2 and 11(1)(*a*).)

3.10 (1) Sums due under a time to pay decree decerning for payment of a principal sum should become payable only after intimation by the creditor of the extract decree to the debtor.

(2) Where a court grants a time to pay direction relating to expenses in a decree which either:

(a) finds expenses due but does not decern for payment of them; or

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(b) decerns for payment of the expenses as taxed by the auditor of court but does not specify the expenses as a quantified sum,

the expenses should be payable in terms of the direction only after intimation by the creditor to the debtor of an extract decree for expenses specifying their amount.

(3) The privilege of time to pay by instalments conferred by a time to pay decree should lapse automatically if, on the due date for payment of an instalment, the debtor is already two prior instalments in arrears. If the debtor is in arrears with one prior instalment on the date when the last instalment falls due, or if he is not in arrears but fails to pay that instalment on that date, the privilege should lapse if he had not paid the unpaid balance of the debt within three weeks after that date.

(4) A time to pay direction relating to a deferred lump sum should lapse 24 hours after the time for payment has arrived.

(5) Where the court makes a time to pay direction in a decree for payment of a principal sum and subsequently grants a decree for payment of the expenses of the action, the lapse of the direction through default in paying a sum or sums due under one of the decrees should terminate also the privilege of time to pay the sums due under the other decree.

(Paragraph 3.45; clauses 1(1) and (3); and 3(1)–(4).)

3.11 (1) A court which has made a time to pay decree should be empowered to vary or recall the time to pay direction in the decree and, subject to such prior conditions as the court thinks fit, to recall or restrict any arrestment securing the debt, on a subsequent application by the debtor or creditor.

(2)* Provision should be made by act of sederunt to ensure that the form of intimation of an extract time to pay decree should notify the debtor of his right to apply for a variation of the time to pay direction in the decree and for recall or restriction of an arrestment securing the debt.

(Paragraph 3.48; clause 3(5), (6) and (7).)

Time to pay orders

3.12 (1) A new jurisdiction should be conferred on the courts to make an order (to be called a time to pay order) whereby a debt which has already been constituted by decree would be payable by instalments or by a deferred lump sum.

(2) Time to pay orders should be available to the same categories of persons and subject to the same limitations as are time to pay directions in terms of Recommendation 3.2 above.

(Paragraph 3.53; clauses 4(1) and (2), and 12.)

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3.13 (1) A time to pay order should be competent where (*a*) the debt has been constituted by a decree or other document of debt bearing a warrant for diligence; or (*b*) the debt consists of or includes tax or rates arrears for the enforcement of which the sheriff has granted a summary warrant authorising diligence.

(2) Such an order, however, should not be competent where:

(a) the debt due under the decree consists of or includes financial provision on divorce, or aliment; or

(b) the decree provides for the recovery of the cost of supplementary benefit or is a contribution order as mentioned in Recommendation 3.3(*b*); or

(c) the debt is due under a non-Scottish decree, analogous to those mentioned above, which is enforceable in Scotland; or

(d) the debt is a civil fine or penalty imposed for contempt of court in civil proceedings, or for breach of an order under section 91 of the Court of Session Act 1868, or for professional misconduct under any enactment; or

(e) the debt is a fine or other sum due under an order of a court in criminal proceedings.

(Paragraph 3.58; clause 4(1) and (7).)

3.14 (1) A time to pay order should only be competent where a charge to pay or arrestment in common form had been executed, an action of adjudication for debt had been raised, or a summary warrant granted, for recovery of the debt.

(2) A time to pay order should not be competent after a diligence enforcing the debt had proceeded to an advanced stage (viz. warrant of sale of poinded goods; intimation of the date of removal or impending sale of goods poinded under the recommended new summary warrant poinding procedure; decree of furthcoming or sale of arrested property; or entry into possession of adjudged property with the debtor's consent or acquiescence or a decree of maills and duties or of removing or ejection relating to such property) and until the date when the diligence had been completed or for any reason had ceased to have effect, after which date a time to pay order should again become competent.

(Paragraph 3.63; clause 4(1) and (4).)

3.15 (1) A time to pay order should be competent only where:

(a) the debt (exclusive of interest but including expenses decerned for as a quantified sum in the extract decree and diligence expenses) does not exceed a prescribed

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sum (fixed initially at £10,000 variable by statutory instrument); and

(b) a time to pay direction or time to pay order relating to the debt has not already been made.

(2)* Provision should be made by act of sederunt requiring a debtor applying for a time to pay order to state in his application that no time to pay direction or order relating to the debt has been made.

(Paragraph 3.66; clause 4(3) and (6).)

3.16 (1) The sheriff courts should have exclusive jurisdiction to make time to pay orders.

(2) The sheriff court which granted the decree for payment or summary warrant for recovery of a debt should have jurisdiction to make a time to pay order affecting that debt. In all other cases, jurisdiction should be conferred on the sheriff court of the place where the debtor is domiciled or, if he is not domiciled in Scotland, a place where he carries on business, or if he has no domicile or place of business in Scotland, a place where he has property (or a source of income) liable to diligence.

(Paragraph 3.71; clause 4(2) and (7) (definition of "sheriff").)

3.17 (1) The procedure in an application for a time to pay order should be as outlined at paras. 3.72 to 3.75 of this report.

(2)* So far as the procedure in an application for a time to pay order is not prescribed by clauses 5 and 6 of the Bill annexed to this report, it should be prescribed by act of sederunt. Provision should be made by act of sederunt to secure that where possible a debtor applying for a time to pay order should furnish particulars of the decree concerned to the sheriff and those particulars should be set out in the charge and other documents served on a debtor in the execution of diligence.

(Paragraph 3.76; clauses 5 and 6.)

3.18 (1) The sheriff should make an interim order sisting diligence by the creditor pending disposal of an application for a time to pay order.

(2) The interim order should not stop the execution of new poindings and arrestments. It should however stop poindings and arrestments from proceeding to warrant of sale or decree of furthcoming or, in a summary warrant poinding, intimation of either removal for sale or sale. It should stop new actions of adjudication for debt and, if such an action had been raised, it should stop the creditor from entering into possession of the adjudged property but it should not

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stop the registration of a notice of litigiosity in connection with the action, nor the obtaining and recording of an abbreviate or decree of adjudication.

(3) The period during which an interim sist of diligence is in force should be disregarded in computing the period during which by law a diligence subsists.

(Paragraph 3.85; clauses 5(3) and 7; Schedule 7, paragraph 2.)

3.19 (1) A time to pay order should preclude enforcement of the debt by any new charge, poinding (other than a poinding of the ground), earnings arrestment, arrestment in common form, or action of adjudication for debt.

(2) The sheriff should have:

(a) a duty to recall an existing earnings arrestment; to recall, or exclude the debt from, a conjoined arrestment order; and to prohibit further steps in an adjudication for debt other than the registration of a notice of litigiosity and the obtaining and recording of an abbreviate and decree of adjudication; and

(b) a power to recall or restrict an arrestment and to recall a poinding (other than a poinding of the ground), and if he does not recall the poinding or arrestment, he should make an order "freezing" the diligence by prohibiting the creditor from taking further steps in the diligence and rendering incompetent the grant of warrant of sale or of decree of furthcoming or sale. This freezing order would not however prevent an officer of court from lodging a report of the poinding nor prevent an application for the disposal of perishable goods or for security of goods.

(3) The period during which a diligence is "frozen" by such an order should be ignored in reckoning the time limits on the duration of the diligence.

(4) A time to pay order and its ancillary orders should cause an unexpired charge to lapse but should not retrospectively annul the effect which an expired charge has had in creating "apparent insolvency" within the meaning of bankruptcy legislation.

(5) If the sheriff, being unaware of the existence of a diligence, omits to make an ancillary order recalling, restricting or freezing it as recommended above, the diligence should continue in operation, and further steps may be taken in it, unless and until it is recalled, restricted or "frozen" by a subsequent order.

(Paragraph 3.93; clause 8; Schedule 7, paragraph 2.)

3.20 The provisions on automatic lapse of time to pay orders, the variation and recall of such orders, and the recall and restriction of existing diligences securing the debt should be similar to the

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corresponding provisions applying to time to pay decrees, but with minor modifications.

(Paragraph 3.97; clause 9.)

Recommendations applying to both time to pay decrees and time to pay orders

3.21 (1) A debt to which a time to pay direction or time to pay order relates should not entitle the creditor to present, or concur in, a petition for the debtor's sequestration while the direction or order is in effect.

(2) A time to pay direction in a decree or a time to pay order should be terminated by an award of sequestration of the debtor's estate, a trust deed for his creditors, an extra-judicial composition contract with his creditors or the circulation of a notice requesting creditors to verify their debts in an application for a debt arrangement scheme such as we recommend in Chapter 4.

(Paragraph 3.100; clause 10.)

3.22 The recall of an arrestment or poinding should not affect any right which the creditor had acquired through his arrestment or poinding to a *pro rata* share in the proceeds of other arrestments and poindings under bankruptcy legislation.

(Paragraph 3.102; clause 11(2).)

3.23 The restriction on diligence enforcing rent imposed by the Rent (Scotland) Act 1984, section 110, should be limited to actions of sequestration for payment, or in security, of rent and should be amended to provide that the sheriff has powers to sist or adjourn the action to enable the rent to be paid by instalments or otherwise which are exercisable at any stage between the first deliverance and the grant of warrant of sale of the sequestrated goods and effects.

(Paragraph 3.114; Bill, Schedule 7, paragraph 34.)

3.24 A time to pay decree and a time to pay order or interim order should not affect the right of a creditor to recover his debt by the exercise of any rights and remedies available to him (such as rights of set off, retention, lien, or recourse against cautioners; the exercise of security rights, e.g. under standard securities or pledges; contractual rights to recover possession of heritable or moveable property, e.g. under hire-purchase agreements; and the rights of electricity or gas boards to disconnect supply) other than the diligences used to enforce unsecured debts and sequestration, and except as mentioned in Recommendation 3.25 below.

(Paragraph 3.118; clause 11(1).)

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3.25 (1) Where a time order has been made under the Consumer Credit Act 1974, it should not be competent thereafter to make a time to pay direction or time to pay order under our recommended legislation for the same debt whether or not the time order is still in operation.

(2) Conversely, where a time to pay decree or order has been granted under our recommended legislation, it should not be competent thereafter to grant a time order under the 1974 Act for the same debt whether or not the time to pay decree or order is still in operation.

(3)* Provision should be made by act of sederunt requiring:

(a) the creditor or owner in an action brought to enforce a regulated agreement or any related security within the meaning of the 1974 Act to lodge a copy of any existing or previous time order relating to the debt;

(b) a debtor applying for a time to pay order to state in his application that no time order under the 1974 Act relating to the debt has been made; and

(c) a debtor applying for a time order under the 1974 Act to state in his application that no time to pay direction or order relating to the debt has been made under our recommended legislation.

(4) Summary diligence should be incompetent to enforce payment of a sum owed under a regulated agreement or any related security within the meaning of the 1974 Act.

(Paragraph 3.127; clause 13; Schedule 7, paragraphs 19 and 20.)

DEBT ARRANGEMENT SCHEMES

Introduction of debt arrangement schemes

4.1 A new legal process, to be known as a debt arrangement scheme, providing for the orderly and regular payment by an individual debtor of the debts due to his several creditors should be introduced in Scots law.

(Paragraph 4.34; clause 14(1).)

Content and nature of debt arrangement schemes

4.2 (1) A debt arrangement scheme should provide for:

(a) an extension of time for payment of debts; or

(b) payment of debts only to the extent of a composition; or

(c) a combination of the two foregoing types of proposal for payment.

(2) The maximum period allowed by a debt arrangement scheme for the payment by the debtor of instalments should

normally be three years from the coming into force of the scheme (when the sheriff's order confirming the scheme takes effect on the expiry of the appeal days or the disposal of an appeal).

(3) The sheriff however should have power to extend that period to be a period not exceeding five years in all. This power should be exercisable either on confirming the scheme or in an application for variation of the scheme after it has been confirmed.

(4) A scheme providing for a composition should state the proportion of each debt which the creditor in that debt would be paid, and the total amount to be paid to all creditors under the scheme.

(Paragraph 4.41; clauses 14(2), (3) and (9), 24(6) and (10), and 28(6).)

4.3 (1) A debt arrangement scheme should provide for payment of debts through an administrator and should regulate the method and times of in-payments and disbursements.

(2) Every scheme should state expressly that a pay deduction order may be made.

(Paragraph 4.44; clause 14(4) and (7).)

4.4 (1) It should be competent to include in a debt arrangement scheme a provision requiring the payment to the administrator of specified funds belonging to the debtor, or the realisation of items of the debtor's property and payment of their net proceeds, to the administrator for disbursement to creditors under the scheme. The scheme could include conditions designed to secure compliance with the provision, e.g. by third parties acting under the debtor's mandate.

(2) The administrator should report to the sheriff on the debtor's compliance with the provision and the sheriff should be under a duty to revoke the scheme, after giving the debtor an opportunity to be heard, if he found that the debtor had not so complied.

(Paragraph 4.47; clauses 14(5), and 30(4) and (5).)

4.5 (1) It should be competent to include in a scheme a restriction on the debtor obtaining credit exceeding an amount specified in the scheme but with exemptions for credit to pay rent and gas and electricity charges for the debtor's residence and any other items so specified.

(2) On the debtor's breach of the restriction, the sheriff should have power to revoke the scheme.

(Paragraph 4.49; clauses 14(6) and 30(1).)

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4.6 A debtor, but not a creditor, should have a title to apply for a debt arrangement scheme, and it should be expressly provided by statute that the debtor may withdraw his application at any time before the scheme is confirmed.
(Paragraph 4.54; clause 14(10).)

Forum and conditions of competence of scheme applications

4.7 The sheriff court should have exclusive jurisdiction to entertain applications for debt arrangement schemes and to confirm, vary and recall such schemes (subject to appeals on questions of law to the Court of Session as recommended in Chapter 9).
(Paragraph 4.56; clauses 14(1), 19, 24, 28 and 30.)

4.8 Jurisdiction in debt arrangement schemes should be exercisable by the sheriff having jurisdiction over the debtor's domicile within the meaning of the Civil Jurisdiction and Judgments Act 1982, section 41, or, in the absence of a Scottish domicile, the debtor's established place of business.
(Paragraph 4.60; clause 42(1) (definition of "sheriff").)

4.9 (1) Only persons who are individuals (not bodies corporate or unincorporate) should have a title to apply for a debt arrangement scheme.

(2) Only debts for which the debtor is personally liable should be included in a scheme.

(3) Debtors who are self-employed, as well as other debtors, should be entitled to apply for a scheme and debts incurred in the course of the debtor's present and previous profession, trade or business, if any, should be included in a scheme.

(4) A scheme application should be competent only if:

(a) the debtor is unable to pay his debts as they fall due;

(b) he owes not less than three debts;

(c) at least one of the debts has been constituted by decree and a charge to pay or arrestment has been executed or an action of adjudication has been raised, or a summary warrant for recovery of rates or taxes has been granted.

(5) A scheme application should be entertained only if it appears to the sheriff that:

(a) the total debts (exclusive of interest and expenses and disregarding a heritably secured debt) do not exceed a prescribed sum fixed initially at, say, £10,000 but variable by statutory instrument; and

(b) the product of the scheme is likely to reach a minimum prescribed sum (fixed initially at £600 but variable by statutory instrument) over three years.

(Paragraph 4.72; clauses 14(1) and (8), and 17(1) and (3)–(5).)

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Inclusion and ranking of debts, stoppage of diligence, effect of scheme on creditors' other rights and remedies, and payments outside scheme

4.10 (1) For the purpose of calculating the amount due to a creditor in terms of a scheme and of ranking creditors on each of the disbursements under a scheme, the amount of the debts initially included in a scheme should so far as practicable be fixed by reference to a single date occurring at an early stage of a scheme application: the proposed date is the date when the first statutory notice is served on a creditor by an administrator in the procedure recommended below for requiring creditors to verify the amounts of their debts ("the first notice date").

(2) Only debts (including interest and legal expenses) presently payable and undisputed at the first notice date would be initially eligible for inclusion in a scheme.

(3) Interest payable between the first notice date and the end of a successful scheme on an interest-bearing unsecured debt should be recoverable by the creditor only if (*a*) the scheme provided for payment of debts in full and (*b*) the interest was claimed in the procedure for discharge of debts at the end of a successful scheme as proposed below.

(4) The expenses of court proceedings due by the debtor should be initially included in a scheme only if a decree for expenses had been extracted, or the amount of expenses agreed by the parties, before the first notice date.

(5) The expenses of an action for payment of a principal sum against the debtor raised while a scheme application or scheme subsisted should be included only if either (*a*) the creditor was not aware of the application or scheme when he raised the action or (*b*) the action was necessary to resolve a dispute as to liability or quantum. Where the expenses of an action were excluded in terms of this rule, and the principal sum was included in the scheme, any discharge of debts at the termination of the scheme should operate to discharge the debtor's liability for those expenses.

(6) Diligence expenses chargeable against the debtor and incurred before the first notice date should be included unless disputed by the debtor, except that the expenses of a diligence taking the form of a court action would be subject to the rule in paragraph (4) above.

(Paragraph 4.80; clauses 15(1)–(4), 16(2)(*a*), 29 and 39.)

4.11 (1) In debt arrangement schemes, all included creditors should rank *pari passu* on the product of a scheme and on each disbursement by the administrator to creditors under the scheme.

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(2) There should be no category of preferred creditors. In particular, no preference should be given to creditors supplying accommodation or essential goods and services to the debtor, nor to creditors having a preferential status in sequestrations under bankruptcy legislation.

(3) The sheriff should disregard any objection to an application for confirmation, or any contention in an application for revocation of a scheme, made by a creditor, who would have a preference in sequestration, to the effect that he would not obtain that preference in the scheme, but pending a scheme application such a creditor should be entitled to apply for the sheriff's leave to petition for sequestration as recommended below.

(4) Part VII of the Employment Protection (Consolidation) Act 1978 (payment by Secretary of State from redundancy fund of benefits to employees of insolvent person) should apply to a debtor subject to a debt arrangement scheme, with subrogation of the Secretary of State, following payment of benefits, to the employee's ranking in the scheme.

(Paragraph 4.96; clauses 16(1), 25 and 30(2); Schedule 7, paragraph 26.)

4.12 Business creditors and married persons who would be postponed creditors in a sequestration should rank in a debt arrangement scheme equally with ordinary unsecured creditors.

(Paragraph 4.98; clause 16(1).)

4.13 (1) On appointing an administrator in a scheme application, the sheriff should make an interim order "sisting" diligence against the debtor.

(2) A copy of the order should be intimated as soon as practicable to each of the known creditors and should bind the creditor from the date of intimation.

(3) The interim order should have the following effects:

(a) It should render incompetent the grant of a warrant of sale of poinded goods; but it should not prevent a creditor from executing a poinding in common form; (the references here are to "personal" poindings, not to the secured creditor's diligence of poinding of the ground).

(b) It should render incompetent intimation of the sale, or removal and sale, of goods poinded under a summary warrant for rates and taxes under the procedure outlined in Chapter 7; but it should not prevent the execution of such a poinding.

(c) It should render incompetent the execution of an earnings arrestment but it should not affect an earnings

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arrestment already executed. It should neither prevent nor affect a current maintenance arrestment or a conjoined arrestment order.

(d) It should render incompetent the raising of an action of furthcoming or sale of arrested property or ships or the grant of decree in an action already raised, but it should not render incompetent the execution of an arrestment in common form.

(e) It should render incompetent the raising of an action of adjudication for debt or, if such an action had already been raised the taking of any steps (such as entry into possession, ejection of the debtor) other than the registration of a notice of litigiosity in connection with the action, the obtaining and extracting of decree, registration of an abbreviate of adjudication and the completion of title (by recording the decree in the property or personal registers). But it should not affect any steps already taken in the diligence.

(f) It should not render incompetent the procedure for obtaining and registering a warrant of inhibition or notice of inhibition nor affect any existing inhibition (or notices) which had already been registered.

(g) It should render incompetent the grant of a warrant for the civil imprisonment of an aliment defaulter.

(4) Time limits on the duration of diligences should be extended by the period during which the interim order affects the diligence.

(Paragraph 4.109; clause 20(1)–(3) and (5); Schedule 7, paragraph 2.)

4.14 (1) A debt arrangement scheme, while in force, should render incompetent the commencement or execution of a charge for payment and any of the ordinary diligences used to enforce or secure unsecured debts, namely, poinding and sale in common form (not being a poinding of the ground) or under summary warrant, earnings arrestment, arrestment and action of furthcoming or sale, inhibition, and adjudication for debt, including diligences (arrestments and inhibitions) used on the dependence or in security as well as diligences in execution. The same prohibition should apply while the order confirming the scheme is appealable or subject to appeal.

