SCOTTISH LAW COMMISSION
(Scot Law Com No 164)

Report on Diligence on the Dependence and Admiralty Arrestments

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
March, 1998

585 EDINBURGH: The 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 Gill, Chairman
Dr E M Clive,
Mr P S Hodge, QC
Professor K G C Reid,
Mr N R Whitty.

The Secretary of the Commission is Mr J G S Maclean. Its offices are at 140 Causewayside, Edinburgh EH9 1PR.

SCOTTISH LAW COMMISSION

Item No 1 of our Fifth Programme of Law Reform

Report on Diligence on the Dependence and Admiralty Arrestments

To: The Rt Hon the Lord Hardie, QC
Her Majesty's Advocate

We have the honour to submit a Report on Diligence on the Dependence and Admiralty Arrestments.

(Signed) BRIAN GILL, Chairman
E M CLIVE
PATRICK S HODGE
KENNETH G C REID
N R WHITTY

J G S MACLEAN, Secretary
22 December 1997

Contents

	Paragraph	*Page*
PART 1 - INTRODUCTION	**1.1**	**1**
Background and context of report	1.3	1
Scope and arrangement of report	1.6	2
Judicial authorisation of warrants for diligence on the dependence etc (Parts 2,3,5 and 6)	1.6	2
Interim attachment of corporeal moveables (Part 4)	1.7	2
Admiralty arrestments and admiralty actions (Part 7)	1.9	2
Admiralty arrestments securing claims against demise charterers (Part 8)	1.12	3
Miscellaneous aspects of diligence (Part 9)	1.13	3
Acknowledgments	1.14	3
PART 2 - THE CASE FOR REFORM OF DILIGENCE ON THE DEPENDENCE		
A. PRELIMINARY	2.1	4
B. THE EXISTING LAW ON DILIGENCE ON THE DEPENDENCE	2.2	4
(1) What is diligence on the dependence?	2.2	4
Arrestment on the dependence	2.3	4
Inhibition on the dependence	2.5	4
(2) Dual role of diligence on the dependence	2.8	5
(a) Diligence on the dependence as provisional and protective measure	2.9	5
(b) Diligence on dependence as embryonic diligence in execution	2.12	5

C. DEFECTS IN THE EXISTING LAW	2.16	6
(1) Warrant too easily obtained	2.17	6
(a) The existing law	2.17	6
Court of Session warrants granted by clerk of court	2.18	6
Court of Session warrants granted by judge	2.19	7
Sheriff court warrants for arrestment	2.20	7
(b) Criticism of existing law	2.21	8
(2) Obtaining recall too difficult	2.23	8
(i) Debt already otherwise secured	2.27	9
(ii) Diligence excessive	2.28	9
(iii) Extravagant conclusions and inflated principal sums	2.29	9
(iv) Defender's financial position	2.30	10
(v) Illegitimate motive of pursuer	2.33	10
(vi) Undue delay	2.35	11
(vii) No "colourable case"	2.36	11
Borderline cases	2.37	12
Conclusion	2.38	12
D. THE NEED FOR REFORM	2.41	12
(1) Criticisms by Scottish judges and legal writers	2.42	13
(2) Principles regulating provisional and protective remedies in other legal systems	2.45	15
Overview of principles	2.46	15
North America	2.47	15
Continental Europe	2.48	15
English law: Mareva injunction	2.49	16
(3) Comparison with Scots law on provisional and protective remedies other than diligence	2.50	16
(4) Comparison with Scots law on diligence in security of future and contingent debts	2.54	17
(5) The principles of procedural fairness and due process	2.58	18
(6) The European Convention on Human Rights	2.60	18
(7) Conclusion	2.66	20
E. THE OPTIONS FOR REFORM	2.68	20
(1) Rebuttal of arguments against judicial discretionary grant of warrant	2.68	20
(a) Effectiveness of present law	2.71	21
(b) Whether proposed judicial discretion system would be ineffective?	2.72	21
Action unfounded on merits	2.74	21
Exorbitant arrestment or inhibition	2.76	21
No need for remedy	2.78	22
(c) Whether criticisms of injustice to defenders exaggerated?	2.81	22
(d) Whether analogy of other provisional and protective measures inapt?	2.84	23
(e) Cost and resource implications of judicial discretion system	2.86	23
The nature and scale of use of diligence on the dependence	2.87	23
Arrestments on the dependence	2.88	23
Inhibitions on the dependence	1.90	24
Court of Session	2.92	25

	Inland Revenue: a special case?	2.95	25
	Concerns of Court of Session	2.96	25
	Sheriff Court	2.97	25
	Conclusion	2.104	27
	Offset in savings for arrestees etc	2.105	27
(2)	Whether injustice to defenders redressible by relatively minor reforms?	2.106	27
	(a) Liberalisation of the grounds for recall	2.107	27
	(b) Strict liability for loss where action on merits fails	2.110	28
	(c) Statutory limits on the amounts arrestable	2.113	28
	(d) Conclusion	2.115	29

PART 3 - A NEW SYSTEM: JUDICIAL AUTHORISATION OF DILIGENCE ON DEPENDENCE

(1)	Nature of diligence on the dependence as extraordinary remedy	3.2	30
(2)	Applications made to a judge	3.4	30
(3)	Form of application	3.6	30
	Provisional proposals	3.6	30
	Statement of grounds of application	3.7	30
	Consultation	3.10	31
	Ex pane and inter partes applications	3.12	31
	Comparative law	3.16	32
	The hearing	3.18	32
	"Validation hearings" where warrant granted ex partel	3.24	33
(4)	Grounds for granting warrant	3.28	34
	Threshold ground: risk that enforcement will be prejudiced	3.29	35
	(i) Defender putting assets beyond the reach of his creditors	3.30	35
	(ii) Risk from defender's insolvency	3.34	35
	Summary	3.37	36
	(a) The first stage of the test	3.37	36
	(b) Reasonableness	3.38	36
	(c) Pursuer's prospects of success in his action	3.39	36
	(d) Consultation	3.43	37
	(e) Recommendation	3.45	37
(5)	Powers of court	3.46	38
	Restriction of warrant	3.49	38
	Recommendation	3.52	39
(6)	Liability of pursuer for wrongful or unjustified diligence on the dependence	3.53	39
	(a) The existing law	3.53	39
	(b) Criticism of the existing law	3.56	40
	Comparative law	3.57	41
	(c) Provisional proposals and consultation	3.58	41
	(d) Recommendation	3.61	41
(7)	Caution or consignation by pursuer	3.64	42
	Existing law and practice	3.64	42
	Comparative law	3.68	42
	Consultation	3.69	43
(8)	Caution or consignation by defender	3.72	43

	Existing law on caution or consignation by defender	3.72	43
	Provisional proposal and consultation	3.74	44
(9)	Warrants for diligence on the dependence securing future or contingent debts	3.76	44
	Common law	3.76	44
	Statute: "cause shown" in relation to aliment and financial provision	3.78	45
	Powers to restrict warrant on granting it	3.80	46
	Procedure	3.81	46
	Consultation	3.86	47
(10)	Jurisdiction of the sheriff to grant warrant for inhibition on the dependence	3.90	48
(11)	Incidence of liability for expenses of using arrestment and inhibition on the dependence	3.98	49
	The existing law	3.98	49
	Diligence on the dependence	3.103	50
	(a) Pursuer's expenses in executing warrant	3.104	50
	Consultation	3.105	51
	Proposal	3.106	51
	(b) Pursuer's expenses in obtaining warrant	3.107	51
	(c) Defender's expenses in opposing application	3.110	52

PART 4 - INTERIM ATTACHMENT OF MOVEABLES IN DEFENDER'S POSSESSION

(1)	Preliminary	4.1	53
(2)	Policy reasons underlying present law	4.2	53
(3)	Previous official consideration	4.5	53
(4)	Should interim remedy against goods in defender's possession be introduced?	4.8	54
	Consultation	4.9	54
	The case for interim remedy affecting moveables in defender's possession	4.12	55
(5)	What form should the interim remedy take?	4.16	55
	The options considered	4.17	56
	(a) First possible option: poinding on the dependence	4.17	56
	(b) Second possible option: arrestment on the dependence of moveable goods in the defender's possession	4.21	56
	(c) Third possible option: interdicts against disposing of or dealing with moveable goods in the defender's possession	4.26	57
	(d) Recommended option: interim attachment	4.32	58
(6)	The new diligence of interim attachment	4.35	58
	(a) Form and grant of warrant, and execution of interim attachment	4.35	58
	Form of warrant	4.35	58
	Grant of warrant	4.36	58
	Mode of execution	4.37	58
	(b) Exceptions and exemptions by law from interim attachment	4.39	59
	Moveables not to be liable to interim attachment unless poindable	4.40	59
	Articles specified in Debtors (Scotland) Act 1987, section 16(1)	4.41	59
	Goods in dwelling-house and curtilage to be exempt	4.42	59
	Vehicles not exempt	4T46	60
	Mobile homes	4.47	60

	Perishable goods	4.48	60
	Stock-in-trade and business assets	4.49	60
(c)	Interim attachment of articles in common ownership	4.53	61
(d)	Court's jurisdiction over interim attachment	4.56	62
(e)	Restriction and recall	4.59	62
(f)	Duration and cessation of interim attachment	4.62	63
(g)	Transmissibility of interim attachment	4.67	64
(h)	Expenses	4.68	64
(i)	Ascription of sums recovered while interim attachment is in effect etc	4.70	65
(j)	Time to pay directions in decrees and time to pay orders	4.72	66
(k)	Interim attachment on dependence of foreign proceedings	4.74	66
(1)	Duties imposed by interim attachment on defender and third parties	4.76	66
	(i) General	4.76	66
	Relationship between the prohibitory and ranking effects	4.77	66
	Personal prohibitions, remedies and sanctions	4.78	66
	(ii) Prohibition on voluntary transfers or securities	4.80	67
	(iii) Prohibition of removal, damage or destruction of attached articles	4.84	68
	Prohibition of removal from Scotland	4.84	68
	Third party removing attached article from defender's possession or control	4.85	68
	Wilful damage or destruction	4.87	68
	(iv) Duty to assist officer of court authorised to poind	4.89	69
(m)	The priority of an interim attachment	4.91	69
	(i) General	4.91	69
	(ii) The priority of poindings	4.93	70
	(iii) Competition of poindings and interim attachments with other rights: an overview	4.96	71
	(iv) Competition with defender's singular successor	4.97	71
	Sale under reservation of title	4.102	72
	(v) Competition with voluntary real rights in security	4.103	72
	Competition with pledges	4.103	72
	Other voluntary real rights in security	4.104	72
	Competition with floating charges	4.105	72
	Conclusion	4.106	73
	(vi) Competition with poindings or arrestments	4.107	73
	(vii) Competition with executor-creditor	4.108	73
	(viii) Competition with trustee in sequestration or liquidator	4.109	73
	(ix) Interim attachment to have same priority in ranking of creditors as poinding; clarification of ranking of poinding in sequestration	4.112	74
(n)	The 60 days rule in insolvency proceedings and interim attachment	4.113	74
(o)	Interim attachment and confirmation as executor-creditor by same creditor	4.115	75

PART 5 - RECALL AND RESTRICTION OF DILIGENCE ON DEPENDENCE

(1)	Preliminary	5.1	76
(2)	Grounds of recall and restriction and incidence of onus	5.4	76
	Warrant granted in an ex pane application	5.6	76
	Other cases	5:«7	77
	Recall of invalid warrant for arrestment on the dependence	5.9	77
	Recommendation	5.10	77

(3)	Jurisdiction and procedure	5.11	78
(4)	Title to apply for recall or restriction of arrestments	5.15	78
	(a) The existing law on title to apply for recall and restriction of arrestments	5.17	79
	(i) Title to apply in the depending action	5.17	79
	(ii) Arrested debts: arrestee has no title	5.20	79
	(iii) Title of third parties claiming ownership of arrested vessels, or fourth parties claiming ownership of other types of arrested subjects	5.23	80
	(b) Reform of title to apply for recall and restriction of arrestments	5.26	81
(5)	Title to apply for recall and restriction of inhibitions	5.28	81
(6)	Special and general recall of diligences and recall of warrant	5.31	81
	Types of recall of arrestments on the dependence	5.32	82
	Summary of differences between general recall and special recall of arrestment on the dependence	5.33	82
	Consultation	5.34	82
	General recall to be replaced by recall of warrant	5.36	83
	Recall and restriction of inhibition or warrant for inhibition	5.37	83
(7)	Admiralty arrestments	5.39	83
(8)	Expenses of recall or restriction or extra-judicial discharge and registration	5.44	84
	Unopposed recall of diligence properly used	5.45	85
	Need to reserve expenses of recall	5.46	85
	Expenses of registering recall	5.47	85
(9)	Loosing of arrestments	5.49	86
	(a) The meaning of "loosing"	5.49	86
	(b) Overview of main issues	5.51	86
	(c) Abolition of letters of loosing arrestment	5.52	86
	(d) Abolition of separate judicial remedy of loosing arrestments of non-maritime subjects	5.55	87
	Options for reform	5.58	87
	Consultation and recommendation	5.60	87
	(e) Retention of judicial remedy of loosing arrestments of maritime subjects	5.63	88
	(f) Loosing by sheriff clerk in summary causes	5.71	89
(10)	Jurisdiction in applications for restriction or recall	5.75	90

PART 6 - DILIGENCE ON THE DEPENDENCE: MISCELLANEOUS

(1)	Introduction ,	6.1	91
(2)	Proceedings in which diligence on the dependence competent	6.2	91
	Actions for payment of a principal sum	6.2	91
	Actions for specific implement: inhibitions	6.4	91
	Foreign proceedings	6.8	92
	Scottish proceedings other than actions for payment	6.9	92
(3)	Service of arrestment and interim attachment and registration of notice of inhibition before commencement of action	6.14	93
	Service of arrestment and interim attachment before commencement of action	6114	93
	Reporting arrestment used prior to service	6.18	94

	Registration of notice of inhibition before service of summons	6.21	95
(4)	Procedure for preventing diligence on the dependence	6.25	95
	Caveats	6.25	95
	Interdict	6.26	96
	Consultation	6.27	96
(5)	Ranking of diligence on the dependence in other processes	6.29	96
	Arrestment on the dependence	6.29	96
	Possible court orders	6.32	97
	Consultation on court orders	6.34	98
	Other processes of ranking	6.36	98
	Inhibition on the dependence	6.41	99
(6)	The negative prescription of arrestment	6.43	99
	Provisional proposal	6.48	100
	Consultation	6.49	101
(7)	No adjudication on the dependence or in security	6.55	102
(8)	Diligence in security of future or contingent debts constituted by decree or liquid documents of debt	6.59	102
(9)	Appeals	6.65	103
	Preliminary	6.65	103
	(a) Appeals against grant or refusal of warrant	6.66	104
	Avenues of appeal	6.68	104
	Requirement of leave	6.69	104
	Appeals from sheriff or sheriff principal to Court of Session	6.70	105
	Effect of appeal against warrant on diligence under warrant	6.71	105
	Reclaiming motions in Court of Session; appeals to House of Lords	6.73	105
	(b) Appeals against recall or restriction of diligence	6.74	106
	Recall, restriction etc not to take effect pending appeal	6.76	106
	(c) Appeals against incidental and ancillary interlocutors	6.77	106
	(d) Recommendation	6.78	107

PART 7 - ADMIRALTY ARRESTMENTS AND ACTIONS

(1)	Introduction	7.1	109
	(a) Preliminary	7.1	109
	(b) Types of arrestment of ships or cargo	7.2	109
	(c) Terminology: maritime hypothecs or liens	7.3	109
	(d) Distinctive features of arrestment of ships	7.9	111
	"Real diligences"; no arrestee	7.10	111
	Immobilising the ship	7.11	112
	Arrestment of common property for debt of co-owner	7.12	112
	Completion by process of sale	7.13	112
	Combination with action constituting debt	7.14	112
	Claims specified by statute and admiralty actions	7.15	112
	(e) Admiralty actions in rem distinguished from admiralty actions in personam	7.16	113
	Subject matter	7.17	113
	Defenders	7.18	113
	Associated diligences	7.19	113
	Expenses of arrestment	7120	113

	Founding jurisdiction	7.21	114
	Differences as regards arrestment of shares in a ship	7.22	114
(f)	Comparison with English admiralty arrests	7.23	114
	Maritime liens and arrestments or arrests in rem	7.25	115
	Arrest purely admiralty process in England; not Scotland	7.26	115
	Arrestment of ship in execution	7.27	115
	Arrestment on the dependence: statutory cross-border harmonisation of scope	7.28	115
	Time when arrestment takes effect	7.30	116
(2)	The jurisdictional and procedural context	7.31	116
(a)	Admiralty causes and arrestments on the dependence	7.31	116
	Admiralty causes at common law	7.32	116
	Rules of Court list of admiralty actions	7.33	117
	Statutory restriction on arrestment of ships	7.36	117
	Purpose of defining admiralty actions	7.38	118
	Retention of separate class of admiralty actions	7.39	118
	Difficulties of demarcating admiralty actions	7.42	119
	Definition in statute	7.43	119
	Competence of arrestment on dependence of claim for "damage received by a ship"	7.45	120
(b)	Sheriff court procedure in admiralty actions	7.50	121
(c)	Sheriff court arrestments in rem and actions in rem	7.52	121
(3)	Warrant for different types of admiralty arrestment: legal right or judicial discretion	7.57	123
	Overview	7.57	123
	The analogy of English law	7.59	123
(a)	Arrestment in rem enforcing maritime liens	7.61	123
(i)	The existing law	7.61	123
	The nature of maritime liens	7.61	123
	Types of maritime lien	7.62	124
	Statutory restriction on arrestment in rem	7.64	124
	Effect of maritime lien and distinction between arrestment in rem and arrestment on the dependence	7.65	124
	Development of arrestment in rem and action in rem	7.66	125
	Obtaining warrant for arrestment in rem under present procedure	7.67	126
	Arrestment in rem as indispensable incident of action in rem	7.68	126
(ii)	Warrant to arrest in rem enforcing maritime lien: legal right rather than discretionary remedy	7.70	126
(iii)	Property encumbered by maritime lien and subject to arrestment in rem	7.76	127
	Arrestment in rem of cargo	7.77	127
	Enforcement of maritime lien against freight	7.78	128
(b)	Arrestment in rem under Administration of Justice Act 1956, section 47(3)(b) securing non-pecuniary claim	7.86	129
(i)	The nature of an arrestment in rem under 1956 Act, section 47(3)(b) securing non-pecuniary claim	7.86	129
	Distinctive features of new remedy	7.88	130
(ii)	Grant of warrant for arrestment in rem under 1956 Act, section 47(3)(b) to be subject to judicial discretion	7.89	131
(c)	Diligence on the dependence of actions inpersonam	7.93	132

	(i) Arrestment of ship on dependence as discretionary interim remedy	7.93	132
	(ii) Claims specified in Administration of Justice Act 1956, section 47(2)(p) to (s)	7.99	132
	Claims specified in section 47(2)(a) to (o)	7.102	133
	The same: ship partly owned by defender	7.104	133
	Definition in section 47(2) of claims for which arrestment on dependence competent	7.105	134
	Diligence against non-maritime property on dependence of admiralty actions in personam	7.107	134
	(d) Right to re-arrest same ship, or to arrest a second sister ship, on dependence	7.108	134
(4)	Protection of owners of arrested ships: pursuer's liability and counter-security	7.111	136
	(a) The Scots rule in its international context	7.111	136
	Scots law	7.111	136
	English law	7.113	136
	Recent Commonwealth legislation	7.114	137
	European legal systems	7.115	137
	Brussels Arrest Convention and Lisbon draft	7.116	138
	(b) Recommendations for reform	7.117	138
	General	7.117	138
	Strict liability or liability for unreasonable use?	*7.119*	*139*
	Unjustified admiralty arrestment in rem enforcing purported maritime lien	7.120	139
	Counter-security	7.123	140
	Recommendation	7.124	140
(5)	Other aspects of admiralty arrestments	7.125	140
	(a) Ancillary warrants and orders	7.125	140
	(b) Arrestment of ships and their cargo on Sundays	7.126	140
	(c) Incidence of liability for expenses of arrestment and sale of a ship and recall of arrestment	7.129	141
	Expenses of arrestment	7.129	141
	Expenses of recall and caution	7.134	142
	(d) Completion of diligence by sale or forthcoming	7.136	142
(6)	Arrestment of cargo on board ship	7.137	142
	(a) Arrestment, not poinding, competent; grant of warrant to be discretionary	7.138	143
	(b) Administration of Justice Act 1956, section 47, inapplicable to arrestments on dependence of cargo on board ship	7.140	143
	(c) Mode of execution of arrestment of cargo	7.143	144
	(d) In arrestment of cargo on board ship, who is the proper arrestee?	7.144	144
	(e) Arrestment of cargo at sea and edictal service	7.149	146
	(f) Effect of arrestment of cargo in relation to the ship's movement and arrestee's dealings with cargo	7.155	147
(7)	Territorial limits on admiralty jurisdiction and on the competence of admiralty arrestments	7.161	149
	(a) Admiralty jurisdiction and its territorial limits	7.161	149
	Admiralty Court's exclusive jurisdiction to authorise arrestments of ships etc	7. 162	149

The Admiralty Court Act 1681	7.164	150
Common law rule conferring admiralty jurisdiction	7.165	150
Statutory definition of the waters subject to admiralty jurisdiction in Admiralty Court Act 1681	7.166	150
Need for modernisation of definition of territorial limits	7.169	151
Admiralty causes of action affected by territorial limits	7.170	151
Territorial limits on admiralty arrestment against ship, or cargo on board ship	7.171	151
Arrestment in rem of cargo	7.175	152
(b) Reform of territorial limits of admiralty jurisdiction applicable to place where an admiralty cause of action arises	7.176	152
(c) Reform of territorial limits of admiralty jurisdiction applying to the place where an admiralty arrestment executed	7.177	152
(8) Subjects attachable by admiralty arrestments: ships, aircraft and hovercraft	7.182	154
(a) The definition of "ships" attachable by admiralty arrestments	7.182	154
"Ship" defined in legislation on Scots admiralty arrestments	7.184	154
Meaning of "ship" in English admiralty jurisdiction	7.185	154
The formula "not propelled by oars"	7.186	155
Consultation	7.187	155
Offshore rigs and installations	7.189	155
Recommendation	7.190	156
(b) Admiralty jurisdiction and aircraft	7.191	156
(i) The common law on diligence against aircraft	7.191	156
(ii) Legislation on salvage of aircraft	7.193	156
Maritime lien for salvage of aircraft enforceable by arrestment in rem	7.195	157
Admiralty arrestment on the dependence or in execution: salvage of aircraft	7.198	157
Adaptation of Administration of Justice Act 1956, section 47 to salvage of aircraft	7.199	158
(iii) Admiralty arrestments on the dependence or in execution securing claims for towage and pilotage of aircraft	7.200	158
(iv) Admiralty arrestment of aircraft to be ancillary to admiralty actions only	7.203	158
(v) Recommendation	7.205	159
(c) Warrants to dismantle pointed aircraft	7.206	159
(d) Hovercraft	7.208	159

PART 8 - ARRESTMENTS OF SHIPS ON DEPENDENCE OF ACTIONS AGAINST DEMISE CHARTERERS

Preliminary	8.1	160
THE EXISTING LAW AND ITS BACKGROUND	8.4	160
The characteristics of charterparties by demise	8.4	160
The legislative background	8.6	161
Scots law before 1956	8.7	161
English law before 1956	8.10	162
The Brussels Arrest Convention of 1952	8.11	162
The object of the Convention	8.11	162
Articles	S.13	162
Article 9	8.14	163

The background to article 3(4)	8.15	163
Arrestment: conservatory measure or attachment preliminary to judicial sale?	8.17	164
The link between conservatory arrest and enforcement of judgment by judicial sale	8.18	164
Interpretation of article 3(4) by English courts	8.19	164
The Adminstration of Justice Act 1956, sections 47 and 48 (implementing the Brussels Convention in Scotland)	8.21	165
Interpretation of section 47(1)(a) of 1956 Act	8.24	166
Recommended amendment of section 47(l)(a)	8.26	166
The "sister ship" provision: 1956 Act, section 47(l)(b)	8.27	166
Cross-border difference: arrestment for debt of co-owner	8.28	166
Ownership of "sister ships": piercing the corporate veil	8.30	167
1956 Act, section 47(l)(a) and demise charterers	8.34	168
Implementation of Brussels Arrest Convention of 1952 by legislation in England and Wales	8.35	168
Section 21(4) of Supreme Court Act 1981	8.36	168
"Owner" does not include demise charterer	8.37	168
Parliamentary background of section 21(4) of 1981 Act	8.39	169
Subsequent international developments: revision of the Brussels Arrest Convention	8.41	170
RECOMMENDATIONS		
(1) Arrestment on the dependence of the particular ship in action against demise charterer	8.43	171
Arguments for proposed amendment	8.44	171
Arguments against proposed amendment	8.50	172
Conclusion	8.53	172
Consultation	8.55	172
(2) Judicial sale in execution of decree against demise charterer after arrestment on dependence	8.58	173
(3) No arrestment of third party's ship in execution of decree in personam against demise charterer	8.64	174
(4) Arrestment of third party's ship to found jurisdiction in action against demise charterer	8.68	175
(5) Section 47(l)(b) of the 1956 Act: the "sister ship" provision and demise charterer defenders	8.71	175
(6) Supplementary issues as to ranking of creditors	8.72	176
(a) Ranking at common law on proceeds of judicial sale	8.74	176
(i) A legislative restatement of the rules for ranking maritime claims?	8.76	176
The order of ranking maritime claims	8.77	176
Ranking of maritime claims and the general law on ranking	8.80	177
Comparative law	8.82	177
Conclusion	8.84	178
(ii) Codify rules on ranking of arrestments for demise charterer's debts?	8.85	178
(iii) Competition between arresting creditors of owner and of demise charterer	8,92	179
(b) Sequestration or liquidation of owner of ship	8.95	180

PART 9 - MISCELLANEOUS ASPECTS OF DILIGENCE

Introduction	9.1	181
A. RANKING OF DILIGENCES	9.2	181
Preliminary	9.2	181
(1) The effect and ranking of arrestments	9.3	181
The prohibition theory and the attachment theory of the effect of arrestments	9.5	181
Real rights and personal rights	9.6	182
The "preferred personal right" theory	9.7	182
(2) The fictional litigiosity theory of the arrester's preference	9.10	183
Lord Advocate v Royal Bank of Scotland: arrestment executed between creation and attachment of floating charge	9.12	183
The lona Hotels case: arrestment executed before creation of floating charge	9.15	184
The fictional litigiosity theory of the arrester's preference	9.17	184
Circles of priorities	9.20	186
Conclusion	9.23	187
(3) Sharp v Thomson and competitions between arrestments and assignations	9.24	187
(4) Equalisation of diligences	9.25	187
Equalisation of adjudications: the existing law	9.27	188
Equalisation of arrestments and poindings: the existing law	9.29	188
Comparison	9.31	189
The main issues	9.32	189
Present and future action	9.34	189
Equalisation of adjudications to be considered in our report on adjudications	9.35	189
The case for abolition of equalisation of arrestments and poindings	9.37	190
Consultation	9.46	191
Abolition of equalisation of arrestments and poindings except in formal insolvency proceedings?	9.50	192
Recommendation	9.52	192
(5) Statutory enactments on ranking of diligences in competition with other rights	9.54	193
(a) The difficulty of statutory regulation	9.54	193
(b) Insolvency Act 1986, section 60(1): rules of ranking in receivership	9.59	194
The need for legislative reform	9.66	195
Recommendation	9.69	196
B. PRIVATE INTERNATIONAL LAW ASPECTS OF ARRESTMENTS	9.70	196
(1) Extra-territorial effect of arrestments	9.70	196
(2) Protection from double exaction	9.74	197
English law: the Deutsche Schachtbau case	9.77	197
Discretionary factors: commercial pressure irrelevant	9.79	198
Discretionary factors: foreign court a tool of judgment debtor	9.80	199
Discretionary factors: risk of double jeopardy to garnishee paramount	9.81	199

The need for a safeguard under Scots law against double exaction	9.83	200
Arrestment in Scotland: attachment or decree outside Scotland	9.86	201
Action or decree in Scotland against innocent third party subject to foreign attachment	9.87	201
Consultation	9.88	201
C. APPLICATION TO THE CROWN	9.92	202
D. OTHER MATTERS CONSIDERED ON WHICH NO LEGISLATION IS RECOMMENDED	9.95	203
(1) Limits on amounts arrestable	9.95	203
The existing law and practice	9.95	203
Arrestment on the dependence	9.95	203
Arrestment in execution	9.98	203
The McKechnie Report's recommendations	9.100	204
Criticism of the existing law	9.101	205
Discussion Paper and consultation	9.102	205
Arrestment on the dependence	9.103	205
Arrestment in execution	9.104	205
(2) Arrestment of bank or other accounts in which earnings are paid	9.109	206
(3) Protection of pensions from arrestment	9.113	207
PART 10 SUMMARY OF RECOMMENDATIONS		209
APPENDIX A: Draft Diligence (Scotland) Bill		231
APPENDIX B: Table relating clauses of the draft Bill to Recommendations of the Report		259
APPENDIX C: Table showing equivalent provisions in the Administration of Justice Act 1956, s 47(2), the Diligence (Scotland) Bill, cl 26(1), the Supreme Court Act 1981, s 20 and the Brussels Arrest Convention 1952, art 1.		263
APPENDIX D: List of those who submitted written comments		266

TABLE OF ABBREVIATIONS

ALRC33
: Law Reform Commission of Australia, Report No 33 on Civil Admiralty Jurisdiction (1986) ALRC 33.

Anton & Beaumont's Civil Jurisdiction in Scotland
: P R Beaumont, Anton & Beaumont's Civil Jurisdiction in Scotland (2d edn; 1995) (Edinburgh).

Report on Aliment and Financial Provision
: Scottish Law Commission, Report on Aliment and Financial Provision (1981) Scot Law Com No 67.

Bell, Commentaries on Statutes
: G J Bell, Commentaries on the Recent Statutes Relative to Diligence or Execution against the Moveable Estate; Imprisonment; Cessio Bonorum; and Sequestration in Mercantile Bankruptcy (Edinburgh, 1840).

Berlingieri, Arrest of Ships
: F Berlingieri, Berlingieri on Arrest of Ships, A Commentary on the 1952 Arrest Convention (2d edn; 1996) (London, New York, Hong Kong) Lloyd's Shipping Law Library.

Brussels Arrest Convention
: International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships, signed at Brussels on May 10,1952. International Conventions on Maritime Law, Treaty Series No 47 (1960) Cmnd 1128.

Brussels Judgments Convention
: Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed at Brussels on September 27, 1968 (set out, as amended, in the Civil Jurisdiction and Judgments Act 1982, Schedule 1).

Consultation Paper
: Scottish Law Commission, Consultation Paper on Arrestments of Ships Securing Claims Against Demise Charterers (1990)

Encyclopaedia
: Encyclopaedia of the Laws of Scotland (Edinburgh, 1926-1935).

Graham Stewart
: J Graham Stewart, The Law of Diligence (Edinburgh, 1898).

Grant Report
: Report of the Departmental Committee on the Sheriff Court (Chairman: The Rt Hon Lord Grant) Cmnd 3248 (1967).

Gretton, Inhibition and Adjudication
: G L Gretton, The Law of Inhibition and Adjudication (2d edn;1996) (Edinburgh).

Helsinki Principles
: The Helsinki Principles on Provisional and Protective Measures in International Litigation, adopted by the International Law Association at their 67th Conferenca,held in Helsinki on, 12-17 August 1996 and ratified by the Executive Council of the Association in London on* 16 November 1996.

Inglis

Ian G Inglis, "Scotland", article in Kaw Vun-Ping et al, Arrest of Ships - 4; The People's Republic of China, Nigeria, Oman, Scotland (London, 1987) 71.

International Maritime Committee, Bulletin No 105

International Maritime Committee, Bulletin No 105, Naples Conference 1951 (1952).

Jackson, Enforcement of Maritime Claims

D C Jackson, Enforcement of Maritime Claims (2d edn; 1996) (London) Lloyd's Shipping Law Library.

Joint Committee

The Joint Committee on Diligence of the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers.

Lisbon Draft

Draft Revision of the International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships, done in Brussels on May 10, 1952, approved by the XXXIJJ International Conference of the Comite Maritime International, Lisbon 1985.

Lugano Convention

Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, opened for signature at Lugano on September 16, 1988 and signed by the UK on September 18,1989 (set out in the Civil Jurisdiction and Judgments Act 1982, Schedule 3C, as amended).

McKechnie Report

Report of the Departmental Committee on Diligence (Chairman: Sheriff H McKechnie) Cmnd 456 (1958).

McMillan

A R G McMillan, Scottish Maritime Practice (Edinburgh and Glasgow, 1926).

Macphail

I D Macphail, A L Stewart, and E R Colwell Wilson, Sheriff Court Practice (Edinburgh, 1988).

O'Malley & Layton

S O'Malley & A Layton, European Civil Practice (1989)

Stair Memorial Encyclopaedia

The Laws of Scotland, Stair Memorial Encyclopaedia (Edinburgh, 1986-1996).

Thomas

D R Thomas, Maritime Liens (London, 1980) (British Shipping Laws Series, vol 14).

NB References to any Institutional writing are references to the last edition thereof.

Part 1 Introduction

1.1 In this report, we recommend reforms of the law on diligence on the dependence, admiralty arrestments and certain other aspects of the law of diligence.

1.2 Diligence is the legal term used to denote primarily the legal methods of securing or enforcing payment of sums due under court decrees. Diligence on the dependence has reference to the provisional measures which may be taken against the property of a defender, while a court action is depending, in order to secure the pursuer's claim. At present only two types of diligence can be used on the dependence: arrestment and inhibition.[1]

Background and context of report

1.3 This is our third report on reform of the law of diligence.[2] It makes recommendations for reform on matters considered in our Discussion Paper No 84 on Diligence on the Dependence and Admiralty Arrestments (1989) among others[3] all issued under our Second Programme of Law Reform.[4] The main provisional proposal in Discussion Paper No 84 - to introduce a judicial discretion in the granting of warrant for diligence on the dependence - was strongly opposed on consultation by very important interests in our legal system.[5] Work on that and other papers had to be suspended in the reporting year 1991-1992 to divert resources to other commitments.[6]

1.4 In April 1995, reform of diligence on the dependence was the main topic considered at a seminar (jointly sponsored by the University of Strathclyde and ourselves) on the reform of diligence. This elicited a consensus on the need for some measure of reform but conflicting views on its manner and extent. Some favoured merely widening the grounds for recall of diligence on the dependence while others favoured the more radical option of introducing a judicial discretion at the stage of the grant of warrant for diligence on the dependence. The seminar was notable for an important paper by Professor Gerry Maher of Strathclyde University[7] which strongly fortified the case for the more radical approach to reform of diligence on the dependence which we had advanced in our Discussion Paper No 84 and which we now recommend in this report.[8]

1.5 The present report is submitted under our Fifth Programme of Law Reform? It will be

1 An arrestment attaches funds or other moveable property belonging to the defender or debtor in the possession of a third party. An admiralty arrestment attaches a ship or cargo in the possession of the defender or debtor. An inhibition prohibits a defender or debtor from transacting with his heritable property to the inhibitor's prejudice and gives the inhibitor a special type of preference on the debtor's insolvency.

2 Our earlier reports were Report on Diligence and Debtor Protection (1985) Scot Law Com No 95 which was largely implemented by the Debtors (Scotland) Act 1987, and Report on Statutory Fees for Arrestees (1992) Scot Law Com No 133, which remains unimplemented.

3 Discussion Paper No 79 on Equalisation of Diligences (1988); Consultation Paper on Arrestments of Ships Securing Claims Against Demise Charterers (1990); Discussion Paper No 90 on Extra-Territorial Effect of Arrestments and Related Matters (1990).

4 (1968) Scot Law Com No 8, Item 8 - the reform of the law of diligence.

5 Including the Faculty of Advocates, the Joint Committee of the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers and the Solicitor to the Inland Revenue in Scotland.

6 See our Twenty-Seventh Annual Report 1991-92 Scot Law Com No 139, para 2.9.

7 Now published in revised form as an article: see G Maher, "Diligence on the Dependence: Principles for Reform" 1996 J R 188. The article is quoted extensively in Part 2.

8 See Parts 2 and 3 below.

9 (1997) Scot Law Com No 159, Item No 1 Civil Remedies - Diligence paras 2.4-2.6.

complemented in due course by a report on diligence against heritable property (dealing with adjudication for debt and inhibition)[10] which we intend to submit before the end of 1999."

Scope and arrangement of report

1.6 Judicial authorisation of warrants for diligence on the dependence etc (Parts 2, 3, 5 and 6). Among all the legal systems which we have examined, Scots law is - unenviably - unique in treating diligence on the dependence as a matter of legal right automatically available to a litigant without even an ex pane enquiry by a judge. In Part 2, we describe the existing law, its main defects, the need for reform, the main legislative options for reform, and the reasons for recommending our chosen option. Detailed provisions for implementing that option - the introduction of a system of judicial scrutiny and authorisation of diligence on the dependence - are recommended in Part 3. In our Discussion Paper No 84, we took the opportunity of making an extensive review of the detailed rules and procedures. Following from that review, consequential and incidental reforms are recommended in Part 5 (recall and restriction of diligence) and Part 6 (miscellaneous reforms).

1.7 Interim attachment of corporeal moveables (Part 4). There is a gap in the provisional and protective measures available to litigants under Scots law since the defender's corporeal moveable property in his possession cannot be attached by any mode of diligence on the dependence of an action for payment. To fill this gap, in Part 4 we recommend the introduction in Scots law of a new diligence - to be known as interim attachment. In an action for payment, the court would have power to grant warrant for the attachment on the dependence of specified moveable goods owned by the defender. This interim attachment would normally have effect for a prescribed period, after decree for payment and disposal of the action, to allow time for the pursuer to poind the goods.

1.8 An interim attachment would pave the way for an eventual poinding but, for reasons of social policy, would be much less drastic, and less onerous to debtors, than a poinding. It would not for example entail a visit by a sheriff officer to inventory and value goods on the debtor's premises and it would not affect goods in dwellinghouses (other than vehicles in garages).

1.9 Admiralty arrestments and admiralty actions (Part 7). Reform of the principles on which diligence on the dependence is authorised raises the questions whether or how far the same principles should apply to the grant of warrant for admiralty arrestments.[12] In Part 7, we review the law on admiralty arrestments, which present special features.[13] Though these special diligences are of considerable importance in modern legal practice - consider for example the implications of arresting an oil tanker at Sullom Voe on the dependence of an action in the Scottish courts - they had received scant attention before our Discussion Paper No 84 where they were reviewed in detail.[14] A few of our proposals were implemented in the revision of the Rules of the Court of Session in 1994. The greater part are dealt with in Part 7.

1.10 In broad outline, we recommend a judicial discretion for the grant of warrant for arrestment of a ship (or cargo) on the dependence of an admiralty (or other) action in personam, or warrant for arrestment in rem securing decree of specific implement in an admiralty action in personam relating to a non-pecuniary claim. Since however an arrestment in rem in an admiralty action in rem is the only method

10 This follows upon our Discussion Paper No 78 on Adjudications for Debt and Related Matters (1988) and will take account of consultation on our forthcoming discussion paper on the reform of inhibitions.

11 Fifth Programme of Law Reform (1997) Scot Law Com No 159, paras 2.7-2.13.

12 An admiralty arrestment before decree may be one of three types viz. (i) an arrestment on the dependence of a ship in an admiralty action in personam or of cargo in an action in personam, or (ii) an arrestment in rem enforcing a maritime lien in an admiralty action in rem or (iii) an arrestment in rem securing decree of specific implement in admiralty action in personam relating to a non-pecuniary claim such as ownership or possession.

13 Eg the arrestment is directed against the ship not against an arrestee, and may be executed though the ship is in the defender's possession. In all other arrestments, the subjects arrested must be in the possession of a person other than the defender or debtor.

14 Aid, Part HI.

of making good a maritime lien (which is a real right in security) and is not an optional extra like diligence on the dependence, a judicial discretion would be out of place in its case. Accordingly warrant for arrestment in rem should continue to be available to the maritime lien-holder as of right.

1.11 We also recommend the enactment of a statutory definition of "admiralty actions", and the re-enactment of provisions of the Administration of Justice Act 1956, sections 47 and 48, in order to present the old and new statute law on arrestment of ships in a coherent, unitary re-statement. The 1956 Act harmonised Scots law and English law with each other and with the laws of other countries which are parties to the Brussels Arrest Convention.[15] That Convention is currently under revision.

1.12 Admiralty arrestments securing claims against demise charterers (Part 8). In our law, an arrestment of a ship on the dependence is permitted only where the defender owns the ship, in consonance with the sound general principle of the law of diligence that an unsecured creditor is not entitled to arrest or poind the property of A for B's debt. The rule contrasts with legislation in England and Wales[16] which, implementing the Brussels Arrest Convention of 1952," allows the arrest of a ship in an action where the defendant is the demise charterer of the ship. Following consultation,[18] in Part 8 we recommend that an arrestment of a ship should be competent on the dependence of an admiralty action in personam against its demise charterer where the ship is the particular ship with which the action is concerned.[19]

1.13 Miscellaneous aspects of diligence (Part 9). In Part 9, we consider some miscellaneous aspects of the law of diligence, including for example the ranking of diligence in competition with other rights; some private international law aspects of arrestments; and whether limits should be imposed by law on the amounts attachable by an arrestment. These matters have been raised in previous discussion papers,[20] or raised by interested persons, or identified in the course of our research.

Acknowledgments

1.14 We are grateful to those who commented on our discussion and consultation papers.[21] We also gratefully acknowledge the assistance of Professor Gerry Maher, University of Strathclyde, for his invaluable seminar paper and comments on draft legislation; Professor G L Gretton, University of Edinburgh, who also commented on draft legislation; and Mr R E M Davidson of Messrs Dorman Jeffrey and Co, who gave expert advice on admiralty arrestments.[22] None of those who assisted us bears any responsibility for the policy recommendations in this report.

15 International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships, signed at Brussels on May 10, 1952. International Conventions on Maritime Law, Treaty Series No 47 (1960) Cmnd 1128. See para 7.28 below.

16 Supreme Court Act 1981, s 21(4); County Courts Act 1984, s 28(4).

17 Articles.

18 Scottish Law Commission, Consultation Paper on Arrestments of Ships Securing Claims Against Demise Charterers (1990).

19 We also make recommendations on consequential matters viz whether that an arrestment should also be competent to found jurisdiction in an admiralty action against a demise charterer, the judicial sale of the arrested ship and the ranking of creditors in competition with the arresting creditor of the demise charterer.

20 Discussion Paper No 79 on Equalisation of Diligences (1988); Discussion Paper No 90 on Extra-Territorial Effect of Arrestments and Related Matters (1990).

21 A list of those who submitted comments is in Appendix D.

22 We are also grateful to the staff of the Registers of Scotland Executive Agency and the Scottish Courts Administration who provided us with statistics on diligences; Department of Transport officials who gave us information on the revision of the Brussels Arrest Convention of 1952; and officials of the Foreign and Commonwealth Office who advised us on the interpretation of the European Convention on Human Rights.

Part 2 The Case for Reform of Diligence on the Dependence

A. PRELIMINARY

2.1 In this Part, we describe the existing law on diligence on the dependence, its main defects, the need for reform, the main legislative options for reform, and our reasons for recommending our chosen option - the introduction of a system of judicial scrutiny and authorisation of warrants for diligence on the dependence.'

B. THE EXISTING LAW ON DILIGENCE ON THE DEPENDENCE

(1) What is diligence on the dependence?

2.2 There are two forms of diligence on the dependence, namely arrestment and inhibition.

2.3 Arrestment on the dependence. An arrestment on the dependence is a form of diligence by which the pursuer in an action for payment of money may prevent a third party holding moveable property belonging to the debtor, or money due to the debtor, from parting with it pending the disposal of the action so that the pursuer's debt may eventually be satisfied in whole or in part from the attached property or funds.[2] The arrestment has the effect of prohibiting the defender (the common debtor) from alienating the arrested subjects, and the third party (the arrestee) from parting with it, and imposes a "nexus" or preferable right over the subjects which the law will recognise and enforce in insolvency proceedings and other processes of ranking. If the pursuer is successful in the action and obtains and extracts decree for payment, the arrestment on the dependence becomes automatically equivalent to an arrestment in execution;[3] but, in processes of ranking, the arrester's preferable right in principle dates from the execution of the arrestment, not the date of extract of the decree.

2.4 Both an arrestment on the dependence and arrestment in execution of a decree, are inchoate or incomplete diligences. In order to transfer arrested funds to the creditor or to enable arrested goods or shares to be sold for his benefit or transferred to him in default of sale, the creditor must obtain decree in an action of furthcoming, which can be raised only after the arrestment on the dependence has become equivalent to an arrestment in execution.[4] In practice, an action of furthcoming is rarely necessary because the debtor, to avoid incurring liability for the expense of such an action, normally either pays the debt directly or gives a mandate to the arrestee to release the arrested funds to the creditor.

2.5 Inhibition on the dependence. "Inhibition is a preventive diligence whereby a debtor is prohibited from burdening, alienating directly or indirectly, or otherwise affecting, his lands or other heritable property to the prejudice of the creditor inhibiting".[5] An inhibition renders the whole of the inhibited debtor's heritable estate "litigious" for a period of 5 years as from the date when the inhibition, or a prior notice of inhibition, is registered in the Register of Inhibitions and Adjudications (the personal register).

---

1 The grant of warrant for arrestment on the dependence of ships is considered along with Admiralty arrestments in rem in Part 7, but some aspects of the law on arrestment on the dependence of ships, such as recall, being so closely bound up with the general law on arrestment, are considered in this Part.

2 See eg Macphail, p 349. A ship in the possession of the owner of the ship may be arrested (but not poinded) and the effect of the arrestment is to prevent the movement of the ship.

3 Abercrombie v Edgar & Crerar Ltd, 1923 SLT 271; see W J Lewis, "Arrestment on the Dependence" 1933 SLT (News) 117.

4 Creswell v Colquhoun & Co 1987 SLT 329.

5 Graham Stewart, p 526. Though called a "preventive" diligence, an inhibition does not prevent a disposal or security violating the inhibition but rather renders it reducible: see next paragraph.

2.6 The inhibition has two main effects. First, it renders reducible, at the instance of the inhibiting creditor, deeds burdening or alienating the debtor's heritable property voluntarily granted after the date of registration of the inhibition.[6] Second, in any insolvency proceedings or other processes of ranking on the debtor's heritable property, the inhibiting creditor is given a preference for his debt over any debts contracted by the debtor after the date of registration of the inhibition. An inhibition thus strikes at the debtor's future voluntary deeds and debts. An inhibition creates litigiosity but does not impose a nexus or create a real right in the nature of a security right. Rather it gives the inhibitor a right to reduce deeds violating the inhibition and a right in any process of ranking to draw such a dividend as he would have drawn if post-inhibition debts had not been contracted and post-inhibition voluntary deeds had not been granted.

2.7 In order to acquire a real right in the nature of a security right, a creditor has to use the diligence of adjudication, but warrant to adjudge on the dependence is not competent. The inhibition only strikes at future "voluntary" acts of the debtor. It does not prevent the debtor from conveying property in implement of a contract concluded before the date of registration of the inhibition. By preventing future voluntary sales or security rights over heritable property, it gives the inhibiting creditor a powerful weapon. He can normally obtain payment as a condition of discharging the inhibition and allowing it to be cleared off the personal register. Inhibition may be used on the dependence of actions in the Court of Session and sheriff court, but warrants to inhibit may be granted only on application to the Court of Session: the sheriff has no jurisdiction to grant such warrants.[7]

(2) Dual role of diligence on the dependence

2.8 In Scots law, diligence on the dependence plays the dual role of a provisional and protective measure and an embryonic diligence.

(a) Diligence on the dependence as provisional and protective measure

2.9 The system of diligence on the dependence has existed, at least in its essential features, in Scotland for centuries. Many other legal systems, in England and Wales, continental Europe, the USA and Canada,[8] make available to litigants, while court actions are in dependence, provisional and protective measures designed to prevent debtors from avoiding payment of their just and lawful debts by dissipating or disposing of their assets.

2.10 We have no doubt that such provisional and protective measures are in principle a necessary and just feature of Scots law. This view was shared by those whom we consulted and is thought to be uncontroversial.

2.11 The Scottish system of diligence on the dependence does however differ from most or all of these other legal systems, and it is these differences which fuel the main criticisms levelled against it. We revert to these later.[9]

(b) Diligence on dependence as embryonic diligence in execution

2.12 In our opinion one of these differences is partly justifiable and partly unjustifiable. Unlike all or most other legal systems, Scots law does not make a rigid distinction between diligence on the dependence and diligence in execution. Inhibition has the same legal effect in the ranking of creditors on the estate

6 Such a reduction (called a reduction ad hunc effectum) benefits only the inhibitor, the deed remaining valid in a question with other parties.

7 See eg Macphail, p 365; McKechnie Report paras 190-191. We intend to issue a discussion paper on Inhibitions, but we deal, in this Report, with the question of whether the sheriff should have jurisdiction to grant warrants of inhibition: see para 3.90.

8 See paras 2.47 - 2.49 below.

9 *See paras 2.41 et seq.*

of the inhibited debtor[10] whether it is used on the dependence or in execution. An arrestment on the dependence is automatically converted by a decree for payment into an arrestment in execution.[11]

2.13 As Professor Maher has observed, one danger in this approach is "that the general principles which inform pre-decree remedies are not automatically associated with the more particular type of interim remedy of diligence on the dependence."[12] A consequence of this has been that, in actions for payment of money, diligence on the dependence has hitherto been regarded as automatically available to pursuers as of right in broadly the same way as diligence in execution is so available. For reasons which we give below,[13] we accept Professor Maher's criticism that this approach is unjustifiable in principle.

2.14 We believe that this criticism would be fully met if - as we recommend below[14] - the substantive and procedural requirements for obtaining warrant for diligence on the dependence are made broadly the same as those governing interim remedies. Indeed our main recommendation in this report is that the pursuer should be required to persuade a judge that he is likely to lose the fruits of his court action unless he is permitted by the court to use diligence on the dependence.[15]

2.15 On the other hand, a justifiable consequence of the embryonic diligence theory of diligence on the dependence is that it has the same preference in ranking as a diligence in execution, and is subject to the same rules on equalisation of diligences,[16] and on the "reduction" of diligences in insolvency proceedings.[17] We do not recommend any change to that general approach. There is no reason in principle why the provisional and protective remedy of diligence on the dependence should affect only the defender and should not continue, as under the present law, to give the arresting or inhibiting pursuer a priority or preference over third parties in the same way as diligence in execution.

C. DEFECTS IN THE EXISTING LAW

2.16 While the need for a system of diligence on the dependence is undoubted, two important features of the Scottish system have long been rightly criticised from the standpoint of defenders, namely (1) that obtaining warrant for diligence on the dependence is too easy; and (2) that obtaining recall of unjustifiable diligence on the dependence is too difficult.

(1) Warrant too easily obtained

(a) The existing law

2.17 As a general rule, warrants for diligence on the dependence in respect of debts alleged to be presently due, are generally granted automatically without judicial enquiry in consonance with the theory that the diligence is a legal remedy to which the creditor is entitled as of right.

2.18 Court of Session warrants granted by clerk of court. In the Court of Session, warrant to arrest and to inhibit on the dependence may be obtained by one of several methods involving the administrative act of a clerk of court granting an ex parte application. The most common method is that the pursuer inserts in the printed form of summons, presented to the General Department of the Office of the Court of Session for signeting, a short form of warrant for arrestment on the dependence, or inhibition on the dependence, or most commonly both.[18] As soon as it is signeted, the warrant has the same legal effect as letters of arrestment and inhibition on the dependence. Warrant for diligence on the dependence is

10 Ie in conferring a preference by exclusion in competition with singular successors of the debtor or with his other creditors.
11 Graham Stewart, The Law of Diligence, p 231; Abercrombie v Edgar & Crerar 1923 SLT 271.
12 G Maher, "Diligence on the Dependence: Principles for Reform" 1996 JR 188 at p 191.
13 *See paras 2.41 et seq.*
14 See Part 3.
15 Recommendation 3.4 (para 3.45).
16 Bankruptcy (Scotland) Act 1985, Sch 7, para 24, which applies to an arrestment on the dependence, provided it is followed up without undue delay. We recommend the repeal of these provisions and the abolition of equalisation in Part 9 below.
17 Ibid, s 37(4) and (5).
18 RCS, r 13.2, Form 13.2-A; superseding Debtors (Scotland) Act 1838, s 16 (arrestments); Court of Session Act 1868, s 18 (inhibitions) now repealed by the Court of Session Act 1988, s 52(2) and Sch 2, Pt I.

also granted automatically where a defender who lodges a counterclaim applies for a warrant at the time of lodging the counterclaim.[19] An arrestment on the dependence,[20] and a notice of inhibition on the dependence,[21] may be used even before the service of the summons.[22]

2.19 Court of Session warrants granted by judge. In a few cases application for warrant for diligence on the dependence is by motion, eg where the pursuer lodges a minute of amendment calling an additional or substitute defender,[23] or where a defender applies for an order for service of a third party notice,[24] or applies for warrant after lodging a counterclaim.[25] Where the pursuer has omitted to obtain warrant for diligence on the dependence at the stage of the signeting of the summons, he may apply for such a warrant at any stage of the proceedings by motion to the Lord Ordinary.[26] In practice, some at least of the motions[27] for the grant of a warrant are intimated to the defender. At least where the motion is opposed, the court has a discretionary power to grant or refuse the warrant, with or without conditions as to caution[28] or consignation.[29] It follows that whether diligence on the dependence is available as of right, or only on an exercise of the court's discretion, can depend on a mere accident of procedure. It seems the better view that there is no requirement to intimate a motion for warrant for diligence on the dependence.[30] An application to the Court of Session for warrant for diligence on the dependence of foreign proceedings under the Civil Jurisdiction and ludgments Act 1982,[31] and the European Judgments Convention[32] is made by petition to the Outer House.[33] It is competent to grant the warrant ex parted It will be apparent that the cases where Court of Session warrants are granted by a judge are exceptional.

2.20 Sheriff court warrants for arrestment. Warrants for arrestment on the dependence are generally granted in the sheriff court by the sheriff clerk or his depute ex pane as a routine administrative act. The pursuer inserts a form of warrant in the initial writ or summary cause summons which he presents to the sheriff clerk when applying for warrant to cite the defender.[35] The Ordinary Cause Rules provide that warrants for citation or for arrestment on the dependence may be signed by the sheriff or the sheriff clerk.[36] In practice, the sheriff clerk normally signs the warrant for arrestment on the dependence along with the warrant for citation of the defender unless the diligence is prima facie not competent.[37] In such cases, the sheriff will decide whether to grant the warrant.[38] The certified copy initial writ with the warrant thereon is sufficient warrant to arrest on the dependence if it is otherwise competent to do so. The grant of warrant is also routine in the Ordinary Cause procedure for calling in additional or substitute defenders,[39]

19 RCS, r 25.2(3). To avoid undue repetition, we use the word "pursuer" to mean (except where the contrary intention appears) any litigant, including a defender, obtaining warrant for diligence on the dependence, and references to the "defender" should be construed accordingly.
20 Debtors (Scotland) Act 1838, s 17.
21 Titles to Land Consolidation (Scotland) Act 1868, s 155; RCS, r 13.9(3).
22 Letters of inhibition passing the signet (used mainly on the dependence of sheriff court actions) are discussed later.
23 RCS, r 13.8(2) as read with RCS, r 24.2.
24 RCS, r 26.3(2).
25 RCS, r 25.2(2)(b).
26 RCS, r 13.8(1).
27 Under RCS, r 13.8(1).
28 le a guarantee by a third party.
29 Fisher v Weir 1964 SLT (Notes) 99.
30 RCS, r 23.3(1) inter alia requires a party enrolling a motion to intimate it to a defender who has entered appearance or lodged defences. However a caveat against diligence on the dependence is not competent; Mackinlay, 20 December 1988 (unreported)(OH) Lord Cullen (inhibition on the dependence) (noted 1989 JLSS 318; RCS r 5.1). It has been represented to us by the Principal Clerk of Session that by parity of reasoning, ie that intimation would defeat the purpose of diligence on the dependence, intimation of a motion for warrant for diligence is not required.
31 Section 27. Extended by SI 1997/2780 (S.174).
32 Article 24, as set out in Schedules 1 and 4 to the 1982 Act.
33 RCS, r 14.2.
34 Eg Clipper Shipping Co Ltd v San Vmcente Partners 1989 SLT 204; Stancroft Securities Ltd v McDowall 1990 SC 274.
35 OCR, r 3.3; Form 01; SCR, r 1; Forms A, B, G, H and I; r 3(2).
36 OCR, r 5.1. If for any reason the sheriff clerk refuses to sign a warrant, the writ may be presented to the sheriff for his consideration and signature if appropriate: 5.1(3).
37 Macphail, pp 353; 815.
38 In Gebruder van Uden v Burrell 1914, 1 SLT 411 Sheriff Fyfe claimed (at p 412) that the sheriff has a discretion whether or not to grant warrant to arrest on the dependence, but this may be doubted.
39 OCR,rl8.2(2)(d).

counterclaims[40] and third party notices.[41] In summary causes, there is a counterclaim procedure which provides for the grant, by the sheriff clerk, of warrant to arrest on the dependence,[42] and in certain proceedings a third party procedure,[43] but the latter do not make provision for arrestment on the dependence. Where a pursuer omits to obtain the warrant at the commencement of an ordinary cause action, he may obtain one later by ex pane application to the sheriff clerk for a precept of arrestment.[44] An arrestment may be executed prior to the service of the initial writ.[45]

(b) Criticism of existing law

2.21 The main defect of the existing law is that warrant for diligence on the dependence can be obtained too easily. It is automatically available, as of right, to a pursuer in an action for payment of money[46] and is generally granted by way of an administrative act[47] without any judicial scrutiny or supervision.[48]

2.22 A pursuer thus has a near absolute right to use diligence on the dependence. He has a powerful weapon which he is entitled to use indiscriminately to the prejudice of the defender. We set out more fully below[49] our reasons for believing that this has an unduly harsh impact on defenders and contravenes the internationally accepted principles of due process and procedural fairness which should govern the authorisation of provisional and protective measures.

(2) Obtaining recall too difficult

2.23 The other principal criticism of the existing law is that the grounds for recall or restriction of diligence on the dependence are far too restrictive. It is almost impossible to have diligence on the dependence recalled without the court imposing a condition of caution or consignation.

2.24 The court's power to recall or restrict arrestments and inhibitions on the dependence is in theory discretionary deriving historically from the nobile qfficium of the Court of Session.[50] But in modern practice the court recalls such a diligence only if the defender can rely on one of the recognised grounds. These appear broad and liberal on paper but are in practice difficult to establish. The main grounds are:

(i) that the effect of the diligence is nimious (ie excessive) or oppressive;

(ii) that it appears prima facie to have been incompetently or irregularly exercised;[51] or

(iii) that it is ineffective.[52]

For present purposes, we are concerned only with grounds (i) and (ii). Ground (iii), namely that the diligence is ineffective, is sometimes treated as an aspect of oppression and therefore subsumed under (i).[53]

---

40 OCR, r 19.2(1).
41 OCR, r 20.3(1).
42 SCR, r21(4)-(6).
43 Act of Sedemnt (Consumer Credit Act 1974) 1985 (SI 1985/705).
44 OCR, r 3.5(2). There is no equivalent in summary cause procedure.
45 OCR, r 6.2.
46 The expression "as of right" seems to "us technically correct and accurately expresses the notion that the warrant is not normally granted by a judge in the exercise of a discretion. See however Maher, 1996 JR 188 at p 190, n 6.
47 See para 2.18 above.
48 This is the general rule. For exceptions, see para 2.19 above.
49 Paras 2.41 et seq.
50 See eg Mackay, Practice of Court of Session, vol 1, p 218; Maclaren, Court of Session Practice, p 96; Greigs, Petitioners (1866) 4 M 1103.
51 Eg Coreck Maritime GmbH v Sevrybokholodflot 1994 SLT 893 (OH); Landcatch Ltd v Sea Catch pic 1993 SLT 451 (OH); Interatlantic (Namibia) (Pty) Ltd v Okeanski Ribolov Ltd 1996 SLT 819 (OH); ciMaciocia vAlma Holdings Ltd 1993 SLT 730 (OH);
52 Eg Graham Stewart, p 198 (arrestment which on any view can attach nothing may be recalled); as to ineffective inhibitions see Henderson v Dawson (1895) 22 R 895 at p 902 per Lord McLaren; Taymech Ltd v Rush and Tompkins Ltd 1990 SLT 681 (OH); Rhodes v Boswell 1993 SC 325; Stair Memorial Encyclopaedia vol 8 para 151.
53 Eg Taymech Ltd v Rush and Tompkins Ltd 1990 SLT 681 (OH) at p 682: see para 2.33 below.

2.25 As regards the first ground, in practice, "nimiety" (or excess) and oppression are generally treated as one test.[54] Lord President Dunedin observed that a nimious and oppressive diligence may be recalled "in some cases simpliciter but much more generally on caution".[55] It is a major criticism of the law on recall that caution shifts the burden but does not take it away. In theory the court has a discretion in deciding whether to recall or restrict the diligence and whether to impose on the applicant a condition of caution or consignation. No fixed rules can be stated.

2.26 The main sets of circumstances supporting recall or restriction found in the reported cases are set out in the following paragraphs. These do touch on the main problem areas causing injustice to defenders at least in theory and may appear on paper to protect defenders adequately. In practice, however, these sets of circumstances are so narrowly construed and seriously flawed that they are often ineffectual as safeguards for defenders.

2.27 (i) Debt already otherwise secured. First, diligence on the dependence may be recalled or restricted where the pursuer's debt is already secured by a voluntary security[56] or by diligence[57] or by the defender consigning the debt.[58] This principle is correct, but it presupposes that security has already been given; so it is not much of a safeguard.

2.28 (ii) Diligence excessive. Where the diligence in question is excessive, or where it is excessive when taken along with other diligence or caution, it may be restricted, or may be recalled as regards some subjects but not others.[59] This is a valuable safeguard so far as it goes. In a recent defamation action against newspaper publishers,[60] the pursuer sued for £750,000 with interest and expenses and arrested on the dependence two sums due to the defenders totalling as much as £2,400,000 - over three times the principal sum claimed. Recall was granted on the defender finding caution for £400,000 - half the figure sought by the pursuer as caution and one sixth of the sums arrested. There are other cases.[61] The wonder is however that such excessive diligence is allowed in the first place.

2.29 (iii) Extravagant conclusions and inflated principal sums. Restriction is competent where the conclusions or craves in the action are extravagant or the sum sued for is disproportionate to the pursuer's interest.[62] The court may have regard to the nature of the action and, especially where it concludes for a random sum,[63] may, if it considers that the sum is excessive, substantially restrict the property affected by the diligence or fix caution substantially below that sum.[64] But practice seems to vary and even in damages actions the critical amount fixed for restriction or caution may often be the sum sued for plus a reasonable amount for expenses.[65] The power of restriction has to be seen against the background of a system in which it "is open to anybody to state a claim of damages against another person, and to lay

54 See Graham Stewart, pp 197-201; 568-571.

55 Barclay Curie & Co Ltd v Sir James Laing & Sons Ltd 1908 SC 82 at p 86.

56 Eg Hamilton v Henderson (1857) 19 D 745. (heritable security; inhibition recalled); Macgregor v Howie (1837) 15 S 681 (sufficient security by assignation; arrestment recalled).

57 Robert Taylor & Partners (Edinburgh) Ltd v William Gerard Ltd 1996 SLT (Sh Ct) 105.

58 Graham Stewart, p 569.

59 See eg Noble v Noble 1921, 1 SLT 57; Tweedie v Tweedie 1966 SLT (Notes) 89 (arrestment); Mclnally v Kildonan Homes Ltd 1979 SLT (Notes) 89 (inhibition); Rodger v Maracus Ltd 1990 SLT 45 (OH) (inhibition).

60 Henderson v George Outram and Co Ltd 1993 SLT 824 (OH).

61 See eg Stratmil Ltd v D & A Todd (Building Contractors) Ltd 1990 SLT 493 (OH) (S arrested £146,000 on dependence of claim for £60,000 which by concession was bound to fail: recall without caution); Interconnection Systems Ltd v Holland 1994 SLT 777 (OH) (pursuers arrested sums totalling £1,039,000 on dependence of claim for £617,000; arrestments of sums amounting to £428,000 recalled, leaving £611,000 still arrested).

62 Graham Stewart, p 198; Interconnection Systems Ltd v Holland 1994 SLT 777; Henderson v George Outram & Co Ltd 1993 SLT 824 (OH); Levy v Gardiner 1964 SLT (Notes) 68.

63 Eg damages, or count, reckoning and payment with an alternative pecuniary conclusion for damages.

64 Eg Fisher v Weir 1964 SLT (Notes) 99 (OH); Arch Joinery Contracts Ltd v Arcade Building Services Ltd 1991 SCLR 638 (OH); Rodger v Maracas Ltd 1990 SLT 45 (OH) (inhibition on dependence of claim for random sum of £600,000 as contractual damages unsupported by relevant or specific averments: recall on caution fixed at £10,000).

65 Eg Interconnection Systems Ltd v Holland 1994 SLT 777 (OH) (claim for £617,000; arrestrnents restricted to £611,000 still arrested); Robert Taylor & Partners (Edinburgh) Ltd v William Gerard Ltd 1996 SLT (Sh Ct) 105 (contractual damages claim in arbitration for principal sum of £40,000 plus £10,000 expenses; arrestments restricted tp £50,000). See also McPhedron and Currie v McCallum (1888) 16 R 45; Ellis v Menzies & Co Ltd (1901) 9 SLT 243; Bruce v Hutton (1934) 50 Sh Ct Rep 272; W J D, "Arrestment on the Dependence" 1934 SLT (News) 49 at p 49.

his damages at a ridiculous figure, and then to proceed to plant arrestments all round".[66] Again the wonder is that such excessive diligence is allowed in the first place.

2.30 (iv) Defender's financial position. There is authority that where the defender has ample funds to meet the pursuer's claim, and there is no prospect of the claim being defeated by other creditors, the court may recall the diligence as oppressive without caution.[67]

2.31 In modern practice, however, generally if the defender's financial standing is good, he will be required to give caution or consignation as a condition of recall.[68] The practice is not invariable, but the exceptions are unusual.[69] That an offer of caution is expected of the defender when applying for recall emerges from cases where his omission to do so has been regarded by the court as grounds for doubting his ability to meet the pursuer's claim,[70] or, if the defender has substantial assets, as a ground for rejecting an argument that the arrestment is nimious and oppressive.[71]

2.32 In the Taylor Woodrow case,[72] the Second Division held that though the defenders had ample assets to meet the pursuers' claim, arrestments on the dependence were not nimious and oppressive because the defenders could easily transfer these assets to their parent company or to another company within their group. It was observed:

> "it cannot be said that there is no prospect of the pursuers' claim being defeated because it could not be denied that it was open to the defenders to dispose of their assets to other companies within the group."[73] (emphasis added)

The traditional test applied by the Second Division - "no prospect of the pursuers' claim being defeated" - seems very strict and difficult to satisfy. After all, as defenders' counsel submitted, this could be said of virtually any defender because a defender, whether a company or an individual, could always dispose of his assets in order to defeat a pursuer's claim.[74] Membership of a group of companies is common in today's economy. Yet the court treated it as a "speciality" for the purposes of recall. It is true that if in lieu of caution or consignation the pursuers are content with a guarantee provided by the defenders' parent company (which would not involve either the defenders or the parent company in expense), then as in the Taylor Woodrow case[75] the diligence may be recalled. Nevertheless the case suggests that the "ample assets" reason for recall is restrictively construed in modern practice and does not always afford protection.

2.33 (v) Illegitimate motive of pursuer. Where it appears that the purpose of diligence on the dependence is not to protect the legitimate interests of the pursuer but to embarrass the defender, it may be recalled without caution.[76] Where such diligence prevents the defender from performing his contract with the pursuer, it will be recalled without caution.[77] Maintaining a clearly ineffectual inhibition on the

66 Dick and Parker v Langloan Iron and Chemical Co (1905) 21 Sh Ct Rep 139 at p 140 per Sheriff Fyfe.

67 Graham Stewart, p 199; Magistrates of Dundee v Taylor and Grant (1863) 1 M 701; cf Taylor Woodrow Construction (Scotland) Ltd v Sears Investment Trust Ltd 1991 SC 140.

68 Taylor Woodrow Construction (Scotland) Ltd v Sears Investment Trust Ltd 1991 SC 140.

69 Eg West Cumberland Farmers v Director of Agriculture of Sri Lanka 1988 SLT 296 (arrestment of ship's cargo recalled on ground that defender was titular head of foreign government department; realistic to assume that any decree for pursuers would be obtempered); Lindsay v K-Shield Double Glazing Ltd 1989 GWD 6-263 (inhibition securing counter-claim recalled, two factors being the financial circumstances of the pursuer defending the counter-claim and the comparatively small amount of the counter-claim).

70 Svenska Petroleum AB v H O R Ltd 1982 SLT 343 at p 344 (OH) per Lord Kincraig. See also David McAlpine Properties Ltd v Jack Jarvis (Kirkcaldy) Ltd 1987 GWD 16-620.

71 Mendok BV v Cumberland Maritime Corporation 1989 SLT 192 at p 193 per Lord McDonald.

72 Taylor Woodrow Construction (Scotland) Ltd v Sears Investment Trust Ltd 1991 SC 140.

73 1991 SC 140 at p 147.

74 *Idem.*

75 Taylor Woodrow Construction (Scotland) Ltd v Sears Investment Trust Ltd 1991 SC 140.

76 Levy v Gardiner 1964 SLT (Notes) 68 (OH); Svenska Petroleum AB v H O R Ltd 1986 SLT 513 at p 518; Stratmil Ltd v D & A Toad (Building Contractors) Ltd 1990 SLT 493 (OH); Conoco Speciality Products (Inc) v Merpro Montassa Ltd (No 2) 1991 SLT 225; Interconnection Systems Ltd v Holland 1994 SLT 777; Matheson v Matheson 1995 SLT 765 (OH); Hydraload Research & Developments Ltd v Bone Connell & Baxters Ltd 1996 SLT 219 (OH).

77 Conoco Speciality Products (Inc) v Merpro Montassa Ltd (No 2) 1991 SLT 225; Lapsley v Lapsley (1915) 31 Sh Ct Rep 330.

personal register only for its nuisance value will be treated as oppressive.[78] In the Hydraload case,[79] a party against whom decree in absence had passed in the sheriff court raised a "cross-action" in the Court of Session and used diligence on the dependence. In the cross-action, the averments in the summons were lacking in specification and inconsistent; the conclusions for damages were extravagant; no prior demand for payment had been made; and the pursuer in the cross-action had neither defended nor counterclaimed in the sheriff court. Lord Marnoch recalled the diligence on the dependence which he described as a "revenge" attack on the other party's financial credit or a belated riposte to the sheriff court action. This is not an isolated case.[80] It is not creditable that Scots law allows such a manifest abuse to happen at all under the official warrant of the court, but waits till after the abuse has been committed to respond, when it may be too late.

2.34 In any event the judicial response is often inadequate because there is a presumption that the pursuer's primary motive in using diligence on the dependence is to protect his interests as a litigant. It is only in relatively rare cases that the defender can rebut this presumption.[81] In the Interconnection Systems case[82] the arresting pursuers had telephoned the defenders' customers to spread news about the arrestments. The court held that abuse of the procedure had not been made out. Though the arrestments might be harming the defenders' business, recall could be granted only if they could establish that the pursuers' primary motive in using the arrestments was to divert business from the defenders to themselves rather than to protect their claim.[83]

2.35 (vi) Undue delay. In theory, the pursuer's "undue delay" in prosecuting his action is also a ground of recall.[84] Court proceedings however can take a very long time indeed before the delay is held to be "undue" for this purpose. It is competent for example to use diligence on the dependence of an action which is then sisted to allow a reference to arbitration,[85] even arbitration outside Scotland under foreign law.[86] Further diligence on the dependence may be executed while the action is sisted.[87] Lord Cullen observed:[88]

> "it is commonplace that the outcome of any proceedings is dependent upon the resolution of matters of fact and law and may take a considerable time to achieve completion; and yet in the meantime it may be appropriate that inhibition and arrestment remain in force."

A "considerable time" may mean in practice several years. Cases of recall for undue delay appear to be infrequent in modern practice.

2.36 (vii) No "colourable case". The diligence may be recalled where there is no "colourable case" or no "intelligible and discernible cause of action".[89] The averments are not:

---

78 Taymech Ltd v Rush and Tompkins Ltd 1990 SLT 681 (OH) at p 682 per Lord Coulsfield; Rhodes v Boswell 1993 SC 325.

79 Hydraload Research & Developments Ltd v Bone Connell and Baxters Ltd 1996 SLT 219 (OH).

80 See eg Stratmil Ltd v D & A Todd (Building Contractors) Ltd 1990 SLT 493 (OH).

81 For an unusual example of rebuttal, see Conoco Speciality Products (Inc) v Merpro Montassa Ltd (No 2) 1991 SLT 225. On this case Professor Maher comments (1996 JR 188 at p 193): "What is unusual about this case is precisely how rare this factual situation is. If not for the prior involvement of the court in granting interim interdict, it would be very difficult to see how the defenders could have rebutted the general presumption of the legitimacy of use of diligence on the dependence by the pursuers."

82 Interconnection Systems Ltd v Holland 1994 SLT 777 (OH).

83 1994SLTatp780F-H.

84 Graham Stewart, p 200; for an unsuccessful application for recall on this ground, see Mowat v Kerr 1977 SLT (Sh Ct) 62.

85 Motordrift A/S v Trachem Co Ltd 1982 SLT 127; Svenska Petroleum AB v H O R Ltd 1986 SLT 513; Mendok BV v Cumberland Maritime Corporation 1989 SLT 192; M T Group v Howden Group pic 1993 SLT 345 (OH); Rippin Group Ltd v ITP Interpipe SA 1995 SLT 831; Robert Taylor & Partners (Edinburgh) Ltd v William Gerard Ltd 1996 SLT (Sh Ct) 105.

86 Svenska Petroleum AB v H O R Ltd 1986 SLT 513 at p 518 (arbitration in England under English law).

87 Robert Taylor & Partners (Edinburgh) Ltd v William Gerard Ltd 1996 SLT (Sh Ct) 105.

88 M T Group v Howden Group pic 1993 SLT 345 (OH) at pp 348, 349.

89 West Cumberland Farmers Ltd v Ellon Hinengo Ltd 1988 SLT 294 (OH) at pp 294-5 per Lord Weir; Clipper Shipping Co Ltd v San Vincente Partners 1989 SLT 204 (OH); Stratmil Ltd v D & A Todd (Building Contractors) Ltd 1990 SLT 493; Taylor Woodrow Construction (Scotland) Ltd v Sears Investment Trust Ltd 1991 SC 140; PTKF Kontinent v VMPTO Progress 1994 SLT 235 (OH); Hydraload Research & Developments Ltd v Bone Connell and Baxters Ltd 1996 SLT 219 (OH). As to inhibition see Barstow v Menzies (1840) 2 D 611.

"examined with anything approaching the standard of scrutiny as would occur in a procedure roll debate. Recognition has to be made that on occasions there is great urgency in instituting proceedings particularly when it is apprehended that a vessel is about to sail beyond the jurisdiction of the court".[90]

It is probably true to say that in current practice the court will generally not recall an arrestment on the dependence, except on full caution or consignation, even in cases where the pursuer's pleadings and quantification of his claim are rough or insubstantial and lacking in specification. In the Interconnection Systems case[91] the defender applying for recall contended that the pursuers' case on the merits was lacking in specification. This contention was rejected on the ground that whatever ultimately might be the strength or weakness of the pursuers' case, it had to be assumed at this stage that there was a proper and fuller basis for the pursuers' action against the defender.[92]

Borderline cases

2.37 In some cases it is not entirely clear whether the ground of recall without caution is, or ought to be, invalidity or nimiety and oppression. Thus, where an arrestment on the dependence has been used in bad faith, as where the property has been wrongly detained in order to create the opportunity to lay the arrestment, the arrestment has sometimes been treated as invalid[93] and sometimes as oppressive.[94] To this indeterminate category perhaps belong also cases where arrestments are used by trust beneficiaries against a trustee in order to prevent him from ingathering the estate or to secure a preference over other beneficiaries.[95]

Conclusion

2.38 The foregoing examples of nimiety and oppression demonstrate that it is not sufficient for a defender to show that the diligence on the dependence has harmed his business or personal circumstances; that it is not clear that diligence on the dependence can be recalled where the substance of the pursuer's case is weak; and that the onus of establishing a ground for recall lies on the defender, who can be sure of recall only if he is prepared to provide a substitute interim remedy to the pursuer by way of caution or consignation.

2.39 In recent cases judges have expressly recognised that diligence on the dependence does confer collateral advantages on the pursuer and thereby tilts the balance of advantage in his favour until the case is disposed of by decree or extra-judicial settlement. These collateral advantages are however seen as an inevitable feature of the present law which is so deeply entrenched that it cannot be changed by judicial decision.

2.40 Perhaps the deeply entrenched, near-absolute right of the pursuer to use diligence on the dependence has had the indirect effect of influencing the courts to refrain from liberalising the law on recall significantly. It would arguably be inconsistent for the law to take away with one hand wide rights which it has just conferred with the other hand.

D. THE NEED FOR REFORM

2.41 The strength of the case for reform is evident from (1) the criticisms of diligence on the dependence made by respected Scottish judges and legal writers over a long period; (2) a comparison with the principles

90 West Cumberland Farmers Ltd v Ellon Hinengo Ltd 1988 SLT 294 at p 295.
91 Interconnection Systems Ltd v Holland 1994 SLT 777 (OH).
92 1994 SLT at p 781B:"At this stage in the proceedings it appears to me that the proper approach is to proceed on the basis that responsible counsel did have evidence which warranted the making of the averments of inducement of breach of contract which appear in the summons, and that he was entitled to commit the pursuers to the position in fact adopted on record".
93 Azcarate v Iturrizaga 1938 SC 573.
94 See Rintoul Alexander & Co v Bannatyne (1862) 1 M 137; classified by Graham Stewart, p 198 under the head of nimious: see also Svenska Petroleum AB v H O R Ltd 1986 SLT 513 at p 518.
95 Graham Stewart, p 199.

regulating "interim and protective measures" or "pre-judgment" remedies in other legal systems in England and Wales, continental Europe, and North America; (3) a comparison with the principles regulating other forms of interim and protective measures (eg interim interdict) in Scots law; and (4) a comparison with the principles regulating the grant of warrant for diligence in security of future or contingent debts in Scots law.

(1) Criticisms by Scottish judges and legal writers

2.42 In view of the opposition to radical reform which we encountered on consultation, it is necessary to draw attention to the long-standing and severe criticisms of the law made by respected Scottish judges and writers. The author of a standard work on sheriff court practice Sheriff W Jardine Dobie, observed with reference to arrestment on the dependence:

> "... a disinterested enquirer, unacquainted with our forms of procedure, might well express surprise, if not amazement, at a process which enables any random pursuer to impound his opponent's funds while he drags through the Courts a claim which may be not only ill-founded, but preposterous".[96]

His description of the unfairness to defenders (written in 1934 but still valid) has never been properly controverted.

> "But whatever the views of a pursuer, the legitimate rights of the defender cannot be entirely ignored. It is easy to affirm that an impecunious defender cannot be hurt by arrestments and an affluent one can get a recall on caution. That comforting dilemma in no sense exhausts the possibilities. The impecunious usually litigate with impunity, and a wealthy corporation sued for some thousands of pounds, or a merchant embroiled over some business transaction, will usually have little trouble in finding security for a reasonable sum. But these are just the circumstances in which the question will not arise. If a merchant is attacked by a rival firm out for mischief, or the man in the street is served with an action of damages for slander, and the amount of the claim is in either case impressive, the defender may be placed in a real difficulty by diligence on the dependence. He can, no doubt, get a recall on caution; but insurance and guarantee companies, not being philanthropic institutions, will expect, in addition to the premium, a transfer or deposit of securities reasonably sufficient to cover their liability. So an appeal to the Court brings no real relief from the incubus, but merely shifts the position of the burden. And it is not the least disturbing feature of the business that, even in actions of damages admittedly brought for a random sum, the amount to which the arrestments will be restricted, or for which caution must be found, will in all probability, if [the] pursuer's advisers shew any faith in their case, be the amount sued for, plus a fair sum for costs.
>
> *... a guid gangin' plea, if taken on appeal to the Inner House, may ... without any complications spin out for two years; and for that period the funds of the defender subject to attachment or pledged for caution are for all practical purposes extra commercium"*[97]

Judicial dicta include the following:

> "The use of inhibition and arrestment may be productive of the most serious injury to the mercantile credit and interests of the party against whom they are used: and it might frequently happen that reparation for such injury could not be obtained".[98]

> "It must be borne in mind that a warrant of arrestment is granted as a matter of course on the mere application of an alleged creditor who desires security for his debt, - a state of the law which has often been the subject of complaint in reference to vessels of large burden with valuable cargoes suddenly detained, when on the point of sailing, in security of claims which have ultimately proved to be unfounded".[99]

---

96 W J D, "Arrestments on the Dependence", 1934 SLT (News) 49 at p 49.
97 Ibid, 1934 SLT (News) 49 at pp 49-50.
98 Beanie & Son v Pratt (1880) 7 R 1171 at p 1173 per Lord Ormidale.
99 Carlberg v Borjesson (1877) 5 R 188 at p 195 per Lord Shand.