(2) As regards diligences already commenced, the scheme should render ineffectual:

(a) a poinding in common form (not being a poinding of the ground) not already followed by warrant of sale;

(b) a summary warrant poinding not already followed by intimation of the dates of removal and sale, or of sale;

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(c) an arrestment in common form not already followed by decree of furthcoming or sale;

(d) an earnings arrestment and a conjoined arrestment order such as are recommended in Chapter 6; and

(e) an inhibition.

(3) A debt arrangement scheme should not affect any action of adjudication for debt which had already been raised. An adjudging creditor's debt should be excluded from a scheme unless the creditor, at the first notice date (or subsequently in terms of the rules on "late" inclusion), had abandoned his action, discharged any notice of litigiosity or abbreviate of adjudication already registered, and discharged any decree of adjudication already obtained, as the case may be.

(4) An unexpired charge should lapse.

(Paragraph 4.118; clauses 15(9), and 18(1)(*a*), (5)(*a*), (*b*) and (6).)

4.15 (1) Where an existing inhibition was rendered ineffectual on the coming into force of a debt arrangement scheme, the debtor should be entitled to have the inhibition discharged by registering in the personal registers a notice (in a form prescribed by statutory rules) of the order confirming the scheme.

(2) The sheriff should have power, exercisable (on the debtor's application intimated to the creditor concerned) on or after confirming a debt arrangement scheme, to make an order declaring ineffectual:

(i) any inhibition or notice of inhibition which was incompetent by reason of being registered after the confirmation of the scheme; and

(ii) a notice of litigiosity, an abbreviate of adjudication or a decree of adjudication registered in connection with an action of adjudication for debt which was incompetent by reason of the raising of the action either in contravention of an interim order sisting diligence or after confirmation of the scheme.

A certified copy of the order should be registrable in the same registers (personal or property registers) as the document concerned was registrable. The declaratory order should not be subject to appeal and should take effect only after the confirmation order is no longer appealable nor subject to an appeal.

(3) The dues of registration of the notice or certified copy presented by or on behalf of the debtor should be borne by him in the first instance.

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(4) As regards liability for expenses and registration dues:

(a) the debtor should bear the expense of obtaining and registering a prescribed notice of the order confirming the scheme mentioned in paragraph (1) above;

(b) the debtor should be entitled to recover from the creditor the expense of obtaining and registering a declaratory order relating to an adjudication document which was ineffectual by reason of the raising of the action of adjudication for debt in contravention of the interim order served on the adjudging creditor; and

(c) where a notice of inhibition or an inhibition had been registered, or an action of adjudication for debt had been raised, after the confirmation of the scheme, the debtor should be entitled to recover from the creditor the expense of obtaining and registering a declaratory order relating to the inhibition or adjudication document only if (i) the creditor had been aware, at the time of registration of the document, that the registration would be ineffectual and (ii) the creditor had refused to discharge, or unduly delayed in discharging, the registration of the document at his own expense.

(Paragraph 4.124; clause 40.)

4.16 (1) Subject to the recommendation made below on "late" inclusion, there should be excluded from a debt arrangement scheme any debt which, at the first notice date, was:

(a) future or contingent;

(b) either (i) unconstituted by decree (or other document of debt) and disputed as to liability or quantum or (ii) constituted but disputed as to the amount remaining unpaid;

(c) due under a credit agreement subject to an application under the Consumer Credit Act 1974, section 139 (re-opening of extortionate credit agreements).

(2) (a) An application by the debtor under the 1974 Act, section 139 should not be competent after the first notice date in a scheme application and thereafter while the scheme application was pending or the scheme was in force.

(b) The sheriff's powers under the 1974 Act, section 139 to reopen extortionate credit agreements should not be exercisable in a scheme application but only in other proceedings (if commenced before the first notice date).

(3) (a) As a general rule, the administrator should include in a draft scheme:

(i) any debt identified after the first notice date and while the scheme application was pending;

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(ii) any debt newly incurred since the first notice date which was undisputed as to liability or quantum and otherwise eligible under the above rules; and

(iii) any debt ineligible for inclusion by reason of being future, contingent, disputed or subject to challenge under the 1974 Act, section 139 at the first notice date if that reason ceased to obtain while the scheme application was pending.

(b) The administrator should not, however, include the debt where:

(i) the sheriff took the view that, having regard to the stage which the scheme application had reached, a later application by the debtor for variation of the scheme after its confirmation would be a more appropriate way of dealing with the question of inclusion; or

(ii) the inclusion of the debt would have the effect that the total included debts would exceed to a substantial extent the upper limit on indebtedness recommended above.

(c) If the existence, and eligibility for inclusion, of the debt was ascertained by the administrator after copies of the draft scheme had been served on creditors, the scheme should be adjusted to include the debt, and re-served on creditors. A new period for objections should be allowed.

(4) The sheriff should have a discretionary power, on application by a creditor and after giving interested persons an opportunity to make representations, to vary a confirmed scheme so as to include a debt which:

(a) had been omitted from the scheme in error;

(b) had been incurred since the first notice date and was undisputed; or

(c) had been excluded from the scheme as future, contingent, disputed or subject to an application under the 1974 Act, section 139 as at the first notice date but had subsequently become eligible for inclusion as presently payable and no longer disputed nor subject to such an application.

But there should be no such inclusion if the effect would be that the total included debts would exceed to a substantial extent the upper limit on indebtedness recommended above.

(5) A creditor omitted from a scheme should have the options of making an application to the sheriff for inclusion of his debt by variation of the scheme, or for revocation of the scheme, or a combined application in the alternative for

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variation or revocation, or of staying outside the scheme and enforcing his debt in full on termination of the scheme notwithstanding any composition in the scheme of the other debts.

(Paragraph 4.138; clauses 15(1), (3) and (5)(*c*), 23(1), (2), (4) and (5), 28(1) and (3), and 30; Schedule 7, paragraph 22.)

4.17 (1) Where the administrator included in a draft scheme a debt which was:

(a) payable and otherwise eligible for inclusion at the first notice date but only identified by the administrator thereafter; or

(b) incurred after the first notice date; or

(c) ineligible for inclusion at the first notice date (as being future, contingent, disputed, etc.) but became eligible for inclusion thereafter,

the amount of the debt should be fixed by reference to the date when the administrator became satisfied as to the eligibility of the debt for inclusion and as to its amount, including court and diligence expenses incurred to that date for which the debtor was liable. That date should be specified in the draft scheme originally served on creditors or, if the debt was included after such service, in the scheme as adjusted and re-served on creditors.

(2) (a) Where the sheriff included a debt by variation of a confirmed scheme, the amount of the debt should be fixed by reference to the date when the application was lodged.

(b) Creditors previously included in a scheme would continue to rank on future disbursements rateably in proportion to the amount of their debts as fixed by reference to the first notice date or other date fixed for ascertaining the amount of their debt under the above proposals.

(3) A debt included "late" after confirmation of a scheme should be excepted from the discharge of debts on termination of a successful scheme. But at the time of granting the discharge of other debts the sheriff should be required to grant a decree decerning (*a*) for payment of the unpaid balance of the sum due to the creditor under the scheme (being in a composition scheme the unpaid balance of the dividend, and including interest claimed in a scheme providing for payment in full) together with a time to pay direction for payment of that balance by instalments or deferred lump sum, and (*b*) if the time to pay direction ceases to have effect by reason of the debtor's default or death, for payment of the unpaid balance of the whole debt (not the unpaid balance of the dividend in a com-

position scheme). The time to pay direction should be subject to variation, but not recall, by the sheriff's order.

(Paragraph 4.143; clauses 16(2), and 31(1), (6)–(8) and (10).)

4.18 (1) Recommendation 4.14 above, to the effect that a debt arrangement scheme should render existing diligences ineffectual and render incompetent diligences executed while a scheme was in force, should apply to diligences at the instance of omitted creditors as well as included creditors.

(2) The following safeguards for creditors executing diligence while a scheme was in force should be enacted.

(a) A creditor should not be liable in damages for executing diligence rendered incompetent by a scheme unless at the time of execution he had been aware that the scheme was in force.

(b) The registration of a scheme recommended below should not be treated as constructive notice to a creditor of a scheme.

(c) A creditor executing diligence while unaware of a scheme should be entitled, after termination of the scheme, to enforce recovery in full of the diligence expenses chargeable against the debtor notwithstanding Recommendation 9.9(1) for restricting the recovery of such expenses.

(3) The restriction on second poindings in the same premises recommended in Chapter 5 should not apply to poindings enforcing debts undischarged on termination of a scheme if the previous poinding had been either executed before confirmation of the scheme and rendered ineffectual by it or had been executed after confirmation when the creditor was unaware that the scheme subsisted.

(4) It should be competent to include diligence expenses chargeable against the debtor in a debt arrangement scheme (notwithstanding Recommendation 9.9(1) restricting the recovery of those expenses), unless the creditor was entitled to complete his diligence despite the scheme.

(Paragraph 4.148; clauses 18(1)–(4) and (6), 38(2), and 118(4)(*b*) and (5).)

4.19 (1) The sheriff should have power to make an order requiring a creditor to give information to the administrator as to payments received by him outside the scheme.

(2) Where a creditor whose debt was included in a scheme or draft scheme received payment of the full amount due to him under the scheme, whether wholly from payments outside the scheme or partly from such payments and partly from payments under the scheme, he should as a

general rule intimate that fact to the administrator as soon as practicable. As an exception to the general rule, payments by a co-obligant would be disregarded for this purpose unless payment by the co-obligant satisfied the unpaid balance of the whole debt (not the composition in a composition scheme).

(3) The sheriff should be empowered to order repayment to the administrator of sums paid by the administrator after the creditor had received the total amount due to him with interest at the statutory rate for sheriff court decrees. The order should be enforceable by diligence. The sheriff should also have power to order the creditor to inform the administrator of the amount of any over-payment.

(4) The early discharge of an included debt wholly or partly by payments outside the scheme should result in an increase in the rate of disbursements to creditors under the scheme.

(5) A procedure should be prescribed enabling the administrator to adjust a draft scheme to exclude a debt which was satisfied before confirmation of a scheme and to re-serve the adjusted scheme. A procedure should also be prescribed requiring the administrator to cease payments when the debt (or composition) was satisfied during the currency of the scheme and requiring the sheriff to vary the scheme by excluding the debt and increasing the disbursements to the other creditors. Where the creditor did not himself intimate satisfaction of the debt, the sheriff should give him an opportunity to be heard before excluding the debt.

(6) After the administrator receives intimation from the creditor or is otherwise satisfied of payment of a debt outside a scheme, there should be a short delay (of 14 days) before the scheme is varied under the foregoing procedure, to give time for a co-obligant to claim subrogation to the original creditor's debt as proposed in Recommendation 4.27 below.

(Paragraph 4.153; clause 33.)

4.20 Sums recovered by diligence after the first notice date should be treated in the same way as payments to account of a debt would be treated in terms of Recommendation 4.19 above.
(Paragraph 4.155; clause 33.)

4.21 (1) Priority should in effect be given to criminal fines by excluding them from debt arrangement schemes and by permitting their enforcement by imprisonment, or civil diligence under a warrant of the criminal court, while a scheme is in force.

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(2) The same rule should apply to other debts (such as bail, caution, security or compensation) due under an order of a court in criminal proceedings, and fines or penalties imposed for contempt of court in civil proceedings.

(Paragraph 4.160; clause 42(1) (definition of "debt"), as read with clause 4(7).)

4.22 (1) A maintenance creditor to whom maintenance (periodical allowance on divorce or pecuniary aliment) is owed should rank for arrears accrued up to the first notice date, but not for maintenance payable after that date.

(2) An interim order sisting diligence should not preclude or affect a current maintenance arrestment, or a conjoined arrestment order enforcing current maintenance, such as we recommend in Chapter 6.

(3) The confirmation of a scheme should render incompetent and ineffectual new and existing current maintenance arrestments and conjoined arrestment orders enforcing current maintenance.

(4) Diligences enforcing arrears of maintenance should be affected by an interim order and the coming into force of a scheme in the same way as diligences enforcing ordinary debts would be so affected (as recommended above).

(5) An interim order sisting diligence and the coming into force of a scheme should render incompetent an application for, and the grant of, a warrant for civil imprisonment of the debtor for failure to pay aliment.

(6) The above rules should apply to maintenance agreements registered for execution, decrees and contribution orders for periodical sums enforcing recovery of supplementary benefit or the cost of maintaining children in care, and analogous non-Scottish judgments and instruments enforceable in Scotland.

(Paragraph 4.168; clauses 15(1), 18(1) and (4), 20(3), 23(3), 28(2), 42(1) (definition of "debt" and "decree"), and 74 (definition of "maintenance" and "maintenance order").)

4.23 (1) An interim order sisting diligence and a debt arrangement scheme should not affect the entitlement of the creditor under a contractual security to exercise the rights and remedies by which his security is enforceable (such as rights of calling-up the security, entry into possession, ejection from heritage, realisation of the security subjects, and acquisition of the subjects by foreclosure in default of sale).

(2) A debt secured by a contractual security over heritable or moveable property of the debtor (as distinct from the property of a cautioner or other co-obligant) should be

excluded from the scheme unless and until the creditor had discharged the security, or sold the security subjects under his power of sale, or acquired them in partial satisfaction of the debt.

(3) Provision should be made amending the Conveyancing and Feudal Reform (Scotland) Act 1970, Schedule 3, paragraph 9 (which makes it a standard condition in a standard security that the debtor shall be held in default when the proprietor of the security subjects has become insolvent) to make it clear that the proprietor should not be held insolvent for the purposes of that paragraph by reason only of the fact that a debt arrangement scheme has been applied for or confirmed.

(4) In determining whether the debtor's resources after meeting his "daily needs" would exceed the "minimum product threshold" for scheme applications recommended above, the sheriff should be empowered, but not required, to treat as "daily needs" payments by the debtor outside a scheme in respect of a security over his residence.

(5) The sheriff should be empowered to make an order requiring a heritable creditor who had exercised his power of sale to pay to the administrator the surplus proceeds of sale otherwise due to the debtor. The order should be enforceable by diligence.

(Paragraph 4.174; clauses 15(7)(*a*), 17(4)(*a*), 23(1)(*g*), 26(4), 28(1)(*g*), 37 and 41(1); Schedule 7, paragraph 15.)

4.24 (1) An interim order sisting diligence and a debt arrangement scheme should not affect the right of a creditor to use the "security diligences" of poinding of the ground or sequestration under the landlord's or superior's hypothec.

(2) Any debt enforceable by poinding of the ground or sequestration under the hypothecs should be excluded from a scheme unless and until the creditor agrees not to use those remedies to enforce that debt.

(Paragraph 4.176; clauses 15(8), 18(8), 20(3) and (7), 23(1)(*g*), 28(1)(*g*), and 41(1).)

4.25 (1) Debts secured by liens or rights of retention over goods other than papers should be treated in the same way as debts secured by contractual securities under Recommendation 4.23(1) and (2) (paragraph 4.174) above.

(2) Debts secured by a lien over papers should be eligible for inclusion in a scheme in the same way as unsecured debts and the scheme should not affect the creditor's right to retain possession of the papers during the currency of the scheme. The lien should be discharged by a discharge of the debt at the end of a scheme or on payment of the sums

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due under a time to pay decree mentioned at Recommendation 4.17(3).

(Paragraph 4.178; clauses 15(7)(*b*), 23(1)(*g*), 28(1)(*g*) and 41(2).)

4.26 (1) No statutory rules are needed to regulate questions of compensation (set off) of liquid debts, or of retention of illiquid debts for the purpose of eventual compensation, in cases where one of the parties has applied for or obtained a debt arrangement scheme.

(2) In applying, however, the common law rule that compensation, or retention and compensation, of a debt due to an insolvent person against a debt due by him cannot be competently pleaded where there was no concourse of credit or debit before notice of bankruptcy, the registration of a debt arrangement scheme should not by itself be treated as giving such notice.

(Paragraph 4.182; clause 38(2).)

4.27 (1) A creditor's right of recourse against a scheme debtor's co-obligant should not be affected by the inclusion of the debt in a scheme, or by the creditor's acceptance of a disbursement under the scheme, or by the discharge of the debtor's liability to the creditor at the end of a scheme.

(2) Where after the first notice date:

(a) a co-obligant pays the unpaid balance of the full amount of the debt (not the composition in a composition scheme); or

(b) if the co-obligant's liability is less than that of the scheme debtor, where the co-obligant pays the unpaid balance of the full amount (not the composition) of the part of the debt for which he is liable,

and thereby acquires a right of relief against the scheme debtor, then the co-obligant may apply to the administrator to vary the scheme or draft scheme by subrogating him for the original creditor to the extent of his right of relief. In no other circumstances should a co-obligant be entitled to have a claim of relief, acquired after the first notice date against the debtor, included in a debt arrangement scheme.

(3) Where the co-obligant's claim of relief arises by virtue of his payment of part of the debt, he should rank along with the original creditor on the original creditor's share of future disbursements under the scheme in such proportions as will secure, so far as practicable, that the sums due to the original creditor and the co-obligant under the scheme are satisfied at the same time.

(4) The common law should regulate questions of ranking where one or more of the co-obligants is or are insolvent.

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(5) There should be a simple procedure whereby the administrator could effect the subrogation of a co-obligant in the creditor's place in a draft scheme or confirmed scheme.

(6) A co-obligant should be required to make his election between subrogation in a confirmed scheme and remaining outside the scheme, within a short period (say 14 days) after the payment was made by virtue of which he became entitled to subrogation.

(Paragraph 4.193; clauses 27(6), 28(4)(*b*) and 34.)

4.28 (1) Where a debt secured by a contractual security over the property of the debtor was payable by the debtor under a regulated agreement under the Consumer Credit Act 1974, or under a related "security" (e.g. a guarantee), it should be excluded from a scheme in accordance with the general rule on secured debts in Recommendation 4.23(2) above. Time orders and other orders under the 1974 Act relating to the debt should not be affected by the scheme unless and until the debt was included in the scheme. The same rules should apply to debts under regulated agreements being enforced by adjudications or enforceable by poinding of the ground. (See Recommendations 4.14(3) and 4.24(2) above).

(2) A debt due by the debtor under a hire purchase or conditional sale agreement, whether regulated under the 1974 Act or not, should be excluded from a scheme unless and until (*a*) the agreement had been terminated and (b) if by virtue of section 130(4) of the 1974 Act the debtor were treated as custodier of the goods in terms of the agreement, until he ceased to be so treated.

(3) Where a debt was subject to a time order for payment by instalments under section 129(2)(*a*), or that section as read with section 132, of the 1974 Act, then:

(a) if another order relating to the debt, or to the agreement under which the debt is owed, was in force, being an order made under:

section 129(2)(*b*) (remedying by debtor or hirer of a non-monetary breach of agreement);

section 131 (protection order);

section 133 (return order or transfer order relating to goods comprised in a regulated hire purchase or conditional sale agreement);

section 135(1) (order attaching conditions to, or suspending the operation of, any order made in relation to a regulated agreement); or

section 136 (variation of agreements or securities);

the debt should be excluded from the scheme until the

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order under section 129(2)(*a*) had been revoked under section 130(6) or had otherwise ceased to have effect;

(b) if another order mentioned in the foregoing list relating to the debt or agreement is not in force, the debt may be included in the scheme on its confirmation or by variation, and the order confirming or so varying the scheme should have the effect of revoking the order under section 129(2)(*a*).

(4) Where a scheme application was pending or a scheme had been confirmed and the court revoked a time order under section 129(2)(*a*), the court should have power to vary or revoke any other order mentioned in paragraph (3)(*a*) above made in relation to the debt, or the agreement under which the debt was due.

(6) In the case of a debt due by the debtor as hirer under a regulated consumer hire agreement, where at the first notice date an application under the 1974 Act, section 132(1) (financial relief of hirer), or proceedings in which the court may make an order under section 132(2), were pending, the debt should be excluded from the scheme until the application or proceedings were disposed of.

(Paragraph 4.205; clauses 15(5)(*a*) and (*b*), 15(6), 18(5)(*c*), 23(1)(*f*) and (*g*), and 28(1)(*f*), (*g*) and (5); Schedule 7, paragraph 21.)

4.29 (1) Any legislation introducing debt arrangement schemes should make it clear that an interim order sisting diligence and a scheme would not affect creditors' remedies other than the diligences enforcing unsecured debts.

(2) In particular, such an order or scheme should not affect the rights of the electricity and gas boards to discontinue supply to a defaulting customer nor the right of a landlord to recover possession for non-payment of rent.

(Paragraph 4.213; clause 41.)

4.30 In computing the short negative prescriptive period of 5 years under section 6 of the Prescription and Limitation (Scotland) Act 1973, and the long negative prescriptive period of 20 years under section 7 of that Act, none of the following periods, namely:

(a) the period after the first notice date while a scheme application was pending;

(b) the period when the sheriff's order disposing of a scheme application was appealable or subject to appeal;

(c) the period while a scheme was in force,

should be reckoned as, or as part of, the prescriptive period.

(Paragraph 4.216: Bill, Schedule 7, paragraph 18.)

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Functions, recruitment, etc. of administrators of debt arrangement schemes

4.31 (1) The legislation following on this report should provide that sheriff clerks, and their deputes and assistants, should be eligible for appointment as administrator.

(2) It should, however, be competent for the Secretary of State to institute arrangements whereby, throughout Scotland or in particular sheriff court districts, it would be competent for the sheriff to appoint a person from a list compiled by the sheriff principal.

(3) Subordinate legislation should govern such matters as resignation, removal from office, discharge and replacement for any necessary cause and, in the case of administrators who are not sheriff clerks or their assistants, caution and (where the administrator does not consent to act gratuitously) remuneration.

(4) Persons appointed from the list should be entitled to elect either to act gratuitously or to require payment of fees as a condition of acceptance of office. The fees would be a prior charge on payment made by the debtor under a confirmed scheme but to the extent that the fees were not so paid, they should be met by public funds.

(Paragraph 4.229; clause 36.)

The procedure in scheme applications

4.32 (1) A scheme application should be initiated by lodging a form prescribed by act of sederunt and a statement of affairs containing particulars also prescribed by act of sederunt.

(2) If the application appears to satisfy the conditions of competence of scheme applications, the sheriff would make an order appointing an administrator.

(3) Within a prescribed period the administrator should require creditors within 10 days to verify their debts and state whether interest accrued before the first notice date was claimed. Failure of a creditor to do so would normally bar him from objecting to the scheme on the ground that the debt or interest was not included or was incorrectly stated in the scheme.

(4) There should be no advertisement for creditors' claims unless ordered by the sheriff. The expenses of any advertisement should be met by the debtor.

(Paragraph 4.238; clause 19.)

4.33 (1) The sheriff at any time during a scheme application, acting on his own or the administrator's motion without objection by a creditor, should have:

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(a) a *duty* to refuse a scheme application if he was satisfied that the conditions of competence were not met, or the financial conditions were to a substantial extent not met, or that the debtor was unlikely to comply with a scheme, or the application was incompetent by reason of sequestration proceedings or a trust deed for creditors or composition contract;

(b) a *power* to refuse a scheme application on the debtor's failure to disclose information to, or to co-operate with, the administrator.

(2) The debtor should have an opportunity to make representations before the sheriff reaches his decision.

(3) On refusing the scheme application, the sheriff should recall the interim order sisting diligence but the recall should not take effect until the expiry of the days of appeal against the refusal of the scheme application or the disposal of any such appeal.

(Paragraph 4.244; clause 21.)

4.34 The administrator should be empowered to require the debtor not to dispose of or remove property from a place in Scotland. The sheriff should have a power to refuse the scheme application if the undertaking was breached.

(Paragraph 4.249; clauses 20(6) and 21(3)(*b*).)

4.35 The sheriff should have power to order a valuation of items of property of the debtor, the cost of which should be borne by the debtor.

(Paragraph 4.251; clause 22(3) and (4).)

4.36 (1) Within a prescribed period, (which may be extended by the sheriff on cause shown) the administrator should prepare a draft scheme and serve it on the parties entitled to object to a scheme together with a copy of the scheme application, a full statement of the debtor's affairs so far as known to the administrator, and a notice giving an opportunity to object in writing within three weeks (or other period prescribed by act of sederunt) after service.

(2) The following parties should be entitled to object to a scheme, namely:

(a) the included creditors;

(b) excluded creditors who may become eligible for inclusion;

(c) any co-obligant of the debtor who on paying the debt would acquire a right of relief against the debtor; and

(d) maintenance creditors, though not ranking in the scheme for arrears.

(Paragraph 4.256; clause 22(1) and (2).)

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4.37 (1) If no objections are made to a scheme, the sheriff should make an order confirming it. It should be competent for him to modify it without re-service on creditors to correct any error in it not materially affecting the interest of any creditor.

(2) Any objection should be intimated to the debtor and the creditors and co-obligants entitled to object who should be given an opportunity to make representations and, failing agreement as to the confirmation or terms of the scheme, an opportunity to be heard.

(3) Following objections or representations by creditors, the sheriff should be under a duty to refuse a scheme application on the same grounds as require him to refuse such an application on his own or the administrator's motion in terms of Recommendation 4.33 above.

(4) In any other case, the sheriff should have a discretion to confirm the scheme with or without modifications or to refuse the scheme application, subject to the requirement to disregard objections by preferred creditors and creditors wishing to sequestrate proposed at Recommendations 4.11(3) and 4.46(5).

(5) An order confirming a scheme or refusing a scheme application should recall the interim sist of diligence.

(6) The administrator should forthwith intimate an order confirming a scheme (together with a copy of the scheme) or an order refusing a scheme application to the debtor, the creditors and co-obligants who received copies of the scheme application. On the coming into force of the scheme, he should also intimate the order confirming the scheme to an employer operating an earnings arrestment or current maintenance arrestment, or to a sheriff clerk operating a conjoined arrestment order in a different court.

(7) An order confirming a scheme or refusing a scheme application, should not take effect until the expiry of the appeal days or the disposal of any appeal, but in the case of an order confirming the scheme, the recall of the interim sist of diligence should take effect immediately.

(Paragraph 4.265; clause 24(1)–(4) and (7)–(10).)

4.38 Prescribed particulars of schemes, discharges of debts and termination of schemes should be registered in the register of insolvencies and by each sheriff clerk in a public register for his own court.

(Paragraph 4.267; clause 38(1) and (3).)

4.39 (1) On or after confirming a scheme, and after giving the debtor an opportunity to make representations, the sheriff should be empowered to make an order requiring an

employer of the debtor to deduct and pay to the administrator on each pay day the whole or a specified part of the debtor's earnings until cessation of the employment or intimation of either an order to cease payments or the termination of the scheme.

(2) The employer should have seven days' grace before being required to operate the order.

(3) If the employer does not comply, the administrator should be entitled to obtain an order for the recovery by diligence of the sums which the employer should have deducted and the employer should not be entitled to recover those sums from the debtor.

(4) An employer should be entitled to the same fee on each pay day as an employer operating an earnings arrestment would under Recommendation 6.21 below.

(5) The administrator should hand over to the debtor any sums paid by the employer in excess of those currently due by the debtor to the administrator under the scheme.

(6) The order should be subject to variation or recall by the sheriff.

(Paragraph 4.270; clause 25.)

4.40 (1) The debtor should not act as the administrator's agent in making payments to creditors.

(2) The debtor should be bound to disclose a material change in his circumstances to the administrator and subject to any direction by the sheriff, the administrator should, on request, report to creditors on the debtor's compliance with the scheme.

(3) The sheriff should be empowered, on cause shown by the administrator, a creditor or co-obligant, to interdict the debtor from disposing of property or removing property from any place in Scotland.

(Paragraph 4.274; clause 26(1) to (3).)

4.41 (1) The sheriff should have a discretionary power, on cause shown, to vary a scheme on the application of any creditor (included or not), the debtor or the administrator, after giving the debtor and the included creditors an opportunity to make representations.

(2) A variation should not reduce the amount payable to a creditor under the scheme below the sums already disbursed to him under the scheme.

(3) When the right to payment of an included debt is assigned or transmits from the creditor to another person, there should be a simple procedure to enable the administrator

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to vary the scheme by subrogating the new creditor in place of the original creditor.

(Paragraph 4.279; clauses 27; 28(7) to (9).)

4.42 (1) The sheriff should have a discretionary power to revoke a scheme, on the grounds of the debtor's default or misconduct or on other cause shown on application by any creditor, included or not, the debtor or the administrator, and after giving the debtor and included creditors an opportunity to make representations.

(2) On revocation, the unpaid balance of the debts (not merely of the dividend due in a composition scheme) would again become enforceable by diligence.

(3) Revocation should not take effect till expiry of the appeal days or, when an appeal was taken, the disposal of the appeal.

(Paragraph 4.285; clause 30(1), (3), (6) and (7).)

4.43 (1) The sheriff should be empowered, on application by the administrator or debtor, to grant a discharge of the debts included in the scheme as originally confirmed where the debtor had paid all the sums required to be paid under the scheme to the administrator in respect of those debts.

(2) An application for discharge should be intimated to creditors whose debts are included, or were included but have since been satisfied to the extent of the creditor's entitlement under the scheme.

(3) The creditors whose debts are included should have an opportunity to make representations and, if agreement was not reached as to whether a discharge should be granted, an opportunity to be heard.

(4) In a 5-year scheme, the sheriff should have power to extend the scheme, once only, for a further period not exceeding 3 months, if it appears likely that the debts would be paid within that period.

(5) The application for discharge should be competent when the debtor's payments under the scheme have been made, but not later than one month, or such longer period as the sheriff may allow, after expiry of the period specified in the scheme for making those payments.

(6) A discharge should not take effect until the expiry of the appeal days or the disposal of any appeal.

(Paragraph 4.289; clause 31(1), (2)(*a*), (4), (5), (11) and (12).)

4.44 (1) (a) In the case of a scheme providing for payment of debts in full, creditors whose debts are included, or were included but have been satisfied to the extent of the creditor's entitlement under the scheme, should have

an opportunity to claim interest arising after the first notice date on an interest-bearing debt and to state its amount. The sheriff should determine any dispute as to liability or amount and have power to grant a decree for interest with or without a time to pay direction.

(b) A discharge of debts:

(i) in a scheme providing for payment in full, should discharge any interest arising after the first notice date if it is not claimed and allowed by the foregoing procedure;

(ii) in a scheme providing for a composition, should discharge any interest arising after the first notice date.

(2) An order determining a dispute as to interest should not take effect till expiry of the appeal days or disposal of any appeal, and a decree for payment of an unpaid debt such as is proposed at Recommendation 4.10(3) above, and a decree for interest should only take effect when the discharge or determination takes effect.

(Paragraph 4.294; clauses 29, and 31(2)(*b*), (3), (9), (10), (12) and (13).)

4.45 (1) A scheme should cease to have effect on the occurrence of any of the events mentioned in paragraph 4.295 of this report.

(2) There should be a procedure for disposing of unpaid disbursements at the termination of a scheme.

(3) The procedure for discharge of the administrator after termination of a scheme should be governed by regulations made by statutory instrument.

(Paragraph 4.298; clauses 32 and 36(5)(*b*)(i).)

Debt arrangement schemes, "apparent insolvency", sequestrations and other insolvency proceedings.

4.46 (1) The making of the interim order sisting diligence in a scheme application should be treated as constituting "apparent insolvency" in the statutory sense for the purpose of clauses in legal documents (other than statutory standard conditions in standard securities).

(2) A scheme application should not be competent if:

(a) at the time of the scheme application:

(i) a petition for sequestration of the debtor's estate was pending, or sequestration had been awarded but the debtor had not yet obtained his discharge; or

(ii) a trust deed for creditors or composition contract was subsisting; or

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(iii) a scheme was already in force or a prior scheme application by the debtor was pending; or

(b) during the scheme application sequestration is awarded or a trust deed for creditors is granted or a composition contract is made.

(3) A qualified creditor petitioning for the debtor's sequestration at any time between the intimation to the creditor of an interim order sisting diligence and the disposal of the scheme application, should not be required to establish that the debtor was "apparently insolvent" in the statutory sense.

(4) (a) While a scheme application is pending, a creditor should not be entitled to present a petition for the debtor's sequestration unless he has obtained the leave of the sheriff having jurisdiction in the scheme application.

(b) Leave should be granted only if it appears to the sheriff that sequestration would be in the best interests of the general body of creditors, or that the scheme would be unduly prejudicial to a particular creditor or class of creditors.

(c) There should be procedures for sisting the scheme application to allow a petition for sequestration to be presented; for recalling the sist and restarting the procedure if sequestration is not awarded; and for refusing the scheme application if sequestration is awarded.

(5) A creditor should not be entitled to oppose a scheme application on the ground that he wished to petition for sequestration.

(6) A petition for sequestration should not be competent while a scheme is in force, without prejudice to a creditor's right to apply for revocation of a scheme, and to petition for sequestration if the scheme is revoked.

(7)* An act of sederunt should require an applicant for a scheme to state in his application that no trust deed for creditors, composition contract, scheme, or scheme application was subsisting, nor to his knowledge any petition for, or award of, sequestration was subsisting.

(Paragraph 4.311; clauses 17(2); 18(1)(*c*); 20(4); 21(2)(*d*), (*e*) and (*f*); 24(4)(*a*)(iv), (v) and (vi); 24(5); and 35.)

4.47 The disqualifications from public office applying to an undischarged bankrupt should not be extended to a debtor who has applied for or obtained a debt arrangement scheme.

(Paragraph 4.314; Bill, Schedule 7, paragraph 39.)

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POINDING AND WARRANT SALES

Charging the debtor to pay

5.1 The service of a charge requiring the debtor to pay the debt should continue to be a necessary preliminary to the execution of a poinding to enforce that debt.
(Paragraph 5.9; clause 115(1).)

5.2 The present multiplicity of different periods prescribed for the days of charge in a charge for payment should be replaced by a single period. This period should be fixed at 14 days where service is to be made within the United Kingdom and otherwise at 28 days.
(Paragraph 5.12; clause 115(2).)

5.3 No change should be made in the present law, whereby, with certain statutory exceptions in the case of charges proceeding on summary cause decrees, charges for payment must be served by hand by an officer of court.
(Paragraph 5.17.)

5.4 It should continue to be necessary for an officer of court serving a charge for payment otherwise than by post to be accompanied by a witness.
(Paragraph 5.20.)

5.5 It is unnecessary to introduce a new rule requiring creditors to obtain leave of the court to serve a charge for payment after a prescribed period has elapsed since the granting of the decree.
(Paragraph 5.23.)

5.6 To simplify the law, a poinding should be incompetent if executed more than 2 years after the date of service of a charge. However, it should continue to be competent for a creditor to reconstitute the right to poind by serving a new charge for payment. The expenses of a second or subsequent charge to implement a decree should not be recoverable from the debtor.
(Paragraph 5.29; clause 115(4) and (5).)

5.7* (1) An act of sederunt should prescribe the form of the charge and explanatory notes to be served on the debtor along with a charge, with a view to making the charge more intelligible to debtors.

(2) The charge should specify the decree on which it proceeds and the full amount of the debt (including the expenses of serving the charge) and should demand payment within the days of charge to the creditor or a specified agent.

(3) The charge and other forms served on the debtor in connection with the diligence should indicate that the

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debtor should consider consulting a solicitor, Citizens Advice Bureau or other local advice centre if advice or assistance is required.

(4) The explanatory note should inform the debtor of the consequences of non-payment, in particular liability to poinding and becoming notour bankrupt or apparently insolvent (which entitles a creditor to petition for the debtor's sequestration), and of the applications that the debtor can make to the court.

(Paragraph 5.32.)

5.8* If edictal charges on Court of Session decrees are to be retained, an act of sederunt should be made along the following lines:

(1) It should cease to be competent to charge edictally a debtor with a known residence or place of business furth of Scotland but within the United Kingdom. Such a debtor should be charged postally, the days of charge being 14.

(2) A charge should be served edictally where the debtor's whereabouts are unknown or where the debtor has a known residence or place of business furth of the United Kingdom. In the latter case a copy of the charge should be sent by post to the debtor or his or her Scottish solicitor (if any). The days of charge of an edictal charge should be 28 days.

(Paragraph 5.38.)

Poinding the debtor's goods

5.9 (1) It should not be competent to poind articles in the debtor's dwellinghouse which are reasonably required for the use of the debtor or any member of the debtor's household, being articles of the following descriptions:

beds or bedding;
household linen;
chairs or settees;
tables;
food;
lights or light fittings;
heating appliances;
curtains;
floor coverings;
furniture, equipment or utensils used for cooking, storing or eating food;
one refrigerator;
articles used for cleaning the dwellinghouse or cleaning, mending or pressing clothes;
articles used for safety in the dwellinghouse (such as fireguards);
furniture used for storing clothes, bedding, household linen and articles used for cleaning the dwellinghouse.

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(2) The above list of articles should be capable of being amended by regulations made by the Secretary of State by means of statutory instrument subject to negative resolution.

(Paragraph 5.48; clause 43(2), (3) and (7).)

5.10 There should be exempt from poinding:

(a) clothing reasonably required for the use of the debtor or any member of the debtor's household; and

(b) articles reasonably required for the care or upbringing of any child who is a member of the debtor's household; and

(c) toys for the use of any child who is a member of the debtor's household.

(Paragraph 5.51; clause 43(1)(*a*), (*e*) and (*f*).)

5.11 (1) The common law exemption for tools of trade should be replaced by a statutory rule exempting implements, tools, books and other equipment reasonably required in the practice of the profession, trade or business of the debtor or any member of the debtor's household not exceeding in aggregate value £500 (or such other sum as may be prescribed).

(2) The Diligence Act 1503, which makes provision for the temporary and conditional exemption from poinding of "plough goods," should be repealed.

(3) Articles reasonably required for the educational or vocational training of the debtor or any member of the debtor's household should be exempt from poinding up to an aggregate value of £500 (or such other sum as may be prescribed).

(4) Medical aids or equipment reasonably required for the use of the debtor or a member of the debtor's household should be exempt from poinding.

(Paragraph 5.57; clause 43(1)(*b*), (*c*) and (*d*), and (7); Schedule 9.)

5.12 (1) Where a caravan or other moveable structure which is the only or principal residence of the debtor is poinded, the debtor should be entitled at any time before warrant of sale is granted to apply to the sheriff for a sist of further proceedings.

(2) The period of the sist should be at the discretion of the sheriff and should be renewable on application for a further period or periods.

(Paragraph 5.60; clause 51.)

5.13 (1) The sheriff should have power, on application by the debtor made within 14 days after the date of the poinding, to

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order the release of specified articles from the poinding on the grounds that:

(a) the articles were exempt from poinding; or

(b) the continuation of the poinding of the articles or their sale would be unduly harsh.

(2) The sheriff on granting an order releasing articles on grounds of undue harshness should have power to authorise a poinding of further articles in the debtor's premises in order to restore the value of the creditor's poinding.

(Paragraph 5.65; clauses 43(4) and (5), and 48.)

5.14 The common law rule whereby a creditor in possession of goods of the debtor may poind those goods should be retained.

(Paragraph 5.69.)

5.15 Section 40 of the Sale of Goods Act 1979 (poinding and arrestment by seller of goods in possession of the seller) should be repealed.

(Paragraph 5.72; Bill, Schedule 9.)

5.16 The seller of goods otherwise exempt from poinding should not be entitled to poind them in order to recover the unpaid price.

(Paragraph 5.74.)

5.17 (1) No poinding should be competent on a Sunday, Christmas Day, New Year's Day or Good Friday nor on such other day as may be prescribed by act of sederunt.

(2) It should be incompetent to commence a poinding before 8 a.m. or after 8 p.m. or to continue a poinding after 8 p.m. without in either case prior authority from the sheriff.

(Paragraph 5.78; clause 44.)

5.18 (1) Warrants for poinding in extract decrees should continue to contain warrants to open shut and lockfast places.

(2) It should not be competent for a warrant to open shut and lockfast places to be used to gain entry to a dwellinghouse where there appears to be nobody or only persons under 16 years present unless the officer:

(a) had at least four days previously given notice of intended entry; and

(b) if on the first visit only children under 16 appeared to be present, had sent a copy of the notice to the local Social Work Department.

(3) The sheriff should be empowered, on application, to dispense with the requirements in paragraph (2) above if it appears that notice would be likely to prejudice the execution of the poinding.

(Paragraph 5.85; clause 45.)

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5.19 (1) The procedure in executing a poinding should be as follows:

(a) The opening ceremony (the saying of three oyezes and the reading of the extract decree and execution of the charge) should be expressly abolished by statute. The officer should however exhibit the extract decree and execution of the charge on which the poinding proceeds.

(b) Before carrying out the poinding the officer should, as at present, demand payment of the debt and expenses and make enquiries of any person present on the premises as to the ownership of the goods proposed to be poinded.

(c) The goods should be valued by the officer, but the officer should be entitled to have them valued by a professional valuator if the officer considers that the nature of the goods makes it advisable.

(d) The officer should be accompanied by only one witness.

(e) If the debtor is present the officer should inform him or her of the right to redeem the goods within 14 days on payment of their values.

(f) The officer should prepare a poinding schedule specifying the poinding creditor, the poinded goods, and their values, the amount of the debt and expenses due.

(g)* An act of sederunt should be made prescribing the form of the poinding schedule which should contain, in addition to the above matters, information on the applications which the debtor may make to the court and the right to redeem.