"The evil done by the diligence is the same, whether the arrestment has been successful or not. That evil is the creation in the minds of arrestees of doubt as to the stability of the common debtor. The average man who receives an arrestment schedule does not stop to discriminate whether that imports an arrestment in execution, or merely an arrestment on the dependence. Most probably he does not know the difference between the two. Even if he does, the impression conveyed to his mind is that the defender is wrongously refusing to pay a claim made against him, and is being sued in court to compel payment; and to the mind of the commercial man in the street I fear an action in court infers resistance to a just claim. If the process of arrestment is repeated, it is not difficult to see how easily the reputation of a commercial firm might be injured in the eye of the commercial community...".[100]

"The reckless use of arrestment on the dependence is, I fear, becoming a crying evil... It should be borne in mind that a warrant to arrest is necessarily granted upon a pursuer's ex pane statement, and in nine cases out of ten such general illiquid claims[101] do not turn out to have been the kind of pecuniary conclusions upon which a warrant to arrest on the dependence should have been granted at all".[102]

2.43 The criticisms go back as far as 1822 when Walter Ross[103] observed that inhibition on the dependence:

"is the most cruel and impolitic diligence that was ever introduced into the law of any country. Because one man pretends or imagines that another is indebted to him, and the experience of every day shows upon what slight grounds these claims are reared up; is it reasonable that another of landed property should, by a judicial writ taken out in the common routine of the court, receive a blow upon his credit, be recorded not only as an actual, but a kind of insolvent debtor, and, in effect, have the amount of that pretended claim made pro tempore a debt upon his lands?"

A standard work on sheriff court pleading[104] remarked of arrestment on the dependence:

"there is no greater hardship connected with litigation than the arbitrary and uncalled-for use of this powerful means of persecution ...".

2.44 We do not accept the representations made to us on consultation that these criticisms can simply be brushed aside as out-of-date. The leading monograph on inhibitions, after citing Ross's criticisms, comments:

"Little has changed. Inhibition on the dependence continues to be used to pressurise (or "concuss" to use the technical word) defenders in an unfair manner".[105]

Lord Penrose recently remarked:

"It is notorious that there may be collateral advantages to a pursuer who effectively arrests substantial sums due to a defender. Maintaining positive cash flow is essential in any well managed business. Interruption of cash flow will necessarily affect the business's budgetary strategy and may well affect short term liquidity and the efficiency of financial management. Claims may be compromised in the face of effective arrestments which would otherwise be contested".[106]

As one consultee commented to us: "it is interesting to see such strongly expressed condemnation made since at least 1822 by sheriffs, academic lawyers and others unlikely to state their views in such fashion without ample justification".

100 Dick and Parker v Langloan Iron and Chemical Co Ltd (1904) 21 Sh Ct Rep 139 at p 140 per Sheriff Fyfe.
101 le actions for random sums such as damages, or count, reckoning and payment.
102 Gebruder van Uden v Burrell (1914) 1 SLT 411 at p 412 per Sheriff Fyfe.
103 Lectures on Conveyancing and Legal Diligence (2nd edn) vol 1, p 468.
104 Lees, Handbook of Written and Oral Pleading in the Sheriff Court (1st edn; 1888) p 40.
105 Gretton, Inhibition and Adjudication (2d edn;1996) p 6.
106 Interconnection Systems Ltd v Holland 1994 SLT 777 at p 780.

(2) Principles regulating provisional and protective remedies in other legal systems

2.45 We pointed out in our Discussion Paper[107] that Scots law appeared unique in treating diligence on the dependence[108] as a matter of legal right automatically available without even an exparte enquiry by a judge.

2.46 Overview of principles. In an important seminar paper,[109] these and other systems were surveyed by Professor Maher who isolated the principles governing pre-judgment remedies in North America and Europe as well as the Mareva injunction. Similar principles were included by the International Law Association in The Helsinki Principles on Provisional and Protective Measures in International Litigation of 1996. (The Full Council of the Association commended the Principles to the attention of law reform agencies for consideration in developing the law).

2.47 North America. The more important provisions on prejudgment remedies in the USA and Canada are highlighted by Professor Maher as follows:[110]

> "(1) The remedies which are equivalent to diligence on the dependence in Scots law are classified as part of the general law on prejudgment remedies, and should be coherent with the underlying principles of that branch of the law.
>
> (2) As such, these remedies are extraordinary in nature.
>
> (3) Accordingly, there must exist meaningful substantive grounds to justify the granting of these remedies.
>
> (4) The substantive grounds relate both to the plaintiff's chances of success in the action, and a shown need for the remedy.
>
> (5) In addition procedural due process requires that these substantive grounds are considered by a judge before a remedy can be granted.
>
> (6) Procedural due process also raises a presumption that the defendant is given advance notice of the application and a hearing prior to any grant of the remedy.
>
> (7) This presumption may be rebutted but only if the plaintiff can show good cause for so doing and subject to safeguards to protect the defendant's position.
>
> (8) These safeguards include the provisional nature of [a] remedy granted on an ex pane application, with a resulting need for a validation hearing where the onus is with the plaintiff; undertakings by the plaintiff where the remedy proves unjustified, ie where the plaintiff does not succeed in the action or the plaintiff cannot establish that special circumstances exist to justify its need."

These principles flow from the over-arching concept of due process of law which limits the scope of prejudgment remedies in the USA and Canada and which the Scots law on diligence on the dependence very clearly infringes.

2.48 Continental Europe. That the main principles and features of continental European systems[111] very closely resemble the North American laws, and differ extremely widely from the Scots law, clearly appears from the following description by Professor Maher of those features:[112]

> "(1) a pursuer must establish cause shown for the remedy in terms of the merits of the action;
>
> (2) the pursuer must also establish the need for an interim remedy;
>
> (3) a pursuer must lodge security in respect of the defender's loss where the pursuer's claim fails;

---

107 See paras 2.45-2.55.

108 Here we refer to diligence on the dependence securing debts already due. Diligence on the dependence securing future and contingent debts is different: see paras 3.76-3.89 below.

109 April 1995; now published in revised form as an article: see G Maher, "Diligence on the Dependence: Principles for Reform" 1996 JR 188.

110 1996 JR 188 at pp 198-199.

111 See O'Malley and Layton, European Civil Practice (1989) Chapters 48 - 55; Discussion Paper No 84, paras 2.51 - 2.54.

112 Maher, 1996 JR 188 at p 199.

(4) damages automatically ensue either if the pursuer loses on the merits or the provisional remedy is unnecessary;

(5) applications for a remedy are made to a judge. ...

(6) application may be made ex pane, usually on cause shown for this step, but the resulting remedy is temporary only, and calls for the pursuer to validate it at a subsequent contested hearing."

Maher's comparative survey[113] suggests[114] that the legal systems of mainland Europe States in the European Union (and possibly beyond) conform to all, or all but one, of these general principles.

2.49 English law: Mareva injunction. In English law, the nearest equivalent to diligence on the dependence,[115] is the Mareva injunction.[116] The North American and continental European principles outlined above bear a striking resemblance to the principles regulating the Mareva injunction[117] whose chief characteristics Professor Maher also summarises:[118]

"(1) An application for a Mareva injunction may be made only to a judge of the High Court, not the county court;

(2) the plaintiff must show that he has a good arguable case;[119]

(3) the plaintiff must show that there is a real risk that the defendant may remove or conceal his assets or deal with them so as to defeat the plaintiff's claim;[120]

(4) the plaintiff must make a full and frank disclosure of all material facts known to him (including those unfavourable to his case), and failure to do so will result in the injunction being discharged;[121]

(5) the plaintiff must give an undertaking in damages in case either he fails on the merits of the action or the injunction turns out to be unjustified."[122] (footnotes in original)

The laws of Northern Ireland and of the Republic of Ireland are similar, both following English decisions on the Mareva injunction.[123]

(3) Comparison with Scots law on provisional and protective remedies other than diligence

2.50 One does not need to go to foreign legal systems to find correct principles inconsistent with the rules governing diligence on the dependence. Within Scots law itself, the analogy of the law and procedure in other provisional and protective remedies, especially interim interdict, also suggests that a pursuer's virtually absolute right to use diligence on the dependence is exorbitant and requires reform.[124]

---

113 Based on our Discussion Paper and the National Sections in O'Malley & Layton, European Civil Practice (1989). Belgian law has no validation proceedings nor need a pursuer there lodge security (ibid, pp 1197-1198). This latter requirement is not found in the law of the Netherlands and possibly not in Luxembourg (ibid, pp 1443-1444; 1409-1410).

114 Maher, 1996 JR 188 at p 199, text keyed to n 40.

115 Apart from the special Admiralty process of arrest of ships.

116 Which takes its name from one of the two cases in which it was first granted: Mareva Campania Naviera SA v International Bulk Carriers SA [1975] 2 Lloyds Rep 509 (CA) also reported at [1980] 1 All ER 213. A Mareva injunction restrains a defendant from disposing of, removing or concealing assets to defeat the claim of a plaintiff in an action in the courts in England and Wales. For Mareva injunction guidelines and standard form see Practice Direction [1994] 4 All ER 52. Unlike diligence on the dependence, a Mareva injunction does not create a preference for the plaintiff in a competition with other creditors: Iraqi Ministry of Defence v Arcepey Shipping Co SA [1981] QB 65 at pp 71-72.

117 The salient features were described briefly in our Discussion Paper No 84, paras 2.48-2.50.

118 1996 JR 188 at p 200.

119 Rasu Maritima SA v Perusahaan Pertambangan (The Pertamina) [1978] QB 644.

120 Third Chandris Shipping Corpn v Unimarine SA [1979] 2 All ER 972.

121 Siporex Trade SA v Comdel Commodities Ltd [1986] 2 Lloyd's Rep 428.

122 Third Chandris Shipping Corpn v Unimarine SA [1979] 2 All ER 972. The plaintiff must also give an undertaking to pay the reasonable costs incurred by any third party as a consequence of complying with the injunction.

123 O'Malley & Layton, European Civil Practice paras 57.58 and 52.59 respectively.

124 See our Discussion Paper No 84, para 2.46; and especially Maher, 1996 JR 188 at pp 201 - 204.

2.51 In its main role, diligence on the dependence closely resembles interim interdict, which though a prohibitory remedy enforceable by the sanctions for contempt of court, and not a true diligence creating a nexus or preference, has been described as "in the nature of a diligence in security".[125] Both are interim remedies. Both are designed to secure that a pursuer's rights are not defeated by the defender during the dependence of an action. Both are generally granted on an ex pane application by the pursuer. Broadly speaking, both are provisional and become final or absolute in the event of the pursuer being successful in his action.

2.52 There is however this difference that interim interdict is a discretionary remedy granted by the court only on cause shown by the pursuer. The onus is on the applicant for interim interdict to show why he should have an interim remedy pending disposal of the merits of the action. Further, the pursuer may be required to find caution as a condition of obtaining interim interdict.[126] In stark contrast, warrant for diligence on the dependence for debts aleady due is generally available to a pursuer as of right; he need not show aprimafacie case for obtaining the interim remedy; and the onus lies on the defender to show cause why the diligence should be recalled or restricted, and to find caution.

2.53 While the analogy of interim interdict should not be pressed too far,[127] nevertheless, it is difficult to see why two remedies so similar in their essential roles and functions should have such different procedures and prerequisites.

(4) Comparison with Scots law on diligence in security of future and contingent debts

2.54 To find correct principles, one does not need to go to foreign legal systems or other interim remedies. Often overlooked is the fact that the present Scots law on diligence on the dependence securing debts already due is inconsistent not only with provisional and protective remedies in other legal systems, and with the Scots law on non-diligence interim remedies (such as interim interdict): it is also inconsistent with the Scots law on diligence (whether on the dependence or in execution) in security of future or contingent debts.[128]

2.55 At common law,[129] diligence (whether on the dependence or in execution) to secure a future or contingent debt is recognised as competent but not normally warranted.[130] In other words it is a type of extraordinary remedy broadly resembling those found in other legal systems and in other branches of Scottish law and procedure. The pursuer has to aver "special circumstances" justifying the grant of warrant.

2.56 Traditionally these special grounds were that the defender was contemplating abscondence[131] or verging on insolvency.[132] These grounds are examples of the two types of circumstance which may deprive a creditor of the fruits of his decree, namely intentional acts by the defender (abscondence) and the more passive inability to pay debts in full which results in a race of diligences or sequestration by other creditors. In the modern law, these traditional special grounds have been widened[133] to include cases where the defender is likely to put assets beyond the reach of his creditors.[134]

125 Graham Stewart, p 780.

126 Wright v Thomson 1974 SLT (Notes) 15.

127 See para 2.85, n 161 below.

128 For the meaning of "future" and "contingent" see Costain Building & Civil Engineering v Scottish Rugby Union 1994 SLT 573 (Five Judges) at pp 576, 577 per Lord President Hope: "An obligation is future...when, although not presently exigible, it is dependent on no other condition than the arrival of the day which has been fixed for its performance. It exists from the date when the obligation was entered into but there is no entitlement to enforce performance until the day for performance has arrived. An obligation is conditional or contingent if its enforceability depends upon an event which may or may not happen, or if it is subject to a resolutive condition by which it may cease to be exigible on the occurrence of some uncertain event".

129 The position has been altered by the Family Law (Scotland) Act 1985, s 19.

130 Gillanders v Gillanders 1966 SC 54; Costain Building & Civil Engineering v Scottish Rugby Union 1994 SLT 573 (Five Judges) at p 576 per Lord President Hope; Graham Stewart, p 201.

131 *Known by its Latin label, in meditationefugae.*

132 *Known by its Latin label, vergens ad inopiam.*

133 See Wilson v Wilson 1981 SLT 101(OH) at p 102 per Lord Maxwell: "while vergens ad inopiam and in meditationefugae are the normally and most commonly recognised special circumstances, or at least were in tirnes gone by, special circumstances are not necessarily confined to these two states of affairs".

134 Tweedie v Tweedie 1966 SLT (Notes) 89 at p 90 per Lord Thomson. Cf Bums v Burns (1879) 7 R 355 at p 357 per Lord President Inglis: "putting away his funds with the intention of not fulfilling his contract".

2.57 So even within the domain of our law of diligence itself - let alone other interim remedies and foreign legal systems - one can find correct principles suggesting that the present law on diligence on the dependence securing debts already due should be changed. Already these traditional special grounds are used on the dependence of actions for future or contingent debts, especially (but not only) financial provision on divorce.

(5) The principles of procedural fairness and due process

2.58 As the foregoing outline demonstrates, all developed legal systems acknowledge the paramount principle of procedural justice that the parties to a dispute are to be treated with impartiality and on an equal footing. The reasons are well summarised by Professor Maher:

> "procedural fairness is necessary as a way of minimising the risk of the unfairness or inaccuracy of the final disposal of a case, and final disposal of a case should as far as possible reflect the substantive merits of the dispute. It should also be noted that final disposal of a case does not necessarily mean disposal after a fully-contested litigation. Indeed there is a public interest in parties settling their disputes at the earliest possible opportunity. But there is also public interest in ensuring that parties engage in settlements which are themselves fair, and in this context fairness means a settlement which reflects the respective assessments made by the parties of the risks involved in establishing or in failing to establish in litigation the strength of their case on the substantive merits.
>
> It is against this general aim of seeking to achieve fair disposals, including fair settlements, which reflect the substantive merits of a dispute, that any system of pre-decree remedies must be assessed. The effect of granting one party an interim remedy is to tilt the balance in favour of that party achieving a final disposal, including settlement, in his favour."[135]

2.59 Professor Maher also argues that any justification for one-sided remedies:[136]

> "must be related to the interim assessment of the substantive merits of the case of the party seeking it as well as the need for such a remedy being granted at this stage of the proceedings. The obvious effect of obtaining an interim remedy of this sort is that the party holding it bargains for settlement from a stronger position than he enjoyed beforehand. If that remedy was granted without consideration of the merits of the applicant's case, then any resulting settlement runs the risk of being unfair. This outcome would also arise, no matter the merits of the claim, if an interim remedy was granted without any indication that it was necessary for the applicant to be awarded it."[137]

We agree with these remarks subject to the comment that there are considerable practical constraints on consideration of the merits of the applicant's case at the stage of an application for warrant.

(6) The European Convention on Human Rights

2.60 The fact that the procedural safeguards for the defender under the Scots law on diligence on the dependence are much weaker than under other European legal systems prompts the questions whether it infringes the European Convention on Human Rights (ECHR) and, if so, what reforms are required to ensure compliance. Two provisions of ECHR are or might be relevant.[138]

2.61 The first is Article 6 which protects the right to a fair trial by providing:

> "In the determination of his civil rights and obligations..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...".

135 1996 JR 188 at p 202.

136 Idem.

137 See Interconnection Systems Ltd v Holland 1994 SLT 777; Conoco Speciality Products (Inc) v Merpro Montassa Ltd (No 2) 1991 SLT 225. In the case of certain types of interim remedies, for example recovery of documents or other evidence, balance is achieved by allowing each party to make use of the remedy. However other interim remedies are one-sided in effect, and this is especially so if, once granted, they cannot be easily recalled.

138 In considering these provisions we have been greatly assisted by Mr M R Eaton and Ms S Dickson of the Foreign and Commonwealth Office.

If that article applied, there must be doubt whether our present law would meet its procedural requirements. The same doubt would be raised by minor reforms, such as liberalising the grounds of recall, which did not introduce adequate safeguards[139] prior to the grant of warrant for diligence on the dependence. It seems likely however that Article 6 does not apply because diligence on the dependence does not involve a determination of civil rights within the meaning of the article. There is authority that "Article 6 does not apply to ... ancillary court proceedings concerning an application for interim relief'.[140] In X v UK'[141] the Commission considered that:

> "the right of access to Court which is guaranteed by Article 6(1) of the Convention does not extend to the interim relief procedure before the Industrial Tribunal. In fact this procedure neither finally nor even provisionally determines the civil rights of a dismissed trade unionist vis-a-vis his employer. It only regulates his temporary position pending the outcome of the main proceedings."[142]

This approach seems to cover diligence on the dependence as an ancillary process with temporary effect not affecting the merits in the principal action.

2.62 More relevant is ECHR, Article 1, First Protocol (the right to property) which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The Court's classic and authoritative analysis is as follows:[143]

> "... this provision comprises three distinct rules. The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of peaceful enjoyment of property; the second rule, contained in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions; and the third rule, stated in the second paragraph, recognises the contracting states are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not 'distinct' in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule ..."

2.63 The grant of warrant for diligence on the dependence appears to amount to control of use of property within Article 1, First Protocol of ECHR. That provision properly construed requires that diligence on the dependence procedures (a) are necessary for the general interest. Moreover they must "strike a fair balance between the demands of the general interest of the community and the requirement of the protection of the individual's fundamental rights".[144] The "fair balance test" in practice means that they (b) do not impose an excessive burden on the individual; and (c) are generally lawful and proportionate.

---

139 Eg judicial scrutiny of the grounds for warrant and of the question whether the defender should have an opportunity to object.

140 Harris, O'Boyle and Warbrick, The Law of the European Convention on Human Rights (1995) 191 citing two decisions of the European Commission on Human Rights, viz the X v UK case (see next footnote) and Alsterlund v Sweden Application No 12446/86, 56 Decisions and Reports 229 (1988).

141 Application No 7990/77, 24 Decisions and Reports 57 (1981)(the applicant a prisoner complained that there had been interference by the prison authorities with his right of access to court for the purpose of seeking interim relief under the Employment Protection Act 1975, s 78).

142 Ibid at p 61.

143 Sporrong and Lonnroth v Sweden A 52 para 61 (1982). See Harris, O'Boyle and Warbrick, The Law of the European Convention on Human Rights p 521 et seq.

144 Sporrong and Lonnroth v Sweden A 52 para 69 (1982). Article 1(2) permits the State to enforce such laws as "it deems necessary" but the Court has held that a fair balance has to be struck between the right of the State under Article 1(2) and the right of the individual to the peaceful enjoyment of his property in Article 1(1), first sentence.

2.64 We think that diligence on the dependence complies with requirement (a) since the enforcement of lawful debts is in the general interest. As regards (b) the defender must show that the measure was manifestly unjustified to establish a breach of Article 1. If the State can show that the "fair balance" issue was taken into account when the measure was imposed this will assist the State's case. It is possible that it would be held that the present virtually unique common law procedures do not satisfy the "fair balance" test. At the other extreme, judicial scrutiny and a presumption in favour of inter panes procedure prior to the grant of warrant, on the lines accepted throughout Europe, would no doubt satisfy the "fair balance" test. Since that test raises questions of degree, it is unclear to us that minor reforms falling short of those safeguards would satisfy it. Test (c), proportionality, presents a similar range of considerations.

2.65 To sum up, there is an appreciable risk that the present common law procedures are not compatible with Article 1, First Protocol of ECHR; that our recommendations below for judicial scrutiny, a presumption in favour of inter panes procedure prior to the grant of warrant, and other safeguards for defenders[145] would be compatible; and that the compatibility of minor reforms predicating the retention of automatic grant of warrants is unclear.

(7) Conclusion

2.66 Virtually all of those whom we consulted agreed that legislative reform of some kind is necessary.[146] Views differed widely however as to the nature and extent of the defects in the present system, which in turn resulted in an equally wide divergence of view as to the reforms needed to cure these defects. We describe the results of consultation below.

2.67 In summary, a pursuer's virtually absolute right to use diligence on the dependence is unprincipled and unjust. It is unique to Scotland and does not conform to principles of due process and procedural fairness recognised in other legal systems, in the Commonwealth, North America and Europe. There is at least an appreciable risk that it is not compatible with the European Convention on Human Rights, Article 1, First Protocol, though that matter is not free from doubt. Within Scotland itself, diligence on the dependence does not conform to the general principles of Scots law governing other provisional and protective measures. In practice, it unwarrantably puts undue pressure on a defender to settle a claim which is unfounded. It disrupts the ordinary course of a defender's business and causes damage to a defender's credit, in circumstances where the diligence is unnecessary because there is no real or substantial danger that the pursuer will lose the fruits of his decree. The injustice to defenders caused by the automatic grant of warrant, unjust in itself, is exacerbated by the near impossibilty of the defender obtaining recall without providing caution or consignation. Caution or consignation merely shifts the incubus without removing it. We have no doubt that reform is essential.

E. THE OPTIONS FOR REFORM

(1) Rebuttal of arguments against judicial discretionary grant of warrant

2.68 In our Discussion Paper No 84, we provisionally proposed that the court should have a discretionary power, exercisable by a judge on the pursuer's application initially ex pane, to grant or refuse warrant for diligence on the dependence, subject to restrictions or conditions.[147] On consultation, this proposal met with a mixed reaction. It is clear that a significant number of lawyers, including some experienced court practitioners, feel strongly that the present system of diligence on the dependence works reasonably well so that at most only minor reform is needed.

2.69 The supporters of the status quo or of minor reforms argued (a) that the present system is effective from the pursuer's standpoint; (b) that the proposed judicial discretion system would not be effective from that standpoint; (c) that the criticisms of the injustice of the present system to defenders were

---

145 See Part 3 passim.

146 The exception was the Joint Committee who resisted any amendment of the rules for granting the warrant and the grounds of recall.

147 Proposition 2(2) (para 2.69). We also proposed (Proposition 6; para 2.101) that the pursuer would be'liable in damages for wrongful diligence on the dependence if his action should turn out to be wholly unsuccessful but that this liability would be confined to cases where the pursuer had misled the court.

exaggerated; (d) that the analogy of other provisional and protective measures in Scots law and other legal systems was inapt; and (e) that the implications of the judicial discretion system for court resources and the public purse were too high a price to pay for introducing that system.

2.70 A minority of those who opposed the judicial discretion system argued against any even minor reform.[148] (f) The others who opposed that system accepted, in some cases reluctantly, that any injustice to defenders arising from the automatic grant of warrant could be redressed by relatively minor reforms which we describe below.[149]

(a) Effectiveness of present law

2.71 The arguments based on the advantages of the present system concentrated on its effectiveness from the pursuer's standpoint. We agree that from that standpoint the present system is about as effective as our legal system could possibly provide. But this defence of the present system does not meet the main criticisms of it, which have nothing to do with its effectiveness, but relate rather to its harsh impact on defenders and its infringement of universally recognised principles of procedural justice.

(b) Whether proposed judicial discretion system would be ineffective?

2.72 Several commentators argued that the proposed system of judicial discretionary grant of warrant would be ineffective. It was said that under the judicial discretion option, the simplicity and speed of the present procedure would be lost. The short answer is that the simplicity and speed of the present system is attained by ignoring fundamental principles of due process and procedural fairness.

2.73 The Faculty of Advocates argued that our proposed system would not offer an effective practical solution to the problems perceived to exist.[150]

2.74 Action unfounded on merits. As regards the removal of hardship to the defender where the action proves to be unfounded, the Faculty of Advocates pointed out that the statement of a prima facie case is already required of any competent pleader. They argued that since our Discussion Paper had not proposed to extend judicial scrutiny of the pursuer's prospects of success on the merits beyond that standard, the judicial discretion solution would not greatly help to solve the problem. The Faculty's criticism would in fact be strengthened if, as we recommend below,[151] the court were simply empowered to have regard to the pursuer's prospects of success.

2.75 Despite this we are not convinced by the Faculty's criticism. Under our recommendations, diligence on the dependence would be treated by the court as an extraordinary remedy.[152] It is likely that, in an ex parte application, the court would require the pursuer to disclose all known relevant matters, including a fair statement of adverse points made, or likely to be made, by the defender. In any event, pursuers applying for warrant would have to demonstrate the need for the diligence, and their failure to do so would have the effect of protecting defenders against diligence in unfounded actions.

2.76 Exorbitant arrestment or inhibition. As regards the problem that the funds attached by arrestment, or the land affected by the inhibition, may be out of all proportion to the amount of the debt claimed or likely to be found due, the Faculty of Advocates pointed out that it was already open to the judge on a motion for recall to restrict the amount of any diligence used. In their view, that can only be effectively done in a contested hearing when full information is available as to what has been attached, as to the defender's financial position, and his position in response to the action.

---

148 These included the Joint Committee.

149 See paras 2.104 et seq.

150 Namely (a) the hardship to the defender where the action proves to be unfounded; (b) that the funds attached by arrestment, or the land affected by the inhibition, may be disproportionately great relative to the amount of the debt claimed or likely to be found due; and (c) that diligence may be used in circumstances where there is no real or substantial risk that enforcement of the pursuer's decree will be frustrated.

151 See Recommendation 4 (para 3.45) below.

152 See idem; also Recommendations 1 (para 3.3) and 2 (para 3.5).

2.77 In our view however the court's power to restrict the scope of an arrestment or inhibition from the beginning would be a valuable safeguard against exorbitant diligence.

2.78 No need for remedy. As to the problem that diligence may be used in circumstances where there is no real or substantial risk that enforcement of the pursuer's decree will be frustrated, the Faculty of Advocates argued that this problem is best dealt with by the court in an opposed motion when raised by the defender and when full information is available. The Faculty also said that if applications for warrant were, at least in the first instance, to be considered by the judge solely on the basis of written pleadings, there would be a grave danger that such pleadings would become meaningless standard pleadings.

2.79 Another consultee argued strongly that to expect the pursuer to persuade a judge to grant warrant ignored the reality of the position. Rarely will the pursuer have any significant, reliable information as to the financial affairs of the defender, whether an individual or a company.[153] Under the present system the onus of satisfying the court that a defender company's financial position is so sound that diligence on the dependence is oppressive, lies on the party having best access to information as to its financial position, ie on that company itself. It was said that to reverse the onus by introducing exparte applications for a judicial discretionary grant would put a premium on delaying tactics by a debtor company in the knowledge that the pursuer has no means of ensuring that when the delay finally ends, money is available to meet the claim.

2.80 We agree that, other things being equal, contested hearings are a better means of testing the need for the diligence than an exparte hearing of the pursuer's application for warrant. In this domain however other things are not equal. If the contested hearing takes place only at the stage of the defender's application for recall, substantial or even irreparable harm may already have been done to the defender's credit by an unnecessary use of the diligence.

(c) Whether criticisms of injustice to defenders exaggerated?

2.81 It was contended by several consultees that "there is no evidence that abuse of the present system is significant".[154] As another consultee put it, the fact that problems arise in a few individual cases "is no good reason for removing completely a system which works well on countless occasions".[155] The Joint Committee submitted that "in general terms, Defenders are adequately protected by the ability to petition for recall of an arrestment in the limited number of cases where the arrestment is clearly oppressive".

2.82 In our Discussion Paper, we acknowledged that the vast majority of actions for payment of debt (perhaps about 95%) are undefended. In these cases it must be assumed that the debt is owed. On that assumption, it is arguable that the defender cannot complain if diligence on the dependence is used against him. On consultation it was argued that the system of diligence on the dependence should not be radically altered in these instances where no problem arises. One experienced practitioner said that introducing a judicial discretion would be like taking a hammer to crack a nut.

2.83 We do not accept these criticisms. First it is not possible to exclude most undefended cases because normally they cannot be identified at the stage of application for warrant. Second, it may be a mistake to assume that diligence on the dependence is always justified in undefended cases. We do not know in how many undefended cases diligence on the dependence is used unnecessarily in the sense that the defender will pay if decree goes against him. In any event most undefended actions are summary causes or small claims and there the use of diligence on the dependence in such actions is statistically small.[156] Third, we have referred above[157] to the considerations which lead us to believe that abuse of the present

153 It was pointed out that accounts information in the Register of Companies often gives an out-of-date picture; that the information, especially abridged accounts for smaller companies, normally reveals little about the company's ability to satisfy a decree at a future indeterminate date; and that even apparently large and sound companies can crash unexpectedly.

154 The quotation is from representations by the Committee of Scottish Clearing Bankers.

155 Mr R Craig Connal, solicitor, Glasgow.

156 See paras 2.89 and 2.91 below.

157 See paras 2.21 - 2.67 passim.

system is indeed significant. Other consultees took the same view. Fourth, even if diligence on the dependence is abused in a minority of cases, the harm which can be done can be considerable in the cases which do occur. Finally, procedural fairness raises issues of principle which cannot be solved by counting heads. This is the approach taken in other legal systems in which the proportion of actions for payment which are undefended is likely to be about the same as in Scotland.

(d) Whether analogy of other provisional and protective measures inapt?

2.84 It was represented to us by a solcitor that the analogy with the English Mareva injunction was inapt.[158] English solicitors had suggested to him that their system was edging towards the Scottish system. The sounder view however seems to be that of Professor Maher who has observed that any impression that English law is belatedly moving towards the Scots law is false;[159] that the true source of the Mareva injunction is the English remedy of the interlocutory injunction; and that this feature "gives the English law of interim remedies, including the Mareva injunction, a doctrinal unity lacking in the equivalent part of Scots law".[160]

2.85 While the analogy with interim interdict cannot be pressed too far,[161] nevertheless it is sufficiently close to make it desirable that its basic principles should apply to diligence on the dependence.

(e) Cost and resource implications of judicial discretion system

2.86 In our Discussion Paper No 84, we recognised that if pursuers were frequently to apply for warrant for diligence on the dependence, a system of discretionary grant of warrants would have cost and resource implications for the courts. This factor was seen by many consultees[162] as a considerable, or even insurmountable, obstacle to the introduction of a system of discretionary grant whatever its merits.

The nature and scale of use of diligence on the dependence

2.87 It is extremely difficult to forecast the number of applications for warrant for diligence on the dependence which would be made in a system of discretionary grant of warrant on the lines we recommend.

2.88 Arrestments on the dependence. We are informed that the number of arrestments executed in 1996 was just under 2,500 (2,483).[163] In the first 6 months of 1997, the number was just over 1,500 (1,519).[164] These figures would include multiple arrestments for the same debt under the same warrant, so that the number of warrants granted would have been smaller. The 1991 survey noted in the next paragraph suggests that the ratio of warrant to arrestment may be about 80% or 75%. On that basis, the number of warrants for diligence on the dependence granted on which arrestment was executed in 1996 would have been about 2,000 (80% of 2,500) or 1,875 (75%).

2.89 The only reliable published statistics on the use of arrestments is a Scottish Office Central Research Unit (SOCRU) Survey of arrestments served in July 1991.[165] This showed that the number of arrestments on the dependence by source of warrant was as follows:

---

158 The fact that English creditors remark on the value of the Scottish system does not go far since their view is unlikely to be unbiassed.

159 Cf Lord Denning, The Due Process of Law (1980) p 133 referring to the Scots law as a one source among others of the Mareva injunction.

160 Maher, 1996 J R 188 at p 199.

161 The grounds of interim interdict are relatively closely bound up with the merits of perpetual interdict whereas the grounds of diligence on the dependence are related to the security of payment which usually has nothing to do with the merits of the action.

162 Including the Lord President, the Principal Clerk of Session and Justiciary, the Sheriff Court Rules Council, the Joint Committee on Diligence of the Law Society of Scotland and Society of Messengers-at-Arms and Sheriff Officers, the Solicitor of the Inland Revenue in Scotland, and some practitioners.

163 Information provided to us by the Scottish Courts Administration based on returns made to them by officers of court (messengers-at-arms and sheriff officers).

164 Idem.

165 The main survey results are set out in our Report on Statutory Fees for Arrestees Scot Law Com No 133 (1991) paras 2.24 - 2.36; Tables A - G. Most arrestments are not reported to the court and counting them requires the co-operation of officers of court (ie messengers-at-arms and sheriff officers). The four Scottish clearing banks receive most arrestments and have in the past compiled statistics, which can provide a check on officers' returns.

Arrestments on the dependence; July 1991

Source of warrant	Scottish Clearing Banks[166]	Other Arrestees	Total
Court of Session	121	19	140
Sheriff Court Ordinary cause	300	248	548
Sheriff Court Summary cause	30	16	46
Sheriff Court small claims	12	12	24
	463	295	758

Source: SOCRU survey of arrestments[167]

These figures would yield an estimated annual figure of just over 9,000 (9,096). Since these figures include multiple arrestments for the same debt under the same warrant, the number of warrants granted would be smaller. The SOCRU Survey of arrestments also showed that in July 1991, the 2,603 arrestments[168] laid in the hands of the four Scottish clearing banks enforced 2,108 debts;[169] ie the ratio of warrant to arrestment was 81%. The 630 arrestments[170] served on other arrestees enforced 473 debts;[171] ie the ratio of warrant to arrestment was 75%. Of course the same warrant could be used in other months.

2.90 Inhibitions on the dependence. In 1996, 3,279 inhibitions on the dependence[172] were registered in the personal register.

Table: Inhibitions registered in the personal register in 1996 by type of warrant

Letters of inhibition on dependence of sheriff court action		2,629	80.18%
Court of Session			
Summons	617		
Certified copy interlocutor	33		
Counterclaim	-		
Third party notice	-		
	650	650	19.82%
		3,279	100%

Source: Registers of Scotland Executive Agency.

2.91 These statistics do not show the sources of the warrant. However a survey conducted by us of inhibitions registered in the personal register in 1985 did give that information. Of 2,731 inhibitions on the dependence of actions for a principal sum (ie excluding actions for divorce or aliment) registered in

166 le Bank of Scotland; Clydesdale Bank pic; Royal Bank of Scotland pic; TSB Bank Scotland pic.
167 See our Report on Statutory Fees for Arrestees Scot Law Com No 133 (1991) p 13 Tables D and E.
168 From all sources not merely warrants for diligence on the dependence.
169 Scot Law Com No 133 p 14 Table F.
170 From all sources not merely warrants for diligence on the dependence.
171 Scot Law Com No 133 p 14 Table G.
172 le excluding notices of inhibition (to avoid double counting). See also para 3.91 for figures for the first nine months of 1997.

that year, 853 (31 %) were on the dependence of Court of Session actions; 1628 (60%) on the dependence of sheriff court ordinary causes; and 250 (9%) on the dependence of sheriff court summary causes.[173]

Court of Session

2.92 The statistics on arrestments in para 2.88 above do not identify the source of the warrant.[174] As regards the Court of Session, the SOCRU survey[175] shows that in July 1991, 140 arrestments were served on the dependence of Court of Session actions yielding an estimate of about 1,700 (1,680) per year. However if there are only about 2,500 arrestments on the dependence every year, it seems unlikely that as many as 1,700 are on the dependence of Court of Session actions.

2.93 A survey conducted by the Principal Clerk of Session and Justiciary during a typical four week period in June/July 1994 suggests that the estimated number of warrants for diligence on the dependence granted yearly in the Court of Session is approximately 3,562. It was represented to us that it is reasonable to assume that, under a system of discretionary grant of warrants for diligence on the dependence, there could be as many as 1,000-2,000 applications to be disposed of by way of court/chamber hearings.

2.94 This is not inconsistent with the other evidence as to existing levels of the use of diligence but understandably may not take sufficient account of the disincentives to the making of applications in our recommendations.[176] The evidence referred to in the next paragraph suggests that a large number of the Court of Session warrants for diligence on the dependence are granted in favour of the Inland Revenue. In our view, actions by the Inland Revenue and other revenue departments (eg Customs and Excise) should not be exempt from the legislation simply to save court resources, though that would be a valuable by-product of such an exemption.

2.95 Inland Revenue: a special case? The Inland Revenue's Solicitor in Scotland (Mr I K Laing) told us that warrant to inhibit on the dependence was granted to the Inland Revenue against 640 defenders in the year to 31 March 1997. In nearly every case decree was subsequently granted to the Revenue or payment made.[177] The previous Solicitor, Mr T H Scott, observed that if a judicial discretion were introduced, the Inland Revenue might well wish to make representations that it should be accorded exemptions from its requirements.[178] Such an exemption would appear to us to be primarily a political matter which is not for us to determine.

2.96 Concerns of the Court of Session. Any substantial impact on the use of judicial time would be a matter of concern to the Court of Session given present resources. The possibility of the intimation of the application to the other party and a further hearing then being held to enable objections to the application to be made would add to the number of potential hearings. In 1995 Lord President Hope was concerned that the steps which had been taken to reduce the length of the motion roll in order to extend the working time available for proofs and other business in the Outer House would be put into reverse if a substantial amount of business were to be restored to the motion roll as a result of the proposals.

Sheriff court

2.97 The Civil Judicial Statistics are published up to 1996.[179] In that year, a total of about 100,000

173 This information was taken from the unpublished "annual bank list" of all entries in the personal register which ceased to be compiled by the Keeper in about 1990.

174 Eg whether warrant granted in Court of Session, or sheriff court ordinary action, or sheriff court summary cause, or sheriff court small claim etc.

175 Scot Law Com No 133 p 13 Tables D and E: see para 2.89 above.

176 Outlined in para 2.103 below.

177 The previous Solicitor (Mr T H Scott) told us in June 1990 that the Inland Revenue raise over 1,000 actions every year in the Court of Session and arrest or inhibit on the dependence in over half of these cases. He estimated that the Inland Revenue would have to instruct counsel in "well over 600 cases a year" with implications for his staff's time as well as cost.

178 The Debtors (Scotland) Act 1987 s 5(4)(d) was cited as a recent example of special provision for the Revenue. There is also the old precedent of diligence under summary warrants for recovery of rates and taxes.

179 Civil Judicial Statistics Scotland 1996 (1997) HMSO.

actions for payment were commenced in the sheriff courts alone. Of these, just over 20,000 (20,111) were ordinary actions;[180] and just under 58,500 (58,419) were small claims.[181] The number of summary cause actions (excluding small claims) initiated was 30,078[182] of which a large proportion would have been actions for payment, or for arrears of rent coupled with a crave for recovery of heritable property.[183] It was represented to us that if applications under a system of discretionary grant were made in even one third of these cases (say 34,000) the shrieval resources required to undertake a fifteen minute hearing in each case would be in the region of eight full-time equivalents with consequential resource implications for Court Service staff.[184]

2.98 Sheriff Principal Nicholson told us that all sheriff courts were stretched to the limit and that "a requirement for judicial scrutiny of all applications for a warrant for diligence on the dependence might be the straw to break the judicial camel's back".

2.99 However it is important not to exaggerate the potential numbers of applications for warrants for diligence on the dependence. It does not seem to us to be likely that applications for warrant will be made in a third (about 34,000) of sheriff court actions for payment.

2.100 We have referred above[185] to the fact that in terms of officer of court returns, the number of arrestments on the dependence of Court of Session and sheriff court actions executed in 1996 was just under 2,500 (2,483). Moreover in that year, 2,629 letters of inhibition on the dependence of sheriff court actions were registered in the personal register, ie 80.18% of all inhibitions on the dependence.[186] On this basis, there may be just over 5,000 diligences (2,500 arrestments; 2,600 inhibitions) actually used on the dependence of sheriff court actions every year. It may be that the arrestment survey seriously under-represents the numbers of arrestments on the dependence. If we multiply the figure by a factor of 3 to reach a figure (7,500) near to the 1991 estimate (7,000) of arrestments on the dependence, the number is still only just over 10,000 diligences actually used on the dependence of sheriff court actions every year. And some of these will be for the same debt requiring only one application to the court.

2.101 In short, the forecast of 34,000 applications fails to recognise the disproportion between the statistics of summary causes and small claims on the one hand and the level of diligence on the dependence actually executed on the other.

2.102 The number of cases where application will be made to the sheriff for warrant to inhibit on the dependence is difficult to forecast. The fact that application will be made to the sheriff rather than the Court of Session may be offset by the countervailing factors mentioned in the next paragraph. The number of cases where application will be made to the sheriff for warrant for interim attachment of corporeal moveables on the dependence is almost impossible to forecast.

2.103 Any forecast must take into account the fact that under our recommendations warrant will no longer be obtained automatically as of right with no extra cost. Since under these recommendations the pursuer will have to apply to the court and justify the grant of warrant; since he will be liable to the defender or third party for loss caused by unjustified diligence if his action fails on the merits; and since he may have to find caution to secure the defender against loss, the numbers of applications for warrants would presumably be fewer - perhaps far fewer - than the estimated 5,000 to 10,000 diligences on the dependence actually used under the present law. As Professor Maher remarks:

---

180 Ibid, Table 3.7.
181 Ibid, Table 3.11.
182 Ibid, Table 3.8.
183 Cf ibid. Table 3.9.
184 Figures supplied by the Scottish Courts Administration on 15.6.95.
185 See para 2.88.
186 See para 2.90. In 1985 the corresponding number was 1,878 being 69% of all inhibitions on the dependence.

"it is fallacious to calculate the likely effects of the proposed changes on judicial time by reference to the number of diligences on the dependence which are granted under the present rules. One of the aims of reform is precisely to ensure that diligence on the dependence is an extraordinary interim measure, not just something for the asking." [187]

2.104 Conclusion. These considerations of expense cannot be allowed to stand against the high considerations of principle, especially the basic human right to due process of law, which underpin our recommendations, nor against the fact that, uniquely among legal systems in the advanced world, Scots law appears to breach that principle.

2.105 Offset in savings for arrestees etc. In any event, as Professor Maher contends, it may be that reform may be justified on economic grounds. He refers to:

"the high economic costs of the present system. As there is virtually no scrutiny of applications of diligence on the dependence at present, it is difficult to know how many diligences which are authorised and executed are unnecessary.[188] However it must be a safe assumption that a good number of diligences are used where there could be no proven need for them. Yet the resources used in processing arrestments and inhibitions on the dependence must be, to put it mildly, of the highest order. Banks, building societies, commercial organisations large and small, the staff on the personal register, are all required to take a variety of steps, often time-consuming to give effect to a legal procedure which may well be quite unnecessary. I accept that there is no hard data on this matter but it cannot be assumed that giving effect to the Scottish Law Commission's proposals would necessarily mean a greater overall use of economic resources. The opposite may well be the case."[189]

(2) Whether injustice to defenders redressible by relatively minor reforms?

2.106 On consultation, most of those who believed that warrant for diligence on the dependence should continue to be granted to pursuers as of right contended that any injustice in the present system could be removed by one or more of the relatively minor reforms which we mentioned in our Discussion Paper. These are (a) liberalisation of the grounds for recall; (b) imposing on the pursuer strict liability for loss arising from diligence on the dependence in an unsuccessful action; and (c) statutory limits on the amounts arrestable.

(a) Liberalisation of the grounds for recall

2.107 Under this option, it would be made easier for defenders to obtain recall or restriction of the diligence. The onus would be on the pursuer to justify the retention of his diligence. To achieve this result Sheriff Principal Nicholson[190] suggested a test requiring the pursuer to show (i) a prima facie case and (ii) the need for the remedy as well as (iii) the circumstance that the balance of convenience favoured authorisation of diligence on the dependence.[191]

2.108 This proposal would certainly meet the criticism that the present grounds for recall are too limited.[192] The requirements of a prima facie case and the need for the remedy, together with a residual discretionary test, closely resemble the criteria applied in European, North American and Commonwealth legal

187 1996 JR 188 at p 205.

188 For some attempt to discover the scale of unnecessary diligence on the dependence at present see Discussion Paper No 84, paras 2.41-2.44.

189 1996 JR 188 at p 205.

190 Who was concerned about the excessive demands on court time which a system of judicial discretionary grant might produce.

191 In his words: "(a) the pursuer has a prima facie case for payment of the sum or sums craved; (b) there are reasonable grounds to make diligence on the dependence, and, in particular, the actual form of diligence used, necessary [to secure payment or performance]; and (c) on a balance of convenience, and having regard to possible prejudice to both parties, a continuance of the diligence in whole or in part is preferable to its recall in whole or in part".

192 See paras 2.23-2.40 above.

systems.[193] It should be noted however that, in these legal systems, these criteria are applied before the grant of authority for interim provisional and protective measures in order to determine whether such measures should be authorised.

2.109 To liberalise the grounds of recall in this way would not cure the fundamental problem that warrant is granted too easily. There would still be nothing to stop a pursuer from framing a trumped up case for random damages and planting arrestments all round in order to cause maximum embarrassment to the defender. At the stage of recall, irretrievable damage to the defender's credit may already have been done - without compensation if the pursuer is not worth suing for damages.

(b) Strict liability for loss where action on merits fails

2.110 In our Discussion Paper No 84, we invited views on a provisional proposal that the pursuer's virtually absolute right to use diligence on the dependence should be retained but that he would be strictly liable to the defender in damages for patrimonial loss arising from his use of the diligence if his action eventually turned out to be wholly unsuccessful. This option was presented[194] as an alternative to the judicial discretionary grant of warrant. A third option was to introduce both judicial discretion and strict liability and to allow the pursuer to elect between them.[195]

2.111 In favour of this option, it may be said that it recognises that the main injustice arises where the pursuer's action is unsuccessful. Moreover the procedure for obtaining warrant would continue to be simple, quick and cheap for all concerned (including the public purse), avoiding the need for a court hearing before the grant of the warrant.[196] On consultation, this option was preferred by a minority of commentators.[197] Only one body preferred the third option (right of election).[198]

2.112 After anxious consideration we adhere to the view that strict liability by itself would not be an adequate substitute for judicial discretion. It would not prevent excessive and oppressive diligence in cases where the court, if it had had the opportunity to consider the matter before granting warrant, would have refused to grant the warrant or restricted the scope of the warrant. Further it would afford no real protection to a defender where the pursuer is a man of straw. There is also a view that: "even if a pursuer is good for damages, a judicial award of damages for wrongous use of diligence is a poor remedy for the mischief done by reckless arrestment, for that can seldom be measured or compensated by mere money damages".[199]

(c) Statutory limits on the amounts arrestable

2.113 Under the present law and practice, an arrestment on the dependence of a Court of Session action or sheriff court ordinary cause normally attaches all sums due by the arrestee to the defender.[200] These sums can far exceed the amount of the debt, or alleged debt, due by the common debtor to the pursuer laying the arrestment. This disproportion has long been criticised. In our Discussion Paper[201] we sought views on the introduction of statutory rules limiting the sums attachable by arrestment on the dependence to the principal sum sued for and certain other sums (eg to cover expenses and accrued interest). This proposal provoked a mixed reaction which we discuss below.[202]

2.114 In any event, we do not think that such a reform would remove the need for judicial discretion.

---

193 Paras 2.46-2.48.
194 Discussion Paper No 84, Proposition 2 (1) (para 2.69). For this purpose, an unsuccessful action means an action in which decree of absolvitor or dismissal is granted, except where the decree is consequential on a settlement of the action.
195 Idem, Proposition 2(3) (para 2.69).
196 See Discussion Paper No 84, para 2.61.
197 Lord President Hope; the Faculty of Advocates; Solicitor of Inland Revenue for Scotland.
198 Association of Scottish Chambers of Commerce.
199 Gebruder van Uden v Burrell 1914, 1 SLT 411 (Sh Ct) at p 412 per Sheriff Fyfe.
200 Ritchie v McLachlan (1870) 8 M 815.
201 Discussion Paper No 84, paras 2.148-2.150.
202 See paras 9.95 - 9.108 below.

The sum claimed may not be due, or it may be a random sum far in excess of that actually due, so that the protection against excessive arrestment could not be achieved by statutory limits. Moreover we believe that limits imposed by fixed statutory rules at the stage of arrestment on the dependence would be arbitrary and unrealistic because the sums due in reality, including not only the principal sum due but also the future expenses of process and interest, cannot be known till the end of the action.[203] We therefore remain of the view that a judicial discretion is necessary. Indeed we think that, instead of imposing arbitrary statutory limits on arrestment, it would be preferable if, at the time of granting the warrant, the court were to have power to limit the amount attachable by an arrestment on the dependence executed under the warrant.[204]

(d) Conclusion

2.115 To sum up, in our view minor reforms based on the assumption that the pursuer should have an automatic right to use diligence on the dependence would not go to the root of the problem. We believe that there is no satisfactory alternative to the introduction of a judicial discretionary power to grant the warrant. We are confirmed in this conclusion by the Helsinki Principles of 1996 which, after asserting in Principle 3 that "States should make available without discrimination provisional and protective measures with the objective of securing assets out of which an ultimate judgment can be satisfied" declares in Principle 4: "The grant of such relief should be discretionary".

203 See para 9.105 below.
204 See Recommendation 5(2)(b) (para 3.52).

Part 3 A New System: Judicial Authorisation of Diligence on Dependence

3.1 In this Part we make recommendations on the main features of the proposed new system under which judges will grant warrant for diligence on the dependence.

(1) Nature of diligence on the dependence as extraordinary remedy

'3.2 The first principle from which all else flows is that diligence on the dependence should be recognised as an extraordinary remedy.

3.3 We recommend:

> **Diligence on the dependence securing sums already due should no longer be ordinarily exercisable by a pursuer as of right but should be treated as an extraordinary remedy available only where its use is justified by special circumstances.**

(Recommendation 1; Draft Bill, clauses 1 and 24)

(2) Applications made to a judge

3.4 It follows from the foregoing recommendation that the court must scrutinise the special circumstances alleged by the pursuer in order to determine whether they do indeed justify the use of diligence on the dependence. In view of the need to ensure proper observance of principles of procedural fairness and due process, this scrutiny should be performed by a judge rather than a clerk of court. Since diligence on the dependence will in future be an extraordinary remedy, the judge should be empowered to tailor the warrant to the special circumstances of the particular case by imposing restrictions on the warrant or attaching conditions to it.

3.5 We recommend:

> **The court should have a discretionary power, exercisable by a judge on the pursuer's application, to grant or to refuse to grant warrant for diligence on the dependence, subject where appropriate to restrictions or conditions.**

(Recommendation 2; Draft Bill, clause 1)

(3) Form of application

Provisional proposals

3.6 In our Discussion Paper No 84,' we proposed that an application for the discretionary grant of a warrant for diligence on the dependence should initially be made ex pane, whether for a warrant to be inserted in the summons or initial writ, or to be granted by interlocutor in a later stage in the depending action. We also proposed[2] that, as under the present law, it should continue to be competent for the pursuer to apply exparte for warrant for diligence on the dependence before service of the summons or initial writ, in order to preserve the element of surprise in cases where service might prompt the defender to take avoidance action.

3.7 Statement of grounds of application. In our Discussion Paper we suggested that the grounds of

1 Proposition 3(2)(a) (para 2.79).
2 *Idem.*

the application should be set out in writing as follows.[3] Where the application is made at the commencement of a Court of Session action or a sheriff court ordinary action, the grounds of application should be set out in an additional article in the condescendence of the summons or initial writ. Where the application is made in a sheriff court summary cause or small claim, the grounds of the application might either be stated in writing in manner prescribed by rules of court or the sheriff might endorse on the statement of claim the grounds on which he relied in granting the warrant. Where the application is made at a later stage in the action, it should be by way of a minute stating these grounds.

3.8 One reason for these suggestions was a proposal that a pursuer should be liable in damages where he had misled the court by making untrue statements or failing to disclose information within his knowledge.[4] This would have raised the difficulty that if the application were to be ex pane, on a simple motion, with an oral presentation of the facts supporting the application, and without any official minute of proceedings, the defender would often find it difficult or impossible to discover, or to prove, what factors had led, or misled, the court into granting the warrant.

3.9 We now recommend however a different basis for the pursuer's liability which does not depend on proof of misleading the court.[5] Nevertheless the grounds of the application should be set out in writing so that in an inter panes application they can be intimated to the defender.

Consultation

3.10 On consultation,[6] these proposals met with a mixed reaction. Several consultees rejected the proposal that in an ex pane application the court should have a discretion to allow the defender an opportunity to oppose the grant of warrant. It was said that this would remove the element of surprise. The Joint Committee argued that an application involving prior intimation to the defender would destroy the effectiveness of diligence on the dependence. The Society of Messengers-at-Arms and Sheriff Officers said that it was strange in this day and age, when the electronic transfer of money can be carried out instantly, that the defender be involved in the grant of warrant to arrest on the dependence bearing in mind the other possible safeguards for defenders.

3.11 The Court of Session judges accepted that an application should be competent before service of the summons or initial writ (in which event it will necessarily be ex pane} but suggested that ex pane applications should be discouraged. They conceded that such applications are necessary where the pursuer believes that what he seeks to arrest may disappear unless urgent steps are taken to prevent its disappearance without notice being given. But they observed that ex pane applications, eg for interim interdict, may be granted somewhat uncritically and so materially harm a defender. The judges also favoured a provision in the Rules of Court to discourage applications made before service of the writ, eg a provision that special cause for the service has to be shown.[7]

3.12 Ex parte and inter partes applications. We agree with the Court of Session judges that ex pane (ie unintimated) applications for warrant for diligence on the dependence should be competent but should be discouraged.

3.13 The element of surprise is important in some cases, especially having regard to modern means of communication where arrestable funds can be quickly spirited away to foreign bank accounts by electronic methods. We also concede that the mere conclusion by the defender of prior missives suffices to defeat a subsequently registered inhibition, whether or not the missives are collusive in the sense of being

3 Discussion Paper No 84, para 2.71.

4 Discussion Paper No 84, Propositions 2(2) (para 2.69); 6(1) (para 2.101). For this reason we had also suggested (para 2.71) that if material facts emerged which were not referred to in the writ supporting the application, the writ should be amended at the bar.

5 See Recommendation 6 (para 3.63).

6 Pursuant to Discussion Paper No 84, Proposition 3 (para 2.79) and responses to a questionnaire to participants in the seminar of 29 April 1995.

7 And that expenses of the unsuccessful application should not be recoverable as an expense of the cause.

intended to defeat a possible inhibition. These important considerations have to be weighed against other considerations.

3.14 The first is that in most actions for payment it seems likely that most defenders are solvent and unlikely to dispose of their assets to defeat the pursuer's claim. This is the assumption underlying the law on interim remedies in at least some other legal systems. In England for example, in the ZLtd case,[8] Kerr LJ remarked that the jurisdiction to grant a Mareva injunction:

> "would not be properly exercisable against the majority of defendants who are sued in our courts, hi non-international cases, and also in many international cases, the defendants are generally persons or concerns who are established within the jurisdiction in the sense of having assets here which they could not, or would not wish to, dissipate merely in order to avoid some judgment which seems likely to be given against them; either because they have property here, such as a house or a flat on which their ordinary way of life depends, or because they have an established business or other assets which they would be unlikely to liquidate simply in order to avoid a judgment...".[9]

3.15 The second consideration is that the precepts of natural justice and procedural fairness suggest that, unless intimation to the defender is likely to defeat the object of the application, the defender should have an opportunity to be heard before his assets are subjected to diligence even if it is only provisional and temporary.

3.16 Comparative law. In English law, where a Mareva injunction is granted by a judge,[10] normally the application is initially ex parte and in chambers.[11] The plaintiff must however make a full and frank disclosure of all material facts known to him (including those unfavourable to his case), and failure to do so will result in the injunction being discharged.[12] In mainland Europe, it appears that ex parte applications are common.[13] In Germany, the application is usually made ex parte but in cases of doubt the court may direct a hearing to be held at which both parties may be heard.[14] In many European systems an interim remedy granted ex parte is temporary only, and the pursuer is normally required to validate it shortly thereafter (the onus being on him) at a subsequent intimated hearing.[15] In North America, as we have seen,[16] the principle of "procedural due process" raises a presumption that the defendant is given advance notice of the application and a hearing prior to any grant of the remedy. This presumption may be rebutted, but only if the plaintiff can show good cause for so doing and subject to safeguards to protect the defendant's position.

3.17 We consider that initially it should be for the applicant to choose whether to intimate the application or not. If the pursuer makes the application ex parte, the court should not grant the warrant unless the applicant can show special cause for obtaining a warrant without allowing the defender a prior opportunity to be heard in an inter panes hearing. It is a condition of this recommendation that other safeguards for the defender should be provided.[17]

3.18 The hearing. In our discussion paper[18] we suggested that the hearing of an application for warrant should follow the existing practice in a hearing in an application for recall with the difference that the facts supporting the application would be set out in writing. Thus the application for the warrant should

8 Z Ltd v A-Z [1982] QB 558.
9 Ibid at p 585-586.
10 See para 2.49.
11 The supporting documents include the originating writ in the action, an affidavit or affidavits and a draft of the injunction sought.
12 Siporex Trade SA v Comdel Commodities Ltd [1986] 2 Lloyd's Rep 428.
13 O'Malley and Layton, European Civil Practice para 50.58 - 50.59 (France); para 53.59 (Italy); para 55.59 (Netherlands). In Denmark the application is usually , but not necessarily, made on notice to the defendant (ibid, para 49.58).
14 O'Malley and Layton, European Civil Practice para 51.59.
15 See para 3.24 below.
16 See para 2.47.
17 *See eg Recommendations 6 (para 3.63) and 7 (para 3.71).*
18 Discussion Paper No 84, Proposition 3 (para 2.79).

normally be disposed of on the basis of the averments of the pursuer and, if defences have been lodged, the defender, on oral representations, and on a prima facie presentation of the facts. The court would not normally require or allow a proof, save in the same exceptional circumstances as justify an allowance of proof in applications for recall.[19] As the Court of Session judges suggested, the court should also be able to proceed on the basis of affidavits.

3.19 It is necessary to clarify the circumstances in which the attendance of an advocate, solicitor, or solicitor-advocate at a hearing before a Lord Ordinary or sheriff would be required. Should such a hearing be required (a) in every application for warrant; or (b) only where the judge considers that he cannot grant the warrant on the basis of the written pleadings, and any affidavits or other documents supporting the application; or (c) where the judge wishes to allow the defender an opportunity to oppose the granting of the warrant?

3.20 Many consultees[20] questioned the need for a hearing in every case because of its resource implications. The Sheriff Court Rules Council suggested that a hearing should only be fixed where the judge is not satisfied that warrant should be granted on the basis of the summons, initial writ or statement of claim.

3.21 In our view, in an intimated application for warrant, there should be a hearing (which would be inter panes) only if the application is opposed by the defender.

3.22 We also consider that in exparte applications there should be a hearing attended by the applicant's legal representative in every case on two issues namely, first, the need to dispense with intimation and, secondly, (assuming the judge dispenses with intimation) the question whether the warrant should indeed be granted. This view was supported by the Court of Session judges and those who consider that the procedure should be similar to that for interim interdict.[21] If there were no requirement of a hearing, there would be a grave risk that ex pane applications would be granted as a routine matter.

3.23 The Scottish Courts Administration and the Scottish Courts Service asked us to consider whether the full application procedure is appropriate in sheriff court summary causes and small claims or only in ordinary procedure. In our view the principles of procedural fairness and due process underlying our recommendations are the same whatever the amount of the sum sued for, the level of court or the type of court process involved. The harm to commercial or personal credit done by an arrestment is not significantly affected by these variables. Furthermore, as a matter of social policy and ordinary justice, we find it impossible to justify witholding these reforms from small claims to recover consumer debts from ordinary individuals on the one hand while, on the other, extending them to actions to recover commercial debts from large companies.

3.24 "Validation hearings" where warrant granted expartel In our post-seminar questionnaire,[22] we sought views on whether a warrant for diligence on the dependence granted ex parte should cease to have effect by law automatically after a short statutory period unless it is "validated", ie unless the pursuer shows cause why he should retain his warrant for diligence?[23] Validation procedures feature in several legal systems in North America[24] and on mainland Europe[25] though others provide merely a procedure for recall.[26] Principle 13 of the Helsinki Principles states: "The provisional and protective measure should be valid for a specified limited time. The court should consider renewal in the light of developments in the court where the substantive action is underway".

19 Eg for the limited purpose of proving foreign law applicable to the ownership of a ship proposed to be arrested on the dependence: Clipper Shipping Co Ltd v San Vmcenie Partners 1989 SLT 204 (OH).

20 Including Lord President Hope; the Scottish Courts Administration and the Scottish Courts Service; Sheriff Principal Nicholson; the Sheriff Court Rules Council; and several practitioners.

21 Eg Sheriff A M Bell and Professor Maher.

22 Issued after the seminar of April 1995 (see para 1.4).

23 Professor W M Gordon pointed out that the term "validated" seemed inapt since the warrant is valid and that a better term might be "confirmed" or "justified". This point has weight but does not require to be answered by us since we reject the proposal below.

24 Eg New York Civil Practice Law and Procedure s 6201: see Maher 1996 JR 188 at 196.

25 See eg O'Malley and Layton, European Civil Practice as to Denmark (validation in 7 days: para 49.58J; France (time limit for validation fixed by court: para 50.60); Italy (validation proceedings begin within 15 days from execution of attachment order: para 53.59); Netherlands (validation proceedings must begin within 8 days after attachment made: para 55.59).

26 Eg Belgium and Germany.

3.25 Most consultees rejected the idea of "validation hearings" on various grounds. First, it would involve hearings even where the defender had no valid ground of objection. Second, it would make demands on court time whether or not the defender in question wished to challenge the diligence.[27] The defender may be content to leave the diligence in place till the action is disposed of, eg where an inhibition affects his dwelling house which he has no immediate plans to sell. Third, the debtor's right to apply for recall is a sufficient safeguard. Fourth, some thought that judicial scrutiny of diligence on the dependence should always be initiated by the defender. We agree with these comments except the last which is inconsistent with our main recommendation.

3.26 If however validation hearings are not introduced, it should be made clear that in any application for recall, the onus should not lie on the defender to justify the recall as under the present law. Rather the onus should lie on the pursuer to justify the continuance in force of his warrant for diligence on the dependence. We make specific recommendations to that effect in Part 5 below.[28]

3.27 We recommend:

(1) The procedure in an application for warrant for diligence on the dependence should be regulated partly by statute and partly by act of sederunt. The procedure should so far as practicable be the same in the Court of Session and the sheriff court, whether the warrant is to be inserted in the summons or initial writ, or to be granted at a later stage in the depending action.

(2) An ex parte application should be competent for warrant to execute diligence on the dependence before commencement of the action by service of the summons or initial writ.

(3) An application for warrant for diligence on the dependence should be intimated to the defender unless the applicant in an ex parte application satisfies the court that warrant should be granted without such prior intimation.

(4) In an intimated application for warrant, there should be a hearing, attended by the parties' legal representatives, only if the application is opposed by the defender. In an ex pane application for warrant, there should be a hearing, attended by the applicant's legal representative, in every case on the need to dispense with intimation and on the question whether the warrant should be granted.

(5) We reject the proposal that a warrant for diligence on the dependence granted ex parte should expire automatically after a short statutory period unless, at a hearing within that period, the pursuer shows cause why the warrant should continue in force.

But this recommendation presupposes that in an application for recall of a warrant granted ex parte without intimation to the defender, the onus should be on the pursuer to justify the continuance of the warrant as proposed at Recommendation 30(1) below.

(Recommendation 3; Draft Bill, clause 1(1), (3) and (4))

(4) Grounds for granting warrant

3.28 It is essential that a statutory test should be enacted to give the courts and others guidance on the grounds which would normally justify the grant of a warrant for diligence on the dependence securing debts already due. In the absence of a test, it would not initially be clear how the courts would construe and apply their new powers. A statutory test would reduce both uncertainty and the need for the courts to evolve their own guidelines at the litigants' expense. Moreover if warrants were to continue to be granted almost as a matter of course, the object of the legislative reforms would be defeated. We consider that there should be a two-stage test.

27 Cf Recommendation 3(4) (para 3.27): (in an intimated application for warrant, there should be a hearing only if the application is approved).

28 See Recommendation 30(1) (para 5.10).

3.29 Threshold ground: risk that enforcement will be prejudiced. The first part of the test would be based on the present law on the grounds justifying the grant of warrants securing future and contingent debts. As noted above[29] these grounds reflect the two types of circumstance which may deprive a creditor of the fruits of his decree, namely intentional acts by the defender putting his attachable assets beyond the reach of his creditors and the defender's insolvency leading to a race of diligences by his other creditors.

(i) Defender putting assets beyond the reach of his creditors

3.30 The first category consists of cases where the defender is likely to put assets beyond the power of his creditors, either by removing funds or moveable property from Scotland, or by disposing of, burdening, or concealing assets within Scotland so as to make them unavailable or untraceable in the event of the pursuer obtaining decree.[30]

3.31 We think that the pursuer should not require to show that the defender will deliberately set out to dissipate his assets with the sole or main motive or intention of defeating the pursuer's claim. At one time the court's powers in divorce actions to interdict dispositions or transfers of property were exercisable only where the disposition or transfer was about to be made by the defender wholly or partly for the purpose of defeating the pursuer's claim for financial provision in whole or in part.[31] It was found that the test of motive or intention to defeat a financial claim was unsatisfactory "because there is no way of telling what the purpose of a proposed disposition is. All that the courts can do is to consider whether the proposed disposition may in fact prejudice the applicant's claim".[32] Accordingly the law was changed and under the reformed law, the court in a divorce or aliment action may interdict a transfer or transaction if the court is satisfied that it "is likely to have the effect of defeating in whole or in part" the pursuer's claim.[33]

3.32 We think that a similar formula should be used in the present context. Normally where a defender deals with his assets in the ordinary course of his business, his transactions and operations would be unlikely to prejudice the eventual enforcement of the pursuer's claim. The proposed formula would go far towards preventing diligence which disrupts transactions and operations in the ordinary course of the defender's business. But such transactions and operations should not be formally excluded since they may indeed frustrate enforcement, an obvious example being the sailing of a ship which may never return to Scottish waters. We recommend that it should not be competent for the court to grant warrant for diligence securing debts already due unless a test on these lines has been satisfied.

3.33 The importance of the old ground of contemplating abscondence ("in meditatione fugae") has greatly diminished since the abolition of imprisonment for debt,[34] now competent only in aliment cases.[35] In modern law, the emphasis is not on the defender's whereabouts but on his transactions with his attachable assets. We recommend that "contemplating abscondence" should no longer be specified as a separate ground justifying warrant.

(ii) Risk from defender's insolvency

3.34 The second and alternative way of demonstrating the need for the remedy should be by showing prima facie that the defender is insolvent or verging on insolvency. That fact would by itself create a real and substantial risk that, in the event of the pursuer obtaining decree, the enforcement of the decree may be prejudiced or defeated.

---

29 Para 2.56.

30 Idem.

31 Divorce (Scotland) Act 1976, s 6.

32 See our Report on Aliment and Financial Provision (1981) Scot Law Com No 67, para 3.150.

33 Family Law (Scotland) Act 1985, s 18(2).

34 Debtors (Scotland) Act 1880.

35 Civil Imprisonment (Scotland) Act 1882, s 4; cf Debtors (Scotland) Act 1987, s 74(3) (abolition of imprisonment for failure to pay rates or taxes).

3.35 This ground is consonant with the "verging on insolvency" limb of the test for obtaining warrant for diligence securing future or contingent debts, ie debts not yet due. As we have seen,[36] that limb is designed to protect the fruits of the pursuer's decree from the diligence of the defender's other creditors or the sequestration or winding up of his insolvent estate. Since "verging on insolvency" is a ground of diligence in security of debts not yet due, a fortiori it should be a ground of diligence securing debts already due.

3.36 It is true that this is not a ground for the grant of a Mareva injunction under English law. But the main reason for that must be found in the circumstance that such an injunction has only personal and not property consequences because it does not give the creditor a preference in insolvency proceedings.[37] The same is true of provisional and protective measures in other foreign systems.[38]

Summary

Ca) The first stage of the test

3.37 The first part of the test would be that the defender is insolvent or verging on insolvency or the existence of a real and substantial risk that, in the event of the pursuer obtaining decree, the enforcement of the decree may be prejudiced by the defender putting his assets beyond the reach of his creditors. No warrant should be granted unless that test is satisfied.

(b) Reasonableness

3.38 In addition, we think that the court must also regard it as reasonable in all the circumstances to grant the warrant, with or without restrictions or conditions. There may be cases where there is a risk of insolvency or of assets being removed from the jurisdiction, but the right course is to give the defender an opportunity to find caution as a condition of the court's refusal to grant the warrant. Or it may be that to grant warrant would be equivalent to allowing diligence in bad faith, as where property sought to be arrested has been wrongfully detained by the pursuer to facilitate the arrestment,[39] or would be inconsistent with contractual arrangements between the pursuer and defender.[40] Or it may be clear that the action is vexatious or frivolous and has so little prospect of success that diligence on the dependence would not be appropriate.[41]

(c) Pursuer's prospects of success in his action

3.39 In our Discussion Paper No 84, we provisionally proposed that the pursuer's prospects of success in his action should be subsumed within the wider test of reasonableness.[42]

3.40 The alternative is that it should be a separate, distinct test into which the court must enquire before granting the warrant, by analogy with a Mareva injunction where the plaintiff is bound to show that he has a good arguable case.[43] In North American and other European systems, the applicant must show the need for the remedy.[44]

3.41 It is true that in applications for interim interdict, it is the practice of the court to have regard to the pursuer's prospects of success, either as a separate matter or more probably as an element in the balance of convenience.[45] But the grounds of interim interdict, though distinct from perpetual interdict,[46]

---

36 See para 2.56 above.
37 See para 2.49 above: Iraqi Ministry of Defence v Arcepey Shipping Co SA [1981] QB 65 at pp 71-72.
38 See para 2.49 above.
39 See eg Rintoul, Alexander & Co v Bannatyne (1862) 1 M 137; Azcarate v hurrizaga 1938 SC 573.
40 See eg Lapsley v Lapsley (1915) 31 Sh Ct Reps 330.
41 See eg Levy v Gardiner 1964 SLT (Notes) 68.
42 Proposition 4(b), para 2.89-2.90.
43 See para 2.49 above.
44 See paras 2.47-2.48 above.
45 See NWLLtd v Woods [1979] 1 WLR 1294 (HL) at pp 1309-1311 per Lord Fraser of Tullybelton, explaining in an English case the practice of the Scottish courts in this matter. ,,,
46 The main issue is the cogency of the need for interim interdict: Burn-Murdoch, Interdict, p 128, approved in Deane v Lothian Regional Council 1986 SLT 22 at p 23; Reed Stenhouse (UK) Ltd v Brodie 1986 SLT 354 at pp 357-358.

are relatively closely bound up with the merits of perpetual interdict whereas the grounds justifying warrant for diligence on the dependence would mainly relate to the risk of insolvency or of transactions defeating enforcement by diligence, both of which will usually have little or nothing to do with the merits of the action.

3.42 In Discussion Paper No 84, we observed that it would usually be difficult and sometimes impossible for the courts in Scotland to assess the pursuer's prospects of success in an ex pane application for warrant for diligence. We suggested that the court should be empowered to have regard to the pursuer's prospects of success, if it has the means to do so, but should not be bound to do so.

(d) Consultation

3.43 On consultation a provisional proposal on these lines met with a mixed reaction. Some consultees agreed.[47] Four disagreed. The Faculty of Advocates said that it would be difficult for the pursuer to make more than formulaic averments and that the tendency would be to grant warrant on the basis of relatively meaningless formulae. Such an outcome however would be so far outwith the spirit of the legislation that we would expect the court to refuse warrant if presented with meaningless formulaic averments. We agree with the Faculty that reasonableness would be difficult to establish in the absence of a contested hearing. That provides a good reason for preferring inter paries to exparte applications. The Committee of Scottish Clearing Bankers did not believe that the proposal adequately protected the pursuer's interests. Both they and the Regional Sheriff Clerks considered that the "real and substantial risk" test would be too severe. The latter preferred a general "reasonableness" or "cause shown" test. One practitioner thought that in virtually every case there would be a risk that enforcement would be prejudiced and that "reasonableness" would put a premium on hard luck stories and stalling defences.

3.44 Clearly these fears have some foundation. We think it right however that in an extraordinary remedy, the test should be severe and we adhere to our original suggestion which reflects the internationally accepted standards. Experience in other jurisdictions does show the difficulties of establishing a prima facie case on the merits and the need to avoid a premature trial. For this reason we still think that the pursuer's prospects of success should not be a separate "threshold ground" akin to the need for the remedy. On the other hand the pursuer's prospects, or rather his apparent prospects, of success should not be ignored in the legislation. As a compromise we gratefully adopt Professor Gretton's suggestion that those prospects should be specified by legislation as a factor which the court may consider in exercising its discretion.

(e) Recommendation

3.45 We recommend:

In an application to the court for the discretionary grant of warrant for diligence on the dependence, the warrant should only be granted where it appears to the court:

(a) that there is a real and substantial risk that, in the event of the pursuer obtaining decree, the enforcement of the decree may be frustrated or materially prejudiced by:

(i) the fact that the defender is insolvent or verging on insolvency; or

(ii) the defender removing assets from the jurisdiction, or disposing of, burdening, removing, concealing or otherwise dealing with his assets; and

(b) that it would be reasonable to grant the warrant, with or without restrictions or conditions, having regard to the pursuer's apparent prospects of success on the merits, and all the other relevant circumstances of the case.

(Recommendation 4; Draft Bill, clause 1(1) and (2))

47 Including the Court of Session Judges and the Sheriffs' Association.

(5) Powers of court

3.46 In our discussion paper we suggested that the court should have wide powers to grant, or refuse to grant, the warrant, with or without restrictions or conditions, and, subject to rules of court, to determine the procedure to be adopted.[48] We adhere generally to these views. The court should have power to grant a warrant for arrestment on the dependence, or inhibition on the dependence, or both such warrants, without restriction. The court should also have power to grant the warrant in a restricted form as mentioned below.

3.47 The court should have power to refuse to grant the warrant unconditionally and without more ado. Questions of competency in applications for recall normally involve the irregular execution of diligence under a competent warrant, but there may be cases where it clearly appeared that the mere grant of a warrant would be incompetent, eg where the action as laid was incompetent for want of jurisdiction in Scotland or a sheriffdom, or because the conclusions of the summons or initial writ did not support the warrant.[49]

3.48 In some cases, it may appear to the court that the element of surprise is unimportant and that justice requires that the defender should have an opportunity to be heard by the court as to whether warrant should be granted, and, equally important, an opportunity to provide caution, as a condition of refusal to grant the warrant. Thus it may be clear that there is no real risk of the defender taking immediate measures to frustrate diligence following intimation of the application, as where the defender is a local authority or large public company known to be of undoubted solvency, which has ample attachable assets and ample funds to meet the pursuer's claim, and which simply delays payment because it contests liability. There may be a question of whether diligence is necessary at all in such cases[50] but even if some security should in the court's opinion be furnished, it will often be clearly better that the defenders should have the opportunity to find caution or make consignation than that their business or credit should be harmed by premature and unnecessary diligence on the dependence securing a claim which may turn out to be unfounded. In more unusual cases, it may appear that the action is vexatious or frivolous and that warrant for diligence on the dependence is being sought to embarrass the defender rather than to protect the pursuer's legitimate interests.[51] An advantage of an opposed hearing is that, as Sheriff Dobie remarked:[52]

> "there seems no good reason why [the pursuer's] statements need be taken at face value when the defender may be at least equally worthy of credit... It is admittedly difficult to adjudicate upon conflicting ex pane statements,[53] but fair consideration should be given to the averments of both sides, and in suitable cases some prima facie evidence might be asked or offered".

3.49 Restriction of warrant. One of the most important powers available to the court would be the power to restrict a warrant for diligence on the dependence, especially warrants for inhibition on the dependence. It should be competent for the court to grant warrant for inhibition on the dependence limited to subjects specified in the warrant as is competent by statute[54] in the case of warrants for inhibition securing aliment or financial provision on divorce. It should also be competent for the court to grant a warrant for inhibition (which affects the defender's heritable property generally) but to except particular subjects from its ambit.[55] It would be desirable or perhaps essential that the description of the subjects specified as included or excluded should be a sufficient conveyancing description to enable the Keeper of the Registers, and users of the personal and property registers, to connect the subjects specified in the inhibition (registered in the personal register) with the title deeds recorded in the Sasines Register or with the Title Sheet in the Land Register.

---

48 Discussion Paper No 84, Proposition 3, para 2.79.

49 Eg the action did not have pecuniary conclusions or, in the case of inhibitions, an appropriate conclusion or crave adfactum praestandum.

50 See eg West Cumberland Farmers v Director of Agriculture of Sri Lanka 1988 SLT 296.

51 See eg Levy v Gardiner 1964 SLT (Notes) 68.

52 1934 SLT (News) 49 at p 50.

53 le statements not supported by evidence which is subject to cross-examination.

54 Family Law (Scotland) Act 1985, s 19(1).

55 As in Pow v Pow 1987 SLT 127; 1987 SCLR 290.

3.50 It is essential that the court should have power to restrict a warrant for arrestment to particular funds or property specified in the warrant, as is competent in relation to aliment and financial provision on divorce.[56] The court should also be empowered to exclude particular funds or property from the scope of a warrant for arrestment. It might, for example, be clear that to arrest a defender company's bank accounts would cause undue disruption of its business, whereas other attachable assets were or might be available which could be arrested with less hardship to the defender.

3.51 On consultation the Sheriffs' Association also said that it would be difficult to specify limitations in a warrant made before service. We agree, but there may be some cases where restrictions clearly should be made. The Committee of Scottish Clearing Bankers commented that restriction of diligence may present real difficulties until such time as there is a comprehensive order of ranking of diligences among themselves and with security over the relative assets. In our view however such considerations would not justify the excessive use of diligence on the dependence. Restriction is the most direct and flexible method of moderating or controlling such excess.

Recommendation

3.52 We recommend:

(1) In disposing of or dealing with an application for warrant for diligence on the dependence, the court should have power:

(a) to grant a warrant for inhibition on the dependence or arrestment on the dependence or both; or

(b) to grant the warrant subject to restriction of its terms; or

(c) to refuse to grant the warrant; or

(d) to refuse to grant the warrant ex parte, to order intimation of the application to the defender, and such other interested person (if any) as the court thinks fit, and to appoint a time for a hearing of the application at which objections may be made.

(2) The court's power to restrict the warrant mentioned at para (l)(b) above should include power:

(a) to limit a warrant for inhibition on the dependence to subjects specified in the warrant or to except subjects so specified from the scope of the warrant; and

(b) to limit a warrant for arrestment on the dependence to particular funds or property, or to except particular funds or property from the scope of the warrant, and also power to restrict the amount which an arrestment will secure, or in respect of which an inhibition will have effect, to an amount less than the amount of the sums claimed in the depending action.

(Recommendation 5; Draft Bill, clause 1(1), (3), (5) and (6))

(6) Liability of pursuer for wrongful or unjustified diligence on the dependence

(a) The existing law

3.53 A litigant using diligence on the dependence in the ordinary course of process is generally not liable for loss which has been caused if his claim should eventually prove to be unfounded. The:

> "right of a litigant to use arrestment and inhibition in security of his claim is in the same position as his right to take action therefor. He has an absolute right to use these diligences without obtaining a special warrant from the Court, and is not liable in damages if he has proceeded regularly, although it should ultimately turn out that his claim is unfounded".[57]

56 Family Law (Scotland) Act 1985, s 19(1).

57 Graham Stewart, p 773, approved in Grant v Magistrates of Airdrie 1939 SC 738 at p 759 per Lord President Normand.

Normally a litigant using diligence on the dependence[58] is liable in damages for loss which it causes only if (1) there is an inherent defect in the warrant; or (2) the diligence is not regularly executed; or (3) though the diligence is formally regular, it was executed with malice (in the sense of improper motive) and want of probable cause.[59] Both malice and want of probable cause are very difficult to prove, - much more so than the test of nimiety and oppression as a ground of recall[60] - and are very rarely established.

3.54 The rationale underlying the need to prove malice and want of probable cause is that a person using a legal process acts in the exercise of his legal right and is entitled to the highest degree of privilege short of absolute privilege.[61] In the leading Wolthekker case,[62] Lord Justice-Clerk Inglis observed:

> "It would be most unreasonable and inconsistent, to give the pursuer of an action the right to use inhibition and arrestment on the dependence, and, at the same time, to make him answerable in damages, merely because he fails in obtaining a judgment against the defender, though he has used his legal right moderately and in good faith. I think it would be quite as reasonable to make him answerable for damages arising from his having raised an action in which he has not succeeded. His right to raise the action, and to state in his summons everything pertinent, though injurious to the defender, is not more unqualifiedly secured to him as a litigant, than his right to use diligence on the dependence".[63]

An ill-founded action is just as competent as a well-founded action[64] and the same is true of diligence on the dependence.