(h) The officer should, along with the witness, sign the poinding schedule and deliver it to, or leave it in the premises for, the possessor of the poinded goods. Delivery of the schedule should be deemed to be the time of execution of the poinding for all legal purposes. Where the debtor is a different person from the possessor, the officer should if reasonably practicable send a copy of the poinding schedule to the debtor.

(i) As at present the officer should leave the poinded goods on the premises in which they were poinded.

(2) The debtor should be entitled to redeem some or all of the poinded goods on payment of their appraised values to the officer of court within 14 days after the execution of the poinding. The officer of court should be under a duty to give the debtor a receipt identifying the redeemed goods and the issue of the receipt should have the effect of releasing the goods from the poinding.

(Paragraph 5.95; clause 46(1), (5), (6) and (8).)

5.20 An officer valuing poinded goods should be required to value

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each article on the basis of what it would be likely to fetch if sold on the open market.

(Paragraph 5.101; clause 46(1) (*c*).

5.21 Subject to Recommendation 5.26 (revaluation if the goods are damaged or destroyed) the sheriff should have no power to order a revaluation of poinded goods.

(Paragraph 5.104; clause 46(7).)

5.22 The statutory procedure for conjoining creditors before execution of a poinding should be retained, but it should not be competent to conjoin ordinary creditors and summary warrant creditors.

(Paragraph 5.109; clause 46(9).)

5.23 (1) The officer of court should be required to make a report of poinding in prescribed form to the sheriff within 14 days after the execution of the poinding (or such longer period as the sheriff may, on cause shown, allow).

(2) The sheriff may refuse to receive a report only on the grounds that it is not signed by the officer and witness or that it was not submitted within the required period.

(3) If the sheriff refuses to receive a report the poinding should cease to have effect.

(Paragraph 5.113; clause 47.)

5.24 The sheriff should have power, on an application by either the creditor or the debtor made after the execution of the poinding, to order the immediate disposal of goods which are perishable or likely to deteriorate in value rapidly, and make consequential orders including orders as to the disposal of the proceeds of sale.

(Paragraph 5.115; clause 46(2) (*b*).)

5.25 (1) The debtor (or possessor) of poinded goods may remove them to other premises if:

(a) the poinding creditor or officer of court consents; or

(b) the sheriff, on application, authorises such removal.

(2) Where poinded goods are removed to other premises the creditor should be entitled to poind them again there, and should also be entitled to poind again any goods remaining on the original premises. Where a new poinding of poinded goods for the same debt is executed, the original poinding should be deemed to have been abandoned so that further proceedings in that poinding would be incompetent.

(3) The debtor should be liable for the expenses of the second or subsequent poinding but not for the expenses of the original poinding deemed to have been abandoned.

(Paragraph 5.120; clause 63; Schedule 1, paragraph 5.)

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5.26 Section 30 of the Debtors (Scotland) Act 1838 (unlawful intromitter to restore or pay double the appraised value on pain of imprisonment) should be replaced by a new provision on the following lines:

(1) Where the debtor or a third party removes goods in breach of poinding the sheriff should have power, on application by the creditor, to order restoration of the goods within a specified time, and in default of restoration to grant warrant to officers of court to search for and restore the goods.

(2) An order for restoration of the goods should not be competent against a third party who acquires the goods for value and without knowledge of the poinding.

(3) Where goods have been removed, damaged or destroyed in breach of poinding the sheriff should have power, on application, to authorise the creditor to poind further articles of the debtor, or in the case of damaged or destroyed goods to authorise a revaluation of those goods.

(4) Where a third party has removed, damaged or destroyed goods in the knowledge that they were poinded the sheriff should have power, on application, to order that third party to consign in court a sum representing the appraised value of the removed or destroyed goods or a sum representing the diminution in value caused by the damage. The sum consigned in court should, on completion of the diligence in respect of the remainder of the goods, be paid to the creditor in satisfaction of the debt, any surplus being paid to the debtor.

(5) Wilful removal, damage or destruction of articles in the knowledge that they were poinded should be liable to be dealt with as a contempt of court.

(Paragraph 5.125; clauses 64 and 65.)

5.27 (1) Unless a warrant of sale has been applied for while the poinding remains effective, a poinding should cease to have effect on the expiry of a period of one year after the date of its execution. The sheriff should, however, have power on application by the creditor to extend the duration of the poinding by such period as appears reasonable to allow the debtor to pay off the debt by instalments or otherwise as agreed between the creditor and the debtor and to grant a further extension or extensions.

(2) An application for extension of a poinding should be made before the expiry of the one-year period or the period of a previous extension, but the poinding should not cease to have effect pending the determination of such an application.

(Paragraph 5.130; clause 62(1) and (2).)

5.28 (1) In order to prevent evasion of time limits on the duration

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of poindings the present restriction on second poindings (incompetent in respect of goods on the same premises under the same extract decree except for goods brought onto the premises after the first poinding) should be set out in statute rather than Practice Notes of the sheriffs principal. The statutory rule should however be subject to the exceptions mentioned in paragraph 5.132.

(2) The sheriff should have power, on application by the creditor, to make an order conjoining two poindings by the same creditor at any time before warrant of sale is granted in either poinding.

(Paragraph 5.134; clauses 50 and 69.)

5.29 (1) A poinding should be capable of being recalled by the sheriff at any time before the creditor applies for a warrant of sale on the same grounds as the sheriff may refuse to grant a warrant of sale in terms of Recommendation 5.30.

(2) The sheriff may recall a poinding which is invalid or which has ceased to have effect without an application for recall being made by the debtor. Otherwise the power to recall should be exercised only on an application by the debtor. The debtor and creditor should be given an opportunity to make representations before an order for recall is made.

(Paragraph 5.137; clause 49(1) to (4).)

Selling the poinded goods

5.30 (1) An application for warrant to sell poinded goods should be intimated by the creditor to the debtor along with a notice in prescribed form informing the debtor of the rights to redeem, to object to the granting of the application, and to make various applications to the court.

(2) The sheriff should have power to refuse to grant a warrant to sell on the grounds that:

(a) the poinding is invalid or has ceased to have effect; or

(b) the goods are in aggregate substantially undervalued; or

(c) the likely proceeds of sale would not exceed the likely expenses of sale; or

(d) it would be unduly harsh in the circumstances to grant a warrant.

(3) The sheriff should be entitled to exercise the powers in (a), (b) and (c) of paragraph (2) above on his or her own motion as well as on an objection being made by the debtor, but should only be able to refuse warrant on ground (d) on an objection being made by the debtor to this effect.

(4) Where the sheriff refuses to grant a warrant of sale and the poinding is thereby terminated, the sheriff clerk should be

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under a duty to intimate this to the debtor (and possessor if a different person from the debtor).

(Paragraph 5.146; clause 52.)

5.31 (1) On receiving intimation of an application for warrant of sale the debtor should be entitled to redeem some or all of the poinded goods on payment of their appraised values to the officer of court within a period of seven days after receipt of the intimation.

(2) The officer of court should be under a duty to give the debtor a receipt identifying the redeemed goods. The issue of a receipt should have the effect of releasing the specified goods from the poinding. The officer should be required to report the redemption forthwith to the court.

(Paragraph 5.150; clause 53(2), (3) and (5).)

5.32 (1) A warrant of sale should not provide for sale in a dwellinghouse unless the debtor (and the occupier of the dwellinghouse if a different person) consents in writing to a sale being held there.

(2) Where the consent or consents required in paragraph (1) above are not given, the sale should normally be required to be held in an auction room specified in the warrant of sale. But if the expenses of removal to the nearest auction room would be likely to exceed the proceeds of sale of the goods there, the sheriff may direct that the sale be held in other premises made available by the creditor if such other premises appear suitable and the occupier of those premises consents in writing to their use, but if no other suitable premises are available the sheriff should refuse to grant a warrant of sale.

(3)* Where goods have been poinded in a dwellinghouse and the creditor is unable to find other suitable premises for holding a sale, assistance should be given by the Government, either by making Government premises available or by subsidising the removal of goods to the nearest auction room or other suitable premises.

(4) The sheriff should not grant a warrant of sale to sell poinded goods in premises (other than a dwellinghouse or an auction room) occupied by a third party unless the third party occupier consents in writing, provided that if the goods have been poinded in those premises and their nature is such that it would be unreasonable for them to be removed for sale, the sheriff should have power to direct that the sale be held in those premises notwithstanding the lack of consent by the third party occupier.

(Paragraph 5.161; clause 54(1)–(5).)

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5.33 (1) Where the sale is to be held in an auction room or premises other than the debtor's premises, the public notice of the sale should not name the debtor or disclose that the goods consist of or include poinded goods.

(2) Where the sale is to be held in premises occupied by a third party, then in addition to the prohibition in paragraph (1) above, the public notice should state that the goods are not those of the occupier.

(3) The sheriff should continue to direct in the warrant of sale the form and timing of public notice to be given in any sale on premises other than an auction room.

(4) Prescribed particulars of every sale should be displayed on the public notice board of the court which granted the warrant of sale.

(Paragraph 5.166; clause 56(3)–(6).)

5.34 Instead of the warrant of sale specifying the time and date of the sale it should specify a period within which the sale must take place. The granting of the warrant should have the effect of extending the duration of the poinding until the sale is executed or the warrant expires unexecuted at the end of the specified period.

(Paragraph 5.169; clauses 55(4) and 62(3).)

5.35 The warrant of sale should continue to appoint an officer of court to make arrangements for the sale to supervise or attend the sale, and to make a report to the court.

(Paragraph 5.172; clauses 55(5), 59(1) and 61(1).)

5.36 (1) Provision should be made by statute rather than by Practice Notes regulating the appointment of persons to conduct warrant sales. Where the sale is to be held in premises other than an auction room:

(a) if the goods are valued at more than £1,000 (or such other sum as may be prescribed by act of sederunt) the sheriff should appoint an auctioneer to conduct the sale, but if an auctioneer is not available an officer of court or other suitable person may be appointed;

(b) if the goods are valued at or less than the above sum the sheriff may appoint either an officer of court or an auctioneer to conduct the sale.

(2) If an officer of court is appointed to conduct the sale he or she should normally be the officer appointed to make arrangements for and supervise the sale, in which case a witness should be required to be in attendance at the sale.

(Paragraph 5.178; clauses 55(6) and 59(2).)

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5.37 (1) The officer of court appointed to arrange the sale should be under a duty to intimate the date of the sale as soon as it has been arranged to the debtor (and possessor if different), and not later than the date of that intimation, to serve a copy of the warrant of sale on the debtor (and possessor if different).

(2) Where the goods are to be removed from the premises in which they are situated for sale the officer should give the debtor (and possessor if different) not less than seven days' notice of the date fixed for removal and the place to which the goods are to be removed for sale.

(Paragraph 5.183; clause 56(1) and (2).)

5.38 The officer should either carry out or at least supervise the uplifting and removal of the pointed goods from the debtor's premises. For use, if necessary, in uplifting the goods, the warrant of sale should include a warrant authorising the officer to open shut and lockfast places.

(Paragraph 5.185; clause 55(2) and (3).)

5.39 Where goods are to be removed for sale the officer should be entitled to uplift and remove only such part of the pointed goods as, according to their appraised values, would satisfy the outstanding balance of the debt, interest and expenses, and should withdraw the remaining goods from the pointing.

(Paragraph 5.187; clause 53(1).)

5.40 (1) The creditor or officer should be entitled to alter within the terms of the warrant for sale the arrangements made for sale after intimation of those arrangements to the debtor, only if the alteration is necessary because of circumstances for which neither the creditor nor the officer is responsible.

(2) The sheriff, on application by the creditor or officer, should have power to amend the warrant of sale if the original warrant cannot be executed in accordance with its terms due to circumstances for which neither the creditor nor the officer is responsible, and to make any necessary incidental and consequential orders.

(3) An application for amendment of a warrant of sale should require to be made within the period for holding the sale specified in the warrant. The application should be intimated to the debtor. The sheriff, on a motion by the debtor or on his or her own motion, should refuse the application if the pointing was invalid or has ceased to have effect, or the amendment proposed is unsuitable.

(4) The pointing should not lapse pending the determination of an application. Where the application is granted the pointing should continue to have effect until the sale is

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held or the period specified for holding the sale elapses, whichever is the sooner. Where the application is refused the poinding should cease to have effect forthwith, unless the sheriff directs otherwise. The sheriff clerk should intimate any cessation of the poinding to the debtor (and possessor of the pointed goods if different).

(Paragraph 5.193; clauses 57 and 62(4).)

5.41 (1) After the grant of warrant of sale the creditor should be entitled, on one occasion only, to cancel the arrangements for sale for the purpose of allowing time for an agreement for payment of the debt to have effect.

(2) It should not be competent to cancel under paragraph (1) above after the goods have been removed for sale.

(3) A report of the agreement should be lodged in court forthwith by the creditor or officer, whereupon the duration of the poinding would be extended for a period of six months from the lodging of the report.

(4) On breakdown of an agreement the creditor should be entitled to sell the goods without further application to the court, provided the sale takes place within the six months' extension and the warrant can otherwise be implemented according to its terms. In other cases, the creditor should have to apply to the sheriff for an amendment of the warrant as in Recommendation 5.40 or a direction that the sale be held in the same premises notwithstanding that the required consents no longer subsist.

(Paragraph 5.197; clauses 58 and 62(5).)

5.42 The appraised value of a pointed article should be treated in the subsequent sale as a reserve price which need not be disclosed to bidders.

(Paragraph 5.199; clause 59(3).)

5.43 (1) The ownership of goods which are not sold should pass to the creditor but the creditor should be permitted to instruct the auctioneer to sell an article to the highest bidder even if the bid is less than the appraised value. The debtor should however still be credited with the appraised value.

(2) Where goods are put up for sale on the debtor's premises and remain unsold, the ownership passing to the creditor by virtue of paragraph (1) above should revert to the debtor on the expiry of the times mentioned below unless:

(a) where the sale was held in the debtor's dwellinghouse the creditor uplifts them by 8 p.m. or such time as may be prescribed on the day of sale;

(b) where the sale was held in other premises belonging

to the debtor the creditor uplifts them by 8 p.m. or such time as may be prescribed on the third day after the sale.

(3) The officer of court should be entitled to remain on or re-enter the premises to enable the creditor to uplift the goods.

(Paragraph 5.203; clause 59(3), (5), (6) and (8).)

5.44 The report of sale (which should be in a form prescribed by act of sederunt) should be made to the sheriff within 14 days after the date of the sale.

(Paragraph 5.207; clause 61(1) and (3).)

5.45 (1) The present procedure for auditing and checking reports of sale should be embodied in statute.

(2) Where the officer refuses or delays without reasonable cause to lodge a report of sale, the sheriff should have power to report the officer to the appropriate disciplinary authority (Court of Session or sheriff principal) and to find the officer liable for all or part of the expenses of the diligence, but should not have power to refuse to receive the report.

(3) If there has been a substantial irregularity in the diligence the sheriff should have power to declare the diligence null. Nullity of the diligence should not affect the title of any third party purchasing the goods in good faith at the sale or subsequently.

(4) The sheriff clerk should send the debtor a copy of the report of sale as approved or intimate the sheriff's order nullifying the diligence.

(Paragraph 5.210; clause 61(2), (4), (5), (9) and (10).)

5.46 No change should be made in the present law and practice whereby the proceeds of a warrant sale are consigned in court by the officer only if the sheriff so directs. The officer should be under a duty to pay any surplus to the debtor or the debtor's agent, or to consign the surplus in court if the debtor or agent cannot be found.

(Paragraph 5.214; clause 60.)

Inclusion in poindings of the goods of third parties.

5.47 (1) The powers and duties of officers in connection with the poinding of goods in the debtor's premises should be regulated by statute rather than the present mixture of common law and Practice Notes of the sheriffs principal. The statute should make provision on the following lines:

(a) The officer should be entitled to presume that an article

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in the possession of the debtor is owned by the debtor either solely or in common with a third party.

(b) An officer should be bound to make enquiries of any person present at the poinding about the ownership of articles proposed to be poinded. It should cease to be competent for an officer to examine a person on oath as to ownership of such articles. Any claim made should be noted in the report of poinding.

(c) An officer should not be entitled to rely on the above presumption if he or she knows or ought to know (whether as a result of the enquiries or otherwise) that the article does not belong to the debtor.

(d) An officer may still rely on the above presumption even though the article is such as is commonly hired or purchased on hire purchase or conditional sale agreement or an assertion is made unsupported by other evidence that the article does not belong to the debtor.

(2)* The entitlement of officers of court to charge fees for poinding goods which do not belong to the debtor should be regulated by act of sederunt.

(Paragraph 5.223; clause 46(1)(*a*)(iii), (3) and (4).)

5.48 (1) An officer of court should be entitled to release goods from the poinding if a third party produces satisfactory evidence of ownership unless the debtor disputes the third party's ownership.

(2) The officer should report any release of goods to the court in the report of poinding, application for warrant of sale or report of sale depending on the stage at which the goods are released. Where goods are released while an application for warrant of sale is pending the officer should forthwith report the release to the court.

(3)* It should be provided by act of sederunt that, without prejudice to any other remedy, a claim of ownership of poinded goods by a third party should be capable of being made by a minute lodged in the poinding process even after warrant of sale has been granted.

(4) Where any article has been released by the officer or the sheriff on the ground that it belongs to a third party, the creditor should be entitled to poind further articles in the debtor's premises.

(5) No change should be made in the law relating to the remedies available to a third party whose goods have been sold at a warrant sale or delivered to the poinding creditor in default of sale.

(Paragraph 5.229; clause 66.)

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5.49 (1) It should become competent to poind and sell goods owned in common by the debtor and a third party or parties to enforce a debt due by the debtor.

(2) To protect the interests of co-owners, the officer should be entitled to release co-owned goods from the poinding if a third party co-owner tenders the debtor's share of the appraised value, unless the debtor denies the third party's claim to co-ownership.

(3) The sheriff should have power, on application by a third party co-owner, to order release of any goods if satisfied that they are co-owned and the applicant pays the debtor's share of their appraised value to the creditor.

(4) The sheriff should also have power to order release of co-owned goods if satisfied that their continued poinding or sale is in the circumstances unduly harsh to the third party co-owner.

(5) In order to restore the value of the poinding where co-owned goods have been released by the officer or the sheriff, the creditor should, on release, automatically become entitled to carry out a poinding of further articles in the debtor's premises.

(6) Where co-owned goods are sold or delivered to the creditor in default of sale, the creditor should be liable to pay to the co-owner a sum representing that co-owner's share of the proceeds of sale of the goods, or their appraised value in the case of unsold goods.

(Paragraph 5.235; clause 67.)

Miscellaneous

5.50 The diligence of poinding should not be available in security of debts payable in the future, nor should it be automatically available on the dependence of a court action. We make no recommendation as to whether the Court of Session should have power to make an order securing moveable property on the dependence of an action in that court.

(Paragraph 5.238.)

5.51 (1) The exemptions from poinding set out in Recommendations 5.9 to 5.11 (clothes, tools of trade, household goods) should apply to arrestment of the debtor's goods in the hands of a third party.

(2) Where household goods are situated in premises in which a person other than the debtor is living, the same exemptions from arrestment and poinding should apply as would apply if that person were the debtor.

(3) The court should have power, on application by the bankrupt, to sist sequestration proceedings in connection

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with a mobile home which is the only or principal residence of the bankrupt.

(4) The exemptions from diligence, the time when diligence is competent, the officer's powers and duties in connection with entry to dwellinghouses, the sheriff's powers to sist proceedings in connection with a mobile home, and the sheriff's powers to release articles on grounds of undue harshness should apply to sequestrations for rent or feuduty as they do to poindings.

(Paragraph 5.244; clauses 43(2)(*b*) and 124; Schedule 7, paragraph 35.)

5.52 The diligence for attaching ships and other vessels in Scotland under specific statutory provisions should be arrestment and sale rather than poinding and sale.

(Paragraph 5.246; Bill, Schedule 7, paragraphs, 3, 11, 14, 16 and 32.)

ARRESTMENT OF EARNINGS

Introduction of continuous diligence against earnings

6.1 (1) A new system of continuous diligence against earnings (called earnings arrestments) should be introduced and arrestments in their present form should cease to be available as a diligence against earnings.

(2) An earnings arrestment would require the debtor's employer to deduct sums calculated in accordance with legal rules from the debtor's net earnings on each pay day occurring after service of the earnings arrestment.

(3) An earnings arrestment would require the employer, without the need for a decree of furthcoming or mandate from the debtor, to pay the sums deducted under paragraph (2) above forthwith to the arresting creditor, subject to a procedure allowing the debtor and the employer to contest an earnings arrestment on the grounds that it is invalid or has ceased to have effect.

(Paragraph 6.30; clauses 72(1) and (2)(*a*), 75(1), and 78(1).)