3.55 The basis of the present law is[65] that it is in the public interest that persons should not be deterred from using the machinery of the law to pursue their ordinary legal remedies.[66] A different principle applies to an extraordinary or special diligence or remedy for which a warrant or order of the court is required and which is obtained upon a statement or representation to the court.[67]

(b) Criticism of the existing law

3.56 The existing law on liability for wrongful diligence on the dependence encourages its unrestricted use since a pursuer generally has nothing to lose, and everything to gain, from its use. If diligence on the dependence is to be regarded as an extraordinary remedy (as we recommend), the basis on which the present law rests would disappear. A person using diligence on the dependence would then be exercising not his legal right but an extraordinary remedy granted at the court's discretion. Therefore he should not be entitled to near absolute privilege. On the contrary, on the extraordinary remedy theory of diligence on the dependence, he should be treated as voluntarily assuming the risk of being held liable for unjustified use of the diligence if for example his action fails on the merits or he acted unreasonably in applying for

58 Ie under a warrant obtained as a routine administrative act.

59 Graham Stewart, p 762; Grant v Magistrates of Airdrie, supra, at pp 758-9.

60 Diligence on the dependence may be excessive or oppressive, within the meaning of the test for recall, though used in good faith. The test of whether diligence on the dependence is excessive or oppressive is an objective test which has reference primarily to the impact of the diligence on the defender. By contrast, the test of delictual liability - malice and want of probable cause - or at least the first part of that test, has reference primarily to the pursuer's spiteful or improper motive. It is this emphasis on subjective motive, together with the fact that creditors rarely use diligence vindictively being concerned simply to recover their debts, which makes the test of delictual liability difficult to satisfy.

61 Notman v Commercial Bank of Scotland 1938 SC 522 at p 532 per Lord Justice-Clerk Aitchison (delivering the Opinion of a Court of seven judges).

62 Wolthekker v Northern Agricultural Co (1862) 1 M 211.

63 Ibid at pp 212-213.

64 Mclaughlin v T Dixon Ltd 1924 SLT (Sh Ct) 57 at p 60 per Sheriff Irvine.

65 Eg Wolthekker v Northern Agricultural Co (1862) 1 M 211; Brodie v Young (1851) 13 D 737; Henning v Hewetson (1852) 14 D 487; J & W Kinnes v Adam & Sons (1882) 9 R 698 at p 702; McGregor v Mclaughlin (1905) 8 F 70 at p 74; Kerr v Malcolm (1906) 14 SLT 191.

66 Notman v Commercial Bank of Scotland, supra, at p 532.

67 See Discussion Paper No 84, paras 2.95-2.96. In modern practice this class of case is generally said to include warrants for sequestration for rent under the landlord's hypothec, summary warrants for recovering arrears of taxes, rates, community charge or council tax, and certain warrants to carry back tenants' goods. At least with regard to the first two mentioned examples, however, they are, in practice, granted ex pane by a routine administrative act and are Obtained as a matter of right.

warrant. This would discourage pursuers from automatically applying for diligence on the dependence in every case.

3.57 Comparative law. Such a safeguard for defenders exists in other legal systems. In English law, the plaintiff must give an undertaking to pay damages flowing from a Mareva injunction if his claim on the merits should be unsuccessful,[68] and similar undertakings are required in some jurisdictions in North America as a condition of obtaining a pre-judgment remedy.[69] So too, in many countries in continental Europe, the pursuer is liable in damages for loss caused to the defender by an interim attachment if he fails to validate or justify it.[70] Principle 8 of the Helsinki Principles states: "The court should have authority to require security or other conditions from the plaintiff for the injury to the defendant or to third parties which may result from the granting of the order. In determining whether to order security, the court should consider the availability of the plaintiff to respond to a claim for damages for such injury".

(c) Provisional proposals and consultation

3.58 In our discussion paper we suggested that a pursuer using diligence on the dependence in pursuance of a discretionary warrant should be liable in damages for wrongful diligence where the court has been misled into granting the warrant by either a material factual statement by the pursuer which he knew, or ought to have known, was untrue or his failure to disclose to the court material facts within his knowledge.[71]

3.59 On consultation, reaction to these proposals was mixed. Some consultees agreed[72] albeit many with qualifications. The Court of Session judges for example suggested that a pursuer should be liable for deliberately or negligently misleading the court even if he were successful on the merits.[73] Among those who disagreed, the Regional Sheriff Clerks thought the proposal too restricted and suggested that wrongful diligence arising from the pursuer's error should be included, since one arrestment could bring a company into liquidation. By contrast Professor Gordon thought strict liability would be too severe and would deter the proper use of diligence.

3.60 Another commentator foresaw problems since pursuers often omit material facts in the summons or other initiating writ. The Faculty of Advocates did not consider it practicable to make the pursuer's liability depend on proof that he had misled the court, given the likely development of oral argument and the uncertainty as to what in fact persuaded the court. We accept this criticism.

(d) Recommendation

3.61 We now think that it follows from the extraordinary remedy theory of diligence on the dependence that its use should in principle be at the applicant's risk. This would be analogous with the position in many (though not all) other legal systems,[74] with the Scottish rules on liability for wrongful diligence under warrants granted in "special applications",[75] and with the Scottish rules on liability for wrongful interim interdict.[76] A pursuer can reasonably be expected to bear the risk of litigation if he seeks to secure his position in the interim by means which damage the defender. Someone must bear that risk and it seems consonant with other branches of the law, and also fairer, to impose it on the pursuer rather than the defender.

3.62 We conclude therefore that the pursuer should be liable to the defender in damages for loss arising directly from his wrongful or unjustified use of diligence on the dependence. Diligence will be wrongful

68 See Practice Direction [1994] 4 All ER 52.

69 Eg California Code of Civil Procedure 1982 s 489.210.

70 O'Malley and Layton, European Civil Practice state that this rule applies in Belgium (para 48.60); Denmark (para 49.58); France (para 50.60); Germany (para 51.59); Italy (para 53.59); Luxembourg (para 54.60); and the Netherlands (para 55.59).

71 Discussion Paper No 84, Proposition 6(1) (para 2.101). We also proposed however that he should not be so liable merely on the ground that his claim of debt is held by the court to be unfounded or that his action eventually turns out to be unsuccessful. Ibid, Proposition 6(2).

72 Including eg the Court of Session judges and the Sheriffs' Association.

73 The Sheriffs' Association suggested the formula "pursuer's failure to disclose facts within his knowledge which he knew or ought to have known to be material" in describing the basis of liability.

74 Para 3.57.

75 Para 3.55.

76 See eg Clippens Oil Co v Edinburgh Water Trs 1907 SC (HL) 9.

if the warrant is invalid or, though valid, irregularly executed. It should be treated as unjustified if, at the time of the application, it was unreasonable for the pursuer to have applied for the warrant, eg where the pursuer failed to verify his unfounded averments as to the defender's financial position. We also think that the pursuer's liability should be extended to the third parties having an interest in property which has been arrested or affected by the inhibition. Such parties could suffer severe loss as a result of wrongful or unjustified diligence on the dependence. Since these third parties have no interest in the litigation, they are as much (if not more) entitled to be compensated as is the defender. Liability should be restricted to patrimonial loss.

3.63 We recommend that:

A pursuer should be liable in damages to the defender, or to a third party having an interest in the property arrested or affected by the inhibition, for patrimonial loss arising directly from his use of diligence on the dependence if (a) the warrant was obtained or executed wrongfully, or (b) it was unreasonable for the pursuer to apply for the warrant.

(Recommendation 6; Draft Bill, clause 6)

(7) Caution or consignation by pursuer

3.64 Existing law and practice. Where an arrestment or inhibition has been used on the dependence, there is old authority that the court hearing an application for recall or restriction may require the arrester or inhibitor to find caution for the damage which may be caused by allowing the diligence to remain.[77] This is rarely resorted to, and Graham Stewart[78] observes that it is used only when it is apparent that the pursuer has little prospect of success. No case has been traced in which caution has been required as a condition of obtaining the warrant. The power has been used only in applications for recall or restriction.

3.65 A requirement for a pursuer to find caution is difficult to reconcile with the pursuer's entitlement to obtain a warrant for diligence on the dependence as of right, and with the rule that he is not liable for damages merely because the action in question turns out to be unsuccessful.[79] The caution could be required only to secure against damages for diligence which is wrongful in the sense that it is formally irregular or that it is executed with malice and want of probable cause, and not against nimious and oppressive use of the diligence.

3.66 This distinguishes diligence on the dependence from interim interdict where the court sometimes imposes a condition that the complainer should find caution for damages and expenses in the event that the interdict is ultimately held to be wrongous or unjustified, ie if the action ultimately fails.[80]

3.67 So far as we are aware, caution or consignation by the arresting or inhibiting pursuer is unknown in modern practice. If however he is to be liable for loss arising from wrongful or unjustified diligence on the dependence as we recommend,[81] there is much greater scope for caution or consignation. There may even be cases where the competency of the diligence is in doubt, eg whether a ship sought to be arrested on the dependence belongs to the defender, and warrant (if granted at all) has to be granted forthwith because speed is essential in the circumstances. In such a case, it may be useful for the court to require the arrester to find caution.

3.68 Comparative law. In some countries of continental Europe the court when authorising an interim attachment may require the applicant to lodge security to indemnify the defender against loss caused by the interim attachment if it is later found that the attachment was not justified.[82] Similarly in English

77 Hamilton v Fullerton (1823) 2 S 264; affd (1825) 1 W&S 531 (arrestment on the dependence); Barstow v Menzies (1840) 2 D 611 (inhibition on dependence securing a claim adfactum praestandum); Graham Stewart, pp 199, 570.

78 p 570 citing Seton v Hawkins (1842) 5 D 396.

79 See para 3.53.

80 Burn-Murdoch, Interdict, p 141 if; but see as to modern practice Wright v Thomson 1974 SLT (Notes) 15.

81 Recommendation 6 (para 3.63).

82 O'Malley and Layton, European Civil Practice state that this power is found in Denmark (para 49.58)4 France (para 50.60)(the applicant may be ordered to provide security but this is not normally required); Germany (para 51.59) (security sometimes" ordered); Italy (para 53.59)(applicant may be ordered to provide security); but not in the Netherlands (para 55.59). Query as to Belgium (para 48.60) and Luxembourg (para 54.60).

law, the plaintiff may be required in an appropriate case to secure a cross-undertaking in damages by a payment into court or the provision of a bond by an insurance company. Alternatively, the judge may order a payment by way of such security to the applicant's solicitor.[83]

3.69 Consultation. The response to the proposal in our discussion paper[84] was again divided. Some consultees agreed that the court should have power to require caution from the pursuer. The Faculty of Advocates observed that it would be undesirable for caution to be required in every application: the court should exercise a discretion. The Court of Session judges were divided. One view favoured the power; the other view regarded it as an unnecessary complication, - a view shared by a solicitor who emphasised that the procedure should be simple and easy.

3.70 The Committee of Scottish Clearing Bankers thought that caution should be required only if the pursuer is outwith the jurisdiction of the Scottish courts. There may be other cases. In the case of ex pane applications, in cases of doubt, the court may think it right to grant warrant for diligence on the dependence only if security is found by the applicant. Further the court may be guided by the practice in interim interdict where it has been laid down that, while there is no fixed rule, caution (though not normally required) may in practice be ordered in exceptional circumstances eg where the pursuer is insolvent or it appears that the defender would have a substantial claim for damages in the event of interim interdict proving wrongous.[85] Having regard to the facts that the Scottish courts already possess this power (though it is rarely invoked); that many foreign courts also possess it; and that in our proposed new system, it might be useful in at least exceptional circumstances, we think that it should be retained.

3.71 We recommend:

> **The court should be empowered to require the pursuer, as a condition of granting warrant for diligence on the dependence, to give security by way of caution or consignation or otherwise for meeting any liability which he may incur for wrongful or unjustified diligence on the dependence.**
>
> (Recommendation 7; Draft Bill, clause 4)

(8) Caution or consignation by defender

3.72 Existing law on caution or consignation by defender. Since the purpose of diligence on the dependence is to provide a creditor with security for his claim, the defender or alleged debtor (or other applicant for recall) is entitled to obtain recall of the diligence if he consigns the sum sued for or finds caution for it to the satisfaction of the court.[86] In the case of arrestment, caution may be found for the arrested fund or property or its value, but more commonly caution for the whole debt is required,[87] thereby enabling the court to recall all the arrestments already used, and to prohibit the use of further arrestments under the same warrant.

3.73 In the case of inhibition on the dependence, caution will normally be found for the debt. If anything less than full caution or consignation is offered, the amount required is fixed by the court in its discretion. "No general rule can be laid down except that the amount depends on the circumstances of each case."[88] In particular, where the pursuer sues for a random sum, eg damages or count, reckoning and payment with an alternative conclusion for damages, the court may modify the amount of caution having regard to the nature of the action, the extent of the subjects arrested or affected by the inhibition and the circumstances of the common debtor.[89] Often the court will fix caution at a sum substantially below the

83 See Practice Direction [1994] 4 All ER 52.
84 Discussion Paper No 84, Proposition 6(3) (para 2.101).
85 Wright v Thomson 1974 SLT (Notes) 15 (OH) per Lord Maxwell.
86 This is recognised in the usual form of arrestment on the dependence which states that the subjects are arrested until sufficient caution be found.
87 Macphail, p361.
88 Graham Stewart, pp 202; also p 571.
89 Graham Stewart, pp 203, 571; Macphail, p 361.

random sum.[90] The court is the judge of the status of the cautioner, but in general caution may be furnished by a private individual. Where the cautioner's solvency becomes doubtful while the action is still in dependence, the pursuer should move for new caution to be found.[91] The court may order consignation of an appropriate sum in lieu of caution.[92]

3.74 Provisional proposal and consultation. In our discussion paper, we provisionally proposed that in a contested application for warrant, the court, when refusing or restricting the warrant, should be able to make the refusal or restriction dependent on the defender finding security for an amount not exceeding the sum claimed together with the estimated expenses.[93] Only the Committee of Scottish Clearing Bankers disagreed.[94] The opinions of the Court of Session judges differed. On one view, the proposal was consistent with and necessary for the modernised system desiderated. On the other view, the court should not grant a warrant in respect of a sum representing an estimate of expenses. They pointed out that at the stage when these matters are considered, the court cannot make any sound assumption that the pursuer will win and thus be awarded expenses. Furthermore, the defender has no right to obtain a similar diligence in respect of a possible award of expenses in his favour unless he can persuade the court to ordain the other party to find caution, a course rarely followed. They concluded that the warrant, caution or consignation should be related simply to the sum likely to be awarded in the event of success without any addition in respect of estimated expenses. These are cogent arguments. On the other hand, most consultees agreed with our provisional proposal.[95] In agreeing, Lord President Hope saw no good reason for changing the law despite the practical problems of making a reasonable estimate of the amount of the expenses in advance of the diligence. In these circumstances we adhere to our proposal subject to some refinements. The legislation should not require the court, in fixing the amount of caution, to estimate the future expenses but rather should direct it to have regard to the amount which it considers reasonable to allow for expenses. This would be a more realistic requirement.

3.75 We recommend:

> **Where in an opposed application for warrant for diligence on the dependence at which the defender appears, the court decides to refuse to grant warrant, or to grant a restricted warrant, the court should have power to impose a condition making the refusal or restriction dependent on the defender finding caution for, or consigning, an amount not exceeding the sum claimed, together with a reasonable sum allowed for expenses.**
>
> (Recommendation 8; Draft Bill, clause 1(7))

(9) Warrants for diligence on the dependence securing future or contingent debts

3.76 Common law. It is competent for the pursuer to obtain warrant to arrest or inhibit on the dependence where the sum sued for is future or contingent. Nearly all the modern cases which we have been able to trace, relating to warrants for diligence on the dependence in security of future or contingent debts, involved aliment or (since 1964) a periodical allowance or capital sum awarded in a divorce action.[96] Aliment involves future debts insofar as, even immediately after decree, the instalments of pecuniary aliment are not yet due. Moreover, the rights to a capital sum and a periodical allowance sued for in a

90 Eg Fisher v Weir 1964 SLT (Notes) 99; Arch Joinery Contracts Ltd (in liquidation) v Arcade Building Services Ltd 1988 GWD 29-1258; Graham Stewart, pp 203, 571.

91 CfRCS, r33.9.

92 Eg Fisher v Weir 1964 SLT (Notes) 99.

93 Discussion Paper No 84, Proposition 5 (para 2.92).

94 The Committee opposed in principle the intimation to defenders of applications for warrants for diligence on the dependence.

95 Including among others Lord President Hope; the Faculty of Advocates; the Regional Sheriff Clerks; and the Sheriffs' Association.

96 See Symington v Symington (1875) 3 R 205; Burns v Burns (1879) 7 R 355; James v James (1886) 13 R 1153; Ellison v Ellison (1901) 4 F 257; Millar v Millar (1907) 15 SLT 205; Noble v Noble 1921 1 SLT 57; Stuart v Stuart 1926 SLT 31; Smith v Smith 1932 SLT 45; Beton v Beton 1961 SLT (Notes) 19; Gillanders v Gillanders 1966 SC 54; Brash v Brash 1966 SC 56; Tweedie v Tweedie 1966 SLT (Notes) 89; Wilson v Wilson 1981 SLT 101; Pow v Pow 1987 SLT 127; 1987 SCLR 290; Thorn v Thorn 1990 SCLR 800 (OH); Matheson v Matheson 1995 SLT 765 (OH).

divorce action are contingent on success in the divorce action and the exercise of the court's discretion.[97] Outside the field of divorce and aliment actions, there are few reported cases involving discussion of diligence on the dependence for payment of a future or contingent debt.[98] We have traced only one case in which warrant was granted.[99] That case is briefly reported and, while the court held the action to be competent,[100] it must be regarded as exceptional in practice.

3.77 The Family Law (Scotland) Act 1985, section 19, now governs the grant of warrant for diligence on the dependence in security of aliment, and of financial provision on divorce (or declarator of nullity of marriage). It follows that the older common law is relevant only to other types of action for payment of future or contingent debts, which appear to be unusual in modern practice. Reference is made to the older law, as outlined at paragraph 2.56 above, under which the special circumstances justifying warrant are that the defender is verging on insolvency, or contemplating abscondence, or removing his property beyond the power of his creditors. The courts have power to restrict a warrant for inhibition on the dependence by excluding specified heritable property from its ambit.[101] It has been observed that inhibition on the dependence is a more effective and suitable method of protection than interdict against disposal of property,[102] since it prevents disposal and at the same time does not involve questions of contempt of court.[103]

3.78 Statute: "cause shown" in relation to aliment and financial provision. As regards diligence on the dependence of actions for aliment or divorce or declarator of nullity of marriage, raised after 1st September 1987, section 19 of the Family Law (Scotland) Act 1985 provides:

> "19.-(1) Where a claim has been made, being-
>
> (a) an action for aliment, or
>
> (b) a claim for an order for financial provision
>
> the court shall have power, on cause shown, to grant warrant for inhibition or warrant for arrestment on the dependence of the action in which the claim is made and, if it thinks fit, to limit the inhibition to any particular property or to limit the arrestment to any particular property or to funds not exceeding a specified value.
>
> (2) In subsection (1) above, "the court" means the Court of Session in relation to a warrant for inhibition and the Court of Session or the sheriff, as the case may require, in relation to a warrant for arrestment on the dependence."

The section makes two changes to the pre-existing law. First, as regards the grounds on which warrant for diligence on the dependence securing aliment or financial provision (ie a capital sum or periodical allowance) may be granted, the section simply states that there must be "cause shown". The intention, as stated in our Report on Aliment and Financial Provision,[104] was that it should be competent to inhibit or arrest on the dependence of a divorce or aliment action even in the absence of special circumstances, and that such diligence "should be made available as normal remedies" in such actions. It was observed that interdict to counteract avoidance transactions is a difficult remedy to enforce in this situation and

97 Brash v Brash 1966 SC 56 at p 58.

98 See however Costain Building and Civil Engineering Ltd v Scottish Rugby Union pic 1993 SC 650 (Five Judges) (arrestment on dependence in common form of contingent claim for payment for building works for which payment not yet certified as due by engineer under building contract; arrestment recalled as incompetent without caution or consignation); followed in Taymech Ltd v Trafalgar House Construction (Regions) Ltd 1995 SLT 202 (OH) (subcontractors' claim contingent on employer's payment to main contractors); distinguished Rippin Group Ltd v TIP Interpipe SA 1995 SC 302 (2d Div) (fact that merits of claim to be determined by an arbiter does not make claim contingent).

99 See Dove v Henderson (1865) 3 M 339.

100 Ibid per Lord President McNeill.

101 Pow v Pow 1987 SLT 127; 1987 SCLR 290 (decided under the common law rather than section 19 of the 1985 Act); Smith v Buchanan 1997 GWD 12-490 (inhibition restricted in application under s 19 of 1985 Act).

102 le an interdict under the Family Law (Scotland) Act 1985, s 18, replacing Divorce (Scotland) Act 1976, s 6.

103 Wilson v Wilson 1981 SLT 101 at pp 102-3 approved in Pow v Pow 1987 SLT 127 at p 129; 1987 SCLR 290.

104 (1981) Scot Law Com No 67, paras 3.152 and 3.153.

that, if inhibition and arrestment on the dependence were available, interdict should be used only as a remedy of last resort, which was desirable since inhibition and arrestment have advantages over interdict.[105]

3.79 Three further comments may be made on "showing cause". First, if the legislative intention had been to make diligence on the dependence securing aliment and financial provision a "normal remedy" in the sense that diligence on the dependence securing a debt presently due is a normal remedy, then there would have been no requirement of "showing cause". It is explained that under the old law interdict was in practice used as the normal remedy to counteract avoidance transactions, and the object of section 19 was that that role should be filled, so far as practicable, by diligence on the dependence. The latter form of protection does not however affect moveables in the defender's possession, and in such a case interdict would be the only remedy. Second, it is on further reflection not easy to see what "cause" will justify the grant of warrant under section 19 other than the "special circumstances" required by the pre-existing law. In this respect, the legislation may not have made a significant difference. Third, the requirement of "showing cause" does not necessarily imply that the cause must be shown at a hearing before a judge. It may be made in averments in the summons or application for letters of inhibition where the grant of warrant is an administrative act. We revert to procedural questions below.

3.80 Powers to restrict warrant on granting it. The second change is that section 19 confers on the Court of Session power to limit an inhibition on the dependence to any particular property and on the Court of Session and sheriff court power to limit the arrestment to any particular property or to funds not exceeding a specified value. As our Report on Aliment and Financial Provision[106] indicates, the legislative intention was that the court should be empowered to restrict an arrestment or inhibition on the dependence to specific items of property or to funds specified in the warrant. It is thought that section 19(1) achieves that intention though it has to be conceded that the object of the verb "to limit" is stated to be the inhibition or the arrestment rather than the warrant in pursuance of which the diligence is used. As regards inhibitions on the dependence, our recommendation was made on the footing that it was not competent for the court to restrict the warrant in the first instance to particular items of property.[107] This was the commonly accepted view which was not challenged on consultation, though the Outer House case of Pow v Pow,[m] in which the court granted warrant for inhibition but excluded a specific item of heritable property from it, suggests that that view was mistaken. It should be noted that section 19(1) gives the court power to specify particular property to be covered by the inhibition, not (as in Pow v Pow) power to grant a general warrant for inhibition with an exclusion of particular property.

3.81 Procedure. There is a conflict of authority as to the proper procedure to be adopted in obtaining warrant for inhibition or arrestment on the dependence in security of a future or contingent debt. It may be convenient to discuss these authorities first and then to consider the effect of the 1985 Act, section 19. The authorities support the three procedures mentioned in the next three paragraphs.

3.82 First, warrant is granted in a summons or initial writ as a matter of course but the»pursuer must, when seeking the warrant, aver the special circumstances on which he founds. This procedure was approved in Noble v Noble[m] and appears to be followed in modern practice in the great majority of cases.

3.83 Second, the pursuer should proceed by a special application intimated to the defender to enable him to oppose. This seems to have been the procedure which Lord President Inglis had in mind in Symington v Symington[110] where he remarked: "It rather appears to me that if such diligence is to be used on the dependence of an action in security of a debt not then due, the creditor must proceed by a bill, so as to give the defender an opportunity of answering ... instead of proceeding to use diligence simply by warrant obtained on the summons". It was subsequently pointed out by Graham Stewart[111] and Lord

105 See previous para, last sentence.
106 Para 3.154.
107 Idem.
108 1987 SLT 127; 1987 SCLR 290.
109 1921, 1 SLT 57 at pp 58-59 per Lord Ashmore.
110 (1875) 3 R 205 at p 206.

Ashmore in Noble v Noble,[U2] first, that in bill procedure, a copy of the bill is not served on the defender so that he has no opportunity to object, and second, that if a copy was served on him, he would be likely to take action to frustrate the diligence. This is the procedure which is followed where in a Court of Session action in which warrant has not been inserted in the signeted summons, warrant is subsequently applied for by motion."[3] In such a case the court will examine the special circumstances even if the motion is unopposed.[114] Sheriff Macphail has argued that in a sheriff court action for enforcement of a future or contingent debt, "the court should grant warrant for citation alone, and should grant warrant for arrestment only after service of the initial writ and upon consideration of a motion which has been duly intimated to the defender".[115]

3.84 Third, Graham Stewart[115] took the view that the proper and only competent procedure was the ex pane application for a bill for letters of arrestment or inhibition on the dependence setting forth the grounds justifying the grant of the letters. This procedure, in an amended form,[117] may still be adopted if warrant has not been obtained in the summons or initial writ and it is desired not to intimate the application for warrant to the defender, but in practice seems to be adopted rarely if ever.

3.85 In our Report on Aliment and Financial Provision^* we recommended that rules of court should lay down the procedure for obtaining warrants for inhibition or arrestment on the dependence, the suggested procedure being by motion intimated to the other party. This was not immediately implemented, with the result that there was no procedure in which the applicant for warrant was required to "show cause". The difficulties were highlighted in Thorn v Thom.[u9] The matter has now been remedied by rules of court. The Rules of the Court of Session now provide that in an action of aliment or a claim for financial provision in an action of divorce or declarator of nullity of marriage, which is for a future or contingent debt, warrant to arrest or inhibit on the dependence may be granted only by motion.[120] Furthermore it is provided that an application for letters of arrestment or inhibition on the dependence of an action to which a claim under section 19 of the 1985 Act applies shall be placed before the Lord Ordinary.[121] In the sheriff court, a warrant for arrestment on the dependence in a family action in respect of a claim to which section 19 applies must be signed by the sheriff.[122]

3.86 Consultation. In our Discussion Paper we suggested that our specific proposals on the discretionary grant of warrants for diligence on the dependence securing debts already due should apply to cases involving diligence on the dependence securing future or contingent debts, including aliment and financial provision on divorce.[123] The pursuer should not be entitled to obtain the warrant as a matter of course. This has already partly been implemented by rules of court.[124] Our recommendations on warrants for diligence on the dependence securing debts already due, liability for wrongful diligence, and related matters,[125] should extend to diligence on the dependence securing future or contingent debts, including aliment and financial provision on divorce or nullity of marriage, and should replace the Family Law (Scotland) Act 1985, section 19. This suggestion was supported by consultees.

---

111 p 20, fall.
112 Supra at p 59.
113 RCS r!3.8(l). If a defender has entered appearance, or lodged defences, or a minute or answers have been lodged, intimation . will have to be made to that party - r 23.3; Wilson v Wilson 1981 SLT 101; Pow v Pow 1987 SLT 127; 1987 SCLR 290.
114 Wilson v Wilson 1981 SLT 101.
115 Macphail, p 354.
116 pp 20 and 535.
117 RCS, r 59.1.
118 Recommendation 42(b) (para 3.155), and para 3.153.
119 1990 SCLR 800 (OH).
120 RCS, r 49.7.
121 RCS, r 59.1(5).
122 OCR, r 5.1(2)(b). Otherwise a warrant for arrestment on the dependence may be signed by the sheriff or sheriff clerk - r 5.1(1).
123 Discussion Paper No 84, para 2.114.
124 See para 3.85 above.
125 See paras 3.3, 3.5, 3.27, 3.45, 3.52, 3.63, 3.71 and 3.75 above.

3.87 We recommend below[126] that the sheriff should have jurisdiction to grant warrants for inhibition on the dependence. That power would be exercisable in family and other actions in the sheriff court.

3.88 We thought it unlikely that pursuers in aliment, divorce or nullity actions would apply for interdict under section 18 of the 1985 Act rather than use inhibition or arrestment on the dependence. In our Discussion Paper[127] we invited views on whether the grant of an interdict under the Family Law (Scotland) Act 1985, section 18 (which interdict prohibits transfers or transactions likely to defeat claims for aliment or financial provision) should be competent only if it appears to the court that inhibition or arrestment on the dependence would not be an adequate remedy. There was little support for this proposal on consultation and we are content that the matter should be left to the discretion of the court.

3.89 We recommend that:

> **Our recommendations on warrants for diligence on the dependence securing debts already due, liability for wrongful or unjustified diligence and related matters, should extend to diligence on the dependence securing future or contingent debts, including aliment and financial provision on divorce or nullity of marriage, and should replace the Family Law (Scotland) Act 1985, section 19.**
>
> (Recommendation 9; Draft Bill, clauses 1-7; Schedule)

(10) Jurisdiction of the sheriff to grant warrant for inhibition on the dependence

3.90 Although the sheriff has power to grant warrant for arrestment on the dependence he has no power to grant warrant for inhibition on the dependence.

3.91 The absence of such a power means that letters of inhibition on the dependence of sheriff court actions are frequently used. For the first nine months of 1997,[128] the Keeper's computerised record of letters of inhibition records 1,910 on the dependence of sheriff court actions (RCS, Form 59.1-D), 897 in execution of decrees (RCS, Form 59.1-B) and 76 in execution of deeds registered for execution (RCS, Form 59.1-C).[129]

3.92 The procedure is complicated. Application is made to the General Department of the Court of Session. The application for letters of inhibition is presented for signeting together with any relevant supporting documents.[130] If the Deputy Principal Clerk is satisfied that the applicant is entitled to a warrant for inhibition he signs and dates the warrant in the application and the application is signeted. The signeted application and warrant constitute letters of inhibition.[131] If the Deputy Principal Clerk refuses to sign and date the warrant in the application, the application may be placed before a Lord Ordinary.[132]

3.93 Although we indicated in our Discussion Paper that we intended to leave the question of whether the sheriff should have power to grant warrants for inhibition to be dealt with in a future discussion paper on inhibitions, responses to a questionnaire issued by us following the diligence seminar on 29 April 1995 showed such overwhelming support for such a proposal that we deal with the matter in this Report.

3.94 Further support for such a proposal can be found in the McKechnie Report's recommendation[133]

---

126 Recommendation 10 (para 3.97).
127 Discussion Paper No 84, para 2.116.
128 See para 2.90 for figures for 1996.
129 Figures supplied by the staff of the Keeper of the Registers of Scotland.
130 RCS, r 59.1(1) and (2), Form 59.1-D.
131 RCS, r 59.1(3).
132 RCS, r 59.1(4).
133 Report of the Departmental Committee on Diligence (1958: Cmnd 456) paras 190-191, rec 63.

that the sheriff should have jurisdiction to grant warrants for inhibition. The Report observed that already the sheriff grants warrant for inhibition in a sense when he awards sequestration.[134] This view was endorsed by the Grant Report.[135]

3.95 The extra expense and delay of the present procedure of applying for letters of inhibition to the Court of Session seem impossible to justify. We consider that reform is long overdue.

3.96 If the sheriff has jurisdiction to grant warrant for inhibition on the dependence, then there is a case for him to be given jurisdiction to grant warrant for inhibition in execution. We shall consider this matter in a forthcoming discussion paper on inhibitions.

3.97 We recommend:

Jurisdiction should be conferred on the sheriff to grant warrant for inhibition on the dependence.

(Recommendation 10; Draft Bill, clause 2)

(11) Incidence of liability for expenses of using arrestment and inhibition on the dependence

3.98 The existing law. The law on the incidence of liability for the expenses of using diligence on the dependence is confused and uncertain. The question (1) whether the expenses are chargeable against the debtor (ie recoverable by the creditor from the debtor) has to be distinguished from (2) the question whether an arrestment attaches the expenses of arrestment (as well as the principal sum, interest and judicial expenses) or gives the inhibitor a preference for his expenses; and (3) the question whether the expenses of arrestment and inhibition on the dependence of an action may be decerned for, in that action, as part of the expenses of process. Graham Stewart[136] observes that "As arrestment in security is taken for the interim protection of the pursuer he cannot, although successful in his action, recover the expense of using it from the defender,[137] nor is the expense of arresting a ship on the dependence and dismantling her recoverable by the pursuer".[138]

3.99 The cases cited, however, support only the proposition that the expenses of diligence on the dependence of an action cannot be decerned for as part of the expenses of process in that action.[139] The decisions were based on the principle that the using of arrestment on the dependence, however necessary it may be to make a pursuer's decree effectual when obtained, has nothing to do with obtaining that decree, which is the sole object of the action. But the court left open the question whether the expenses of arrestment on the dependence of an action are a debt due by the defender,[140] and as such recoverable in a separate action[141] such as an action of furthcoming[142] or an action of payment. The expenses of an arrestment in execution are recoverable at common law in a separate action for payment,[143] as were the expenses of poinding and warrant sale[144] until the Debtors (Scotland) Act 1987 made them recoverable out of the diligence itself but as a general rule not otherwise.[145]

134 Ibid, para 191.
135 Report of the Departmental Committee on The Sheriff Court (1967: Cmnd 3248) para 125, rec 23.
136 p 133. See also Maclaren, Expenses p 116.
137 Citing Taylor v Taylors 25 January 1820 FC; Symington v Symington (1874) 1 R 1006; Roy v Turner (1871) 18 R 717.
138 Black v Jehangeer Framjee & Co (1887) 14 R 678.
139 See eg Maclaren, Expenses p 116.
140 Symington v Symington (1874) 1 R 1006 at p 1009 per Lord Ardmillan.
141 Ibid at p 1009 per Lord Deas; Roy v Turner (1891) 18 R 717 at p 718 per Lord McLaren.
142 Roy v Turner, supra at p 718 per Lord Adam.
143 Graham Stewart, p 555.
144 Cf Inglis v Mclntyre (1862) 24 D 541 at p 544; Harvie v Luxram Electric Ltd (1952) 68 Sh Ct Reps 181 at pp 182-183.
145 Section 93(1) and (5): it has always been competent to poind sufficient goods to cover the expenses of the charge, poinding and warrant sale (McNeill v McMurchy Ralston & Co (1841) 3 D 554), but prior to the 1987 Act a tender of the debt not covering diligence expenses terminated the diligence.

3.100 On policy grounds, Graham Stewart's explanation seems unsatisfactory. All inchoate diligences, such as arrestments in execution and poindings, are for the protection of the creditor, and it is difficult to see why the interim character of arrestment on the dependence should mean that the creditor is not to have his expenses. If the expenses of an arrestment on the dependence are a debt chargeable against the defender, then under the Debtors (Scotland) Act 1987, section 93(2), they are recoverable from the debtor out of the arrested property and the court will grant decree in the action of furthcoming for the payment of the balance of any expenses not so recovered. Alternatively the expenses may be recovered by a subsequent action of payment and diligence thereon. Another explanation of the supposed non-recoverability of the expenses of diligence on the dependence was given by Lord Sands (obiter) in Hatton v A/S Durban Hansen[m] (in which it was held that the expenses of an arrestment in rem of a ship were recoverable) where he remarked:[147]

> "It is a well-recognised principle of our law that a creditor is entitled to payment not merely of his debt but of all the judicial expenses of its recovery. On the other hand, the law will not presume that a debtor against whom decree may be pronounced is unable or unwilling to meet his obligations. These two principles explain why the expenses of diligence in execution are allowed and those of diligence in security are disallowed."

This explanation is not in our view wholly persuasive. First, it is not easy to see why the recovery of the expenses of diligence should hinge on the absence of any legal presumption that the defender was unwilling to meet his obligations. Such an approach views the matter wholly from the defender's standpoint and ignores those cases where the pursuer was not only successful on the merits of his action but also had good reason to use diligence on the dependence. Moreover, it is always open to a defender, by formal tender of the sum which he thinks is due, to protect himself against further unnecessary expense. Second, ex hypothesi the defender cannot be completely unable to pay because, for arrestment expenses to be recoverable at all, the arrestment must have attached some assets. In principle, the debtor should use his assets to pay his debts.

3.101 Graham Stewart[148] states a similar rule as to the expenses of an inhibition as he states for arrestments on the dependence, on the basis of the same authorities dealing with decree for the expenses of process of the action in which diligence on the dependence was used. In the case of inhibitions, however, there is this difference that there is no authority establishing that the expenses of an inhibition used in execution of a decree are chargeable against the debtor. On the contrary, there is sheriff court authority[149] that the expenses of such inhibitions are not so chargeable. The reason for the decision was that "Inhibition is in its nature merely prohibitory, - a diligence of precaution or protection, - and, unlike arrestment, which may also be described as prohibitory, can never be carried so far as to become a direct step in enforcing payment".

3.102 Though our Discussion Paper[150] dealt with the question of expenses of arrestment on the dependence separately from the question of expenses of inhibition on the dependence, since the existing law and policy considerations differ somewhat as between these two forms of diligence, nevertheless, in this report, we recommend a uniform solution so far as practicable.

3.103 Diligence on the dependence. Two categories of expenses require to be considered, namely (1) the expenses in executing warrant for diligence on the dependence, and (2) the expenses of obtaining or opposing warrant under the new procedure.

3.104 (a) Pursuer's expenses in executing warrant. As regards the first of these, the McKechnie Report[151] recommended that the court should have a discretion to award the pursuer the expenses of an arrestment on the dependence if he obtains decree (even if only for expenses) or can show good reason

146 1919 SC 154.
147 Ibid at p 155.
148 pp 554-555.
149 Clark v Scott (1878) 1 Guthrie's Select Sheriff Court Cases 204.
150 Discussion Paper No 84, paras 2.127-2.132.
151 Recommendation 58 (para 181).

why the arrestment was used. The McKechnie Committee's reasoning was that it may well be that the arrestment is not necessary to ensure that the pursuer is able to recover his debt. Our preferred option[152], was that the court should have a discretionary power to award the pursuer the expenses of arrestment on the dependence where the pursuer:

(a) has obtained decree for payment (or for expenses), or the action has been settled; and

(b) shows good reason why the arrestment was used.

Where, however, the arrestment on the dependence was used in pursuance of a warrant granted by the court in its discretion, the pursuer should be presumed to have had good reason for using the arrestment unless the defender rebuts that presumption. In any other case, the expenses of arrestment should not be chargeable against the defender.

3.105 Consultation. While several consultees agreed with the foregoing suggestion, the Joint Committee and the Association of Scottish Chambers of Commerce both supported an automatic award of expenses if the pursuer was successful in his action. Other consultees stressed the need for a simple solution.

3.106 Proposal. In the light of these remarks, we propose a simple provision that if the pursuer obtains a warrant, which will normally mean that he has satisfied the court that the grant of warrant is reasonable, he should prima facie be entitled to the expenses of executing arrestment on the dependence. To make prima facie entitlement depend on success on the merits would complicate the law because for example there can be mixed success. Nor does success on the merits necessarily mean that the use of the diligence is justified. The court should retain a power to modify or refuse expenses of executing an arrestment on the dependence, which should be exercisable if the court considers that the pursuer was unreasonable in applying for warrant or if modification or refusal would otherwise be reasonable eg if the pursuer's action failed. We see no reason to change the rule under which the expenses of executing an arrestment on the dependence are not treated as expenses of process and so are not among the sums decerned for in the final decree which can be enforced by any mode of diligence, eg a poinding or second arrestment. The pursuer would require to recover the expenses of execution out of the proceeds of an action of forthcoming and could obtain decree in that action for the unpaid balance of those expenses under the Debtors (Scotland) Act 1987, s 93(2). As mentioned in paragraph 3.109 below, the expenses of executing an inhibition are not recoverable from the defender.

3.107 (b) Pursuer's expenses in obtaining warrant. As regards the criteria determining liability for the pursuer's expenses in obtaining warrant for arrestment on the dependence under the new procedure, our Discussion Paper put forward a number of possible options for discussion[153] and invited views.[154]

3.108 All consultees[155] advocated simplicity in this area. The Faculty of Advocates were strongly of the view that the award of expenses in this area, as in other areas, should be left to the discretion of the court. Others suggested that as a general rule expenses should follow success in the action. In rejecting elaborate criteria, the Judges suggested a general rule that if the pursuer applies for and obtains a discretionary warrant, then, unless it can be shown that he had no good reason for doing so, the expenses of the application should be expenses in the cause.

3.109 Such an approach would be consonant with the view of the Sheriffs' Association, with which we agree, that the criteria of entitlement to expenses should be the same as for the expenses of executing the arrestment on the dependence. We therefore propose that where warrant has been granted, the pursuer should be prima facie entitled to the expenses of obtaining the warrant unless the court modifies or refuses

152 Discussion Paper No 84, para 2.130, Proposition 10(1).

153 Including (1) the pursuer should always be liable for his own expenses; (2) the pursuer should be liable for his own expenses unless he is successful in the action, when the expenses would become recoverable from the debtor; (3) the defender should only be liable for any extra expenses of the pursuer caused by the defender's opposition to the application in a case where the pursuer is successful in his action; and (4) the court should have a discretion to award the pursuer the expenses of the application if he obtains a decree (even if only for expenses). Cf the McKechnie Report's recommendation as to the expenses of arrestment on the dependence itself.

154 Discussion Paper No 84, para 2.130, Proposition 10(2).

155 Including for example the Sheriffs' Association and the Committee of Scottish Clearing Bankers.

them on the ground that the pursuer was unreasonable in applying for the warrant or it otherwise considers modification or refusal to be reasonable. Such aprimafacie entitlement should apply also to the expenses of obtaining a warrant for inhibition on the dependence. On balance we think that the pursuer's expenses of obtaining the warrant for arrestment or inhibition on the dependence (like the defender's expenses of opposing the application[156]) should be treated as expenses of process. The expenses of executing an inhibition, including even inhibition in execution, are not recoverable from the defender or debtor (though this rule will be reviewed[157]). We consider however that the pursuer's expenses of obtaining the warrant for inhibition on the dependence are in a different position. It would be odd if the defender's expenses of opposing the application were to be treated as expenses of process but not the pursuer's expenses in making the application.

3.110 (c) Defender's expenses in opposing application. We also suggested, in our Discussion Paper,[158] that if the pursuer is unsuccessful in his action, he should be liable to the defender for the defender's expenses in opposing the application. The majority of consultees agreed. One commentator disagreed and argued that if the defender is successful in opposing the application, he should be entitled to his expenses at that stage. It should not depend on the ultimate result of the action. We propose that where warrant has been granted but the pursuer was unreasonable in applying for it, the defender should be prima facie entitled to his expenses of opposing the application unless the court modifies or refuses them on grounds that it is reasonable to do so. We consider that this recommendation should apply also to the expenses incurred in opposing an application for warrant for inhibition on the dependence.

3.111 We recommend:

(1) The court should award the pursuer the taxed expenses of obtaining warrant for, and executing, an arrestment on the dependence, or of obtaining warrant for an inhibition on the dependence, except to the extent that the court modifies or refuses them on the ground that:

(a) he was unreasonable in applying for the warrant; or

(b) the modification or refusal is otherwise reasonable in the circumstances including the result of the action.

(2) Where warrant for arrestment or inhibition on the dependence is granted but in the court's opinion the pursuer was unreasonable in applying for the warrant, the defender should be entitled to his expenses in opposing the application for warrant unless the court modifies or refuses them on the ground that it is reasonable to do so in the circumstances including the result of the action.

(3) Subject to the foregoing, the court should have a discretion to award or refuse the expenses of obtaining, or opposing, the grant of warrant for diligence on the dependence, and of executing an arrestment on the dependence.

(4) The expenses of obtaining, or opposing, the grant of warrant for diligence on the dependence should be decerned for as expenses of process in the action.

(5) The expenses of executing an arrestment on the dependence, so far as chargeable against the defender under the foregoing proposals, should be recoverable by furthcoming or other diligence in accordance with the common law and the Debtors (Scotland) Act 1987, section 93(2).

(Recommendation 11: Draft Bill, clause 7)

156 See next paragraph.
157 This will be considered in our forthcoming discussion paper on inhibitions.
158 Discussion Paper No 84, para 2.130, Proposition 10(3).

Part 4 Interim Attachment of Moveables in Defender's Possession

(1) Preliminary

4.1 There is a gap in the provisional and protective measures available under Scots law insofar as there is no means of attaching articles of the defender's moveable property in his possession on the dependence of an action for payment. In our discussion paper[1] we sought views on whether or how this gap should be filled. The effect of such an attachment may be drastic and we have carefully considered the matter.

(2) Policy reasons underlying present law

4.2 By a quirk of legal history, the policy of the law was formulated first in the context of inhibitions. At one time, an inhibition operated against the moveable as well as the heritable property of the defender[2] but, as Bell remarked,[3] "with the growth of commerce it has been gradually restricted to the heritable estate, leaving the moveable to be affected by arrestment".[4] Arrestment[5] only affects moveables in the possession of a person other than the defender or debtor, or persons who in law are identified with him (ie his employees or general factors or commissioners). Otherwise an arrestment "would operate as an inhibition in moveables, without being attended with those requisites of publication which accompany that diligence".[6]

4.3 So the underlying policy, conceived in the interests of commerce, was against attachment of goods in the defender's possession by those diligences - ie arrestment and inhibition - which were available on the dependence of actions for payment. This policy was intelligible against the background of a system in which warrants for arrestment and inhibition on the dependence were granted automatically. The effect on commerce of an automatic attachment of moveable stock-in-trade on the dependence is self-evident.

4.4 The same objections would not apply - at least with the same force - if the grant of warrant to attach moveables in the defender's possession on the dependence were to be a matter of judicial discretion. In this Part we argue that the introduction of a system of judicial discretion as recommended in Part 3 above would provide a unique opportunity to fill this anomalous gap in the law.

(3) Previous official consideration

4.5 On a previous occasion, we had already considered, and rejected, a proposal to introduce poinding on the dependence in the context of a system in which warrants for diligence on the dependence are available to a pursuer as of right. As the McKechnie Committee[7] had recognised, it seems at first sight difficult to justify a rule whereby poinding on the dependence is incompetent. In our Consultative Memorandum No 48,[8] however, we pointed out that in practice arrestment is generally a quicker, cleaner and cheaper diligence and is less often attended by unpleasant consequences than poinding.[9] We suggested

1 Discussion Paper No 84, Part IV, Proposition 44 (para 4.41).
2 Dalrymple v Lyell (1687) Mor 1052.
3 Bell, Commentaries, vol 2, p 135.
4 See also Graham Stewart, p 546; Lord Braco v Ogilvy (1623) Mor 7016 where the Court held that "moveables are of that nature, that, falling under daily commerce, the dealing and trafficking therein ought not to cease by simple inhibition, without arrestment proceeding upon lawful cause"; Aitken v Anderson (1620) Mor 7016; Scot v Coutts (1750) Mor 6988.
5 Other than admiralty arrestments reviewed in Part 7 below.
6 Bell, Commentaries, vol 2, p 70.
7 McKechnie Report, paras 48, 49.
8 Consultative Memorandum No 48 on Poindings and Warrant Sales para 2.3.
9 See eg Hill Burton Report on Arrestment of Wages (1854) Parliamentary Papers, LXIX, p 41. It has been traditional in Scotland to use an arrestment rather than a poinding as a diligence of first resort where practicable.

that diligence on the dependence and indeed poindings should not be more widely available than is necessary. This provisional conclusion was generally accepted on consultation and in our Report on Diligence and Debtor Protection[10] we recommended that 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.

4.6 One body suggested to us 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. We did not consider that proposal because a similar recommendation had already been made by the Maxwell Report on Jurisdiction and Enforcement.[11] That report recommended[12] that the court of Session should have a discretionary power to make an order securing inter alia moveable property in the hands of a defender on the dependence of an action in the Court of Session. The order would be enforced in Scotland by the ordinary procedure of poinding. It 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.

4.7 This recommendation was a response to European cases which were construed as suggesting that the Scottish courts would be required by European law[13] to give effect to comparable orders of Courts in EEC Contracting States made on the dependence of actions in these courts.[14] It is now accepted that provisional and protective measures are a matter for the internal law of the country in which such measures are sought (rather than for the law of the country where the action is depending).[15] The recommendation was not accepted by Government or implemented by statute, and the Civil Jurisdiction and Judgments Act 1982, section 27 empowers the Court of Session to grant warrants for arrestment and inhibition on the dependence and interim interdict but not poinding on the dependence.[16]

(4) Should interim remedy against goods in defender's possession be introduced?

4.8 In Discussion Paper No 84[17] we re-opened this question against the background of the proposed new judicial discretionary system of granting warrants for diligence on the dependence.

4.9 Consultation. On consultation reaction was divided.[18] Some who opposed the introduction of an interim remedy argued that a reasonable balance between creditors and debtors had been attained by the existing law, and that the introduction of an interim remedy was unnecessary and undesirable. Some were deterred by the possible complexity of any legislation on interim attachment. One commentator represented to us that interim attachment could have a major impact on commercial defenders, much more so than the other diligences on the dependence.

4.10 Some consultees also thought that interim attachment might increase the resource implications for the courts. The Joint Committee argued that ex parte applications for warrant for interim attachment may place a severe burden on the courts, particularly sheriff courts, in circumstances where solicitors advise their clients that it would be wise to obtain such a warrant on the dependence of every action for payment. These fears seem unjustified since we recommend that a warrant would be available only in relatively exceptional circumstances.[19]

10 Paras 5.236-5.238, recommendation 5.50 (para 5.238).
11 Report of the Scottish Committee on Jurisdiction and Enforcement (1980) HMSO Edinburgh (Chairman: the Hon Lord Maxwell).
12 Ibid, paras 14.8-14.25.
13 European Judgments Convention, art 24.
14 Maxwell Report, paras 14.8-14.10; De Cavel v De Cavel (No 1) (European Court Case 143/78) [1979] ECR 1055; 1979 2 CMLR 547; 1984 SLT (European Court Case Notes) 18; Denilauler v Couchet Freres (European Court Case 125/79); [1981] ECR 1553; [1981] 1 CMLR 62; 1984 SLT (European Court Case Notes) 24.
15 P R Beaumont, Anton and Beaumonts Civil Jurisdiction in Scotland (2d edn; 1995) para 7.47; Stancroft Securities Ltd v McDowall 1990 SC 274.
16 We revert to this matter at paras 4.17-4.20 below.
17 Part IV.
18 Some commentators (eg the Sheriffs' Association; the Solicitor, Scottish Homes) refrained from commenting on the principle because it raised major issues of policy.
19 On the statistical background, see paras 2.86-2.105 above.

4.11 Some approved the proposal either without comment,[20] or subject to minor amendments.[21] The Committee of Scottish Clearing Bankers made suggestions for making the interim remedy more favourable to creditors, eg minimising the range of exemptions. A solicitor who had acted for finance houses in Scotland welcomed the proposal which he thought well suited to cases where vehicles were purchased on the basis of personal, unsecured credit.

4.12 The case for interim remedy affecting moveables in defender's possession. We think that a strong case can be made for introducing an interim remedy on the dependence preventing the disposal of specified corporeal moveables in the defender's possession.

4.13 First, without such an interim remedy, there would continue to be an anomalous gap in our system of interim remedies and provisional and protective measures. If our recommendation for judicial discretionary warrants were to be implemented, the only substantial justification for that gap would disappear. For the grant of warrant for the remedy could be controlled by the court in a discriminating way which is not possible under the present law. It seems to us therefore that the introduction of this form of interim remedy, far from running counter to our recommendations, would be a logical consequence of them.

4.14 Second, the legal systems of England and Wales and many other European countries[22] make available provisional and protective measures covering moveables in the possession of defenders on the dependence of actions for payment. The new system of judicial discretion recommended in Part 3 above is broadly on the same pattern as in those countries. There seems no reason therefore why Scots law should continue to be out of line with these systems.

4.15 Third, the position of unsecured creditors has been weakened by developments in the Scots law on securities and diligence,[23] and would be further weakened by the legislation proposed in this report. But this trend should not go further than is necessary to maintain a proper balance between pursuers and defenders. Though interim attachment on the dependence of moveables in the defender's possession would be available only in relatively exceptional circumstances, the discriminating grant of warrant by the courts would to some extent redress the balance in favour of creditors in a fair and principled way. We therefore recommend the introduction of such interim measures and turn to consider what form they should take.

(5) What form should the interim remedy take?

4.16 In our discussion paper[24] we sought views on four legislative options, namely:

(a) the introduction of poinding on the dependence;

(b) the introduction of a system of arrestment on the dependence of moveable goods in the defender's possession;

(c) the introduction of a system of interim personal interdicts against the disposal of, or dealing with, such moveable goods on the dependence; and

(d) an interim attachment order preventing disposal of such moveable goods on the dependence or until the goods can be poinded in execution.

---

20 Eg the Court of Session judges.

21 Eg the Regional Sheriff Clerks.

22 O'Malley and Layton, European Civil Practice refer to such measures in Belgium (para 48.59); Denmark (para 49.59); France (para 50.59); Germany (para 51.59); Ireland (para 52.59); Italy (para 53.59); Luxembourg (para 54.59); Netherlands (para 55.59); Northern Ireland (para 57.58). As to Sweden, see Ginsburg and Brazelius, Civil Procedure in Sweden (1965) pp 219 - 222.

23 Eg the statutory provisions introducing floating charges as construed in the Lord Advocate v Royal Bank of Scotland 1977 SC 155; the restrictions on the diligence of poinding and warrant sale in the Debtors (Scotland) Act 1987.

24 Discussion Paper No 84, paras 4.10 - 4.41.

The options considered

(a) First possible option: poinding on the dependence

4.17 On consultation, nobody dissented from our view that the provisional measures should not take the form of poinding on the dependence even if the warrant to poind were to be granted by a judge exercising a discretion after enquiry.

4.18 The procedure in a poinding involves the inventorying and valuation by a messenger-at-arms or sheriff officer, accompanied by a witness, of moveable goods at the defender's premises.[25] It is a more elaborate and expensive diligence than is necessary or appropriate in the case of a diligence on the dependence of an action.

4.19 There is also the fact that poinding is preceded by a charge to pay which is inappropriate in the case of a diligence on the dependence. Moreover, a poinding has the effect that unless specially authorised, the debtor is not entitled to move the poinded goods from the place where they were poinded,[26] a restriction which goes beyond what is necessary or desirable in the case of a diligence on the dependence.

4.20 Consultation confirmed our view that the introduction of poinding on the dependence would arouse considerable opposition. We have therefore rejected that option.

(b) Second possible option: arrestment on the dependence of moveable goods in the defender's possession

4.21 Under the second option, the pursuer would apply to the court for a warrant to arrest specified moveable goods in the defender's possession. If decree of payment were granted, the extract of the decree would convert the arrestment into an arrestment in execution which could be completed by an action of furthcoming concluding for warrant of sale. This option would have the advantage that the goods could be attached on the dependence without the need for inventorying and valuation while the action was in dependence.

4.22 This approach would, however, create difficulties at the later stage when, after extract of the decree for payment, the goods attached required to be sold. First, it would seem almost impossible to justify new provisions for the judicial sale of goods in the defender's possession which differ substantially from the provisions on poinding and warrant sale enacted in Part II of the Debtors (Scotland) Act 1987. Many of the latter provisions can only operate effectively where there has been a poinding, eg the limit on the value of the articles which may be poinded;[27] the debtor's right to redeem the goods at valuation;[28] or the sheriffs power to refuse warrant of sale if the value of the goods do not justify the expense of a sale at an auction room.[29] The procedures would not operate effectively where there had merely been an arrestment (which does not involve valuation).

4.23 Second, an arrestment is simply the first part of the diligence of arrestment and action of furthcoming (except in the special case of admiralty arrestments). An action of furthcoming is mainly designed to enable a third party arrestee to put forward defences against making the goods furthcoming, and is not appropriate where (as here) there is no third party arrestee.

4.24 Third, it seems to follow that, if the provisional measure is to be a diligence (and not an interdict), what is needed is an interim attachment on the dependence followed after extract by a poinding and warrant sale. An arrestment in our law is a prelude to a furthcoming or an admiralty process of sale, and it would be confusing and anomalous to make an arrestment a prelude to a poinding.

---

25 See Debtors (Scotland) Act 1987, s 20.
26 Ibid, s 28.
27 Debtors (Scotland) Act 1987, s 19.
28 Ibid, ss 21(4) and 33(2).
29 Ibid, ss 24(3)(b) and 30(2)(a)(ii).

4.25 There was no support for this option on consultation. This confirms our view that, with the special exception of admiralty arrestments,[30] arrestments should be confined to debts and moveable property in the possession of a third party and should not extend to moveable goods in the defender's possession.

(c) Third possible option: interdicts against disposing of or dealing with moveable goods in the defender's possession

4.26 Under the third option, the pursuer would apply to the court for an interdict prohibiting the defender from disposing of, burdening, removing, concealing or otherwise dealing with his moveable goods in his possession in such a way as to frustrate or prejudice the eventual enforcement of the pursuer's claim. This form of interdict would to some extent resemble aMareva injunction[31] or an order under section 18 of the Family Law (Scotland) Act 1985 interdicting a spouse from effecting a transfer of property or a transaction involving property. Interdicts of the latter type are not confined to moveables in the possession of the interdicted spouse. But they are competent only in connection with actions for aliment, divorce or declarator of nullity of marriage and related applications.

4.27 We have found the choice between interdict and the fourth option, interim attachment, to be difficult. Some consultees preferred a simple judicial power of interdict to interim attachment, on the ground that the legislation on interdict would be simpler. There is something in this argument. We think however that statutory exemptions of the type considered below[32] would be as necessary for interdict as for interim attachment so that the legislation on interdict would not be as simple as some consultees envisaged.

4.28 Unlike a diligence on the dependence, an interdict does not have the effect of giving the party obtaining the interdict a preference in insolvency proceedings or other processes of ranking on the interdicted party's estate or a priority over singular successors acquiring the goods in bad faith or gratuitously. To avoid anomalies we think that, so far as possible, provisional and protective measures on the dependence should take the form of diligences. Otherwise our law on these measures would lack unity, consistency and coherence. In principle, a preference ought to be available.

4.29 In the context of aliment and divorce actions, it is generally accepted that arrestments and inhibitions on the dependence are preferable to interdicts.[33] Interdicts are generally only enforceable by the heavy, quasi-criminal sanctions for contempt of court, whereas arrestment and inhibition on the dependence can operate effectively without recourse to quasi-criminal sanctions, which are best avoided. In the case of arrestment there is "civil liability in second payment"[34] and in the case of inhibition there is the civil remedy of reduction of transactions breaching the inhibition.

4.30 Unfortunately an interim attachment of moveable goods in the defender's possession may not operate effectively without recourse to the quasi-criminal sanctions for contempt of court. So the case for interdict is stronger in this context. A sanction of liability in second payment may not be realistic. The attaching creditor's remedy of restitution of the attached goods from third parties could operate only against those third parties who had acquired the goods in bad faith or gratuitously. The main argument for preferring interim attachment over interdict is to preserve coherence with the other forms of diligence on the dependence rather than to minimise recourse to the sanctions for contempt of court.

4.31 An interim attachment on the dependence followed by a poinding would entail the somewhat unusual consequence that a nexus would be imposed on the goods affected on two occasions, first by an interim attachment and thereafter by a poinding executed after decree when the existence and amount of the debt and expenses are known. Since an interdict operates only against the person of the defender and does not impose any nexus on the property in question, an interdict would avoid that unusual result. The

30 See Part 7 below.
31 See para 2.49 above.
32 See paras 4.39-4.52.
33 See Wilson v Wilson 1981 SLT 101 at pp 102-3 approved in Pow v Pow 1987 SLT 127 at p 129; 1987 SCLR 290.
34 A third party-arrestee parting with arrested money or property in breach of arrestment may be required to pay its amount or value a second time to the arrester.

incidents and consequences of an interim attachment as described below, however, would not be precisely the same as those of a poinding and accordingly, although the successive attachment solution would be unusual,[35] we think that it is justified in principle. We therefore reject interdict as the recommended option.

(d) Recommended option: interim attachment

4.32 We have concluded therefore that it should be competent for the court to make an order granting warrant for attaching specified moveable goods on the dependence of an action for payment which would have effect for a period after extract of the decree for payment to allow the pursuer to poind the goods.

4.33 Although in policy terms the main legislative aim is to provide an interim remedy in respect of goods belonging to a debtor in his own possession, there should be no legislative requirement that the goods must be in the debtor's possession. Such a requirement might prompt sterile disputes as to whether the goods of a debtor are in his own possession or in the possession of a third party. Under the present law, while the goods of a debtor in his own possession are poindable but not arrestable, the converse is not true, for the goods of a debtor in the possession of a third party are poindable as well as arrestable.[36] In practice if the defender's goods are in the possession of a third party, both the court and the pursuer are likely to prefer arrestment on the dependence to the new interim attachment, because it will be easier and cheaper to work out than an interim attachment followed by poinding.

4.34 We recommend:

> **It should be competent for the court to make an order granting warrant for the attachment of specified moveable goods owned by the defender on the dependence of an action for payment, which would normally have effect for a prescribed period, after decree for payment and disposal of the action, to allow time for the pursuer to poind the goods. This new form of diligence should be known as an interim attachment.**
>
> (Recommendation 12; Draft Bill, clauses 8 and 16(1))

(6) The new diligence of interim attachment

(a) Form and grant of warrant, and execution of interim attachment

4.35 Form of warrant. A warrant for interim attachment of corporeal moveables should specify the particular moveables affected by the attachment. Normally these would be in the debtor's possession, though that would not be essential.[37] We think that the degree of specification should be left to the courts. We believe that the courts would specify the moveables with sufficient precision (a) to leave the defender in no doubt as to what moveables were attached, on analogy with interdict,[38] and (b) to enable an officer of court (messenger-at-arms or sheriff officer) to identify what moveables were affected by the attachment.

4.36 Grant of warrant. The warrant should only be granted by a Lord Ordinary or sheriff on an application in exceptional circumstances in accordance with the principles and procedure recommended in Part 3 for the discretionary grant of warrants for arrestment and inhibition on the dependence.

4.37 Mode of execution. The interim attachment would be executed by the service of a schedule of interim attachment (in a form prescribed by act of sederunt) on the defender. The competent modes of service should be the same as for the service of a schedule of arrestment on a third party arrestee.

---

35 *Cf however the successive nexus imposed by the landlord's hypothec and sequestration for rent; or by a rnaritime hypothec or lien and arrestment in rem.*

36 Bell, Commentaries vol 2, p 60; Bell, Principles ss 2286, 2289; McDonald v Hancock (1841) 3 D 1128; Graham Stewart, p338.

37 See para 4.33 above.

38 See eg Murdoch v Murdoch 1973 SLT (Notes) 13 per Lord President Emslie; applied in Webster v Lord Advocate 1985 SLT 361; Arshad v Sarwar 1990 GWD 8-440 (interim interdict against disposing of assets refused on ground that its terms would be too vague and wide).

4.38 We recommend:

(1) The form of warrant for interim attachment, and the schedule of interim attachment implementing the warrant, should be prescribed by act of sederunt and the warrant, or a document referred to in the warrant, should specify the particular moveable goods affected by the attachment.

(2) A warrant for interim attachment should only be granted by a Lord Ordinary or sheriff in accordance with the principles and procedures set out in Part 3 for the discretionary grant of warrants for diligence on the dependence, with any necessary modifications.

(3) (a) The interim attachment should be executed by the service of a schedule of interim attachment.

(b) The modes of service, which should be prescribed by act of sederunt, should be the same as in the service of a schedule of arrestment.

(Recommendation 13; Draft Bill, clause 8(1) - (4))

(b) Exceptions and exemptions by law from interim attachment

4.39 We think that the legislation following hereon should provide certain specific and absolute exceptions or exemptions from interim attachment.

4.40 Moveables not to be liable to interim attachment unless poindable. Since an interim attachment would be a prelude to poinding, only poindable goods should be liable to interim attachment. As read with the common law, this would exclude cash, negotiable instruments, ships and cargo on board ship, in the defender's possession, and certain statutory exemptions eg railway rolling stock.[39]

4.41 Articles specified in Debtors (Scotland) Act 1987, section 16(1). Moreover, those categories of goods in the defender's possession which are exempt by the Debtors (Scotland) Act 1987 from poinding should also be exempt from interim attachment. These exemptions are of two kinds. The first relates to specified articles, wherever situated, which are reasonably required for the use of the debtor or any member of his household.[40] These articles should be exempt from interim attachment irrespective of their value. In the absence of a valuation by an officer of court, a limit by reference to value would not be practicable. This wider exemption can be justified on the ground that the attachment operates only on the dependence.

4.42 Goods in dwelling-house and curtilage to be exempt. The second type of exemption under the 1987 Act relates to a list of 16 categories of what may broadly be called essential household goods belonging to a debtor which are situated in a dwelling-house (which may be the debtor's or a third party's) and reasonably required for the use of the person residing there or a member of his household.[41]

4.43 In our Discussion Paper we suggested that the exemption from interim attachment should be wider and that no corporeal moveables of the defender in his possession and situated in a dwelling-house (whether of the defender or a third party) or its curtilage at the time of the execution of the interim attachment, or such other time as the court may specify, should be subject to interim attachment, except possibly a vehicle on those premises.[42] This was generally accepted.

4.44 While this exemption might appear wide and arbitrary, we think that there should be a clear rule to avoid disputes as to what is exempt or not exempt. We believe that no officer of court should be empowered to enter a dwelling to inspect and inventory goods while the action for payment is in

39 Railways Companies (Scotland) Act 1864, s 4.

40 Namely (a) clothing; (b) implements, tools of trade, books or other equipment requked in a profession, trade or business, not exceeding £500 in aggregate value; (c) medical aids and equipment; (d) books and other articles required for education or training not exceeding £500 in aggregate value; (e) children's toys; and (f) articles reasonably required for care or upbringing of a child: see Debtors (Scotland) Act 1987, s 16(1).

41 Debtors (Scotland) Act 1987, s 16(2).

42 Discussion Paper No 84, paras 4.26, 4.27.

dependence, so that there would be no practical means of applying the existing statutory exemption for household goods. Moreover, an exemption from an interim attachment on the dependence can in principle be more generous to defenders than an exemption from poinding in execution.

4.45 Although exemptions from diligence are usually ascertained as at the date of the execution of the diligence, in the case of interim attachment we propose that goods in a dwelling at the time of the grant of the warrant of interim attachment should be exempt. This will prevent the defender from frustrating the order by moving goods into a dwelling-house.[43]

4.46 Vehicles not exempt. We agree with the representations made to us[44] that a vehicle belonging to the defender should be attachable though within the curtilage of a dwellinghouse. Vehicles may be described by their registration number. Since the interim attachment would not prevent the defender from using the vehicle, he would not normally be prejudiced.[45]

4.47 Mobile homes. Mobile homes, such as caravans, houseboats and similar moveable structures which are the only or principal residence of the defender are not exempt from poinding, though the court may sist the proceedings in a poinding for a specified period.[46] Since an interim attachment would not prevent a mobile home from being moved from place to place within the jurisdiction (in the absence of a court order), we consider that mobile homes should not be exempt from interim attachment. This view was accepted on consultation. As the Committee of Scottish Clearing Bankers pointed out, if the home were not mobile, it could be subject to an inhibition.

4.48 Perishable goods. Because of the potentially long gap between an interim attachment and a warrant sale in pursuance of a poinding, articles which are of a perishable nature or likely to deteriorate substantially and rapidly in condition or value should be exempt. Such articles may be sold by a quick procedure in a poinding[47] but such a sale is not appropriate while an action is in dependence.

4.49 Stock-in-trade and business assets. Under the foregoing proposals, only trade equipment of individuals exempt from poinding[48] would be exempt from interim attachment.[49] The question arises whether stock-in-trade and other business assets[50] as such should be exempt from interim attachment. On consultation, the Committee of Scottish Clearing Bankers, in opposing such an exemption, observed that (vehicles apart) the most common items which they poinded were business assets.

4.50 On the other hand, one commentator argued strongly for an exemption of business assets on the ground that an interim attachment of them would often have more of a "bombshell effect" on business defenders than arrestments or inhibitions on the dependence. An interim attachment of stock-in-trade in a shop, for example, could force the shop to close at once and put employees out of work. The Joint Committee remarked that unless some arrangement could be effected which would make the attachment have the effect of a floating charge, it could cause the immediate termination of trading.

4.51 We have found this to be a difficult question. On the one hand, we think that stock-in-trade acquired for resale should be exempt because its interim attachment would terminate trading. On the other hand, interim attachment of stock-in-trade acquired for hiring, and articles used by the defender in his profession, trade or business, might often not have any unreasonable effect. In the latter type of case but not the

43 Difficulties might arise from the fact that there is no official record of what goods were or were not in a dwelling at the relevant time, but the goods to be attached would be specified in the warrant for interim attachment and the onus should be on the defender to prove that the goods were in a dwelling at the relevant time.

44 By the Committee of Scottish Clearing Bankers and the Faculty of Advocates.

45 If he wished to remove the vehicle from the jurisdiction of the Scottish courts, he could apply to the court for authority or obtain the pursuer's consent.

46 Debtors (Scotland) Act 1987, s 26.

47 Ibid, s 21(l)(b).

48 Under the Debtors (Scotland) Act 1987, s 16(l)(b).

49 Exemptions under the Debtors (Scotland) Act 1987, s 16 apply only in relation to debtors who are individuals so that trade equipment owned by a company would not be exempt from interim attachment.

50 le moveable assets used in connection with a profession, trade or business.

former, we think that legislation should make interim attachment competent, relying on the judge's discretion as a safeguard for the defender.

4.52 We recommend:

(1) Only poindable subjects should be liable to interim attachment. The following categories of corporeal moveables should be exempt from interim attachment, namely:

(a) articles specified in the Debtors (Scotland) Act 1987 section 16(1) (which exempts certain articles wherever situated from poinding) irrespective of the value of the articles, and accordingly the monetary limits on the exemptions in paragraphs (b) and (d) of section 16(1) should not apply to exemptions from interim attachment;

(b) all articles belonging to the defender located in a dwelling-house (whether the defender's or a third party's) or its curtilage at the time of the grant of the warrant for interim arrestment;

(c) articles of a perishable nature or likely to deteriorate substantially and rapidly in condition or value; and

(d) raw material acquired by the defender for manufacture or stock-in-trade acquired by him for re-sale.

(2) The following articles should not be exempt from interim attachment, namely:

(a) a mobile home, such as a caravan or houseboat, which Is the only or principal residence of the defender; and

(b) a vehicle of the defender within the curtilage of a dwelling-house.

(Recommendation 14; Draft Bill, clause 8(1), (5) and (6))

(c) Interim attachment of articles in common ownership

4.53 Under the Debtors (Scotland) Act 1987 section 41, articles in the common (pro indiviso) ownership of the debtor and a third party may be poinded and sold subject to the rights of the third party to have the article released from the poinding on paying to the creditor the value of the debtor's interest (in accordance with the value of the article as appraised by the officer of court when executing the poinding[51]). What is poinded is the article itself rather than the debtor's pro indiviso share.[52]

4.54 Though on consultation views were divided, we propose that such articles should not be exempt from interim attachment. The third party's right to raise an action of division and sale or to sell or encumber his pro indiviso share would not be affected. Otherwise, however, he would not have a higher right than the defender to deal with the article, eg by taking it out of the jurisdiction. The court should have power to release the article from the interim attachment if the third party pays the market value of the debtor's interest.

4.55 We recommend:

(1) Articles owned in common (pro indiviso) by the defender and a third party should be attachable by interim attachment. Such a third party should not have a higher right than the defender to deal with the article eg by taking it out of the jurisdiction.

(2) The court however should have power to release the article from the interim attachment if the third party pays the market value of the debtor's interest.

(Recommendation 15; Draft Bill, clause 11)

51 See Debtors (Scotland) Act 1987, s 20(4).
52 *Ibid, s 41.*

(d) Court's jurisdiction over interim attachment etc

4.56 So long as the interim attachment is in effect,[53] the court which granted the warrant for interim attachment should have jurisdiction to recall or restrict the attachment (with or without conditions) and to grant ancillary orders with respect to the attachment, eg as to the security or location of the attached articles.[54] If the pursuer obtained decree for payment, the interim attachment and the supervisory jurisdiction would subsist for a period after the decree was extracted and the action was finally disposed of in all other respects. Rules of court would regulate the procedure in an application for recall, restriction or other order.[55] Where the interim attachment ceases to have effect on the execution of a poinding of the attached articles,[56] the local sheriff court where the poinding was executed[57] would receive the report of the poinding and exercise its statutory jurisdiction over the poinding and warrant sale in the normal way.[58] The interim attachment would have served its main purpose of ensuring that the attached goods were made available for poinding and warrant sale, saving the pursuer's preference in ranking.

4.57 It would be useful if the court were to be given the same power to make ancillary orders with respect to an arrestment on the dependence as we propose in relation to interim attachment. The court's existing powers in that connection do not seem well developed.

4.58 We recommend:

(1) It should be competent for the court to make ancillary orders with respect to the interim attachment, including orders as to the security or location of attached articles; orders allowing temporary removal from the jurisdiction; and warrants to dismantle.

(2) The courts should have the same powers with respect to arrestments on the dependence.

(Recommendation 16; Draft Bill, clause 23(1))

(e) Restriction and recall

4.59 The rules and procedures relating to the restriction and recall of arrestments and inhibitions on the dependence[59] should apply with any necessary modifications to an interim attachment. If decree for payment had been granted and extracted, the rules on recall of arrestments in execution would apply, namely, that recall is normally granted only where the diligence is irregular or incompetent or in special circumstances on caution or consignation.[60]

4.60 Where a dispute arises, between the parties or with a third party, as to the validity of an interim attachment in whole or in part, the court should have power to resolve the dispute, at least provisionally, by a recall, restriction or other order which is not binding in other proceedings.[61] As in the case of arrestments, the court would refuse to exercise its power if it considered that that issue should be determined in other proceedings (such as an action of declarator or multiplepoinding) where all interested parties were called and the issues could be properly focussed by pleadings.[62]

---

53 As to the duration of an interim attachment, see paras 4.62-4.66 below.

54 An example would be a warrant to dismantle in aid of orders preventing removal of property from the jurisdiction, eg aircraft, vehicles or vessels on non-tidal waters not subject to Admiralty arrestenents. An ancillary order might also, for example, give the defender permission to remove attached property from the jurisdiction on an undertaking to return it by a specified time or on a specified event.

55 Eg by keeping the court process open for the purpose of enabling an application to be made by the simple procedure of enrolling and intimating a motion in the process.

56 See Recommendation 18(l)(c) (para 4.66).

57 At common law, it is the sheriff court within whose territorial jurisdiction the goods are pointed, not the court which granted the decree containing warrant to charge and poind, which possesses substantive and supervisory jurisdiction over a poinding and warrant sale. This rule is assumed and not changed by the Debtors (Scotland) Act 1987, Part II.

58 See Debtors (Scotland) Act 1987, Part II.

59 See Part 5.

60 Graham Stewart, p 195; Lord Ruthven v Drummond 1908 SC 1154.

61 As to arrestments, see eg Coreck Maritime GmbH v Sevrybohholodflot 1994 SLT 893 (OH)(vessel not immune from arrestment; recall refused); Landcatch Ltd v Sea Catch pic 1993 SLT 451 (OH) (arrestment laid in arrester's hands of funds held as trustee held competent; recall refused). As to poindings, cf Debtors (Scotland) Act 1987, s 40 (3) (release of goods from poinding on application by third party claiming title not to be binding in other proceedings).

62 Maciocia v Alma Holdings Ltd 1993 SLT 730 (OH) (recall refused because the question whether a deed for discounting receivables created an effective trust was not appropriate for determination in an application for recall).

4.61 We recommend:

(1) While the action is in dependence, the rules and procedures relating to the restriction and recall of arrestments and inhibitions on the dependence recommended in Part 5 below should apply to the recall and restriction of interim attachments. Where the interim attachment continues in effect after decree for payment, recall should be granted only on the more limited grounds on which an arrestment in execution may be recalled.

(2) Where a dispute arises, between the parties or with a third party, as to the validity of an interim attachment in whole or in part, the court should have power to resolve the dispute, at least provisionally, by a recall, restriction or other order.

(Recommendation 17; Draft Bill, clause 53)

(f) Duration and cessation of interim attachment

4.62 An interim attachment on the dependence would be an inchoate diligence, which would be replaced by another inchoate diligence, that of poinding in execution after decree of payment was granted, but saving the attacher's preference in ranking. The eventual judicial sale would be a warrant sale in pursuance of a poinding.

4.63 On consultation there was general agreement with our proposal[63] that an interim attachment should cease to have effect (generally or in relation to particular articles) (a) on judicial recall; (b) on the pursuer extra-judicially releasing goods from the attachment; (c) when the action of payment is finally disposed of in the defender's favour and decree of absolvitor or dismissal is granted; (d) on the lapse of a prescribed period of six months after the extract of decree of payment; and (e) on the execution of a poinding of all the articles subject to the interim attachment.[64]

4.64 The time limit at (d) of six months was selected as giving the pursuer a reasonable time in which to execute a charge to pay and a poinding.[65] The Regional Sheriff Clerks thought that six months was too short. Another commentator disapproved (d) observing that the debtor's right to apply for recall was sufficient protection, and that if the creditor was working out his remedy against other property, there would be no reason to release the interim attachment. Therefore the matter might go on for some considerable time. It seems to us however that some time limit on the duration of an interim attachment is necessary to safeguard defenders and for consistency with the policy of the Debtors (Scotland) Act 1987, section 27, which limits the duration of a poinding to one year after the date of execution.[66] The purpose of an interim attachment is to pave the way for a poinding and within a reasonable time after obtaining final decree, the creditor should either proceed to charge and poind or let the interim attachment lapse. We therefore adhere to our proposal on the time limit of six months. In special circumstances,[67] however, the court should have power to extend the duration of the interim attachment if it is reasonable to do so.

4.65 At common law, a diligence ceases to have effect if the debtor makes or tenders payment of the sum due under the decree.[68] This rule was changed by the Debtors (Scotland) Act 1987, section 95(1), under which the main diligences enforcing unsecured debts, including poinding and sale, cease to have effect if the full amount recoverable thereby[69] is paid or tendered to the creditor. The same rule should apply to interim attachment.

---

63 Discussion Paper No 84, para 4.35; Proposition 44(11) (para 4.41).

64 We intended that in a ranking, the creditor's preference should depend not on the poinding but on the prior interim attachment: cf Discussion Paper No 84 para 4.38. Accordingly the poinding would supersede the interim attachment but saving the effect of the latter in any process of ranking.

65 The days of charge are 14 days if the defender is in the United Kingdom and 28 days if he is outside the United Kingdom or his whereabouts are unknown: Debtors (Scotland) Act 1987, s 90(3).

66 Unless warrant of sale has been granted and subject to the sheriffs powers to extend the duration of the poinding and to other provisions for extension.

67 Eg the death of the creditor or debtor or both, unavoidably precluding the execution of the poinding.

68 Inglis v Mclntyre (1862) 24 D 541; Harvie v Luxram Electric Ltd (1952) 68 Sh Ct Reps 181.

69 le including diligence expenses and not merely the principal sum, interest and court expenses.

4.66 We recommend:

(1) An interim attachment should cease to have effect (generally or in relation to particular articles) on judicial recall of the interim attachment and also:

(a) when the action of payment is finally disposed of in the defender's favour and decree of absolvitor or dismissal has been granted;

(b) on the lapse of the period of 6 months after the disposal of the action in which decree for payment was granted;

(c) on the execution of a poinding of the articles subject to the interim attachment to enforce the same claim; or

(d) on the pursuer extra-judicially releasing goods from the interim attachment.

In special circumstances, the court should have power to extend the duration of the interim attachment if it is reasonable to do so.

(2) The Debtors (Scotland) Act 1987, section 95(1) (certain diligences terminated by payment or tender of full amount owing) should be amended so as to apply to interim attachments.

(3) Where the interim attachment of an article ceases to have effect because it has been superseded by a poinding as mentioned in para (l)(c) above, then in any competition of creditors relating to that poinded article, the poinding should rank as if it had been executed at the time when the interim attachment was executed.

(Recommendation 18; Draft Bill, clauses 16 and 21(b)(i))

(g) Transmissibility of interim attachment

4.67 In principle, diligences are actively and passively transmissible in the same way as the debts they secure. The general rule is that if a diligence against moveable property has been begun during the lifetime of a deceased debtor, it may be followed out notwithstanding his death.[70] An arrestment does not fall by reason of the death of the arrester, arrestee or common debtor.[71] We do not think that the transmissibility of interim attachment requires specific statutory regulation.

(h) Expenses

4.68 In our view, the same rules should apply to the question whether the expenses of applying for and opposing a warrant for interim attachment are chargeable against the defender as apply in relation to the expenses of applying for and opposing a warrant for arrestment on the dependence.[72] The issue of liability for those expenses will be determined in the action. If the expenses of applying for or opposing a warrant for interim attachment are chargeable against the defender, they should be treated as expenses of process with the effect that decree for payment of them will be granted in the action. If the court finds that the expenses of executing a warrant for interim attachment are chargeable against the defender, they should be recoverable in broadly the same way, and to the same extent, as the expenses of poinding and warrant sale under the provisions of the Debtors (Scotland) Act 1987, section 93 (1), (4) and (5). In other words they should be recoverable out of a subsequent poinding and sale (or in rare cases confirmation as executor-creditor) enforcing the claim secured by the interim attachment but not by any other legal process. Where the pursuer obtains decree in his action, he will be able to use the warrant to charge and poind in the extract decree. Where however the pursuer is entitled to the expenses of executing interim attachment but fails to obtain decree in his action (eg where the defender responds quickly to the service on him of the summons or initial writ by making payment of the other sums due), he will not hold any warrant to charge and poind. In such a case, the legislation should enable him to obtain such a warrant though he lacks a decree for payment.

---

70 Graham Stewart, p 670.
71 Graham Stewart, p 134; Bell, Commentaries vol 2, p 80; Stair Memorial Encyclopaedia vol 8, para 299.
72 See paras 3.98 etseq.

4.69 We recommend:

(1) The rules recommended above as to liability for the expenses of applying for and opposing a warrant for arrestment on the dependence should apply in relation to interim attachment.

(2) Provision should be made on the lines of the Debtors (Scotland) Act 1987, section 93(1), to the effect that any expenses chargeable against the defender incurred in the service of a schedule of interim attachment of articles belonging to him should be recoverable from him either by a poinding and sale of those articles executed to secure the same claim or by a confirmation of the pursuer as executor-creditor of estate of the defender comprising those articles, but not by any other legal process. Any such expenses not so recovered by the time when the diligence in question is completed or otherwise ceases to have effect should cease to be chargeable against the defender. Where the pursuer is entitled to the expenses of executing interim attachment but fails to obtain decree in his action, special provision should enable him to obtain a warrant to charge and poind.

(3) Where however the interim attachment is recalled by a time to pay order or superseded by an insolvency process, the expenses should remain chargeable and recoverable in the same way as is provided, in relation to poinding expenses, by the Debtors (Scotland) Act 1987, sections 93(4) and (5).

(Recommendation 19; Draft Bill, clause 18)

(i) Ascription of sums recovered while interim attachment is in effect etc

4.70 If the unrecovered expenses of interim attachment cease to be chargeable against the defender when it, or the ensuing poinding, ceases to have effect, the question will arise whether payments to account made during the subsistence of the interim attachment are to be treated on the one hand as payments of the principal sum or interest, or on the other hand as expenses.[73] A similar problem arising in the case of other diligences was solved by the Debtors (Scotland) Act 1987, section 94 which provides that payments while the diligence subsists are to be ascribed in a certain order.[74] We propose that a similar principle should apply to sums paid to account while an interim attachment is in force. Further, where sums are recovered by a poinding and sale or paid to account while it subsists, then in applying the ascription rules in section 94(2) of the 1987 Act, the expenses of a prior interim attachment of the same moveables securing the same claim should be treated as if they were part of the expenses of the poinding and sale.

4.71 We recommend:

(1) Any sums secured by an interim attachment and paid to account while it subsists should be ascribed first to the expenses (chargeable against the defender) of applying for and executing the interim attachment; thereafter to the interest accrued to the date of execution of the interim attachment; and finally to the principal sum and interest accrued after the date of execution.

(2) Where the interim attachment is followed by a diligence of poinding and sale enforcing the same claim, and sums are recovered by that diligence or paid to account of the sums recoverable by it while it subsists, then in applying the rules on ascription of payments in the Debtors (Scotland) Act 1987, section 94(2), any unpaid expenses of the interim attachment recoverable by the poinding and sale should be treated in the same way as the expenses of the poinding and sale are treated under section 94(2)(a)(i).

(Recommendation 20; Draft Bill, clause 19)

---

73 Cf our Report on Diligence and Debtor Protection (Scot Law Com No 95) para 9.51.

74 Namely, first expenses recoverable by the diligence; then interest accrued prior to the execution of the diligence; and then the principal sum and other sums including other interest.

(j) Time to pay directions in decrees and time to pay orders

4.72 Under Part I of the Debtors (Scotland) Act 1987, the court has power to sist, recall or restrict arrestments, including arrestments on the dependence, in connection with a time to pay direction in a decree for payment or with a time to pay order.[75] We propose that the court should have similar powers in relation to interim attachments of moveables in the defender's possession. The period during which an interim order sisting diligence, or a time to pay direction or order, is in force should be disregarded in reckoning the 6 months period after extract during which the interim attachment has effect.[76]

4.73 We recommend:

The power of the court to sist, recall or restrict arrestments under the Debtors (Scotland) Act 1987, Part I, should apply in relation to interim attachments.

(Recommendation 21; Draft Bill, clause 15)

(k) Interim attachment on dependence of foreign proceedings

4.74 The Civil Jurisdiction and Judgments Act 1982, section 27 discussed above[77] should be amended so as to empower the Court of Session to grant warrant for interim attachment of property in Scotland on the dependence of proceedings outside Scotland to which the section applies.

4.75 We recommend:

The Civil Jurisdiction and Judgments Act 1982, section 27 (which empowers the Court of Session to grant warrants for arrestment and inhibition on the dependence of certain proceedings outside Scotland) should be amended so as to enable the Court to grant warrant for interim attachment on the dependence.

(Recommendation 22; Draft Bill, clause 17)

(l) Duties imposed by interim attachment on defender and third parties

(i) General

4.76 Our recommendations are primarily based on the principle that the effect of an interim attachment should be broadly the same as the effect of a poinding (i) in imposing a personal prohibition against alienation by the defender so as to defeat the attachment; and (ii) in creating a priority or preference for the pursuer in competition with certain other rights claimed by singular successors or creditors of the debtor.

4.77 Relationship between the prohibitory and ranking effects. The fact that a defender is prohibited from transferring ownership of attached articles to a third party does not mean that the pursuer should be entitled to restitution from the latter of any attached article transferred in breach of the prohibition. Rights acquired by a third party in good faith may require protection. We therefore deal separately below with competitions between interim attachments and third parties' rights.

4.78 Personal prohibitions, remedies and sanctions. In summary, an interim attachment may be breached by one or other of the following acts done with respect to an attached article, namely (i) voluntary transfer by the defender of ownership to a third party; (ii) voluntary creation by the defender of a real right in security; (iii) unlawful damage or destruction by the defender or a third party; (iv) unlawful intromission by a third party; (v) its unauthorised removal by the defender furth of Scotland; and (vi) failure by the defender to make it available to an officer of court authorised to poind.

4.79 The possible remedies or sanctions for breach of interim attachment will vary according to the

75 See Debtors (Scotland) Act 1987, ss 2(3), 3(1), 6(3), 9(2)(e) and 10(l)(b).
76 Cf Debtors (Scotland) Act 1987, ss 8(3) and 9(9).
77 See para 2.19 above.

type of breach but, by analogy with the law on breach of poinding, may consist of or include (a) reduction of a voidable transfer or security and restitution; (b) physical restoration of the article; (c) consignation in court of value; (d) damages; and (e) punishment for contempt of court.

(ii) Prohibition on voluntary transfers or securities

4.80 In general an interim attachment should have the same effect as a poinding[78] in prohibiting the defender from transferring ownership[79] of an attached article to a third party. This prohibition would differ from rendering the attached goods "litigious" because litigiosity only strikes against "voluntary" transfers and not against a transfer implementing a contract entered into before execution of the diligence. A poinding has priority over the personal rights of third parties in respect of the pointed articles,[80] including for example the personal right of a purchaser to demand delivery under a contract of sale under which ownership has not yet passed,[81] or the personal right of a landlord to take over the tenant's stock at waygoing.[82] An interim attachment should have the same effect." Accordingly it should prohibit the defender from transferring ownership of an attached article even where the transfer would implement a contract entered into before the execution of the attachment. An interim attachment should also prohibit the defender from creating a security over an attached article in favour of a third party.[83]

4.81 The pursuer's remedies arising where a defender transfers or pledges an attached article in breach of interim attachment require regulation. If the sale or pledge is effected by a third party (eg the defender's agent) who knows that it is attached, the third party should - as in the case of poinding - be liable in damages for the value of the security lost up to the amount of the debt.[84] In many cases it will be pointless to impose this liability on the defender himself because, if decree is pronounced against him, he will be liable in full anyway.[85] In such cases, the only practical sanction against the defender for transferring ownership, or for pledging, in breach of interim attachment would be - as in the case of a poinding - proceedings for contempt of court. There may however be cases where the pursuer incurs extra expense amounting to consequential loss as a result of the defender wrongfully disposing of the attached goods (eg the expenses of executing an inhibition on the dependence to replace the interim attachment, which at present are not recoverable from the defender). In principle, these should be recoverable.

4.82 A bonafide singular successor of the debtor (whether a purchaser for value, a pledgee or a donee[86]), transacting without notice of the duly executed interim attachment, should not be liable either in damages or for contempt of court for unlawful intromission.[87] Conversely a mala fide singular successor transacting with such notice should be so liable.

4.83 We recommend:

(1) An interim attachment should have the effect of prohibiting the defender from:

(a) transferring ownership of an attached article to a third party whether for onerous causes or not; or

(b) creating a real right in security over an attached article in favour of a third party.

78 Henderson v Grant (1896) 23 R 659 at p 667 per Lord Kinnear, cited by Graham Stewart, p 358, fn 6.
79 A transfer of ownership would include a conveyance in trust, since the trustee would become owner.
80 See Stair Memorial Encyclopaedia vol 8, para 231 (G L Gretton).
81 Eadie v McKinlay 1 Feb 1815 FC; Sim v Grant (1862) 24 D 1033; Graham Stewart, p 341.
82 Stewart v Rose (1816) Hume 229; Mclean's Tr v McLean (1850) 13 D 90.
83 On the analogy of poindings, in some cases, eg pledges, an interim attachment would prevail over the security but in others, eg floating charges and aircraft mortgages, the security would prevail; see paras 4.103-4.105 below.
84 Cf Brown v Stephenson (1849) 11 D 1083; Graham Stewart, p 358.
85 Cf Stair Memorial Encyclopaedia vol 8, para 233, fn 4.
86 Unlike a bonafide purchaser, a bonafide pledgee ranks after a prior poinder (see para 4.103 below) and a bonafide donee must make restitution. But like a bonafide purchaser, neither is a wrongdoer and therefore neither is personally liable in damages or for contempt.
87 Cf Graham Stewart, p 358.

(2) Infringement by the defender, or by a third party (such as an agent or singular successor of the defender) who knows that the article in question is attached, of the foregoing prohibition should be treated as a breach of the interim attachment and be liable to be dealt*with as a contempt of court.

(3) A party in breach of an interim attachment should be liable in damages to the pursuer for patrimonial loss resulting from the breach.

(Recommendation 23; Draft Bill, clauses 10 and 13)

(iii) Prohibition of removal, damage or destruction of attached articles

4.84 Prohibition of removal from Scotland. Under the present law, an arrestment in the hands of a third party prohibits the third party from parting with the arrested subjects[88] but does not fix the subjects in a particular place, unlike a poinding in execution[89] or the arrestment of a ship.[90] On the other hand, an arrestment in the hands of a third party does impliedly prohibit the arrestee from moving the property from Scotland.[91] We propose similar rules for interim attachment. It should not fix the attached articles in a particular place, but it should prohibit their removal from Scotland without the pursuer's consent or the authority of the court.

4.85 Third party removing attached article from defender's possession or control. Though the defender should not be prohibited from moving or otherwise intromitting with the attached articles, the interim attachment should prohibit a third party, who knows that articles are attached, from removing them from the defender's possession and control without his consent.

4.86 Where, with or without the defender's consent, any attached article has been removed from his possession or control by a third party, with or without knowledge that it is attached, the court should have power to order the person in possession to restore it to the defender within a specified period. There may be circumstances (eg where the defender has colluded in the removal) where the court should order that the article should be made available to the pursuer. Where necessary to make such an order effective, the court should have power to grant an ancillary search warrant.[92] The court however should refuse or, as the case may be, recall such an order where ownership of the article has been acquired for value and without knowledge of the interim attachment.[93]

4.87 Wilful damage or destruction. Under the 1987 Act,[94] the wilful damage or destruction of poinded goods by the debtor, or by a third party who knows that the articles have been poinded, is a breach of poinding and may be dealt with as a contempt of court. Further a third party (but not the debtor) who damages, destroys or removes poinded articles may be ordered by the sheriff to consign a sum in court to make good the resulting deficiency in value.[95] Similar provisions should apply to interim attachment but should apply also to defenders. These statutory provisions supersede statutory penalties under the 1838 Act[96] which were regarded as not precluding the alternative remedy of common law damages.[97] Though pecuniary remedies are likely to be more useful against third parties,[98] they may occasionally be of use against defenders. Suppose for example the defender sells attached moveable property in breach of the attachment, the court should have power to order him to consign the proceeds of sale in court as substitute security.

---

88 See para 2.3 above.
89 Debtors (Scotland) Act 1987, s 28.
90 See para 7.11 below.
91 See para 7.155 below.
92 Cf the Debtors (Scotland) Act 1987, s 28(4) on restoration of articles removed from premises in breach of poinding.
93 Cf Debtors (Scotland) Act 1987, s 28(5).
94 Debtors (Scotland) Act 1987, s 29.
95 Ibid, s 29(3)-(5).
96 Debtors (Scotland) Act 1838, s 30 (person unlawfully intromitting with or carrying off poinded effects liable to imprisonment till he restores the effects or pays double the appraised value).
97 Brown v Stephenson (1849) 11 D 1083; Graham Stewart, p 358.
98 Cf Wallace Evans & Partners v T Daly & Co Ltd 1984 SLT (Sh Ct) 25 at p 27.

4.88 We recommend:

(1) An interim attachment should have the effect of prohibiting:

(a) the defender, or a third party who knows that an article is attached, from removing it furth of Scotland without the consent in writing of the pursuer or the authority of the court; and

(b) such a third party from removing it from the defender's possession and control without the defender's consent.

(2) Where an attached article is removed (with or without the defender's consent) from the defender's possession or control by a third party with or without knowledge that it is attached, the court should have power to order the person in possession (who may be the third party or someone else) to restore it to the defender or to make it available to the pursuer within a specified period, and for that purpose to grant an ancillary search warrant. But such an order should not be made, or if made should be recalled, where the article has been acquired for value and without knowledge of the interim attachment.

(3) Any of the following acts, namely:

(a) the wilful damage, destruction or unauthorised removal from Scotland of an attached article by the defender, or by a third party who knows that the article is attached; and

(b) the wilful removal by such a third party of an attached article from the defender's possession and control,

should be treated as a breach of the interim attachment, and be liable to be dealt with as a contempt of court.

(4) The court should be empowered to order a party, who damages, destroys or removes an attached article in breach of the interim attachment, to consign a sum in court to make good the resulting deficiency in value.

(Recommendation 24; Draft Bill, clauses 10, 12 and 23(2), (3), (4))

(iv) Duty to assist officer of court authorised to poind

4.89 Where the pursuer obtains decree and becomes entitled to poind the attached articles," the defender and any third party concerned should be under a duty not to conceal attached articles from an officer of court duly authorised to poind in execution of the decree and also under an affirmative duty to make them available to the officer.

4.90 We recommend:

Subject to any orders made by the court, the defender, and any third party concerned, should be obliged in due course not to conceal but to make attached articles available to an officer of court authorised to poind in security of a claim secured by the interim attachment.

(Recommendation 25; Draft Bill, clause 10(d))

(m) The priority of an interim attachment

(i) General

4.91 In our view, in a competition with creditors and singular successors of the defender, an interim attachment should, as a general rule, have the same effect in ranking as a poinding. The main qualifications to this general rule would be that, as in other diligences on the dependence, the interim attachment would

99 le following the expiry of a charge without due payment.

have to be followed up without undue delay, and the ranking would be provisional, being ultimately dependent on the pursuer obtaining decree in the depending action.

4.92 Unfortunately there is some uncertainty in the existing law on the ranking of poindings. We think however that it would be inappropriate to make separate statutory provision on the ranking of interim attachment distinct from the rules on the ranking of poindings. An interim attachment is designed to preserve property in order to facilitate poinding. There should not be two different sets of rules governing the ranking of two such closely connected forms of diligence over goods.

(ii) The priority of poindings

4.93 Professor Gretton has identified[100] four different theories as to the nature of the right which a creditor acquires by poinding. These are: (1) that the poinding by itself transfers ownership to the creditor under certain conditions;[101] (2) that the poinding gives the creditor a real right in security while the debtor remains owner till the warrant sale;[102] (3) that the creditor acquires a real right in security from the date of the grant of the warrant of sale;[103] and (4) that poinding does not give the creditor any real right at all.[104] We agree with Professor Gretton's tentative conclusion[105] that the second theory is probably correct, though in our view "real right in security" should be taken to denote a special type of preference rather than a subordinate real right.[106]

4.94 The reason for the uncertainty is easily explained. When poindings were first reformed over 200 years ago by legislation, two old cases - Tullis[101] and Samson[m] - held that ownership did not pass until the warrant sale, while Bell contended that ownership passed at the execution of the poinding.[109] In the modern law, Bell's contention, always doubtful, must be rejected as inconsistent with the Debtors (Scotland) Act 1987, which now makes it clear that ownership of a poinded article does not pass to the poinding creditor unless and until the article remains unsold after exposure at the warrant sale.[110]

4.95 The policy reasons underpinning the rule that a poinding does not transfer ownership to the poinder seem sound[1]" and equally applicable to an interim attachment. The poinding creditor, for example, should not bear the risk, in addition to the extinction of his debt, of accidental destruction of poinded goods in the debtor's custody on the res peril domino principle.[112] Another important reason is the protection of bonafide purchasers, to which we revert below."[3]

100 Stair Memorial Encyclopaedia vol 8, para 243.
101 Ibid citing Bell, Commentaries vol 2, p 61.
102 Ibid citing Norman v Dymock 1932 SC 131 at p 134 per Lord Morison.
103 Ibid citing Lord Advocate v Royal Bank of Scotland 1977 SC 155 at p 172 per Lord President Emslie.
104 William S Yuile Ltd v Gibson 1952 SLT (Sh Ct) 22.
105 See n 100 above.
106 The right lacks one of the essential indicia of a true real right in so far as it does not prevail over a subsequent transfer of the poinded goods to a bonafide purchaser for value: see para 4.97 below.
107 Tullis v Whyte 18 June 1817 FC.
108 Samson v McCubbin (1822) 1 S 407: see para 4.109 below.
109 Bell, Commentaries vol 2, p 61. Originally, a poinding required two valuations and the goods were adjudged to belong to the poinder at the second valuation (held at the market cross). The second valuation was abolished by legislation (an act of sederunt of 1754; Bankruptcy Act 1783 (23 Geo HI, c 74), s 5). Bell (idem) contended that under the legislation the poinding was complete on the first and only valuation, when the goods were adjudged to belong to the poinding creditor. However the Act of Sederunt of 14th December 1805 provided that "the diligence shall only be considered as inchoated, and not as complete, till the minute of sale or delivery" was lodged with the sheriff clerk. The Tullis case was influenced by this Act of Sederunt. See Graham Stewart, pp 364, 365.
110 Debtor (Scotland) Act 1987, s 37(6). Further the poinding creditor may purchase a poinded article at a warrant sale (1987 Act, s 37(5)(a)), which assumes that he is not already owner. Between a poinding and warrant sale, a third party may claim that a poinded article is owned by the debtor and himself: 1987 Act, s 41(2).
111 For a valuable review see Turner v Mitchell andRae (1884)2 Guthrie 152 at p 155.
112 Turner v Mitchell and Rae (1884) 2 Guthrie 152 at p 155. It is also argued there that there is an inconsistency between the penalties for unlawful intromission with poinded articles and a theory that a vitium reale ^nables the creditor as owner to vindicate the goods.
113 See paras 4.97-4.101.

(iii) Competition of poindings and interim attachments with other rights: an overview

4.96 The better view is that while a poinding does not transfer a real right of ownership to the creditor, it does lay a nexus on a poinded article creating a preferred personal right[114] over it in the creditor's favour. As to the nature of the right, in summary: (1) it is not a true real right in security because it does not have priority over a subsequent real right of ownership acquired by a singular successor of the debtor purchasing in good faith and for value.[115] (2) On the other hand, as regards creditors in voluntary securities granted by the debtor, it does seem to have priority over a subsequently completed pledge; though (3) special rules may apply to floating charges.[116] Subject to the rules on the cutting down"[7] and equalisation[118] of diligences, it does give priority over (4) some subsequent diligences but not others,"[9] and (5) over the general unsecured creditors eg in a sequestration or liquidation.[120]

(iv) Competition with defender's singular successor

4.97 If in a sale of goods ownership has passed to the purchaser before the execution of the poinding, the poinding is incompetent and the purchaser is preferred. In the case of a subsequent sale by the debtor of poinded goods to a bonafide purchaser for value acquiring without notice of the poinding, the poinding creditor cannot vindicate the goods in the purchaser's hands, because the real right of ownership is not transferred by the poinding to the creditor.[121] It remains with the debtor who can therefore transfer it.[122] But a later bonafide purchaser who acquires knowledge of the poinding must retain any unpaid balance of the price for the benefit of the poinder.[123]

4.98 There seems ample justification for these rules, which should apply to interim attachments. For strong commercial and other reasons, the law does not favour the proliferation of latent defects[124] in the transfer of title to moveable goods.[125]

4.99 A rule that a poinding does not affect the title of a bona fide purchaser for value seems to imply that it does affect the title of a third party acquiring in bad faith or gratuitously. There is however a dearth of authority on the question whether a transfer of ownership of a poinded article by a debtor to a third party acquiring in bad faith or gratuitously is voidable at the instance of the poinder. Normally the poinder will invoke statutory remedies or claim damages.[126] Since the third party is an unlawful intermeddler, it seems likely that the transfer is voidable.

4.100 The Debtors (Scotland) Act 1987 left the poinder's right of avoidance to be developed by the common law, but that course would be unsatisfactory in the case of interim attachment which will be purely statutory. We consider that a transfer of ownership of an attached article made in breach of interim attachment to a singular successor of the defender acquiring in bad faith (ie knowing that the article is attached) or gratuitously should be voidable at the instance of the pursuer.[127] Since the transfer would be voidable only and not void, the pursuer could not challenge the rights of subsequent bonafide, onerous singular successors.

---

114 Though this right is sometimes called a security, it is not a subordinate real right in security for the reasons given in the text.

115 See next paragraph.

116 See paras 4.105-4.106.

117 Bankruptcy (Scotland) Act 1985, s 37(4).

118 Bankruptcy (Scotland) Act 1985, Sch 7, para 24: see Part 9 below for recommendations to abolish equalisation.

119 See paras 4.107-4.108.

120 See paras 4.109-4.111.

121 See eg the well reasoned sheriff court case of Turner v Mitchell and Rae (1884) 2 Guthrie 152. Direct authority is sparse but the rule is consistent with the cases of Tullis and Samson holding that a bare poinding does not transfer ownership though, unlike Turner, these cases go too far in not recognizing that a bare poinding creates a nexus.

122 It has been said that if the price has been paid but the goods have not been delivered, the poinder is preferred; Graham Stewart, pp 365-366; cited by Wilson, Debt (2d edn) para 16.10. But this seems a relic of a bygone period when ownership passed on delivery.

123 Turner v Mitchell and Rae (1884) 2 Guthrie 152; Graham Stewart p 366.

124 A report of poinding to the sheriff is not published.

125 This policy was recognised by the Debtors (Scotland) Act 1987, s 28(5) under which the statutory remedies for the restoration by third parties of poinded articles unlawfully removed from premises do not apply to articles acquired by a third party for value and without knowledge of the poinding.

126 Graham Stewart, p 358.

127 As to the law applicable to a voidable title, see Stair Memorial Encyclopaedia vol 18 para 692.

4.101 We recommend:

Where in breach of an interim attachment ownership of an attached article is transferred to a singular ^successor of the defender taking gratuitously or knowing that the article is attached, the transfer should be voidable at the instance of the pursuer. An interim attachment however should not affect the title of a purchaser who has acquired ownership of the attached article for value and without knowledge that the article is attached.

(Recommendation 26; Draft Bill, clause 14)

4.102 Sale under reservation of title. Where goods are sold under a valid reservation of title clause and delivered to the purchaser, the real right of ownership remains vested in the seller until the conditions in the contract of sale for the passing of ownership are satisfied.[128] A poinding by the seller's creditor of goods in the purchaser's possession sold subject to reservation of title is competent.[129] It seems clear that the poinding will prevail over the purchaser's purely personal, contractual right.[13°] Such a poinding would be likely to disrupt the purchaser's business but is thought to be ver.y rare - and perhaps unknown - in modern practice, perhaps because of the difficulty of identifying the goods and of knowing whether ownership has passed.[131] We propose that an interim attachment of such goods should likewise be competent but this would be subject to the court's discretionary powers.[132]

(v) Competition with voluntary real rights in security

4.103 Competition with pledges. Bell states that "in voluntary conveyances, pledge, etc, the poinder is preferred if the messenger's execution precedes the completion of the transfer by delivery".[133] This proposition rested on his theory that the poinding transferred ownership which, as we have seen, does not now represent the law. Graham Stewart states that "an assignation (sic)... not by way of sale, eg in security, ... must be completed by delivery, actual or constructive, as required by the common law; the execution of the poinding before such completion secures the poinder's preference".[134]

4.104 Other voluntary real rights in security. If these authorities on competitions with pledges are right, by analogy a poinding should in principle have priority over other subsequently created real rights in security. It has been pointed out however[135] that the statutory instrument regulating aircraft mortgages has the effect of postponing a poinding or arrestment to a registered mortgage of an aircraft[136] and the same would apply to an interim attachment.

4.105 Competition with floating charges. There is an authoritative obiter dictum that a bare poinding is not an "effectually executed diligence" prevailing over a subsequently attaching floating charge.[137] Since a floating charge has effect as a fixed security at the date of attachment, and since the fixed security for corporeal moveables is a pledge, this dictum seems inconsistent with the rule just discussed that a poinding has priority over a subsequent pledge. On the basis of a later case relating to arrestments,[11&] it

128 Armour v Thyssen Edelstahlwerke AG 1990 SLT 891 (HL).

129 A poinding of the debtor's goods in the possession of a third party is competent: Bell, Commentaries vol 2 p 60; Bell, Principles ss 2286, 2289; McDonald v Hancock (1841) 3 D 1128; Graham Stewart, Diligence p 338.

130 See para 4.93 above.

131 There is also the possibility that legal practitioners normally regard poindings as appropriate only for goods in the debtor's possession.

132 Eg to withhold warrant or to except such goods from the warrant.

133 Bell, Commentaries vol 2, p 61.

134 Graham Stewart, p 366, citing his treatment (at pp 150,151) of competitions between arrestments and securities over corporeal moveables. See also Wilson, Debt (2d edn) para 16.10: "Poinding is, of course, preferred to a pledge, if the execution was prior to completion of the security by delivery".

135 G Jamieson, "Arrestment and Poinding of Aircraft" 1997 SLT (News) 89 at pp 90,91.

136 See Mortgaging of Aircraft Order 1972 (SI 1972/1268), article 14(l)(priority of mortgages); Sch 2, para 10 (in Scotland, ranking on proceeds of sale).

137 Lord Advocate v Royal Bank of Scotland 1977 SC 155 at p 172 per Lord President Emslie observing that the poinding must be followed by warrant of sale. There is no authority for this latter proposition.

138 Cf lona Hotels Ltd v Craig 1990 SC 330 (arrestment executed prior to creation of floating charge preferred). In a ranking by a receiver under section 60(1) of the Insolvency Act 1986, a voluntary security will always rank before an effectually executed diligence. See Part 9 below.

may be that a poinding executed prior to the creation (as distinct from the attachment) of a floating charge may have priority over the charge. Though the rule on "effectually executed diligences" has been criticised,[139] it should in principle apply to interim attachments as it does to poindings.

4.106 Conclusion. Since a poinding does not give the poinder priority over a bonafide purchaser, it is difficult to see why a poinder should have priority over a bonafide pledgee. Any amendment of the law however would have implications for the law on competitions of poindings with floating charges (as deemed pledges). That matter is controversial. It lies outwith the scope of this report. We recommend below[140] that in a competition with a pledge or other real right in security created by the defender in favour of a third party, an interim attachment should have the same priority or preference as if the attached article had been poinded by the pursuer on the date of the execution of the interim attachment.

(vi) Competition with poindings or arrestments

4.107 Poindings not followed by warrant sale at the date of the competition rank among themselves by priority of date.[141] A poinding followed by warrant sale ranks in priority to a bare poinding executed earlier[142] unless the creditor in the bare poinding lodges a claim to a ranking on the proceeds of the warrant sale either before the sale or while the proceeds are still under the control of the court.[143] Similar rules apply to competitions between a poinding and an arrestment.[144]

(vii) Competition with executor-creditor

4.108 In a competition between a poinding and a confirmation as executor-creditor, priority depends on the date of the warrant «a1e as compared with the date of the confirmation.[145]

(viii) Competition with trustee in sequestration or liquidator

4.109 There is sheriff court authority - Wm S Yuile Ltd v Gibson[m] -to the effect that a creditor who has poinded goods, but not carried the poinding through to a warrant sale, is not entitled to a preference in the subsequent sequestration of the debtor. This decision relied on the old cases of Tullis[141] and Samson[148] which held that only the warrant sale, not the poinding, effected a transfer of ownership. While that is correct, it does not follow that the poinding does not confer a lesser right than ownership on the poinding creditor. In both of these cases there were specialities. The Tullis case[149] involved a competition between a poinding and a subsequent poinding of the ground by a heritable creditor whose priority was held to rest on the service of a summons of poinding on the ground before the ordinary poinder's warrant sale. In such a case the heritable creditor has a hypothec over the moveables on the security subjects, so that the competition is with a secured creditor, not an ordinary creditor doing diligence. In the Samson case,[150] it was held that a bare poinding gives no preference in a question with a trustee in sequestration[151] but that was strictly obiter since the poinding was held inept.[152] Nevertheless Wm S Yuile Ltd v Gibson^ seems to deny a poinding any effect at all in competition with other creditors.

139 See Part 9 below.
140 Recommendation 27 (para 4.109).
141 Graham Stewart, pp 365, 366. Conjoined poindings rank pan passu.
142 Idem.
143 Ibid, pp 140,141; cf Debtors (Scotland) Act 1987, s38(a) which preserves the sheriffs power to order consignation of the proceeds in court, so that a competition of creditors may be resolved.
144 Graham Stewart, pp 159, 366.
145 Graham Stewart, p 452.
146 1952 SLT (Sh Ct) 22.
147 Tullis v Whyte 18 June 1817 FC.
148 Samson v McCubbin (1822) 1 S 407.
149 Tullis v Whyte 18 June 1817 FC.
150 Samson v McCubbin (1822) 1 S 407.
151 Which was awarded more than 60 days later, so that no question of the cutting down by statute of prior diligences arose.
152 By reason of delay in reporting the poinding to the sheriff in accordance with the statutory procedure.
153 1952SLT(ShCt)22.

4.110 There is weighty authority against this view which was not cited. In Stephenson v Dobbins^ a court of five judges heldjhat while a poinding may not operate as,"an absolute adjudication of the property in the pointed goods",[155] nevertheless it lays a nexus on the goods, which gives a preference or security in competition with creditors other than preferable creditors. On the basis of this case, in Norman v Dymock[156] Lord Morison observed (obiter):

> "The effect of a poinding at common law is to operate implement of the decree. It does not transfer to the creditor the property attached; but it does lay a nexus on it, and it creates a security over it in the creditor's favour...".

There are other authorities holding that the nexus confers a preference.[157] Moreover, the provision in successive Bankruptcy Acts that a poinding within the period of 60 days before sequestration shall not be effectual to create a preference for the poinder[158] plainly implies that a poinding executed before that period does confer a preference.[159] In our view, the same rule should apply to interim attachments.

4.111 This view of the law however is not free from doubt and it seems to us to be desirable that the doubts should be removed by legislation at the same time as the rules on the ranking of poindings are applied to interim attachment.

(ix) Interim attachment to have same priority in ranking of creditors as poinding; clarification of ranking of poinding in sequestration

4.112 We recommend:

(1) In a competition with the claims of creditors of the defender, whether secured by voluntary securities or diligences or unsecured, an interim attachment should have the same priority or preference in ranking (if any) as if the attached article had been poinded by the pursuer on the date of the execution of the interim attachment. This is subject to the provisos that the interim attachment is followed up without undue delay, and that the pursuer obtains decree in the depending action.

(2) For avoidance of doubt, it should be made clear by statute that in a sequestration of the debtor's estate, the nexus imposed on a poinded article by the execution of a poinding gives the poinder a preference, in a competition with the general body of the debtor's creditors, over the proceeds of sale of the poinded article, but subject to the statutory 60 days rule mentioned in the next recommendation.

(Recommendation 27; Draft Bill, clauses 21; 55)

(n) The 60 days rule in insolvency proceedings and interim attachment

4.113 By statute arrestments and poindings executed within a prescribed period of 60 days before the date of sequestration or the commencement of the winding up of a company are rendered ineffectual in a question with the trustee or liquidator.[160] These provisions should apply to an interim attachment. The effect would be that if the interim attachment of goods were executed prior to the 60 days period, but the attacher's poinding of the goods were executed within that period, the poinding would not be rendered ineffectual by the statutory provisions. The creditor's preference would depend not on the poinding but on the prior interim attachment.

---

154 (1852) 14 D 510: the question was whether the execution of a poinding should be treated as the implementation in whole or part of an extract decree in absence so as to bar the sheriff from reponing a party against it.

155 Ibid at p 512 per Lord Wood.

156 1932 SC 131 at p 134.

157 See eg Clarke v Hinde Milne & Co (1884) 12 R 347 (liquidation); Bendy Bros Ltd v McAlister (1910) 26 Sh Ct Rep 152; French v Pollok (1885) 2 Guthrie 29, observing (at pp 30,31) that a bare poinding under the Debtors (Scotland) Act 1838 established a preference.

158 Currently Bankruptcy (Scotland) Act 1985, s 37(4).

159 See Bendy Bros Ltd v McAlister (1910) 26 Sh Ct Rep 152 at p 153.

160 Bankruptcy (Scotland) Act 1985, s 37(4) and (5) as extended by Insolvency Act 1986, s 185,

4.114 We recommend:

Section 37(4) and (5) of the Bankruptcy (Scotland) Act 1985, as extended by the Insolvency Act 1986, section 185 (which relate to the effect of sequestration and liquidation in rendering ineffectual arrestments and poindings executed within 60 days prior to the date of sequestration or the commencement of the winding up of a company) should apply to interim attachments. Where an interim attachment of goods prior to the 60 days period is followed up by a poinding of those goods within that period, the creditor should nevertheless remain entitled to any preference derived from the interim attachment.

(Recommendation 28; Draft Bill, clause 22)

(o) Interim attachment and confirmation as executor-creditor by same creditor

4.115 Where the debtor dies after the creditor has obtained decree and no executor is confirmed, the creditor may follow up his interim attachment with the diligence of confirmation as executor-creditor rather than charge, poinding and warrant sale. Such a confirmatien should terminate the interim attachment and its ranking on the previously attached goods should draw back to the date of interim attachment.

4.116 We recommend:

Where the creditor follows up his interim attachment with a confirmation as executor-creditor, the confirmation should terminate the interim attachment and the ranking of the confirmation on the previously attached goods should depend on the date of interim attachment.

(Recommendation 29; Draft Bill, clause 16(2)(b) and 21(b)(ii))

Part 5 Recall and Restriction of Diligence on Dependence

(1) Preliminary

5.1 The reform of diligence on the dependence so that it becomes an extraordinary remedy authorised only by a judge[1] would meet the first and most important criticism of our law identified in Part 2, namely that warrant for diligence on the dependence is too easily obtained.[2]

5.2 If that reform were to be introduced and work well, then the second defect identified in Part 2,[3] - namely that obtaining recall or restriction of unjustifiable diligence on the dependence is too difficult - would become much less important. The reason is simply that in future there would be few cases in which diligence on the dependence was used unjustifiably. For it would be the court's scrutiny prior to granting the warrant, not as under the present law, its jurisdiction to recall or restrict diligence after its use, which would form the main safeguard for defenders.

5.3 The court's powers to recall and to restrict diligence on the dependence nevertheless would remain important. The principles regulating these will require adaptation to cohere with the reformed system of granting the warrant, and amendments are needed to these and ancillary matters.[4] Furthermore parts of the relevant law have grown haphazardly over centuries and need modernisation and a technical overhaul.[5]

(2) Grounds of recall and restriction and incidence of onus

5.4 In modern practice the court's power to recall or restrict diligence on the dependence, though in theory discretionary, is in practice exercised only if the defender can rely on a recognised ground.[6] The main grounds are (i) that the effect of the diligence is nimious (ie excessive) or oppressive; (ii) that it appears prima facie to have been incompetently or irregularly exercised;[7] or (iii) that it is ineffective.[8]

5.5 A principal criticism of the existing law and practice is that the first of these grounds - nimiety and oppression - is too narrowly construed by the courts and therefore that it unduly prejudices defenders.[9] In the new system, that ground should be replaced by a new test which should be based on-the same factors[10] as, and cohere with, the test recommended as the ground for granting the warrant in the first place.[11]

5.6 Warrant granted in an exparte application. Where the warrant has been granted in an exparte application and the application for recall or restriction is by the defender (as distinct from a third party), the onus should rest on the pursuer -the holder of the warrant and respondent in the application - to justify the continuance in force of the warrant, or as the case may be, the specific arrestment which is being

1 See Part 3 above.
2 See para 2.16.
3 *Idem.*
4 Eg there are unnecessary restrictions on the tide of third parties to apply for recall or restriction.
5 Eg the development of recall and restriction have made "loosing" of arrestments unnecessary.
6 See para 2.20 above.
7 Eg Coreck Maritime GmbH v Sevrybokholodflot 1994 SLT 893 (OH); Landcatch Ltd v Sea Catch pic 1993 SLT 451 (OH); and cf Maciocia v Alma Holdings Ltd 1993 SLT 730 (OH).
8 Eg Taymech Ltd v Rush and Tompkins Ltd 1990 SLT 681 (OH); Stair Memorial Encyclopaedia vol 8, para 151.
9 See paras 2.23 - 2.40.
10 Ie whether the enforcement of the decree will be prejudiced by the defender's insolvency or his dissipation of his assets and the reasonableness of granting the warrant.
11 Recommendation 4 (para 3.45).

challenged. In other words the burden of satisfying the court should be the same as in the "validation hearing" found in some legal systems such as we discussed in Part 3.[12] This represents an important change from the existing law where the onus has to be discharged by the defender or other applicant for recall.

5.7 Other cases. Where the warrant has been granted following an inter panes contested hearing, circumstances can vary so widely that specific or detailed regulation of the grounds of recall and of the onus of satisfying the court becomes difficult. To safeguard the pursuer who should not require to justify his diligence twice over in contested hearings, it is arguable that the single ground of recall should be whether there has been a material change of circumstances since the hearing and that the onus should be on the defender to show such a change. But that may lead to sterile preliminary arguments as to the meaning of the "material change" test, and whether it is satisfied, when the real issue is whether the diligence is justifiable. Where the warrant had not been granted ex parte, the simplest and best solution would be to retain the court's general common law power of recall and restriction with the modification that the "nimous and oppressive" test would be replaced by a new test based on the need for the diligence and the reasonableness of it.[13] Further the court should decide the question of onus in the circumstances.

5.8 Midway between ex parte applications for warrant and contested inter panes hearings are cases where the application for warrant has been intimated to the defender but not opposed at a hearing. Since the reasons for the defender not opposing can vary widely (eg from neglect to lack of time), we recommend applying the same flexible solution to those cases. This solution would apply equally well to applications for recall by third parties such as arrestees.

5.9 Recall of invalid warrant for arrestment on the dependence. Where a warrant for arrestment on the dependence is invalid, as where it has been granted on the dependence of an action without pecuniary conclusions or craves (except for expenses), it might be thought that the warrant itself should be recalled. The practice seems, however, to be to recall any arrestments used under the warrant.[14] The majority of consultees agreed with our suggestion[15] that it should be made clear by statute that the purported warrant itself may be recalled on the ground of its invalidity.

Recommendation

5.10 (1) Where the warrant for diligence on the dependence has been granted in an application which has not been intimated to the defender, and the defender applies for recall or restriction, the onus should rest on the pursuer to satisfy the court that the warrant, or as the case may be the specific diligence, in question should continue in force.

(2) The court should continue to have a discretionary power to recall or restrict diligence on the dependence on the ground that the diligence is irregular, incompetent or ineffective.

(3) It should be made clear by statute that a purported warrant for arrestment on the dependence may be recalled on the ground of its invalidity.

(4) In an application for recall or restriction, the court should have regard to the same principles as are proposed in Recommendation 4 (para 3.45) for regulating the initial grant of warrant. These should replace the existing test that the diligence is "nimious (excessive) and oppressive".

(Recommendation 30; Draft Bill, clause 53)

12 See paras 3.24 - 3.26; Recommendation 3(5) (para 3.27).
13 See para 5.5.
14 See eg Stafford v McLaurin (1875) 3 R 148.
15 Discussion Paper No 84, Proposition 20(3) (para 2.229): see also para 2.227.

(3) Jurisdiction and procedure

5.11 Our Discussion Paper No 84 proposed some minor changes to jurisdiction and procedure in applications for recall or restriction of diligence on the dependence.[16] Our only proposal on Court of Session procedure has been implemented by rules of court.[17]

5.12 The sheriff's jurisdiction to recall or restrict arrestments[18] derives from the Debtors (Scotland) Act 1838, section 21, under which the procedure is by petition and answers.[19] In modern practice this cumbersome procedure requiring a separate initial writ is still used where the application is made before a process is available in which a motion for recall can be enrolled.[20] Our proposal for the introduction by act of sederunt of a simpler procedure of application by way of letter to the sheriff clerk[21] was criticised by the Regional Sheriff Clerks who suggested that the application should be made by written motion as in the Court of Session.[22] In summary causes the procedure is by minute and answers,[23] which seems more cumbersome than Court of Session procedure by motion for recall which can be opposed without written answers. On consultation opinion was divided on the need for simplification and we make no recommendations.

5.13 Whatever procedure is adopted should be regulated by rules of court.[24] Accordingly the legislation following this report should repeal the provisions on petition procedure in the Debtors (Scotland) Act 1838, section 21.[25]

5.14 We therefore recommend that:

The provisions on petition procedure in the Debtors (Scotland) Act 1838, section 21 should be repealed.

(Recommendation 31; Draft Bill, Schedule)

(4) Title to apply for recall or restriction of arrestments

5.15 In our Discussion Paper No 84, we referred to certain difficulties which affect the rules defining the persons who have a title to apply for recall or restriction of a diligence.[26] Most of the problems relate to arrestment, rather than inhibition, on the dependence. The general rule is that "any one who has an interest in having the arrestment taken off and who can produce the requisite caution may apply".[27]

5.16 We identified three possible limitations on title to apply for recall (or restriction) which were generally accepted on consultation to be unduly restrictive. These are:

(a) limitations on the title of persons other than the pursuer or defender to make an incidental application for recall in the depending action;

---

16 Paras 2.179-2.188; Proposition 17.

17 Discussion Paper No 84, Proposition 17(1) (para 2.188) (all applications for recall or restriction of arrestments and inhibitions under Court of Session warrants granted after final extract to be made to the Outer House, unless the action is already before the Inner House on a reclaiming motion) implemented by RCS, rr 14.2(g), 14.3(c). See also RCS, rlS.10.

18 Graham Stewart, p 209. Discussion Paper No 84, para 2.181.

19 Macphail, pp 362-363.

20 After a process has been made up by the sheriff clerk under OCR, r 9.5, applications are by motion.

21 Based on a former Court of Session procedure designed for cases where no process was available for enrolling a motion for recall. See RC 74(g) revoked by Act of Sederunt (Rules of the Court of Session Amendment No 1) (Miscellaneous) 1990 (SI 1990/705).

22 RCS, r 13.10. They suggested that if an application were made prior to the options hearing diet (RCS, rr 9.2, 9.12), an amended rule, which failing the sheriff's interlocutor, could require the pursuer to return the writ for the hearing on the application.

23 SCR, r 48.

24 The existing practice whereby applications made after tabling are by intimated motion should continue. Strictly the law should be brought into line with this practice by an amendment of the Ordinary Cause Rules.

25 Any new arrangements should of course apply equally to such proceedings in respect of inhibition on the dependence if jurisdiction is granted to the sheriff. See Recommendation 10 (para 3.97).

26 Paras 2.189-2.201, Propositions 18 and 19.

27 Graham Stewart, p 210.

(b) limitations on the tide of an arrestee to apply for recall where the thing arrested is a debt; and

(c) limitations on the title of a third party claiming ownership of an arrested vessel or of a fourth party claiming ownership of other types of arrested property.[28]

In cases (b) and (c), our recommendations relate to arrestment in execution as well as arrestment on the dependence.

(a) The existing law on title to apply for recall and restriction of arrestments

(i) Title to apply in the depending action.

5.17 Since the power to recall was originally vested only in the Inner House of the Court of Session, the powers of Outer House judges and sheriffs to recall are based on specific statutes or rules of court.

5.18 The proposals in our Discussion Paper have been implemented in the Court of Session by the Rules of Court of 1994 which provide[29] that "any person having an interest" may apply for recall or restriction of diligence on the dependence. In the notes to the Rules, this phrase is stated to include "the defender, an arrestee, owner of arrested property or other person affected by the diligence... Thus an owner claiming the arrested property as his and not due to the debtor can apply for recall".[30]

5.19 In the sheriff court, however, the Debtors (Scotland) Act 1838, section 21, still governs the power of the sheriff to recall arrestments on the dependence in ordinary causes. Since the sheriff has no power at common law to recall arrestments, only the defender or debtor may apply to the sheriff.[31] In summary causes, there is a rule that "a party" has title to apply for recall.[32] Since, in principle, the exclusive jurisdiction of the Court of Session cannot be restricted except by a plain enactment, probably the word "party" should be restrictively construed so as to exclude third parties and therefore only the defender or debtor may apply to the sheriff.

(ii) Arrested debts: arrestee has no title

5.20 It has been held that when the subject arrested is a debt or claim of money allegedly due by the arrestee to the common debtor, the arrestee has no title to apply for recall but must await a furthcoming.[33] The reason stated was that:

> "the arrestee is not in any way hurt or damnified by waiting until a furthcoming is raised. An arrestment in the hands of A of all moneys due by him to B does not put a nexus upon any particular money in A's hands, it does not prevent A from going on with his business, and using any money that he has got; it only attaches such sum as A is due to B, and it leaves A perfectly free in the furthcoming that is directed against him to say that he is due no sum to B".[34]

On the other hand, where the thing arrested is a corporeal moveable, it was held that the arrestee does have a title to apply for recall. The reason given was that:

> "if a corporeal moveable is arrested, and the arrestee wishes to say that it is his own, the arrestee has no power of either starting himself or getting others to start a furthcoming; and, accordingly, if he had not some other way of getting rid of the arrestment, he would be in this uncomfortable position that a nexus would be upon the subject which would put him in danger to deal with it, and at the same time he would have no possible means of starting a furthcoming in which he could appear to vindicate his right".[35]

28 In this context, "a third party" refers to a party other than the pursuer and defender, and "a fourth party" refers to a party other than the pursuer, defender and arrestee.
29 RCS,r 13.10.
30 RCS, note 13.10.2.
31 Graham Stewart, p 209; Macphail, p 362.
32 SCR, r 48.
33 Barclay, Curie & Co Ltd v Sir James Laing & Sons Ltd 1908 SC 82 at p 87.
34 *Idem.*
35 Ibid at p 87 per Lord President Dunedin.

5.21 In our Discussion Paper No 84[36] we raised a doubt as to whether, where the thing arrested is a sum of money allegedly due by the arrestee to the defender, the arrestee is ever prejudiced by being required to await a furthcoming.[37] It is difficult to see why the arrestee should be required to await a furthcoming over the timing of which he has no control.

5.22 It may be that the new Rules of Court have partially got rid of this limitation in the case of applications in pending Court of Session actions for recall of arrestments on the dependence.[38] But the limitation remains in arrestments on the dependence of sheriff court actions and arrestments in execution.

(iii) Title of third parties claiming ownership of arrested vessels, or fourth parties claiming ownership of other types of arrested subjects

5.23 In Brand v Kent?[9] rents allegedly due to the common debtor were arrested on the dependence. A fourth party petitioned for recall on the ground that the rents belonged to him. The petition was refused on the ground inter alia that if the arrested rents were due to the fourth party, the arrestment could not affect him since the schedule of arrestment in its terms attached only rents due to the common debtor. Therefore the fourth party had no title or interest to apply for their recall. It is difficult to disagree with the logic of this ground of the decision. On the other hand, there is no general rule that if an arrestment can be ignored as ineffective, no-one has a title or interest to apply for its recall. For example, if an arrestment is null because executed without warrant, the arrested fund can be disposed of without recall; but an application for recall is competent[40] and Graham Stewart[41] observes that that is the safest course. It is difficult to see why a fourth party should not have a title to apply to have particular rents due to him excluded from an arrestment, even though the order restricting the arrestment would be declaratory rather than executive in its effect.

5.24 A third party claiming ownership of an arrested ship has a title to apply for recall;[42] and it seems to be the better view that a fourth party claiming ownership of other types of arrested subjects also has such a title. As Graham Stewart observes[43] if the question of right is disputed, it will not normally be tried in the application for recall unless instantly verifiable or unless there are special circumstances; and recall will only be granted on caution.[44] It is thought that this conclusion is not inconsistent with Nordsoen v Mackie Koth & Co[45] in which Brand v Kent was applied.[46] The law, however, is uncertain.

5.25 This limitation does not apply to applications in pending Court of Session actions for recall of arrestments on the dependence.[47] But if it exists at common law, it still applies to arrestments on the dependence of sheriff court actions and arrestments in execution.

---

36 Para 2.195

37 For example the arrestee may be a tenant who is uncertain whether the rents are properly due to the defender or someone else. Or the arrestee may be a bank which is uncertain as to whether the true owner of funds in a current or deposit account is the defender or someone else. Or a bank or building society may be uncertain as to the question whether an arrestment in its hands attaches funds in a bank account in its network of branches in England and Wales.

38 RCS, note 13.10.2.

39 (1892) 20 R 29.

40 Macfarlane v Sanderson (1868) 40 Sc Jur 189.

41 p200.

42 Duffus v Mackay (1857) 19 D 430; Bildstein v Bock & Co (1872) 9 SL Rep 512; compare, however, Tail v Main 1989 SCLR106atpllO.

43 p 210 fa 4.

44 See Vincent v Chalmers & Co's Tr (1877) 5 R 43 at p 44 per Lord President Inglis: "In an application of this kind we must be able to say that arrestments should never have been used at all, or else to say that they should be recalled on caution being found. We cannot allow a proof, (emphasis added).

45 1911 SC 172. In that case, a fourth party petitioned for recall of an arrestment on the dependence on the ground that the arrested funds belonged to him. The petition was dismissed as incompetent partly because it raised a question of ownership requiring proof and partly because the question of ownership would only be appropriately determined in a process in which all interested parties could be convened. Neither the defender nor the arrestee were convened in that process. The petition however was for recall without caution, and it is thought that it would have been competent if caution had been offered.

46 The status of Brand v Kent is in some doubt and may only be authority for its own facts: see Lord Ruthven v Drummond 1908 SC 1154 at p 1158.

47 RCS, note 13.10.2.

(b) Reform of title to apply for recall and restriction of arrestments

5.26 On consultation the majority of commentators supported a wide and liberal provision giving all interested persons a title to apply, though some suggested modifications. In the case of applications in depending actions, we think that the sheriff court should follow the new Court of Session rule.

5.27 The opportunity should be taken to extend a similar rule to arrestment in execution so as to remove the bar, or possible bar, to applications for recall by arrestees liable for arrested pecuniary debts. At the same time it should be made clear by statute that a third party claiming ownership of an arrested vessel or a fourth party claiming ownership of other types of arrested subjects, has a title to apply for recall or restriction of the arrestment, without prejudice to the court's power to dismiss or refuse the application on the ground that a proof is required and would be inappropriate, or that all interested parties have not been convened in the process.

(5) Title to apply for recall and restriction of inhibitions

5.28 In principle, a third party having an interest may apply for recall[48] or restriction[49] of an inhibition.

5.29 Title to apply for recall of inhibitions on the dependence is now governed by the same Rule of the Court of Session as arrestments on the dependence.[50] A similar rule should apply to recall and restriction of sheriff court warrants for inhibition.

5.30 We recommend:

(1) It should be made clear by statute that any person having an interest to apply for recall or restriction of a diligence used on the dependence of a sheriff court ordinary cause, summary cause or small claim should have a title to apply to the sheriff in whose court the action depends.

(2) Any party having an interest should have a title to apply for the recall or restriction of an arrestment in execution or inhibition in execution on the ground that the warrant is invalid or that the diligence is irregular, incompetent or ineffective.

(Recommendation 32; Draft Bill, clauses 53 and 54(1))

(6) Special and general recall of diligences and recall of warrant

5.31 It may be necessary or desirable in some cases not only to recall or restrict diligences on the dependence which have already been used but also to prevent the use of further diligence under the warrant. A defender may obtain interdict against the threatened use of arrestment and inhibition on the dependence where it can be instantly verified that the use of the diligence would be wrongful,[51] or where he has consigned the principal sum sued for in the action.[52] In general, the application for interdict must be made to the Court of Session and not to the sheriff.[53] It has been observed that while the safest course is to apply to the Court of Session, it may be that a sheriff could competently interdict the use of arrestment on the dependence in his own court.[54] Court orders recalling diligence may also prospectively render

48 Eg where a singular successor of the inhibited debtor, having paid the debt, is unable to obtain a discharge of the inhibition from the inhibiting creditor. See also Allied Irish Banks pic v GPT Sales & Services Ltd 1993 SCLR 778 (application by heritable creditor of the inhibited debtor); Gretton, Inhibition and Adjudication (2d edn) p 51.

49 Eg where an inhibition has been competently registered but is ineffectual to strike at subjects conveyed to a third party, and the third party seeks to have the subjects excluded from the scope of the inhibition.

50 RCS, r 13.10(l)(b); cf Titles to Land Consolidation (Scotland) Act 1868, s 158 (limited to applications by the defender or debtor).

51 Beattie and Son v Pratt (1880)7R1171. By "wrongful" is meant executed without warrant, or irregularly, or with malice and want of probable cause.

52 Duffv Wood (1858) 20 D 1231.

53 Graham Stewart, pp 195; 573; 754; Burn-Murdoch, Interdict pp 186-7.

54 Macphail, p 360.

future diligence ineffectual,[55] and avoid the need for the quasi-criminal sanction of contempt of court for breach of interdict.

5.32 Types of recall of arrestments on the dependence. Three types of recall of arrestments on the dependence may be distinguished, namely:

(a) "general recall" in which the interlocutor recalls all arrestments used and to be used by the pursuer against the defender on the dependence of the action;

(b) "special recall" in which the interlocutor recalls specified arrestments already used in the hands of specified arrestees; and

(c) (possibly) a recall of the warrant for arrestment on the dependence itself as distinct from the recall of arrestments used or to be used in pursuance of the warrant.

A general recall is relatively unusual in modern practice.

5.33 Summary of differences between general recall and special recall of arrestment on the dependence. There are several differences between special and general recall, especially as regards the caution required by the court as a condition of the recall.

(1) In a special recall, the interlocutor recalls specified arrestments already used in the hands of specified arrestees. In a general recall, the interlocutor recalls all arrestments already used, and renders ineffectual prospectively any arrestments which may in future be used, by the pursuer against the defender on the dependence of the action without specifying the arrested property, the arrestments or the arrestees affected.[56]

(2) In a special recall, the cautioner's obligation is to make the previously arrested property forthcoming in the event that the pursuer obtains decree. In a general recall, the cautioner's obligation is a simple obligation to pay the debt.[57]

(3) In a special recall, the cautioner's liability cannot exceed the amount or value of the arrested property though either the debt due by the defender or the upper limit of the caution fixed by the court exceeds that amount or value.[58] In a general recall, the cautioner's obligation to pay the debt is not limited by reference to the amount or value of any particular fund or property.[59]

(4) In a special recall, the cautioner stands in the place of the arrestee and cannot state any objection which could be stated by the defender.[60] He cannot therefore defend the action against the defender on the merits or object to a reference to arbitration. In a general recall, the cautioner is in the position of an ordinary cautioner and thus may defend the depending action[61] and object to a reference to arbitration.[62]

5.34 Consultation. Special recalls are constantly used in practice and are clearly necessary. Although the distinction between general and special recall does seem to complicate the law, the majority of consultees favoured the retention of a general recall.

5.35 A general recall can be a useful safeguard for a defender who has furnished caution or consignation for the whole debt. It would, for example, be wrong if the court, when recalling an existing arrestment of a ship on the eve of its departure, had no power to prevent the immediate re-arrestment by an

55 See next paragraph.
56 Macdougall's Tr v Law (1864) 3 M 68.
57 *Idem.*
58 Lord Balmerino v Lord Lochinvar (1626) Mor 788; Potter v Bartholomew (1847) 10 D 97; Bell, Commentaries vol 2, p 67.
59 Macdougall's Tr v Law (1864) 3 M 68.
60 Potter v Bartholomew (1847) 10 D 97; Malcolm v Cook (1853) 16 D 262.
61 Macdougall's Tr v Law (1864) 3 M 68.
62 *Idem.*

unreasonable pursuer of the ship before it could depart. We think that two types of recall - one global and the other specific - should be retained.

5.36 General recall to be replaced by recall of warrant. To simplify the law however we propose that instead of making a general recall of all existing and future arrestments under a warrant for diligence on the dependence while leaving the warrant itself standing ineffectual and useless, the court should have power to recall or restrict the warrant itself. If the court has a discretion to grant the warrant, it should have a discretion to recall it. If circumstances change, the pursuer can apply for a new warrant. Moreover recall of the warrant is a simpler and more satisfactory concept than general recall to apply to the new diligence of interim attachment.

5.37 Recall and restriction of inhibition or warrant for inhibition. In the case of the recall or restriction of an inhibition, the normal form of interlocutor in terms "recalls (or restricts) the inhibition used at the instance of the respondent against the petitioner which was registered in the Register of Inhibitions and Adjudications on [date] [specify any restriction]".[63] The interlocutor authorises registration of a certified copy in the personal register.[64] The inhibition referred to appears to be the schedule of inhibition served by the messenger-at-arms on the inhibitee[65] because it is that document, rather than the warrant for inhibition, which contains the prohibition of sale and other acts prejudicing the inhibitor.[66] It seems also to be competent for the court to recall or restrict the warrant for inhibition (as distinct from the inhibition itself) and where the warrant itself was invalid or the schedule of inhibition had not yet been served, that would be the proper course.[67] We see no reason to change these rules and think that the court should be able to recall or restrict either the inhibition or its warrant.

5.38 We recommend:

It should be provided by statute that the court has power to make:

(a) an order recalling or restricting a specific arrestment, inhibition or interim attachment used on the dependence or in security;

(b) an order recalling or restricting a warrant for any of those diligences;

(c) an ancillary order; and

(d) an order attaching conditions to a decision granting or refusing to grant any such order, including conditions as to caution or consignation.

(Recommendation 33; Draft Bill, clause 53)

(7) Admiralty arrestments

5.39 As we explain in Part 7 below, there are three main types of admiralty arrestment. First, in the case of an arrestment in common form of a ship, or cargo on board ship, on the dependence of an admiralty cause or action in personam, the principles of recall or restriction are the same as in arrestments on the dependence of non-maritime subjects in ordinary (non-admiralty) actions.[68] Accordingly Recommendation 33 above should apply.

---

63 McBryde and Dowie, Petition Procedure in the Court of Session, (2nd edn), p 86.

64 *Idem.*

65 This on reflection seems preferable to the view stated in our Discussion Paper No 84, para 2.228, to the effect that the court recalls or restricts the warrant for inhibition itself rather than particular steps in the diligence taken under the warrant.

66 See the form of schedule of inhibition: RCS Form 16.15-R

67 Cf Dove v Henderson (1865) 3M 339.

68 See eg Azcarate v Iturrizaga 1938 SC 573; Motordrift A/S v Trachem Ltd 1982 SLT 127; Svenska Petroleum AB v HOR Ltd 1982 SLT 343(OH), 1986 SLT 513; William Batey & Co (Exports) Ltd v Kent 1987 SLT 557 (IH); 1985 SLT 490(OH); West Cumberland Farmers v Director of Agriculture of Sri Lanka 1988 SLT 296(OH); Clipper Shipping Co Ltd v San Vmcente Partners 1989 SLT 204 (OH); PTKF Kontinent v VMPTO Progress 1994 SLT 235 (OH); Coreck Maritime GmbH v Sevrybokholodflot 1994 SLT 893 (OH); Interatlantic (Namibia) (Pty) Ltd v Okeanski Ribolov Ltd 1996 SLT 819 (OH). Cf The "Aifanourios" 1980 SC 346; Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co 1985 SLT 68 (HL); 1984 SLT 462.

5.40 Second, an arrestment in rem of a ship under section 47(3)(b) of the Administration of Justice Act 1956 in an admiralty action in personam to secure the implementation of a non-pecuniary decree[69] is a relatively novel and distinctive type of arrestment introduced by that section into Scots law. The section confers on the court a special power of recall[70] exercisable where it is satisfied that sufficient "bail"[71] or other security for such implementation has been found.[72] This power should be retained subject to drafting modification.[73]

5.41 Third, in the case of an arrestment in rem of a ship, cargo or other maritime res in an admiralty action in rem enforcing a maritime lien (or hypothec) authority is scant. There seems little doubt however that in principle an arrestment in rem may be recalled on the ground that warrant is invalid or that the diligence is otherwise irregular, incompetent or ineffective. It cannot be recalled on the ground that the defender is solvent and unlikely to prejudice enforcement of the decree against him because of the theory / that the action is directed against the ship itself.[74] Nor can it be recalled on the ground that there is no need for the remedy because of the theory that an arrestment in rem is an essential prerequisite of an admiralty action in rem enforcing a maritime hypothec or lien.[75] We think however that it should be capable of recall if sufficient security (by consignation, caution or otherwise) is found for payment of the sums secured by the maritime lien.

5.42 Since several items of property could be encumbered by the maritime lien,[76] it should be competent to restrict this type of arrestment in rem.

5.43 We recommend:

(1) Our recommendations on recall and restriction of arrestment on the dependence should apply to the recall and restriction of an admiralty arrestment on the dependence of a ship or cargo on board ship.

(2) The court should have power to restrict or recall, with or without conditions, the arrestment in rem (of a ship, cargo or other maritime res) securing a maritime lien on the ground that:

(a) the warrant is invalid;

(b) the diligence is otherwise irregular, incompetent or ineffective; or

(c) it is reasonable to make the order.

(3) The same rules should apply to the arrestment in rem of a ship under section 47(3)(b) of the Administration of Justice Act 1956 to secure the implementation of a non-pecuniary decree in place of the existing power to recall (under the proviso to the 1956 Act, section 47(5)) on caution or security being found for implementation of the decree.

(Recommendation 34; Draft Bill, clauses 53 and 54(2))

(8) Expenses of recall or restriction or extra-judicial discharge and registration.

5.44 In our Discussion Paper No 84,[77] we identified three difficulties as to liability for the expenses of applications for recall or restriction, and for extra-judicial discharges, and registration thereof in the

69 Ie a claim relating to the ship and specified in paragraphs (p) to (s) of section 47(2) of the 1956 Act. Here the claimant is not entitled to a maritime lien over the ship.
70 But not a power to restrict since only one item of property - the ship - may be arrested and so restriction is not conceptually or legally possible.
71 The English term for caution.
72 1956 Act, s 47(5), proviso.
73 It should be re-enacted in the Bill with minor verbal modifications along with the other provisions of the 1956 Act, s 47.
74 See para 7.18 below.
75 See paras 7.19 and 7.68 below.
76 Eg in a salvage maritime lien, the ship, cargo, flotsam, jetsam, lagan, derelict and wreck: see para 7.76 below.
77 Paras 2.230 - 2.241.

personal register.[78] We accept the view of some consultees[79] that generally statute should not intervene to regulate expenses and that expenses should continue to be at the court's discretion, because circumstances vary unforeseeably.

5.45 Unopposed recall of diligence properly used. The first problem was that where an arrestment or inhibition on the dependence is recalled or restricted on caution or consignation, without opposition by the pursuer, and the diligence was properly used in the circumstances, it is not clear what the rule is or should be. On one view, the applicant for recall or restriction should bear the expenses of the application. On another, the question of expenses should be reserved and the right to expenses should follow success in the action. On consultation, opinion was almost evenly split between the two views. We think this matter should be left to the court's discretion.

5.46 Need to reserve expenses of recall. The need to reserve expenses of recall until the outcome of the principal action is known was first established in petitions for recall.[80] In a petition, if a reservation is not asked for and granted, the process is ended. It is not possible to allow the petitioner the expenses of recall in the principal action because it is a separate process.[81] It seems that the rule was then inappropriately transposed to recalls granted on an incidental application in the principal action.[82] There was general agreement on consultation that in incidental applications for recall, an express reservation of expenses is an unnecessary technical formality.[83] This matter is best dealt with by the courts without primary legislation.

5.47 Expenses of registering recall. There are differing views on who should be liable for the expenses of registering the recall or restriction of an inhibition in the personal register. Graham Stewart[84] observed that the party inhibited is liable, but that proposition is not supported by the authority[85] he cites. Professor Gretton's approach[86] is: "to say that the fee must be paid by the inhibitor if the inhibition is recalled on the ground of nimiety or oppression, or irregularity, or lapse, or abandonment, but otherwise by the debtor". On consultation, some respondents considered that the expenses should be dealt with as part of the expenses of recall. Others[87] adopted Professor Gretton's approach. A third view was that the expenses should be met by the debtor unless the court orders otherwise. In the absence of a consensus we make no recommendation and leave the matter to be resolved by the courts without primary legislation.

5.48 We recommend:

The difficulties as to the expenses of applications for recall identified at paras 5.44 - 5.47 above should be resolved by the courts without the need for primary legislation.

(Recommendation 35)

78 See Graham Stewart, pp 212-213, 573; Maclaren, Expenses pp 117-119; Gretton, Inhibition and Adjudication (2d edn) pp 60-63.
79 Especially the Court of Session judges and the Faculty of Advocates.
80 Gordon v Duncan (1827) 5 S 602; Clark v Loos (1855) 17 D 306; Dobbie v Duncanson (1872) 10 M 810.
81 Maclaren, Expenses p 118.
82 Graham Stewart, p 213, citing the opinion of an Auditor of the Court of Session.
83 As the Sheriffs' Association remarked, an express reservation can usefully highlight the unresolved issue of expenses but the absence of a reservation should not prevent parties from arguing about the expenses of the application when the general expenses of the action are under consideration. Failing such argument, the expenses of the application should be treated as part of the expenses of the cause.
84 p 573.
85 Laing v Muirhead (1868) 6 M 282.
86 Gretton, Inhibition and Adjudication (2d edn) p 63.
87 Including the Faculty of Advocates and Sheriffs' Association.

(9) Loosing of arrestments

(a) The meaning of "loosing"

5.49 Originally the loosing of an arrestment on the dependence was very different in its procedure, incidents and effects from recall or restriction. It has always differed from restriction and still differs in some important respects from recall. The whole topic is, however, bedevilled by lax and imprecise legal usage, in particular the various meanings ascribed to the word "loosing". Sometimes the word "loosing" is used in its original, distinctive and strictly correct sense of a method (by way of signeted letters of loosing) of releasing arrested property which does not extinguish the arrestment itself and the nexus which it creates, at least until the common debtor uplifts the arrested property.[88] Sometimes "loosing" is used as a synonym for recall (which extinguishes the arrestment).[89] Sometimes "loosing" appears to have reference to judicial interlocutors in petitions or incidental applications having an effect similar to letters of loosing.[90] Again, while the principal authorities define "loosing" as a licence or permission given to the defender to uplift or receive the arrested property from the arrestee, it is clear that loosing must mean something different where the thing arrested is a ship since in such a case there is no arrestee.[91] Here it means a permission to move the arrested ship from the place where it was arrested.[92]

5.50 In order to explain these confusions, our discussion paper described briefly how the law developed.[93] Here we concentrate on the modern law.

(b) Overview of main issues

5.51 To a large extent the concept of "loosing" of arrestments, in most of its forms, is historical surplusage rendered otiose by the evolution of judicial recall and restriction.[94] In this section we propose the abolition of (i) signeted letters of loosing, and of (ii) judicial loosing of non-maritime subjects; (iii) retention of the judicial remedy of loosing arrestments of maritime subjects; and (iv) replacement of the sheriff clerk's power of loosing in summary causes with a power of recall.

(c) Abolition of letters of loosing arrestment

5.52 In the late 19th century, signeted letters of loosing arrestments (whether in security, on the dependence, in execution or to found jurisdiction) fell into disuse, being superseded in practice by judicial recall or restriction in petitions and more especially incidental applications in depending actions.[95]

5.53 We proposed in our Discussion Paper[96] that letters of loosing should be abolished and that, as a consequential reform, the Arrestments Act 1617[97] (which empowers the clerk of court to receive caution when accepting a bill for letters of loosing arrestments) should be repealed. On consultation there was unanimous support for this proposal and we adhere to it.

5.54 We recommend:

> **Letters of loosing arrestments (whether in security, on the dependence, in rent or in execution) should be abolished and the Arrestments Act 1617 (clerk of court to receive caution when receiving bill for letters of loosing) should be repealed.**
>
> (Recommendation 36; Draft Bill, clause 49(1) and (3) and Schedule)

88 Bell, Commentaries, vol 2, p 67; Baron Hume's Lectures, vol 6, p 106.
89 See eg Bobbie, Petitioner (1871) 8 SL Rep 523 where "loosing" is used in the judgment and "recall" in the interlocutor; Cormack & Sons v Semple (1890) 7 Sh Ct Rep 100, where the interlocutor of Sheriff Lees both "loosed" and "recalled" arrestments and presumably had effect as a recall rather than a loosing in its distinctive sense.
90 See eg Macphail, p 360.
91 See para 7.10 below.
92 See eg McMillan, p 74.
93 Discussion Paper No 84, paras 2.248,2.249.
94 Discussion Paper No 84, para 2.247.
95 Scots Style Book (1902) vol 1, p 408 ff; Maclaren, Bill Chamber Practice (1915) p 236.
96 Discussion Paper No 84, para 2.250.
97 APS record edn 1617, c 17; 12mo edn 1617, c 17.

(d) Abolition of separate judicial remedy of loosing arrestments of non-maritime subjects

5.55 In our Discussion Paper we also sought views on whether loosing as a nominate form of judicial order distinct from recall or restriction should be abolished. In relation to arrestments of subjects other than ships,[98] a loosing properly so called is in effect a permission granted to the defender to uplift the arrested property after satisfying any condition as to caution or consignation, coupled with a recall of the arrestment taking postponed effect when the property is uplifted." So loosing does not extinguish the diligence or nexus entirely (at least until the arrested subjects are uplifted by the defender). By contrast, the effect of a recall is to extinguish an arrestment entirely.

5.56 Other important legal effects or incidents are as follows, (i) The arrestment retains its preference in a competition with other arrestments and rights (at any rate until the arrested property is uplifted).[100] (ii) The arrested property is subject to an action of furthcoming if it is still in the arrestee's possession when the arrester obtains decree for payment.[101] (iii) If however the arrestee has released (ie parted with) the "loosed" property to the defender by the time when the arrester obtains decree for payment, the arrester's claim is only against the cautioner.[102] In other words the uplifting of the property appears to extinguish the arrestment leaving only caution or consignation to secure the arrester's claim, (iv) If another creditor has laid a later arrestment on the "loosed" property before it has been uplifted, the loosing becomes ineffectual and the cautioner is freed of his obligation to make the loosed property furthcoming, on notifying the later arrestment to the creditor whose arrestment had been loosed.[103]

5.57 Nearly all the text-books on sheriff court practice state that judicial loosing is competent in the sheriff court.[104] We have not however found any reported sheriff court cases of judicial loosing properly so called. There is a dearth of authority on whether judicial loosing, as distinct from loosing by signeted letters, of arrestments of subjects other than ships or their cargo is competent in the Court of Session and again we have found no reported Court of Session cases of judicial loosing properly so called of such arrestments. We have traced only two modern statutes containing a reference to loosing.[105]

5.58 Options for reform. Our Discussion Paper put forward three main legislative options. The first is to leave the law in its present state. This seems unsatisfactory since the law is complex and uncertain, at any rate as regards the powers of the Court of Session. The second option is that loosing should remain as a distinct mode of releasing arrested property to the defender or common debtor, and should be defined by statute. A statutory definition however would be unduly complex.

5.59 The third option is to abolish loosing as a distinct nominate form of remedy. This would simplify the law but might be seen as narrowing the powers of the court unnecessarily. There may be circumstances where the court may wish to grant such an order, although it is not easy to envisage what these circumstances would be.

5.60 Consultation and recommendation. Consultation revealed a division of opinion as between retention and abolition. Approximately one half of consultees who responded to Proposition 23(2)[106] considered that loosing should be retained. The Court of Session judges, for example, considered that abolition of "loosing" would unduly restrict the court's powers.

---

98 For loosing of arrestments of ships, see para 5.63 below.

99 Bell, Commentaries vol 2, p 67; Baron Hume's Lectures vol 6, p 106.

100 Idem.

101 Idem.

102 Graham Stewart, p 214; Lord Balmerino v Lord Lochinvar (1626) Mor 788.

103 Bell, Commentaries, vol 2, p 67.

104 McGlashan, Sheriff Court Practice (4th edn) p 368; Dove Wilson, Sheriff Court Practice (4th edn) p 213; Wallace Sheriff Court Practice p 209; Lewis, Sheriff Court Practice (8th edn) p 101; Macphail, p 360. Dobie Sheriff Court Practice appears not to deal with loosing.

105 See Proceeds of Crime (Scotland) Act 1995, ss 32, 33, 37 and 38; Prevention of Terrorism (Temporary Provisions) Act 1989 as amended by 1995, c 40, Sch 4, paras 16(2) and 16A(2).

106 Discussion Paper No 84, para 2.263.

5.61 We agree however with the remaining consultees who favoured abolition on the grounds that restriction and recall sufficed and that a nominate remedy of loosing was an unnecessary complication. There is nothing to stop the court from achieving the same effect as loosing by making orders of recall and restriction with conditions. Loosing dates from a bygone age when such orders were not possible.

5.62 We recommend:

> **To simplify the law, loosing as a separate type of order or legal concept should be abolished in relation to arrestments of non-maritime subjects, without prejudice to the court's power to make orders of recall and restriction subject to conditions to achieve the same effect as loosing.**
>
> (Recommendation 37; Draft Bill, clause 49(1) and (2))

(e) Retention of judicial remedy of loosing arrestments of maritime subjects

5.63 In our Discussion Paper[107] we noted that there seemed to be a largely uncommented-on distinction between the loosing of an arrestment of a ship (or its cargo, to which similar principles may for present purposes be taken as applying[108]) and the loosing of an arrestment of other types of moveable property.

5.64 First, whereas a loosing of an arrestment of subjects other than a ship implies the giving of a permission or licence to the defender or common debtor to receive the property from the arrestee, in the case of ships the arrestment is executed against the ship[109] and there is no arrestee distinct and separate from the defender.

5.65 Second, as we discuss below,[110] an arrestment of a ship, unlike an arrestment of other corporeal moveables in the hands of third parties fixes the ship in the place where the arrestment was laid. The permission implied in loosing is a permission to move the ship from that place.

5.66 Third, whereas the uplifting of arrested property other than a ship from the hands of a third party arrestee in pursuance of a loosing seems to have the same effect as a recall of the arrestment, it seems that the moving of a ship in pursuance of a loosing does not impliedly recall the arrestment, but merely makes it:

> "possible to postpone completion of the diligence to a more convenient date. The arrester thus retains the security of the ship herself in the event of her safe return within the jurisdiction, and acquires also the personal security of the cautioner for her value in the event of her being lost at sea or sold abroad".[111]

5.67 In most reported cases relating to ships and their cargo, recall or restriction on caution or consignation is the common mode of "releasing" the ship from arrestment but at least one case shows that loosing may be a useful method of obtaining a just result.[112] Thus, in Svenska Petroleum AB v HOR Ltd,"[3] for example, counsel for the applicants submitted that even if the arrestments were valid "they should be loosed because of the hardship which will ensue from their being maintained until the disposal of the actions"[114] (emphasis added). In that case, the court gave permission for the vessel to sail to

---

107 Discussion Paper No 84, para 2.257.

108 On the question whether an arrestment of cargo on board ship immobilises the ship until discharge of the cargo or merely prevents removal of the ship with the cargo on board from the jurisdiction, see paras 7.155 - 7.160 below. For simplicity, we assume here that the ship with her cargo on board is immobilised until discharge of the cargo.

109 See para 7.10.

110 See para 7.11.

111 McMillan, p 74.

112 See also RCS, r 13.11 which permits any person having an interest to apply for a warrant authorising the movement of a vessel or cargo which is the subject of an arrestment mentioned in rule 13.6. This is really a species of loosing of an arrestment.

113 1982 SLT 343: application by the owners and time charterers of a ship lying at Hound Point in the Forth for the recall of arrestments of part of the ship's cargo on the dependence.

114 Ibid, at p 344. In Stewart v Macbeth & Gray (1882) 10 R 382, the interlocutor recalled an arrestment of a ship on consignation "to the effect of allowing the said ship to proceed on her voyage to Trinidad", but this seems to be no different from a recall simpliciter on consignation rather than a loosing.

Southampton, for bunkering purposes, on the understanding that she would be returned to the Forth thereafter.[115]

5.68 Most of our consultees addressing this issue agreed that the court should retain its power of loosing the arrestment of a ship and its cargo. The Faculty of Advocates commented that there was no need for a statutory definition of the wide powers already understood to be available to the court on incidental application.

5.69 We have no doubt that the court should retain its power of loosing the arrestment of a ship and its cargo.

5.70 We recommend:

> **The court should continue to possess power, in an application for recall, restriction or loosing, to loose an arrestment on the dependence or an arrestment in rem of a ship or its cargo, ie to make an order authorising the applicant or his nominee to move the ship, or the cargo, or both, from the place where the ship or cargo is situated for such purposes and subject to such conditions, or further order, if any, as the court thinks fit, including caution or consignation.**
>
> (Recommendation 38; Draft Bill, clause 49(2)(a))

(f) Loosing by sheriff clerk in summary causes

5.71 Rule 48 of the Summary Cause Rules provides:

> "(1) A party may have an arrestment on the dependence of a cause loosed on paying into court, or finding caution to the satisfaction of the sheriff clerk in respect of, the sum claimed together with the sum of £50, in respect of expenses.
>
> (2) On payment into court or the finding of caution to his satisfaction in accordance with paragraph (1), the sheriff clerk shall issue to the party a certificate which shall operate as a warrant for the release of any sum or property arrested and shall send a copy of the certificate to the party who instructed the arrestment."

It is not at all clear whether "loosed" in rule 48(1) is used in its strict technical sense or whether (as seems more likely) it simply means "released". The same rule[116] provides for judicial restriction or recall by the sheriff on application. In our Discussion Paper[117] we said it was arguable that this provision (which is a simplified version of a statutory provision of 1837[118]) should be revoked and that, if loosing were to be retained, it should only be effected by an interlocutor of the sheriff.

5.72 Consultation elicited various responses. The Court of Session Judges and the Joint Committee favoured abolition. If loosing were to remain, the Faculty of Advocates considered that this power should remain. The Regional Sheriff Clerks, who favour the abolition of loosing, wished some such power to be retained under another name as there would be difficulties in its absence.

5.73 Given the divergent views, we make no recommendation to abolish entirely this somewhat anomalous power of the sheriff clerk. We agree however with the representation made to us that "recalled" should be substituted for "loosed" in SCR r 48(1), especially since we have recommended that the concept of "loosing" should be confined to arrestments of maritime subjects.

---

115 As that case discloses, it is permissible to authorise the movement of the ship outside the jurisdiction.
116 r 48(3) & (4).
117 Discussion Paper No 84, para 2.256.
118 Small Debt (Scotland) Act 1837, s 8 and Sch C (repealed).

5.74 We recommend:

Rule 48(1) of the Summary Cause Rules (power of sheriff clerk to loose arrestment on dependence) should be amended by substituting "recalled" for "loosed".

(Recommendation 39)

(10) Jurisdiction in applications for restriction or recall

5.75 Jurisdiction in the international sense to entertain applications for restriction or recall of a diligence is governed by the Brussels and Lugano Judgments Conventions and the Civil Jurisdiction and Judgments Act 1982. In proceedings concerned with the enforcement of judgments (which include applications for restriction or recall of diligence in execution), the courts of the contracting state in which the judgment has been or is to be enforced have exclusive jurisdiction.[119]

5.76 Diligences on the dependence are characterised as provisional and protective measures (rather than measures for the enforcement of judgments) for the purposes of the Conventions. The grounds of the assumption of jurisdiction in provisional and protective measures are not specifically regulated, and a court may make provisional and protective measures though jurisdiction on substance lies in another contracting state.[120] It seems to be generally assumed that jurisdiction in the principal action carries with it jurisdiction in provisional and protective measures. On that view, applications for restriction or recall of a diligence on the dependence should continue to be made to the court which granted the warrant, at least while the action is still in dependence.