Earnings arrestments

6.2 (1) An earnings arrestment should attach a certain amount (calculated in accordance with our recommendations below) of the debtor's earnings payable on each pay day after the date when the earnings arrestment takes effect until the debt for which the arrestment is served is satisfied or the arrestment otherwise ceases to have effect.

(2) Earnings for this purpose should be defined to mean any sums payable to the debtor by way of wages or salary

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(including any fees, bonus, commission, overtime pay, or other emoluments payable in addition to wages or salary or payable under a contract of service).

(3) Sums not attachable by earnings arrestment due by the employer to the employee should be attachable by an ordinary arrestment.

(Paragraph 6.39; clauses 72(1), 73(1) and 75(2).)

6.3 (1) Pensions (including annuities for past services and periodic payments by way of compensation for loss of office or employment) should be attachable by earnings arrestments.

(2) Pensions or allowances payable in respect of disablement or disability, however, should not be attachable by earnings arrestments.

(3) Provided the amount deductible under an earnings arrestment is fixed in accordance with our recommendations below, a pension which is alimentary at common law should be attachable by earnings arrestment notwithstanding the common law exemption.

(4)* The competent authorities should consider whether the various enactments regulating specific public sector occupational pension schemes should be amended to enable creditors to attach such pensions by earnings arrestments.

(5) The foregoing recommendations are not intended to allow attachment of pensions, allowances and benefit payable under social security legislation.

(6) We make no recommendation to change the law on the arrestment of liferents or annuities (other than annuities for past services).

(Paragraph 6.45; clause 73(1)(*c*), (2)(*a*), (*d*), (*e*) and (*f*).)

6.4 No changes should be made to the recently revised rules on the exemptions from arrestment of merchant seamen's pay, or the rules whereby the pay of members of the armed forces and women's services administered by the Defence Council is exempt from diligence.

(Paragraph 6.48; clause 73(2)(*b*) and (*c*).)

6.5 It should be incompetent to use an earnings arrestment to enforce a debt which is not due at the date of execution of the arrestment.

(Paragraph 6.51; clause 72(2)(*a*).)

6.6 An earnings arrestment should attach (in addition to the principal sum and judicial expenses due under the decree) interest accrued up to the date of service of the earnings arrestment, but only if, and to the extent that, the amount of

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interest is specified in the schedule of arrestment.
(Paragraph 6.54; clause 77(1)(*a*) and (*b*), and (2).)

6.7 (1) An extract decree or other writ containing a warrant for diligence should authorise an earnings arrestment without the need for a further application to the court.

(2) The service of a charge should be an essential preliminary to the service of an earnings arrestment. However, it should continue to be competent to serve an arrestment against funds other than earnings without first serving a charge.

(3) It should be competent to serve an earnings arrestment to enforce more than one debt due by the debtor to the same creditor providing a prior charge has been served in respect of each debt.

(Paragraph 6.59; clauses 77(3) and 112(1)(i); Schedule 7, paragraphs 8 and 10.)

6.8 Without prejudice to Recommendations 6.12(2) and 6.16(1) (recall and cessation of earnings arrestments) an earnings arrestment should have effect on each pay day after service of the schedule on the employer until the debt recoverable by the arrestment has been satisfied.
(Paragraph 6.66; clause 75(2).)

6.9 (1) The amount deducted from a debtor's net earnings in pursuance of an earnings arrestment should be calculated in accordance with statutory tables based on the sliding scale model. Separate tables should be provided for weekly and monthly paid employees and employees paid at other regular intervals.

(2) Net earnings means the earnings which remain payable after deduction of income tax, social security contributions and superannuation scheme contributions.

(3) Overtime, bonus, commission and other payments paid in addition to the debtor's regular earnings should:

(a) if paid on the same day as the regular earnings, be aggregated with the regular earnings for the purpose of calculating the amount to be deducted;

(b) if paid separately, be subject to a deduction of 20%.

(4) The statutory tables and percentage specified in paragraph (3)(b) above should be capable of being varied by regulations made by the Secretary of State by statutory instrument subject to negative resolution. The varied tables and percentage should apply to an earnings arrestment executed after the coming into force of the regulations and to a subsisting earnings arrestment where either the creditor or the debtor has intimated in prescribed form the regulations to the employer. An employer should be entitled, but not

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bound, to give effect to the regulations in connection with a subsisting arrestment of becoming aware of their existence otherwise than by intimation in prescribed form.

(Paragraph 6.76; clauses 73(3), 76 and 95; Schedule 3.)

6.10 Without prejudice to any other remedy open to the debtor, the courts should not retain their common law powers to order lower deductions from arrestments of earnings than the deductions laid down by statute. The courts should not have a special statutory power to vary the deduction levels in earnings arrestments.

(Paragraph 6.79; clause 72(3).)

6.11 The normal rules on deductions from earnings set out in Recommendation 6.10 above should apply to earnings arrestments for the recovery of arrears of maintenance, rates and taxes.

(Paragraph 6.82; clause 76.)

6.12 (1) An earnings arrestment should not only (as under existing law) require the employer to make a deduction from the debtor's earnings on each pay day while it is in force, but also require the employer to pay forthwith the arrested sums to the creditor.

(2) The employer and the debtor (and the creditor in the case of determination of a dispute) should be entitled to apply to the court for an order recalling the earnings arrestment or determining any dispute as to the manner of its operation. The court in determining a dispute should have power to order payment to be made by one party to another, with interest from a date to be specified at the rate normally applicable to decrees.

(3) A claim by a creditor or debtor against the employer in respect of deductions made, or which should have been made, under an earnings arrestment should be incompetent after one year from the date when the deduction was made or should have been made.

(Paragraph 6.91; clauses 75(1), 78(1) and (2), and 95(4).)

6.13 (1) An employer should be bound to give effect to an earnings arrestment schedule on any pay day occurring seven days or more after the date of service of the schedule.

(2) An employer should be entitled, but not bound, to give effect to an earnings arrestment schedule on any pay day occurring within seven days after the date of service of the schedule.

(3) An employer who does not give effect to an earnings arrestment until a pay day occurring after the expiry of

the seven day period should not be required to make any deduction in respect of a pay day which fell within the seven day period.

(Paragraph 6.97; clauses 75(1) and (2)(*a*), and 95(2) and (3).)

6.14 Failure by an employer to pay sums due to the arresting creditor under an earnings arrestment should render the employer liable to an action for payment of the sums without a right of recovery from the debtor.

(Paragraph 6.100; clause 75(3).)

6.15 The debtor's sequestration should render an earnings arrestment ineffectual in a question with the trustee so far as the arrestment relates to earnings payable after the date of sequestration, but it should not affect deductions made before that date.

(Paragraph 6.103; clause 98(2).)

6.16 (1) In addition to an earnings arrestment ceasing to have effect on the debtor's sequestration, it should cease to have effect as between debtor and creditor when:

(a) the debt due has been satisfied; or

(b) the debt due becomes unenforceable by diligence; or

(c) the creditor abandons the arrestment; or

(d) the arrestment is recalled by the sheriff.

(2) The clerk of the court should intimate in prescribed form to the employer, debtor and creditor the making of an order recalling an earnings arrestment.

(3) The creditor should be under a duty of intimating in prescribed form to the employer as soon as reasonably practicable the fact that the debt has been satisfied or has become unenforceable by diligence. Sums received by the creditor after the debt has been satisfied or has become unenforceable by diligence should be recoverable by the debtor with interest at the rate normally applicable to decrees from the date of receipt to the date of payment.

(4) The employer should be entitled, but not bound, to continue to operate an earnings arrestment until receiving intimation in prescribed form that the arrestment has ceased to have effect or until the debtor ceases to be employed.

(5) Where the sheriff is satisfied, on an application by a debtor, that the creditor failed to intimate as soon as reasonably practicable satisfaction of the debt or its

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unenforceability by diligence, the sheriff may order the creditor to pay the debtor a sum not exceeding twice that recoverable by the debtor in terms of paragraph (3) above.

(Paragraph 6.110; clauses 75(2), (5), (6) and (7), 78(1), and 95(5)(*a*).)

6.17 Section 22 of the Debtors (Scotland) Act 1838 (which deals with prescription of arrestments) should not apply to earnings arrestments.

(Paragraph 6.112; Bill, Schedule 7, paragraph 2.)

6.18 (1) The normal mode of service of all schedules of earnings arrestment should be by recorded delivery or registered letter (which at present is competent only in the case of arrestment on sheriff court summary cause decrees).

(2)* It should be provided by act of sederunt that the envelope containing a schedule of earnings arrestment should be clearly marked "Arrestment of earnings" in addition to the direction to the Post Office to return undelivered letters to the sender.

(3) Hand service of an earnings arrestment schedule should be used only if the registered or recorded delivery letter cannot be delivered.

(4) A witness should not be required to the service of an earnings arrestment schedule.

(5) Where an employer receives two or more schedules of earnings arrestment relating to the same debtor on the same date effect should be given to the schedule received first if the employer is aware of the different times of receipt, otherwise the employer may choose which schedule to give effect to.

(Paragraph 6.117; clauses 86(3) and 96(2).)

6.19 The officer of court serving an earnings arrestment schedule on the debtor's employer should, if reasonably practicable, at the same time serve a copy of the schedule on the debtor by registered or recorded delivery letter. Only if service cannot be effected by this means should hand service be used. Failure to serve a copy should not affect the validity of service of the arrestment schedule.

(Paragraph 6.119; clause 96(1) and (2).)

6.20* Modern forms of schedule of earnings arrestment and the officer's certificate of service of the earnings arrestment should be prescribed by act of sederunt. The statutory deduction tables, together with such further information as

is considered appropriate for the guidance of employers, should be included in the prescribed form of schedule.
(Paragraph 6.122; clause 75(2)(*a*).)

6.21 An employer should be entitled to deduct a fee of 50p (or such other sum as may be prescribed) on each occasion on which a deduction is made from the debtor's pay in pursuance of an earnings arrestment. The fee should be deducted from the exempt earnings payable to the debtor rather than from the arrested sum payable to the creditor. The employer should give the debtor a statement of the fee deducted along with the statement showing deduction of the arrested sum.
(Paragraph 6.125; clause 97.)

6.22 (1) Sums deducted from the debtor's earnings by an employer in pursuance of an earnings arrestment should be paid forthwith direct to the arresting creditor and not through a court collection department.

(2) Without prejudice to any other mode of payment which may be agreed between the employer and the creditor who has laid an earnings arrestment, the employer should be entitled to remit the arrested sums to the creditor or other person specified in the arrestment schedule (*a*) by postal letter enclosing a crossed cheque payable to the creditor bearing on it the words "not negotiable; a/c payee" together with a written statement of the pay period to which the payment relates, or (*b*) by such other method as may be prescribed.

(3) If a cheque in terms of paragraph (2) above is dishonoured the creditor should be entitled to demand payment of that remittance and subsequent remittances in cash.

(Paragraph 6.130; clause 75(1) and (4).)

Current maintenance arrestments

6.23 (1) A new form of continuous arrestment of earnings (called a current maintenance arrestment) should be introduced to facilitate the recovery of current maintenance (aliment and periodical allowance and analogous orders) as it falls due.

(2) Accordingly, a current maintenance arrestment, which should normally have effect until the obligation to pay maintenance ceases, should require the employer of a maintenance debtor, on every pay day, to deduct from the debtor's net earnings the whole of the maintenance due for the period since the last pay day and to pay it forthwith to the maintenance creditor, except to the

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extent that the earnings are exempt as recommended in Recommendation 6.27 below.

(Paragraph 6.148; clauses 72(2)(*b*), and 79(1) and (2).)

6.24 A current maintenance arrestment should be competent to enforce decrees for aliment and periodical allowance, alimentary bonds and agreements registered for execution, decrees and orders for periodical payments for the recovery of the cost of supplementary benefit or the cost of maintaining children in the care of local authorities and comparable non-Scottish maintenance orders registered in Scotland for enforcement. It should not however be competent to enforce by way of a current maintenance arrestment expenses awarded in connection with maintenance actions or other lump sums such as inlying expenses awarded in an affiliation decree, or decrees constituting claims at common law by third parties for reimbursement of the cost of aliment provided to maintenance debtors or their alimentary dependants in the past.

(Paragraph 6.151; clauses 72(2)(*b*) and 74.)

6.25 (1) It should be competent to lay a current maintenance arrestment only if:

(a) the debtor had received notification in prescribed form of the maintenance decree setting out the maintenance obligation; and

(b) at any time after four weeks from the date of notification at least three instalments of maintenance are due and unpaid.

(2) The notification should warn the debtor of the consequences of default and should be made by, or on behalf of, the creditor rather than by the clerk of court.

(Paragraph 6.155; clause 82(1).)

6.26 (1) A current maintenance arrestment schedule should specify the rate of maintenance to be deducted by the employer from pay as a daily rate. The daily rate should be derived from the rate of maintenance expressed in the decree in accordance with rules set out in statute.

(2) The employer should be required to deduct every time earnings are paid to the debtor while the current maintenance arrestment is in operation, the maintenance due for the period from the day on which earnings were last paid to the debtor to the day in question. The maintenance due would be the number of days in the period multiplied by the daily rate.

(Paragraph 6.161; clauses 79(4) and (5), and 81(1).)

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6.27 (1) The first £5 of a debtor's daily net earnings (as defined in Recommendation 6.9(2)) should be exempt from arrestment by a current maintenance arrestment, but no other exemption should apply.

(2) The sum mentioned above should be capable of being varied by regulations made by the Secretary of State by statutory instrument subject to negative resolution. The varied sum should apply to a current maintenance arrestment executed after the coming into force of the regulations and to a subsisting arrestment where either the creditor or the debtor has intimated in prescribed form the regulations to the employer. An employer should be entitled, but not bound, to give effect to the regulations in connection with a subsisting arrestment on becoming aware of their existence otherwise than by intimation in prescribed form.

(Paragraph 6.166; clauses 68(1)(*b*), (3) and (4), and 95(1).)

6.28 (1) Arrears of maintenance (whether arising before or after the execution of a current maintenance arrestment) should not be recoverable by a current maintenance arrestment, but the maintenance creditor may enforce payment of the arrears by other diligence, including an earnings arrestment operated concurrently against the same earnings.

(2) Interest should not run on any arrears of maintenance which may arise during the subsistence of a current maintenance arrestment.

(Paragraph 6.176; clauses 72(2)(*a*), 79(7) and 85(1).)

6.29 An employer operating a current maintenance arrestment should not be required to deduct tax from payments to the maintenance creditor notwithstanding that the maintenance payments secured by the current maintenance arrestment are not "small maintenance payments" for the purposes of the income tax code.

(Paragraph 6.180; clause 79(5)(*a*).)

6.30 The court should have the same powers to recall, or resolve a dispute about the operation of, a current maintenance arrestment and to make consequential orders for payment as it has in connection with an earnings arrestment in terms of Recommendation 6.12 above. In addition the court should, on application by the debtor, have power to recall a current maintenance arrestment if it is satisfied that the debtor is unlikely to default again in paying maintenance.

(Paragraph 6.183; clause 83(1)–(3).)

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6.31 (1) A current maintenance arrestment should cease to have effect as between debtor and creditor when:

(a) the creditor abandons the arrestment; or

(b) the arrestment is recalled by an order of the court; or

(c) the debtor is sequestrated; or

(d) the obligation being enforced is varied, recalled, or superseded by a court order, ceases to be enforceable by diligence or otherwise ceases to be due, and where more than one obligation is being enforced by the current maintenance arrestment by the variation, recall, supersession, unenforceability, or cessation of any one of the obligations.

(2) The clerk of the court should intimate in prescribed form to the employer, debtor and creditor the making of an order recalling a current maintenance arrestment.

(3) An arresting creditor should be under a duty to intimate to the employer in prescribed form as soon as is reasonably practicable that the arrestment has ceased to have effect by virtue of a variation, recall, supersession, cessation of enforceability by diligence, or cessation of the obligation or one of the obligations being enforced by the arrestment. Any sum received by the creditor under the arrestment after the arrestment had ceased to have effect should be recoverable by the debtor with interest at the rate normally applicable to decrees from the date of receipt to the date of repayment.

(4) The employer should be entitled, but not bound, to continue to operate the current maintenance arrestment until notification in prescribed form that the arrestment has ceased to have effect is received or until the debtor ceases employment.

(5) Where the sheriff is satisfied, on an application by a debtor, that the creditor failed to intimate as soon as reasonably practicable that the arrestment had ceased to have effect by virtue of any of the circumstances in paragraph (3) above, the sheriff should have power to order the creditor to pay to the debtor a sum not exceeding twice the sum recoverable by the debtor from the creditor under paragraph (3) above.

(Paragraph 6.189; clauses 83(1), (4), (5), (6), (7) and (8); 95(5) and 98(2).)

6.32 (1)* It should be provided by act of sederunt that in any action in which an application for aliment or periodical allowance is made, and in any application for variation of a decree for aliment or periodical allowance, the

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applicant should be required to furnish the court with such particulars within his or her knowledge as may be prescribed as to any existing maintenance decree against the other party to the application, and any existing current maintenance arrestment or earnings arrestment enforcing that decree.

(2) Where a maintenance decree, which was being enforced by a current maintenance arrestment, is varied, or superseded by a new maintenance decree, then:

(a) further default should not be a necessary prelude to enforcement, by a current maintenance arrestment, of the new decree within three months after the current maintenance arrestment enforcing the original decree had ceased to operate; and

(b) the court should have an express statutory power to delay the coming into operation of the new decree to allow time for intimation to the employer of the cessation of the original decree and service of a new current maintenance arrestment enforcing the varied or new decree. Where, however, a decree for aliment in favour of a spouse is superseded by an award of periodical allowance on divorce in favour of that spouse, the court should not postpone the coming into operation of the decree for periodical allowance.

(3) Where a maintenance decree, which was being enforced by a current maintenance arrestment, ceases to be effective in part, further default should not be a necessary prelude to enforcement, by a new current maintenance arrestment, of the remaining obligation or obligations in the decree within three months after the current maintenance arrestment enforcing the whole decree ceased to have effect.

(4) Where a new current maintenance arrestment is served under a new maintenance order or a varied order before the date specified in that order, the employer should apply the new maintenance rate specified in the schedule as from the first pay day following that date. But the employer should not be liable for failing to comply with a current maintenance arrestment within a period of seven days after the date of the service of the arrestment schedule.

(Paragraph 6.198; clauses 82(3), 84 and 95(2).)

6.33 (1) A maintenance creditor in receipt of supplementary benefit and current maintenance under a current maintenance arrestment or a conjoined arrestment order may authorise

in writing the Department of Health and Social Security to receive sums payable under the arrestment or order. The Department should intimate the authorisation to the employer or the sheriff clerk as the case may be who should be bound thereafter to pay to the Department the sums due to the maintenance creditor.

(2) The authorisation may be withdrawn by the maintenance creditor and should lapse on the maintenance creditor ceasing to be in receipt of supplementary benefit. The Department should forthwith intimate the withdrawal or lapse of the authorisation to the employer or sheriff clerk.

(Paragraph 6.200; clause 94.)

6.34 Recommendations 12(3), 13, 14, and 17 to 22 should apply to current maintenance arrestments as they apply to earnings arrestments.

(Paragraph 6.202; clauses 79(6), 86(3), 95(2)—(4), 96(1) and (2), and 97; Schedule 7, paragraph 2.)

6.35 A non-Scottish maintenance order (including an authentic instrument or court settlement within the meaning of the European Judgments Convention and an order in favour of a public authority for reimbursement of the cost of maintenance provided by it) registered in Scotland for enforcement should be enforceable by current maintenance arrestment only if it provides for periodical payments to be made by the maintenance debtor.

(Paragraph 6.207; clause 74.)

6.36 Where a certificate of arrears is produced to the registering court at the time of registration of the incoming maintenance order, it should be competent for the maintenance creditor to serve a current maintenance arrestment without the need to satisfy the requirements of notice and default proposed in Recommendation 6.25 above.

(Paragraph 6.209; clause 82(2).)

6.37* Provision should be made by act of sederunt that where a non-Scottish order is enforced by a current maintenance arrestment or an earnings arrestment, the schedule of arrestment served on the employer should specify the name and address of a person within the United Kingdom to whom deductions are to be remitted.

(Paragraph 6.211.)

6.38 Where a Scottish court grants an order varying a non-Scottish maintenance order registered for enforcement and the order is being enforced by a current maintenance arrestment, the court should have power to postpone the coming into operation

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of the variation to allow the change from the old rate to the new rate to be made without a break in the continuity of deductions.

(Paragraph 6.214; clause 84.)