5.77 As regards subject matter jurisdiction, we think that jurisdiction to restrict or recall a diligence in execution - including execution of a warrant of the Court of Session,[121] sheriff court, extract writ registered for execution, or other order or writ enforceable by diligence - should be entrusted to the sheriff courts, on the ground that the subject matter is not sufficiently important to require an application to the Court of Session after decree. The sheriff has exclusive supervisory jurisdiction over some other diligences in execution of decrees of the Court of Session.[122] As regards the allocation between different sheriff courts of jurisdiction in applications for the restriction or recall of a diligence in execution, specific rules would be unduly complex,[123] and we propose that application should be competent to any sheriff court. If it were necessary or expedient in the interests of justice, the sheriff could use his general powers of transfer to transfer the application to another sheriff court.

5.78 We recommend:

(1) The present rule should continue under which an application for restriction or recall of a diligence on the dependence is made to the court (Court of Session or sheriff court) which granted the warrant, while the action is still in dependence.

(2) The sheriff should have exclusive jurisdiction to restrict or recall diligence in execution.

(3) An application for restriction or recall of a diligence in execution should be competent in any sheriff court.

(Recommendation 40; Draft Bill, clause 53(8)(b) and 54(1))

119 Brussels and Lugano Judgments Conventions, article 16(5).
120 Cf Brussels Judgments Convention, Article 24; 1982 Act, Sch 4, article 24; 1982 Act, s 27.
121 An application for recall of an inhibition must be made to the Outer House of the Court of Session: RCS r 14(2)(g).
122 Eg poindings; and diligence against earnings under Debtors (Scotland) Act 1987, Part JJI.
123 Special rules would be needed for enforceable documents of debt not emanating from a sheriff court, eg Court of Session warrants and orders of tribunals.

Part 6 * Diligence on the Dependence: Miscellaneous

(1) Introduction

6.1 In addition to the major reforms recommended in Parts 3 to 5 above, some miscellaneous issues in the reform of diligence on the dependence remain which are discussed in this Part.

(2) Proceedings in which diligence on the dependence competent

6.2 Actions for payment of a principal sum. At common law, arrestment on the dependence is competent only where the action concludes for or craves payment of money other than expenses.[1] The pecuniary conclusion or crave may be alternative or subsidiary to a non-pecuniary conclusion or crave, such as declarator, reduction, or accounting. Though the Court of Session Act 1868, section 18[2] did not expressly limit the availability of warrants of inhibition on the dependence to actions of any particular kind, it was generally accepted that the competence of the diligence is governed by the common law, which inter alia allows inhibition on the dependence of an action containing pecuniary conclusions or craves other than expenses.[3] The availability of diligence on the dependence is not to be extended further than is permitted by law and usage.[4]

6.3 We adhere to our view, from which there was no dissent on consultation, that these rules are satisfactory. In Part 2 above,[5] we referred to certain rules making warrants for diligence on the dependence available in counterclaims and third party notice procedure. Where such warrants are available, our recommendations should apply with any necessary modifications.

6.4 Actions for specific implement: inhibitions.[6] Inhibition is competent on the dependence of an action to enforce an obligation to convey land, so as to prevent its disposal to a third party;[7] or in an action for implement of an obligation to grant a lease, to prevent sale of the land to the pursuer's prejudice;[8] or in an action by a truster against his trustee for reconveyance of the reversion of the trust estate, to prevent the trustee from conveying it to his own creditors or alienating it.[9]

6.5 Inhibition of this kind is also competent to secure property transfer orders in divorce and nullity actions,[10] and in such a case the court has a power to restrict the inhibition to the property concerned at the stage of granting the warrant.[11] However, in other actions for specific implement of an obligation ad factum praestandum relating to heritable property, the inhibition affects the whole of the defender's heritable property, and not merely the property to which the obligation relates, at least unless and until it is restricted by the court. This has been rightly described as curious,[12] and we consider it to be unjust.

---

1 Graham Stewart, p 19; Weir v Otto (1870) 8 M 1070; RCS r 13.6(c)(ii).
2 Which enabled warrants for inhibition to be inserted in summonses. Now repealed by the Court of Session Act 1988, s 52(2) and Sch 2, Pt I.
3 Weir v Otto, supra; Graham Stewart, p 531. See RCS r.!3.6(c)(i) and note 13.6.2 - The summons need not contain pecuniary conclusions: it is necessary only that there is a conclusion which can be secured by inhibition.
4 Stafford v McLaurin (1875) 3 R 148 at p 150.
5 Paras 2.18 - 2.20.
6 See Graham Stewart, pp 528, 532.
7 Barstow v Menzies (1840) 2 D 611.
8 Seaforth's Trs v Macaulay (1844) 7 D 180.
9 Pedie v Stewart (1830) 8 S 710.
10 Family Law (Scotland) Act 1985, ss 8 and 19.
11 *Ibid, s 19.*
12 Gretton, Inhibition and Adjudication (2d edn) p 14.

6.6 In our discussion paper we proposed that a warrant for inhibition securing an obligation ad factum praestandum should be limited expressly, by a proper conveyancing description, to the particular heritable property to which the obligation relates.[13] A warrant for inhibition not so limited should be treated not merely as ineffectual but as inherently defective, so that any inhibition used thereunder would be wrongful and sound in damages.

6.7 Most consultees supported this proposal. Some concern was expressed[14] about the feasibility of obtaining a proper conveyancing description quickly enough. This requirement is not onerous however and should be inserted in secondary legislation so as to facilitate review and amendment. It was suggested to us that inhibition should be abolished in such cases letting the pursuer rely on interdict. However we consider that inhibition has advantages over interdict.[15]

6.8 Foreign proceedings. Consultation did not reveal any difficulties raised by the statutory provisions allowing diligence on the dependence of certain classes of foreign proceedings.[16]

6.9 Scottish proceedings other than actions for payment. In the Court of Session, the Rules of Court provide for warrants for diligence on the dependence to be granted only in actions.[17] Pecuniary obligations are rarely the subject matter of Court of Session petitions, so that diligence on the dependence of petitions will rarely be competent. But where it is competent, it seems undesirable to require the petitioner to apply for letters of inhibition or arrestment on the dependence.

6.10 On consultation, opinion was divided on whether there was any need for warrants for diligence on the dependence to be available in Court of Session petitions containing a prayer for a decree for payment of a sum of money other than expenses. Some[18] saw no need for change principally because there are so few petitions containing a prayer for a decree for payment of a sum of money which could not otherwise be raised as a summons.

6.11 As others[19] pointed out, however, cases can occur, eg a petition for judicial review,[20] and a petition seeking an order under section 461(2)(b) of the Companies Act 1985,[21] and new powers could raise other examples. The court's power to grant a remedy should not depend on the accident of the form of the proceedings. We consider that warrant for diligence on the dependence should be competent in petitions containing a prayer for a decree for payment of money other than expenses.

6.12 In the sheriff court, summary applications are treated as actions for some purposes,[22] and are commenced by initial writ which may contain a warrant for arrestment on the dependence.[23] Among the wide variety of miscellaneous common law and statutory summary applications in the sheriff court, it is not clear in what forms of application diligence on the dependence is competent. We therefore make no recommendations on this matter.

---

13 Discussion Paper No 84, Proposition 1(2) (para 2.12).
14 By the Regional Sheriff Clerks and The Committee of Scottish Clearing Bankers.
15 In notifying third parties and avoiding the sanction of contempt of court. See para 4.29.
16 Civil Jurisdiction and Judgments Act 1982, s 27, as amended by 1991 c 12, Sch 2; Stancroft Securities Ltd v McDowall 1990 SC 274.
17 Eg RCS, r 13.6. Prior to the RCS 1994 we understand that occasionally warrant for diligence on the dependence was granted in a petition for custody containing a prayer for an award of aliment. See Encyclopaedia of Scottish Legal Styles vol 2, p 395. RCS 1994, r 13.1 provides that, subject to any other provision in the Rules, all causes originating in the court shall be commenced in the Outer House by summons. There does not appear to be "any other provision" in respect of family actions.
18 Notably the Faculty of Advocates, the Principal Clerk of Session and the Committee of Scottish Clearing Bankers.
19 Including the Court of Session Judges and the Joint Committee, amongst others.
20 See RCS, r 58.4(b).
21 See the court's powers under section 461(1) of that Act.
22 Sheriff Courts (Scotland) Act 1907, s 3; Macphail, p 871 ff.
23 OCR, Form G1. See Recommendation 10 (para 3.97) in which we recommend that the sheriff should be granted the same powers as the Court of Session has to grant a warrant for inhibition on the dependence.

6.13 We recommend:

(1) Warrants for diligence on the dependence should continue to be available in actions for payment of a principal sum of money, including actions concluding for a random sum (such as damages or count, reckoning and payment) and should not be available in actions in which the only pecuniary conclusion or crave is for expenses or, in the case of inhibition on the dependence, where the only conclusion which can be secured is one for expenses.

(2) Where warrants for diligence on the dependence are available in counterclaims and claims in third party notice procedure, the recommendations in this report should apply with any necessary modifications.

(3) Warrants for inhibition on the dependence should continue to be available in actions for specific implement of obligations adfactum praestandum relating to heritable property, so far as competent under the present law.

(4) Warrants for diligence on the dependence should be available in Court of Session petitions containing a prayer for a decree for payment of a sum of money other than expenses.

(Recommendation 41; Draft Bill, clauses 1, 3 and 45).

(3) Service of arrestment and interim attachment and registration of notice of inhibition before commencement of action

6.14 Service of arrestment and interim attachment before commencement of action. An action can be said to be in dependence only when it has been commenced by service on the defender of the summons or initial writ. Accordingly at common law the schedule of arrestment on the dependence could be competently served only after service of the summons on the defender.[24] Since service of the summons gave defenders notice of the pursuer's intention to use arrestment on the dependence, defenders sometimes put away their funds to render the arrestments useless.[25] Accordingly a series of statutory provisions[26] culminating in the Debtors (Scotland) Act 1838, section 17, enabled a pursuer in a Court of Session action to lay an arrestment in pursuance of the warrant in his summons. Section 17 further provides that:

> "Such arrestment shall be effectual provided the warrant of citation" [ie in the signeted summons] "shall be executed against the defender within 20 days after the date of the execution of the arrestment, and the summons called in court within 20 days after the diet of compearance, or where the expiry of the said period of 20 days after the diet of compearance falls within the vacation, or previous to the first calling day in the session next ensuing, provided the summons be called on the first calling day next thereafter; and if the warrant of citation shall not be executed and the summons called in the manner above direct, the arrestment shall be null ..." .

In Brash v Brash,[27] Lord Kissen observed that there is no equivalent of the "diet of compearance" in the present day practice of the Court of Session; refused to accept counsel's submission that its equivalent is the first day on which the summons can be lawfully called; and refused to hold an arrestment null on the ground that it did not comply with the provisions of section 17 relating to the diet of compearance. On this approach, it is enough if the summons is served within 20 days after service of the arrestment. There is no obligation on the pursuer to report to the Court of Session execution of an arrestment before service such as applies in sheriff court procedure.[28]

6.15 In sheriff court ordinary cause actions, an arrestment on the dependence used before service of the initial writ falls unless the initial writ is served within 20 days from the date of arrestment.[29] In a summary

24 Elphinston v Creditors of Stricken (1706) Mor 8144; Hamilton v Dunlop (1711) Mor 8145; Neil v Brown (1773) Mor sv "Arrestment", App'x 3.

25 Baron Hume's Lectures, vol VI, p 93; Graham Stewart, p 17.

26 Bankruptcy Act 1793, s 3; Bankruptcy Act 1814, s 2.

27 1966 SLT 157 at p 158 (omitted from the report in 1966 SC 56).

28 See para 6.18 below.

29 OCR, r 6.2(l).The requirement, of the former Ordinary Cause Rules (r 112(l)(a)), of tabling, in the case of defended causes, within 20 days after the first ordinary court day occurring after expiry of the period of notice, was not retained by the 1993 Ordinary Cause Rules. In the case of undefended causes, decree in absence must have been pronounced within 20 days after the expiry of the period of notice.

cause, an arrestment executed prior to service of the summons falls if the summons is not served within 42 days from the date of execution of the arrestment.[30]

6.16 On consultation there was unanimous support for retention of the rule that an arrestment used prior to service falls if the summons or initial writ is not executed within a specified period thereafter.[31] The whole point of the diligence is to secure a claim in a depending action, and accordingly the action should be commenced shortly after execution of the arrestment. The same principle should apply to the new diligence of interim attachment recommended in Part 4.

6.17 There was unanimous agreement with our proposal for abolition of the requirement that the action must call or be tabled within a prescribed period.[32] In the sheriff court, the Ordinary Cause Rules[33] no longer carry a requirement of tabling. As far as the Court of Session is concerned, section 17 of the Debtors (Scotland) Act 1838 should be re-enacted with modifications to give effect to current practice, namely that it is sufficient if the summons is served within the statutory period (currently 20 days) after service of the arrestment.[34] We propose that the period should be 21 days since such days are normally reckoned in multiples of weeks.

6.18 Reporting arrestment used prior to service. An arrestment on the dependence executed prior to the service of a sheriff court ordinary cause initial writ or summary cause summons must be reported "forthwith" by the arrester or his solicitor respectively to the sheriff clerk.[35] The reason for this provision is said to be that the execution should be in the sheriff clerk's hands as the defender might at any moment apply to the sheriff to have the arrestment recalled or loosed on caution;[36] or might apply at once to have rectified anything which he may have to complain of in regard to its use.[37] There are conflicting sheriff court decisions on whether failure to observe this requirement renders the arrestment inept.[38] It has been argued that failure to report in time renders the arrestment null, "except perhaps where the court is satisfied that the delay may be excused on the ground of some special cause".[39] There is no equivalent requirement to report to the Court of Session arrestments used prior to service of a Court of Session summons.

6.19 We have not found any satisfactory explanation for the difference between the Court of Session and sheriff court rules on reporting of pre-service arrestments. Applications for recall of arrestments[40] are not prejudiced by the absence of a requirement to report the arrestment. Moreover the reasons adduced for reporting[41] seem to apply equally strongly to arrestments on the dependence used after service of the initial writ or summons. Yet reporting is not required in post-service arrestment cases. We do not see why it should be needed in pre-service arrestment cases. Consultation did not reveal any support for the retention of a reporting requirement.

6.20 We recommend that:

(1) Where an arrestment on the dependence is executed prior to the service of the summons or initial writ, the existing rule should be retained under which the arrestment falls unless the summons or writ is served within a prescribed period after the date of execution of

30 SCR, r 47.
31 Discussion Paper No 84, para 2.135, Proposition 12(1).
32 Discussion Paper No 84, para 2.136, Proposition 12(2).
33 OCR, r 6.2(1).
34 See para 6.14 above.
35 OCR, r 6.2(2); SCR, r 47, deriving ultimately from the Act of Sederunt of 10 July 1839, s 18.
36 Johnson v Johnson (1910) 26 Sh Ct Rep 134 at p 138; citing McGlashan Sheriff Court Practice (4th edn) s 1013 (the clerk would have to prepare a bond of caution).
37 Dove Wilson, Sheriff Court Practice (4th edn) p 212; Wallace, Practice of the Sheriff Court (1909) p 209.
38 So held in Johnson v Johnson (1910) 26 Sh Ct Rep 134; Cluny Investment Services Ltd v Macandrew & Jenkins WS 1992 SCLR 478 (Sh Ct); contra AB v EF (1911) 26 Sh Ct Rep 172; opinion reserved in Macintyre v Caledonian Railway Co (1909) 25 Sh Ct Rep 329 at p 332 where Sheriff McClure stated: "It is not, I think, clear whether the prescription of rule 127 is directory or imperative, ...".
39 Macphail, p 357.
40 RCS, r 13.10.
41 Namely that the sheriff clerk needs to have the arrestment in case there should be an application relating to the arrestment, eg for recall on caution or rectification of a complaint.

the arrestment. The current period of 20 days should be changed to 21 days. The rule as so amended should apply also to interim attachment.

(2) Section 17 of the Debtors (Scotland) Act 1838 should be re-enacted with the modification that the reference to a requirement for the summons to call within a prescribed period is omitted.

(3) The requirement that a sheriff court arrestment on the dependence used prior to the service of the initial writ or summons must be reported to the sheriff clerk, should be abolished by act of sederunt.

(Recommendation 42; Draft Bill, clauses 5, 9 and Schedule)

6.21 Registration of notice of inhibition before service of summons. Before registering in the personal register an inhibition contained in a Court of Session summons, and before service of the summons, it is competent to register a notice of inhibition in statutory form in that register.[42] If the inhibition itself is registered in the personal register not later than 21 days from the date of registration of the notice, the inhibition takes retrospective effect as from that date.[43]

6.22 The notice procedure also applies to letters of inhibition but since such letters cannot be obtained on the dependence of a sheriff court action till the action has been commenced by service of the initial writ or summons, the notice procedure does not apply to depending sheriff court actions.[44] If as recommended above, the sheriff will in future have jurisdiction to grant warrant for inhibition, the notice procedure should apply accordingly.

6.23 The Titles to Land Consolidation (Scotland) Act 1868, section 155 (which governs the notice of inhibition procedure) presupposes the automatic grant of warrant to inhibit in the summons. In future, where a warrant to inhibit is granted by a judge under the new powers and procedure recommended above, the warrant would authorise the pursuer to register a notice of inhibition in the personal register and the date of registration of the notice would operate as the commencement date of the inhibition if the inhibition and execution thereof is registered within 21 days thereafter. If the warrant is granted exparte, the pursuer could competently register the notice of inhibition prior to service on the defender of the summons or initial writ.

6.24 We recommend:

(1) Where a warrant of inhibition on the dependence is granted by a judge under the new provisions recommended above, the pursuer should be entitled to register in the personal register a notice of inhibition prior to the date of service of the summons or initial writ. The inhibition would take effect from the date of registration of the notice of inhibition if the inhibition and the execution thereof are registered within 21 days after that date. The Titles to Land Consolidation (Scotland) Act 1868, section 155 (which regulates notices of inhibition) should be amended accordingly.

(2) The notice of inhibition procedure should apply to a warrant of inhibition on the dependence granted by the sheriff as well as to such a warrant granted by a Lord Ordinary.

(Recommendation 43; Draft Bill, clause 58)

(4) Procedure for preventing diligence on the dependence

6.25 Caveats. It has been held in the sheriff court[45] that it is incompetent for a person to lodge in that

42 Titles to Land Consolidation (Scotland) Act 1868, s 155.
43 Idem.
44 Gretton, Inhibition and Adjudication (2d edn) p 37.
45 Ward v Kelvin Tank Services Ltd 1984 SLT (Sh Ct) 39.

court a caveat against the grant of a warrant for arrestment on the dependence.[46] The decision proceeded partly on the absence of any authority sanctioning a caveat procedure and partly on the ground that a caveat would deny the pursuer "a right conferred by law to arrest without notice being given".[47] It appears that there is also no caveat procedure applying to diligence on the dependence in the Court of Session.[48]

6.26 Interdict. A defender may obtain interdict against the threatened use of arrestment and inhibition on the dependence where (a) it can be instantly verified that the use of the diligence would be wrongful,[49] or (b) he has consigned the principal sum sued for in the action.[50] In general, the application for interdict must be made to the Court of Session, not the sheriff.[51] But it has been observed that while the safest course is to apply to the Court of Session, it may be that a sheriff could competently interdict the use of arrestment on the dependence in his own court.[52] It is incompetent to interdict the registration of an inhibition[53] the proper procedure being application for recall.[54]

6.27 Consultation. On consultation, there was unanimous agreement that no change should be made in the existing law on interdict against diligence on the dependence. As respects caveats, two commentators thought that the parallels between interim interdict and discretionary warrants for diligence on the dependence were so close that the same, or broadly the same, rule on caveats should apply to both. One of the Court of Session judges favoured a modified form of caveat against a warrant on the ground that it would discourage ex pane applications. The modification was that the pursuer would be allowed to appear before the judge and to make out grounds for disregarding the caveat.[55] We doubt whether a caveat which can be disregarded is worth much and that the complications and other disadvantages would outweigh the benefits. The proposed reforms seem to us to protect defenders adequately. On consultation most respondents agreed with our proposal[56] that the above-mentioned rules on caveats or interdict should not be changed.

6.28 We recommend:

(1) It should remain incompetent to register a caveat against diligence on the dependence.

(2) No change should be made in the existing law on interdict against diligence on the dependence.

(Recommendation 44)

(5) Ranking of diligence on the dependence in other processes

6.29 Arrestment on the dependence. Occasionally difficulties arise where a fund must be distributed upon which there is an arrestment on the dependence. Though the decree in the depending action has the effect of converting the arrestment on the dependence into an arrestment in execution, a competition between creditors involving an arrestment on the dependence can arise before decree. The competition may be an action of multiplepoinding or an insolvency process such as a sequestration, liquidation or

46 A caveat is a request to the court that notice be given, to the person lodging the caveat (the caveater), of the commencement of proceedings for interdict or some other remedy and that before the court decides to make any interim order, the caveater has an opportunity to object to the making of the order.

47 Ward v Kelvin Tank Services Ltd 1984 SLT (Sh Ct) 39 at p 41.

48 Mackinlay, 20 December 1988 (OH), unreported, per Lord Cullen (inhibition). Cf Gretton, Inhibition and Adjudication (2dedn)pp 52,53.

49 Beattie and Son v Pratt (1880) 7 R 1171. By "wrongful" is meant executed without warrant, or irregularly, or with malice and want of probable cause. Burn-Murdoch Interdict p 187 states that inhibition can be interdicted if shown to be nimious or oppressive, but this is a ground of recall not of damages and interdict appears to be of doubtful competence in such a case.

50 Duffv Wood (1858) 20 D 1231.

51 Beattie and Son v Pratt, supra at pp 1173-4; Graham Stewart, pp 195; 573; 754; Burn-Murdoch, Interdict, pp 186-7.

52 Macphail, p 360.

53 Craig v Anderson (1776) 5 B S 482; Graham Stewart, p 571; Burn-Murdoch, Interdict, p 187.

54 Dove v Henderson (1865) 3 M 339.

55 Eg by showing that there were strong reasons for thinking that the caveat was essentially a device to enable the defender to defeat any possible diligence. It was said that the judge would be alerted by the caveat to the possible strength of the arguments against granting warrant.

56 Discussion Paper No 84, para 2.122, Proposition 9.

trust deed for creditors. The main difficulty is of course that until decree is granted in the action on the dependence of which the arrestment was used, a scheme of division cannot be finalised.

6.30 What course of action should be adopted in the ranking process? Where the ranking process is a multiplepoinding, it was held in Baynes v Graham[57] that the fund should remain in media until the arrester's action is ended. This was a just decision on the facts of that case because the Court of Session had found in favour of the arrester and the action continued in dependence only because the defender had appealed to the House of Lords.[58] But this solution would not necessarily be equitable in all cases. A frivolous action for a small sum might hold up distribution of the fund in medio for an indefinite or unduly long period. The arrester's competitors are not assisted by the law on prescription of arrestments, because prescription runs from the date of the decree not the date of the arrestment.[59]

6.31 In a sequestration under bankruptcy legislation, provision is made allowing the trustee before paying a dividend to set aside funds which may be required to satisfy contingent claims.[60] It may be that in practice the trustee will set aside funds to meet the preference created by an arrestment on the dependence.

6.32 Possible court orders. In our Discussion Paper,[61] taking the case of a multiplepoinding, we identified five options open to the court,[62] namely:

(1) to delay the distribution until the arrester's action for payment is finally disposed of, (the course adopted in Baynes v Graham[63]);

(2) to allow distribution if the court is satisfied that the arrester has unduly delayed in pursuing his action;[64]

(3) as in (1) above, with this difference that the court seized of the multiplepoinding should give the arrester a period within which to obtain decree, failing which the arrestment will cease to have effect;

(4) to set aside sufficient to meet the arrester's provisional claim (principal, interest and expenses) and to make an interim distribution to the other competing creditors;

(5) to distribute the fund to the other creditors in disregard of the arrestment, but reserving the arrester's right to recover from the other creditors in the event of his obtaining decree for payment, perhaps requiring the other creditors to find caution. This fifth option was the one favoured by the Lord Ordinary in Baynes v Graham.^

6.33 We invited comments on this issue and the options set out above.[66] Our provisional view was that the court entertaining the multiplepoinding should have a discretionary power to choose any of these options. We thought that the introduction of a judicial discretion seemed justifiable having regard to the provisional and interim nature of diligence on the dependence and the need to strike a balance between the interests of the arrester on the dependence and other creditors.

---

57 16 February 1796 FC; Mor 2904.

58 The case however has been relied on for the proposition that, in a competition between an arrestment on the dependence and an arrestment in excution followed by an action of furthcoming, the forthcoming may be sisted to await the outcome of the action on the dependence of which the competing arrestment has been used: see Graham Stewart, p 140; Walker v United Creameries Ltd (1928) 44 Sh Ct Rep 148.

59 Debtors (Scotland) Act 1838, s 22; Graham Stewart, p 223.

60 Bankruptcy (Scotland) Act 1985, s 52(3) which requires the trustee to make "allowance for future contingencies" before paying a dividend in respect of an accounting period.

61 Discussion Paper No 84, para 2.167.

62 The list was not necessarily exhaustive.

63 16 February 1796 FC; Mor 2904.

64 Cf Bankruptcy (Scotland) Act 1985, Sen 7, para 24(2): Stair Memorial Encyclopaedia, vol 8, sv "Diligence" (G L Gretton) para 287, fn 4, suggests that probably if the arrester on the dependence "is unreasonably slow in pursuing his action the sist in the multiplepoinding will be recalled, and the arrester will have lost his position by mom".

65 Supra.

66 Discussion Paper No 84, para 2.168.

6.34 Consultation on court orders. Only four consultees[67] agreed totally with our proposal. A further five agreed with other options. The Sheriffs' Association were concerned that option (c) might be unfair if the creditor were prevented from obtaining decree within the specified periods for reasons outwith his control, eg postponement of proof due to illness. Both Mr Craig Connal and the Committee of Scottish Clearing Bankers favoured only (a) and (d). Mr Connal added that the arresting creditor's right should not be affected by the presence of other claimants. The Committee added that (a) and (d) are the only practical solutions as (b) and (c) leave scope for the defender to delay matters unduly and (e) would seem to present difficulty with administration. The Regional Sheriff Clerks favoured only (a). Professor Gretton disapproved of (e). He also suggested that the court should be able to switch from one order to another.

6.35 No consensus emerged against either the broad approach of our proposal or for the elimination of a particular option. We therefore adhere to our proposal. Since the circumstances can vary, we consider that the court should have a wide range of choice of orders and a broad discretion to select the most appropriate order.

6.36 Other processes of ranking. We also invited views on whether, if this solution were to be adopted for multiplepoindings, the same solution should be adopted with any necessary modifications in insolvency proceedings (sequestrations, liquidations and trust deeds for creditors) and any other processes of ranking of arrestments.[68]

6.37 Again opinion was divided. Five consultees considered that it would be desirable to make some such provision in insolvency proceedings. Three consultees would extend all of the proposed orders. Other commentators would extend only those of which they approved.

6.38 On the other hand, some consultees[69] saw no need for any such extension. The Committee of Scottish Clearing Bankers considered that strict rules of ranking should be codified rather than provision made for the delay of distribution. The Court of Session Judges commented that, as the law on insolvency had recently been reformed, it would be inappropriate to make any such recommendations. Two commented that significant difficulties do not appear to have arisen in the insolvency field; the Joint Committee considered that the trustee in bankruptcy already has sufficient powers.

6.39 These pragmatic arguments, especially the apparent absence of significant difficulties, have dissuaded us from extending our recommendation to insolvency proceedings, sequestrations and liquidations. However the powers might be useful in actions of furthcoming.

6.40 We recommend:

Where a creditor arresting on the dependence claims a ranking in an action of multiplepoinding or furthcoming, the court entertaining the multiplepoinding or furthcoming should have power to make any of the following orders, namely:

(a) an order delaying distribution of the fund in media until the creditor's action for payment is finally disposed of;

(b) an order allowing distribution in disregard of the arrestment on the dependence, if the court is satisfied that the creditor has unduly delayed in pursuing his action;

(c) an order as at (a) above coupled with an order recalling the arrestment on the dependence and taking effect on the expiry of a specified period unless the creditor obtains decree for payment within that period;

(d) an order requiring consignation of sufficient funds to meet the amount or likely amount of the creditor's claim and authorising an interim distribution to the other competing creditors; and

67 The Association of Scottish Chambers of Commerce, the Court of Session Judges, the Faculty of Advocates and the Joint Committee.

68 Discussion Paper No 84, Proposition 14(2) (para 2.169).

69 Mr Connal, the Committee of Scottish Clearing Bankers, the Court of Session Judges and the Joint Committee.

(e) an order authorising distribution of the fund in disregard of the creditor's arrestment on the dependence reserving the creditor's right of recovery from the other creditors and requiring the other creditors to find caution to secure that right.

(Recommendation 45; Draft Bill, clause 20)

6.41 Inhibition on the dependence. We also consulted on whether the same solution should apply to inhibitions on the dependence in cases where an inhibitor on the dependence claims a ranking in a multiplepoinding or on the proceeds of sale of subjects under heritable security.[70] Eight consultees considered that it should apply but subject to the same qualifications as related to arrestments. The Joint Committee said that it was difficult to see how the rights of parties would be worked out if sequestration did not occur. Only two consultees opposed the extension.[71]

6.42 We recommend:

Where an inhibitor on the dependence claims a ranking in a multiplepoinding or on the proceeds of sale of subjects under heritable security, the court seized of the multiplepoinding or ranking should have similar powers in relation to the inhibition on the dependence as are proposed in Recommendation 45 above in relation to arrestment on the dependence.

(Recommendation 46; Draft Bill, clause 20)

(6) The negative prescription of arrestment

6.43 The statutory provisions on the negative prescription of arrestments on the dependence are unsatisfactory and do not vouch sufficiently well the orthodox and generally accepted view that the three-year negative prescription of an arrestment on the dependence runs from the date of the decree.[72] The Prescription Act 1669,[73] as originally enacted, provided:

> "That all arrestments to be used hereafter upon decrees, registered bonds, dispositions or contracts not pursued and insisted on within five years after the laying on thereof shall after that time prescribe; ... And that all arrestments used or to be used upon dependence of actions shall likewise prescribe within five years after sentences obtained in the said actions, if the said arrestments be not pursued or insisted on within that time", (modernised spelling and punctuation).

Implementing a recommendation of the Bell Commission's Second Report of 1835,[74] the Debtors (Scotland) Act 1838, section 22, enacted that:

> "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".

This provision reduced the prescriptive period from five to three years and made specific provision on the commencement of the period of the negative prescription of arrestments enforcing "future or contingent" debts.

6.44 There is no doubt that the 1838 Act section 22 amended, but did not supersede, the 1669 Act,[75]

---

70 Discussion Paper No 84, Proposition 15 (para 2.171).

71 The Committee of Scottish Clearing Bankers explained that it is generally accepted that inhibitions do not in fact create any right to payment of the funds, but as argued by Professor Gretton, the inhibition must be followed up by an arrestment in order to create a nexus over the funds in question. Professor Gretton's view however is inconsistent with Halifax Building Society v Smith 1985 SLT (Sh Ct) 25.

72 For this view see Graham Stewart, p 223, Stair Memorial Encyclopaedia vol 8, para 308, n 2.

73 1669 c 14 record edn; c 9 12mo edn.

74 p 33, Propositions as to Arrestments, Proposition 2: "That the period of prescription of arrestments shall be limited to three years, instead of five, to be reckoned from the date of the execution of arrestment when used on a liquid ground of debt; from the date of the decree, when used on a depending action; and from the period of the debt becoming due, when used on a future or contingent debt". See also p 24.

75 See Jameson v Sharp (1887) 14 R 643 at p 647 per Lord President Inglis: "The Statute of 1669, though it is old, is still in viridi observatione, for not only has effect been given to it in quite modern times, but its policy has been recognised in comparatively recent legislation by the Act 1 and 2 Viet c 114" (ie the Debtors (Scotland) Act 1838).

and that the tempus inspiciendum for the commencement of the negative prescription of an arrestment on the dependence was governed by the 1669 Act, and not by the 1838 Act, section 22 except in a case where the arrestment on the dependence enforced a "future or contingent" debt. In this last category of case, there wa's a risk of conflict between the 1669 Act, and the 1838 Act, section 22. In the event of such a conflict, the 1838 Act section 22 as the later enactment would rule.

6.45 The next step was, however, that the provisions of the 1669 Act quoted at paragraph 6.43 above were repealed by the Statute Law Revision (Scotland) Act 1906.[76] This repeal seems incorrect since these provisions had been expressly held to be still in full force and effect in 1887[77] and, as we have seen, had been amended but not impliedly repealed by the 1838 Act. The orthodox view is still that in arrestments on the dependence enforcing debts already due, prescription begins to run from the date of decree in the action,[78] but its basis is not clear.

6.46 Furthermore, the reference in the 1838 Act, section 22 to "arrestments which shall be used upon a future or contingent debt" has caused some confusion. The late Professor W A Wilson remarked:

> "The Debtors (Scotland) Act 1838, s. 22, provides that arrestments upon a 'future or contingent debt' will prescribe in three years 'from the time when the debt shall become due and the contingency be purified'. In Jameson v Sharp[79] the arrestment of a vested interest in a trust was held to be prescribed and it does not seem to have been suggested that the 1838 Act had any application. Perhaps the 'or' is exegetical and 'future' is used to mean 'contingent'; that would explain the 'and' between 'due' and 'the contingency'."[80]

In other words "future and contingent" means simply "contingent".[81] Professor Gretton however points out that in the 1838 Act, section 22:

> "presumably the future or contingent debt referred to is that due by the common debtor to the arrester, not that due by the arrestee to the common debtor though W A Wilson... seems to take the latter view".

6.47 Professor Gretton's view seems preferable. If as he suggests, the 1838 Act, section 22 refers to the debt due by the common debtor to the arrester, this would explain Wilson's apparent conundrum that in Jameson v Sharp[82] it was not suggested that the 1838 Act had any application. For in that case it was the debt due by the arrestee to the common debtor which was "future".[83]

6.48 Provisional proposal. In our Discussion Paper[84] we suggested that the Debtors (Scotland) Act 1838, section 22, should be replaced by a new statutory provision setting out clearly the law on the negative prescription of arrestments on the dependence and other arrestments, on the following lines: (1) an arrestment on the dependence of an action should (if not insisted in) prescribe on the expiry of three years after the date when the decree for payment was extracted,[85] unless the debt is future or contingent and the time for payment does not arrive till after that date, in which event paragraph (3) below should apply; (2) an arrestment in execution of an extract decree for payment of a debt presently due, or other

---

76 The remaining provisions were repealed by the Prescription and Limitation (Scotland) Act 1973, s 16(2) and Sch 5, Part I.

77 Jameson v Sharp (1887) 14 R 643 at p 647 quoted above.

78 See, however, RCS, note 13.6.3.

79 (1887) 14 R 643.

80 Wilson, Debt (1st edn; 1982) p 13; see also (2d edn; 1991) para 17.7, n 9.

81 For the meaning of "future" and "contingent", see para 2.54, n 127 above.

82 (1887) 14 R 643.

83 In Jameson v Sharp (1887) 14 R 643, a creditor arrested in execution of a decree a fund which was vested in the common debtor but not payable till the death of an annuitant. The debt due by the common debtor to the arrester was presently due under the decree. It was the debt due by the arrestee to the common debtor which was "future" ie payable on the occurrence of an event which must occur.

84 Discussion Paper No 84, paras 2.176 and 2.178, Proposition 16.

85 It is only after extract that an action of forthcoming may be raised. Any arrestment used prior to extract (eg during an appeal or the appeal days) is treated as being an arrestment on the dependence and not as an arrestment in execution.

extract registered document relating to such a debt, should (if not insisted in) prescribe on the expiry of 3 years from the date of execution of the arrestment; (3) an arrestment in security of a future debt or a contingent debt should (if not insisted in) prescribe on the expiry of three years after the date when the debt becomes payable.

6.49 Consultation. There was general agreement that clarification is necessary. Out of nine respondents, six[86] approved these proposals.

6.50 The remaining consultees commented on the appropriate duration of the prescriptive period.[87] There was insufficient support for a change to any particular period and we do not propose any change from the present period of three years.

6.51 Two consultees[88] suggested a uniform rule that the negative prescription should run for a fixed period from the date of execution, regardless of whether the arrestment itself was in execution or not. It was said that having the prescription run either from the date when the decree was extracted (as in (1)) or from the date when the debt becomes payable (as in (3)) is highly unsatisfactory for the arrestee. The only date which is accessible to him is the date of execution of the arrestment. In the case of diligence on the dependence, it was said that 3 years is long enough for a pursuer to obtain decree. He could re-arrest if necessary.

6.52 Inhibitions on the dependence prescribe in five years from the date when they take effect,[89] like inhibitions in execution, but unlike arrestments on the dependence. There seems to be a good reason for this difference.[90] The period of prescription of inhibitions determines the length of searches in the personal register and from the standpoint of conveyancing practice, it is essential that that period should be standardised at a fixed and universally known duration. The faith of the records depends on it. That cannot be said of arrestments where uniformity would have advantages but is not imperative.

6.53 We agree with Professor Gretton's comment that an arrestee and other arresters have an interest to know when an arrestment prescribes. But it seems contrary to principle that a prescriptive period should run against a diligence on the dependence which the pursuer cannot interrupt by furthcoming because he cannot obtain decree. Few representations were made to us for change. On balance we adhere to our provisional proposal to clarify, but not radically to alter, the existing law.

6.54 We recommend:

(1) The Debtors (Scotland) Act 1838, section 22, should be replaced by a new statutory provision setting out clearly the law on the negative prescription of arrestments on the dependence and other arrestments, on the following lines.

(2) An arrestment on the dependence of an action should (if not insisted in) prescribe on the expiry of three years after the date when the decree for payment was extracted, unless the debt is future or contingent and the time for payment does not arrive till after that date, in which event paragraph (4) below should apply.

(3) An arrestment in execution of an extract decree for payment of a debt presently due, or other extract registered document relating to such a debt, should (if not insisted in) prescribe on the expiry of three years from the date of execution of the arrestment.

---

86 Including the Court of Session Judges and the Faculty of Advocates.

87 Professor Gretton suggested that there might be a case for restoring the prescriptive period to 5 years (uniformity with the general law of prescription) or for reducing it yet further (a poinding in effect prescribes after one year). The Joint Committee supported five years while Gretton ultimately suggested that the period should be reduced, perhaps to one year. The solicitor for Scottish Homes stated that in practice five years would be too long and three years would be preferable.

88 The Solicitor for Scottish Homes and Professor Gretton.

89 Conveyancing (Scotland) Act 1924, s 44(3)(a).

90 It was represented to us that similar policy grounds exist as for inhibitions.

(4) An arrestment in security of a future debt or a contingent debt should (if not insisted in) prescribe on the expiry of three years after the date when the debt becomes payable.

(Recommendation 47; Draft Bill, clause 48 and Schedule)

(7) No adjudication on the dependence or in security

6.55 Under the present law, it is not competent to adjudge heritable property on the dependence of a court action.[91] It seems to us that the availability of inhibitions on the dependence makes it unnecessary and undesirable to introduce adjudications on the dependence.

6.56 Adjudication is competent in security of future or contingent debts where the debtor is verging on insolvency and the debt is uncertain in amount.[92] The form and procedure in the action is much the same as in an action of adjudication in execution of debts presently due.[93] There is, however, no legal period of redemption. The adjudication is only a security and can never be converted into a full right of ownership. So far as we can ascertain this form of diligence has long been in disuse. It seems unnecessary to retain it so long as inhibitions can be used to "secure" future or contingent debts.

6.57 Consultation revealed almost unanimous agreement with these proposals which were set out in our Discussion Paper.[94] Only the Committee of Scottish Clearing Bankers suggested that adjudication on the dependence should be available subject to such regulations and restrictions as apply to arrestments and inhibitions on the dependence.

6.58 We recommend:

(1) Adjudications on the dependence should not be introduced in Scots law.

(2) The diligence of adjudication in security of future or contingent debts should be abolished.

(Recommendation 48; Draft Bill, clause 51 and Schedule)

(8) Diligence in security of future or contingent debts constituted by decree or liquid documents of debt

6.59 It is still competent to obtain letters of arrestment and letters of inhibition in security of future or contingent debts where there is no depending action and the debt has been constituted by decree or other liquid document of debt.[95] Such cases are rare in modern practice.[96]

6.60 An application for such letters of arrestment or inhibition in security is presented in the Signet Office of the General Department and considered by the Deputy Principal Clerk.[97] If he is satisfied that the applicant for letters is entitled to a warrant for arrestment or inhibition he will sign and date the warrant which then passes the signet.[98] If the Deputy Principal Clerk refuses to sign and date the warrant, the application must on request be placed before a Lord Ordinary whose decision is final and not subject to review.[99] As we have seen,[100] in an application for letters of arrestment or inhibition in security of future or contingent debts, warrant can be granted only on cause shown in special circumstances and accordingly such an application should on request be placed by the Deputy Principal Clerk before the Lord Ordinary.

---

91 Debtors (Scotland) Act 1987, s 101.
92 Graham Stewart, p 665.
93 Ibid, p 666.
94 Discussion Paper No 84, paras 2.264-2.266 (Proposition 24).
95 Graham Stewart, pp 22-23; 535-537.
96 They are likely to involve cases where a person has obtained a decree for aliment or periodical allowance on divorce, or nullity of marriage, or a bond for a future debt and the debtor under the decree or bond is verging on insolvency or putting away his funds.
97 RCS, r 59.1 (2).
98 RCS, r 59.1 (3).
99 RCS, r 59.1 (4).
100 Paras 2.54 - 2.57; 3.76 et seq.

6.61 In principle when dealing with such a case, the judge should have the same powers and follow broadly the same procedure as we have recommended for warrants securing debts already due[101] and warrants for diligence on the dependence securing future or contingent debts.[102] Already in family law actions such cases are dealt with by a Lord Ordinary rather than by signeted letters,[103] and the same reasoning applies to warrants for diligence on the dependence securing future or contingent debts. A provisional proposal to that effect in our Discussion Paper No 84[104] was agreed almost unanimously.

6.62 One commentator said that a case could be made for abolishing diligence in security of future or contingent debts other than on the dependence. We think it would be unsafe to do so having regard for example to decrees for aliment or financial provision which in effect create new periodical debts after decree. Moreover one never knows what the future may bring: as statutory judicial discretions increase, new statutes could create new types of future or contingent debts[105] in relation to which diligence in security could be useful.

6.63 A provisional proposal in our Discussion Paper No 84[106] that letters of inhibition and letters of arrestment should be abolished was premature because although the most common types of signeted letters will disappear under our recommendations[107] some will remain.[108] We considered whether interim attachment should be available in security of future or contingent debts but found that very considerable complications would be involved in adapting the diligence. The complications would not be justified by the benefit.

6.64 We recommend:

(1) The Court of Session on petition and the sheriff on summary application should have power to grant warrant for arrestment and inhibition in security of a future or contingent debt due under a decree or extract registered document of debt on the same grounds and subject to the same conditions as under our recommendations the courts would grant warrant for diligence on the dependence for debts already due and future or contingent debts.

(2) The foregoing procedure would replace procedure by application presented in the Signet Office of the General Department of the Court of Session.

(Recommendation 49; Draft Bill, clause 50)

(9) Appeals

6.65 Preliminary. Our recommended legislation would introduce many different types of court order which may be brought under review by a higher court on appeal or reclaiming motion.[109] In this Section, we propose retention of the present rules under which appeals (and reclaiming motions) against

101 See Part 3.
102 Recommendation 9 (para 3.89).
103 Under RCS, r 59.1(5), an application for letters of arrestment or inhibition on the dependence of an action to which a claim under section 19 of the Family Law (Scotland) Act 1985 applies is placed before the Lord Ordinary whose decision is final and not subject to review.
104 Proposition 25(2) (para 2.269).
105 Cf financial provision on divorce introduced by the Succession (Scotland) Act 1964.
106 Proposition 25(1) (para 2.269).
107 Viz letters of inhibition on the dependence of a sheriff court action: see Recommendation 3.10 (para 3.97).
108 Viz letters of inhibition are required for inhibition (a) in execution of a Court of Session or sheriff court decree; (b) in execution of writs and foreign judgments registered for execution in the Books of Council and Session; and (c) in execution on a document of debt. As regards (a), in a forthcoming discussion paper on inhibitions, we propose to examine whether warrants to inhibit in execution should be included automatically in extract decrees for payment.
109 In the Court of Session, appeals from interlocutors of the Lord Ordinary to the Inner House are called reclaiming motions and are regulated by rules of court, since technically they regulate the procedure for disposing of the internal business of a collegiate court: see RCS, Chapter 38. By contrast, all other appeals, including appeals from the sheriff to the sheriff principal, are treated as going beyond procedure and are regulated by statute: see Court of Session Act 1988, s 40(1) (appeals from the Court of Session to the House of Lords); Sheriff Courts (Scotland) Act 1907, ss 27 - 29 (appeals from interlocutors of sheriff or sheriff principal).

interlocutors granting or refusing recall or restriction of diligence are competent without leave.[110] The same rule should apply to interlocutors granting or refusing warrant for diligence on the dependence.[111] Appeals in other, ancillary, incidental or consequential interlocutors should require leave.[112] The effect of an appeal against a warrant on the right to execute it by diligence should be clarified.[113] To avoid undue complexity, we have invoked so far as practicable the general statutory provisions and rules of court on appeals.

(a) Appeals against grant or refusal of warrant

6.66 The transformation of the grant of warrant for diligence on the dependence from a routine administrative act to a discretionary judicial decision raises the question whether an appeal should lie against an interlocutor granting, or refusing to grant, a warrant. On consultation, there was general agreement that appeals and reclaiming motions against interlocutors granting or refusing warrant for diligence on the dependence or in security[114] should be competent.[115] The same rule should apply to a warrant for arrestment in rein of a ship to secure a non-pecuniary claim[116] which is a comparable discretionary interim remedy.[117] The rarity of appeals and reclaiming motions against interlocutors granting or refusing warrant for diligence on the dependence of divorce actions suggests that they will also be rare in other actions.

6.67 On the other hand, a warrant for arrestment in rem of a ship, cargo or other maritime res to secure a maritime lien is in a completely different position. Under our recommendations, such a warrant will continue to be obtained by the pursuer as a matter of course and be treated as an essential part of an admiralty action in rem."[8] It follows that recall of the warrant would effectively trigger the dismissal of the action and therefore (as under the present law) should not be appealable at all, with or without leave.

6.68 Avenues of appeal. In the sheriff court, on the analogy of appeals against interlocutors granting or refusing recall of diligence on the dependence,[119] an appeal should lie to the Inner House, or to the sheriff principal and from him to the Inner House.

6.69 Requirement of leave. On consultation, there was general agreement with our provisional proposal that leave for an appeal from the sheriff to the sheriff principal should not be required.[120] Such a solution is consonant with this Report's general policy of assimilating diligence on the dependence to other interim remedies.[121] We propose therefore that an interlocutor granting or refusing warrant for diligence on the dependence[122] should be included in the statutory list of categories of interlocutors which are appealable without leave of the sheriff.[123] The same rule should apply to a warrant for arrestment in rem of a ship

110 Paras 6.74, 6.75.
111 Paras 6.66 - 6.69.
112 Para 6.77.
113 Para 6.71.
114 See our Draft Bill (in Appendix A) - clause 1(1): grant or refusal of warrant for arrestment or inhibition on the dependence; clause 3(1): grant or refusal of warrant for inhibition on dependence of action for specific implement; clause 8(1): grant or refusal of warrant for interim attachment; clause 27(1): grant or refusal of warrant for arrestment of ship on the dependence; clause 30(1): grant or refusal of warrant for arrestment of ship's cargo on the dependence; clause 31(1): grant or refusal of warrant for re-arrestment of same ship, or arrestment of second ship, on the dependence; clause 50(1): grant or refusal of warrant for arrestment or inhibition in security of a future or contingent debt due under a decree.
115 Discussion Paper No 84, Proposition 7 (para 2.105).
116 Draft Bill, clause 29(1) replacing Administration of Justice Act 1956, s 47(3)(b).
117 See paras 7. 86 - 7.92 below.
118 See paras 7.61 - 7.78 below.
119 See para 6.75 below.
120 See Discussion Paper No 84, Proposition 7(4) (para 2.105) following the precedent of the Court of Session rule and the rule in appeals against decisions of the sheriff in petitions for recall of arrestments on the dependence (competent without leave - Tait v Main 1989 SCLR 106 (Sh Ct)) rather than decisions in incidental motions where leave is required under Sheriff Courts (Scotland) Act 1907, s 27(F).
121 The Sheriff Courts (Scotland) Act 1907, s 27 dispenses with leave in the case of appeals against interim interdict (para (A)) and interim decree for payment and order ad faction praestandum (para(B)).
122 See para 6.66, n 114.
123 See Sheriff Courts (Scotland) Act 1907, s 27.

to secure a non-pecuniary claim[124] since, under our recommendations, it will be treated as a comparable discretionary interim remedy.[125]

6.70 Appeals from sheriff or sheriff principal to Court of Session. Appeals from the sheriff or sheriff principal to the Inner House of the Court of Session are regulated by the Sheriff Courts (Scotland) Act 1907, section 28. In our Discussion Paper No 84, we suggested that leave should not be required in either avenue of appeal.[126] This provoked a mixed reaction, one suggestion being that leave should be required for an appeal from the sheriff principal to the Inner House.[127] The scheme of section 28 of the 1907 Act, however, is to require leave in both avenues of appeal. On reflection, for simplicity and to avoid unnecessary exceptions to the general rule, we think that the appeals to the Court of Session should be governed by the 1907 Act, section 28.

6.71 Effect of appeal against warrant on diligence under warrant. The question whether diligence on the dependence is competent under a warrant in an interlocutor brought under review on appeal or reclaiming motion is not entirely free from doubt. There is a line of authority holding that diligence on the dependence is competent until the time when diligence in execution becomes competent, and may be used even after a final decision of the Court of Session during an appeal to the House of Lords.[128] One might think that in principle it should not matter whether the warrant is granted as a matter of course or on a motion. On the other hand, there is a line of authority holding that the effect of an appeal (or reclaiming motion) against an interlocutor is that, from the time of making the appeal or motion, all execution under the interlocutor is sisted.[129] Moreover certain enactments[130] allow execution in specific cases, thereby accepting the general rule. In this second line of authority, however, the interlocutors in question did not grant warrant for diligence on the dependence. It is an open question which line of authority would apply to such an interlocutor. The law requires clarification.

6.72 The policy however is clear. To guard against the use of appeals (or reclaiming motions) to defeat diligence on the dependence, an appeal against the warrant, or against any order which is incidental, consequential or ancillary to the warrant (eg a condition of the warrant), should not prevent the warrant from coming into effect. This proposition was approved on consultation.[131] In our discussion paper,[132] we suggested that an appeal against a decision to grant warrant should be competent only if the application had been intimated and contested.[133] On reflection we think that such a provision would be a needless complication.[134]

6.73 Reclaiming motions in Court of Session,* appeals to House of Lords. We make no recommendations for primary legislation concerning reclaiming motions in the Court of Session, which should be regulated by rules of court in the normal way,[135] or adapting the rules on appeals to the House of Lords.[136]

---

124 Draft Bill, clause 29(1), replacing Administration of Justice Act 1956, s 47(3)(b).

125 See paras 7.86 - 7.92 below.

126 Proposition 7(4) (para 2.105).

127 The suggestion was made by the Court of Session Judges presumably on the assumption that an appeal would always lie to the sheriff principal in the first instance. This however is not possible because we were informed by the Regional Sheriff Clerks that an alternative avenue of appeal is necessary where a sheriff principal is not available.

128 Graham Stewart, pp 20, 21; Bell, Commentaries vol 2, para 65: "after judgment has been carried to appeal".

129 Macleay v Macdonald 1928 SC 776 at p 782 per Lord Anderson; Fowler v Fowler (No 2) 1981 SLT (Notes) 78.

130 RCS, r 38.8(5); Sheriff Courts (Scotland) Act 1907, s 29.

131 Discussion Paper No 84, Proposition 7(3)(para 2.105).

132 Discussion Paper No 84, para 2.103.

133 Where a discretionary warrant had been granted at an uncontested hearing, the defender's remedies would be an application for recall, and appeal against refusal to recall, rather than an appeal against the warrant.

134 It is not for example required in the comparable case of interlocutors granting interim interdict: see 1907 Act, s 27(A).

135 If RCS, r 38.3(5) were to apply, a reclaiming motion would be competent from the decision of the Lord Ordinary or Vacation Judge to the Inner House, with leave, within 14 days.

136 Appeals from the Inner House of the Court of Session to the House of Lords lie with leave or, if the judges differ, without leave: Court of Session Act 1988, s 40(1).

(b) Appeals against recall or restriction of diligence

6.74 In the Court of Session, an interlocutor recalling or restricting diligence on the dependence, or refusing such a'recall or restriction, is subject to review by the Inner House by a reclaiming motion, without leave, within 14 days thereafter.[137] The same rule applies to an interlocutor granting authority to move an arrested vessel or cargo.[138] Again we make no recommendations for primary legislation since such reclaiming motions should continue to be regulated by rules of court.

6.75 In the sheriff court, the Debtors (Scotland) Act 1838, s 21 provides that the judgment of the sheriff in a petition for recall or restriction is subject to review in the Court of Session. Leave to appeal is not required. Though a recall of arrestment is not included in the interlocutors listed in the Sheriff Courts (Scotland) Act 1907, s 27, as appealable without leave, it has been held in a series of sheriff court cases that an appeal to the sheriff principal is also competent at common law.[139] Leave to appeal against such a decision is required where the decision was made on an incidental motion.[140] On consultation there was general approval of our suggestion that, on the analogy of reclaiming in the Court of Session,[141] leave to appeal should not be required. We adhere to that suggestion which should apply to diligence on the dependence or in security; arrestment in rem of a ship securing a non-pecuniary claim; an arrestment or inhibition in execution;[142] and a warrant for such diligence.

6.76 Recall, restriction etc not to take effect pending appeal. If the appeal procedure is not to be defeated, the present rule must be retained under which a recall or restriction or loosing does not take effect until after the appeal or reclaiming motion has been disposed of.[143] On consultation there was general agreement that the provisions on appeals or reclaiming motions against interlocutors recalling, restricting or loosing arrestments on the dependence operate satisfactorily in practice. The rule should apply to an appeal against an interlocutor recalling or restricting a diligence, or warrant for diligence, on the dependence of an action or in security[144] or an arrestment in rem,[1*5] an appeal against an interlocutor varying or recalling a restriction, condition or requirement,[146] and an appeal against a release from interim attachment.[147]

(c) Appeals against incidental and ancillary interlocutors

6.77 As a general rule, appeals against incidental and ancillary interlocutors authorised by the Bill[148]

137 RCS, r 38.3(4)(h).
138 RCS, r 38.3(4)(i).
139 Macphail, paras 11-33, fn 76;18-11; 18-43; Mowat v Kerr 1977 SLT (Sh Ct) 62.
140 Tail v Main 1989 SCLR 106 (Sh Ct); Sheriff Courts (Scotland) Act 1907, s 27(F).
141 RCS, i 38.3(4)(h), replacing RC 74(h).
142 An appeal against a recall of a poinding in execution is governed by the Debtors (Scotland) Act 1987, ss 24(3) and 103.
143 West Cumberland Farmers Ltd v Ellon Hinengo Ltd 1988 SLT 294 at p 295; Taylor Woodrow Construction v Sears Investment Trust Ltd 1991 SC 140 (Second Division recalled the Lord Ordinary's recall of arrestment on the dependence before it took effect); Costain Building and Civil Engineering Ltd v Scottish Rugby Union pic 1993 SC 650 at p 663F,G.
144 *Draft Bill, clause 53(2): recall or restriction of diligence (or warrant for diligence) on dependence of an action or in security of a future or contingent debt; ancillary order; clause 54(1): recall or restriction of arrestment or inhibition in execution; clause 54(2): recall or restriction of arrestment in rem.*
145 Draft Bill, clause 54(2).
146 Draft Bill, clauses 1(8) and 4(2).
147 Draft Bill, clause 11(2).
148 See eg Draft Bill, clause 1(3): refusal to dispense with intimation; clause 1(3): order requiring intimation to third party; clause l(5)(a): restrictions or conditions; clause 1(7): order requiring defender to make consignation or find caution or give security; clause 4(1): order requiring pursuer to make consignation or find caution or give security; clause 7(l)-(3): order as to expenses for arrestment or inhibition on dependence; clause 11(4): order vesting defender's share of ownership of the article released from interim attachment; clause 12(1): order for consignation by person in breach of interim attachment; clause 16(l)(a): order extending duration of interim attachment; clause 7(l)-(3) as extended by clause 18(1): order as to expenses for interim attachment; clause 23: ancillary orders as respects property subject to arrestment on dependence or interim attachment; clause 29(4): order for intimation of application for warrant for arrestment in rem of ship to secure non-pecuniary claim; clause 32(1): order requiring pursuer executing admiralty arrestment to make consignation or find caution or give security; clause 34(l)-(3): order as to expenses for admiralty arrestment; clause 36: grant or refusal of warrant for sale of ship arrested on the dependence of action against demise charterer; clause 40(2): grant or refusal of warrant to dismantle or move ship or cargo; clause 46(3): order for sale of aircraft arrested on dependence of action to recover towage or pilotage; clause 52: court's power to supersede extract to avoid double exaction; clause 53(2): order determining questions as to validity, effect or operation of warrant for diligence on dependence of an action or in security of a future or contingent debt and ancillary order.

would require leave. This is the existing general rule on reclaiming which would apply to incidental interlocutors.[149] Exceptionally, however, in the Court of Session an interlocutor granting authority to move an arrested vessel or cargo may be reclaimed against without leave.[150] There is no comparable provision in the sheriff court. The dividing line between interlocutors which require leave and those which do not is somewhat arbitrary but in principle should be the same in the Court of Session and sheriff court.[151] The Court of Session therefore should have power, by act of sederunt, to make further categories of interlocutors under the Bill appealable without leave, in addition to those specified in the Sheriff Courts (Scotland) Act 1907, section 27.

(d) Recommendation

6.78 We recommend:

(1) An appeal or reclaiming motion should be competent against an interlocutor granting or refusing:

(a) a warrant for diligence on the dependence or in security or for arrestment in rem of a ship securing a non-pecuniary claim; or

(b) the recall or restriction of:

(i) a diligence on the dependence or in security;

(ii) an arrestment in rem;

(iii) an arrestment or inhibition in execution; or

(iv) a warrant for such diligence.

(2) Such interlocutors should be included in the list in the Sheriff Courts (Scotland) Act 1907, section 27, of classes of interlocutor of the sheriff which are appealable without leave to the sheriff principal.

(3) No change should be made in the present law and practice under which the grant of warrant for an arrestment in rem to secure a maritime lien is not subject to review by way of appeal or reclaiming motion against the grant of warrant.

(4) Provision for reclaiming should be made by act of sederunt rather than primary legislation.

(5) Appeals to the Court of Session from the sheriff or sheriff principal should be governed by the general rule laid down by the Sheriff Courts (Scotland) Act 1907, section 28(d) (which allows such appeals with leave).

(6) The execution of a warrant for:

(a) diligence on the dependence; or

(b) an arrestment in rem of a ship securing a non-pecuniary claim,

should not be prohibited or rendered ineffectual by the making of an appeal or reclaiming motion against the grant of the warrant, or against any condition attached to the warrant. The Sheriff Courts (Scotland) Act 1907, section 29 (effect of appeal) should be amended accordingly.

(7) In consonance with the present law on recall of diligence, an interlocutor:

(a) recalling or restricting:

(i) a diligence on the dependence or in execution;

---

149 RCS, r 38.3(5); Sheriff Courts (Scotland) Act 1907, s27(F) and 28(A).

150 RCS, r 38.3(4)(i).

151 Inconvenience is minimised by the rule that an appeal without leave automatically empowers the court to review all existing interlocutors: RCS, r 38.8(1); Sheriff Courts (Scotland) Act 1907, s 29.

(ii) an arrestment in rent; or

(iii) a warrant for such diligence or any order which is incidental, consequential or ancillary to the warrant; or

(b) loosing an arrestment of a ship,

should not take effect until either the period for an appeal against the interlocutor has expired without an appeal being made or, if such an appeal has been made, until the matter has been finally determined in favour of recall, restriction or loosing or until the appeal has been abandoned.

The foregoing references to an appeal include a reference to a reclaiming motion.

(8) (a) As a general rule interlocutors under the legislation following hereon, other than those mentioned in paras (1) and (2) above, should be subject to appeal or reclaiming only with leave.

(b) We do not however recommend any change to the rule under which a Court of Session interlocutor granting authority to move an arrested vessel or cargo may be reclaimed against without leave.

(c) The Court of Session should be empowered, by act of sederunt, to make further categories of interlocutors of the sheriff under the legislation following hereon appealable without leave, in addition to the interlocutors specified in the Sheriff Courts (Scotland) Act 1907, section 27.

(Recommendation 50; Draft Bill, clause 57)

Part 7 Admiralty Arrestments and Actions

(1) Introduction

(a) Preliminary

7.1 In this Part we are mainly concerned with the arrestment of ships, and cargo on board ship, which are called a "maritime res" or "maritime property".[1] An arrestment is the proper diligence for arrestment of a ship or cargo, including a ship under construction which has acquired the identity of a ship.[2] Poinding is not competent.[3] We also recommend the enactment of a statutory definition of "admiralty actions", and the re-enactment of provisions of the Administration of Justice Act 1956, sections 47 and 48, in order to present the old and new statute law on arrestment of ships in a coherent, unitary re-statement. Recall of arrestments of ships was dealt with in Part 5.[4]

(b) Types of arrestment of ships or cargo

7.2 Three types of arrestment of ships or cargo before decree have to be considered.

(a) Arrestment in rent of a ship or her cargo in an admiralty action in rent enforcing a maritime lien (or hypothec) against the ship (or other maritime res), whether the maritime lien is created by common law or statute.

(b) Arrestment in rem of a ship under section 47(3)(b) of the Administration of Justice Act 1956 in an admiralty action in personam to enforce a non-pecuniary claim to that ship, being a claim specified in paragraphs (p) to (s) of section 47(2) of the 1956 Act, though the claimant is not entitled to a maritime lien over the ship.

(c) An arrestment on the dependence of a ship in an admiralty action in personam, or of cargo in an action in personam.

(c) Terminology: maritime hypothecs or liens

7.3 In Scots law, two types of real right in security over moveable property commonly arise by operation of law, rather than by contract, - a hypothec and a lien. A classic work on securities gives an authoritative explanation of the distinction:

> "A hypothec is a real right in security, in favour of a creditor, over subjects which are allowed to remain in the possession of the debtor. It is an exception to the general rule, that a real security requires to be completed by actual or symbolic delivery of the subject. In the earlier authorities, some confusion may be observed between a hypothec and a lien or right of retention. Thus ... certain maritime hypothecs are usually known as maritime liens. But the distinction between the two rights, one of which dispenses with possession, while the other depends upon it, is now regarded as clear".[5]

1 Certain other items of property (eg wreck) may be subject to a maritime lien and therefore qualify as a maritime res: see para 7.6 below.

2 McMillan, p 64; Balfour v Stein 1 June 1808 FC, Mor "Arrestment" App'x No 5; Mill v Hoar 18 December 1812 FC. What is a ship or vessel for this purpose at common law is discussed at para 7.183 below.

3 Bankton, Institute IV, 41, 9. Poinding of ships used to be competent under certain statutes but these have been amended: see Debtors (Scotland) Act 1987, Sch 6, paras 4, 9, 10, 13, 24 and 25.

4 See paras 5.39 - 5.43; 5.63 - 5.70.

5 Gloag and Irvine, Law of Rights in Security (1897) p 406; see also pp 437 - 439 on "maritime hypothecs". See also Bell, Dictionary (7th edn) sv "hypothec" p 515. In textbooks, the terminology varies. Graham Stewart, p 167 refers to "maritime hypothecs".

Most maritime liens or hypothecs in Scots law are "tacit", that is to say they arise by operation of law rather than contract. The only examples of conventional (contractual) maritime liens are bonds of bottomry and respondeqtia.[6]

7.4 It was represented to us on consultation that the term "maritime hypothec" should be used rather than "maritime lien" to denote non-possessory maritime securities in line with correct Scottish legal usage. We have found this to be a difficult question. There are strong arguments both ways. On the one hand, statutory provisions should respect basic Scottish legal concepts, categories and terminology. In modern Scots law, the distinction between a right of lien (which requires possession by the secured creditor) and a right of hypothec (which does not depend on such possession) is "clear and definite".[7] It has been repeatedly observed that the right in security usually referred to as a "maritime lien" is in its true nature a hypothec within the Scottish meaning of that term.[8] The late Lord Carmont remarked that the right "ought properly to be styled hypothec".[9] It seems that'maintaining the distinction between non-possessory rights called hypothecs and possessory rights called liens would promote the coherence of Scots law[10] and - were it not for international usage[11] -its intelligibility. Since maritime hypothecs are the only form of tacit hypothec in Scots law which are commonly referred to as "liens", the usage is anomalous. An important part of our statutory functions is to promote the systematic development of Scots law and to eliminate anomalies.[12]

7.5 On the other hand, there are strong contrary arguments. The expression "maritime lien" is used invariably in modern Scottish case reports too numerous to cite. It is also used in United Kingdom legislation;[13] and even in the Rules of the Court of Session[14] and their enabling statute.[15] Nevertheless, that the use of "lien" in maritime legislation without more is inapt in Scots law appears implicit in the Scottish provisions in the Administration of Justice Act 1956, Part V, which, though they use the term "lien",[16] expressly provided that "any reference to a lien includes a reference to a hypothec or charge".[17]

7.6 Maritime legal practice is international in character and international usage affects terminology.[18] It is important to note that the language of international maritime conventions reflects English and French legal usages, both of which differ from Scottish usage in this domain. French law[19] and some other European systems use the Romanistic term "hypothec" to denote types of security without possession, whether judicial, conventional or legal (tacit), often with a requirement of registration.[20] Reflecting French

---

6 We understand that bonds of respondentia are unknown in modem practice.

7 Stair Memorial Encyclopaedia vol 20 (1992) sv "Rights in Security", para 101, n 1.

8 W M Gloag in: Encyclopaedia vol 8 (1929) sv "Hypothec", para 31: "The hypothecs which are recognised as extending over a ship are usually known as maritime liens. They are, however, not liens in the ordinary sense of the word but hypothecs, inasmuch as the right they confer is a right in security over a ship without possession."; and in: Encyclopaedia vol 9 (1929) sv "Lien", para 463: "The rights known as maritime liens indeed include securities without possession, but such liens are in reality hypothecs,..."; J Carmont in: Encyclopaedia vol 8 (1932) sv "Salvage" para 567; A J Sim in: Stair Memorial Encyclopaedia vol 20 (1992) sv "Rights in Security", para 101, n 1.

9 J Carmont in: Encyclopaedia vol 8 (1932) sv "Salvage" para 567.

10 By "coherence" we mean that all the elements of a legal system should make sense when put together.

11 See para 7.7 below.

12 In this report however we are not codifying the Scots law of hypothecs.

13 Eg Merchant Shipping Act 1995, ss 39(1); 41; 158(8); 190; Sch 7, Part II, para 9; Sch 11, Part I, article 20; Hovercraft Act 1968, ss l(l)(h)(ii) and 2(2).

14 RCS (1994), r 46.2(l)(a) (admiralty action may be brought in rem where the conclusion of the summons is directed to recovery in respect of a maritime lien).

15 Court of Session Act 1988, s 6(iii) derived from Administration of Justice (Scotland) Act 1933, s 17(iii).

16 See s 45 (jurisdiction in relation to collisions), subs (5) (any reference in s 45 to an action for reparation does not include an action to make good a lien); section 47 (arrest of ships on dependence or in rem), subs (4) (subject to subsection (3), s 47 does not authorise use of an arrestment in rem otherwise than in respect of a conclusion for the making good of a lien).

17 Administration of Justice Act 1956, s 48 (d).

18 Cf the hypothecs of the solicitor, landlord or feudal superior which, as a maritime lawyer observed to us, have no significant, international dimension.

19 See eg Code Civil, articles 2114 - 2134.

20 Idem; see also eg Belgium C C, Book III, Title 18; Netherlands C C, articles 227 - 235 (hypotheeklhypotheque is a real right in security over registered property). In German law, BOB ss 1113-1190, a Hypothek is a registered real right in security over land.

usage, recent maritime lien and mortgage (MLM) conventions, in the official English version, use the French word "hypotheque" without translation as a synonym for "mortgage"[21] and use "lien" in its English law sense.[22] The French versions of international conventions normally refer to a maritime lien as "un privilege'™ and not"as "une hypotheque".[24] The word "hypothecation" is used as a synonym for "mortgage" in the Brussels Arrest Convention[25] and the Scottish provisions of the Administration of Justice Act 1956 implementing the Convention.[26] This is confusing because in English law "hypothecation" has reference only to a bond of bottomry or respondentia.[21] There are moves at an international level to change the word "hypothecation" to "hypotheque" to conform to the MLM conventions.[28]

7.7 In summary, it seems that international conventions, which are important in maritime law, support the continued use of "lien" and do not support the use of "hypothec" in the Scottish sense. Against this background, we accept the representations made to us by experienced Scottish practitioners in maritime law that use of the expression "maritime hypothec" in its Scottish sense in maritime practice could well cause confusion and is best avoided. On the other hand, there is a need to reconcile common maritime usage with the fundamental generic classifications and terminology of our law. To achieve this, we favour the two-pronged legislative solution set out in the next paragraph.

7.8 We recommend:

> ***In the legislation following on this report, the word "lien", when used as a synonym for a maritime hypothec in the sense of Scots law, should be qualified by the adjective "maritime", and the resulting term "maritime lien" should be expressly defined as a hypothec over a ship, cargo or other maritime res.***
>
> (Recommendation 51; Draft Bill, clauses 28(2); 33(2); and 59)

(d) Distinctive features of arrestment of ships

7.9 Arrestments in rent or on the dependence of ships have features which distinguish them from arrestments of other types of moveable property.

7.10 "Real diligences"; no arrestee. An arrestment on the dependence and an arrestment in rem of a ship differ from arrestments of non-maritime property in:

> "being a real diligence directed against the vessel itself, and unlike the personal diligence of arrestment directed against a custodier or debtor in a sum of money".[29]

There is no arrestee.[30] Thus a ship may be arrested though it is in the possession of the defender. The arrestment is executed by affixing the schedule of arrestment to the mast or mainmast (or some other prominent part of the ship if there is no mast) and, in the case of an arrestment of a ship on the dependence, chalking the Sovereign's initials "ER" above it,[31] rather than by serving it on a third party arrestee. The

21 Maritime Liens and Mortgages Convention, 1967, articles 1-3,5,6,10 and 11; Maritime Liens and Mortgages Convention, 1993. The United Kingdom has not signed or ratified these conventions.
22 MLM Convention 1967, articles 4 - 9, 11.
23 le a priority in ranking creditors: see French CC, articles 2095 -2102.
24 A debt secured by a maritime hypothec or lien is called "une cr£ance privile'giee". See eg the Maritime Lien and Mortgage Convention 1926, article 8:"Les creances privilegiees suivent le navire en quelque main qu'ilpasse" (Claims secured by a lien follow the vessel into whatever hand it may pass).
25 Article l(l)(q). The French version is:"si la creance est garantie par une hypotheque maritime ou un mortgage sur le navire saisi". It is for this reason that in the 1967 Convention the French word "hypotheque" is used instead of hypothecation.
26 Administration of Justice Act 1956, s 47(2)(r) ("the mortgage or hypothecation of any ship..."); re-enacted in Appendix A, Draft Bill, clause 26(l)(s).
27 Berlingieri, Arrest of Ships (2d edn) p 56.
28 Lisbon Draft of the revised Brussels Arrest Convention, article l(l)(u) "a mortgage or an 'hypotheque' or a charge of the same nature on the ship"; see Berlingieri, Arrest of Ships (2d edn) pp 56, n 88; 177; 186.
29 Carlberg v Borjesson (1877) 5 R 188 at p 195 per Lord Shand.
30 Barclay, Curie & Co Ltd v Sir James Laing & Sons Ltd 1908 SC 82 at p 89 per Lord McLaren.
31 Graham Stewart, p 41; RCS, r 16.13(2).

arrestment is thus a "real diligence" in a procedural sense. An arrestment in rem enforcing a maritime hypothec or lien is also a real diligence in a substantive law sense since, after the circumstances giving rise to the lien have occurred, the arrestment in rem may be executed though ownership of the ship has been transferred to a bona fide purchaser without notice of the lien.[32] By contrast, an arrestment of a ship on the dependence may be executed only if the defender is owner of the ship at the time of execution.

7.11 Immobilising the ship. The arrestment of a ship fixes or immobilises the ship in the place where she is located at the time of the execution of the arrestment and withdraws her from employment, subject to warrants and orders of the court, until a process of sale is completed or the arrestment is recalled.[33] It is a corollary of this rule that an arrestment of a ship cannot be executed while the ship is on passage.[34] An arrestment of other types of corporeal moveables merely prevents the arrestee from parting with them until the time arrives when they have to be made furthcoming to the pursuer or when the arrestment is recalled.[35]

7.12 Arrestment of common property for debt of co-owner. Whereas an arrestment of non-maritime property in common (pro indiviso) ownership can generally not be arrested for the debt of one of the co-owners,[36] it is well established that a ship is arrestable for the debt of an owner of part only of the ship,[37] ie the owner of one or some of the 64 shares in the ship.

7.13 Completion by process of sale. The arrestment of a ship in rem or on the dependence, or of cargo in rem, is completed by a process of sale[38] rather than an action of furthcoming.[39] The sale is under the direction of the Deputy Principal Clerk.[40] In the case of an arrestment on the dependence of an admiralty action in personam, a separate action of declarator and sale is competent.[41] Where the arrestment is of cargo on the dependence of an action in personam the appropriate process to complete the diligence is an action of furthcoming.[42] Similar rules apply to arrestments of ships in execution of decrees[43] (which are competent in Scotland, unlike England[44]).

7.14 Combination with action constituting debt. Whereas an action of furthcoming of arrested non-maritime property is always a separate process raised after a decree of constitution of the debt, a process of sale of an arrested ship may be combined with an action to constitute the debt.[45]

7.15 Claims specified by statute and admiralty actions. An arrestment of a ship on the dependence or in rem can be executed only to enforce or secure claims of a type specified in the list in section 47(2)

---

32 Clan Line Steamers Ltd v Earl of Douglas SS Co Ltd 1913 SC 967 at p 973 per Lord President Dunedin; The Bold Buccleugh (1851) 7 Moo PC 267.

33 See eg Carlberg v Borjesson (1877) 5 R 188 at p 195 per Lord Shand; Wolthekker v Northern Agricultural Society Ltd (1862) 1 M 211 at p 213 per Lord Benholme; Alexander Ward & Co Ltd v Samyang Navigation Co Ltd 1975 SC (HL) 26 at p 54 per Lord Kilbrandon; West Cumberland Farmers Ltd v Ellon Hinengo Ltd 1988 SLT 294 at p 294 per Lord Weir.

34 Carlberg v Borjesson (1877) 5 R 188; affd 5 R (HL) 215; Administration of Justice Act 1956, s 47(6).

35 As to an arrestment of cargo, see paras 7.137 - 7.160. Arrested non-maritime property should not be removed from the jurisdiction: para 7.156.

36 Graham Stewart, p 103.

37 Monteith v Murray (1677) Mor 3685; McAulay v Gault 6 March 1821 FC (arrestment on dependence); Malcolm v-Cook (1853) 16 D 262 (arrestment in execution); William Batey & Co (Exports) Ltd v Kent 1985 SLT 490 (OH), affd 1987 SLT 557; Graham Stewart, pp 44,45.

38 Combined with a declarator of the maritime lien where appropriate.

39 Graham Stewart, pp 242-245; RCS, r 46.5.

40 RCS, r 46.5.

41 In the interests of clarity, it is now specified in RCS, r 46.5(2) that such a sale in a separate action is subject to r46.5.

42 RCS, r 46.5(1).

43 Where the arrestment is of a ship in execution of a decree in an admiralty action in personam, or an ordinary action for payment, the appropriate process for completion of the arrestment is an action of sale: Graham Stewart, p 242. Where the arrestment is of cargo in execution of a decree in an admiralty action in personam., or in an ordinary action for payment, the appropriate process for completion of the arrestment is an action of furthcoming.

44 The Alletta [1974] 1 LI Rep 40; D C Jackson, Enforcement of Maritime Claims (2d edn;1996) p 324.

45 Taylor v Williamson (1831) 9 S 265; RCS, r 46.5.

of the Administration of Justice Act 1956.[46] Until recently this list differed substantially from the definition of admiralty actions in the Rules of the Court of Session.[47] Implementing (with one very minor modification) a proposal in our Discussion Paper,[48] the new Rules of Court now define "admiralty action" by reference to the list of claims in the 1956 Act, section 47(2), subject to one unimportant addition.[49] We revert to the definition of admiralty actions below.[50]

(e) Admiralty actions in rem distinguished from admiralty actions in personam

7.16 The main differences between an admiralty action in rem and an admiralty action in personam are summarised in the following paragraphs.

7.17 Subject matter. An admiralty action in rem is brought to enforce a maritime lien (or hypothec) and contains within itself the procedures by which such a lien is "worked out" or "made good".[51] An admiralty action inpersonam is an admiralty action listed in section 47(2) of the Administration of Justice Act 1956 other than one in rem.[52] It may be a petitory action brought to enforce the personal obligation of payment secured by a maritime lien, but an action in personam does not enforce or work out the lien itself.

7.18 Defenders. An admiralty action in rem is always directed against the ship or cargo (the maritime res) which must be arrested in rem.[53] The owners of, or other parties interested in, the ship or cargo must be called as defenders by name if known to the pursuer.[54] Otherwise they must be called as such without being named.[55] An admiralty action in personam is always directed against persons called as defenders who, by a special rule, may include the master of the ship as representing the owners.[56] But an action in personam is never directed against the ship herself or cargo itself.

7.19 Associated diligences. An arrestment in rem of the ship or cargo encumbered by the maritime lien is not only a competent, but also an essential, incident of an admiralty action in rem.[51] Warrant for arrestment in rem should be sought in the summons when signeted and should be executed before service of the summons.[58] An arrestment on the dependence, by contrast, is a competent, but not an essential, incident of an admiralty action in personam. Implementing a proposal in our Discussion Paper,[59] the new Rules of Court now make it possible to convert an admiralty action in personam into an action in rem after signeting.[60]

7.20 Expenses of arrestment. It follows from the previous point that whereas the expenses of an arrestment on the dependence of an admiralty action in personam are not recoverable at common law

---

46 That list is substantially re-enacted in Appendix A, Draft Bill, clause 26(1).
47 RC 135.
48 Discussion Paper No 84, Proposition 26(1) (para 3.15).
49 The modification and addition is that a claim "in respect of a contract of respondentia" is also defined by RCS, r 46.1 as an admiralty action though it falls outside the list in the 1956 Act, s 47(2). So such a claim (apparently obsolescent in modern practice), though it cannot be secured by arrestment of a ship on the dependence or in rem because the 1956 Act, s 47 does not apply, may nevertheless be brought by way of admiralty action.
50 See paras 7.31 et seq.
51 The conclusions are for: (a) declarator that the pursuer has a (maritime) lien over the ship or cargo for a specified sum and interest; (b) declarator that the pursuer's lien to the extent of the specified sum is preferable to the right of all others having, or pretending to have, rights in the ship or cargo; (c) warrant to sell the ship or cargo on the lien being declared and to apply the proceeds in satisfaction of the lien or in or towards payment of the sum claimed. See RCS, Form 13.2-B(9).
52 Cf RCS, r 46.2, r 46.4.
53 See note 46.3.1 on RCS, r 46.3. RCS, r 46.3(l)(a) refers to "the ship or cargo against which the action is directed". Its precursor RC 137 referred to "proceedings by action in rem directed against a ship or cargo". This reflects the "personification theory" of actions in rem, as to which, see para 7.65, note 185.
54 RCS,r46.3(l)(a).
55 RCS, r 46.3(l)(b)(i):the master of the ship should also be called as representing the owners: r 46.3(l)(b)(ii).
56 RCS, r 46.4(2).
57 RCS, r 46.3(2).
58 Mill v Fildes 1982 SLT 147 (OH) at p 150.
59 Discussion Paper No 84, Proposition 30(2) (para 3.48).
60 See RCS, r 13.8 (warrants after signeting) and note 46.3.1; cf Mill v Fildes 1982 SLT 147 under RCS 1965.

from the defender as part of the expenses of process, (because they are not essential to the obtaining of the decree in personam),[61] *the expenses of an arrestment in rem are recoverable as part of the expenses of process because they are essential to the obtaining of decree in rem.*[62]

7.21 Founding jurisdiction. The rules for the assumption of jurisdiction in admiralty actions are a complex mixture of common law, statute and international convention.[63] The generally accepted view is that an arrestment in rem of a ship or cargo, if executed within the territorial jurisdiction, of itself founds jurisdiction in an action in rem.[64] An arrestment to found jurisdiction is unnecessary and insufficient. The owners or other persons interested in the maritime res need not be personally subject to the jurisdiction of the court. By contrast, in an admiralty action in personam, jurisdiction has to be founded against the defenders whether by arrestment to found jurisdiction[65] or otherwise[56] and an arrestment on the dependence does not suffice.