6.39 (1)* It should be provided by act of sederunt that where the registration of a non-Scottish maintenance order registered for enforcement in Scotland is cancelled because the debtor has ceased to reside in Scotland, the prescribed officer of the court in which the order is registered should so far as reasonably practicable intimate the cancellation in prescribed form:

(a) if the cancelled order was being enforced by a current maintenance arrestment, to the employer operating that arrestment; or

(b) if the cancelled order was being enforced by a conjoined arrestment order, to the sheriff clerk of the court dealing with the conjoined arrestment order.

(2) The creditor in the maintenance order whose registration was cancelled should be bound as soon as reasonably practicable to intimate in prescribed form the cancellation to the employer or the sheriff clerk as the case may be, and in the case of failure Recommendation 6.31(5) (imposition of a discretionary penalty) should apply.

(Paragraph 6.217; clause 83(6) and (8).)

Conjoined arrestment orders

6.40 Employers should not be required to operate more than one earnings arrestment against a debtor's pay at any one time and accordingly it should be provided by statute that an earnings arrestment served during the currency of another earnings arrestment against the same debtor's pay should be ineffectual.

(Paragraph 6.222; clause 86(1).)

6.41 (1) A creditor whose earnings arrestment is, or would be, ineffectual by reason of an existing earnings arrestment by another creditor should be entitled to apply to the court for an order (called a "conjoined arrestment order") requiring the employer to pay the sums deducted on each pay day into court for disbursement to the original creditor and the applicant creditor.

(2) Earnings arrestments should be expressly excluded from provisions in the bankruptcy legislation equalising poindings and arrestments executed within certain periods before or after notour bankruptcy or apparent insolvency.

(Paragraph 6.228; clauses 87(1) and 93; Schedule 7, paragraph 38.)

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6.42 (1) Where during the subsistence of an earnings arrestment a later earnings arrestment is served, the employer should be under a duty to disclose, as soon as reasonably practicable, to the later creditors:

(a) the name and address of the first arresting creditor;

(b) the total amount due to the first arresting creditor as at the date of service of that creditor's earnings arrestment; and

(c) the date of service and place of execution of the first creditor's earnings arrestment.

(2) A creditor should have a title to apply for a conjoined arrestment order if entitled to serve an earnings arrestment on the debtor's employer, whether or not the creditor has served an earnings arrestment which is ineffectual because of a subsisting earnings arrestment.

(3) Power to make a conjoined arrestment order should be conferred on the sheriff court rather than the Court of Session.

(4) The amount recoverable under a conjoined arrestment order by the later creditor who applies for an order should be the principal sum and judicial expenses due under the decree, interest accrued to the date of application, the expenses of the prior charge and the expenses of the application for the order but only if, and to the extent that, the sums are specified in the application.

(5)* It should be provided by act of sederunt that the creditor's application should contain sufficient information to enable the court to make an order without a hearing including:

(a) the applicant's name, address and amount of the debt due at the date of application;

(b) the first arresting creditor's name and address, the sum due to that creditor at the date of service of that creditor's earnings arrestment and the place of execution of that earnings arrestment; and

(c) the name and address of the debtor and of the employer.

(6)* It should be provided by act of sederunt that a conjoined arrestment order may, in the absence of objections or special circumstances, be made by a sheriff clerk instead of a sheriff.

(7) The sheriff clerk should serve in the prescribed manner a copy of the conjoined arrestment order on the employer, the debtor and the creditors.

(8) An earnings arrestment served during the currency of a conjoined arrestment order affecting the same debtor's earnings should be ineffectual. The employer should be under a duty to inform the arresting creditor which court

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granted the order. A later creditor should be entitled to apply to that court to participate in the existing conjoined arrestment order.

(9) If the employer fails without reasonable excuse to discharge the duty in paragraphs (1) or (8) above, the creditor should be entitled to apply to the sheriff court having jurisdiction over the employer for an order requiring the employer to disclose the required information.

(Paragraph 6.326; clauses 86(4) and (5), 87(1), (2), (6), (7), (9) and (11) and 88(1), (2), (4) and (5).)

6.43 (1) An employer should be bound to give effect to a conjoined arrestment order on any pay day occurring seven days or more after the date of service of the order.

(2) An employer should be entitled, but not bound, to give effect to a conjoined arrestment order on any pay day occurring within seven days after the date of service of the order.

(3) The conjoined arrestment order should supersede the subsisting earnings arrestment as soon as the employer gives effect to the order. The conjoined arrestment order should direct the employer to deduct from the debtor's earnings on each pay day until further order, a sum calculated in accordance with the rules applicable to an earnings arrestment, and to remit such deductions forthwith to the court.

(4) Recommendation 6.22 (payment by employer by cheque or otherwise) should apply to conjoined arrestment orders as it applies to earnings arrestments.

(5) The employer should be entitled to deduct a fee of 50p (or such other sum as may be prescribed) on each occasion on which a deduction is made from the debtor's pay under a conjoined arrestment order. The fee should be deducted from the exempt earnings payable to the debtor and the employer should give the debtor a statement of the fee deducted along with the statement showing the deduction made under the conjoined arrestment order.

(6) An employer who fails to comply with a conjoined arrestment order should be liable to pay the sheriff clerk the sums that would have been received if the order had been complied with, without a right of recovery from the debtor. In addition, a failure which is wilful and without reasonable excuse should be capable of being treated as a contempt of court.

(Paragraph 6.241; clauses 87(1), (3) and (13), 89(2) and (7), 95(2) and 97.)

6.44 (1) The court should apportion between the creditors in a conjoined arrestment order rateably according to their debts, all sums received from the employer.

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(2) For the purpose of calculating the shares due to the creditors, the debt of the original arresting creditor should be taken to be the sums due at the date of service on the employer of that creditor's earnings arrestment schedule and specified in that schedule, and the debt of the creditor who applied for the conjoined arrestment order and any subsequent conjoined creditor should be taken to be the sums (debt, interest and expenses) due and specified in their application to the court.

(3) There should be no preference for arrears of aliment, rates or taxes in a conjoined arrestment order.

(4)* Provision should be made by act of sederunt regulating the disbursement by the court to the conjoined creditors of their share of the collected sums, including such matters as the frequency of payment, notification of the details of the ranking of the creditors, and an account of the court's intromissions on termination of the order.

(Paragraph 6.244; clause 90; Schedule 4.)

6.45 It should be competent to lay both a current maintenance arrestment and an earnings arrestment against the same earnings and if, in these circumstances, there is only one arrestment of each type, a conjoined arrestment order should be incompetent. The employer should operate both arrestments simultaneously and if there were insufficient earnings above the fixed sum threshold to satisfy both arrestments, the employer should give priority to the earnings arrestment.

(Paragraph 6.249; clauses 85 and 87(4).)

6.46 (1) A second current maintenance arrestment served during the currency of an existing current maintenance arrestment should be ineffectual, and current maintenance arrestments should be expressly excluded from provisions in the bankruptcy legislation equalising poindings and arrestments executed within certain periods before or after notour bankruptcy or apparent insolvency. A creditor whose current maintenance arrestment is or would be ineffectual by reason of an existing current maintenance arrestment or conjoined arrestment order should be entitled to apply to the court for a conjoined arrestment order or to be included in the existing order, and the procedure in Recommendation 6.42 above should apply.

(2) The conjoined arrestment order should require the employer to deduct and pay to the court the maintenance at the specified rate (being the aggregate of the daily rates due to the original creditors) so far as there were net earnings above the fixed sum threshold of £5 per day. The court would disburse the sums received to the maintenance

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creditors. In the event of there being insufficient net earnings to satisfy both maintenance creditors, the court would divide the amount deducted in proportion to the daily rates of current maintenance payable to each.

(3) It should be incompetent for a maintenance creditor to enforce by way of a conjoined arrestment order two or more maintenance obligations which he or she could enforce by single current maintenance arrestment against the debtor's earnings.

(Paragraph 6.252; clauses 86(2), (4) and (5), 87, 88, 89(3), 90 and 93; Schedules 4 and 7, paragraph 38.)

6.47 In a conjoined arrestment order with three or more creditors and involving both ordinary creditors and maintenance creditors, the sum that would be deducted under an earnings arrestment should be paid to the ordinary creditor, or if more than one to the ordinary creditors as a class sharing rateably according to the amount of their debts. The maintenance creditor or creditors should receive their maintenance out of any balance above the fixed sum threshold, abating rateably between themselves according to the daily rates of current maintenance payable to each if there is more than one maintenance creditor and insufficient earnings to satisfy all.

(Paragraph 6.255; clauses 89(4) and 90; Schedule 4.)

6.48 For the purposes of Recommendation 6.46(1) (two or more maintenance creditors cannot use current maintenance arrestments simultaneously against the same debtor) and Recommendation 6.46(3) (a maintenance creditor not entitled to use conjoined arrestment order to enforce two or more obligations if current maintenance arrestment could be used) a maintenance creditor should be defined as the payee in a maintenance obligation whether the payee is an individual, an official or an authority.

(Paragraph 6.259; clause 80(1) and (3).)

6.49 (1) It should be competent for a conjoined arrestment order to enforce arrears of maintenance and current maintenance payable to the same creditor.

(2) No interest should run on arrears of maintenance arising during the operation of a conjoined arrestment order which is enforcing current maintenance.

(Paragraph 6.262; clause 87(8).)

6.50 (1) The employer should continue to operate a conjoined arrestment order until the debtor ceases employment or until intimation of the recall or variation of the order by the court is received.

(2) In addition to the court's power to recall a conjoined arrestment order following the granting of a time to pay

order or on the coming into force of a debt arrangement scheme, the court should, on application, recall a conjoined arrestment order if it is satisfied that the order is invalid or has ceased to have effect or if all the conjoined creditors (or the last remaining creditor) apply for recall.

(3) A conjoined arrestment order should cease to have effect on the sequestration of the debtor, or on all the debts included in the order (or the last remaining debt in the order) being satisfied, ceasing, or becoming unenforceable by diligence.

(4) The court should, on application, vary a conjoined arrestment order if:

(a) a debt due to a creditor is satisfied or becomes unenforceable by diligence; or

(b) a creditor no longer wishes to have the debt included; or

(c) in the case of maintenance the obligation to pay maintenance ceases, is recalled or varied, or becomes unenforceable by diligence.

(Paragraph 6.270; clauses 87(10), 92(1)–(4) and 98(2).)

6.51 (1) A creditor whose debt is included in a conjoined arrestment order should be under a duty to inform the sheriff clerk when the debt is satisfied or ceases to be enforceable by diligence, and in the case of maintenance when the obligation to pay maintenance ceases. Sums received by a creditor after satisfaction of the debt, the debt becoming unenforceable by diligence or, in the case of maintenance, where the obligation to pay maintenance ceases, should be recoverable by the sheriff clerk with interest at the rate normally applicable to decrees from the date of receipt to the date of payment. The sheriff clerk should distribute the sums recovered among the remaining creditors as if the repaying creditor had ceased to be conjoined in the order.

(2) Where the sheriff is satisfied, on an application by the debtor, that the creditor failed to intimate as required in paragraph (1) above, the sheriff may order the creditor to pay the debtor a sum not exceeding twice that recoverable by the sheriff clerk in terms of paragraph (1) above.

(3) An application for variation or recall of a conjoined arrestment order should be capable of being made by the debtor, a creditor, the employer, the sheriff clerk operating the order and the debtor's trustee in sequestration.

(4) The sheriff clerk should be under a duty to intimate the granting of an order varying or recalling a conjoined arrestment order to the debtor, the creditors, and the debtor's trustee in sequestration if the trustee's whereabouts

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are known. Intimation should be made to the employer of any recall and any variation resulting in a change in the amount to be deducted from the debtor's earnings.

(Paragraph 6.276; clauses 91(4)–(8), and 92(2) and (5).)

6.52 The court, on application by the debtor, the sheriff clerk, a creditor or the employer should have power to determine a dispute as to the manner of operation of a conjoined arrestment order. The court in disposing of the application should have power to order one of the parties to pay to another sums which had been deducted or retained in error with interest.

(Paragraph 6.278; clause 91(1) and (2).)

6.53 The sheriff clerk should be under a duty to intimate to an employer operating a conjoined arrestment order any variation in the statutory deduction tables applicable to earnings arrestments, or the level of exempt earnings applicable to current maintenance arrestments. The employer should be entitled, but not bound, to give effect to such a variation on any pay day occurring within seven days of the date of intimation, but should be bound to give effect to such a variation on any pay day occurring thereafter.

(Paragraph 6.280; clauses 89(6) and 95(2).)

Miscellaneous

6.54 (1) The sheriff courts should have exclusive jurisdiction to:

(a) grant conjoined arrestment orders; and

(b) deal with applications for variation or recall of or disputes regarding the mode of operation of earnings arrestments, current maintenance arrestments and conjoined arrestment orders.

(2) An application under paragraph (1)(a) above should be made to the sheriff court in whose jurisdiction the place of execution of the earnings or current maintenance arrestment is situated. An application under paragraph (1)(b) above should be made to the sheriff court that granted the conjoined arrestment order in question or in whose jurisdiction the place of execution of the earnings or current maintenance arrestment in question is situated.

(3) It should also be competent to make an application under paragraph (1) above to a sheriff court in whose jurisdiction the debtor's employer has an established place of business.

(Paragraph 6.291; clause 99.)

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DILIGENCES AND PRIORITIES ENFORCING RATES, TAXES AND CROWN DEBTS

Reform of diligence under summary warrants for rates and taxes

7.1 (1) It should be incompetent for a summary warrant to be granted for the recovery of arrears of rates or taxes due by a debtor if an action has already been raised for payment of those arrears.

(2) The raising of an action against the debtor for payment of arrears of rates or taxes should render an existing summary warrant for those arrears ineffective as regards that debtor.

(3) It should be incompetent to raise an action against the debtor for payment of arrears of rates or taxes once a poinding, arrestment or earnings arrestment has been executed for recovery of those arrears in pursuance of a summary warrant.

(Paragraph 7.8; Bill, Schedule 5, paragraphs 1, 4, 6 and 7.)

7.2 A summary warrant should be granted only by a sheriff and diligence in execution of a summary warrant should be carried out only by sheriff officers.

(Paragraph 7.11; clause 103(3); Schedule 5.)

7.3 A summary warrant for the recovery of rates or taxes should authorise an arrestment of the debtor's funds and property other than earnings, and an earnings arrestment (or where appropriate a conjoined arrestment order) against his earnings.

(Paragraph 7.18; Bill, Schedule 5, paragraphs 1, 2, 6 and 7.)

7.4 Summary warrants for rates and taxes should continue to be enforceable by a special statutory poinding procedure rather than by poinding in common form.

(Paragraph 7.20; Bill, Schedule 6.)

7.5 The special statutory poinding procedure should be the same for all summary warrants for rates and taxes.

(Paragraph 7.22; Bill, Schedule 5, paragraphs 1, 2, 6 and 7; Schedule 6.)

7.6 (1) In summary warrant poinding procedure, the goods should be valued at their open market value at the time of poinding. The valuation should be carried out by the officer except in special cases where a specialist valuator should value the goods.

(2) The debtor should have an opportunity and right to redeem any of his goods by payment to the officer of their appraised values within 14 days after the execution of the poinding and within seven days after notification to the debtor of the date of sale or removal and sale.

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(3) The debtor should be entitled to apply to the sheriff for recall of the poinding on the grounds that the goods were substantially undervalued, at any time up to the officer's intimation to him of the date arranged for the sale or removal of his goods for sale.

(4) In any auction of goods in pursuance of a summary warrant the appraised values of the goods should be treated as reserve prices. The creditor need not disclose the existence of a reserve price or its amount to bidders.

(Paragraph 7.30; Bill, Schedule 6, paragraphs 5(1)(*b*) and (5), 7, 11(2), and 14(1).)

7.7 Where goods poinded under a summary warrant are exposed for sale, the appraised value should operate as a reserve price. The ownership of goods which are not sold because the highest bid fails to reach the reserve price should pass to the rating or tax authority, unless the authority authorises the auctioneer to sell the goods to the highest bidder. The debtor should be credited with the appraised value or the amount of the highest bid whichever is the greater.

(Paragraph 7.36; Bill, Schedule 6, paragraph 14(3)–(6).)

7.8 The sheriff should have power on an application by the debtor made within 14 days of the execution of the poinding to release an article from the poinding on the grounds that:

(a) it is exempt from poinding; or

(b) continuation of the poinding or the sale of the article would be unduly harsh.

(Paragraph 7.39; Bill, Schedule 6, paragraphs 1 and 6.)

7.9 The sheriff should have power, on application by the debtor or of his own accord at any time before the sale, to recall a summary warrant poinding on the ground that it is invalid or has ceased to have effect. The sheriff should also have power, on an application made by the debtor before intimation by the officer to the debtor of the arrangements made for the sale of the debtor's poinded goods or their removal for sale, to recall the poinding on the ground that a sale would be unduly harsh, the goods were in aggregate substantially undervalued, or that the likely proceeds of sale will not exceed the likely expenses of sale.

(Paragraph 7.42; Bill, Schedule 6, paragraph 7.)

7.10 (1) A summary warrant should be deemed to include a warrant to open shut and lockfast places in the debtor's occupancy for the purposes of executing a poinding and sale under the summary warrant.

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(2) It should not be competent for an officer to enter a dwellinghouse which is unoccupied or in which no person over 16 years of age is present in pursuance of a warrant to open shut and lockfast places unless the officer had previously intimated to the debtor (and in the case of occupation by children under 16 years, the social work department) his intention to enter or had obtained prior authority from the sheriff.

(Paragraph 7.45; Bill, Schedule 6, paragraphs 4 and 24.)

7.11 In line with the recommendation of the Keith Report, the duty of an auctioneer to intimate an auction of moveables imposed by section 63(9) and (10) of the Taxes Management Act 1970 should be abolished.

(Paragraph 7.48; Bill, Schedule 5, paragraph 2.)

7.12 (1) Section 249 of the Local Government (Scotland) Act 1947 (which provides for a summary procedure for the review of summary warrant proceedings on application by an aggrieved owner of the poinded goods) should be repealed.

(2) Without prejudice to any other competent remedy:

(a) the provisions allowing a debtor to apply for the recall of a poinding or the release of articles from a poinding which are recommended for ordinary poindings should be competent in summary warrant poindings subject to such modifications as are necessary in view of the different procedure;

(b) the provisions allowing applications to be made for the recall of, and the resolution of disputes relating to, earnings arrestments proceeding on court decrees should be competent for earnings arrestments proceeding on summary warrants.

(Paragraph 7.53; clauses 78 and 92; Schedule 6, paragraphs 6, 7, 21 and 22; Schedule 9.)

7.13* The existing statutory surcharge due to a rating authority by the debtor on the granting of a summary warrant against him should be retained, but the level of the surcharge (presently 10%) should be reviewed. Surcharges should not be introduced for tax summary warrants.

(Paragraph 7.57; Bill, Schedule 5, paragraphs 1 and 2.)

7.14 (1) The statutory commission of 10% of the tax due payable to an officer executing a summary warrant should be abolished. Instead the creditor should be liable to the officer in the first instance for payment of the officer's diligence expenses charged in accordance with the table of fees prescribed by act of sederunt but with a right to recover

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the expenses from the debtor as recommended in Recommendations 9.7 to 9.9.

(2) The sheriff officer executing a summary warrant should be entitled to charge the rating or tax authority prescribed fees for collecting and accounting for sums paid to him by the defaulter in satisfaction of the sums due. The defaulter should not become liable for such fees.

(Paragraph 7.61; Bill, Schedule 5, paragraphs 1 and 2.)

7.15 Diligence on a summary warrant should be capable of being executed anywhere within Scotland without endorsement of a warrant of concurrence and in consequence section 251 of the Local Government (Scotland) Act 1947 should be repealed.

(Paragraph 7.65; clause 116; Schedule 9.)

Betting, Gaming and Excise duties

7.16 The procedure for recovery of betting, gaming and excise duties should be called "taking possession" instead of "poinding". A warrant to take possession of articles and sell them by public auction should be granted only by a sheriff and should be executed only by sheriff officers.

(Paragraph 7.69; Bill, Schedule 7, paragraphs 29 and 31.)

Civil imprisonment for non-payment of rates, taxes, and fines and penalties due to the Crown.

7.17 (1) Civil imprisonment for failure to pay rates and fines and penalties due to the Crown, together with the procedure for civil imprisonment prescribed by the Debtors (Scotland) Act 1838 on the administrative *fiat* of a clerk of court and the corresponding procedure for imprisonment under the Exchequer Court (Scotland) Act 1856, sections 33 and 34, should be abolished, subject to the qualification mentioned in the following paragraph.

(2)* The foregoing recommendation is not intended to remove the powers of the court to grant warrant for civil imprisonment on default in payment of a fine imposed by the court either:

(a) for contempt of court in civil proceedings; or

(b) for breach of an order for restoration of possession, or for specific performance of a statutory duty, under section 91 of the Court of Session Act 1868.

The competent authorities should, however, consider whether the powers of the court to grant such warrants, and the legal effect of such warrants, should be clarified and whether the courts should be empowered by statute to use the machinery for enforcement of criminal fines as a means of recovering fines for contempt in civil proceedings.

(3) The proviso to section 4 of the Debtors (Scotland) Act 1880 (which limits the maximum period of civil imprisonment for debt to 12 months) should be repealed as inconsistent with the limits provided by section 15(2) of the Contempt of Court Act 1981 in relation to contempt of court.

(4)* The competent authorities should consider whether the maximum limits on fines and imprisonment for contempt in Court of Session proceedings provided by section 15(2) of the 1981 Act should apply to sentences of fines and imprisonment imposed by the Court of Session under section 91 of the Court of Session Act 1868.

(Paragraph 7.80; clause 100(3); Schedule 7, paragraph 9; Schedule 9.)

Abolition of Exchequer diligence

7.18 (1) The special diligences for the enforcement by the sheriff principal of Exchequer decrees should be abolished, and such decrees should be enforceable in the same manner as other decrees for payment.

(2) As regards Crown preferences acquired by virtue of Exchequer diligence:

(a) an arrestment under an Exchequer decree should no longer by itself confer on the Crown a special preference in a competition with an ordinary arrestment; and

(b) a charge or other diligence should no longer be deemed equivalent to the teste of a writ of extent and accordingly should no longer give the Crown a preference in a competition with diligences by other creditors over the debtor's moveable property, or in a competition with a trustee in a sequestration or liquidator of a company.

(Paragraph 7.92; clause 100(5).)

Prior claims for rates or taxes against persons taking moveables by diligence or assignation

7.19 The priorities for recovery by official collectors of one year's arrears of rates and taxes, where moveable goods and effects are taken by diligence or assignation in Scotland, should be abolished.

(Paragraph 7.106; clause 100(4).)

Fugae *warrants*

7.20 *Fugae* warrants should be abolished.

(Paragraph 7.108; Bill, Schedule 9 amendment of Debtors (Scotland) Act 1880, section 4.)

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OFFICERS OF COURT

Retention of present system

8.1 The present system whereby citation and diligence is executed by independent contractor fee-paid officers of court should be retained (subject to various reforms) and should not be replaced by salaried officers employed within the Scottish Court Service or a central government department.

(Paragraph 8.10; clauses 101 to 111.)

Organisation and control of officers of court

8.2 The separate offices of messenger-at-arms and sheriff officer should be retained and should not be replaced by one service of court officers authorised to execute warrants of all courts within Scotland.

(Paragraph 8.16; clauses 103 and 130.)

8.3 Sheriff officers should not become a self-regulating and self-disciplining service. The functions of appointment, supervision and control of sheriff officers should continue to be exercised by sheriffs principal and should not be transferred to a new central authority having such functions in respect of sheriff officers and messengers-at-arms.

(Paragraph 8.20; clauses 104 to 107.)

8.4 (1) The primary function of appointment, supervision, control and discipline of messengers-at-arms should be transferred from the Lyon King of Arms to the Court of Session. The Lord Lyon should, however, retain formal functions in connection with the appointment, suspension and deprivation of office of messengers-at-arms and the Lyon Clerk should continue to keep the Roll of Messengers-at-Arms.

(2) An application for appointment as messenger should be heard by a judge of the Court of Session who if satisfied that the applicant is suitable should pronounce an interlocutor containing a finding to this effect.

(3) The Lord Lyon on receiving the interlocutor of the Court of Session should, after interviewing the petitioner, administer the oath to perform a messenger's duty faithfully, present the petitioner with a commission as messenger-at-arms and insignia (blazon and baton) of office, and instruct the petitioner's name to be entered in the Roll of Messengers-at-Arms.

(4) A Court of Session interlocutor finding that a messenger should be suspended from practice or deprived of office should be transmitted to the Lord Lyon who should suspend or deprive (as the case may be) the messenger and instruct an appropriate amendment to be made to the Roll of Messengers-at-Arms.

(Paragraph 8.28; clauses 103(1) and (5), and 104 to 107.)

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8.5 (1) The Court of Session's existing powers to make rules regulating messengers-at-arms and prescribing fees for citation and diligence should be replaced by wider statutory powers to make rules regulating and controlling the service of officers of court.

(2) A new standing body, which may be called the Advisory Council on Messengers-at-Arms and Sheriff Officers, should be established to advise the Court of Session on rules to be made under the foregoing powers and generally to keep under review all matters relating to officers of court.

(3) The Advisory Council should consist of a judge of the Court of Session (who should act as chairman) appointed by the Lord President of the Court of Session, five other members also appointed by the Lord President (including two sheriffs principal, two officers of court and a solicitor), and one member appointed by the Secretary of State for Scotland. The Secretary of the Council should be a full-time clerk of session or sheriff clerk appointed by the Secretary of State.

(Paragraph 8.34; clauses 101 and 102.)

8.6 (1) Messengers-at-arms should not be authorised by their commissions as messengers to execute warrants of the sheriff courts (including writs registered for execution in any sheriff court books), without prejudice to their authority to execute warrants of a particular sheriff court by virtue of their commissions as sheriff officers.

(2) Where a statute provides that a tribunal or inquiry order is enforceable "in like manner as a recorded decree arbitral" it should be amended to provide that the order is enforceable in like manner as an extract registered decree arbitral bearing a warrant of execution issued by the sheriff court of any sheriffdom in Scotland.

(Paragraph 8.40; clause 103(3); Schedule 7, General Amendment, paragraphs 17, 24, 25 and 30.)

8.7 A sheriff officer should not be entitled to enforce a warrant of any sheriff court anywhere in Scotland. The existing rules whereby a warrant for diligence granted by a sheriff court is executed either by an officer of the court which granted the warrant or an officer holding a commission for the place where the warrant is to be executed should be retained.

(Paragraph 8.43; clause 116.)

Appointment, supervision and discipline

8.8 (1)* In order to secure uniformity of training standards and qualifications throughout Scotland, the Court of Session, after consulting the Advisory Council on Messengers-at-Arms and Sheriff Officers recommended above, should

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prescribe by act of sederunt rules governing the training and qualifications of sheriff officers and messengers-at-arms. The rules should regulate the apprenticeship of entrants to the sheriff officers' service, and require the holding of written examinations and the issue of certificates of competence to undertake the work of messenger-at-arms or sheriff officer.

(2)* Consideration should be given by the competent authorities, after consulting the Society of Messengers-at-Arms and Sheriff Officers, to the introduction of a formal programme for the training of messengers-at-arms and sheriff officers using methods appropriate to the small numbers of persons who enter the service at any one time.

(3)* The procedure to be followed in applications for a commission as messenger-at-arms or sheriff officer should be regulated by act of sederunt made by the Court of Session after consulting the Advisory Council on Messengers-at-Arms and Sheriff Officers. Such an application should not be competent unless the applicant holds the prescribed messenger's or sheriff officer's certificate of competence, as the case may be.

(4) No change should be made in the existing powers of the sheriffs principal to grant a commission as sheriff officer having regard to the interests of the applicant, and to the public interest which should continue to be paramount. The Court of Session, in disposing of an application for appointment as messenger-at-arms, should have similar discretionary powers.

(5) A person should be eligible to apply for and to hold a commission as messenger-at-arms only if he or she holds a commission as sheriff officer.

(Paragraph 8.56; clauses 101(1), and 103(2) and (4).)

8.9* Provision should be made by act of sederunt to make it clear that an officer of court may be employed under a contract of service by another officer of court or firm of officers to execute citation and diligence, and that officers of court are permitted to organise themselves in firms.

(Paragraph 8.61; clause 101(1)(*a*).)

8.10 (1) A sheriff principal should have power, even in the absence of a complaint, to appoint a suitable person or persons to inspect the work of any sheriff officers in executing citation and diligence and to make enquiry as to paid extra-official activities and to report.

(2) Where an inspection would involve officers who are messengers-at-arms as well as sheriff officers, the sheriff principal should request the concurrence of the Court of

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Session to the inspection so that the work of the officers in both capacities can be examined. The person conducting the inspection should submit the report to the Court of Session and to the sheriff principal.

(3) The Court of Session should have power, even in the absence of a complaint, to direct a sheriff principal to appoint a suitable person or persons to inspect the work of any messengers in their capacity as messengers as well as sheriff officers and the work of sheriff officers associated in business with them. The person conducting the inspection should submit the report to the Court of Session and to the sheriff principal.

(4) The expenses of an inspection and report should be chargeable to the Exchequer.

(Paragraph 8.66; clause 104.)

8.11 (1)* Provision should be made by act of sederunt that the report of a poinding should state the fees, mileage charges and outlays incurred in serving the charge and executing the poinding. The auditor of the sheriff court should have power, in the absence of any request by the creditor or debtor or remit by the court, to audit and tax selected expenses. Unless the audit was requested by the debtor or creditor, the audit expenses should be chargeable to the Exchequer.

(2) Any fee chargeable by the auditor of court in connection with audit and taxation of reports of sales of poinded goods should be waived.

(3)* Provision should be made by act of sederunt that all diligence forms served on debtors should contain a detailed statement of the fees, mileage charges and outlays incurred in that step of the diligence.

(4)* The debtor or creditor should, as at present, have a right to have diligence expenses audited and taxed. It should be provided by act of sederunt that for sheriff court diligence and poindings proceeding on a Court of Session decree the audit should be carried out by the sheriff court auditor; for other Court of Session diligence the audit should be carried out by the Auditor of the Court of Session.

(5)* Provision should be made by act of sederunt that where diligence expenses are found on audit to be correctly stated or understated, the debtor or creditor requesting the audit should be liable for the auditor's fee. Where the diligence expenses are found on audit to be overcharged, the sheriff (or in the case of an arrestment proceeding on a Court of Session decree, the Lord Ordinary) should have power to adjust the diligence expenses, to order repayment of fees or other sums found to have been overcharged, and to

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order the officer to pay the expenses of audit and subsequent procedure. The officer in question should also be liable to be reported to the appropriate disciplinary authority.

(6) A person appointed in terms of Recommendation 8.10 should have power to check diligence expenses charged by officers of court and to report evidence of overcharging. Deliberate overcharging should render the officer concerned liable to disciplinary proceedings for misconduct.

(Paragraph 8.73; clauses 61(7) and 104(1).)

8.12 (1) Where as a result of an inspection of the officer's work or a complaint or otherwise the sheriff principal has reason to believe that a sheriff officer may have been guilty of misconduct, the sheriff principal should have power to appoint a solicitor to investigate the matter, unless the officer admits the misconduct in writing or gives a satisfactory explanation of the matter. Misconduct should include conduct tending to bring the office of sheriff officer or messenger-at-arms into disrepute.

(2) If, following the investigation, the solicitor is of the opinion that there is a probable case of misconduct and sufficient evidence to support it, disciplinary proceedings should be brought at the instance of the solicitor before the sheriff principal. In such proceedings, the sheriff officer should be given fair notice of the allegations of misconduct and a right to legal representation. If the solicitor is of the opinion that there is no probable case of misconduct, or insufficient evidence, a report to this effect should be made to the sheriff principal.

(3) Similar powers to deal with allegations of misconduct involving messengers-at-arms should be conferred on the Court of Session.

(4) The Court of Session or the sheriff principal should have power following a written admission of misconduct or a finding of misconduct as a result of disciplinary proceedings as mentioned in paragraph (2) above to:

(a) deprive the officer of office;

(b) suspend the officer from practice;

(c) impose a fine of up to £2,500 or such other sum as may be prescribed by the Secretary of State;

(d) order repayment of fees, outlays and other sums overcharged; and

(e) censure the officer.

(5) It should not be competent to deal with an officer of court in any of the ways set out in paragraph (4) above unless the officer admits misconduct in writing or is found guilty of misconduct in disciplinary proceedings.

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(6)* The Court of Session after consulting the Advisory Council on Messengers-at-Arms and Sheriff Officers should make rules by act of sederunt regulating disciplinary proceedings against officers of court.

(7) The expenses of an investigation and disciplinary proceedings should be borne in the first instance by the Exchequer, but the Court of Session or the sheriff principal should have power at the termination of disciplinary proceedings to award expenses against either party. The party bringing the proceedings against the officer should be deemed for this purpose to be the Secretary of State.

(8) Where the officer is in default in payment of a fine imposed under paragraph (4)(*c*) above the court should have power to suspend or dismiss the officer or grant warrant for recovery of the fine by diligence.

(Paragraph 8.84; clauses 101(1)(*h*), 105 and 106(4)–(8).)

8.13* (1) Provision should be made by act of sederunt that where allegations of misconduct arise in relation to the execution of a warrant granted by a court situated within the officer's commission area outwith that area, or a warrant granted by a court situated outwith the officer's commission area within that area, the allegations should (as at present) be dealt with by the sheriff principal from whom the officer holds a commission. But the sheriff principal should have power to remit any part of the proceedings to the sheriff principal within whose sheriffdom the alleged misconduct occurred, and the latter sheriff principal should report back to the former sheriff principal.

(2) Provision should be made by act of sederunt empowering the Court of Session to remit any part of proceedings dealing with allegations against a messenger to the sheriff principal within whose sheriffdom the alleged misconduct arose. In addition, where an officer's alleged misconduct involves misconduct as a messenger-at-arms and as a sheriff officer, the Court of Session should have power to order that disciplinary proceedings be held by the sheriff principal from whom the officer holds a commission as sheriff officer, and the sheriff principal should have power to remit disciplinary proceedings to the Court of Session.

(Paragraph 8.87; clause 101(1)(*h*).)

8.14 The sheriff principal having disciplinary authority over a sheriff officer should have power to suspend the officer from practice or deprive the officer of office if the sheriff principal becomes aware that the officer has been convicted of any crime or offence unless the conviction was disclosed in the application by the officer for a commission or is spent in terms of the Rehabilitation

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of Offenders Act 1974. Similar powers should be conferred on the Court of Session in relation to messengers-at-arms.
(Paragraph 8.89; clause 106(1)–(3).)

8.15 (1) Any penalty imposed by one disciplinary authority on an officer for misconduct which has been admitted in writing or established as a result of formal disciplinary proceedings should be intimated to all other authorities from whom the officer holds a commission.

(2) Where a suspension from practice or deprivation of office is intimated to another authority it should be obliged to suspend the officer from practice or deprive the officer of the commission held from that authority.

(Paragraph 8.91; clause 107.)

Standards of conduct

8.16 (1) Any citation or diligence executed by an officer of court should be null where the subject matter of the diligence or proceedings is one in which the officer has an interest as an individual.

(2) For the purposes of this recommendation and Recommendations 8.17 and 8.18 an officer who knowingly executes citation and diligence which is null should be liable to disciplinary proceedings for misconduct.

(Paragraph 8.96; clause 109(1)(*a*).)

8.17 (1) Any citation or diligence executed by an officer should be null where the debt sought to be enforced is due to a business associate or a relative of the officer.

(2) In this recommendation and in Recommendation 8.18 "business associate" means a co-director, partner, employer, employee, agent or principal (other than the principal instructing the citation or diligence) and "relative" means wife or husband, and parent, grandparent, child, grandchild, brother or sister by blood or affinity.

(Paragraph 8.100; clause 109(1)(*b*), (2), (3) and (4).)

8.18 (1) Any citation or diligence executed by an officer should be null where the debt sought to be enforced is due to a company or firm and the officer:

(a) has a pecuniary interest (however small) in that company or firm and the principal business of that company or firm is the purchase of debts for enforcement; or

(b) is a director or partner of that company or firm or holds personally or along with a business associate or a relative a controlling interest.

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(2) Any citation or diligence executed by an officer should be null where the debt or obligation sought to be enforced is due to a company or firm and a business associate or a relative of the officer:

(a) is a director or partner of that company or firm or holds a controlling interest; or

(b) has a pecuniary interest (however small) in that company or firm and the principal business of the company or firm is the purchase of debts for enforcement.

(Paragraph 8.104; clause 109(1)(*b*), (2), (3) and (4).)

8.19 (1) The Court of Session should have power, after consulting the Advisory Council on Messengers-at-Arms and Sheriff Officers, to specify by act of sederunt in relation to officers of court:

(a) extra-official activities which are prohibited; or

(b) extra-official activities undertaken for remuneration which are allowed, or allowed subject to conditions specified in the act of sederunt.

(2) An officer of court should be prohibited from undertaking for remuneration any extra-official activity (other than those specified in terms of paragraph (1)(a) or (b) above) unless the sheriff principal on application by the officer grants authority in respect of the activity in question. The sheriff principal should be required to grant such authority unless it appears that the activity would be incompatible with the nature and functions of the office of officer of court, and such authority may be granted subject to such conditions as the sheriff principal thinks fit.

(3)* Records should be kept by sheriff clerks of authorised extra-official activities in respect of each officer.

(4) The performance of prohibited or unauthorised extra-official activities should render the officer concerned liable to disciplinary proceedings for misconduct and the penalty should be within the discretion of the sheriff principal.

(5) If, as we propose at Recommendation 8.8(5), all messengers-at-arms are required to be sheriff officers, it would be unnecessary to provide for separate authorisations by the Court of Session of the extra-official activities of messengers-at-arms.

(Paragraph 8.110; clause 101(1)(*e*) and (*f*), (2) and (3).)

8.20* An act of sederunt should be made expressly prohibiting officers of court from purporting to act in that capacity when collecting debts before the debts have been constituted by decree.

(Paragraph 8.113; clause 101(1)(*e*).)

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8.21* An act of sederunt should be made to the following effect.

(a) Officers of court should be entitled to collect debts not constituted by decree provided they have obtained prior written authorisation from the sheriff principal. An officer should be required to disclose any personal interest or any interest held by a member of his or her family or by a business associate in an organisation when applying for authority to collect debts on behalf of that organisation, and any subsequent acquisition of an interest.

(b) Sheriff clerks should keep in respect of each officer a register of authorisations granted and the disclosed interests of officers, members of their family and their business associates in organisations whose debts the officers are authorised to collect.

(c) An officer who collects debts without authorisation by the sheriff principal, or who demands payment from the debtor of a collection charge which is not legally enforceable, should be liable to disciplinary proceedings for misconduct.

(Paragraph 8.121; clause 101(1)(*f*), (2) and (3).)

8.22* An act of sederunt should be made:

(a) providing that the collection of debts which have been constituted by decree or are enforceable under a summary warrant for rates or taxes should form part of the official functions of officers of court, and the officer's bond of caution should be extended to cover the collection of such debts as well as diligence. In the absence of contrary instructions, instructions to an officer to execute diligence should be deemed to include a mandate to receive payment of, or on account of, the debt. Charges for collecting such debts should not, however, be recoverable by the creditor from the debtor and should not be regulated by act of sederunt; and

(b) requiring officers of court to keep accounts of money collected on behalf of creditors and to have these accounts audited periodically.

(Paragraph 8.125; clause 101(1)(*d*), (*i*), (*j*) and (*k*).

8.23* (1) New rules of conduct should be made by act of sederunt applying to both messengers-at-arms and sheriff officers, requiring them to execute citation and diligence when instructed, but entitling an officer to refuse to act if:

(a) the prescribed expenses, or a reasonable estimate thereof, are not tendered or secured by or on behalf of the person instructing him; or

(b) disqualified from acting in terms of Recommendations 8.16 to 8.18 above; or

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(c) it is not reasonably practicable for the officer to carry out the instructions because of pressure of other business or for other reasonable cause and the officer intimates this forthwith to the solicitor or person instructing him.

(2) Without prejudice to the existing civil liability of an officer to persons instructing him, breach of the rules in paragraph (1) above should render the officer liable to disciplinary proceedings for misconduct.

(Paragraph 8.130; clause 101(1)(*c*).)

8.24* (1) An act of sederunt should be made prohibiting an officer of court:

(a) from purchasing personally, or through an agent, goods sold by virtue of diligence in which the officer has acted; and

(b) from sharing with the creditor any goods (or their proceeds of sale) adjudged to the creditor by virtue of diligence in which the officer has acted; and

(c) from sharing with the purchaser any profit the purchaser makes in re-selling goods bought at a sale carried out by virtue of the diligence in which the officer has acted.

(2) Any breach of the above rules should render the officer concerned liable to disciplinary proceedings for misconduct.

(Paragraph 8.135; clause 101(1)(*c*).)

8.25 The Court of Session should have power to make regulations controlling advertising and soliciting for business by officers of court.

(Paragraph 8.137; clause 101(1)(*c*).)

Miscellaneous

8.26 Any rule of law whereby damages recoverable from an officer for failure or delay in the execution of diligence are determined solely by the amount of the debt should be expressly abolished.

(Paragraph 8.141; clause 110.)

8.27 (1) Sheriff officers should be provided with an official identity card which they should be bound to exhibit on request when performing their official functions.