7.22 Differences as regards arrestment of shares in a ship. -Since an admiralty action in rem directed against a ship, and an arrestment in rem in such an action, are designed to enforce a maritime lien arising out of services rendered to, or damage done by, the ship as such,[67] it seems to follow that in principle an arrestment in rem must attach the whole ship and cannot attach merely a share, or particular shares, in the ship. Consequently a sale following an arrestment in rem always relates to the whole ship. By contrast, an admiralty action in personam for payment of money enforces a debt due by a particular defender or defenders. A ship is arrestable for the debt of an owner of part only of the ship.[68] It is thought that in such a case, since an arrestment on the dependence of the action in personam, or an arrestment in execution, attaches only the particular share or shares in the ship owned by the defender or debtor, a judicial sale following such an arrestment relates only to that share or those shares.[69] Such a sale therefore differs from a sale making good an arrestment in rem enforcing a maritime lien. On the other hand, an arrestment on the dependence of a share in a ship has the effect of detaining the whole ship since the defender has an undivided (pro indiviso) share in every inch of the ship, and it so far resembles an arrestment in rem, or an arrestment on the dependence, of the whole ship.

(f) Comparison with English admiralty arrests

7.23 While it is often said that admiralty law is the same in Scotland and England,[70] this statement is not altogether correct.[71] It does not apply to many aspects of remedies, diligence and procedure[72] which form an important part of admiralty law.

---

61 See para 3.98 above; Black v Jehangeer Framjee & Co (1887) 14 R 678.

62 Ration v A/S Durban Hansen 1919 SC 154.

63 See Anton and Beaumont's Civil Jurisdiction in Scotland (2d edn) paras 5.09; 5.59-5.60; 9.12(7); and 10.07. The Brussels Judgment Convention of 1968, article 57, saves jurisdictional rules in international conventions on particular matters. The Brussels Arrest Convention of 1952, article 7, confers jurisdiction on the court of the country of the arrest if its domestic law gives jurisdiction to that court or in listed cases. See para 8.18 below.

64 Cf Anton, Private International Law (1st edn;1967) p 115. The fact that an arrestment in rem by itself carries with it jurisdiction has been recognised by the Civil Jurisdiction and Judgments Act 1982, Sch 5, para 7; and Sch 9, para 6.

65 The continued efficacy of arrestment to found jurisdiction in admiralty causes is recognised by the Civil Jurisdiction and Judgments Act 1982, Sch 5, para 7; and Sch 9, para 6.

66 Eg domicile of the defenders within the jurisdiction of the court.

67 See paras 7.61 - 7.63 below.

68 Monteith v Murray (1677) Mor 3685; McAulay v Gault 6 March 1821 FC (arrestment on dependence); Malcolm v Cook (1853) 16 D 262 (arrestment in execution); William Batey & Co (Exports) Ltd v Kent 1985 SLT 490 (OH) (affd 1987 SLT 557); Baron Hume's Lectures vol 6, p 95; Graham Stewart, pp 44,45; McMillan, Scottish Maritime Practice p'56.

69 Direct authority is sparse but RCS, r 46.5(2),(3), (7) - (11) provide expressly for an order for the sale of a share as did RC 143 (1965). See also Stair Memorial Encyclopaedia vol 8, para 322.

70 Meaning that the Scots law will always follow the English law. See eg Boettcher v Carron Co (1861) 23 D 322; Carrie v McKnight (1896) 24 R (HL) 1; SS Blaimore Co Ltd v Macredie (1898) 25 R (HL) 57 at p 59; Clydesdale Bank Ltd v Walker & Bain 1926 S C 72 at p 82; 1925 SLT 676 at p 681 per Lord Justice-Clerk Alness: "The law in maritime questions is British law. The law of Scotland is identical with that of England"; The Goring [1988] 1 AC 831 (HL) at p 853.

71 Compare the article by Edward T Salvesen (later Lord Salvesen) "Maritime Lien for Collision" 1897 J R 34, criticising the decision and reasoning of the House of Lords in Currie v McKnight, supra. As an example of an area where the two systems of substantive admiralty law differ, Mr Salvesen referred (at pp 38-39) to the rules regulating the employment of a vessel where the owners are not agreed. There are other differences. So far as we are aware, there is no comprehensive, systematic and authoritative comparison of the two systems of admiralty law on which alone a sound generalisation could be based.

72 See eg Sheaf Steamship Co v Campania Transmediterranea 1930 S C 660; Clipper Shipping Co Ltd v San Vmcente Fanners 1989 SLT 204 (OH) at p 208 per Lord Coulsfield.

7.24 In English law, there are two main types of arrests in rem under the admiralty jurisdiction, namely:

(1) an arrest in rem to enforce a maritime lien; and

(2) an arrest in rem[73] to enforce a statutory right of action in rem.[74]

These forms of arrest in rem can be fully understood only against the background of the history and development of English admiralty law.[75] This differs substantially from the history and development of its Scottish counterpart, and though legislation in 1956 got rid of the main differences,[76] Scottish arrestments form part of a wider chapter of a general law of arrestments which has no English counterpart. As regards the terminology of actions, an English statutory arrest in rem of a ship not enforcing a proper maritime lien is used in what is called an admiralty action in rem; in Scotland, an arrestment of a ship on the dependence is used in an admiralty action in personam.[11]

7.25 Maritime liens and arrestments or arrests in rem. The law on maritime liens and their enforcement by arrests in rem in England and arrestment in rem in Scotland are similar. The theory of maritime liens in English law was first clearly affirmed in England in 1851[78] and subsequently adopted in Scots law.[79] Most of the law on maritime liens has been built up in English cases and it is here that cross-border similarities are greatest.[80]

7.26 Arrest purely admiralty process in England; not Scotland. In English law, an "arrest" is purely an admiralty process in the sense that no arrest is competent outside admiralty causes,[81] the nearest English non-maritime equivalent to an arrest being a Mareva injunction.[82] In Scots law an arrestment on the dependence of a ship, though it has some distinctive features,[83] is essentially an example, in an admiralty action, of a form of diligence on the dependence which is available throughout the law in all types of action for the payment of money.[84]

7.27 Arrestment of ship in execution. An arrestment of a ship in execution of a decree or judgment is competent in Scotland[85] but apparently not in England.[86]

7.28 Arrestment on the dependence: statutory cross-border harmonisation of scope. In England, before 1956 the statutory right to arrest in rem not enforcing a maritime lien was narrowly circumscribed, being confined to (i) admiralty actions and (ii) the particular ship with which the action was concerned. By contrast before 1956, Scotland and some other civil law countries (a) based jurisdictional competence on the presence of property within the territorial jurisdiction and arrestment thereof ad fundandam jurisdictionem, and (b) allowed arrestment of such property on the dependence under general common law powers not confined to admiralty causes or the particular ships.[87] As we note below,[88] the

73 As regards terminology, in English law, an "arrest" is always called an arrest in rem even if it does not enforce a maritime lien.
74 Sometimes misleadingly called statutory liens.
75 See eg Law Reform Commission of Australia, Report No 33 on Civil Admiralty Jurisdiction (1986) ALRC 33, Chapter 2.
76 Administration of Justice Act 1956, Part I (England and Wales) (now repealed and re-enacted in Supreme Court Act 1981) and Part V (Scotland).
77 Inglis,p77. RCS,r46.4.
78 The Bold Buccleugh (1851) 7 Moo 267 (PC).
79 Carrie v McKnight (1896) 24 R (HL) 1.
80 We revert to maritime liens at para 7.61 below.
81 See para 7.76 above.
82 See para 2.49 above.
83 See paras 7.9 to 7.15 above.
84 See Parts 2 - 6 above.
85 Eg Malcolm v Cook (1853) 16 D 262; Duffus v Mackay (1857) 19 D 430.
86 The Alletta [1974] 1 Lloyd's Rep 40; Jackson, Enforcement of Maritime Claims (2d edn) p 324.
87 An attempt to limit arrestment of a ship on the dependence to the particular or offending ship on the basis of the English rule was expressly rejected in Sheaf Steamship Co v Campania Transmediterranea 1930 SC 660.
88 Paras 7.36, 7.37.

Administration of Justice Act 1956 harmonised Scots law and English law with each other and with the laws of other countries who are parties to the Brussels Arrest Convention. Arrestment on the dependence, or in England arrest in rem, of ships is competent only in a closed list of admiralty actions[89] and only against the particular ship in the claim concerned or one "sister ship".

7.29 It is important to emphasise however that the 1956 Act, section 47, did not change the essential nature of arrestment on the dependence under Scots law but merely limited its scope or field of competence to a list of claims.[90] To describe arrestments on the dependence of actions for the claims specified in the 1956 Act section 47 as "statutory liens", or as the basis of statutory liens,[91] is therefore a misnomer.[92] In Scots law, arrestments on the dependence of ships are not liens at all but inchoate common law diligences. Their effects, and the preferences which they create, are the same as those of arrestments and poindings of non-maritime subjects.

7.30 Time when arrestment takes effect. In English law, in the case of a statutory right to arrest in rem not enforcing a maritime lien, the arrest has effect only from a later moment in time, though there is uncertainty as to the precise moment, the possibilities being when a writ in rem initiating an action in rem is issued, or when a writ is served, or when a res is arrested.[93] The weight of authority seems now to favour the time when the writ is served.[94] By contrast a Scots arrestment on the dependence has effect from the time of execution of the arrestment. Both differ from a maritime lien which has effect as a security from the moment the circumstances arise giving effect to the lien.[95]

(2) The jurisdictional and procedural context

(a) Admiralty causes and arrestments on the dependence

7.31 The arrestment of a ship is in origin an admiralty process which before 1830 was authorised by a warrant granted by the Judge-Admiral of the High Court of Admiralty of Scotland. The arrestment was competent on the dependence of an action under a warrant granted by the ordinary courts of law provided that the concurrence of the Judge-Admiral was obtained; but in strict law it was his concurrence which formed the warrant.[96] In 1830, the High Court of Admiralty was abolished and its jurisdiction in civil maritime causes and proceedings was transferred to the Court of Session[97] and sheriff courts.[98] The result is that in an action for payment of money, it is competent to arrest a ship on the dependence on a warrant in a signeted Court of Session summons, or a sheriff court ordinary cause initial writ or summary cause summons.[99] It seems that before 1956 the action in question did not have to be an admiralty cause.[100]

7.32 Admiralty causes at common law. Originally admiralty causes consisted of maritime causes as defined by the common law[101] and also specific types of cause in which jurisdiction was assigned by

---

89 See Appendix C.
90 See eg Inglis p 88.
91 Cf Stair Memorial Encyclopaedia vol 20, sv "Rights in Security" paras 304 - 307 which discuss admiralty arrestments on the dependence under the inapt heading "statutory liens".
92 It appears to be derived from an English usage which has been criticised as inapt even for England. See eg Jackson, Enforcement of Maritime Claims (2d edn) pp 376, 377; see also p 427: "the label 'statutory liens' when used in an Admiralty context is used as equivalent to 'statutory rights in rem', and to some the latter is the more accurate description of the right".
93 Thomas, p 32.
94 The Banco [1971] P 137, at pp 153, 158-159; The Berny [1979] QB 80; Thomas, p 34.
95 *The Bold Buccleugh (1851) 7 Moo PC 267. An arrest in rem enforcing such a lien has effect against the maritime res though ownership has been transferred to a bonafide purchaser after that moment: idem.*
96 Mackenzie v Campbell (1829) 7 S 899.
97 Court of Session Act 1830, s 21.
98 Ibid s 22 (repealed); see now Sheriff Courts (Scotland) Act 1907, s 4.
99 Cf HM Advocate v Murray 1925 SLT (Sh Ct) 6 (arrestment of ship on dependence of small debt action).
100 This would appear to follow from Mackenzie v Campbell (1829) 7 S 899; and see Inglis, p 76.
101 The Admiralty Court Act 1681, record edn c 82, 12mo edn c 16 (repealed by SLR in 1964) declared that the court had a privative original jurisdiction "in all maritim and seafaring causes forreigne and domestick whether civil or criminal whatsoever within this Realme" but did not define "maritim causes".

particular enactments to admiralty courts.[102] The only common law definitions were those of the Institutional writers, which were in general terms.[103]

7.33 Rules of Court list of admiralty actions. The Clyde Report on the Court of Session[104] (1927) recommended that there should be a separate list or roll of Admiralty and Commercial Causes, which would have their own specialities of procedure (including in the case of admiralty actions, arrestments in rem and preliminary acts in maritime collision cases) and would give the parties facilities for simplifying and cheapening the procedure.[105] The report stated that "Admiralty cases may be said to define themselves".[106] Under powers first conferred in 1933,[107] the Rules of the Court of Session defined admiralty causes by reference to a list.[108]

7.34 As stated earlier,[109] rule 46.1 of the current Rules of the Court of Session followed a proposal in Discussion Paper No 84 by defining "Admiralty action" by reference to the list of claims in section 47(2) of the Administration of Justice Act 1956 being the claims in respect of which arrestments may be laid. Contracts of respondentia have been added to the definition.[110] Unlike the previous Rule of Court which was expressed to be inclusive,[111] the definition is exhaustive.

7.35 There is no comparable list in the sheriff court ordinary or summary cause rules. In practice admiralty causes are treated as being the same in the sheriff court as in the Court of Session,[112] so that the list is construed as applying also in the sheriff court. The sheriff court has exclusive jurisdiction in admiralty causes below £1,500 in value"[3] and otherwise concurrent jurisdiction with the Court of Session,[114] with minor exceptions.[115]

7.36 Statutory restriction on arrestment of ships. Under the Administration of Justice Act 1956, section 47(1), an arrestment on the dependence and an arrestment in rem have effect "as authority for the detention of a ship" but only if the action involves one of the claims in the statutory list in section 47(2) and, in the case of an arrestment on the dependence, either the arrested ship is the ship with which the action is concerned, or all the shares in the ship are owned by the defender. It is thought that the statutory prohibition of detention of a ship implies a prohibition of arrestment, ie it renders an arrestment incompetent or ineffectual,[116] and is not simply a prohibition of physical detention of a ship under a competent arrestment.[117] Section 47 of the 1956 Act[118] was enacted to enable the United Kingdom to

102 Eg Foreign Enlistments Act 1870, ss 19, 30 (still in force); Merchant Shipping Act 1894, s 167(3) (now repealed); Merchant Shipping (Stevedores and Trimmers) Act 1911 (now repealed), all discussed in Encyclopaedia, vol 1 (1926) pp 154-155.

103 See Erskine, Institute I, 3, 33; Bell Commentaries vol 1, p 546. Bell defined them as actions "relative to charter-parties, freights, salvages, wrecks, collision of ships, bottomry, and policies of sea insurance without any regard to the place of contract, as executed on sea or at land". There was doubt whether claims arising from maritime insurance were maritime, since they were no longer treated as maritime in England: see Encyclopaedia vol 1, p 154.

104 Report of the Royal Commission on the Court of Session and the Office of Sheriff Principal Cmd 2801 (Chairman: Lord President Clyde).

105 Ibid p 55 and pp 67 ff. Previously admiralty causes had no special procedure of their own: ibid p 67.

106 Ibid p 12.

107 Administration of Justice (Scotland) Act 1933, s 17(i); consolidated as Court of Session Act 1988, s 6(i).

108 The former RC 135.

109 Para 7.15 above.

110 Bonds of bottomry are mentioned in section 47(2)(h) of the 1956 Act.

111 The former RC 135. It had, however, been suggested that the definition "will now in practice be definitive": Stair Memorial Encyclopaedia vol 1, para 411.

112 Macphail, p61.

113 Sheriff Courts (Scotland) Act 1907, s 7 as amended by SI 1988/1993.

114 The provisions in the Merchant Shipping Act 1894, s 547(1) and (2) (governing the sheriff's jurisdiction to entertain actions relating to salvage) have been repealed, as proposed in our Discussion Paper No 84, Proposition 27 (para 3.20).

115 There is a minor and unimportant exception under the Foreign Enlistment Act 1870, s 19 (jurisdiction in respect of forfeiture of ships for offences against Act) as read with the definition of "Court of Admiralty" in s 30, confining jurisdiction to the Court of Session.

116 See eg William Batey (Exports) Ltd v Kent 1987 SLT 557 at p 561; Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co 1985 SC (HL) 1 atpp 11, 12.

117 Cf Stair Memorial Encyclopaedia vol 1, para 417.

118 Like Part I which dealt with admiralty jurisdiction and arrest of ships in England and Wales and Schedule 2 containing similar provisions for Northern Ireland.

ratify and to comply with the Brussels Arrest Convention relating to the Arrest of Seagoing Ships of 1952.[119] Before the passing of the 1956 Act, the maritime claims falling within the jurisdiction of the High Court in England were limited to those listed in the Supreme Court of Judicature (Consolidation) Act 1925, section 22. This jurisdiction was exercisable in proceedings in rem or inpersonam. This list was adopted by the Brussels Arrest Convention Articles 1 to 3 and was then made applicable (with minor modifications) to England by section 1 of the 1956 Act (now consolidated in the Supreme Court Act 1981, section 20) and to Scotland by section 47. Only one category has been added.[120]

7.37 The Brussels Arrest Convention and the 1956 Act represent a compromise. This inter alia narrows the wide powers of arrestment available to Scotland and civil law countries which based jurisdictional competence on the presence of property within the territorial jurisdiction and arrestment thereof ad fundandam jurisdictionem and allowed arrestment of such property on the dependence under general common law powers not confined to admiralty causes or particular ships. The compromise also widens (by allowing the arrestment of "sister ships" in certain circumstances) the relatively narrow powers of arrest available in England and other common law countries under which the power of arrest arose only in respect of admiralty claims based upon a maritime lien, or a statutory right to arrest in rem, and affected only the particular ship in respect of which the claim arose.

7.38 Purpose of defining admiralty actions. We noted earlier[121] that the Rules of the Court of Session,[122] implementing a proposal in our Discussion Paper,[123] now define "Admiralty action" primarily by reference to the list of claims in section 47(2) of the Administration of Justice Act 1956. Our proposal was based on the view that the main criterion of an admiralty action should be not, or not only, that the subject matter of the claim is associated with the sea or has a maritime character, but rather that the claim is enforceable by an admiralty arrestment of a ship or her cargo, whether in rem or on the dependence. As A R G McMillan[124] contended:

> "the true ratio of an action in Admiralty is that it is one in which the most appropriate and most effective remedy lies in proceeding directly against the ship, and it is in this that the chiefjustification for the retention of an Admiralty Court as a court of instance is found."[125]

7.39 Retention of separate class of admiralty actions. On consultation, Professor W M Gordon raised the question why we still have admiralty causes at all when we no longer have separate admiralty courts in the sense of courts which have purely admiralty jurisdiction. He suggested that the law creates unnecessary mysteries in this area.

7.40 This question goes beyond our terms of reference which relate primarily to admiralty arrestments. It may be that the case for abolition of admiralty actions is stronger in Scotland than in common law jurisdictions, which unlike Scots law do not permit arrest outside admiralty, and where therefore interim remedies in admiralty differ from the general law on interim remedies much more than under Scots law.[126]

7.41 A key factor here however is that arrestments of ships are subject to international regulation separate from the international regulation of aircraft and other moveables which have a transient presence within

---

119 TS 47 (1960) Cmnd 1128. The background to the 1956 Act is explained in many reported cases, eg Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co 1985 SC (HL) 1 per Lord Wilberforce and Lord Keith; and The Eschersheim [1976] 1 WLR 430 per Lord Diplock. See also Part 8 below.

120 1956 Act, s 47(2)(s)(forfeiture or condemnation of ship or goods or their restoration after seizure).

121 See para 7.15.

122 RCS, 1994, r 46.1, replacing the former RC 135.

123 Discussion Paper No 84, Proposition 26(1).

124 Criticising the definitions of admiralty causes in Bell, Commentaries vol 1, p 546; Erskine Institute I, 3, 33. McMillan remarks: "... while Bell bases his definition on the general ground of association with the sea, irrespective of the place of contract or performance, Erskine makes performance 'within the verge of the Admiral's jurisdiction' the foundation of his definition". See A R G McMillan, "The Scottish Court of Admiralty: A Retrospect" 1922 J R 38, 164 at p 167.

125 A R G McMillan, loc cit (previous note). See also A R G McMillan, Scottish Maritime Practice p 7: "Admiralty jurisdiction is essentially a jurisdiction over ships, and its primary importance is that it recognises and provides procedure for enforcing rights in ships of a special character".

126 Cf Law Reform Commission of Australia, Report No 33 on Civil Admiralty Jurisdiction (1986) ALRC 33, Chapter 6.

the territorial jurisdiction of the Scottish courts. Arrestments of ships, whether in rem or to found jurisdiction, form an internationally accepted ground for the assumption of jurisdiction in admiralty actions[127] notwithstanding that the arrestment to found jurisdiction of non-maritime subjects is generally regarded as unacceptably exorbitant.[128] Moreover the provisions of the Brussels Arrest Convention, articles 1 and 3 and the Administration of Justice Act 1956, section 47(2), make it convenient to define the claims specified in those provisions as admiralty actions. In any event, there are specialities in maritime actions[129] and maritime arrestments[130] requiring distinctive rules which make it convenient to group them together for separate regulation.

7.42 Difficulties of demarcating admiralty actions. There are difficulties in demarcating admiralty actions. Because of the Brussels Arrest Convention 1952, it is not legislatively possible to add significantly to the list of claims in section 47(2) of the Administration of Justice Act 1956. There are, however, other types of proceedings which are of a maritime character. For example, actions in respect of a contract of respondentia'[31] have been included in the definition of "Admiralty actions" in the rales of court.[132] In England, it is disputed whether respondentia is included in "bottomry"[133] which, unlike respondentia, is mentioned in the Brussels Arrest Convention and the implementing UK legislation.[134] Again, arrestments of ships in execution of decrees for payment are competent under Scots law for a debt other than a debt of the ship[135] and such an arrestment is not restricted by the terms of the Brussels Arrest Convention to the claims listed in article 1(1).[136] Therefore it may well be that some of the provisions of RCS Chapter 46 (Admiralty Actions) should apply to proceedings falling outside the defined list of admiralty actions. Indeed this is already to some extent recognised by rule 46.5(2) (sale of ship or cargo) which expressly applies not only to "an Admiralty action" but also to "an action of declarator and sale of a ship".[137] There is little authority on whether or how far ancillary proceedings connected with maritime claims should be treated as admiralty actions.

7.43 Definition in statute. Normally the Court of Session should retain control over the regulation of actions but, for several reasons, we have reluctantly concluded that the definition of "admiralty action" should be enacted by primary legislation rather than (as at present) by act of sederunt. The definition must consist of or include actions containing conclusions or craves appropriate for the enforcement of the claims specified in the Administration of Justice Act 1956, section 47(2) and the Brussels Arrest Convention of 1952. Moreover, the references to "admiralty causes" in the provisions on jurisdiction in primary legislation[138] should no doubt be construed by reference to the list of claims in the 1956 Act, section 47(2). The definition of "admiralty actions" is thus not a concept which the Court of Session has power to modify.[139]

---

127 See eg Brussels Arrest Convention 1952, Article 7 (forum arresti of a sea-going ship has jurisdiction to determine the case upon its merits); Brussels Judgments Convention 1968, Article 57 (saving for jurisdictional rules under international conventions); Civil Jurisdiction and Judgments Act 1982, Sch 5, para 7 and Sch 9, para 6 (saving for jurisdiction of Scottish courts in admiralty causes in so far as based on arrestment in rem or ad fundandam jurisdictionem of a ship, cargo or freight). See further paras 7.21; and 8.18.

128 Brussels Judgments Convention 1968, article 3.

129 Distinctive provisions include the closed list of claims on which arrestment in rem or on the dependence is competent (r 46.1); distinctive character of actions in rem enforcing maritime liens (rr 46.2 and 46.3); the regulation of sale by the court (r 46.5); ship collisions or salvage (rr 46.6 -46.8); oil pollution compensation fund (r 46.9).

130 See paras 7.09 - 7.15 above.

131 A contract of respondentia is a contractual hypothecation of the cargo of a ship in security of a loan for the purpose of enabling a voyage to be commenced or continued from a foreign port. A contract of bottomry is a contractual hypothecation of the ship herself for the same purpose: Bell, Dictionary (7th edn) sv "bottomry" and "respondentia". These methods of financing voyages are no longer found in practice, though occasional cases of bottomry are reported: The Comet [1965] 1 Lloyd's Rep 195.

132 RCS, r 46.1.

133 See eg Jackson, Enforcement of Maritime Claims (2d edn) p 23.

134 Brussels Arrest Convention 1952, article l(l)(h); Administration of Justice Act 1956, s 47(2)(h); Supreme Court Act 1981, s 20(2)(r).

135 See eg Malcolm v Cook (1853) 16 D 262;

136 See article 1(2).

137 An action of sale of a ship arrested in execution or at the instance of a mortgagee would not be an admiralty action.

138 Civil Jurisdiction and Judgments Act 1982, Sch 5, para 7; and Sch 9, para 6.

139 Discussion Paper No 84, paras 3.14-3.15, Proposition 26.

7.44 We recommend:

(1) Admiralty actions in Scots law should continue to be defined by reference to the list of claims specified in the Administration of Justice Act 1956, section 47(2) (which restricts the competence of admiralty arrestments to arrestments securing claims specified in that list), with the addition of "respondentia".

(2) The same definition should apply directly to the admiralty jurisdiction of the sheriff court.

(3) The definition should be enacted in primary legislation rather than rules of court.

(Recommendation 52; Draft Bill, clause 26)

7.45 Competence of arrestment on dependence of claim for "damage received by a ship". The Administration of Justice Act 1956, s 47(2)(a), refers to "damage done or received by any ship". Under English law, the corresponding provisions in the Supreme Court Act 1981, section 20(2), are para (d) referring to "any claim for damage received by a ship" and para (e) referring to "any claim for damage done by a ship".[140] Claims under para (d) for damage received by a ship constitute the one category of claim in section 20(2) which, in terms of section 21, is not enforceable by action in rem. The 1981 Act thereby gave legislative effect to the decision of the House of Lords in The Eschersheim.[w] In that case the ratio was that to bring an admiralty action in rem under English law, the claim must be "in connection with a ship". In a claim based on "damage received by a ship", the ship would belong to the claimant. It was held that a claimant could not invoke admiralty jurisdiction by an action in rem against his own ship.

7.46 We do not think that the Scottish provisions in section 47(1), as read with section 47(2)(a), of the 1956 Act would ever be construed as permitting the pursuer to arrest his own ship on the dependence. In the first place, with one statutory exception,[142] an arrester cannot competently arrest property in his own hands.[143] Second and more importantly, there is the fundamental point that the very purpose of an arrestment on the dependence is to attach the defender's property so that, if the pursuer obtains decree of payment, the debt can be satisfied from the proceeds of a judicial sale or from funds made furthcoming. The creditor can scarcely satisfy his debt from his own property or funds.

7.47 On the other hand, if the pursuer cannot arrest his own ship, it is at first difficult to see what is the legal effect of the words "or received" in para (a) of section 47(2). In our Consultation Paper we therefore suggested that to clarify the law, the words "or received" in section 47(2)(a) of the 1956 Act should be repealed.[144]

7.48 All consultees accepted our view that the 1956 Act, section 47(1) as read with s 47(2)(a), does not permit the pursuer to arrest his own ship on the dependence. The Law Society of Scotland however envisaged circumstances in which damage has been received by a ship from a fixed object such as a pier. The owner of the ship damaged might then wish to arrest, under the so-called "sister ship" provision,[145] a ship owned by the proprietor of the pier, eg a port authority or the owners of a private marina.[146] They contended that most people would consider that such damage should be an admiralty cause. In England, criticising The Eschersheim,[141] Professor D C Jackson postulated other cases where "damage received by a ship" might found an arrest in rem eg that of "an owner whose yacht is taken without permission

140 See Appendix C.

141 [1976] 1 WLR 430; [1976] 2 Lloyd's Rep 1; also reported sub nom The Jade [1976] 1 All ER 920 (HL).

142 It was represented to us on consultation that in the case of an arrestment securing a "quasi-lien" referred to in the 1956 Act, s 47(2)(p) or (q), a pursuer could arrest his own ship.

143 Graham Stewart, p 105.

144 Consultation Paper, Proposition 4 (para 46).

145 See 1956 Act, s 47(l)(b) allowing an arrestment on the dependence of a ship owned by the defender in a claim specified in s 47(2) other than a ship with which the action is concerned.

146 In other words, the Law Society of Scotland did not accept Lord Diplock's proposition in The Eschersheim [1976] 1 WLR 430; [1976] 2 Lloyd's Rep 1, that in a claim based on "damage received by a ship", the ship would necessarily belong to the claimant.

147 [1976] 1 WLR 430; [1976] 2 Lloyd's Rep 1; also reported sub nom The Jade [1976] 1 All ER 920 (HL).

and who wished to bring an action in rem against a ship owned by the wrongdoers".[148] In the light of these remarks, we conclude that the English statutory precedent[149] disallowing arrest in rem should not be followed in Scotland.

7.49 We recommend:

An arrestment on the dependence of an action should continue to be competent in respect of "damage received by a ship", as where the arrested ship is not that concerned in the action but a different ship wholly owned by the defender in the action.

(Recommendation 53; Draft Bill, clauses 26(l)(a) and 27)

(b) Sheriff court procedure in admiralty actions

7.50 It is an unusual feature of admiralty practice that whereas the procedure in admiralty actions in the Court of Session is closely regulated by rules of court specially adapted to such actions,[150] no corresponding provision is made in the sheriff court rules of procedure. We have not been able to discover any rational ground for this gap in the sheriff court procedural rules. It appears that any gaps in the sheriff court ordinary cause or summary cause rules of procedure may be filled by following the special Court of Session rules relating to admiralty actions.[151] This gap in the sheriff court rules is likely to cause difficulties in practice and it would be more convenient for sheriff court practitioners and others if special sheriff court rules of procedure for admiralty causes were to be introduced. This proposal[152] was strongly supported on consultation.[153]

7.51 We recommend:

Separate rules of court (modelled on the Court of Session Rules) governing procedure in admiralty actions in the sheriff court should be introduced.

(Recommendation 54; Draft Bill, clause 44)

(c) Sheriff court arrestments in rem and actions in rem

7.52 At present, certain of the rules allowing arrestments of ships and their cargo outside the jurisdiction of the sheriff court granting the warrant appear to apply to arrestments in rem. Thus the Ordinary Cause Rules, rule 5.8, and the Summary Cause Rules, rule 11, enable a warrant for arrestment and other types of warrant to be executed anywhere in Scotland without the endorsation of a warrant of concurrence by the sheriff clerk of the sheriff court where the warrant is to be executed.[154] These rules do not expressly exclude arrestments in rem.[155]

---

148 Jackson, Enforcement of Maritime Claims (2d edn) p 22. The learned author also refers (idem) to "an action between owner or charterer where either may wish to bring an action in rem against the ship as a weapon against the other, particularly in the light of the ability to bring an action in rem against and arrest a sister ship".

149 See para 7.45.

150 RCS, rr 46.1-46.9.

151 In a sheriff court action for recovery of arrears of payment under three ship mortgages, the Second Division on appeal held that it was competent for the sheriff to follow the procedure for sale of an arrested ship set out in the former RC 143 for the Court of Session: Banque Indo Suez v Maritime Co Overseas Inc 1985 SLT 117. In that case it was observed (at pp 119 and 121) that s 4 of the Sheriff Courts (Scotland) Act 1907 provides that all powers and jurisdictions formerly competent to the High Court of Admiralty in Scotland in all maritime causes and proceedings shall be competent to the sheriffs. This enactment however replaces the Court of Session Act 1830, s 22, and seems to refer to the High Court of Admiralty (which was abolished by the 1830 Act) rather than to the Court of Session. The true ratio of the case probably lies in the power of the sheriff to resort to Court of Session practice for guidance to fill a lacuna in sheriff court rules of procedure: see Macphail, p 22; Tail v Main 1989 SCLR 106 (Sh Ct) at p 109 per Sheriff Principal Ireland. See now RCS, r 46.5.

152 Discussion Paper No 84, Proposition 28 (para 3.22).

153 We understand that this matter has from time to time been considered by the Sheriff Court Rules Council in the context of their policy on harmonisation with the Court of Session, and is still under review.

154 Similar provision is made by the Debtors (Scotland) Act 1987, section 91, though that section very properly does not apply to arrestments in rem.

155 Nor do they expressly exclude arrestments to found jurisdiction though to apply them to arrestments to found jurisdiction would be inconsistent with the purpose of such arrestments so that such arrestments are probably excluded by implication.

7.53 In our Discussion Paper[156] we proposed that it should not be competent to arrest in rem a ship or cargo outside the territorial jurisdiction of the sheriff court in which the action in rem is to be raised, nor should an arrestment in rem outside that jurisdiction be rendered competent by a warrant of concurrence. These proposals-were generally supported by consultees. The Joint Committee suggested that if the res is within the territorial jurisdiction of the sheriff at the time when the warrant is granted, it should be possible to arrest the res anywhere in Scotland without a warrant of concurrence. We agree with this modification.

7.54 An action in rem is primarily directed against a ship or cargo and in principle the ship or cargo should be, or have been, arrested in rem within the jurisdiction of the sheriff court entertaining the action in rem. Any other rule would mean that an action in rem could be raised in a sheriff court with which the ship or cargo concerned had no connection whatsoever. For example, a warrant for arrestment in rem could be obtained in Glasgow sheriff court and executed against a vessel plying between Aberdeen and Shetland though that vessel had never been, and (but for the arrestment) would never be, near the sheriffdom of North Strathclyde. In an action in personam, jurisdiction is founded against a defender independently of the use of an arrestment on the dependence, on the basis of jurisdictional rules (eg relating to the defender's domicile) so that the action has some connection with the sheriff court entertaining it; and an arrestment on the dependence outside the sheriff court's jurisdiction does not have the effect of giving the sheriff court an exorbitant or inappropriate jurisdiction. An arrestment in rem outside the jurisdiction however would have that effect, and is best avoided.

7.55 Section 4 of the Sheriff Courts (Scotland) Act 1907 provides that the powers and jurisdictions competent to the High Court of Admiralty in Scotland in all maritime causes and proceedings[157] shall be competent to the sheriffs "provided the defender shall upon any legal ground of jurisdiction be amenable to the jurisdiction of the sheriff before whom such cause or proceeding may be raised ..." This proviso is not appropriate in the case of an action in rem which is directed against a ship or cargo irrespective of whether the owners or parties interested in the ship or cargo are subject to the sheriff's jurisdiction. We suggested in our Discussion Paper[158] that the foregoing proviso should be amended by confining it to an admiralty action in personam. This proposal was supported on consultation.

7.56 Accordingly, we recommend that:

(1) It should be provided by statute that a warrant to arrest in rem a ship or other maritime res granted by a sheriff court should be capable of execution (a) within the territorial jurisdiction of that sheriff court; or (b) anywhere in Scotland without a warrant of concurrence if the ship or res were within the territorial jurisdiction when the warrant was granted.

(2) It should not be competent to circumvent the foregoing rule by obtaining a warrant of concurrence from the sheriff clerk of a different sheriff court, and accordingly warrants of concurrence relating to arrestments in rem should be incompetent.

(3) Section 4 of the Sheriff Courts (Scotland) Act 1907, (which inter alia confers on the sheriff admiralty jurisdiction in maritime causes and proceedings, provided that the defender is amenable to the sheriff's jurisdiction) should be amended to make it clear that the sheriff's jurisdiction in an admiralty action in rem directed against a ship or cargo is founded on an arrestment in rem of the ship or cargo notwithstanding that the owners or persons interested in the ship or cargo are not, or not otherwise, amenable to the sheriff's jurisdiction.

(Recommendation 55; Draft Bill, clauses 42 and 43)

156 Discussion Paper No 84, Proposition 29(1) and (2).

157 Section 4 of the Sheriff Courts (Scotland) Act 1907 was repealed, so far as relating to criminal proceedings, by the Criminal Procedure (Scotland) Act 1975, Sch 10.

158 Discussion Paper No 84, Proposition 29(3).

(3) Warrant for different types of admiralty arrestment: legal right or judicial discretion

Overview

"'7.57 In this Section we recommend that in contrast with the solutions recommended in Part 3 for arrestment on the dependence of non-maritime subjects, warrants for arrestments in rem enforcing maritime liens should be available to the pursuer as a matter of right.

7.58 On the other hand, different considerations apply to arrestments in rem under section 47(3)(b) of the Administration of Justice Act 1956 (enforcing "quasi-liens") and arrestments[159] of ships on the dependence of admiralty actions in personam. It is difficult to distinguish them from arrestment on the dependence of non-maritime subjects. In their case therefore we recommend that warrant should be available to the pursuer only at the court's discretion as recommended in Part 3 for non-maritime arrestments.

The analogy of English law

7.59 In our Discussion Paper No 84 we cited authority holding that the English High Court has a discretion to refuse to issue, or to give effect to, a warrant to arrest in rem,[160] (though the power was generally exercised on some legal ground[161]). In 1993 however the Court of Appeal held, on the basis of an amendment of 1986 to the English rules of court,[162] that provided the property was within the scope of the action in rem, and the procedure had been duly complied with, the issue of the warrant is as of right.[163] We do not know whether this rule applies to all types of arrests in rem under English law.[164] In our view different considerations apply to different types.

7.60 We understand that in English admiralty practice it is relatively unusual that the opportunity will arise for the exercise of a true discretion.[165] Normally the Admiralty Marshal or his deputy, neither of whom is a judicial officer, disposes of applications for warrant to arrest.[166] Generally it is only if the Admiralty Marshal is minded to refuse the application that it will come before a registrar or a High Court judge. Further, the Admiralty Marshal may, before giving effect to a warrant for arrest, seek directions from a High Court judge.

(a) Arrestment in rem enforcing maritime liens

(i) The existing law

7.61 The nature of maritime liens. A maritime lien (or hypothec) is a form of security, over a maritime res (ie a ship or her apparel or cargo) enforceable in Scotland by an admiralty action in rem in which the res is attached by an arrestment in rem, declarator of the maritime lien is granted, and the res is thereafter sold in a judicial sale.[167] As we have seen,[168] it is a hypothec or security without possession and thus differs from other forms of lien in which the security depends on the creditor's possession.[169] It differs from a mortgage of a ship in that it arises by operation of law from the moment when the circumstances arise which are the source of the claim it secures, and it is not registrable in a public register. It has been held that the substantive law on maritime liens is the same in Scots law and English law.[170]

---

159 And also inhibitions on the dependence of admiralty actions which, though unusual, are no doubt competent where the claim is a pecuniary debt. As to arrestment of cargo, see para 7.137 et seq.

160 The Andria now renamed the Vasso [1984] 1 QB 477 (CA) at p 489 per Robert Goff LJ; followed in The Kherson [1992] 2 Lloyd's Rep 261.

161 Eg the incompetence of the application or a procedural defect.

162 RSC (Amendment No 3) 1986 (SI 1986/2289).

163 The Varna [1993] 2 Lloyd's Rep 253 (CA), disapproving The Kherson [1992] 2 Lloyd's Rep 261. Noted in M Whiteley, "Arrest and the Duty of Disclosure" [1993] LMCLQ 458.

164 In The Vanessa Ann [1985] 1 Lloyd's Rep 549, Staughton J, in a dispute between co-owners (Supreme Court Act 1981, ss 20(2)(b); 20(4)), ordered the conditional release of a ship from arrest on the theory that arrest was a discretionary remedy. We indicate below that in this class of case it should be.

165 Eg on questions of public policy or public safety such as whether warrant should be issued for the arrest of a ship carrying very dangerous noxious waste, or a ship on passage at sea.

166 See RSC, Order 75, rule 5 for the procedure.

167 See Thomas, Maritime Liens (1980); Encyclopaedia vol 9, p 388, stv "Maritime Liens"; Stair Memorial Encyclopaedia vol 1, para 413; vol 20 paras 274 - 286.

168 See paras 7.3 et seq.

169 Eg the possessory lien of a ship repairer or salvor: Stair Memorial Encyclopaedia vol 20 paras 300 and 302.

170 Currie v McKnight (1896) 24 R (HL) 1.

7.62 Types of maritime lien. Five "principal" or "proper" maritime liens are recognised by Scots law following English law, namely those arising in respect of:

(1) damage done by a ship (mainly collision);

(2) bonds of bottomry or respondentia (now obsolete);

(3) seamen's wages;

(4) master's wages and disbursements; and

(5) salvage.[171]

It will be seen that the first arises ex delicto from a wrong done by a ship. The last four arise from services rendered to a ship. The maritime liens for bottomry, respondentia, seamen's wages and master's wages and disbursements all arise by contract and the maritime lien for salvage arises by operation of law. The master's maritime lien for wages and disbursements is a creature of statute[172] while the others derive from the common law, though modified by statute. It is unlikely that further maritime liens will be recognised at common law, eg, in respect of towage or pilotage.

7.63 Other maritime liens have been created by statute. These consist of or include:[173]

(1) the fees and expenses of the receiver of a wreck;[174]

(2) remuneration for services rendered by coastguards;[175]

(3) compensation to owners or occupiers of land for damage occasioned in cases of shipwreck;[176]

(4) rights to salvage of property or persons;[177] and

(5) (possibly) damage to a harbour, dock, pier, quay or works.[178]

7.64 Statutory restriction on arrestment in rem. Under the Administration of Justice Act 1956, section 47(1), an arrestment in rem is competent only if the action involves one of the claims in the statutory list in section 47(2). These include claims which may be secured by the principal maritime liens.[179] It is not clear that they would include all the other statutory maritime liens mentioned in the preceding paragraph.[180]

7.65 Effect of maritime lien and distinction between arrestment in rem. and arrestment on the dependence. A maritime lien gives the creditor a hypothec or security without possession from the moment when the circumstances occur out of which the lien arises.[181] The effect of an arrestment in rem is not to create a nexus or security over the res, because a nexus or hypothec already exists, but rather to fix the res in the place where it is when the arrestment in rem is executed. It has been called "a real diligence" but, as we mentioned at paragraph 7.10 above, that expression has been used in two quite different senses. In its first sense, it means a diligence which fixes the ship in the place in which it was arrested, and in this sense an arrestment in common form of a ship on the dependence of an admiralty cause in personam is also a "real diligence". Arrestments of non-maritime moveable subjects on the dependence of personal or petitory actions do not have the effect of fixing the subjects in a particular place. This is the sense in which the expression "real diligence" was used by Lord Shand in an oft-quoted passage in Carlberg v Borjesson.[1*2] The concept of "real diligence" may however mean a diligence which

171 The International Convention on Salvage 1989, Article 20 (set out in the Merchant Shipping Act 1995, Sch 11) leaves the issue of a maritime lien to international convention or national law.

172 Currently the Merchant Shipping Act 1995, s 41.

173 See Thomas, paras 20-25.

174 Merchant Shipping Act 1995, s 249(3).

175 Ibid, s 250.

176 Ibid, ss 234(5) and (6).

177 Ibid, Sch 11; International Convention on Salvage 1989; as to salvage of persons, see article 16.

178 Harbours, Docks and Piers Clauses Act 1847, s 74.

179 And also claims arising out of any contract for or in relation to salvage services rendered in saving life from a ship. See paras (a), (c), (ca), (h), (n) and (o) of s 47(2) and s 47(8).

180 Viz under the Merchant Shipping Act 1995, ss 249(3); 250; and 234(5) and (6); or the Harbours, Docks and Piers Clauses Act 1847, s 74.

181 See eg Thomas, p 2.

182 (1877) 5 R 188 at p 195: "The arrestment of a vessel differs from an ordinary arrestment in being a real diligence directed against the vessel itself, and unlike the personal diligence of arrestment directed against a custodier or debtor in a sum of money. Its effect, as the term "arrest" itself implies, is to fix the vessel in the place in which she is found, and, if there is any danger of her being removed from the place, the power to dismantle may be exercised".

is good against the whole world or at least bonafide purchasers without notice of the lien and that concept is appropriate for maritime liens enforced by arrestments in rem but not for the right or nexus created by arrestments in common form on the dependence of admiralty actions in personam. Thus an arrestment on the dependence of a ship is not effectual unless the defender is owner of the ship at the time of execution of the arrestment. A maritime lien by contrast follows the res into whose hands soever it comes. It is indefeasible by change of possession or even by transfer of property.[183] For this reason an arrestment on the dependence in common form is an inappropriate form of diligence to enforce a maritime lien. As Lord President Dunedin observed (with respect to a damage maritime lien):[184]

> "But the working out of the maritime lien must be by effectuating a sale of the ship as a real diligence against all and sundry and not merely against the person who is called in the petitory part of this action and asked to submit to a decree. If it is a good lien, the ship can be sold, and it does not matter to whom the ship belongs. Now if that is so, that seems to me to make an arrestment on the dependence an inappropriate form of diligence, because you are not there working out your payment out of the property of the debtor; you are not dealing with a debtor; you are dealing with the ship itself, which is supposed, so to speak, to be the living agent of the wrong that has been done to you."[185]

It follows from the foregoing that whereas at common law an arrestment on the dependence is competent against a "sister ship" or other property of the defender and not merely the ship in respect of which the claim arose,[186] an arrestment in rem may be executed only against the ship or other property encumbered by the maritime lien which the arrestment in rem enforces.

7.66 Development of arrestment in rem and action in rem. Until procedural reforms in the 1930s, the procedure in Scottish proceedings in rem enforcing a maritime lien required a petition in the Bill Chamber, or to the sheriff, for warrant to arrest the vessel in rem before an action in rem, (ie an action of declarator of the maritime lien and a warrant for sale of the ship) could be raised.[187] A warrant for arrestment in rem in a signeted summons in an action in rem was incompetent. The Clyde Report[188] criticised the preliminary procedure as "cumbrous and expensive to a degree which makes resort to the action in rem, familiar in England, rarely practicable". The report's under-noted recommendation[189] was, and is, implemented by rules of court.[190] An admiralty action in rem has conclusions for declarator that the pursuer has a maritime lien over the ship or cargo for a specified sum and interest preferable to the rights of others, and for warrant to sell the ship or cargo on the lien being declared and to apply the proceeds of sale in satisfaction of the lien.[191]

183 Encyclopaedia, vol 9, p 388.

184 Clan Line Steamers Ltd v Earl of Douglas Steamship Co Ltd 1913 SC 967 at p 973.

185 The reference to "living agent" may reflect the "personification theory" of maritime liens. There are several theories as to the nature of a maritime lien including (i) the procedure theory (ie to persuade a defendant to appear in court);(ii) the personification theory (which looks on the action in rem as directed against the ship or maritime res); and (iii) the hypothec or deodand theory (which traces the origins of liens partly to the Roman law of hypothec and partly to the idea of the responsibility of the ship for a wrong as in the the old English doctrine of deodand): see Jackson, Enforcement of Maritime Claims (2d edn) pp 379 - 381. There is no analysis from a Scottish standpoint.

186 Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co 1985 SC (HL) 1 at p 12 per Lord Keith of Kinkel. See now Interatlantic (Namibia) (Pry) Ltd v Okeanski Ribolov Ltd 1996 SLT 819 in which it was held that only one ship (the ship concerned or a sister ship) per action may be arrested on the dependence under section 47(1) of the Administation of Justice Act 1956.

187 See eg Clan Line Steamers Ltd v Earl of Douglas Steamship Co Ltd 1913 SC 967; McConnachie 1914 SC 853; Hatton v A/S Durban Hansen 1919 SC 154; Ellerman's Wilson Line Ltd v Commissioners of Northern Lighthouses 1921 SC 10.

188 Clyde Report, p 42.

189 Ibid p 43: "What is required is a simple action in rem against the ship herself and all persons interested in her (without naming them) for declarator of the lien, for the sale of the ship, and for the application of the proceeds in extinction pro tanto of the lien, on the signeting of which warrant to arrest the ship should pass (without the necessity of any preliminary petition) in the same manner as we recommend ... with regard to other forms of arrestment."

190 Made under the Administration of Justice (Scotland) Act 1933, section 17(iii) consolidated in the Court of Session Act 1988, s 6(iii). This requires (not merely empowers) the Court of Session to provide by act of sederunt "for enabling the *enforcement of a maritime lien over a ship by an action in rem directed against the ship and all persons interested therein without naming them and concluding for the sale of the ship and the application of the proceeds in extinction pro tanto* of the lien, and for enabling arrestment of the ship on the dependence of such an action, and for the regulation of the procedure in any such action".

191 RCS, Form 13.2-8(9).

7.67 Obtaining warrant for arrestment in rem under present procedure. An Admiralty action in rem can proceed only on an arrestment in rem.[192] Warrant for arrestment in rem should be sought in the summons when signeted.[193] The warrant is granted automatically by the administrative act of a clerk of court rather than by a judge after enquiry. A warrant for arrestment in rem of a ship must specify the ship whereas in a warrant for arrestment on the dependence, while it is normal practice to specify the ship to be arrested, it is not essential at common law.[194]

7.68 Arrestment in rem as indispensable incident of action in rem. Rule 46.3(2) (Actions in rem) provides:

> "In an Admiralty action in rem the ship or cargo shall be arrested in rem and a warrant for such arrestment shall be inserted in the summons in the form in Form 13.2-A."

This rule makes it clear that the ship or cargo must be arrested in rem. Unlike the former Rule of Court[195] which it replaces, this rule makes it clear that the arrestment in rem enforcing a maritime lien is an integral part of the action and that warrant should be sought in the summons when signeted.[196] Implementing a proposal in our Discussion Paper,[197] the new rule 13.8 makes it possible to convert an admiralty action in personam into an action in rem or combined action after signeting.

7.69 It seems clear that an arrestment in rem enforcing a maritime lien should continue to be the indispensable basis of an action in rem. Such an action has to contain within itself not only a declarator of the maritime lien but also an attachment, which is effectual against all parties who have an interest in the ship or other maritime res encumbered by the maritime lien, followed by a process of sale which must be equally effectual since it disencumbers the res of all those interests.[198] Without an arrestment in rem, a bona fide third party purchaser of the ship could competently take the ship away, if it had been arrested in personam after the ownership had been transferred to him.

(ii) Warrant to arrest in rem enforcing maritime lien: legal right rather than discretionary remedy

7.70 In our view, warrant to arrest in rem a ship or cargo to enforce a maritime lien should continue to be a matter of legal right, as under the present law, rather than of judicial discretion on the lines recommended in Part 3 above.[199]

7.71 One advantage of the legal right solution is that it avoids the delay necessarily caused by the application to a judge. In an arrestment of a ship or her cargo, speed may be essential. We do not rely on this consideration however because, as we explain below,[200] speed may be just as necessary in the case of non-maritime arrestments.

7.72 Here we are only concerned with arrestments in rem whose object is to make good a pre-existing maritime lien, ie a tacit hypothec or security right which has already been constituted by a prior event.[201] As we argued in Part 3, a judicial discretion to grant or refuse warrant is appropriate for a diligence on

192 RCS, r 46.3(2).
193 RCS, Form 13.2-A. See next paragraph.
194 Clark v Loos (1853) 15 D 750.
195 RC 137 (1965).
196 In paragraph 3.35 of our Discussion Paper we had drawn attention to the fact that RC 137 did not expressly prescribe the stage in the proceedings at which the arrestment in rem must be executed.
197 Discussion Paper No 84, paras 3.36-3.39.
198 Cf Clan Line Steamers Ltd v Earl of Douglas Steamship Co Ltd 1913 SC 967 at p 973 per Lord President Dunedin: "if we could not keep the ship in order to make good the maritime lien, it would be very little use having a maritime lien in our law at all".
199 The Brussels Arrest Convention of 1952 is neutral on the question whether the grant of warrant for a maritime arrestment should be available as of right or as a matter of judicial discretion. It is widely recognised that the purpose of the Convention was to effect a compromise limiting the cases where civil law countries may grant warrant and expanding the cases where common law countries may grant warrant. It does not lay down the cases where warrants for arrestment must be granted. See eg Berlingieri, Arrest of Ships (2d edn; 1996) p 99 quoting Professor Philip at text keyed to fn 209.
200 See para 7.97.
201 See para 7.65.

the dependence in respect of an unsecured debt. In our view however it is inappropriate in principle where the diligence enforces a security.[202] There is no element of consumer protection which might justify a judicial discretion limiting enforcement of the security.[203]

7.73 Moreover, normally[204] the only way in which the holder of the maritime lien can make his security right effectual is by way of an action in rem for which, as we have seen,[205] an arrestment in rem is essential. If the court were to refuse warrant for arrestment in rem, it would deprive the pursuer of the benefit of his maritime lien or force him to initiate insolvency proceedings only to have the lien recognised.

7.74 On consultation, there was general agreement with our view that warrant to arrest in rem a ship or cargo to enforce a maritime lien should continue to be a matter of legal right[206] and we adhere to it.

7.75 We recommend:

A warrant for arrestment in rem of a ship and other maritime property in an admiralty action in rem enforcing a maritime lien should continue to be available to the pursuer as of right.

(Recommendation 56; Draft Bill, clause 28(1))

(iii) Property encumbered by maritime lien and subject to arrestment in rem

7.76 The types of maritime res or property capable of being encumbered by a maritime lien vary with different types of maritime lien, as follows:[207]

(a) the damage maritime lien encumbers the ship and freight;[208]

(b) the bottomry and respondentia maritime liens encumber the ship, freight and cargo;[209]

(c) the seamen's wages maritime lien encumbers the ship and freight;[210]

(d) the master's wages and disbursements maritime lien encumbers the ship and freight;[211]

(e) the salvage maritime lien encumbers the ship, freight, cargo, flotsam, jetsam, lagan, derelict and wreck.[212]

References to the ship include references to its appurtenances and apparel.

7.77 Arrestment in rem of cargo. It will be seen that the salvage maritime lien and the bottomry and respondentia maritime liens encumber cargo. The mode of execution of an arrestment in rem of cargo is governed by RCS, rr 16.13 and 16.14. A copy of the arrestment schedule and of the certificate of execution is given to the ship's master or other person on board in charge of the cargo if the cargo is on board.[213] If the cargo is being or has been landed or transhipped, the schedule of arrestment is served on the custodian of the cargo or, "where the cargo has been landed on the quay or into a shed of any port or harbour authority, to the harbour master."[214]

---

202 There is an analogy in sequestration for rent making effectual the landlord's hypothec in respect of arrears of rent. Decree is granted without cause shown (which is only necessary for sequestration in respect of rent not yet due).

203 We acknowledge that in legislation on the enforcement of consumer credit securities, in the Consumer Credit Act 1974 and earlier hire-purchase legislation, there are precedents for judicial discretionary powers. But these are unusual and stem from the policy of consumer protection which does not apply to maritime liens.

204 le except where there are insolvency proceedings or other process of ranking where the ship in question forms part of the estate for distribution, in which case the maritime lien will be given effect in the ranking: see eg Goudy, Bankruptcy (4th edn) p 527.

205 See para 7.68.

206 Discussion Paper No 84, Proposition 30(1) (para 3.48).

207 See Thomas, para 37.

208 Encyclopaedia, vol 9, p 398; McMillan, p 176; Thomas, paras 225-226.

209 Encyclopaedia, vol 9, pp 389, 395-398; McMillan, pp 157-158; Bell, Com vol 1, p 535; Thomas, para 382.

210 Encyclopaedia, vol 9, p 399; McMillan, p 280; Thomas, para 318.

211 Encyclopaedia, vol 9, p 399; McMillan, pp 282-284; Thomas, paras 318, 359.

212 Encyclopaedia, vol 9, p 399; McMillan, p 218; Thomas, paras 278-286, which explains the terms used in the text.

213 RCS, r 16.13(3).

214 RCS, r 16.14(1).

7.78 Enforcement of maritime lien against freight. It is thought that it is incompetent for a lien holder whose lien covers freight to arrest in rem freight in the hands of the person liable to pay the freight. Thus RCS, r 46.2 enables an action in rem, or a combined action in rem and inpersonam, to be brought "against the owners of, of parties interested in, a ship or cargo" where the conclusion of the summons is directed:

> "to recovery in respect of a maritime lien against the ship or cargo or the proceeds of it as sold under order of the court or where arrestment in rem may be made under section 47(3) of the Administration of Justice Act 1956".

No mention is made of freight. We have not traced any reported decision involving an arrestment in rem of freight in order to make good a maritime lien encumbering the freight.[215]

7.79 This raises the question of how a lien against freight is to be enforced. The answer seems to be by the indirect means of an arrestment in rem against the ship or cargo, following English admiralty practice.[216] The English Rules of the Supreme Court, Order 75, rule 10(5) provide that:

> "a warrant of arrest issued against freight may be executed by serving the warrant on the cargo in respect of which the freight is payable or on the ship in which that cargo was carried or on both of them".[217]

There is, however, no corresponding provision in the Rules of the Court of Session. A maritime lien on freight is accessory to a lien on the ship: if there is no lien on the ship, there can be no lien on freight in respect of the same debt.[218] Presumably the right to arrest in rem the cargo will normally suffice to require the cargo-owner to consign the freight into court,[219] and it seems that in English practice either the freight is paid into court or security for the amount of the freight is given. The Brussels Arrest Convention does not refer to maritime liens against freight.

7.80 In our Discussion Paper we invited views on whether any provision is necessary or desirable to amend or clarify the procedure for enforcing a maritime lien against freight.[220] The rule of English admiralty law that a lien against freight is enforced indirectly by arrest of the ship or cargo may flow from the fact that arrest in English law is not available against a pecuniary debt: a garnishee order is the nearest equivalent. But in Scotland arrestments of money in common form are familiar and it would be possible to enact a procedure for arresting freight "in rem" in the hands of the person liable to pay it. By an "arrestment in rem" in this context we mean an arrestment having priority over other diligences such as ordinary arrestments in common form, executed after the date when the lien arose. It is conceded however that the priority would be difficult to regulate in a manner which precisely reflected the priority of a lien over a ship and cargo. Such an arrestment could not of course be followed up by sale. Instead the pursuer would apply to the court for an order requiring the arrestee to consign the freight in court. The arrestee liable to account for the freight would have an opportunity to oppose the application. The freight would then be available for satisfying the debt secured by the maritime lien. We acknowledge that Scots admiralty law should so far as practicable be the same as English admiralty law, but there seems no reason why there should not continue to be cross-border differences in procedure.[221]

---

215 In Lucovich, Petitioner (1885) 12 R 1090, a petition for warrant to arrest in rem to enforce a bottomry bond under the pre-1933 Act procedure (when warrants could not be inserted in the summons), the prayer was to grant warrant to arrest the ship and its apparel and "the freight due by the various receivers of the cargo discharged by the said steamship at Leith". The interlocutor however only granted warrant to arrest the ship.

216 See Encyclopaedia of Scottish Legal Styles, vol 8 (1938) p 392, fn 4; Maxwell, Practice of the Court of Session (1980) p 387.

217 See also RSC, Order 75, rule 8(l)(a) which provides that a writ by which an action in rem is begun must be served on the property against which the action is brought except (inter alia) where the property is freight, in which case it must be served on the cargo in respect of which the freight is payable or the ship in which that cargo was carried.

218 The Castlegate [1893] AC 38; Smith v Plummer (1818) 1 B and Aid 575, at pp 582, 583.

219 Cf The Ringdove (1858) Swab 310 at p 312 per Dr Lushington; The Flora (1866) LR 1 A and E 45; McMillan, pp 176-177.

220 Discussion Paper No 84, Proposition 30(3) (para 3.48).

221 See Sheaf Steamship Co v Campania Transmediterranea 1930 SC 660; Clipper Shipping Co Ltd v San Vmcente Partners 1989SLT204(OH)atp208.

7.81 We note that in The Castlegate[222] two of the judges in the House of Lords[223] took the view that in equity it should be competent to enforce a maritime lien against freight even if the lien was not enforceable against the ship. In our Discussion Paper,[224] we sought views on whether such a rule should be introduced in Scots law. Although this would introduce a difference from English admiralty law, the difference would be minor.

7.82 On consultation, reaction was divided. Professor W M Gordon thought it undesirable to tie the Scots law to the English law unless that was the only possible solution. The Joint Committee agreed that the pursuer in an action in rem enforcing a lien encumbering freight should be entitled to arrest in rem the freight in the hands of the person liable to pay the freight. They said that a maritime lien for freight should not be enforceable as an independent right against the ship but that as (in their view) freight is accessory, it would be acceptable for a maritime lien encumbering freight to be enforceable against the freight if such a measure is ancillary to an action against the ship. Messrs Dorman, Jeffrey and Co thought that an arrestment in rem of freight in the hands of a person within the jurisdiction of the Scottish courts would be a valuable innovation, and should be available even if the Scottish courts were not able to detain the vessel for whatever reason.

7.83 On the other hand, the Faculty of Advocates considered that no legislation was necessary since the indirect means of enforcing a lien against freight[225] is satisfactory. The Court of Session judges favoured cross-border uniformity of admiralty law so far as practicable, and were not persuaded that statute should intervene.[226]

7.84 On reflection we think that direct enforcement by arrestment in rem against freight should not be introduced. It would be difficult to frame priorities in ranking. The existing rules on ranking arrestments in rem presuppose that the thing arrested in rem is a ship or cargo and could not easily be transposed to cases where the thing arrested was a liability to account for freight. Such a liability can be arrested on the dependence.

7.85 We recommend that:

> **It should continue not to be competent for the pursuer in an action in rem enforcing a lien encumbering freight to arrest in rem the freight in the hands of the person liable to pay the freight.**
>
> (Recommendation 57)

(b) Arrestment in rem under Administration of Justice Act 1956, section 47(3)(b) securing non-pecuniary claim

(i) The nature of an arrestment in rem under 1956 Act, section 47(3)(b) securing non-pecuniary claim

7.86 At common law, where a person claimed ownership or possession of a ship in an action of specific implement concluding for delivery of the ship, the appropriate interim remedy for preventing the ship from leaving Scotland while the action was depending was interim interdict.[227] An arrestment on the dependence was and still is not competent because the conclusion or crave in the depending action must

222 [1893] AC 38.
223 Ibid at p 48 per Lord Herschell LC and at p 54 per Lord Watson.
224 Proposition 30(4) (para 3.48).
225 By arrestment in rem against the ship in accordance with English practice.
226 They said it was not clear why it is necessary, by a statutory fiction, to arrest freight which is a pecuniary debt, when Scots law already provides such an arrestment by way of arrestment on the dependence. The point is that arrestment on the dependence would not carry with it a special priority deriving from the maritime hypothec or lien.
227 Jones v Samuel (1862) 24 D 319.

be pecuniary.[228] There are no doubt practical advantages in using the concept of arrestment: it attracts useful rules on the mode of execution of the diligence, the duties of the defender and the availability of ancillary warrants to dismantle and warrants to bring into safe harbour. The reason for the introduction of a completely new type of arrestment in rem in Scots law was not to obtain these advantages but rather to enable Scots law to comply with the terms of the Brussels Arrest Convention.[229]

7.87 This was achieved by the Administration of Justice Act 1956, section 47(3)(b) which introduced an arrestment in rem of a ship to secure a non-pecuniary claim (such as a conclusion for specific implement of an obligation ad factum praestandum) of a kind mentioned in paragraphs (p) to (s) of section 47(2), whether or not the claimant is entitled to a lien over the ship. These paragraphs are as follows:

> "(p) any dispute as to the ownership or right to possession of any ship or as to the ownership of any share in a ship;
>
> (q) any dispute between co-owners of any ship as to the ownership, possession, employment or earnings of that ship;
>
> (r) the mortgage or hypothecation of any ship or any share in a ship;
>
> (s) any forfeiture or condemnation of any ship, or of goods which are being, or have been, carried, or have been attempted to be carried, in any ship, or for the restoration of a ship or any such goods after seizure."

It will be seen that these paragraphs relate to an interest in a ship or other property.[230] The effect of the new interim remedy is governed by section 47(5).[231]

7.88 Distinctive features of new remedy. An arrestment in rem under section 47(3)(b) not enforcing a maritime lien is distinctive in several respects.[232] First, it is a unique example in Scots law of an arrestment which "secures" a non-pecuniary claim.[233] Second, it is the only example in Scots law of an arrestment which is neither an arrestment in common form on the dependence nor an arrestment in rem enforcing a maritime lien.[234] Third, although it is an arrestment in rem, it is competent only in admiralty actions in personam (whether or not combined with actions in rem) but not in actions which are purely admiralty actions in rem.[235] An arrestment in rem under section 47(3)(b) secures a non-pecuniary decree, such as a decree of specific implement enforcing an obligation ad factum praestandum, the most obvious example being an obligation to deliver or give possession of a ship to the pursuer.[236] In contrast with a Scottish admiralty action in rem,[237] there is no pecuniary debt, no declarator of a lien, and no sale. An action for such a claim must therefore be an admiralty action in personam with different incidents and effects from an action in rem. Unlike the previous Rules of the Court of Session,[238] the Rules of Court

---

228 The common law rule that an arrestment on the dependence or in execution cannot competently secure or enforce a non-pecuniary claim (Lindsay v London & NWRly Co (1855) 18 D 62 affd 3 Macq 99) applies to ships: see Azcarate v Iturrizaga 1938 SC 573 (arrestment on the dependence of action of declarator of ownership of ship held incompetent). Arrestment to found jurisdiction however is competent in a non-pecuniary action eg Powell v Mackenzie & Co (1900) 8 SLT 182 (action ad factum praestandum).

229 See article l(l)(o),(p) and (q).

230 It is not competent, in terms of section 47(3), to arrest in rem under section 47(3) any ship other than the ship to which the claim relates.

231 Section 47(5) provides that a warrant for arrestment of a ship in rem under section 47(3), in a case where the person in whose favour it is issued is not entitled to a lien over the ship, shall have effect as authority for detention of the ship as security for the implementation of the decree of the court so far as it affects that ship. The court may, on the application of any person having an interest, recall the arrestment if satisfied that sufficient bail (sic) or other security for implementation of the decree has been found (section 47(5), proviso).

232 The right which such an arrestment creates has been called a "quasi-lien": Inglis, pp 86-87.

233 See para 7.86, footnote 228 above.

234 It bears some resemblance to statutory rights under English law to arrest ships in rem in admiralty actions not enforcing "proper" maritime liens.

235 Arrestment of a ship to found jurisdiction is competent though the ship has been competently arrested in rem to secure a non-pecuniary claim mentioned in the 1956 Act, s 47(2)(p) to (s): PTKF Kontinent v VMPTO Progress 1994 SLT 235 (OH).

236 Eg PTKF Kontinent v VMPTO Progress 1994 SLT 235 (OH).

237 See especially RCS, r 46.5; and RCS, Appendix, Form 13.2-8(9) (form of conclusion in admiralty action in rem).

238 Eg RC 140(a) and (d), which appeared to presuppose that an arrestment in rem in an admiralty action would be used only in an action in rem.

now recognise[239] that an arrestment in rem may be executed in an admiralty action inpersonam to enforce a non-pecuniary claim relating to the ship under section 47(2)(p)-(s) of the 1956 Act by virtue of section 47(3) of that Act. Fourth, an arrestment in rem under section 47(3)(b) is not followed by a process of sale but merely "secures" implementation of the decree. Fifth, an arrestment on the dependence creates a preference for the arrester which will be recognised and enforced in subsequent rankings of creditors. Maritime liens have their own rules of ranking, including the rule that certain liens rank inter se in inverse order of attachment.[240] By contrast an arrestment in rem under section 47(3) does not appear to have any effect on the ranking of creditors, or in competitions with bonafide purchasers or mortgagees, or generally on the substantive rights of parties, other than rights to interim possession. Sixth, an arrestment in rem to enforce a maritime lien by itself confers jurisdiction in an action in rem.[241] It is thought that jurisdiction to grant warrant to arrest in rem under section 47(3)(b), being an ancillary interim remedy in an action, must depend on the court having jurisdiction in the principal action.

(ii) Grant of warrant for arrestment in rem under 1956 Act, section 47(3)(b) to be subject to judicial discretion

7.89 In our view the grant of warrant for this unusual type of arrestment in rem should be a matter of judicial discretion rather than a legal entitlement. The main point is that an arrestment in rem under the 1956 Act, section 47(3)(b) is of the nature of an order regulating interim possession pending decree in a petitory action determining the rights of parties.[242] It is simply a special statutory interim remedy by which a ship may be fixed in the place where it is arrested and brought within the control of the court.[243]

7.90 In many respects, its nearest analogues are interim interdict at common law[244] and an order by the Court of Session regulating interim possession pendente lite under the Court of Session Act 1988, section 46[245] or section 47(2).[246] In exercising these statutory powers, the court has:

> "a discretion as to the granting of the order, having regard to the circumstances of the case, including the nature of what is sought to be ordained, and the consequences of granting or refusing the order".[247]

On that analogy we believe that the court should have a general discretion to grant, or to refuse to grant, warrant to arrest in rem under section 47(3)(b) of the 1956 Act. Such a solution seems consonant with the distinctive characteristics of the remedy outlined above.[248]

7.91 We also mentioned above that in English law the theory is that an admiralty arrest in rem is a legal right rather than a discretionary remedy.[249] In The Vanessa Ann,[250] however, which involved a dispute between co-owners under the English equivalent of the 1956 Act, section 47(2)(q),[251] Staughton J, ordered the conditional release of a ship from arrest on the theory that arrest was a discretionary remedy. We

---

239 RCS.r 16.13. See note 16.13.1(2).
240 Thomas, pp 235-237; The Lyrma (No 2) [1978] 2 Lloyd's Rep 30.
241 See para 7.21 above.
242 It is for this reason that it may be used whether or not the ship belongs to the defender, and even if it belongs already to the pursuer. Inglis, p 87 remarks: "For example, under [s.47(2)(p)] an owner may wish to obtain possession of a ship which he has chartered to the defender. He would be entitled to arrest his own ship in security of the claim to obtain possession because, for example, of a breach by the defender of a material obligation in the charter.".
243 Breach of the arrestment would be punishable as a contempt of court: cf Inglis and Bow v Smith and Aikman (1867) 5 M 320.
244 Which it replaces: see para 7.86 above.
245 (Specific relief may be granted in interdict proceedings) re-enacting Court of Session Act 1868, s 89.
246 Re-enacting part of s 6(7) of the Administration of Justice (Scotland) Act 1933. It provides: "In any cause in dependence before the Court, the Court may, on the motion of any party to the cause, make such order regarding the interim possession of any property to which the cause relates, or regarding the subject matter of the cause, as the Court may think fit". The "Court" here means the Court of Session (1988 Act, s 51).
247 Maersk Co Ltd v National Union of Seamen 1988 SLT 828 (OH) at p 831 per Lord Cullen; see also Stirling Shipping Co v National Union of Seamen 1988 SLT 832 (OH) at p 836 per Lord Cullen.
248 See para 7.88.
249 See para 7.59.
250 [1985] 1 Lloyd's Rep 549.
251 Supreme Court Act 1981, s 20(2)(b).

prefer that theory in the context of Scots law. Most consultees agreed that the grant of warrant should be discretionary,[252] - only one (the Joint Committee) favouring entitlement.

7.92 We recommend:

In proceedings having a non-pecuniary conclusion for enforcement of a claim mentioned in paragraphs (p) to (s) of section 47(2) of the Administration of Justice Act 1956, the court's power to grant warrant for an arrestment in rem under section 47(3)(b) of that Act should be discretionary and exercisable only by a Lord Ordinary or sheriff.

(Recommendation 58; Draft Bill, clause 29(1))

(c) Diligence on the dependence of actions in personam

(i) Arrestment of ship on dependence as discretionary interim remedy

7.93 In our Discussion Paper No 84, we suggested that our proposal for the discretionary grant of warrants for arrestment on the dependence of non-maritime property would be appropriate for arrestments of ships and their apparel on the dependence of admiralty actions in personam.[253]

7.94 Consultees divided on broadly the same lines as in relation to non-maritime subjects. The Faculty of Advocates, for example, argued that the case against judicial discretion was stronger since in their view speed is more often essential than in most other arrestments on the dependence.

7.95 It may be conceded that, in the case of arrestments of ships, speed is often essential. In some cases the delay caused by an application to the court, even if it takes only a few hours more than the signeting of a summons, may be fatal. On the other hand, it is necessary to bear in mind the interests of the defender and third parties as well as the pursuer. An arrestment of a ship on the eve of its sailing can have damaging economic consequences for defenders and third parties.

7.96 There is some indication that the law on the recall of arrestments of ships is more favourable to defenders than in the case of arrestments of other types of property: "security will be more readily modified or dispensed with than in the case of other subjects, and the ordinary rule of in dubio requiring caution will not necessarily be followed".[254] This suggests that the reformed law of arrestments of maritime subjects on the dependence should be at least as favourable to defenders as in the case of arrestments of non-maritime subjects.

7.97 Moreover, funds in a Scottish bank can be transferred to a foreign bank account just as quickly as a ship can be moved. For these reasons, the automatic grant of warrant for arrestment on the dependence is no more justifiable in the case of ships than in the case of funds in a bank.

7.98 We recommend that:

Recommendations 1 (diligence on the dependence to be extraordinary remedy available only in special circumstances) and 2 (introducing judicial discretionary grant of warrant for diligence on the dependence) should apply to a warrant for arrestment of a ship on the dependence of an admiralty action in personam. Recommendations 3 - 8 should apply accordingly.

(Recommendation 59; Draft Bill, clause 27(1) and (3))

(ii) Claims specified in Administration of Justice Act 1956, section 47(2)(p) to (s)

7.99 Under section 47(3)(a) of the 1956 Act, arrestment in common form of a ship is competent on the dependence of an admiralty action in personam containing a pecuniary conclusion appropriate for the

252 Discussion Paper No 84, Proposition 31(2) (para 3.54).
253 See Discussion Paper No 84, Proposition 32(3) (para 3.64).
254 McMillan, pp 71, 72.

enforcement of any claim of a type specified in paragraphs (p) to (s) of section 47(2) if the ship is the ship to which the pecuniary conclusion of the action relates.

7.100 Paragraphs (p) to (s) of section 47(2) are quoted at paragraph 7.87 above. The conditions of competence of an arrestment on the dependence which are imposed by section 47(3)(a) differ from the conditions of competence laid down in section 47(1).[255] In section 47(3)(a), no mention is made of an arrestment on the dependence of a share, or shares, in a ship. Yet it is clear that in a claim of a type mentioned in paragraphs (p) to (s) of section 47(2), the defender may be the owner of only one share, or only some of the 64 shares, in a ship. Accordingly, on a literal interpretation of section 47(3)(a), where the defender is or claims to be the owner of only one share in a ship, the whole ship - as distinct from the share - may be arrested on the dependence (and by necessary inference, sold in a process of sale). This seems to have been a drafting error.

7.101 In our Discussion Paper we suggested that section 47(3)(a) should be amended so as to refer to a share in a ship, as well as to a ship.[256] On consultation, the Joint Committee considered that it was essential that provisions should remain to enable a creditor to enforce his diligence against the whole ship even if the defender holds only one share of it. In our view, the creditor should be entitled to detain the whole ship but not to sell more than his debtor's share. The majority of consultees agreed with our suggestion.

7.102 Claims specified in section 47(2)(a) to (o). Under section 47(1) of the 1956 Act, a warrant for arrestment in common form of "property" on the dependence (of an admiralty action in personam) is authority for the detention of the ship only if the conclusion in respect of which the warrant is issued is appropriate for the enforcement of a claim specified in section 47(2) paragraphs (a) to (o),[257] and either (a) the ship is the ship with which the action is concerned or (b) all the shares in the ship are owned by the defender.

7.103 This important provision restricts the types of case in which an arrestment of a ship or cargo on the dependence were competent at common law. It seems clear that section 47(1) was not intended to replace certain relevant common law rules. Thus, though section 47(1) refers to an arrestment of "property", this must have reference to an arrestment of a ship, or a share in a ship, or her apparel, or possibly her cargo,[258] which alone at common law provide authority for detaining a ship.

7.104 The same: ship partly owned by defender. It seems clear also that section 47(1) has reference to a ship or a share in a ship belonging to the defender at the time of execution of the arrestment. It provides that an arrestment on the dependence of a ship etc is incompetent "unless either - (a) the ship is the ship with which the action is concerned, or (b) all the shares in the ship are owned by the defender". As one commentator[259] observes:

> "If section 47(1)(a) is read literally and in isolation from the common law position it would allow a ship to be arrested if it did not belong to the defender at all just because it was the ship with which the action was concerned. This would give the status of a maritime lien to every claim encountered in s.47(2) which would be an absurd result."

It seems clear therefore that section 47(1)(a) has reference to a ship owned, at least partly, by the defender at the time of execution of the arrestment.[260] In our Discussion Paper we suggested that section 47(l)(a) should be so amended in the interests of clarity. A majority of consultees agreed with our suggestion. Only the Joint Committee disagreed, asserting that if such a suggestion were to be accepted, it would create a situation where the defender could avoid arrestment of the ship by disposing of his interest in it

---

255 Which also bears to apply inter alia to paragraphs (p) to (s) of section 47(2) but since section 47(1) is expressed to be "subject to" section 47(3), section 47(3) rules in the event of any conflict between section 47(1) and section 47(3).

256 Discussion Paper No 84, Proposition 32(1), (para 3.64).

257 S 47(1) refers also to claims specified in s 47(2) paras (p)-(s).

258 We revert to cargo on board ship at para 7.137 below.

259 Inglis, p 88.

260 See eg William Batey & Co (Exports) Ltd v Kent 1985 SLT 490, affd 1987 SLT 557.

after the emergence of the claim but before proceedings could be raised. The Committee thought it was unnecessary to do anything, but, if anything was done, it suggested that the provision should state that the defender was the owner of the ship or a share in the ship at the date of emergence of the claim. In Scots law, however, the requirements of arrestment have to be satisfied at the time of execution of the arrestment not the commencement of the action and we see no reason to depart from that general rule.

7.105 Definition in section 47(2) of claims for which arrestment on dependence competent. The definition in section 47(2) of the 1956 Act of the claims which may be secured by an arrestment on the dependence, and the analogous provisions in the corresponding English legislation, have been litigated in a number of reported cases.[261] A review of section 47(2) is beyond the scope of this Report.

7.106 We recommend that:

(1) In the legislation following this report, in re-enacting the Administration of Justice Act 1956, section 47(l)(a) (which makes it competent to arrest in certain circumstances a ship on the dependence if it is the ship with which the depending action is concerned) it should be made clear that the arrestment is competent only if the defender is the owner of the ship, or a share in the ship, at the time of the execution of the arrestment.

(2) In our recommended legislation replacing the 1956 Act, section 47(3)(a), (which provides for the arrestment of a ship on the dependence of an action to enforce a claim specified in paragraphs (p) to (s) of section 47(2) of that Act), it should be made clear that the arrestment may be of a share in a ship or of the ship.

(Recommendation 60; Draft Bill, clause 27(1) and (2))

7.107 Diligence against non-maritime property on dependence of admiralty actions in personam. It seems to be competent for a warrant for arrestment in common form of property, other than a ship or her cargo, and even for inhibition on the dependence, to be granted on the dependence of an admiralty action in personam.[262] This result seems entirely satisfactory.

(d) Right to re-arrest same ship, or to arrest a second sister ship, on dependence

7.108 The precise formulation of the restriction on the repeated arrestment of the same ship, and on the arrestment of two or more ships, on the dependence of the same action (or to secure the same claim), has raised difficulties within Scotland and beyond. As we have seen, before the Administration of Justice Act 1956, section 47, came into operation, there was no formal limit in Scots law on the number of ships owned by the defender which could be competently arrested on the dependence of an action for payment.[263] Until a recent case[264] it was however not altogether clear how far section 47(1) had limited that right.[265] Section 47(1) provides in effect that it is not competent to arrest on the dependence a ship "unless either (a) the ship is the ship with which the action is concerned, or (b) all the shares in the ship are owned by the defender ..." (emphasis added). If no questions of cross-border or international harmonisation arose, the provision would probably have been construed as not limiting the number of ships which might be arrested, provided that they complied with either paragraph (a) or paragraph (b).[266] In Interatlantic (Namibia) (Pty) Ltd v Okeanski Ribolov Ltd,[267] however, it was held, following The Banco[268] an English

261 For a survey of the cases, see Inglis, pp 79-85.

262 There is nothing in RCS, Chapter 46, to suggest that diligence against non-maritime subjects is not competent. It was competent under the pre-1994 rules: RC 139, and RC, Appendix, Form 14 as read with Form 1.

263 In Sheaf Steamship Company v Campania Transmediterranea 1930 SC 660, the Court of Session held that while Scots Admiralty law may be the same as English Admiralty law, the law on remedies and procedure was not the same, and that an arrestment to found jurisdiction could be laid against a sister-ship of a wrong-doing ship, though an arrest of the sister-ship would have been incompetent under English Admiralty law. The same reasoning must have applied to arrestment on the dependence.

264 Interatlantic (Namibia) (Pty) Ltd v Okeanski Ribolov Ltd 1996 SLT 819 (OH).

265 See Inglis, p 88.

266 Discussion Paper No 84, para 3.61.

267 1996 SLT 819 (OH).

268 [1971] 1 Lloyd's Rep 49. See also comments in Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co 1985 SC (HL) 1 per Lord Keith of Kinkel.

case, that the purpose of the 1956 Act was to incorporate into our law the provisions of the Brussels Arrest Convention, which provides by article 3(3):

> "A ship shall not be arrested, nor shall bail or other security be given more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claim by the same claimant; and, if a ship has been arrested in any one of such jurisdictions, or bail or other security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in the same ownership for the same maritime claim shall be set aside, and the ship released by the Court..., unless the claimant can satisfy the Court ... that the bail or other security had been finally released before the subsequent arrest or that there is good cause for maintaining the arrest."

It has been observed that the article expressly covers the three under-noted situations.[269] The general policy against multiple or repeat arrestments for the same claim, which was given effect in England in section 21(8) of the Supreme Court Act 1981, received the general support of consultees who responded to our Discussion Paper.[270]

7.109 It does not appear however that an absolute prohibition of multiple or repeat arrestments is required by the Convention. This is recognised by the reference to "good cause for maintaining the arrest" at the end of article 3(1). Berlingieri remarks :

> "Article 3(1) does not, however, cover the situation where the claimant applies for a second arrest. However, as the second arrest must not be set aside when the bail paid to release the ship from the first arrest (or to prevent a threatened arrest) has been released or 'when there is other good reason (sic) for maintaining the arrest', similarly, a second arrest must be granted in the same situations".

In other words the Convention allows a second arrestment of the same ship if there is good cause for the second arrestment within the meaning of article 3(1). The travauxpreparatories suggest that an example of "good cause" might be a sudden inflation of the currency in which the security is granted.[271] Another example might be where the ship subject to the original arrestment had been removed from the territorial jurisdiction in breach of arrestment.[272] The Lisbon draft identifies certain other cases where a second or repeat arrest for the same claim should be permitted.[273] While it would be premature to recognise these examples in our statute law, the prohibition of multiple arrestments of sister ships, and of repeat arrestments of the same ship, should not be absolute but should be qualified by a requirement that the claimant show good cause for the second arrestment in accordance with article 3(1) of the Convention.

7.110 We recommend:

> **It should be made clear by statute that where a ship has been arrested on the dependence of an action to secure a claim mentioned in the Administration of Justice Act 1956, section 47(2)(a) to (o), then:**
>
> **(a) that ship may not be arrested on the dependence again; and**
>
> **(b) while the first-mentioned arrestment is in effect, no other ship owned by the defender may be arrested on the dependence,**
>
> **to secure the same claim unless, in an application by the pursuer for a new warrant of arrestment on the dependence to secure that claim, the court is satisfied not only that the**

269 Berlingieri, Arrest of Ships (2d edn) p 88: "(i) arrest of a ship that had previously been arrested in respect of the same maritime claim; (ii) arrest of a ship that had been released from a previous arrest after bail or other security had been provided; and (iii) arrest of a ship after bail or other security had been provided in order to avoid a threatened arrest".

270 Discussion Paper No 84, Proposition 32(3) (para 3.64).

271 International Maritime Committee, Bulletin No 5, pp 263, 264 (British delegation).

272 Cf Admiralty Act 1988 (Australia), s 20(3)(b); ALRC 33, p 165.

273 Viz (broadly) where the security obtained is inadequate, or the cautioner is unlikely to be able to fulfil his obligations, or the previous arrest was released by the claimant on reasonable grounds: Lisbon draft, Article 5(1).

criteria for the grant of warrant are met but also that there is special cause to grant the warrant, with or without conditions.

(Recommendation 61; Draft Bill, clause 31)

(4) Protection of owners of arrested ships: pursuer's liability and counter-security

(a) The Scots rule in its international context

7.111 Scots law. The common law rule that a litigant using diligence on the dependence is generally not liable for loss which has been caused if his claim should eventually prove to be unfounded[274] applies to admiralty arrestments on the dependence.[275]

> "The speciality, that the subject arrested ... is a ship, is altogether unimportant. The same warrant or precept of arrestment to which the pursuer of an action is entitled enables him to arrest the money, the goods, the cattle, and the ships of the defender, - all or any of them; and it would be a strange inconsistency, that he should be under one kind of responsibility when he arrests the ship, and another and a different kind of responsibility when he arrests the freight earned by the ship".[276]

The pursuer is not liable without proof of malice and want of probable cause,[277] which is extremely difficult to prove. Requiring a pursuer to find security for the unjustifiable use of admiralty arrestments may in theory be competent[278] but in practice is virtually unknown.

7.112 We have not traced any direct authority on liability for damages arising out of an unjustifiable arrestment in rem under the 1956 Act, section 47(3)(b) supporting a non-pecuniary claim.[279] There is however a close analogy with interim interdict, which before 1956 was the appropriate interim remedy.[280] This suggests that a pursuer arresting in rem under section 47(3)(b) would (or should) be liable in damages to the defender for patrimonial loss if he fails to obtain the decree adfactum praestandum which the arrestment in rem supports. But the matter is not free from doubt. As regards an arrestment in rem enforcing a maritime lien, the closest analogy in the existing law is a sequestration for rent under the landlord's hypothec, warrant for which is granted at the pursuer's risk.[281] Again it is not clear whether this analogy, or the ordinary ship arrestment analogy, governs the standard of liability in damages for wrongful or unjustified use.

7.113 English law. The rule in English law on liability for wrongful or unjustified admiralty arrests in rem is similar to the Scottish rule on liability for wrongful or unjustified diligence on the dependence. A plaintiff whose claim fails is not liable in damages to the owner of the arrested ship unless the arrest in rem is effected or maintained by the plaintiff in bad faith or with "crassa negligentia" (gross negligence).[282] Significantly, this rule has been recently criticised by the English court:[283]

> "This is a rule of English law which can bear very harshly on shipowners who for some special reason may be unable to obtain release of their vessel by putting up security. It is not a rule which is found in civil law systems. The more widely used procedure for obtaining security is the Mareva injunction, but there is an undertaking in damages required and the Liability in respect of that undertaking arises upon the basis that, if the underlying claim fails, the plaintiff is liable for all losses caused by the injunction. The absence of a similar facility in Admiralty proceedings in rem may thus leave without remedy an innocent defendant shipowner who has suffered loss by' an unjustifiable arrest but who is unable to establish malice or crassa negligentia".

---

274 See para 3.53 above.
275 Graham Stewart, p 773; Wolthekker v Northern Agricultural Co (1862) 1 M 211.
276 Wolthekker v Northern Agricultural Co (1862) 1 M 211 at p 213 per Lord Justice-Clerk Inglis (arrestment of ship on dependence).
277 *Idem.*
278 Cf para 3.64.
279 *See para 7.86 et seq.*
280 Jones v Samuel (1862) 24 D 319.
281 Watson v McCulloch (1878) 5 R 843.
282 Jackson, Enforcement of Maritime Claims (2d edn) pp 337, 338.
283 The "Kommunar" (No 3) [1997] 1 Lloyds Rep 22 at p 33 per Colman J.

In Canada and New Zealand the law is similar.[284]

7.114 Recent Commonwealth legislation. In South Africa, the Admiralty Jurisdiction Regulation Act (No 105 of 1983), section 5(4), enacts:

> "any person who ... without good cause obtains the arrest of property or an order of the court, shall be liable to any person suffering loss or damage as a result thereof for that loss or damage".

If transplanted to Scots law, the expression "without good cause" could be construed narrowly[285] or liberally. Its "breadth and vagueness" was criticised by the Law Reform Commission of Australia and in an "attempt to strike a more precise balance between plaintiff and defendant,"[286] the Australian Admiralty Act 1988 (No 34), section 34(1), provides:

> "Where, in relation to a proceeding commenced under this Act:
>
> (a) a party unreasonably and without good cause:
>
> (i) demands excessive security in relation to the proceeding; or
>
> (ii) obtains the arrest of a ship or other property under this Act; or
>
> (b) a party or other person unreasonably and without good cause fails to give a consent required under this Act for the release from arrest of a ship or other property;
>
> the party or person is liable in damages to a party to the proceeding, or to a person who has an interest in the ship or property, being a party or person who has suffered loss or damage as a direct result."

This is, and was intended to be, narrower in three respects than the South African provision. First, as regards the standard of the claimant's conduct, it applies only to arrests which are made "unreasonably" as well as "without good cause", to avoid the possibility of a penalty where the arrest appeared reasonable at the time but turned out to be unjustified.[287] Second, as regards title to sue, only a litigant or person with an interest in the ship can recover. Third, as regards causation, the loss must be the direct result of the arrest.[288] In South Africa, there is no mandatory requirement on the claimant to lodge security for loss caused by the arrest (sometimes called "counter-security").[289] Interested parties however can apply to the court to order the claimant, on good cause shown, to lodge security for legal costs[290] or for a counter-claim for damages for wrongful arrest.[291] There is no precisely equivalent provision requiring the provision of counter-security in the Australian Civil Jurisdiction Act 1988.

7.115 European legal systems. Of the civil law countries of continental Europe, it has been said that the arrester "is responsible for all damages arising out of the arrest of a ship whenever it is proved that the arrest was not justified".[292] In European countries, the law and practice on provision by the claimant of counter-security is not uniform. Such provision may be mandatory, at the discretion of the court, or not required at all. It is mandatory in for example Belgium, Denmark, Finland, Norway, Spain and Sweden.[293] In some countries, eg Germany, counter-security is at the discretion of the court. In the case

---

284 Counter-security for the debt is generally not required but, if the applicant is a foreign resident, counter-security for the defendant's legal costs, or in New Zealand the registrar's fees and expenses, may be required: A D McArdle (ed), International Ship Arrest (1988) p 52 (Canada); p 208 (New Zealand); Smith (ed), Ship Arrest Handbook (1997) p 28 (Canada); pp 164,165 (New Zealand).

285 Cf the phrase "want of probable cause" in the current Scottish test.

286 Law Reform Commission of Australia, Report No 33 on Civil Admiralty Jurisdiction (1986) ALRC 33, para 302.

287 ALRC 33, para 302.

288 Idem.

289 A D McArdle (ed), International Ship Arrest (1988) p 266; Smith (ed), Ship Arrest Handbook (1997) p 209.

290 Admiralty Jurisdiction Regulation Act 1983, s 5(2)(b).

291 Admiralty Jurisdiction Regulation Act 1983, s 5(4)(b).

292 Report on 1952 Arrest Convention, CMI Bulletin, 105, p 3, quoted in Berlingieri, Arrest of Ships (2d edn) p 132, n 74.

293 A D McArdle (ed), International Ship Arrest (1988) p 26 (Belgium); p 76 (Denmark); p 105 (Finland); p 213 (Norway);p 271 (Spain); p 282 (Sweden); Smith (ed), Ship Arrest Handbook p 19 (Belgium); p 52 (Denmark); p 170 (Norway); p 221 (Spain); pp 230,231 (Sweden).

of a strong well documented claim, it may not be required.[294] In Italy counter-security may be imposed whenever the debtor's liability is not evident.[295] Counter-security is not normally required in France, Greece, and the Netherlands.[296]

7.116 Brussels Arrest Convention and Lisbon draft. In the negotiations leading to the Brussels Arrest Convention, the civil law countries[297] favoured, but the common law countries opposed, a provision giving a shipowner a right to damages for wrongful arrest.[298] As a result of this disagreement, article 6 of the Convention does not impose uniform rules of liability for damages for wrongful or unjustified arrest on the claimant but refers the substantive law to the law of the state in whose jurisdiction the arrest was made or applied for (lex fori arresti). In the face of continued international disagreement, the Lisbon draft also does not regulate the substantive law but instead article 6(1) confers on the court of the arrestment power to impose counter-security. It provides:

> "The Court may as a condition of the arrest of a ship, or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security of a kind and of an amount, and upon such terms, as may be determined by that Court for any loss which may be incurred by the defendant in consequence of:
>
> (a) the arrest having been wrongful or unjustified; or
>
> (b) excessive security having been demanded and obtained."[299]

Article 6(2) of the Lisbon draft would concede to the court of the arrest jurisdiction to determine the extent of the claimant's liability, if any, for wrongful or unjustified arrest or excessive security.[300]

(b) Recommendations for reform

7.117 General. The differences between legal systems show this to be a very difficult question in policy terms. The main argument against reform is that Scots law should not be different from the English law. One aspect of this is the risk of forum-shopping. The English rule on damages and counter-security for unjustified arrest differs from the English rule on Mareva injunctions. So our general recommendations on strict liability and counter-security for arrestment of non-maritime subjects,[301] which would achieve broad cross-border harmonisation with the rule on Mareva injunctions, would not achieve cross-border harmonisation if, and in so far as, they were to be extended to maritime arrestments. It follows that this solution might deter litigants from raising admiralty actions in Scotland and instead to bring them in England in order to take advantage of the very limited, plaintiff-oriented rule on liability and the absence of any judicial power to order counter-security. Apart from forum-shopping, some may believe that pursuers in Scottish admiralty actions should not be under a significant disadvantage compared with plaintiffs in English admiralty actions.

7.118 While we sympathise with this view, we believe that reform is required in the light of (i) our general

294 McArdle (ed), International Ship Arrest p 117. According to Smith (ed), Ship Arrest Handbook: "German courts nowadays normally request such security".

295 McArdle (ed), International Ship Arrest p 163; Smith (ed), Ship Arrest Handbook p 116.

296 McArdle (ed), International Ship Arrest p 127 (Greece) (the court has power to oblige the petitioner to put up counter security but in practice does not do so); p 206 (Netherlands) (a request by the debtor for counter security for the cost of the bank guarantee in releasing the ship is sometimes honoured); Smith (ed), Ship Arrest Handbook p 73 (France) "very rarely used"; p 87 (Greece) "extremely rare"; p 157 (Netherlands) "hardly ever occurs".

297 Including for this purpose the Scandinavian countries.

298 Berlingieri, Arrest of Ships (2d edn) pp 131,132. The United Kingdom also opposed a provision that the court of the place where the ship is arrested may require the claimant to provide security: ibid, p 133. The British delegate observed that in England actions for wrongful arrest were rare and he had never heard any complaint in this respect: Proces-verbaux, p 102.

299 Article 6(l)(protection of owners and demise charterers of arrested ships); Berlingieri, Arrest of Ships (2d edn; 1996) pp!82 -184.

300 The issue of liability is referred by article 6(3) to the law of the state where the arrest was effected.

301 See paras 3.53 - 3.63 and 3.64 -3.71.

recommendations on a pursuer's strict liability in damages for the wrongful or unjustified use of arrestment of non-maritime property on the dependence,[302] and on the provision of counter-security for such arrestment;[303] (ii) the recent judicial criticism of the English rule, which in an Admiralty context broadly corroborates our recommendations;[304] (iii) the recent legislation in South Africa and Australia;[305] and (iv) the terms of the Lisbon draft on judicial powers to order counter-security.[306] So far as a pursuer's liability for unjustified arrestment on the dependence is concerned, one looks in vain for any ground of principle to distinguish arrestments of ships or cargo from arrestments of non-maritime property. To apply different principles would make our law on liability for the unjustified exercise of diligence on the dependence inconsistent and incoherent. As Lord Justice-Clerk Inglis observed, a pursuer should be under the same kind of responsibility when he arrests a ship, as when he arrests the freight earned by the ship.[307]

7.119 Strict liability or liability for unreasonable use? As regards the substantive law on the pursuer's liability,[308] the choice seems to lie between (i) extending our general .recommendations on strict liability in respect of unjustified arrestments to admiralty arrestments; and (ii) introducing, on the model of the recent Australian statute, a rule of liability for using an admiralty arrestment "unreasonably and without good cause".[309] In our view, the need for consistency and coherence referred to above requires that the first option should apply to admiralty arrestments on the dependence and arrestments in rent under the 1956 Act, section 47(3)(b) supporting non-pecuniary claims.

7.120 Unjustified admiralty arrestment in rem enforcing purported maritime lien. In the case of an admiralty arrestment in rem enforcing a maritime lien, or a purported maritime lien, in an action in rem, the considerations are somewhat different. On the one hand, the closest analogy in the existing law is a sequestration for rent under the landlord's hypothec. This remedy is treated as "a special remedy granted only on a representation of facts for the truth of which the applicant is responsible".[310] The diligence is at the applicant's risk and he is liable in damages for loss caused by its use without proof of malice and want of probable cause not only where it is formally irregular but also where, though formally regular, it is used unjustifiably.[311]

7.121 We think however that this standard of liability is too high. Unlike an arrestment on the dependence or an arrestment in rem supporting a non-pecuniary claim, an arrestment in rem enforcing a maritime lien is an integral part of an action in rem and an essential step towards obtaining decree. The pursuer in an action in rem has no choice but to apply for the insertion of a warrant for arrestment in rem in the summons or initial writ since the competency of his action in rem depends on it. It is not an "optional extra" interim remedy which, at least in strict law, the other types of maritime arrestment undoubtedly are. This suggests that it would be unfair always to place the risk of its use on the pursuer.

7.122 Nevertheless if the pursuer fails to obtain a declarator of a maritime lien, the defender may have a justifiable grievance having regard to the serious loss which he may have suffered. The arrestment in rem giving effect to the purported maritime lien may be used unjustifiably in circumstances where the defender cannot prove malice and want of probable cause on the pursuer's part and so is left without a remedy. This suggests to us that the Australian solution of imposing liability for "unreasonable use" may be a particularly apt standard of liability for arrestments in rem enforcing purported maritime liens unjustifiably.

---

302 Recommendation 6 (para 3.63).
303 Recommendation 7 (para 3.71).
304 The "Kommunar" (No 3) [1997] 1 Lloyd's Rep 22 at p 33 per Colman J, quoted at para 7.113 above.
305 See para 7.114 above.
306 Article 6, quoted at para 7.116 above.
307 Wolthekker v Northern Agricultural Co (1862) 1 M 211 at p 213 quoted at para 7.111 above.
308 le as distinct from a judicial power to order counter-security.
309 Admiralty Act 1988 (Australia), s 34(1) quoted at para 7.114 above.
310 Graham Stewart, p 776.
311 Graham Stewart, p 776 - 778. Examples of unjustifiable use arise where the rent has been paid or consigned, or payment offered and refused, or the tenant has not got possession of the whole subjects.

7.123 Counter-security. In the light of the Lisbon draft,[312] we think that the opportunity should be taken to introduce similar provisions on counter-security which would not only be internationally acceptable but would also be consonant with our recommendations for non-maritime arrestments.[313]

7.124 We recommend:

(1) Recommendations 6 (liability for wrongful or unjustified diligence) and 7 (caution or consignation by pursuer) should apply to wrongful or unjustified admiralty arrestments on the dependence and arrestments in rent under the Administration of Justice Act 1956, section 47(3)(b) securing non-pecuniary claims.

(2) Where in an admiralty action the pursuer unreasonably and without good cause uses an admiralty arrestment in rent to enforce a maritime lien, or purported maritime lien, against a ship or other maritime property he should be liable in damages for loss caused as a direct result to another party to the action or to a person having an interest in the ship or property.

(3) The court in an admiralty action should be empowered, as a condition of granting warrant for an admiralty arrestment in rent or on the dependence, or of refusing to recall or to restrict such a warrant or arrestment, to require the pursuer to provide security for any loss which may be incurred by another party to the action, or by a person having an interest in the ship or property, as a direct result of the arrestment having been wrongful or unjustified.

(4) The court should have power to vary or recall any order mentioned in para (3) above, with or without conditions.

(Recommendation 62; Draft Bill, clauses 32 and 33)

(5) Other aspects of admiralty arrestments

(a) Ancillary warrants and orders

7.125 In our Discussion Paper[314] we analysed the law and practice on warrants to dismantle, warrants to bring into harbour and other ancillary orders.[315] On consultation there was general agreement with our view that these powers are sufficient to meet any contingency which is likely to arise.[316] We therefore make no recommendation on this matter.

(b) Arrestment of ships and their cargo on Sundays

7.126 It is (or was) a general rule of the common law that diligence cannot be executed on a Sunday.[317] In our Discussion Paper[318] we proposed that the common law rule should be abrogated in relation to the arrestment of ships or of cargo on board ships, whether on the dependence, in rem, in execution or to found jurisdiction.

7.127 The common law rule was abrogated, in relation to arrestment on the dependence of a ship in an Admiralty action, by the case of Nederlandse Scheepshypotheekbank NV v Cam Standby Ltd™ The court recognised that the rule could give rise to:

---

312 Article 6, quoted at para 7.116 above.

313 See Recommendation 7 (para 3.69).

314 Discussion Paper No 84, paras 3.71 - 3.77.

315 The "court has a wide discretion to make whatever orders that seem to it appropriate with regard to the movement of a vessel which has been arrested, particularly where her continued presence at a jetty or quay is causing loss and damage to an innocent third party": Inglis, p 92; see Svenska Petroleum AB v HOR Ltd 1982 SLT 343; West Cumberland Farmers Ltd v Director of Agriculture of Sri Lanka 1988 SLT 296, discussed at paras 7.155 - 7.160.

316 The Regional Sheriff Clerks considered that statutory provision was necessary to facilitate recovery of an arrested ship which has sailed in breach of arrestment, but the other consultees disagreed.

317 Graham Stewart, pp 235, 317, 338, 713.

318 Discussion Paper No 84, paras 3.97-3.100, Proposition 36.

319 1994 SCLR 956.

"difficulty nowadays with, for example, tankers or bulk-ore carriers whose turn-round time is very short, particularly as such vessels are frequently discharged over the weekend."[320]

--The Rules of the Court of Session of 1994 have taken matters a stage further by permitting arrestment on a Sunday in the case of an arrestment of a ship in rem or on the dependence, or an arrestment in rem of cargo on board ship,[321] or on the dependence of an admiralty action in personam, or of an ordinary action, of cargo on board ship.[322]

7.128 In the case of an arrestment in rem, or an arrestment on the dependence, of cargo landed or transhipped the common law rule still applies. We think however that any extension of the rule to these cases should be effected by rules of court.

(c) Incidence of liability for expenses of arrestment and sale of a ship and recall of arrestment

7.129 Expenses of arrestment. At common law the expenses of an arrestment on the dependence in common form of a ship follow the ordinary rule discussed above,[323] and are not recoverable as an expense of process since they are not an essential prerequisite of obtaining decree for payment. As we discussed above, they may be recoverable at common law in a subsequent action and, if so, they would be recoverable out of the arrested property under section 93(2) of the Debtors (Scotland) Act 1987 which provides:

> "Subject to subsection (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 and sale shall be recoverable from the debtor out of the arrested property; and the court shall grant decree in the action of furthcoming for the payment of the balance of the expenses not so recovered."

This provision applies to arrestment on the dependence in common form of a ship, except that no mention is made of the court granting decree in an action of sale (as distinct from an action of furthcoming) for the payment of the unpaid balance of the expenses.

7.130 In our Discussion Paper[324] we proposed the same solution as applies to the expenses of arrestments on the dependence of non-maritime subjects outlined in Part 3.[325] This proposal was supported by consultees.[326]

7.131 The expenses of an arrestment in rem to enforce a maritime lien and the expenses of sale (including the expense of moving the ship to the place of sale and of the related insurance premium) are necessary incidents of an action in rem and are therefore recoverable as part of the expenses of process.[327] Section 93(2) of the Debtors (Scotland) Act 1987 is drafted in terms suitable for an action in personam and was not intended to apply to actions in rem, in relation to which section 93(2) is unnecessary.

7.132 Our proposal in our Discussion Paper[328] that the expenses of an arrestment in rem to enforce a maritime lien and the expenses of sale should continue to be recoverable as part of the expenses of the action in rem was supported on consultation.

7.133 We have traced no direct authority on the incidence of liability for the expenses of an arrestment in rem under section 47(3)(b) of the Administration of Justice Act 1956. Since such an arrestment is not a necessary step in obtaining decree, in principle the expenses should not be recoverable as expenses of process at common law. The nearest analogy is with interim measures protecting property pendente lite,

320 Inglis, p 97.
321 RCS.r 16.13(1).
322 RCS, r 16.14(2).
323 See paras 3.98-3.101.
324 Discussion Paper No 84, paras 3.101 and 3.105, Proposition 37(1).
325 *Paras 3.98 et seq.*
326 The Joint Committee said the whole question of what expenses are recoverable in a party and party situation requires to be reviewed.
327 CfBrvdersen, Vaughan and Co v Flacks RederiA/S (1921) 1 SLT 60; Rattan v A/S Durban Hansen 1919 SC 154.
328 Discussion Paper No 84, paras 3.102 and 3.105, Proposition 37(2).

eg interim interdict, in which the award of expenses is discretionary. We suggested in our Discussion Paper[329] that that analogy should be followed and consultees did not dissent.

7.134 Expenses of recall and caution. The general rules applicable to liability for the expenses of recall of an arrestment on the dependence including the expenses of providing caution as well as the expenses of the application, apply to the recall of arrestments of ships whether on the dependence or in rent.[330] These rules have been considered in Part 5 where we conclude that no legislation is necessary.[331]

7.135 We recommend that:

(1) The rules relating to the expenses of an arrestment on the dependence should apply in relation to the arrestment on the dependence of a ship.

(2) The expenses of an arrestment in rent to enforce a maritime lien and the expenses of sale should continue to be recoverable as part of the expenses of the action in rent.

(3) The expenses of an arrestment in rem under section 47(3)(b) of the Administration of Justice Act 1956 should be discretionary.

(Recommendation 63; Draft Bill, clause 34)

(d) Completion of diligence by sale or furthcoming

7.136 In our Discussion Paper,[332] we considered the completion of an arrestment of a ship or cargo by judicial sale and proposed various amendments to the rules of court. These proposals[333] have generally been implemented by the Rules of the Court of Session of 1994, rule 46.5, and we make no further recommendations.

(6) Arrestment of cargo on board ship

7.137 The law on the arrestment of cargo on board a ship resembles the law on arrestment of ships in some respects and differs in other respects. There is no comprehensive Institutional or judicial analysis of this topic and the law is to some extent uncertain. The brief treatment of the law in the Institutional writers assimilated arrestment of cargo to arrestment of ships.[334] It may be that the common law has changed since the Institutional period which may be taken as ending about the time (1830) when admiralty jurisdiction was transferred to the Court of Session and sheriff courts.[335] Thus McMillan remarks:

> "Except where arrestment in rem is used, there is no distinction in principle between the arrestment of goods at sea and on land. The arrestment of a ship does not necessarily arrest her cargo and imposes no nexus on the cargo except in so far as practical difficulty may be experienced in discharging it from the arrested vessel. Formerly the arrestment of cargo was an Admiralty process, for which the concurrence of the Judge Admiral was necessary, but since the abolition of the Admiralty Court this distinction between arrestments of goods at sea and on land no longer holds."[336]

There are however some important differences in the modern law between arrestments of cargo on a ship and arrestments of goods on land. For example, it is thought that goods on board ship may be arrested in the hands of the owner of the goods, which is incompetent in the case of goods on land. Section 23 of the Court of Session Act 1830 provided that "the finding of caution and using of arrestment heretofore observed in the High Court of Admiralty, and all regulations relative thereto, may be enforced in" the

329 Discussion Paper No 84, paras 3.103 and 3.105, Proposition 37(3).
330 See McMillan, p 83.
331 See paras 5.44 - 5.48.
332 Discussion Paper No 84, paras 3.106-3.114, Proposition 38.
333 Eg that a judicial sale of a ship may be made by private bargain rather than by public roup: Discussion Paper No 84, paras 3.112 and 3.114, Proposition 38(2).
334 Bankton, Institute IV, 41, 9; Baron Hume's Lectures vol 6, pp 94-95, Bell, Commentaries vol 2, p 60.
335 Court of Session Act 1830, ss 21-23. The fifth and last personal edition of Bell's Commentaries was published in 1826.
336 McMillan, p 62.

Court of Session and sheriff court. This language does not suggest that the transfer of admiralty jurisdiction was intended to change the law on arrestment of cargo on board ship.

(a) Arrestment, not poinding, competent; grant of warrant to be discretionary

7.138 The greater weight of authority is to the effect that, in Graham Stewart's words: "ships in the possession of the debtor or his servants, and their cargoes, are arrested not poinded".[337] The primary source of this rule is Bankton, who cites a case which has never been found.[338] The principle underlying the rule as to both ships and cargo was doubted by Bell[339] and Graham Stewart,[340] but Lord Ivory[341] and even Graham Stewart[342] state that the rule is universally accepted in practice. No authority has been traced in which goods on board ship have been poinded.[343] It is thought that the rule can be taken as correct in law. In our Discussion Paper[344] we did not propose any change to the rule and our consultees supported this unanimously. There was also wide support for our proposal that an admiralty arrestment of cargo on board ship on the dependence of an action in personam should be discretionary.[345]

7.139 We recommend:

(1) No change should be made in the common law rule under which cargo on board a ship may be arrested but cannot be competently poinded.

(2) Recommendations 1 (diligence on the dependence to be extraordinary remedy available only in special circumstances) and 2 (introducing judicial discretionary grant of warrant for diligence on the dependence) should apply to a warrant for arrestment of cargo on the dependence of an action in personam. Recommendations 3 - 8 should apply accordingly.

(Recommendation 64; Draft Bill, clause 30)

(b) Administration of Justice Act 1956, section 47, inapplicable to arrestments on dependence of cargo on board ship

7.140 One question not entirely free from doubt is whether an arrestment of cargo on the dependence of an action is subject to the restrictions imposed by the Administration of Justice Act 1956, section 47. As we have seen, section 47(1) of the 1956 Act provides that "no warrant issued ... for the arrest [sic] of property on the dependence of an action or in rem shall have effect as authority for the detention of a ship ..." (emphasis added) unless certain conditions are satisfied. At first sight, it might be thought that the reference to "property" includes a reference to cargo on board ship. An arrestment of cargo on board ship, whether in rem or on the dependence, has the effect of detaining the ship temporarily until the cargo is discharged, though it is not clear whether the arrestment immobilises the ship at her anchorage (on the analogy of arrestment of the ship herself) or merely prevents her removal from the jurisdiction with her cargo on board (on the analogy of ordinary arrestments).[346] However there is now authority which suggests

337 Emphasis added: Graham Stewart, p 105; see also p 344.
338 Bankton, Institute IV, 41, 9, citing Cochran (unreported, Feb 6, 1750). See also Baron Hume's Lectures vol 6, pp 94-95; Lord Ivory's Notes to Erskine Institute III, 6, 21, note b; Campbell on Citation (1862) p 225.
339 In Ms Commentaries vol 2, p 60. In his Commentaries on Statutes p 16, however, Bell accepts without qualification that in "proceeding to attach a ship, the diligence of arrestment is to be used, not poinding".
340 Diligence, p 344.
341 Notes to Erskine Institute III, 6, 21, note b.
342 Diligence, p 344.
343 In Arthur v Hastie and Jamieson (1770) Mor 14209; 2 Paton 251, the opportunity arose to contest an arrestment of cargo on board ship in the hands of the ship's master who was the servant (employee) of the owner of the cargo (and of the ship), but the plea was not advanced despite a full argument on the defender's behalf.
344 Discussion Paper No 84, Proposition 35(l)(para 3.96).
345 Discussion Paper No 84, Proposition 33 (para 3.70). Despite the terms of this proposition, the action need not be an admiralty action: see para 7.140 below.
346 We revert to this at paras 7.155 - 7.160 below.

that section 47 of the 1956 Act does not apply to arrestments on the dependence of cargo on board ship.[347] The reference to "property" in section 47(1) may have been intended to apply to the apparel and appurtenances of a ship.

7.141 As a matter of policy, we think that section 47 of the 1956 Act should not apply to arrestments of cargo on board ship which only have the effect of detaining the ship temporarily until the cargo is discharged. Moreover, we doubt whether the Brussels Convention of 1952,[348] (which the 1956 Act, section 47 implements), was intended to cover arrestments of cargo on board ship temporarily detaining the ship until discharge of the cargo.[349] In our Discussion Paper[350] we therefore suggested that section 47 should be amended to make it clear that the restrictions which it imposes on arrestments of "property" on the dependence of an action do not apply to an arrestment on the dependence of cargo on board a ship. This was unanimously supported on consultation.[351]

7.142 We recommend:

> **In re-enacting the provisions of section 47 of the Administration of Justice Act 1956, it should be made clear that the restrictions which those provisions impose on property on the dependence of an action do not apply to an arrestment on the dependence of cargo on board a ship.**
>
> (Recommendation 65; Draft Bill, clauses 27 and 30)

(c) Mode of execution of arrestment of cargo

7.143 In our Discussion Paper[352] we pointed out some defects in the pre-1994 Rules of the Court of Session which governed the mode of execution of arrestment of cargo. These defects have largely been removed by RCS (1994), rules 16.13 and 16.14.[353] We make no further recommendations.

(d) In arrestment of cargo on board ship, who is the proper arrestee?

7.144 In ordinary arrestments, (ie of subjects other than ships or their cargo), the general rule is that an arrestment is ineffectual against "property in the debtor's own possession or in that of persons who are

---

347 In Svenska Petroleum Co Ltd v HOR Ltd 1982 SLT 343; 1983 SLT 493; 1986 SLT 513, the pursuer arrested cargo on board a ship on the dependence of an action of damages for an alleged breach of the defender's contractual obligation to nominate by the due date a tankership to carry a cargo of oil. We understand that the action was not brought as an Admiralty action. No mention was made of the 1956 Act, section 47, in the reports of the case. It is extremely doubtful whether the conditions of section 47 were satisfied. Thus the defenders were not owners of the ship (see section 47(l)(b)). Moreover the action was primarily concerned not with a ship but with breach by the purchaser of a contract to purchase oil, so that the condition that the ship detained must be the ship with which the action is concerned could not be satisfied (see section 47(l)(a)). Nevertheless the applicants for recall of the arrestment of the cargo did not rely on an argument that the 1956 Act section 47 applied to an arrestment on the dependence of cargo on board ship and had not been complied with, though a successful argument to that effect was badly needed. See also West Cumberland Farmers Ltd v Ellon Hinengo Ltd 1988 SLT 294, (arrestment of cargo on board ship in a dry dock): likewise no mention of the requirement of s 47 of the 1956 Act.

348 International Convention Relating to the Arrest of Seagoing Ships, signed at Brussels, on May 10, 1952.

349 The main article of the Convention provides that "[a] ship ... may be arrested in the jurisdiction of any of the Contracting States in respect of any maritime claim, but in respect of no other claim". Ibid, art 2. The word "arrest" is defined to mean "the detention of a ship by judicial process to secure a maritime claim ...". Ibid, art 1. No mention is made of an arrest of cargo, and while the definition of "arrest" could be widely construed, we doubt whether it was intended to cover an arrestment of cargo which has merely the incidental effect of detaining the ship temporarily pending discharge of the cargo.

350 Discussion Paper No 84, Proposition 35(2).

351 It seems unnecessary to disapply section 47 of the 1956 Act from arrestments in rem of cargo on board ship since it is difficult to conceive of circumstances in which the restrictions in section 47 would render incompetent an arrestment in rem of cargo which is otherwise competent under the general law. An arrestment in rem of cargo on board ship can only be executed (1) in connection with an action in rem concerning the ship and her cargo so that s 47(l)(a) would be satisfied and (2) to enforce a maritime lien securing a claim mentioned in para (a), (c), (ca), (n) or (o) of s 47(2).

352 Discussion Paper No 84, para 3.81.

353 For example the pre-1994 RC 140(b) made no provision for an arrestment in rem of landed cargo in the hands of the owner or his agents and this is now competent under the new rule of court. RCS, r 16.14(1). This is necessary because of the rule that the maritime lien travels with the encumbered res into whose hands so ever it comes.

in law identified with him".[354] The object of this rule is said by Bell[355] to be that otherwise the arrestment "would operate as an inhibition in moveables, without being attended with those requisites of publication which accompany that diligence". The test of whether a person is identified with the debtor is whether the person must deliver the property to the debtor on demand or whether the debtor can only obtain possession by raising an action for delivery.[356] The distinction seems to be more or less the same as that between an employee of the debtor under a contract of service, and an independent contractor under a contract of hire of services.[357]

7.145 A distinction between servants of the defender cargo-owner, and his independent contractors liable to deliver the cargo to him, does not seem to have much relevance to an arrestment of the cargo on board ship since, as we have seen, the rule is that, in Graham Stewart's words, "ships in the possession of the debtor or his servants, and their cargoes, are arrested not poinded".[358] The result of the latter rule seems to be that if the shipmaster is the servant of the defender cargo owner, (eg because the cargo owner is owner of the ship or a charterer by demise), an arrestment of cargo on board ship under the shipmaster's charge and control may be laid in the shipmaster's hands.[359] If this were not so, there would be no means of attaching cargo on board a ship where the defender cargo owner is also the carrier because poinding of cargo on board ship is incompetent. It is therefore difficult to understand Graham Stewart's remarks[360] that:

> "An apparent exception to the competency of arresting in the hands of carriers occurs in the case of carriage by sea where the owner of goods has hired the ship on time and it is at his disposal. In such a case the master and crew are the servants of the freighter, and arrestment therefore by his creditor in the hands of the shipmaster is incompetent."

No authority is cited and it is thought that the proposition is incorrect. We think that the law should be clarified by statute.

7.146 While no clear principle emerges from the few reported cases, nearly all decided last century, the courts seem to adopt a liberal approach and will generally sustain an arrestment of cargo on board ship if it is laid in the hands of the person having possession and control of the cargo. Cargo on board ship under the charge of the shipmaster may be arrested in the hands of the shipmaster at least if he has assumed or acknowledged custody of the cargo.[361] In one case,[362] goods on board ship in a port waiting to be unloaded were arrested in the hands of the manager of the carrier shipping company who had actual charge and custody of the cargo. The validity of the arrestment was not challenged on that ground. In the Carron Co case,[363] arrestment in the hands of shipbrokers of a cargo of coal was sustained where the vessel was lying in harbour under the sole control of the shipbrokers, was being loaded under their directions and superintendence; and the coal when it was brought alongside was taken possession of and put on board by them, at a time when the master was not on board. The defenders argued that "the arrestment of goods aboard ship could only be in the hands of the owners" (meaning apparently the owners of the ship) "or of the master", and that "Arrestments must be in the hands of principal, the only exception being the case of the ship captain. Arrestment in the hands of the agent of the debtor of the

354 Bell, Commentaries vol 2, p 70; Graham Stewart, pp 107-108.

355 Commentaries vol 2, p 70.

356 Idem; Graham Stewart, pp 107-108. Bell (supra) says: "It seems to be settled that wherever goods are in the hands of another than the owner, upon a contract which, involving mutual obligation, admits of an actio contraria, as meeting an acrio directa; which implies, therefore, that the possession cannot legally, without an action, be retained against the consent of him who holds it; then the possession is to be considered as not with the owner".

357 Graham Stewart, p 108, citing inter alia Matthew v Fawns (1842) 4 D 1242 (arrestment of goods of debtor on board a ship in a harbour by service in the hands of the carrier's manager who had possession and control of the goods).

358 Graham Stewart, p 105 (emphasis added).

359 See Arthur v Hastie and Jamieson (1770) Mor 14209; 2 Paton 251, cited at para 7.138 above.

360 At p 108.

361 McDonald and Halket v Wingate (1825) 3 S 494; Kellas v Brown (1856) 18 D 1089; Svenska Petroleum AB v HOR Ltd 1986 SLT 513. McMillan, p 63 states that he must have delivered the bill of lading, but this may only be evidence of actual custody.

362 Matthew v Fawns (1842) 4 D 1242; explained in Carron Co v Currie & Co (1896) 33 SL Rep 578 at p 581 per Lord Low who states that the session papers in Matthew show that the goods were on board ship when arrested.

363 Carron Co v Currie & Co (1896) 33 SL Rep 578 (OH).

common debtor is bad".[364] It was held however that as the shipbrokers had the sole and uncontrolled management of the ordinary affairs of the carrier who owned the ship, they were in the position of factors and commissioners (equivalent to principals) rather than agents, and that so long as the ship was in the harbour and taking in cargo, the cargo was in the exclusive control of the shipbrokers. The judgment does seem to have accepted the distinction drawn by Bell[365] between commissioners having general management powers (equivalent to principals) and agents. McMillan, however, uses this case to vouch the proposition that:

> "If the goods have been delivered to the ship-owner, but have not yet been placed on board, arrestment takes place in his hands or in those of his agents. This is contrary to the common law rule that arrestment in the hands of an agent is incompetent, but is sanctioned owing to the peculiar position and exceptional powers of ship's husbands".[366]

It is thought that the Carron Co case does not support arrestment .in the hands of a ship owner's agents.

7.147 It seems to us that the main uncertainty in the present law is the doubt whether it is competent to arrest a cargo on board ship where the cargo is in the possession of the defender or his servants or employees.[367] In our Discussion Paper[368] we suggested that this doubt should be removed by statute. Our suggestion was supported unanimously.

7.148 We recommend:

> **It should be made clear by statute that it is competent to arrest cargo on board a ship where the cargo is in the possession of the defender or his servants or employees.**
>
> (Recommendation 66; Draft Bill, clause 40(l)(a))

(e) Arrestment of cargo at sea and edictal service

7.149 Although a ship cannot be arrested while she is on passage,[369] there is authority that the cargo of a ship which is at sea or abroad may be competently arrested by edictal service.[370]

7.150 The first question is whether an arrestment can or should be competently executed to attach cargo on a vessel on passage at sea. It is a general rule that an arrestment is competent only if the arrestee is subject to the jurisdiction of the Scottish courts.[371] In Carron Co v Currie & Co[372] the shipbroker defender in an action of furthcoming argued that if an arrestment of cargo could be competently laid in the hands of a shipbroker, it would result in this that if a shipbroker had the management of all the liners of some large company,[373] arrestment might be used in his hands of cargo on board any of the ships wherever they might be. Rejecting this contention, Lord Low observed[374] that an arrestment in the hands of a shipbroker would not have been good if the ship had set sail because neither the ship nor the cargo would have been in the charge and custody of the shipbrokers. Yet the shipbrokers had general powers of management of the company which owned the ship (and had not merely supervised the loading) so that the shipmaster must have been subject to their control. Graham Stewart[375] on the other hand remarks that "arrestments used in the hands of the shipowners would attach goods on board their vessels then at sea". The case[376]

---

364 At p 579.
365 Commentaries vol 2, p 71.
366 McMillan, p 63.
367 See para 7.145 above.
368 Discussion Paper No 84, Proposition 35(3).
369 Carlberg v Borjesson (1877) 5 R 188; aff'd 5 R (HL) 215; Administration of Justice Act 1956, s 47(6).
370 Bankton, Institute IV, 12, 9, after stating that the judge-admiral's concurrence is required to a warrant of arrestment of goods within his jurisdiction, remarks: "if the goods, belonging to persons in this country, are in a ship which is at sea, or abroad, it must be done at the mercat-cross of Edinburgh, pier and shore of Leith, in the hands of the ship master".
371 Graham Stewart, p 37; Brash v Brash 1966 SC 56.
372 (1896) 33 SL Rep 578.
373 However, according to Inglis (1987) p 88: "Nowadays it is rare for more than one ship to be in the same ownership".
374 (1896) 33 SL Rep 578 at p 581.
375 p 108.
376 Rae v Neilson (1742) Mor 716.

relied on however related to the arrestment of the share of a partner in a partnership, by service in the hands of the other partners, which was sustained though the moveable assets of the partnership were at sea or abroad at the time of arrestment. It may be that this differs from an arrestment of cargo at sea since, in an arrestment of a share in a partnership, what is arrested is a species of incorporeal right (which includes a share of the profits of sale of the assets) rather than the assets themselves. In the light of the dicta in the Carron Co case quoted above, it is thought that an arrestment of cargo on board a vessel at sea in the hands of the owner, or the owner's general managers, would not be effectual, though the matter is not free from doubt.[377]

7.151 In our Discussion Paper[378] we suggested that it should not be competent to arrest cargo on board a vessel on passage partly because such an arrestment seems exorbitant, and partly because of the practical difficulty of directly enforcing a diligence against corporeal moveables outside Scotland. Consultees agreed with this suggestion unanimously.

7.152 We recommend:

It should continue to be incompetent to arrest cargo on board a vessel on passage.

(Recommendation 67; Draft Bill, clause 41)

7.153 There is a logically separate question of whether it should be competent, or continue to be competent, to execute an arrestment of cargo on board a ship, whether on passage or not, by edictal service. According to Bankton, the cargo of a ship which is at sea or abroad may be competently arrested by edictal service.[379] On the other hand, McMillan (1926) stated that in practice edictal arrestment of cargo is unknown.[380] On consultation, with one exception, all consultees agreed that edictal service of an arrestment of cargo on board a vessel should not be competent.[381] The Faculty of Advocates said it was unknown in practice and the Joint Committee said it would not be required.

7.154 The matter is now regulated by the new Rules of the Court of Session. Edictal execution[382] has been retained by rule 16 for execution of diligence on a person who is furth of Scotland or whose whereabouts are unknown or on whom execution cannot be made.[383] Rule 16.12(1) provides however that rule 16 does not apply to (i) an arrestment to which rule 16.13 (arrestment of ships and arrestment in rem of cargo on board ship) applies or (ii) an arrestment to which rule 16.14(1) (arrestment in rem of cargo landed or transhipped) applies. Although the prohibition of edictal service of an arrestment of cargo is not comprehensive,[384] we think that any further amendment of the rules should be left to rules of court.

(f) Effect of arrestment of cargo in relation to the ship's movement and arrestee's dealings with cargo

7.155 One question which the authorities address only indirectly, relates to the legal effect of an arrestment of cargo on board ship on the arrestee's right to move the ship with the cargo still on board. The Svenska and West Cumberland Farmers cases throw some light on the matter.[385] Both make it clear that the arrestee is not entitled to remove the ship, with its cargo on board, outside the territorial jurisdiction.

---

377 On the duties and rights of the shipmaster or shipowner in the case of an arrestment of cargo at sea, assuming it to be competent, there is only inconclusive sheriff court authority: Mossgiel SS Co v Stewart (1900) 16 Sh Ct Rep 289.

378 Discussion Paper No 84, Proposition 35(5).

379 Bankton, Institute IV, 12, 9.

380 McMillan, p 63.

381 Proposition 35(6), (para 3.96).

382 Now abolished for service of documents.

383 See RCS (1994), r 16.12(4).

384 As far as cargo goes, edictal execution seems still to be available in respect of (1) arrestment of cargo on board ship on the dependence of an admiralty action in personam (or of an ordinary action) and (2) arrestment on the dependence of landed or transhipped cargo.

385 Svenska Petroleum AB v HOR Ltd 1982 SLT 343 (also reported in part 1983 SLT 493); West Cumberland Farmers Ltd v Director of Agriculture of Sri Lanka 1988 SLT 296.

7.156 In both of these cases, however, it is not clear (since it was unnecessary for the court to consider the point) whether the basis of the decision was that:

(1) (on the analogy of an admiralty arrestment of the ship herself) the arrestment of the cargo immobilised the ship at the place where the arrestment was executed, at least until the cargo was unloaded; or

(2) (on the analogy of an ordinary arrestment of non-maritime moveable goods) the arrestment of the cargo merely prevented the ship-master or owner from parting with the cargo, and from taking it in the ship outside the jurisdiction.

The second of these two possibilities assumes that, in an ordinary arrestment in common form of corporeal moveables, situated within the jurisdiction, the arrestee is impliedly prohibited from moving the goods outside the jurisdiction without the leave of the Court. Apart from the two cases just discussed, which may have been decided on that general basis, we have traced little authority on that point. There are however cases, decided at a period in the development of the law when an arrestment to found jurisdiction was regarded as imposing a temporary nexus on the arrested property,[386] in which the courts stated that such an arrestment "fixes" the moveable property arrested within the territorial jurisdiction of the court.[387] The apparent implication of these cases is that an arrestment imposing a nexus "fixes the goods within the jurisdiction unless and until the court grants leave for their removal outside the jurisdiction".[388]

7.157 The distinction between the ship-arrestment analogy and the non-maritime arrestment analogy is important in at least two respects. First, it is important for the construction of the word "detention" in section 47(1) of the Administration of Justice Act 1956.[389] In the case of an arrestment in rein of cargo on board ship, does "detention" mean detention at the place of execution of the arrestment or detention within the territorial jurisdiction?

7.158 Second, if the ship-arrestment analogy is correct, and the ship is immobilised at least until the cargo is discharged, then it would be competent for the arrester to apply for ancillary warrants to dismantle and to bring into harbour. If the non-maritime-arrestment analogy is correct, then the vessel may sail within Scottish territorial waters and the arrestee may discharge the cargo in Scotland for safe-keeping until such time as it has to be made furthcoming to the pursuer. Ancillary warrants to dismantle, and bring into safe harbour, would not be necessary and might not be competent.[390]

7.159 In our Discussion Paper[391] we suggested that, if arrestment of cargo on board a ship on passage at sea is declared by statute to be incompetent[392], then the ship-arrestment analogy should be preferred. This suggestion was supported unanimously by consultees.

---

386 As opposed to the modern theory that such an arrestment is merely an "attestation" of the presence of the goods within the jurisdiction, imposing no nexus, and is not an "attachment": Craig v Brunsgaard Kjosterud & Co (1896) 23 R 500 at p 503 per Lord McLaren; approved in Fraser-Johnston Engineering Co v Jeffs 1920 SC 222, at pp 227-228, 230; Agnew v Norwest Construction Co 1935 SC 771 at p 780; Alexander Ward & Co Ltd v Samyang Navigation Co Ltd 1975 SC (HL) 26 at p 54; see also Blade Securities Ltd, Petitioners 1989 SLT 246 at p 247.

387 See eg McArthur v McArthur (1842) 4 D 354 at p 362 per Lord Fullerton; Lindsay v London & N W Railway Co (1860) 22 D 571 at p 585 per Lord President McNeill; Longworth v Hope (1865) 3 M 1049 at p 1055 per Lord Curriehill. Moreover in Trowsdale's Tr v Forcett Railway Co (1870) 9 M 88 at p 92, Lord Justice Clerk Moncreiff remarked: "It is perfectly true that in point of fact an arrestment adfundandam does not fix the subject arrested within the jurisdiction, for the arrestee may safely part with it, and it so far differs from an arrestment in execution;..." (emphasis added).

388 The nexus subsists after the goods are removed from the jurisdiction (in the absence of recall of the arrestment): McDonald and Halket v Wingate (1825) 3 S 494; Bell, Commentaries on Statutes p 16.

389 We have recommended at para 7.142 above (Recommendation 7.13) that it should be made clear by statute that the restrictions in the Administration of Justice Act 1956, s 47, should not apply to arrestments on the dependence of cargo on board ship. But they may continue to apply to arrestments in rem of cargo on board ship.

390 This question is bound up with the question whether cargo on board a vessel on passage at sea may be competently arrested because it is clear that, if such an arrestment is competent, the arrestment could not be given the legal effect of immobilising the vessel in the place in which it was when the arrestment was executed.

391 Discussion Paper No 84, para 3.95.

392 As proposed in Proposition 35(5).

7.160 We recommend:

> **An arrestment of cargo on board a ship, in dry dock or at a recognised anchorage, should have, until the arrested cargo is unloaded, the same effect in immobilising the ship as the arrestment of the ship herself would have, subject to the powers of the court to grant ancillary warrants and orders as to the dismantling and movement of the ship, and as to the unloading of the cargo.**
>
> (Recommendation 68; Draft Bill, clause 40(2))

(7) Territorial limits on admiralty jurisdiction and on the competence of admiralty arrestments

(a) Admiralty jurisdiction and its territorial limits

7.161 In our Discussion Paper,[393] we pointed out that the definition of the territorial limits on the landward side of the admiralty jurisdiction of the Scottish courts is extremely uncertain and unsatisfactory. That definition may determine:

> first, the place where a cause of action must arise in order that the action may be treated as an admiralty action, and
>
> second, the place where an admiralty arrestment of a ship or her cargo is competent and where the ordinary diligences of arrestment and poinding are not competent.

7.162 Admiralty Court's exclusive jurisdiction to authorise arrestments of ships etc. The starting point is that an arrestment of a ship was originally competent only in pursuance of a warrant, or warrant of concurrence, granted by the High Court of Admiralty of Scotland[394] and was completed by a process of sale before that Court.[395]

7.163 It has always been a general rule of Scots law that warrants for diligence can be executed only within the territorial jurisdiction of the court granting the warrant.[396] In the case of arrestments of ships, a warrant by the Court of Session[397] and a fortiori a warrant or precept by the sheriff or other inferior civil (or criminal) court, could not be executed within the verge of the Admiral's territorial jurisdiction without a warrant of concurrence granted by the Judge-Admiral.[398] It is likely too that the principal reason why goods on board ship were as a general rule (as they still are) arrestable only by a kind of admiralty arrestment, and not poindable,[399] was that where a ship was afloat in a harbour, the goods on board, as well as the ship herself, were beyond the territorial jurisdiction of the ordinary courts of law under whose warrants (or their equivalent signeted letters of homing or poinding) the diligence of poinding was alone competent, but were within the jurisdiction of the Admiralty Court.[400] The general rule was[401] that:

---

393 Discussion Paper No 84, paras 3.115-3.168.

394 Or its judge, the Judge-Admiral.

395 See eg Bankton Institute IV, 12, 9; IV, 41, 9; Baron Hume's Lectures vol 6, pp 94, 95.

396 Unless either a warrant of concurrence is granted by the court within whose territorial jurisdiction the diligence is to be executed or the need for such a warrant has been dispensed with by statute. See eg Graham Stewart, p 275. The need for sheriff court warrants of concurrence has been largely dispensed with by enactments culminating in the Debtors (Scotland) Act 1987, s 91(1) which however does not apply to arrestments in rem: see para 7.52.

397 Or its equivalent - letters of arrestment passing the Signet.

398 Mackenzie v Campbell (1829) 7 S 899 at p 900 per Lord Cringletie, the other judges concurring: "The general warrant from this Court" (scil the Court of Session) "never could affect anything on the sea. It was the Admiral's concurrence which formed the warrant.". In that case it was held that the Court of Session had no jurisdiction to recall arrestments of a vessel in pursuance of letters of arrestment executed with the concurrence of the Judge-Admiral.

399 Bankton, Institute IV, 41, 9.

400 This point was made by the defender in Mill v Hoar 18 December 1812 FC; see the pleadings in Hume, Session Papers (unpublished, Advocates'Library) vol 115, No 16 (petition dated 14 December 1812) p 11. Though the defence was unsuccessful, this proposition seems historically accurate.

401 Per Judge-Admiral Cay in 1802 in a Memorial to the Treasury: quoted in Batey, "The Judge-Admiral of Scotland" 1916 JR 144, pp 146-150.

> "No warrant for the attachment of either person or property issuing from any Court in Scotland, civil or criminal, can be executed on the high seas or within high-water mark without the concurrence of the [Judge-Admiral]".[402]

Conversely, one would have expected that the warrants of the Admiralty Court or Judge-Admiral would not have been capable of execution outside the territorial limits of the Admiralty Court's jurisdiction. But this proposition is doubtful.[403]

7.164 The Admiralty Court Act 1681. The reference to "high-water mark" in the Judge-Admiral's memorial derives from an old common law rule and the Admiralty Court Act 1681[404] which inter alia defined the territorial limits of the jurisdiction of the old High Court of Admiralty of Scotland especially on the landward side. The Act narrates that the jurisdiction of the High Admiral of Scotland extends:

> "upon the seas and in all ports harbours or creiks of the same and upon fresh waters or navigable rivers below the first bridges or within the flood marks so far as the same does or can at any time extend; ..."

The definition is in terms of waters, but the Act was construed as not altering the Admiralty Court's historic jurisdiction over ships on land below the flood mark.[405]

7.165 Common law rule conferring admiralty jurisdiction. Following a series of enactments,[406] admiralty jurisdiction is now conferred on the Court of Session by the Court of Session Act 1830, section 21[407] and on the sheriff court by the Sheriff Courts (Scotland) Act 1907, section 4. Nevertheless the common law rule conferring admiralty jurisdiction on land within Scotland "below the flood-mark"[408] or "high water mark" has apparently never been abrogated by statute and may be still in force.

7.166 Statutory definition of the waters subject to admiralty jurisdiction in Admiralty Court Act 1681. The leading case of Boettcher v Carron Co[409] shows conclusively that the 1681 Act territorial limits applied after the Court of Session Act 1830 so as to regulate the place of the cause of action at least in collision-damage cases. Moreover, Lord Justice-Clerk Inglis, though affirming that the maritime or admiralty law of Scotland was the same as that of England,[410] nevertheless clearly stated that the territorial limits within which the admiralty jurisdiction was exercisable were different in Scotland from those applying in England. It is unclear whether the statutory definition of the waters subject to admiralty jurisdiction in the Admiralty Court Act 1681 still has effect.

7.167 On one view, the repeal of the 1681 Act by the Statute Law Revision (Scotland) Act 1964 has had the effect of repealing the territorial limits specified in the 1681 Act. The result would then be that admiralty actions in Scotland can now be brought in respect of causes of action wherever arising in Scottish (tidal and non-tidal) waters, except where the substantive law relating to particular causes of action determines the place where the cause of action must arise.[411] On this view, Scots law may have reached by a different route the same position as English law in terms of the Supreme Court Act 1981, section 20(7) as construed in The Goring.[412]

---

402 Ibid at p 149.
403 See para 7.171.
404 APS, record edn c 82; 12mo edn c 16, repealed by the Statute Law Revision (Scotland) Act 1964.
405 See eg Baron Hume's Lectures, vol 5, p 276: "within the flood-mark, if ashore".
406 See Treaty of Union 1707, Article XIX (repealed by the Statute Law Revision (Scotland) Act 1964, Sch 1 so far as enacted in the Act of the Parliament of Scotland ratifying the Treaty, and by the Statute Law (Repeals) Act 1973 so far as enacted in the ratifying Act of the Parliament of England); as to the sheriff courts, see Court of Session Act 1830, section 22.
407 "the Court of Session shall hold and exercise original jurisdiction in all maritime civil causes and proceedings of the same nature and extent in all respects as that held and exercised in regard to such causes by the High Court of Admiralty before the passing of this Act;..." (emphasis added).
408 See Discussion Paper No 84, paras 3.121 et seq.
409 (1861) 23 D 322.
410 Ibid at pp 330-331; approved in Currie v McKnight (1896) 24 R (HL) 1 at pp 2, 4, 6 and 7-8.
411 As to salvage see now Merchant Shipping Act 1995, Sch 11, setting out International Convention on Salvage 1989, Article l(a) quoted in footnote 414 below.
412 [1988] 1 AC 831 (HL).

7.168 On another view, the Statute Law Revision (Scotland) Act 1964 is to be construed as not changing the pre-existing law and the application of the territorial limits in the 1681 Act is "saved" by the provisions of the Court of Session Act 1830, section 21 and the Sheriff Courts (Scotland) Act 1907, section 4.[413] On this view, the 1681 Act limits apply except where the substantive law relating to particular causes of action, notably salvage,[414] give a different definition of the place where the cause of action must arise. This view is also unsatisfactory since it means that the 1681 Act has been removed from the Statute Book but its effect is still there and it is increasingly difficult to trace.

7.169 Need for modernisation of definition of territorial limits. Even if the territorial limits in the 1681 Act are still in force, the statutory terms of the definition of those limits require modernisation.

7.170 Admiralty causes of action affected by territorial limits. The particular admiralty causes of action affected by the territorial limits (if still in force) are also somewhat unclear.[415] Those limits do not apply to the locus contractus[416] but do apply to the place where damage to a ship or cargo is done.[417]

7.171 Territorial limits on admiralty arrestment against ship, or cargo on board ship. In principle, the statutory territorial limits in the 1681 Act, if still in effect, should apply to the place where an admiralty arrestment against a ship, or cargo on board ship, may be executed. But there are two judicial decisions[418] holding that those limits do not apply to an arrestment of a ship under construction on the stocks or dry land outside those limits.

7.172 The leading case is Balfour v Stein (1808)[419] in which the Court of Session held that an admiralty arrestment on the dependence of a vessel (a sloop or sea-going ship) was competent where she was under construction on the stocks and had never been waterborne. Baron Hume's Session Papers[420] disclose that the defender argued not only that the thing arrested was not yet a ship or vessel, but also that "as a maritime arrestment, it was plainly incompetent, as being executed out of the Admiral's maritime jurisdiction".[421] In Mill v Hoar (1812)[422] it was held that the validity of an admiralty arrestment of a ship under construction on the stocks, on the dependence of an Admiralty Court action for debt, was unquestionably established by Balfour v Stein.

1.173 The ratio of Balfour v Stein[423] is not altogether clear because the judges' reasoning is not reported. The following observations may be made. First, the Session Papers disclose that the arrestment was executed outside the Admiralty Court's territorial jurisdiction and arguments on the significance of this were addressed to the Court which nevertheless upheld the validity of the admiralty arrestment.[424] Second, though Graham Stewart[425] says that in Balfour v Stein it seems to have been assumed that either arrestment or poinding of a ship was competent, that is true only of the argument of the unsuccessful defender. The Session Papers disclose that the successful pursuers founded strongly on the proposition advanced by Bankton[426] that a poinding of a ship is incompetent, with the necessary result that if an admiralty arrestment

---

413 This view is supported by the fact that it would be a very surprising result of statute law revision if the repeal of an Act, characterised by the repealing Act as spent or superseded, had the dramatic result of widening the admiralty territorial jurisdiction to the whole of Scotland.

414 Merchant Shipping Act 1995, Sch 11, International Convention on Salvage 1989, Article l(a): "Salvage operation means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever" (emphasis added).

415 See the authorities in Discussion Paper No 84, paras 3.131 -3.133.

416 Lord Ivory's Notes to Erskine Institute I, 3, 33; Bell Commentaries vol 1, p 546.

417 Walker v Campbell 15 June 1803 FC; Mor 7537; Boettcher v Carron Co (1861) 23 D 322.

418 Balfour v Stein 1 June 1808 FC; Mor "Arrestment" App'x No 5; Mill v Hoar 18 December 1812 FC.

419 7 June 1808 FC; Mor "Arrestment" App'x No 5. advocation from the Admiralty Court.

420 Hume, Session Papers (unpublished, Advocates' Library) vol 99, No 31, Petition on behalf of Robert Stein.

421 Ibid, p 9.

422 18 December 1812 FC.

423 7 June 1808 FC; Mor "Arrestment" App'x No 5.

424 It could be that the place of execution was so near the flood-mark as to be de minimis in the opinion of the Court but in Mill v Hoar 18 December 1812 FC there is no hint that Balfour v Stein was based on such a specialty.

425 Diligence, p 344.

426 IV, 41, 9.

were not competent, the ship would not be attachable by any form of diligence at all and so would be beyond the reach of the defender's creditors. Third, if the ground of decision in Balfour v Stein is that ships wherever situated can be attached only by an admiralty arrestment, (since poinding is not competent), then vessels on inland waters outside the Admiralty Court's territorial jurisdiction, such as navigable freshwater rivers (beyond the first bridge) or inland lochs, must likewise be arrestable by an admiralty arrestment if they are not to be beyond the reach of creditors' diligences. We have not traced any case on the competence of arrestment or poinding of vessels on such inland waters. In the two cases cited above, involving ships under construction,[427] the ships appear to have been sea-going ships, and there may be special considerations applying to sea-going ships under construction. Ships usually have to be constructed on dry land. Fourth, if the question were to arise today whether the poinding of a ship on (say) an inland non-tidal loch was competent in execution of a decree, account might have to be taken of the argument that, at the time when the rule allowing the arrestment and prohibiting the poinding of ships was fixed, it was normally necessary to carry the poinded goods to the market cross for valuation.[428] That requirement however had been abolished in an Act of 1793 before Balfour v Stein was decided,[429] and while the abolition does not appear to have been brought to the attention of the court it would be unsafe to assume that the Court was unaware of it. In any event, once the rule allowing the arrestment of ships and prohibiting their poinding was fixed, it could not be abrogated by a change in the procedure for poinding.

7.174 To sum up, it is unclear whether admiralty arrestments of ships may be competently executed anywhere in Scotland (whether in inland non-tidal waters or on dry land) outside the territorial limits of admiralty jurisdiction, assuming - which itself is unclear - that these limits are still in force.[430]

7.175 Arrestment in rent of cargo. In our Discussion Paper[431], we added that, in the case of an arrestment in rem of cargo encumbered by a maritime lien, it was unclear how the maritime lien was to be enforced in a case where the cargo had been landed and was in the possession of the owner, and thus was not covered by the rules on the mode of arrestment in the pre-1994 RC 140(b). This omission has now been rectified by RCS 1994, r 16.14(1).

(b) Reform of territorial limits of admiralty jurisdiction applicable to place where an admiralty cause of action arises

7.176 In our Discussion Paper we did not propose any reform of admiralty jurisdiction for determining the place where a cause of action must arise. We considered that reform should be considered by an advisory body with United Kingdom terms of reference. This proposal was supported by consultees.

(c) Reform of territorial limits of admiralty jurisdiction applying to the place where admiralty arrestment executed

7.177 In our Discussion Paper[432] we put forward two options for reform of the territorial limits on the competence of admiralty arrestments. The first was to enact a new definition of the territorial limits broadly on the lines of the Admiralty Court Act 1681. The second option was to make it clear by statute that admiralty arrestments of ships are competent anywhere in Scotland. Our preference for the second option was supported on consultation.[433]

---

427 Balfour v Stein 1 June 1808 FC; Mor "Arrestment" App'x No 5; Mill v Hoar 18 December 1812 FC.

428 Bell, Commentaries vol 2, p 60, argued that it should have been sufficient to Carry the rudder to the market cross, like the coulter of a plough (Smeton v Brand (1698) Mor 10524), but such a symbolic step seems never to have been accepted in Scots law so as to permit of the poinding of a ship.

429 Payment of Creditors Act 1793, s 5; see Graham Stewart, p 348.

430 See paras 7.171 - 7.173 above.

431 Discussion Paper No 84, para 3.151(6).

432 Discussion Paper No 84, paras 3.156-3.165.

433 Discussion Paper No 84, Proposition 40(2). With regard to the application of this recommendation to an arrestment in rem of cargo, the requisite amendment of the former RC 140(b) (see Discussion Paper No 84, para 3.166) in order to provide a mode of executing an arrestment in rem against cargo where the cargo has been delivered to its owner or the owner's agents, is catered for by the current RCS, r 16.14(1). See para 7.175 above.

7.178 It would be unfortunate if a vessel could escape arrestment simply by moving from tidal waters to non-tidal waters, or in the case of smaller vessels, by being taken ashore above the flood-mark. It would be retrograde to introduce an artificial barrier to enforcement against ships by re-enacting in modern form statutory provisions which may no longer be in effect, whose primary purpose was to delimit the jurisdiction of the Admiralty Court which no longer exists as a separate court, and which, as the old cases on arrestments of ships under construction show, may not have applied to admiralty arrestments (although that is uncertain).

7.179 We note that, in England and Wales, the general rule is that in an admiralty action in rem, the res may be arrested if it is within the territorial jurisdiction of the court,[434] and we understand that "jurisdiction" for this purpose has reference to anywhere on land or in territorial waters.[435] We see no reason why a pursuer in a Scottish admiralty action should not have equally extensive rights of arrestment.

7.180 We think however that an arrestment on the dependence of an admiralty or ordinary action in personam,[4*6] or in execution of a decree for payment in an action in personam (whether the action is an admiralty action or an ordinary action for payment), of cargo in the owner's possession should be competent only while the cargo is on board the ship, as under the existing law and RCS, r 16.14(2). Where cargo has been landed, it loses its character of ship's cargo and there is no longer any reason for treating it as liable to an Admiralty arrestment in the owner's possession.

7.181 We recommend:

(1) The legal definition of the territorial limits on the landward side of admiralty jurisdiction for the purpose of determining the place where a cause of action must arise if the action is to be treated as an admiralty action, is uncertain in Scotland and (it is thought) England and Wales. Legislative reform should however properly be advanced by an advisory body with United Kingdom terms of reference.

(2) Subject to paragraphs (3) and (4) below, it should be provided by statute that an arrestment of a ship or her cargo, whether:

(a) in rem; or

(b) on the dependence of an admiralty or ordinary action in personam; or

(c) in execution of decree in an action in personam (whether an admiralty action or an ordinary action for payment),

may be competently executed wherever the ship or cargo is situated within Scotland, whether in tidal or non-tidal waters or on land below or above the flood-mark.

(3) However, an arrestment of a ship's cargo in the owner's possession:

(a) on the dependence of an admiralty or ordinary action in personam; or

(b) in execution of decree in an action in personam (whether an admiralty action or an ordinary action for payment),

should only be competent while the cargo is on board the ship, (without prejudice to an arrestment of landed or transhipped cargo in a third party's hands under RCS, r 13.6).

---

434 See Supreme Court Practice, General Note to RSC, Order 75, r 5 (warrants of arrest): see also Order 75, r 11.

435 The Admiralty Marshal has informed us that he has for example arrested a vessel in a car park in an inland town (West Bromwich) and another vessel at the Boat Show. As regards cargo, he may arrest cargo which has been landed (if it can still be identified) and has for example arrested fuel oil pumped ashore and in oil tanks in a refinery by closing down the tanks.

436 Cargo on board a ship may be arrested on the dependence of an action which is not an Admiralty action: see Svenska Petroleum AB v HOR Ltd 1982 SLT 343; 1983 SLT 493; 1986 SLT 513.

(4) Nothing in the foregoing recommendations should affect the rule that the arrestment of a ship, or of cargo on board a ship, which is afloat may be executed while the ship is at anchorage and not while she is on passage.

(Recommendation 69; Draft Bill, clauses 39, 40(l)(b), 41)

(8) Subjects attachable by admiralty arrestments: ships, aircraft and hovercraft

(a) The definition of "ships" attachable by admiralty arrestments

7.182 Closely related to the definition of the territorial limits on admiralty arrestments is the definition of the subjects attachable by admiralty arrestments. The rule that the territorial limits of the competence of admiralty arrestments extend to vessels in freshwater rivers and lochs, and on land above the floodmark, carries the risk of sterile disputes as to whether, in a given case, arrestment and sale or charge, poinding and warrant sale is competent. A choice of the wrong form of diligence may render the pursuer or creditor, and the officer of court, liable in damages for the wrongful use of diligence.[437] Fortunately such disputes are rare in Scots law, though not unknown.[438]

7.183 There is surprisingly no authoritative Scottish common law definition of what constitutes a "ship" or "vessel" for the purposes of admiralty arrestments whether in rem or on the dependence or in execution. The Scots cases on admiralty arrestments which we have identified (which are too numerous to cite) have all concerned what appear to be sea-going ships.

7.184 "Ship" defined in legislation on Scots admiralty arrestments. So far as primary and subordinate legislation is concerned, the statute requiring the introduction in Scotland of the admiralty action in rem refers to "a ship",[439] without definition. The Administration of Justice Act 1956, section 47, in restricting the competence of admiralty arrestments on the dependence and in rem, also uses the term "ship" which is defined in section 48(f) as follows:-

> "'ship' includes any description of vessel used in navigation not propelled by oars."

The pre-1994 Rules of the Court of Session did not define "ship"[440] but the new Rules of 1994 on Admiralty Actions[441] import by reference the foregoing definition in section 48(f) of the 1956 Act. The 1956 Act definition was also used in the Merchant Shipping Acts until the Merchant Shipping (Salvage and Pollution) Act 1994[442] removed the phrase "not propelled by oars".

7.185 Meaning of "ship" in English admiralty jurisdiction. At one time the admiralty jurisdiction of the English High Court was exercisable, at least for certain purposes, only in respect of any "ship or sea-going vessel"[443] but this was subsequently extended by omitting the adjective "sea-going".[444] Thereafter, for a period, the enactments governing the admiralty jurisdiction of the High Court in England and Wales[445] defined "ship" in the same way as did the Merchant Shipping Acts, ie as including "any description of vessel used in navigation not propelled by oars". However, in the (inclusive) definition of "ship" in the provisions of the Administration of Justice Act 1956,[446] and consolidating provisions,[447] defining the admiralty jurisdiction of the English High Court, the words "not propelled by oars" have been omitted.

437 Emerald Airways Ltd v Nordic Oil Services Ltd 1996 SLT 403 (OH).
438 See most recently Emerald Airways Ltd v Nordic Oil Services Ltd 1996 SLT 403 (OH) discussed below.
439 Administration of Justice Act 1933, s 17(iii) (repealed) re-enacted in the Court of Session Act 1988, s 6(iii): "the enforcement of a maritime lien over a ship by an action in rem directed against the ship". S 6(iv) of the 1988 Act (re-enacting s 17(iv) of the 1933 Act) uses the word "vessel" in referring back to s 6(iii).
440 RC 135 - 147A.
441 RCS, rr 46.1-46.9.
442 Schedule 4, para 2. Section 313(1) of the Merchant Shipping Act 1995 states "'ship' includes every description of vessel used in navigation."
443 Admiralty Court Act 1840, s 6.
444 Wreck and Salvage Act 1846, s 20.
445 Admiralty Court Act 1861, s 2; Supreme Court of Judicature (Consolidation) Act 1925, s 22(3).
446 S 8(1).
447 Supreme Court Act 1981,s 24(1).

At one time "ship" in the English county court admiralty jurisdiction was defined as including "any description of vessel whatsoever"[448] though since 1959 it has been defined in the same way as in the High Court admiralty jurisdiction.[449]

7.186 The formula "not propelled by oars". It may be that, in the English admiralty definition and recent Merchant Shipping Acts, the formula "not propelled by oars" was omitted to avoid the conflict of opinion which arose in The Champion,[450] which concerned the admiralty jurisdiction of the county courts in respect of a collision involving a dumb barge.[451] On one view, the dumb barge was not a ship because the test was whether the barge was normally propelled by oars. On the alternative view, the test was whether the barge was being propelled by oars at the material time ie the time of the collision. Since it has been held that vessels which are sometimes propelled by oars (eg to go in and out of harbour) may nevertheless be "ships" within the statutory definition,[452] and since the definition is inclusive rather than exhaustive, the change in definition is likely to be unimportant. It has been observed[453] that whereas a dumb barge propelled by oars is not a ship for the purpose of the Merchant Shipping Acts, it is nonetheless a ship for the purposes of English Admiralty jurisdiction.[454]

Consultation

7.187 In our Discussion Paper we examined in detail the various statutory definitions of "ship" used in the Merchant Shipping Acts and Admiralty legislation.[455] No-one dissented from our view that since Admiralty arrestments should apply to vessels sailing in tidal and non-tidal waters, it would be inappropriate to define the word "ship" as "sea-going ship" for the purpose of such arrestments. We suggested that the definition for Scots admiralty jurisdiction should be the same as for English admiralty jurisdiction, given that the difference is small in any event,[456] ie omitting the formula "not propelled by oars". This met with a mixed reaction on consultation. Most agreed. The Court of Session Judges however found the argument for omitting the formula unconvincing, remarking: "It surely cannot be suggested that a rowing eight or a rowing dinghy is intended to be a 'ship' for the purposes of admiralty jurisdiction". Professor Gretton asked rhetorically if a canoe gathering dust in someone's garage is subject to admiralty jurisdiction, or poindable?

7.188 Probably for reasons such as these, the definition of "ship" in the new Rules of Court of 1994 copies the Scottish provisions of the Administration of Justice Act 1956,[457] ie it retains the formula "not propelled by oars". This definition was introduced after our Discussion Paper and was no doubt carefully considered in the light of the discussion there. We think that stability of definition is important and do not see sufficient reason to recommend any change except that the definition should be exhaustive ("shall mean...") rather than inclusive ("shall include...").

Offshore rigs and installations

7.189 In view of the extended meaning given to "ship" in the Merchant Shipping Acts, and by inference in the legislation on admiralty jurisdiction, it seems likely that a floating oil-rig capable of being towed around the seas from place to place as occasion might require would be treated as a "ship" for the purposes of Admiralty jurisdiction and arrestments. On the other hand, an offshore oil platform or similar offshore

448 County Courts Act 1934, s 56(7).
449 County Courts Act 1984, s 147(1), re-enacting same definition in County Courts Act 1959, s 201.
450 [1934] P 1.
451 Ie a barge without mast or sail, as a Thames lighter (Shorter OED).
452 Ex pane Ferguson (1871) LR 6 QB 280 at p 291.
453 Thomas p 189.
454 Cf Gapp v Bond (1887) 19 QBD 200. However dumb barges have been treated as "ships" for the purposes of the Merchant Shipping Acts (The Harlow [1922] P 175) and though sometimes propelled by oars would seem still to be "ships" for those purposes.
455 Discussion Paper No 84, paras 3.169-3.181. Since then new definitions have been identified: eg the Salvage Convention 1989, Article l(b) defines "vessel" as "any ship or craft, or any structure capable of navigation".
456 Ibid, Proposition 41 (para 3.181).
457 S48(f).

installation permanently affixed to the sea-bed would fall outside the definition.[458] We assume that these results are satisfactory.

Recommendation

7.190 We recommend:

> **In the context of admiralty actions and arrestments under Scots law, the concept of a "ship" should be defined as meaning any description of vessel used in navigation and not propelled by oars. The concept of "sea-going ship" should not be introduced.**
>
> (Recommendation 70; Draft Bill, clause 59)

(b) Admiralty jurisdiction and aircraft

(i) The common law on diligence against aircraft

7.191 Until the recent Emerald Airways case,[459] there was virtually no direct authority on diligence against aircraft. In that case, Lord Hamilton held that the common law rule that a ship may be arrested in her owner's hands does not, as a general proposition, extend to aircraft, at least not aircraft of a kind designed only to land on, and take off from, terra firma.[460] He reserved his opinion as to whether or not a seaplane might, in some waterborne circumstances, be liable to arrestment in its owner's hands.[461]

7.192 This judgment expressly confirms the view of the common law on which our Discussion Paper No 84 proceeded.[462] We revert below[463] to the question whether aircraft should be attachable by admiralty arrestment.

(ii) Legislation on salvage of aircraft

7.193 In an important early case in Aberdeen sheriff court, it was held that under British Admiralty common law, a British ship rescuing an aircraft from the perils of the sea is not entitled to salvage because the aircraft is not within the category of ships, vessels, or boats,[464] and it makes no difference that the aircraft is a sea-plane.[465] The Air Navigation Act 1920, section 11, as originally enacted, applied the law of wreck and salvage to aircraft but this was construed as confined to aircraft wrecked within the territorial jurisdiction.[466] In 1936, the 1920 Act, section 11 was extended to cases where the salvage services were rendered outwith the territorial jurisdiction.[467] These provisions were consolidated in 1949 and again in 1982.[468] The Civil Aviation Act 1982, section 87(1) provides:

> "87.- (1) Any services rendered in assisting, or in saving life from, or in saving the cargo or apparel of, an aircraft in, on or over the sea or any tidal water, or on or over the shores of the sea or any tidal water, shall be deemed to be salvage services in all cases in which they would have been salvage services if they had been rendered in relation to a vessel."[469]

458 Cf Article 3 of the Salvage Convention 1989 which excludes from the Convention certain platform and drilling units. The exclusion only applies when the units are (i) on location and (ii) engaged in exploration, exploitation or production. While in transit to the place of operation, such rigs would fall within the general definition of vessel or property.

459 Emerald Airways Ltd v Nordic Oil Services Ltd 1996 SLT 403 (OH) (aircraft purportedly arrested in its owners' hands by execution of a style of schedule of arrestment commonly used in arresting ships).

460 Ibid at p 405J-L. Held further (at p 4061) the 1956 Act, Part V, was enacted on the correct basis that at common law arrestment of aircraft is not available in circumstances in which ships are arrestable.

461 Ibid,p4Q6F.

462 See ibid p 406E, commenting on our Discussion Paper No 84, para 3.192.

463 See para 7.204.

464 Watson v RCA Victor Co Inc (1934) 50 Lloyd's L R 77 (Sheriff Court).

465 Idem, followed in Polpen Shipping Co Ltd v Commercial Union Assurance Co Ltd [1943] 1 KB 161, in which it was held that a flying boat was not a ship or vessel within the meaning of an insurance policy.

466 See the Watson case, supra.

467 Air Navigation Act 1936, Sch 5.

468 Civil Aviation Act 1949, s 51(1); Civil Aviation Act 1982, s 87.

469 There seems to have be an overlap between this provision and the Aircraft Wreck and Salvage Order 1938, (S R & O 1938/136; Rev vol 1, p 1329) art 2, which applied inter alia the Merchant Shipping Act 1894, s 546 (salvor's right to salvage for services to cargo or wreck of vessel) (now repealed), to aircraft. For salvage of vessels see now Merchant Shipping Act 1995, s 224 and Sch 11 (International Convention on Salvage 1989).

Subsection (1) relates to salvage services rendered to an aircraft. Where salvage services are rendered by an aircraft, subsection (2) provides that the owner of the aircraft shall be entitled to the same reward for those services as he would have been entitled to if the aircraft had been a vessel.

7.194 Section 87(1) applies to aircraft "in, on or over the sea". We understand that an example of salvage of an aircraft "over the sea" occurred about the time of the Falklands campaign when a Harrier VTOL (or "jump-jet") aircraft ran out of fuel and managed to land on top of containers on a Spanish ship bound for Las Palmas.[470]

7.195 Maritime lien for salvage of aircraft enforceable by arrestment in rent. In England, the provisions of section 87(1) of the 1982 Act are generally construed as indirectly creating a maritime lien for salvage services rendered to aircraft.[471] This result is said to be supported by other statutory provisions, notably section 21(3) and (5) of the Supreme Court Act 1981, which do not apply in Scotland.

7.196 Nevertheless it is thought that in Scotland section 87(1) has to be construed as indirectly creating a maritime lien for salvage to aircraft. The 1982 Act, section 87(4) (consolidating earlier provisions) enables the making of an Order-in-Council directing that the provisions of any Act relating to inter alia wreck and salvage shall apply to aircraft as they apply to vessels. The Aircraft (Wreck and Salvage) Order 1938[472] (made under earlier provisions and now having effect as if made under section 87(4) of the 1982 Act[473]) provides in articles 4 to 6:

> "4. Every court having Admiralty jurisdiction shall have jurisdiction over claims under section 11 of the Air Navigation Act 1920, and this Order.
>
> *5. The jurisdiction conferred by the last preceding article may be exercised either by proceedings in rem or by proceedings in personam ...*
>
> 6. The powers of all such courts and the rules of practice and procedure for the time being in force in regard to the Admiralty jurisdiction of those courts shall apply and extend to claims under section 11 of the Air Navigation Act 1920, and under this Order."