(2) Messengers-at-arms should be provided with an official identity card in addition to a wand and blazon, and they should be bound to exhibit on request the identity card when performing their official functions.

(Paragraph 8.145; clause 111.)

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8.28 (1) The Civil Judicial Statistics for Scotland should include statistical information on all the main steps of diligences. The Judicial Statistics (Scotland) Act 1869 should therefore be amended to enable the competent authorities to require officers of court to make annual returns of the steps of diligence executed by them.

(2)* The cost of the work involved in making the returns should be borne by the Exchequer and the administrative machinery for making the returns from officers of court should preserve confidentiality as to the nature and volume of business executed by each officer or firm and as to the parties involved in the diligence process.

(Paragraph 8.148; Schedule 7, paragraph 7.)

8.29* The competent authorities should review the provisions relating to payment of dues by messengers-at-arms and should consider making similar provisions in relation to sheriff officers.

(Paragraph 8.152.)

MISCELLANEOUS

Warrants for diligence

9.1 (1)* A single form of warrant for diligence in execution of a decree of a civil court, an extract registered writ, or an order of a criminal court should be prescribed by act of sederunt or act of adjournal.

(2) The diligences authorised by the prescribed form of warrant should be laid down in statute.

(Paragraph 9.7; clause 112(1); Schedule 7, paragraphs 8, 10 and 23.)

Letters of horning and poinding

9.2 (1) The granting of letters of horning, letters of poinding, letters of horning and poinding, and letters of caption should cease to be competent.

(2) A simple administrative procedure should be available enabling creditors acquiring from another person a right to a decree (including a writ registered for execution), whether before or after extract, to obtain a warrant for diligence in their own name on production of the extract decree and their title to it to a clerk of court. This procedure should also be available to a creditor in a deed registrable for execution where a subsidiary document is needed to quantify the obligation in the deed or identify the creditor.

(3) An extract decree of poinding of the ground should contain a warrant in prescribed form authorising officers of court to poind the ground.

(Paragraph 9.12; clauses 112(2), 113 and 114; Schedule 7, paragraphs 1 and 6; Schedule 9.)

Registration of certificates of execution of charges

9.3 It should cease to be competent to register a certificate of execution of a charge for payment, that has expired without payment having been made, in any register of hornings.

(Paragraph 9.15; clause 115(6).)

Obligations ad factum praestandum

9.4 (1) An obligation *ad factum praestandum* contained in an extract of a writ registered for execution in the Books of Council and Session or sheriff court books should cease to be enforceable by imprisonment by virtue of registration. A creditor who wishes to enforce an obligation *ad factum praestandum* contained in a registered writ should be required to constitute the obligation by decree.

(2) To clarify the law it should be declared to be incompetent to charge a debtor to perform an obligation *ad factum praestandum*.

(Paragraph 9.22; clause 125.)

Execution outwith sheriffdom

9.5 (1) Diligence on a warrant inserted in an extract of a writ registered for execution in sheriff court books or contained in any decree of a sheriff should be capable of being executed anywhere in Scotland without endorsement of a warrant of concurrence.

(2) Any such diligence in pursuance of a warrant in a decree, summary warrant or extract registered writ may be executed either by an officer of the court which granted the decree or warrant (or from whose books the extract was issued), or by an officer of the sheriff court district in which the warrant is to be executed.

(Paragraph 9.26; clause 116.)

Encouraging debtors to use the courts

9.6 (1) Sheriff clerks should be under a statutory duty to provide debtors with information as to the procedures available and assist them, if requested, to complete any form required in connection with proceedings under our recommendations. But a sheriff clerk should not be liable to the debtor for any failure in the performance of these duties.

Recommendation No.

(2)* An act of sederunt should be made permitting a party to proceedings in the sheriff courts under our recommendations to be represented by a person who is neither an advocate nor a solicitor.

(3)* Diligence documents served on the debtor, whose form is to be prescribed by an act of sederunt, should contain information as to the applications which the debtor may make to the courts.

(4)* The forms prescribed by act of sederunt for use in connection with proceedings under our recommendations should be drafted so as to be capable of being used by unrepresented persons.

(5) No court dues should be payable by debtors in connection with any application under our recommendations.

(Paragraph 9.31; clauses 121 and 122.)

Expenses

9.7 (1) The expenses chargeable against the debtor in connection with:

(a) an earnings arrestment, should consist of the expenses of serving a charge to pay on the debtor and a schedule of arrestment on the debtor's employer;

(b) a current maintenance arrestment, should consist of the expenses of serving a schedule of arrestment on the debtor's employer.

(2) Provision should be made for the expenses of poinding and sale along the following lines.

The expenses detailed in the list below should be chargeable against the debtor:

(a) in serving one charge;

(b) in serving a notice and a copy thereof before entering a dwellinghouse for the purpose of executing a poinding;

(c) in executing a poinding;

(d) in making a report of the redemption by the debtor of any poinded article;

(e) in granting a receipt for payment for redemption;

(f) in making a report of the execution of a poinding, but not in applying for an extension of time for the making of such a report;

(g) in making intimation, serving a copy of the warrant of sale and giving public notice of the sale;

(h) in removing any articles for sale in pursuance of a warrant of sale;

Recommendation No.

(i) in making arrangements for, conducting and supervising the sale;
(j) in granting a receipt for payment for, or in making a report of, the release or redemption of poinded articles;
(k) in making a report of a payment agreement entered into after warrant of sale;
(l) in making a report of sale;
(m) in granting a receipt for payment for the release from a poinding of any article which is owned in common;
(n) in making a report of the release of any such article;
(o) in opening shut and lockfast places in the execution of the diligence.

This list should be capable of being altered by the Secretary of State by statutory instrument subject to affirmative resolution procedure.

(3) The debtor's liability for the expenses of executing an order made by the court in connection with the removal, damage or destruction of poinded articles, or their security or immediate disposal, should be at the discretion of the sheriff.

(4) Where new arrangements for sale have to be made but an amendment to the warrant of sale is unnecessary, the debtor should be liable for the expenses of the new arrangements but not for the expenses of the cancelled arrangements.

(Paragraph 9.36; clauses 77(1)(*c*) and 79(3); Schedule 1, paragraphs 1, 3, 6 and 7(*b*).)

9.8 (1) No expenses should be awarded against a debtor in favour of a creditor, or against a creditor in favour of a debtor, by a court in connection with any applications to the court under our recommendations. But where a party acts on grounds which appear to the sheriff to be frivolous, the sheriff should have power to award expenses of up to £25 (or such other sum as may be prescribed) against the party so acting. The prescribed sum should be capable of being altered by the Secretary of State by statutory instrument in order to reflect changes in the value of money. This rule should be subject to the exceptions in the following paragraphs.

(2) The rule in paragraph (1) should not apply to appeals from decisions made on application under our recommendations, to applications involving third parties, or to an application for a time to pay decree. In these cases expenses should be awarded according to the normal rules.

Recommendation No.

(3) The expenses of an application made by a creditor in connection with the diligence of poinding and sale should be at the discretion of the sheriff, except where the application is for warrant of sale or amendment of the warrant of sale. Where the sheriff awards expenses against the debtor, these expenses should be calculated as if the application had been unopposed (whether or not the debtor opposed the application), but if the debtor in the opinion of the sheriff opposed on frivolous grounds, the sheriff should have power to award additional expenses of up to £25 (or such other sum as may be prescribed) against the debtor.

(4) The debtor should be liable for the creditor's expenses in connection with an application for warrant of sale. However, where a warrant of sale is amended by the sheriff on application by the creditor, the debtor should be liable for the creditor's expenses in applying for and executing the amended warrant but should cease to be liable for the creditor's expenses in connection with the original warrant (except any additional expenses the sheriff had awarded against the debtor on the ground of frivolous opposition to the original warrant).

(5) The debtor should be liable for the creditor's expenses in connection with an application for a conjoined arrestment order or for inclusion in an existing conjoined arrestment order, but should be relieved from liability for that creditor's expenses in serving a prior schedule of arrestment where applicable.

(Paragraph 9.44; clauses 87(6), 88(5) and 117; Schedule 1, paragraphs 1, 2, 4 and 7 to 10.)

9.9 (1) The expenses of a poinding and sale, an earnings arrestment and a conjoined arrestment order should be recoverable by, and only by, that diligence, and any expenses outstanding after the diligence has ceased to have effect should cease to be chargeable against the debtor. For this purpose the expenses of a conjoined arrestment order should include only the expenses of an application for, or for inclusion in, an order.

(2) The expenses chargeable against the debtor in connection with the diligence of arrestment and furthcoming should be recoverable out of the arrested funds, but the court should on granting decree of furthcoming grant a decree in favour of the creditor for the expenses of diligence so far as not recovered from the arrested funds.

(3) The expenses of executing a current maintenance arrestment should not be recoverable by that arrestment, but may be recovered by other diligence under the same warrant.

(4) A poinding and sale, arrestment and furthcoming and an earnings arrestment should cease to have effect on payment of the full amount of the debt, interest and expenses due, or if a tender of such payment is made, on it not being accepted within a reasonable time. A similar rule should apply to ordinary debts included in a conjoined arrestment order. The present rule that payment or tender of the sum in the decree alone will stop diligence should be expressly abolished.

(5) Where a diligence is recalled on making a time to pay order or a conjoined arrestment order, or rendered ineffectual by a sequestration or a debt arrangement scheme, or rendered unenforceable by the creditor's accession to a trust deed for creditors or the subsistence of a protected trust deed, before the expenses recoverable by that diligence have been fully recovered, the outstanding balance of such expenses should be recoverable by further diligence if and when the creditor's right to do diligence subsequently revives unless the debtor's liability for the expenses has been discharged.

(6) In awarding expenses against the debtor in connection with an application made in the course of a poinding or an arrestment of earnings, the sheriff should grant a decree in favour of the creditor for such expenses, so entitling the creditor to recover them by further diligence. This rule, however, should not apply to the expenses of an application, (a) for warrant of sale which was unopposed or opposed on non-frivolous grounds, or (b) for, or for inclusion in, a conjoined arrestment order.

(7) Any sums recovered by a poinding and sale, arrestment and furthcoming, an earnings arrestment or a conjoined arrestment order in so far as it is enforcing an ordinary debt or debts (other than current maintenance), or paid to account while the diligence is in effect, should be ascribed first to the expenses recoverable by the diligence, thereafter to the interest accrued to the date of execution of the diligence, and finally to the debt and interest accrued since the date of execution.

(8)* The act of sederunt prescribing diligence forms should provide that forms served on the debtor which contain a statement of diligence expenses chargeable should advise the debtor that he or she may make a complaint to the sheriff clerk if dissatisfied with the amount of the expenses.

(Paragraph 9.58; clauses 77(1)(*d*), 87(6) and 118 to 120.)

Legal aid

9.10 (1) Creditors and debtors should be ineligible for legal aid in connection with any proceedings at first instance under

Recommendation No.

our recommendations, except in so far as such proceedings are covered by an existing legal aid certificate or consist of an application for a time to pay direction in the Court of Session or the sheriff's ordinary court.

(2) A legal aid certificate granted for proceedings leading to a decree for payment should remain effective for the purposes of applying for or opposing a time to pay direction in relation to the decree. Where a certificate is granted for, or is effective for, the purposes of a time to pay direction it should remain effective for the purposes of proceedings for variation or revocation of that direction.

(3) A legal aid certificate which is effective for the purposes of diligence to enforce payment of maintenance should be effective for any proceedings under our recommendations in connection with a poinding and sale or an arrestment of earnings which are necessary in the circumstances for the completion of the diligence.

(4)* The Legal Aid fund should have no right of recovery from property preserved or recovered for an assisted person as a result of proceedings (including appeals) under our recommendations and accordingly regulations for that purpose should be made under the powers contained in sections 3 and 15 of the Legal Aid (Scotland) Act 1967 and sections 5 and 6 of the Legal Advice and Assistance Act 1972.

(Paragraph 9.64; clause 123.)

Appeals

9.11 (1) It should be competent to appeal from a decision by the Lord Ordinary or sheriff in relation to any application under our recommendations but such an appeal should be on a point of law only and require the leave of the Lord Ordinary or sheriff.

(2) An appeal from the sheriff should lie to the sheriff principal and thence to the Court of Session without further leave, or directly to the Court of Session. A further appeal should lie without further leave from the Court of Session to the House of Lords.

(3) An appeal from the Lord Ordinary should lie to the Inner House of the Court of Session and thence without further leave to the House of Lords.

(4) Where the application relates to an administrative direction, an urgent matter or where the original position could not be restored if the decision were to be reversed, no appeal should be competent.

Recommendation No.

(5) The existing time limits for appeals should apply to an appeal in relation to an application under our recommendations.

(6)* An act of sederunt should be made providing a simple method of appeal where only the grant or refusal of a time to pay direction attached to a decree is challenged.

(Paragraph 9.70; clause 128(1)–(3).)

9.12 (1) Subject to paragraph (5) below, the sheriff's decision on an application under our recommendations should have immediate effect and remain in effect unless and until it is reversed on final appeal. Any reversal should not have retrospective effect.

(2) The time between the initial decision and the final determination of an appeal should not count for the purposes of any time limit in diligence, where the effect of taking an appeal is to prevent further proceedings.

(3) While an appeal in connection with poinded goods is pending it should be incompetent for a warrant for their sale to be granted or for them to be removed for sale or sold.

(4) An appeal court should have power pending the determination of an appeal to grant interim orders, and on determination of the appeal power to make such incidental and consequential orders as seem just and reasonable.

(5) Where to give immediate effect to the sheriff's decision would render an appeal pointless, the decision should not come into effect unless and until the sheriff refuses leave to appeal, or the period allowed for appeal elapses without an appeal being taken, or if an appeal is taken until it is upheld on a final determination.

(Paragraph 9.74; clauses 68 and 128(4)–(7).)

Application to the Crown

9.13 Subject to the provisions of the Crown Proceedings Act 1947, the recommendations contained in this report should bind the Crown in its capacity as creditor or employer.

(Paragraph 9.77; clause 129.)

Diligence on extract registered writs

9.14 The Court of Session should have power by act of sederunt to regulate the procedure, and to prescribe forms, used in connection with diligence proceeding on an extract of a writ registered for execution in the Books of Council and Session or in sheriff court books, or an order enforceable as if it were an extract of a registered writ.

(Paragraph 9.79, clause 127.)

APPENDIX C

List of those who submitted written comments on Consultative Memoranda Nos. 47–51.

Committee of Scottish Clearing Bankers
Court of Session Judges
Department of Employment
Department of Trade
Sheriff Principal J. A. Dick
Faculty of Advocates
Faculty of Law, University of Aberdeen
Finance Houses Association
Sheriff Principal G. S. Gimson
J. G. Gray, Esq., S.S.C.
H.M. Customs and Excise, V.A.T. Control Division
Incorporated Society of Valuers and Auctioneers (Scottish Branch)
Labour Party Scottish Council
Law Society of Scotland
Legal and Trade Protection Agency
Lord Lyon King of Arms
National Coal Board
Scottish Association of Citizens Advice Bureaux
Scottish Consumer Council
Scottish Council for Civil Liberties
Scottish Law Agents Society
Scottish Trades Union Congress
Sheriffs' Association
Sheriff's Principal
Society of Messengers-at-Arms and Sheriff Officers
Solicitor of Inland Revenue (Scotland)
Sheriff Principal R. R. Taylor
Sheriff N. E. D. Thomson
Tory Reform Group in Scotland

APPENDIX D

THE RESEARCH PROGRAMME ON THE NATURE, SCALE AND SOCIAL ASPECTS OF DILIGENCE AND DEBT RECOVERY

For each of the research reports, the information is presented as follows:
(1) title of report
(2) abbreviation by which the report is cited
(3) author
(4) year and details of publication
(5) abstract.

1. THE NATURE AND SCALE OF DILIGENCE

"C.R.U. Diligence Survey".

Mrs. B. Doig, Central Research Unit, Scottish Office.

Research Report for the Scottish Law Commission, No. 1. Central Research Unit Papers 1980.

This study examines the nature and scale of the use of diligence over a period in 1978; all debt decrees passed to sheriff officers in Scotland for enforcement over three months were included in the survey and they were followed through for a further three months. The study identifies what happened to cases such as the mode of diligence used (e.g. arrestment or the poinding of goods) and the stage in the procedure reached at the end of the survey period; and the type of creditor and debtor, the amount of the principal sum and the sheriffdom.

2. CHARACTERISTICS OF WARRANT SALES

"C.R.U. Warrant Sales Report".

Mrs. A. Connor, Central Research Unit, Scottish Office.

Research Report for the Scottish Law Commission, No. 2. Central Research Unit Papers 1980.

This report presents the results of an investigation into warrant sales (other than sales under summary warrants) executed in Scotland in 1977 for which reports of sale were available (140 out of 285). The investigation identifies characteristics of warrant sales, e.g. the incidence of "personal" and "commercial" sales; the pursuer groups instructing sales; the amounts of principal sum and expenses involved; and the amounts realised at sales.

3. DEBT RECOVERY THROUGH THE SCOTTISH SHERIFF COURTS

"C.R.U. Court Survey".

Mrs. B. Doig, Central Research Unit, Scottish Office.

Research Report for the Scottish Law Commission, No. 3. Central Research Unit Papers 1980.

This study describes the characteristics of a sample of about 8,000 summary cause and ordinary actions disposed of in the sheriff court, (for the recovery of debts or property in Scotland) over the six month period, September 1977–February 1978: e.g. the types of pursuer, the amounts of principal sums, offers to pay by instalments, the court's decision.

4. ARRESTMENTS OF WAGES AND SALARIES—A REVIEW OF EMPLOYERS' INVOLVEMENT

"C.R.U. Arrestment Survey".

Mrs. A. Connor, Central Research Unit, Scottish Office.

Research Report for the Scottish Law Commission, No. 4. Central Research Unit Papers 1980.

This study identifies the different ways in which a small sample of employers handled the arrestment of wages and salaries, their policies towards employees who had debt and diligence problems, and the administrative and processing problems which arose from the present arrestment system.

5. THE ORIGINS AND CONSEQUENCES OF DEFAULT—AN EXAMINATION OF THE IMPACT OF DILIGENCE

"Edinburgh University Debtors Survey".

Mr. M. Adler and Mr. E. Wozniak, Department of Social Administration, Edinburgh University.

Research Report for the Scottish Law Commission, No. 5. Central Research Unit Papers 1981.

This study examines the characteristics and experiences of about 100 persons whose property, funds, or earnings were subjected to diligence, the circumstances in which the debt arose, and the help given by various agencies.

6. SURVEY OF DEFENDERS IN DEBT ACTIONS IN SCOTLAND

"O.P.C.S. Defenders Survey".

Mrs. J. Gregory and Mrs. J. Monk, Social Survey Division, Office of Population Censuses and Surveys.

Research Report for the Scottish Law Commission, No. 6, H.M.S.O. 1981.

This study of about 1,500 defenders is complementary to the more detailed survey of persons subjected to diligence (see 5 above). It identifies the social characteristics and circumstances of persons who experienced the first stages of legal action (but who did not necessarily experience the later stage of diligence against them), the nature of the debt and the procedures taken for its recovery.

7. DEBT COUNSELLING—AN ASSESSMENT OF THE SERVICES AND FACILITIES AVAILABLE TO CONSUMER DEBTORS IN SCOTLAND

"C.R.U. Debt Counselling Survey".

Mrs. A. Millar, Central Research Unit, Scottish Office.

Research Report for the Scottish Law Commission, No. 7. Central Research Unit Papers 1980.

Key personnel in a sample of Government Departments and voluntary organisations were interviewed on the debt counselling and related services and facilities which they provided for consumer debtors. A quantitative survey of the nature and scale of debt and diligence problems dealt with by the different types of organisation was also conducted, e.g. the amount of money involved, the pursuer, and the stage in the debt recovery proceedings when help was sought.

8. DEBT RECOVERY—A REVIEW OF CREDITORS' PRACTICES AND POLICIES

"C.R.U. Creditors Survey".

Mrs. B. Doig and Mrs. A. Millar, Central Research Unit, Scottish Office.

Research Report for the Scottish Law Commission, No. 8. Central Research Unit Papers 1981.

The study examines the practices and policies of a range of about 80 creditors (e.g. public agencies, finance houses, banks, mail order and retail firms) on debt recovery including: the nature of their credit arrangements; the factors influencing the decisions to grant credit; the informal debt recovery procedure used and their use of debt collection agencies and solicitors; the scale of court actions relative to earlier informal recovery arrangements; and their policies towards the raising of court action and the use of diligence.

Copies of Items 1–5 and 7–8 are available as Central Research Unit Papers and can be obtained from Central Research Unit, Scottish Office, New St Andrew's House, Edinburgh EH1 3SZ. Telephone 031–556 8400.

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