The references in articles 4 and 6 to section 11 of the Air Navigation Act 1920 must now be construed as, or as including, a reference to section 87 of the 1982 Act,[474] ie a claim under section 87(1) in respect of salvage of aircraft. Accordingly, in Scotland an action in rem in respect of salvage of aircraft is competent by virtue of article 4 and the power to grant warrant to arrest in rem is competent by virtue of article 6.[475]

7.197 No statutory provision is made defining the property encumbered by a maritime lien for salvage services rendered in respect of aircraft. It has been suggested that the lien will encumber the aircraft and its cargo and apparel since these are mentioned in section 87(1), and that it also encumbers freight as being included by implication from the reference to aircraft.[476] Any legislation clarifying this matter should be in a United Kingdom Act, and we make no recommendations here.

7.198 Admiralty arrestment on the dependence or in execution: salvage of aircraft. It seems that section 87(1) of the Civil Aviation Act 1982 and the Aircraft (Wreck and Salvage) Order 1938, articles

---

470 Of this case, it has been observed: "Contemporary press reports suggested that the owners of the Spanish vessel were exerting their possessory maritime lien for salvage and refusing to return the aircraft until suitable security for a salvage claim had been arranged. It is understood that the claim was settled for a substantial sum reflecting both the high value of the property salved, and its likely total loss if it had not been salved by the Spanish vessel". See R Knox, "Collisions and Salvage", para 2.3, in the Law Society of Scotland, PQLE Maritime Law Seminar Papers (unpublished, 23 February 1989) at p 48.

471 See eg Thomas, pp 28, 160 ff.

472 See eg Thomas, pp 28, 160 ff.

473 Civil Aviation Act 1949, s 70(2); Interpretation Act 1978, s 17(2)(b).

474 See Interpretation Act 1978, s 17(2)(a); Civil Aviation Act 1949, s 70(5).

475 Note 46.1.2 to the Rules of the Court of Session relating to Admiralty Causes (RCS, rr 46.1-46.9) states that the 1982 Act and 1938 Order apply Admiralty jurisdiction (and arrestments) to claims for salvage of aircraft.

476 Thomas, p 161, citing by way of analogy The Fusilier (1865) BR & L 341.

4 to 6, also have the effect that it is competent to raise an action inpersonam, and to execute arrestments on the dependence or in execution, all in accordance with admiralty forms and procedures in order to secure a claim fpr salvage of aircraft and its associated property. It follows that a salvor of an aircraft may arrest the aircraft in the possession of the debtor defending the action in personam, whether on the dependence or in execution.

7.199 Adaptation of Administration of Justice Act 1956, section 47 to salvage of aircraft. The Administration of Justice Act 1956, section 47(1), in restricting the competence of arrestment of ships, speaks of warrants having effect "as authority for the detention of a ship" but no mention is made of aircraft. It is now provided that in section 47(2) (which limits the claims which may be secured by arrestment of ships) the salvage claims mentioned in paragraphs (c) and (ca)[477] include claims in respect of aircraft available by virtue of the Civil Aviation Act 1982, section 87.[478] This gives effect to aprovisional proposal in our discussion paper.[479]

(iii) Admiralty arrestments on the dependence or in execution securing claims for towage and pilotage of aircraft

7.200 Claims for towage and pilotage services rendered to ships (which are not maritime liens) are admiralty causes specified in the Administration of Justice Act 1956, section 47(2), paragraphs (i) and (j), as claims for which the ship in question may be arrested on the dependence.

7.201 Section 48(f) of the 1956 Act provides that in section 47:

> "'towage' and 'pilotage' in relation to an aircraft, means towage and pilotage while the aircraft is waterborne."

This provision assumes that section 47(2)(i) and (j) [a]pply to aircraft. The drafting would be improved if section 47(2)(i) and (j) were expressly extended so as to apply to aircraft.[480]

7.202 As RCS, rule 46.1 now defines "Admiralty action" as "an action having a conclusion appropriate for the enforcement of a claim to which section 47(2) of the Administration of Justice Act 1956 applies .....", claims for towage and pilotage of aircraft are now included.[481] This would be made even clearer if our recommendation that section 47(2)(i) and (j) were expressly extended so as to apply to aircraft was accepted.[482] It should also be expressly provided by statute that the law on towage and pilotage of ships applies to aircraft and that claims in respect of the towage and pilotage of waterborne aircraft are enforceable by way of admiralty action in personam and by arrestment in the hands of the defender or debtor.[483]

(iv) Admiralty arrestment of aircraft to be ancillary to admiralty actions only

7.203 Under existing law, (a) the maritime law on salvage would apply to aircraft where the cause of action arises in the maritime environment as defined by the Civil Aviation Act 1982, section 87(1), and (b) the maritime law on towage and pilotage would apply to aircraft where the cause of action arises within the territorial limits of admiralty jurisdiction whatever these may be.

7.204 We do not consider that admiralty arrestments should apply to aircraft generally in cases where

477 Substituted by the Merchant Shipping (Salvage and Pollution) Act 1994, Sch 2, para 4(2)(a).

478 See 1956 Act s 47, subsection (8) inserted by the Merchant Shipping (Salvage and Pollution) Act 1994, Sch 2, para 4(2)(b).

479 Discussion Paper No 84, para 3.188 and Proposition 42(2) (para 3.194). The adaptation of section 47 however still seems incomplete as a matter of drafting since the reference in section 47(1) to "detention of a ship" has not been expressly glossed so as to include a reference to the detention of an aircraft in the case of salvage, (or as we note below towage and pilotage).

480 Compare the provisions for England and Wales in the Supreme Court Act 1981, s 20(2)(k) and (1). This proposal was endorsed on consultation. See Discussion Paper No 84, Proposition 42(3).

481 See Discussion Paper No 84, para 3.190.

482 Ibid, para 3.189, Proposition 42(3).

483 Ibid, para 3.190, Proposition 43(3).

the action is not an admiralty action. Admiralty arrestments are a somewhat distinctive and exceptional form of diligence peculiarly adapted to ships, and should not be extended to other forms of moveables more than is necessary.[484] In Part 4 above, we recommend the introduction of a new diligence of interim attachment on the dependence which would apply to aircraft.

(v) Recommendation

7.205 We recommend that:

(1) Provision should be made by statute, making it clear that:

(a) the law of towage and pilotage applies to aircraft while waterborne as it applies to vessels; and

(b) claims in respect of the towage and pilotage of waterborne aircraft are enforceable by way of admiralty action inpersonam, and by arrestment in the hands of the defender or debtor.

(2) Except in cases of Admiralty actions involving salvage, towage and pilotage of aircraft, admiralty procedures and arrestments should not apply to aircraft.

(Recommendation 71; Draft Bill, clause 46)

(c) Warrants to dismantle poinded aircraft

7.206 There is however one feature of admiralty arrestments which might be introduced into the law on poindings. In admiralty arrestment of ships, it is competent to obtain an ancillary warrant to dismantle and to execute that warrant at the same time as executing the warrant of arrestment. In poindings, the nearest equivalent to a warrant to dismantle is an order under section 21(l)(a) of the Debtors (Scotland) Act 1987 for security of poinded goods, but such an order cannot be obtained till after the execution of the poinding. We recommend that before an aircraft is poinded it should be competent to apply for an order for dismantling of the aircraft, the dismantling order being exercisable at or after the execution of the poinding.[485]

7.207 We recommend:

It should be competent for a creditor who proposes to poind an aircraft, to apply, before executing the poinding, for an order for dismantling the aircraft exercisable at or after the execution of the poinding, without prejudice to the creditor's right to apply after the execution of the poinding for such an order under the Debtors (Scotland) Act 1987, section 21(l)(a).

(Recommendation 72; Draft Bill, clause 47)

(d) Hovercraft

7.208 The Hovercraft Act 1968, section 2(1) provides that Part V of the Administration of Justice Act 1956 (which includes sections 47 and 48 discussed above) should have effect as if references to ships included references to hovercraft. The new definition of.'Admiralty action' in RCS, rule 46.1 has in effect implemented the proposal in our Discussion Paper[486] to ensure that admiralty causes cover hovercraft.

7.209 The Hovercraft Act 1968, section 2(1) also enacts that section 4 of the Sheriff Courts (Scotland) Act 1907[487] should apply to hovercraft. There are few, if any, hovercraft operating in Scotland and we are not aware of any need for legislation.[488]

---

484 This proposal was accepted by consultees. See Discussion Paper No 84, para 3.192 and Proposition 42(4).

485 This was supported by consultees. See Discussion Paper No 84, para 3.193 and Proposition 42(5).

486 Discussion Paper No 84, para 3.195, Proposition 43.

487 Which provides inter alia that powers and jurisdictions formerly competent to the High Court of Admiralty in Scotland in all maritime causes shall be competent to the sheriff.

488 Section 2(2) of the 1968 Act applies the law on maritime liens to hovercraft. Further the Hovercraft (Application of Enactments) order 1972 (SI 1972/971) article 8(l)(a) applies inter alia the provisions on wreck and salvage of the Merchant Shipping Act 1894, sections 544-546 to hovercraft, and overlapping provision is made by article 8(3) applying the law on salvage to hovercraft.

Part 8 Arrestments of Ships on Dependence of Actions Against Demise Charterers

Preliminary

8.1 Under the law outlined in Part 7 above, an arrestment of a ship on the dependence is permitted only where the defender owns the ship. This rule is generally satisfactory since it is consistent with the sound general principle that an unsecured creditor is not entitled to arrest or poind the property of A for B's debt.

8.2 The rule contrasts with legislation in England and Wales[1] which enables an admiralty action in rem, and application for arrest in rem, enforcing an unsecured maritime claim in respect of a ship[2] to be brought in the High Court or county court where the person who would be liable on the claim in an action inpersonam is a demise charterer of the ship. In March 1990, in response to representations by the Law Society of Scotland, we issued a Consultation Paper[3] seeking views on a similar solution in Scots law, namely, legislation making an arrestment of a ship competent on the dependence of an action in personam against its demise charterer where the ship is the particular ship with which the action is concerned. We consider this and consequential issues in this Part.[4]

8.3 Two other matters are also briefly considered in this Part, though we recommend against legislation. The first is whether in a "sister ship" arrestment, the court should be entitled "to pierce the corporate veil" in order to determine whether a corporate defender in an admiralty cause is in substance the same person as the owner of the arrested sister ship.[5] The second concerns a cross-border difference on the right to arrest a share in a ship for the debt of a co-owner.[6]

THE EXISTING LAW AND ITS BACKGROUND

The characteristics of charterparties by demise

8.4 Broadly speaking charterparties[7] are of two kinds. The first category consists of contracts under which the shipowner retains responsibility for managing and navigating the ship and contracts to carry goods for the charterer to an agreed destination ("voyage charterparty") or for an agreed period of time to destinations specified by the charterer ("time charterparty"). These are contracts of carriage of goods by sea.[8] A charterparty by demise is radically different because it is not a contract of carriage of goods. It is in substance:[9]

1 Supreme Court Act 1981, s 21(4); County Courts Act 1984, s 28(4).
2 Equivalent to an arrestment on the dependence of an admiralty action in Scots law.
3 Scottish Law Commission, Consultation Paper on Arrestments of Ships Securing Claims Against Demise Charterers (1990).
4 Viz whether an arrestment should also be competent to found jurisdiction, or in execution of a decree for payment, in such an action, and whether consequential provisions are needed regulating judicial sale of the arrested ship and the ranking of creditors in competition with the arresting creditor.
5 See paras 8.30 - 8.33.
6 See para 8.27 below.
7 A charterparty is a contract for the hire or lease of a ship under which its owner makes all or part of it available, with or without the master and crew, to another person known as the charterer.
8 Bell, Commentaries vol 1, p 587 n. 4, editor's note: a "locatio opens vehendarum mercium - a contract of carriage of goods".
9 Bell, Commentaries vol 1, p 587 n. 4, editor's note.

> *"a lease of the ship or of the ship and services of the master and crew, whereby the charterer takes the vessel into his possession as he would lease a house, and takes the master and crew into his own employment, through whom as his servants he will maintain the possession demised to him....the charterer is considered tanquam dominus, or as owner pro hac vice."*[10]

A charter by demise of the ship without master and crew is called a "bareboat charter". In England likewise, it has been observed that whether the demise charter is with master and crew or bareboat:

> "the charterer becomes for the time being the owner of the ship; the master and crew are, or become to all intents and purposes, his employees, and through them the possession of the ship is in him. The owner has however divested himself of all control either over the ship or over the master and crew, his sole right being to receive the hire specified in the charterparty and to take back the ship when the charterparty comes to an end. During the currency of the charterparty the owner is, therefore, under no liability to third persons whose goods may have been carried on the demised ship or who may have done work or supplied stores for her, and those persons must look only to the charterer who has taken his place."[11]

The analogy with the real right of ownership (dominium) however should not be taken too far. We understand that demise charters do not necessarily, or perhaps normally, subsist for the full lifetime of a ship. As Messrs Dorman Jeffrey and Co remarked on consultation, the nearest analogue is a full repairing and insuring lease of heritable property. The tenant's creditors cannot satisfy their debts by selling the real right of ownership of the subjects of lease, which continues to belong to the landlord.

8.5 At one time demise charters were rare[12] and even regarded as obsolete[13] but are now more common. Ship operators may "charter in" demised chartered ships to their fleet of owned ships and "paint the funnel".[14] Financial institutions may use demise charters as security for loans to ship operators or to make profit from ships acquired through a borrower's insolvency.[15]

The legislative background

8.6 We turn now to consider the legislative background to the question whether an arrestment of a ship should be competent on the dependence of an action in personam against its demise charterer.

Scots law before 1956

8.7 As we saw in Part 7, in Scots law before the Administration of Justice Act 1956 came into force, there were two types of arrestments of ships:

(a) an arrestment of a ship, or a share in a ship, on the dependence of an action in personam against the owner of the ship; and

(b) an arrestment in rem of a ship in an admiralty action in rem enforcing a maritime lien or hypothec against the ship.

8.8 An arrestment of a ship, or a share in a ship, on the dependence of an action in personam was (and is) only competent if the defender in the depending action was the owner of the ship. The ship did not require to be the particular ship with which the action in personam was concerned: a "sister ship" in the ownership of the defender could be arrested. The action in personam did not have to be an admiralty action in personam enforcing a maritime claim.

8.9 An arrestment in rem of a ship enforcing a maritime lien could be used only against the ship which was subject to the maritime lien (and not against a "sister ship" in the same ownership as the ship affected

10 Ie "like an owner", or "owner for the time being".
11 Halsbury's Laws of England (4th edn) vol 43(2) (1997) para 1414 (footnotes omitted).
12 Encyclopaedia vol 3 (1927) para 90.
13 Sea and Land Securities Ltd v William Dickinson & Co Ltd [1942] 2 KB 65 at p 69 (CA).
14 R Grime, Shipping Law (2d edn; 1991) p 52.
15 *Ibid p 53.*

by the maritime lien). But the ship affected by the maritime lien could be arrested in rem even if her ownership had changed hands since the date when the event (eg damage by the ship or salvage services rendered to the ship) occurred giving rise to the lien. This right to arrest in rem irrespective of ownership was, however, confined to the narrow category of maritime liens, which arise in only a few classes of maritime claims.[16]

English law before 1956

8.10 In English law, the rules on arrests in rem enforcing a maritime lien were similar to the Scots rules on arrestments in rem.[11] Before 1956, an arrest in rem of a ship to enforce a personal maritime claim (as distinct from a maritime lien) could be used only against the particular ship with which the action was concerned and not a "sister ship" owned by the defendant.

The Brussels Arrest Convention of 1952

The object of the Convention

8.11 As we saw in Part 7, the law was changed both in Scotland and in England and Wales by the Administration of Justice Act 1956 which was designed to implement the Brussels Arrest Convention of 1952.[18] This Convention sought to harmonise the narrow rules of English law and the wide rules of Scots law and other continental civil law systems by:

(a) confining the right to arrest ships on the dependence or before judgment[19] to defined classes of maritime claim;[20] and

(b) allowing the arrest of "sister ships" in some circumstances but not others.

8.12 It is generally recognised that the meaning of the Brussels Arrest Convention is unclear in so far as it relates to arrestments securing claims against demise charterers.

Article 3

8.13 Article 3(1) of the Brussels Arrest Convention provides:

> "Subject to the provisions of para (4) of this Article and Article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail;...."[21]

Para (4) of article 3 provides:

> "When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claims.
>
> "The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship."

The expression "maritime claim" refers to the list of claims set out in article 1.

---

16 See paras 7.62, 7.63 above.

17 *The English equivalent of a Scots arrestment on the dependence is, somewhat confusingly, also called an arrest in rem.*

18 See paras 7.36, 7.37.

19 Article 1, para 2, defines "arrest" so as to exclude "the seizure of a ship in execution or satisfaction of a judgment". See para 8.17 below.

20 The maritime claims are set out in article 1 (1): see Appendix C below.

21 The article continues: "but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in Article l(l)(o), (p) or (q)." Paras (o), (p) and (q) of article 1(1) relate to proprietary claims and correspond to the 1956 Act, s 47(2)(p),(q) and (r).

Article 9

8.14 If the provisions of article 3(1) are read in isolation, they might be construed as meaning that the particular ship in respect of which a maritime claim arises may be arrested, whether or not the defender is owner of the ship, for those provisions do not expressly require that the defender must be owner of the ship at the time of arrest. Some commentators adopt that construction of the Arrest Convention.[22] Article 3(1) has to be read however in conjunction with article 9 which provides:

> "Nothing in this Convention shall be construed as creating a right of action, which, apart from the provisions of this Convention, would not arise under the law applied by the Court which had seisin of the case, or of creating any maritime liens which do not exist under such law or under the Convention on Maritime Mortgages and Liens, if the latter is applicable." (emphasis added)

To allow an arrest of a ship in respect of every maritime claim specified in article 1 irrespective of who owns the ship would in effect be to transform every such claim into a maritime hypothec or non-possessory lien. The travaux preparatoires of the Convention disclose that the Finnish Branch of the International Maritime Committee made the fundamental point that article 3(1):

> "might be construed so as to permit a claimant to arrest the particular ship in respect of which he alleges that a maritime claim arises, even after the ownership of the vessel has passed to a third party, although the maritime claim does not give rise to a maritime lien ('privileges maritimes')".[23]

In response, the Rapporteurs commented that what is now article 9 was intended to deal with the matter (albeit that it may not be effective to do so under some systems of law).[24]

The background to article 3(4)

8.15 The travaux preparatoires also disclose that the inclusion of what is now article 3(4) in the Convention was due to a rule of law obtaining in the Netherlands and Norway under which "law proceedings" on maritime claims must in some cases be instituted against the "operator" of a ship and not against the registered owner, since the "operator" and not the owner is personally liable.[25] It was further stated that:

> "after due consideration, the majority of the International Commission felt that it was necessary to provide for this point only in connection with a Charter by Demise".[26]

The reason was not stated but was presumably that a charterer by demise is in the position of a "temporary owner" assuming all liabilities relating to the employment of the ship. Berlingieri contends that this explanation does not of itself justify an action against the ship, unless the claim is secured by a maritime lien.[27]

8.16 The last sentence of what is now article 3(4) was added in response to further representations by the Netherlands representatives who commented that the last sentence:

> "is necessary as under Netherlands law in many cases including collision and salvage, not the legal owner as such or the registered owner as such are liable, but the "reeder" ie the person who appointed

22 See eg Jackson, Enforcement of Maritime Claims (2d edn) pp 197, 201.

23 International Maritime Committee, Bulletin No 105, Naples Conference 1951 (1952) p 126. At ibidp 111, the Finnish Branch of the Committee pointed out that the Draft Convention had not considered the problem that under some systems of law "where the owner of the ship is not personally liable, arrest cannot be granted, except where the maritime claim is connected with a maritime lien on the ship ...".

24 Ibid, pp 126-127. The Rapporteurs suggested an amendment which was never made. That amendment was "to leave to the 'lexfori arresti' the question whether a ship which has passed into the ownership of a third party is liable to arrest".

25 International Maritime Committee, Bulletin No 5, p 3.

26 Ibidp 4.

21 Berlingieri, Arrest of Ships (2d edn) p 76. He continues (ibid): "The International Sub-Committee could not ignore Article 13 of the 1926 Convention on Maritime Liens and Mortgages, of which Norway was a party". Article 13 of that Convention applies it to vessels operated by persons other than the owner.

the Master and there are other cases possible, in which the Master is not the legal servant of the legal owner or registered owner".[28]

Arrestment: conservatory measure or attachment preliminary to judicial sale?

8.17 Those who defend the extension by article 3 of arrests to persons other than the owner may rely on the view that arrest under the Convention is, and was intended to be, merely a conservatory measure,[29] as distinct from a prelude to a compulsory judicial sale. This is evident from the definition of "Arrest" in article 1(2), which states:

> "'Arrest' means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment."

From this Berlingieri concludes:

> "Consequently, the judicial authority competent for the execution or satisfaction of a judgment cannot, in order to establish whether the ship can be seized and sold in a forced sale in satisfaction of a judgment against a person other than the owner of that ship, apply the provisions of the Arrest Convention."[30]

Coupled with the fact that the Convention did not create new maritime hypothecs or liens,[31] this may explain why some countries accepted article 3. On the other hand, to say the least, "it seems rather odd to grant the right to arrest a ship on which a claim cannot be enforced".[32]

The link between conservatory arrest and enforcement of judgment by judicial sale

8.18 Article 7(1) provides that in the cases there listed, the forum arresti has jurisdiction to determine the case upon its merits. The aim was to facilitate enforcement in execution of the decree against the ship. Article 7(2) provides that if the forum arresti lacks jurisdiction on the merits, the security for release of the ship:

> "shall specifically provide that it is given as security for the satisfaction of any judgment which may eventually be pronounced by a court having jurisdiction so to decide".

The effect is that the owner may have to pay caution to obtain release of the ship, even though the debt is that of the demise charterer.

Interpretation of article 3(4) by English courts

8.19 The last sentence of article 3(4)[33] is controversial and difficult to interpret. It provoked a difference of opinion in the Court of Appeal in an English case, the Span Terza.[34] The issue in that case turned on the meaning of "charterer" in the Administration of Justice Act 1956, section 3(4). The majority[35] thought that the words in article 3(4) were far wider than section 3(4) because these words did not include the limitation of any such person as the charterer, but the majority did not find the Convention of assistance in construing section 3(4). Donaldson L J thought that "charterer" in section 3(4) meant demise charterer. He pointed out that article 3(4) "is not only somewhat eccentrically drafted, but eccentrically laid out in the paper" since "this extraordinary final sentence" of article 3(4) "is set out into the margin, suggesting that it applies to the whole article, whereas it plainly does not from its own internal wording".[36] He continued:[37]

28 International Maritime Committee, Bulletin No 5, p 60.
29 Berlingieri, Arrest of Ships (2d edn) p 78, citing the French delegate.
30 Berlingieri, Arrest of Ships (2d edn) p 79.
31 Idem, citing inter alia Agenzia Marittima Saidelli and Trader S.a.s v M/v Dexterity [1994] Dir. Mar. 1195 (USDC-Eastern District of Louisiana).
32 Berlingieri, Arrest of Ships (2d edn) p 78.
33 Quoted at para 8.13 above.
34 [1982] 1 Lloyd's Rep 225 (reported in 1982 but construing the Administration of Justice Act 1956, not the Supreme Court Act 1981). The decision was reached on an ex pane application determined as a matter of urgency and apparently had to be used with caution as a precedent.
35 Sir David Cairns, at ibid, p 227; Stephenson L J concurring.
36 Ibid at p 230.
37 *Ibid at p 231.*

"I do not regard that [scil. the final sentence of Article 3(4)] as providing any authority whatever for extending the word "charterer" to "non owner-like charterers" - in other words, beyond the scope of the demise charterer. I think it refers to mortgagees in possession of a ship, and possibly to salvors, because it must be remembered that under most traditional ship mortgage deeds it is possible for a mortgagee to enter into possession of a ship and to trade the ship as his own; he does not thereby become the owner of the ship, but he does become a quasi-owner in exactly the same way as, or analogously to the position of, the demise charterer. So we get, in the section itself, section 3(4), consistently, as I think, with that concept, the owner, which is par (1) of art 3; we get the demise charterer which is sub-par (4) of art 3; and we get a person in possession or in control of the ship, which is the tailpiece to par (4) of art 3."

8.20 If the final sentence of article 3(4) means that the main provision of article 3(4) is to apply not only to charters by demise but also to cases where there is no charter by demise, it would cover time and voyage charterers and persons temporarily in control or possession of the ship at the time when the claim arose and allow an arrestment (and eventual sale) of the ship even though the registered owner is not liable under the maritime claim. Although the registered owner is not so liable, he would ex hypothesi lose his property. Such an interpretation would seem to introduce a new species of maritime lien and a wide breach of the general rule that a creditor cannot arrest and sell A's property for B's debts. There is the further difficulty that if article 9 can be invoked so as to preclude the creation by the final sentence in article 3(4) of maritime liens or hypothecs, it is difficult to see what that final sentence does in fact mean.

The Administration of Justice Act 1956, sections 47 and 48 (implementing the Brussels Convention in Scotland)

8.21 Sections 47 and 48 of the Administration of Justice Act 1956, which implemented the Brussels Convention in Scotland, do not expressly refer to a charterer by demise or any other charterer or person in possession and control of the ship. Section 47(1) provides:

"Subject to the provisions of this section and section 50 of this Act, no warrant issued after the commencement of this Part of this Act for the arrest of property on the dependence of an action or in rem shall have effect as authority for the detention of a ship unless the conclusion in respect of which it is issued is appropriate for the enforcement of a claim to which this section applies, and, in the case of a warrant to arrest on the dependence of an action, unless either -

(a) the ship is the ship with which the action is concerned, or

(b) all the shares in the ship are owned by the defender against whom that conclusion is directed."

8.22 It will be seen that subsection (1) of section 47 refers to claims to which that section applies. These are the maritime claims set out in section 47(2). Section 47(2) defines the claims by reference to their subject matter in paragraphs (a) to (s).[38] These correspond to the list of maritime claims in article 1 of the 1952 Convention.[39]

8.23 The claims mentioned in paragraphs (a) to (o) of section 47(2) of the 1956 Act may be enforced by an arrestment of a ship on the dependence if the conditions of section 47(1) are satisfied. We are only concerned here with the question whether an arrestment should be competent on the dependence of an action in personam against a demise charterer where the action in personam falls into any of paragraphs (a) to (s) of section 47(2).[40]

38 Para (ca) was added by the Merchant Shipping (Salvage and Pollution) Act 1994, Sch 2, para 4.
39 See Appendix C below. Para (s) has no counterpart in the Convention list.
40 We are not concerned with arrestments in rem enforcing maritime liens or supporting non-pecuniary claims.

Interpretation of section 47(l)(a) of 1956 Act

8.24 It would be possible to construe section 47(1)(a) as permitting arrestment on the dependence of a ship with whicluhe action is concerned (if the claim is specified in section 47(2)) irrespective of whether the defender in the depending action is owner. Indeed this is the way in which Lord Chancellor Hailsham construed the provision in a debate on an English Bill in the House of Lords as noted below.[41]

8.25 There is no Scottish reported decision upholding this wide interpretation and we do not think that the Scottish courts would adopt it. It seems to us much more likely that they would adopt a narrower interpretation on the lines of that outlined by Mr Ian G Inglis in the passage partly quoted in Part 7 above[42] where he contends:

> "Unless there is a maritime lien or quasi lien[43] it is incompetent under the general law to arrest anything which does not belong to the defender at the time of such arrest. Where, however, the defender is part owner of a ship and that ship is the ship with which the action is concerned then that ship may be arrested even if the defender only owns one out of the 64 shares in it. [Citing William Batey & Co (Exports) Ltd v Kent 1987 SLT 557 affg. 1985 SLT 490.] The wording of section 47(1) is by no means clear but it is submitted that if it is considered in the light of the pre-1956 law this is the only sensible meaning that can be given to it".

This argument is supported by the fact that the Brussels Arrest Convention did not create new maritime liens.[44]

Recommended amendment of section 47(l)(a)

8.26 In Part 7 above we accept this argument and recommend[45] that in legislation following on this report the ambiguity in section 47(1)(a) should be removed to make it clear that an arrestment is competent only if the defender is, at the time of the execution of the arrestment, the owner of a share or shares in the ship with which the action is concerned.

The "sister ship" provision: 1956 Act, section 47(l)(b)

8.27 Where a person is the defender in an action for a claim specified in section 47(2), the 1956 Act, section 47(1)(b) permits the arrestment of any ship wholly owned by him at the time of the arrestment. It should be noted that, in relation to the ship with which the action defended by him is concerned, he may be liable in his capacity as an owner, demise charterer or time charterer of the ship. English law is similar.[46] The oft-used term "sister ship" should not be taken to mean that the defender must own both "sister ships".

Cross-border difference: arrestment for debt of co-owner

8.28 In England, both section 3(4) of the 1956 Act (now repealed) and its successor, section 21(4) of the Supreme Court Act 1981,[47] provide that the person liable inpersonam must be "the beneficial owner as respects all the shares in" the ship in question (ie the ship concerned in the claim or the sister ship). English law thus differs from Scots law where it has been held, in relation to the 1956 Act:

> "Section 47(l)(b) applies to the situation where all the shares in the ship are owned by the defender. Section 47(1)(a) applies to the situation where the ship is the ship with which the action is concerned without any qualification as to the ownership of the shares therein. It follows that the ship is prima facie arrestable even though it is in joint ownership".[48]

41 See para 8.39.
42 Inglis, p 88 quoted at para 7.104 above.
43 By a "quasi lien" is meant a right enforceable by arrestment in rem under s 47(3)(b) of the 1956 Act which relates only to the narrow class of claims mentioned in paras (p) to (s) of s 47(2).
44 Article 9, quoted at para 8.14 above; Berlingieri, Arrest of Ships (2d edn) p 79.
45 Recommendation 60(1) (para 7.106).
46 Supreme Court Act 1981, s 21(4)(ii).
47 Quoted at para 8.36 below.
48 William Batey & Co (Exports) Ltd v Kent 1985 SLT 490(OH) at p 492 per Lord Brand, affd 1987 SLT 557.

This result was expressly reached[49] on a construction of the 1956 Act, section 47(1), not the common law, which is however consistent with it.[50]

8.29 It seems to have been considered by the draftsmen of the 1956 Act that this was a matter on which cross-border differences could exist. The Brussels Arrest Convention does not expressly require that the defender of the particular ship concerned must be owner of all the shares: see article 3(1).[51] This is reflected in the 1956 Act, section 47(l)(a). Article 3(2) provides that "Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons". This is reflected in the 1956 Act, section 47(l)(b). So far as we can see, the Convention leaves it to individual States to regulate the right to arrest shares in co-owned ships for the debt of one co-owner. However the provisions on the right to arrest for a demise charterer's debt appear to be mandatory and binding on all parties to the Convention.

Ownership of "sister ships": piercing the corporate veil

8.30 In the context of arrest of "sister ships", where the defender in the admiralty action is a company or other body corporate, there is much international interest in the question of how far the court should be entitled "to pierce the corporate veil"[52] in order to determine whether the defender in the maritime claim is (substantially) the same person as the owner of the sister ship.[53] They may be separate corporate persons but behind the corporate facade they may be in reality the same person. This is particularly important because of the growth of one-ship companies.[54]

8.31 The approach taken in England, likely to be followed in Scotland,[55] is that, on general principles of company law, while the possibility of piercing the corporate veil does exist,[56] it can be done only if registration of the ship is clearly a sham or amounts to fraud.[57] This is difficult to prove.

8.32 The South African Law Commission contended that the provisions of the Brussels Arrest Convention on sister ships had been defeated by the proliferation of one-ship companies.[58] Its report resulted in the Admiralty Jurisdiction Regulation Act 105 of 1983, amended in 1992,[59] which enacts provisions designed to lift the corporate veil between ship-owning companies. The Act as amended allows the arrest of an "associated ship" which is defined to mean a ship, other than a ship in respect of which the maritime claim arose, which is: (a) owned, at the time when the action is commenced, by the person who was the owner of the ship concerned at that time; or (b) owned, at that time, by a person who controlled the company which owned the ship concerned at that time; or (c) owned, at that time, by a company which is controlled by a person which owned the ship concerned, or owned the company which owned the ship concerned, at that time.[60] A charterer or subcharterer[61] is deemed to be the owner of the ship concerned in any relevant claim for which the chaterer or subcharterer is alleged to be liable.[62]

49 William Batey & Co (Exports) Ltd v Kent 1985 SLT 490(OH) at p 492.
50 See para 7.12 above.
51 See para 8.13.
52 On this doctrine see P L Davies (ed), Cover's Principles of Modem Company Law (6th edn;1997) Chapter 8.
53 For a comparative survey, see Berlingieri, Arrest of Ships (2d edn) pp 61 - 64.
54 A fleet of ships may be operated by a combination of one-ship companies subject to a single unified control.
55 The rules on piercing the corporate veil are the same as in England: cf Woolfson v Strathclyde R C 1978 SC (HL) 90. The distinction between "beneficial owner" and "owner" should make no difference.
56 Dicta in The Aventicum [1978] 1 Lloyd's Rep 184 at p 187; The Maritime Trader [1981] 2 Lloyd's Rep 153 at p 157; The Saudi Prince [1982] 2 Lloyd's Rep 255 at p 260.
57 The "EvpoAgnic" [1988] 2 Lloyd's Rep 411 (CA); The Maritime Trader [1981] 2 Lloyd's Rep 153; Jackson, Enforcement of Maritime Claims (2d edn) pp 199, 200; Berlingieri, Arrest of Ships (2d edn) pp 63, 64.
58 South African Law Commission, Report on the Review of the Law of Admiralty Project 32 (1982), para 7.3.
59 Admiralty Jurisdiction Regulation Act 87 of 1992; General Law Amendment Act 139 of 1992, - both taking effect in August 1993. See H Staniland, "Enforcement of Maritime Claims" in: W A Joubert (ed), The Law of South Africa vol 25 (1991) para 182; idem, "Ex Africa semper aliquid novi: Associated ship arrest in South Africa" [1995] LMCLQ 561.
60 Admiralty Jurisdiction Regulation Act 1983, s 3(7)(a) as amended by the Admiralty Jurisdiction Regulation Amendment Act of 1992 s 2(c) (South Africa).
61 Including a time or voyage charterer as well as a demise charterer.
62 Admiralty Jurisdiction Regulation Act 1983, s 3(7)(c) as amended by the Admiralty Jurisdiction Regulation Amendment Act of 1992 s 2(d) (South Africa).

8.33 The Australian Law Reform Commission considered that, if an associated ship provision on the South African model were needed, it should be introduced through company law or insolvency law rather than in specific contexts like Admiralty jurisdiction.[63] In any event a provision on these lines, even if it were desirable, would go beyond the Brussels Arrest Convention[64] and so could not be enacted in the United Kingdom unless the Convention were to be amended.

1956 Act, section 47(l)(a) and demise charterers

8.34 The main question with which this Part of the Report is concerned is whether the re-enactment of section 47(l)(a) of the 1956 Act proposed by this Report should allow an arrestment on the dependence where the defender is not the owner, but a demise charterer, of the ship with which the action is concerned.

Implementation of Brussels Arrest Convention of 1952 by legislation in England and Wales

8.35 The Brussels Arrest Convention of 1952 was implemented in England and Wales originally by sections 1 to 3 of the Administration of Justice Act 1956 which were consolidated by the Supreme Court Act 1981 with amendments.[65]

Section 21(4) of Supreme Court Act 1981

8.36 In so far as the Scottish provisions in section 47(1) of the 1956 Act allow an arrestment of a ship on the dependence of an action in personam enforcing a claim mentioned in paras (a) to (o) of section 47(2),[66] the corresponding provision in English legislation is subsection (4) of section 21 of the Supreme Court Act 1981. That subsection provides:

> "In the case of any such claim as is mentioned in section 20(2)(e) to (r), where
>
> (a) the claim arises in connection with a ship; and
>
> (b) the person who would be liable on the claim in an action in personam ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,
>
> an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against
>
> (i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or
>
> (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it." (emphasis added)

This subsection re-enacts with amendments section 3(4) of the Administration of Justice Act 1956.[67] The principal amendment is the addition of the words italicised referring to a demise charterer.

"Owner" does not include demise charterer

8.37 In England, both section 3(4) of the 1956 Act and its successor, section 21(4) of the 1981 Act, require that the person liable in personam must be "the beneficial owner" of the ship in question at the relevant time. Before 1981, there were conflicting decisions as to whether a demise charterer was "the beneficial owner" within the meaning of the 1956 Act, section 3(4), but the better view was that he was not.[68]

---

63 ALRC 33, pp 108,109.

64 South Africa and Australia are not parties to the Brussels Arrest Convention.

65 Corresponding provision is made for the county courts (now consolidated as County Courts Act 1984, s 28(4)) but it is necessary here to refer only to the 1956 and 1981 Acts.

66 See Appendix C for a comparison with the English statutory list of claims.

67 Paras (e) to (r) of section 20(2) correspond to paras (a) to (o) of the Scottish provisions in section 47(2) of the 1956 Act.

68 The I Congreso del Partido [1978] QB 500 at pp 537-542; The Father Thames [1979] 2 Lloyd's Rep 364 at p 368 per Sheen J; contra, The Andrea Ursula [1973] QB 265 (Brandon J).

8.38 It should be noted that the Scottish provisions in the 1956 Act, 47(l)(b)[69] do not use the concept of "beneficial owner" but refer to "owner".[70] There is no reported Scottish case seeking to construe "owner" as including demise charterer and such a construction seems unlikely to win acceptance.

Parliamentary background of section 21(4) of 1981 Act

8.39 The original English provisions in section 3(4) of the 1956 Act had required two links to be made between the person liable in personam and the ship concerned in the claim. The person who would be liable in the action in personam had to be:

(i) at the time when the cause of action arose the owner or charterer or person in possession or control of the ship; and

(ii) at the time when the action was brought the owner of the ship.

In the Bill which became the Supreme Court Act 1981, as originally introduced, clause 21(3) provided that in respect of the claims set out in what are now paras (e) to (r) of section 20(2), "being a claim which arises in connection with a ship ... an action may be brought in the High Court against that ship". Clause 21(3) removed entirely the links between the person liable in personam and the ship concerned in the claim. In the House of Lords debates, this provision was strongly criticised by Lord Diplock,[71] who had been briefed by various shipping and maritime law organisations. Lord Diplock observed that, although British policy had hitherto been concerned to oppose any extension of maritime liens, clause 21(3) would have had the effect of converting the claims in paras (e) to (r) of clause [section] 20(2) into such liens or hypothecs. He remarked that, for example, cargo claims and charter party claims under paras (g) and (h) of clause [section] 20(2) are not recognised in many countries as maritime liens and continued:

> "These claims for cargo losses or damage - claims under charter parties - represent ordinary, simple contract debts. The effect of Clause 21(3), as it stands at present, is to convert these into secret charges, lasting six years and thus, possibly, through more than one change of ownership of the vessel, which may be very large indeed. Compared with other maritime liens, whose duration is generally short - one year or, possibly, only one voyage - these will, as I say, continue unless the subsection is amended, to last six years ...
>
> I venture to suggest that a Bill of this kind, which is concerned with jurisdiction and with practice and procedure, is no place in which to make so fundamental an alteration in the substantive law and, without close discussion and consideration, to make a change in what, hitherto, has been the commercial policy of this country in this field."

The Lord Chancellor (Hailsham) replied[72] that English law did not yet conform to the Brussels Arrest Convention and the object of the clause was to make it do so: "I add, again somewhat plaintively, that Scottish law does conform with the Brussels Convention". This latter remark is a reference to the wide interpretation of section 47(l)(a) of the 1956 Act criticised at para 8.25 above.

8.40 The offending provision was amended in the House of Commons by the substitution of what is now section 21(4) of the 1981 Act. The Solicitor General for England and Wales (Sir Ian Percival) observed:[73]

> "I choose my words carefully. It is a matter of some doubt exactly what the convention requires. Some say that we have adopted the provisions fully, and some say that we have not. The convention is not entirely clear on the point, but it appears to allow for the arrest of ships in respect of a wide

69 Quoted at para 8.20 above.

70 The words used are: "all the shares in the ship are owned by the defender". The meaning of the concept of "beneficial ownership" is controversial in Scots law: see eg Sharp v Thomson 1997 SC(HL) 66; K G C Reid, "Jam Today; Sharp in the House of Lords" 1997 SLT (News) 79; and para 9.24 below.

71 H L Debs 1980-81, vol 418, cols 1308-1310.

72 Ibid col 1310.

73 HC Debs 1980-81, Standing Committee B, First Sitting, 3 June 1981, col 28.

variety of classes of claim, including those mentioned in clause 20(2)(e) to (r), regardless of the identity of the owner."

He said that afteE consultation the Government had decided not to proceed with the changes for the time being and further remarked:[74]

> "Although it is nearly 30 years since the Brussels Arrest Convention was concluded, there is as yet no kind of uniformity of international practice on this matter, so that there is no question of this country being out of line by not making these changes. I stress that, too. It would be a different matter if we were out of line after all these years with everybody else's implementation and interpretation of the convention."

The Solicitor General then explained why what is now subsection (4) of section 21 of the 1981 Act was extended to include charterers by demise:[75]

> "As I have indicated, in cases where there is no maritime lien, a plaintiff may bring his action in rem against the ship only if the person who would be liable on the claim in personam is the owner at the time when the action is started. For many purposes a charterer by demise is in the same position as an owner, unlike other charterers he employs his own crew and is for all practical purposes in complete control of the ship. Moreover, demise charters are usually for long periods. Those who have been consulted agree that it would be a small but useful improvement in the present law if demise charterers were placed on the same footing as owners, so that if the person who would be liable in personam on a claim is the demise charterer of the ship in question, the action can be brought against that ship even if it changed owners since the cause of action arose. The new subsection (5) of clause 21 [now section 21(4)] accordingly incorporates that feature."

Subsequent international developments: revision of the Brussels Arrest Convention

8.41 Steps towards revision of the Brussels Arrest Convention were initiated in 1984. A draft convention was approved by the Comite Maritime International at their Lisbon Conference in 1985 (the Lisbon draft[76]). Article 3 deals with the ships which may be arrested.[77] Article 3(1) deals with the arrest of a ship as to which a maritime lien is asserted. Article 3(2) governs arrest of ships other than those as to which a claim is asserted (eg "sister ships"). Then Article 3(3) provides:

> "Notwithstanding the provisions of paragraphs (1) and (2) of this Article, the arrest of a ship which is not owned by the person allegedly liable for the claim shall be permissible only if, under the law of the state where the arrest is demanded, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship".

So an arrest of a ship owned by a third party to secure a claim against a demise charterer would be competent under the Lisbon Draft only if, by the lexfori, a judicial sale of the ship were competent in execution of a decree for payment against the demise charterer. If such a provision were eventually to be accepted by the UK Government, it would reverse the current policy underlying section 21(4) of the 1981 Act.

8.42 After further international developments,[78] the revision of the Lisbon draft has recently been considered by the Joint IMO-UNCTAD[79] Inter-governmental Group of Experts (JIGE). In Geneva in December 1996, the JIGE reached agreement on draft articles forming the basis of a new Convention revising the Brussels Arrest Convention. We understand that the EVIO and the United Nations have recently been considering the convening of a Diplomatic Conference and that this is likely to be held

---

74 Idem.

75 Ibid, col 29.

76 Draft Revision of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships (done at Brussels, 10 May 1952).

77 For a detailed analysis, see Berlingieri, Arrest of Ships (2d edn) pp 171 -174.

78 Conveniently described in Berlingieri, Arrest of Ships (2d edn) pp 158-160.

79 International Maritime Oganisation - United Nations Conference on Trade and Development.

early in 1999.[80] How soon (if at all) United Kingdom legislation is likely to follow thereon is not for us to say. Our recommendations in this Part have had to be based on the assumption that legislation on the Jicots law will not necessarily be prevented by the move towards revision of the Brussels Arrest Convention. It will be for Government to review the position and to decide whether that assumption is valid in the light of changing circumstances.

RECOMMENDATIONS

(1) Arrestment on the dependence of the particular ship in action against demise charterer

8.43 From the foregoing somewhat complicated background certain factors emerge.

8.44 Arguments for proposed amendment. First, the Brussels Arrest Convention of 1952 is ambiguous in some respects but the first part of article 3(4) makes it clear that it was intended that it should be competent to arrest a ship on the dependence of an action in personam against a demise charterer where the ship is the particular ship with which the action is concerned. Scots law does not conform to the Convention in that respect. We believe that it should be amended to conform to that extent.

8.45 It is widely recognised that the purpose of the Convention is to effect a compromise limiting the cases where civil law countries may grant warrant and expanding the cases where common law countries may grant warrant. It does not lay down the cases where warrants must be granted. On this basis Professor Allan Philip argues that if the applicable law does not permit enforcement against the ship owned by a person who is personally liable, arrest is not permissible.[81]

8.46 The reasonableness of this solution in policy terms is shown by the fact that, as noted above, it has been adopted in the Lisbon Draft.[82] But as a matter of construction of the unrevised text of the Arrest Convention:

> "it seems impossible to insert a proviso which does not appear in the text, viz that [the claimant] may arrest the ship provided the lex fori permits him to enforce his claim on the ship".[83]

8.47 The Arrest Convention in its preamble declared that the Contracting States "recognised the desirability of determining by agreement certain uniform rules relating to the arrest of seagoing ships". This seems to us to impose an international obligation to conform as closely as possible to the Convention.

8.48 Second, to allow an arrestment on the dependence of every maritime claim mentioned in article 1 of the 1952 Convention (1956 Act, section 47(2), paras (a) to (o)) would conform to the wide interpretation of the Convention especially article 3(1) and the final sentence of article 3(4). That wide interpretation however does not take account of article 9 which is often overlooked and which was intended to prevent the creation of new maritime liens not recognised in national systems of law.[84] We do not think that the wide interpretation of the Convention is sufficiently clear and unambiguous to warrant legislation which would have the effect of transforming all the claims in section 47(2) of the 1956 Act into maritime liens.

8.49 Third, to allow an arrestment on the dependence of the particular ship with which an action in personam is concerned where the defender is the demise charterer would harmonise Scots law with English law as set out in section 21(4) of the Supreme Court Act 1981, and with legislation in certain other countries of the Commonwealth introducing arrest in rem of a third party's ship for the demise charterer's claim.[85] The provisions of section 21(4) were enacted after consultation with British shipping

80 At the time of writing, H M Government were awaiting notification from the United Nations Organisation of their decision on this matter.

81 Philip, "Maritime Jurisdiction in the EEC" [1977] Juris Gentium 113.

82 Article 3(3): see para 8.41 above.

83 Berlingieri, Arrest of Ships (2d edn) p 80.

84 See para 8.14 above.

85 Admiralty Act 1973, s 5(2) proviso (b) (Actions in rem) (New Zealand); Admiralty Act 1988, s 18 (right to proceed on demise charterer's liabilities) (Australia). See also Admiralty Jurisdiction Regulation Act 105 of 1983, s 3(7)(c) as amended by Admiralty Jurisdiction Regulation Act 87 of 1992, s 2(d) (charterer or subcharterer deemed to be owner in respect of a maritime claim against him; not restricted to charter by demise) (South Africa).

interests who approved the extension to demise charterers. It is generally accepted that an international Convention introducing uniform rules should normally be implemented in Scots law in the same way as in the laws of other parts of the United Kingdom, unless there are special considerations, eg relating to the distinctive"character of Scots law, which indicate that uniformity is not appropriate. We have not identified such special considerations in the present context.

8.50 Arguments against proposed amendment. We are aware that there are a number of strong arguments of principle or policy which might be advanced against the proposed amendment of the law. First, and most importantly, the proposal would breach a fundamental principle of ordinary justice and of Scots law that an unsecured creditor cannot execute diligence against the property of A for B's debt.[86] Scots law has got rid of such provisions in the context of poinding for rates.[87] The proposal can therefore be regarded as retrograde. If the proposal had been applied to a contract of hiring of moveables, it would be regarded as unacceptable.

8.51 Second, the demise charterer may have defences against his creditor's claim, but there is no indication that the owner of the ship arrested for the demise charterer's debt can maintain these pleas in default.

8.52 Third, the proposal creates difficulties in competitions between creditors and in insolvency proceedings which, other things being equal, would be best avoided.

8.53 Conclusion. In our view, however, since the United Kingdom has sought to implement the Convention by statute and subsequently ratified it, the issue of principle must now be regarded as foreclosed and the main task now is to consider what provisions are necessary to give practical effect in Scots law to the relevant provisions of the Convention and to avoid the creation of unnecessary anomalies. We would nevertheless mention the point that the true owner of the ship or his advisers would be aware at the time when the owner entered into the charter party that in English law, and in future Scots law, an arrest or arrestment of the ship would be competent to secure a claim in personam against the charterer. The possibility of arrestment would be a known risk.

8.54 The foregoing amendment should clearly apply to the admiralty actions currently specified in paragraphs (a) to (o) of section 47(2) of the 1956 Act.[88] There is however a question whether the amendment should apply also to the maritime claims mentioned in paragraphs (p) to (s) of section 47(2). The corresponding provisions of the English Act of 1981 are paragraphs (a) (b) (c) and (s) of section 20(2) and in relation to them section 21(2) of the 1981 Act provides that an action in rem may be brought against the ship or property in connection with which the claim or question arises. In the Scottish Act of 1956, on the other hand, subsection (3)(a) of section 47 makes it clear that if a conclusion appropriate for the enforcement of a claim specified in paragraphs (p) to (s) of section 47(2) is pecuniary, an arrestment on the dependence is competent. If a claim (such as is mentioned in section 47(2)(q)) arose out of a dispute as to possession of a ship which is under the control of a demise charterer, and the claim includes for example a pecuniary conclusion for damages for wrongful detention of possession, it presumably ought to be possible to arrest the ship on the dependence. This suggests that the proposed reform should apply to paragraphs (p) to (s) of section 47(2).

8.55 Consultation. On consultation, the majority of consultees agreed with our proposal,[89] accepting that, as the United Kingdom has ratified the Convention the only remaining task is to give practical effect to that Convention in Scots law. The Association of Scottish Chambers of Commerce expressed reservations on departing from the principle that an unsecured creditor cannot execute diligence against

86 We revert at para 8.58 below to the question whether the arrestment would carry with it a power of sale.
87 See Local Government (Scotland) Act 1947, s 247(2) as originally enacted and Glasgow Corporation v Midland Household Stores Ltd 1967 SLT (Sh Ct) 22. Compare Local Government (Scotland) Act 1947, s 247 as substituted by Debtors (Scotland) Act 1987, Sch 4, para 1, as read with Sch 5 (poinding procedure under summary warrant).
88 See Appendix A, Draft Bill, clause 26.
89 Consultation Paper, para 36, Proposition 1.

the property of one party for the debts of another party. In valuable comments, Messrs Dorman Jeffrey and Co pointed out that the proposal would operate unjustly against the owner of the ship. They accepted however that the Brussels Arrest Convention and the English Act had established the policy for the United Kingdom, and that our task in Scotland must be to minimise the injustice so far as practical.

8.56 In this latter respect our other proposed reforms would help. Clearly our recommendations that arrestment on the dependence should be an extraordinary remedy available only in special circumstances determined by a judge in his discretion[90] should apply a fortiori to a warrant for arrestment of a ship or her cargo on the dependence of an admiralty action in personam against a demise charterer. The related recommendations[91] should also apply mutatis mutandis, including the rule of liablity in damages to both the demise charterer and the owner of the arrested ship for patrimonial loss arising from a wrongful or unjustified arrestment.

8.57 We recommend:

(1) In our recommended re-enactment of the Administration of Justice Act 1956, section 47(l)(a) (which permits an arrestment, on the dependence of an action in personam enforcing a claim mentioned in section 47(2), of the ship with which the action is concerned) should be amended so as to permit an arrestment on the dependence of such an action where, at the time of the execution of the arrestment, the defender is the demise charterer of the ship.

(2) Recommendations 1 (diligence on the dependence to be extraordinary remedy available only in special circumstances) and 2 (proposing the judicial discretionary grant of warrant for diligence on the dependence) should apply to a warrant for arrestment of a third party's ship on the dependence of an admiralty action in personam against a demise charterer. Recommendations 3 - 8 should apply with any necessary modifications.

(Recommendation 73; Draft Bill, clause 27(l)(a))

(2) Judicial sale in execution of decree against demise charterer after arrestment on dependence

8.58 In our Consultation Paper[92] we considered whether it should be provided that the right of the creditor of the demise charterer should be limited to a right to arrest without power of sale. Whether or not the Brussels Arrest Convention presupposes that an arrest carries with it a power of sale,[93] it seems to be construed in that way in England and Wales.

8.59 The Supreme Court Act 1981, section 21(4)(i),[94] implies that the High Court may authorise a judicial sale of the ship. The reason is that under English law an admiralty action in rem carries with it the power to arrest in rem the ship to which the action relates. After the ship has been arrested, the claimant may request the Court to authorise the sale of the ship and, subject to any prior claims, the distribution of the proceeds of sale to the claimants in rem in accordance with their respective rights or preferences.[95]

---

90 Recommendations 1 and 2 (paras 3.3 and 3.5 above).

91 Recommendations 3 - 8 in Part 3.

92 Ibid, para 50.

93 See para 8.17 commenting on article 1(2).

94 Which authorises the bringing of an action in rem against a ship in respect of a liability in personam of the demise charterer in connection with the ship.

95 See D C Jackson, Enforcement of Maritime Claims (2d edn; 1996) p 550: "... the action in rem carries with it its own unique remedy - the judicial sale. The ability to bring an action in rem creates the ability to arrest the property (usually a ship) in respect of which the action is brought. Once under arrest, the claimant may ask that the property be sold and, subject to priority questions, the proceeds made available for claimants in rem - ie all those who issue writs in rem prior to the distribution of the fund". See also p 554: "The Admiralty Court may order the appraisement and sale of property under arrest [RSC Order 75, r 23] on the motion of a party to the action or the Admiralty Marshal. [RSC, Order 75, r 12].". The Admiralty Marshal has informed us that he could not recollect any case, reported or unreported, where a judicial sale had actually been carried out to satisfy the demise charterer's debt. Apparently in practice the owner normally bails the ship and then claims against the demise charterer.

8.60 It is likely that in many cases a judicial sale of a ship arrested on the dependence would be avoided by a judicial recall or extra-judicial "release" of the arrestment on the demise charterer (defender or debtor) or the third party-owner providing security. But provision for judicial sale is needed for the case where the arrestment is not recalled or "released". In the case of a judicial sale of a ship arrested to secure the debt of the demise charterer, the difficulty arises of defining what proprietary interest in the ship the creditor of the demise charterer is entitled to sell given that sale implies the passing of ownership and the demise charterer is ex hypothesi not the owner of the ship or of any of the 64 shares therein. It seems to us to be implicit in the Brussels Arrest Convention that the creditor of the demise charterer should be entitled to sell the interests of the owners of the 64 shares in the ship free of incumbrances and to account to those owners for any surplus proceeds of sale.

8.61 On consultation,[96] there was general agreement that an express provision to that effect should be enacted, though two consultees expressed misgivings about the justice of allowing a sale of A's property for B's debt. That however is the price of conforming to the Brussels Arrest Convention on this matter.

8.62 Rules of court should require intimation of an order for sale to be made by the demise charterer's creditor to the owner of the demise chartered ship so as to give him an opportunity to redeem the ship by paying the sum due to the creditor. Apart from that, we envisage that the procedure in the sale should be governed by the ordinary rules of the Court of Session.[97] To avoid any doubts as to vires, the legislation should provide (in conformity with current admiralty rules and practice) that the court must adjudge the ship to belong to the purchaser free of all incumbrances, and rank and prefer any claims on the proceeds of sale which should be consigned in court.[98] In this way the arresting and selling creditor would be bound to account to the owner, and to any creditors holding securtities or diligences, for any surplus arising on the net proceeds of the sale.

8.63 We recommend:

(1) Where a ship belonging to a third party is arrested on the dependence by a creditor of the demise charterer, the arrestment should be converted by decree for payment into an arrestment in execution and accordingly it should be competent to complete the diligence by a judicial sale of the ship.

(2) It should be made clear by statute that the creditor is entitled to sell the interests of the owners of all the shares in the ship.

(3) Rules of court should require that the owner of the demise chartered ship be given an opportunity to redeem the ship by paying the sum due to the creditor.

(4) In other respects the ordinary procedure for sale of a ship under the Rules of the Court of Session, rule 46.5 should apply. But express provision should be made by primary legislation, in terms similar to rule 46.5, disencumbering the ship on sale and requiring the court to rank the owner and any other claimants on the free proceeds of sale.

(Recommendation 74; Draft Bill, clause 36)

(3) No arrestment of third party's ship in execution of decree in personam against demise charterer

8.64 Section 47 of the Administration of Justice Act 1956, insofar as it concerns arrestments connected with actions and claims in personam, applies only to arrestments on the dependence and not to arrestments in execution.[99]

96 Consultation Paper, paras 49 and 51, and Proposition 5.
97 RCS, r46.5.
98 RCS, r 46.5 (10)-(12).
99 This conforms to article 1, para 2 of the Brussels Arrest Convention quoted at para 8.17 above.

8.65 Our recommendation to allow an arrestment on the dependence of the particular ship with which the action is concerned, if chartered by demise by the defender, differs from the existing provisions of the 1956 Act, section 47, insofar as it widens rather than restricts the scope of arrestments of ships competent under the common law.[100]

8.66 In our Consultation Paper we suggested that if arrestments against demise charterers are to be competent on the dependence, then for the sake of consistency they should also be competent in execution. This was generally agreed but one consultee pointed out that the Brussels Arrest Convention, article 1(2), excludes judicial sale in execution.[101] We understand that in English law, unlike Scots law, an arrest in rem "is not available after judgment on liability and that it cannot be used as a method of execution of a judgment of an English court".[102] There is a persuasive case for confining this anomalous extension of arrestments to the minimum necessary to comply with international obligations and cross-border harmonisation.

8.67 In our view therefore where a decree for payment is granted against the demise charterer of a ship in an action to enforce a claim specified in section 47(2) of the Administration of Justice Act 1956, being an action and claim concerned with that ship, it should not be competent to enforce the decree by the arrestment and judicial sale of that ship in execution of that decree.

(4) Arrestment of third party's ship to found jurisdiction in action against demise charterer

8.68 In our Consultation Paper[103] we suggested that it should be made clear by statute that the creditor of a demise charterer may arrest to found jurisdiction in the same circumstances as he could arrest on the dependence in terms of Recommendation 73 (para 8.57) above. Otherwise the legislation implementing that recommendation might be ineffective in practice.

8.69 We are aware that arrestment to found jurisdiction is nowadays regarded as an internationally unacceptable and exorbitant ground of jurisdiction in the normal case, and for that reason is precluded by article 3 of the European Judgments Convention as a general ground of jurisdiction. This provision does not, however, apply to arrestments of ships. Article 57 of the European Judgments Convention provides that that Convention does not affect conventions to which the Contracting States are parties and this saving is generally considered as including a reference to the Brussels Arrest Convention of 1952.[104] Moreover the rules allocating jurisdiction to the different parts of the United Kingdom[105] and the rules for the assumption of jurisdiction by the Scottish courts in cases not covered by the European Judgments Convention[106] both allow the arrestment of a ship to found jurisdiction in admiralty causes. This proposal was generally approved on consultation and we adhere to it.

8.70 We recommend:

> **In an admiralty action in personam against the demise charterer of a ship, it should be competent for the pursuer to arrest the ship to found jurisdiction .**
>
> (Recommendation 75; Draft Bill, clause 35)

(5) Section 47(l)(b) of the 1956 Act: the "sister ship" provision and demise charterer defenders

8.71 Under section 47(l)(b) of the 1956 Act, where the defender in an admiralty action is the demise charterer of the particular ship with which the action is concerned, a "sister ship" owned by the demise

100 In practice, most arrestments of ships connected with actions in personam are likely to be used on the dependence rather than in execution, but there may be some cases where a ship comes within the jurisdiction only after decree against the demise charterer has been granted,

101 See para 8.17.

102 Jackson, Enforcement of Maritime Claims (2d edn) p 324, citing The Alletta [1974] 1 Lloyd's Rep 40.

103 Para 40.

104 Anton and Beaumont's Civil Jurisdiction in Scotland (2d edn) para 3.35; Ladgroup Ltd v Euroeast Lines S A 1997 SLT 916(OH).

105 Civil Jurisdiction and Judgments Act 1982, Sch 5, para 7.

106 Ibid, Sch 9, para 6.

charterer may be arrested on the dependence provided that the demise charterer owns all the shares in the ship at the time of the arrestment. The same result would follow where the defender is not the owner but was rather, for example, the time or voyage charterer or was in possession and control of the particular ship with which the action is concerned. This result is unexceptionable because it does not infringe the general principle against arresting A's property for B's debt. We do not recommend any change in this rule. It seems that similar rules apply in English law in terms of section 21(4)(ii) of the Supreme Court Act 1981.

(6) Supplementary issues as to ranking of creditors

8.72 In so far as the arrestment of a ship by a creditor of the demise charterer has the effect of prohibiting the removal of the ship from her anchorage, it does not appear that any practical difficulty would arise requiring legislation. An arrestment, however, has other legal effects which may well require express regulation by statute. These relate to competitions of creditors under the general law of ranking at common law on the proceeds of a judicial sale of the ship, and the ranking of an arrestment at the instance of a creditor of the demise charterer on the sequestration or (far more likely) liquidation of the true owner.

8.73 A provisional proposal in our Consultation Paper[107] for amendment of the rules on equalisation (paripassu ranking) of arrestments and poindings under the provisions of the Bankruptcy (Scotland) Act 1985, Schedule 7, para 24, is superseded by our recommendation in Part 9 below for the repeal of those provisions.[108]

(a) Ranking at common law on proceeds of judicial sale

8.74 On consultation it was strongly represented to us that a statutory framework regulating the ranking of an arrestment securing a claim against a demise charterer should be introduced because of the novel character of such an arrestment. We have found this to be a difficult question.

8.75 There are three main issues. First, while a legislative restatement of the rules for ranking maritime claims lies outside the scope of this report,[109] should we undertake this task in a supplementary discussion paper and report? Second, if not, is a comprehensive legislative statement of the rules for ranking an arrestment securing a claim against a demise charterer desirable? Third, if not, should any specific provision on the ranking of such an arrestment be enacted?

(i) A legislative restatement of the rules for ranking maritime claims?

8.76 There is no completely satisfactory modern analysis of the rules and order of ranking "maritime claims" under Scots law.[110] Such authorities as exist normally follow English sources which, however, differ among themselves, notably on the question of how far Equity should govern ranking.[111] As a unitary system, Scots law does not have a separate system of Equity.

8.77 The order of ranking maritime claims. The following is a commonly accepted order of ranking maritime claims:[112]

(1) certain special legislative rights, including for example dues payable to a port or harbour authority having statutory power to detain the ship;[113]

(2) the expenses of the arrestment (or other preliminary process), detention and judicial sale;[114]

---

107 Consultation Paper, Proposition 7(2) (para 59).
108 Recommendation 78 (para 9.53).
109 We have not consulted on a general restatement.
110 Useful material is found in Stair Memorial Encyclopaedia vol 20 (1992) paras 308 - 315. However arrestments on the dependence of ships are not "statutory liens" (cf paras 304 -307, and 315). See also the Scottish rules of equalisation of arrestments under the Bankruptcy (Scotland) Act 1985, Sch 7, para 24.
111 See Tetley, Maritime Liens and Claims pp 403, 404.
112 See Stair Memorial Encyclopaedia vol 20, para 308.
113 RCS, r 46.5(10); Harbours, Docks and Piers Clauses Act 1847, ss 44, 56, 57, 74.
114 The Siena Nevada [1932] 42 Lloyd's Rep 309 (Court of Session, OH) at p 310;

(3) claims secured by possessory liens (of the ship repairer or salvor) which last only so long as not voluntarily given up and have priority over claims arising subsequent to possession;[115]

f. *(4) claims secured by the principal maritime liens[116] enforceable by arrestment in rem;*[111]

(5) claims secured by ship mortgages which rank after maritime liens;[118] and finally

(6) claims secured by arrestments on the dependence and arrestments in execution.

8.78 With the partial exception of arrestments, generally speaking the ranking of these classes of claim, both within classes and between classes, is governed by English case law. The ranking of an arrestment (head (6)) in a competition with the other classes of maritime claim (heads (1) - (5)) will no doubt be governed, with any necessary modifications, by the same rules as apply in a competition between an arrest in rem enforcing an English statutory right of action (ie not enforcing a maritime lien) and the other classes of maritime claim.[119] One modification is that, on general principles, the priority point of an arrestment will normally be the date of execution of the arrestment[120] and not (as in the case of an English arrest in rem enforcing a statutory right of action) the date of the service of the writ commencing the action.[121]

8.79 Moreover competitions between claims secured by arrestments on the dependence and arrestments in execution among themseves are governed by Scots law. Such arrestments almost invariably rank inter se according to the dates of execution[122] but subject to the statutory rules on the cutting down of diligences on sequestration.[123]

8.80 Ranking of maritime claims and the general law on ranking. The rules on ranking creditors' maritime claims outlined above are not exhaustive. Competitions may arise between an arresting creditor and, for example, a third party claiming ownership of the ship[124] or the general creditors of the shipowner (or demise charterer) in an insolvency process (bankruptcy, liquidation or receivership).

8.81 So the rules of ranking maritime claims are not entirely severable from the general law on ranking. The rules of ranking creditors' claims should in principle be the same whether the process of ranking be a judicial sale of a ship (by an arrester/lien-holder, or a mortgagee, or an ordinary unsecured creditor using an arrestment), or a multiplepoinding, or an insolvency process.[125]

8.82 Comparative law. As the Law Reform Commission of Australia have pointed out, there is no internationally accepted model code of ranking maritime claims.[126] Most recent reforms of admiralty jurisdiction in Commonwealth countries made no provision,[127] or minimal provision,[128] on priorities in ranking. One exception is South Africa which enacted a full set of rules of ranking in 1983 and revised them in 1992.[129] The Law Reform Commission of Australia pointed out that the South African rules of 1983 were substantially those recommended by the American Maritime Law Association which in turn

115 The Russland [1924] P 55 at p 59; Stair Memorial Encyclopaedia vol 20, para 309.

116 See paras 7.62 et seq.

117 On ranking of maritime liens among themselves, see Stair Memorial Encyclopaedia vol 20, paras 310 - 313.

118 Stair Memorial Encyclopaedia vol 20, para 314.

119 See para 7.24 above.

120 Graham Stewart, Chapter VII.

121 See para 7.30 above. In England the action is an action in rem and in Scotland an action inpersonam.

Ill See however para 8.90, footnote 142 below.

123 See para 8.97 below; and subject also to statutory provisions on the equalisation of diligences outside sequestration whose repeal is recommended in Part 9.

124 See eg Schultz v Robinson and Niven (1861) 24 D 120; Interatlantic (Namibia) (Pty) Ltd v Okeanski Ribolov Ltd 1996 SLT819(OH).

125 Halifax Building Society v Smith 1985 SLT (Sh Ct) 25 at p 33 per Sheriff Principal Caplan: see para 9.57 below.

126 ALRC 33, para 256.

127 Supreme Court Act 1981 (England and Wales).

128 Admiralty Act 1988, s 35 (which is designed to ensure that an action in rem or arrest in rem against a sister ship of a wrongdoing ship ranks as a general maritime claim and not as a maritime lien transferred from the wrongdoing ship to the sister ship) (Australia).

129 Admiralty Jurisdiction Regulation Act 105 of 1983, amended by the Admiralty Jurisdiction Regulation Act 87 of 1992. See para 8.49, n 85 above.

were based on the Maritime Liens and Mortgage Convention of 1967.[130] The MLM Conventions of 1926, 1967 and 1993 however have failed to win widespread international acceptance so there is no single, agreed international model to follow and, because of the great complexity of the topic, such agreement is unlikely.[131]"

8.83 The Commission observed:

> "Any comprehensive set of rules for ranking of claims has to cover the ranking inter se of claims of the same class and type, for example one wages claim with another, or one claim of necessaries with another; the ranking inter se of claims of the same class but of different types, for example, a maritime lien for seamen's wages with a maritime lien for salvage, or statutory rights in rem in respect of claims for necessaries and for towage; and the ranking as between the classes of claims, that is maritime liens, mortgages, and statutory rights in rem. In addition the rules have to cater for claims outside the normal scope of admiralty..."[132]

While recognising the uncertainty and inaccessibility of the rules for ranking maritime claims, the Law Reform Commission of Australia recommended against codifying these rules having regard to the rigidity and complexity of any legislative restatement, the difficulty of foreseeing and resolving competitions in novel or unusual situations, and the need to adapt to changes in the maritime world.[133] Similar considerations apply in Scotland.

8.84 Conclusion. We conclude that we should not undertake a legislative restatement of the rules for ranking maritime claims in a supplementary discussion paper and report. If such a restatement were desirable, it would have to be undertaken on a United Kingdom basis. But we do not think that the case for such a restatement has been made out for the reasons given by the Law Reform Commission of Australia.[134]

(ii) Codify rules on ranking of arrestments for demise charterer's debts?

8.85 Since under existing law an arrestment of a corporeal moveable is not competent where the debtor is not the owner, there is no direct precedent in the existing law for resolving a competition between, say, an arrestment against a demise chartered ship at the instance of a creditor of the demise charterer, and an arrestment of the ship at the instance of a creditor of the owner.

8.86 On the other hand, the analogy of the existing law on competitions between diligences by the creditors of the seller of goods and diligences by the creditors of the purchaser of goods may suggest a solution. Thus Graham Stewart[135] observes that a competition between a poinding creditor of the seller and an arresting creditor of the purchaser would be determined by the rules of priority applicable to such diligences.[136] In other words, the fact that the debtor in each diligence is not the same person is disregarded. A competition between arrestments is determined by priority of the date of executing the arrestment where the debtor in each case is the same person, disregarding the date of the furthcoming or the warrant of sale or of the sale itself.[137] It seems likely therefore, on the analogy of the rule stated by Graham Stewart that the same criterion of preference would apply to a competition between arrestments of a demise chartered ship at the instance of a creditor of the demise charterer and a creditor of the owner.

8.87 It is however normal legislative practice to leave questions of ranking to be regulated by existing common law principles and, in this case, it might be difficult to frame rules of ranking which would be comprehensive and uncomplicated and avoid unintended consequences.

---

130 ALRC 33, para 256.
131 Idem.
132 Idem.
133 ALRC 33 para 257.
134 See previous para.
135 Diligence (1898) p 146.
136 These rules are set out in Graham Stewart, p 159 et seq.
137 Ibidpp 137-141.

8.88 On consultation, some (including the Law Society of Scotland) agreed with our provisional view[138] that the rules of ranking the new type of arrestment should be left to be developed by the common law.

8.89 Others disagreed. Messrs Dorman Jeffrey & Co observed that parties to demise charters, in contracts freely entered into, endeavoured to regulate their respective rights and interests between themselves. They argued that the consequences of any change in the law should be articulated so that owners and mortgagees may know where they stand. Pointing to various complications,[139] they argued strongly that a statutory framework regulating the application of the proceeds of sale was essential to allow ready assessment of the value to a creditor of the arrestment which would in turn facilitate the release of the vessel to continue trading in the hands of the owner or a new charterer.

8.90 Professor Gretton also considered it unwise to rely on the common law,[140] and suggested a generalised statutory provision to the effect that on arrestment of a ship, the demise charterer's creditor should rank in a competition with creditors of the owner[141] according to the respective times of arrestments, ie "first come, first served". Such a rule without more, however, does not seem acceptable, because the rule of temporal priority according to the dates of execution of the arrestments is not invariable.[142]

8.91 This illustrates the difficulty of framing even a relatively simple statutory rule of ranking. A statutory framework of ranking would be even more difficult.[143] In other legal systems it has not been found necessary. The English, New Zealand and Australian statutes introducing arrest in rein of a third party's ship for the demise charterer's claim[144] did not make any express statutory consequential provision on the ranking of such claims at all, let alone provide a new statutory framework. While we have sympathy with the desire for such a framework, we think that the case for it has not been made out.

(iii) Competition between arresting creditors of owner and of demise charterer

8.92 There remains the question of whether specific provision is needed on the application of the common law rules of ranking to an arrestment by a creditor of the demise charterer? The main question seems to be whether an arrestment of a ship by a creditor of a demise charterer should rank on a basis of parity with an arrestment of the same ship by a creditor of the owner (ie by priority of the times of executing the arrestments). The alternative would be that one class of arrestment (eg those enforcing the demise charterer's debts) should be postponed to the other (eg those enforcing the owner's debts).

8.93 In our Discussion Paper, we left this question open. However it was rightly represented to us on consultation that maritime arrestments for the demise charterer's liabilities are anomalous and potentially unfair to the shipowner. It follows that their effects should not be extended further than the minimum necessary to comply with international obligations and cross-border harmonisation. We propose therefore that in ranking competitions on the proceeds of a judicial sale of a ship, arrestments of the ship enforcing the shipowner's debts should be preferred to arrestments enforcing those of the demise charterer. Such a provision would serve as a sound starting point from which the law could develop.

---

138 Consultation Paper, paras 52-55, Proposition 6.

139 The owner may have claims for arrears of charter hire and damages for breach of contract against the demise charterer.

140 He criticised our reliance on the rule stated by Graham Stewart which he argued was probably wrong. See para 8.86 above.

141 Whether those creditors are personal arresters, arresters in rem under a maritime hypothec or lien, or mortgagees.

142 In the (admittedly unusual) case of a competition between a bare arrestment and a later arrestment completed by judicial sale before the prior arrester has lodged a claim against the fund in media, the arrestment completed by sale is treated as a higher right created later and is preferred to the bare arrestment: Graham Stewart, pp 140, 141.

143 In such a framework, it would be necessary to indicate the priority point of the arrestment (generally the date of execution of the arrestment but occasionally the date of judicial sale: Graham Stewart, pp 140, 141) and the priority point of every competing right of whatever nature.

144 Supreme Court Act 1981, s 21(4); Admiralty Act 1973, s 5(2) proviso (b) (Actions in rem) (New Zealand); Admiralty Act 1988, s 18 (right to proceed on demise charterer's liabilities) (Australia).

8.94 We recommend:

(1) In any process of ranking on a fund derived from the judicial sale of a ship which is or was chartered by demise, any arrestment of the ship (or a share in the ship) by a creditor of the owner of the ship (or the share) should have priority over any arrestment on the dependence of the ship by a creditor of the demise charterer.

(2) Otherwise, competitions in ranking between arrestments of a ship by the demise charterer's creditors and other rights over the ship should be left to the common law.

(Recommendation 76; clause 37)

(b) Sequestration or liquidation of owner of ship

8.95 A competition could arise between, on the one hand, the proposed new form of arrestment attaching a demise chartered ship to secure a maritime claim against the demise charterer concerning that ship and, on the other hand, the trustee in the owner's sequestration or, in the far more usual case where the owner of the ship is a company, the liquidator of the owner company.[145]

8.96 We recommend above that an arrestment by a demise charterer's creditor should rank after the claims of the creditors of the owner. It follows that the creditor of the demise charterer should not be entitled to insist in his diligence and proceed to a judicial sale. The ship should be treated as subject to the liquidation or sequestration. The creditor of the demise charterer should rank on the proceeds of sale of the arrested ship as if he were a creditor of the owner, except that he would claim any deficiency from the demise charterer and would not rank for that deficiency in the liquidation or sequestration on the other assets of the owner.[146] A variant of this solution was generally agreed on consultation.

8.97 The provisions for the rendering ineffectual of arrestments and poindings executed within 60 days prior to the sequestration or liquidation of the true owner[147] need not apply to an arrestment executed within that period by a creditor of the demise charterer. The justification for these rules is to achieve fair sharing of the bankrupt owner's estate among the general body of his unsecured creditors. The trustee or liquidator of the bankrupt owner representing his unsecured creditors succeeds to the benefit of individual pre-sequestration diligences of the bankrupt owner.

8.98 All the more so the 60-day rule should apply, in the sequestration or liquidation of the owner, to an arrestment by a creditor of the demise charterer since creditors of the owner would have priority over that arrestment. A variant of this proposal was generally approved on consultation.

8.99 We recommend:

(1) In the sequestration or liquidation of the owner of a ship, a creditor of the demise charterer who has arrested the ship on the dependence should be entitled to claim a dividend or preference (if any) in the liquidation or sequestration from the proceeds of sale of the ship but from no other asset of the owner.

(2) In the liquidation of the owner of the ship or the sequestration of his estate, the rules for the rendering ineffectual of prior arrestments and poindings under the provisions of the Bankruptcy (Scotland) Act 1985, section 37(4) and (5) and the Insolvency Act 1986, section 185, should apply to an arrestment of the ship by a creditor of the demise charterer as they apply to an arrestment by a creditor of the owner of the ship.

(Recommendation 77; Draft Bill, clause 38)

145 See our Consultation Paper, paras 65 - 67; Proposition 9 (para 68).
146 See Consultation Paper, para 66; Proposition 9(1) (para 68).
147 Bankruptcy (Scotland) Act 1985, s 37(4) and (5); Insolvency Act 1986, s 185.

Part 9 Miscellaneous Aspects of Diligence

Introduction

9.1 In this Part we consider some miscellaneous aspects of the law of diligence which have been raised in previous Discussion Papers or by interested persons, or identified in the course of our research. Though some are only indirectly related to the main matters dealt with in Parts 2 to 8 above, it seems more convenient to deal with them here than in a separate report.

A. RANKING OF DILIGENCES

Preliminary

9.2 The problems of competitions in ranking are among the most difficult in legislation in the domain of insolvency, diligence and securities.

(1) The effect and ranking of arrestments

9.3 The precise legal definition of the effect of an arrestment is controversial. It has been said that "in the whole law of diligence, this failure to develop a coherent doctrine as to the effect of an arrestment is probably the most remarkable and the most inexcusable".[1] It might be thought therefore that, as part of our review of the law of diligence, we should make recommendations for legislation designed to provide a new framework of principle within which the law can develop. In our view, however, though legislation on particular topics may well be desirable, the time is not ripe for such general legislation. This view is supported by our consultation on statutory reform of arrestment and furthcoming following the seminar in April 1995.[2] We asked consultees whether they favoured statutory reform of arrestment and furthcoming and if so whether they preferred statutory codification or piecemeal statutory reforms to remove specific defects. Most consultees thought some statutory reform was needed. Most preferred piecemeal statutory reform or at least specific reforms leading to partial codification. Only one body favoured codification. Two consultees thought that while some statutory reform was needed, judicial reform would ideally be a preferable method for changing or clarifying the fundamental principles of the law on arrestment and furthcoming.

9.4 The difficulties involved in defining the effect of an arrestment spring partly from the fact that the right which an arresting creditor acquires by virtue of an arrestment does not fit exactly into the fundamental distinction of our property law between personal rights and real rights,[3] partly from the fact that the substantive law has changed over time with the risk that old and superseded doctrines can be resurrected,[4] and no doubt partly for other reasons, including the past vagaries and inconsistencies of case law development. But the possibility should not be discounted that some inconsistencies, or apparent inconsistencies, reflect policy conclusions against the characterisation of arrestments as pure real rights or pure personal rights.

9.5 The prohibition theory and the attachment theory of the effect of arrestments. Professor Gretton has recently illuminated the law in this domain by isolating two theories as to the effect of an arrestment.[5] He remarks:[6]

1 Stair Memorial Encyclopaedia vol 8, para 285 (G L Gretton).
2 See para 1.4 above.
3 For an account of this distinction, see Stair Memorial Encyclopaedia vol 18, paras 3 - 10.
4 See eg Lord Advocate v Royal Bank of Scotland 1977 SC 155 discussed below.
5 Stair Memorial Encyclopaedia vol 8, para 285.
6 *Idem.*

> "Broadly there have been two approaches to the effect of an arrestment. The first has been to regard it as a mere prohibition upon the arrestee from parting with the arrested subject. The second has been to regard arrestment as being not only a prohibition, as in the first view, but also as an attachment, laying a nexus[7] on the subject arrested. Thus if money is arrested, the arrestment is regarded as a conditional assignation to the arrester, to be purified at furthcoming, while if goods are arrested, the arrestment is regarded as giving the arrester a real right of security in the goods. These two approaches give the same result in simple cases, where there is an arrestment followed by a furthcoming, and there are no competing rights. But they give wholly different results in more complex cases, where there are competing rights, or where there is breach of arrestment".

He points out that both views have been in the field since the time of Stair; that some rules reflect one theory, some the other; that as a result the law, in his view, is not coherent so that "when a new type of problem arises, such as the competition of an arrestment with a floating charge, there is no settled rational framework within which the law can be developed".[8] We revert below to the decline of the prohibition theory, the rise of the attachment theory, and the unsatisfactory resurrection of the prohibition theory in Lord Advocate v Royal Bank of Scotland.[9]

9.6 Real rights and personal rights. It should be noted incidentally that our sources are not always consistent in defining real rights so as to distinguish them from personal rights. The test adopted in this Report is that a right to a thing is a real right if it attaches directly to the thing[10] and is enforceable against all persons challenging its existence" other than holders of prior real rights. On this view, a right is not a real right properly so called unless it prevails over all singular successors, even purchasers in good faith and for value, as well as competing creditors.[12]

9.7 The "preferred personal right" theory. Reverting to arrestments it is possible that a third theory provides a more satisfactory explanation of the hybrid nature and various effects of arrestments than either the prohibition theory or the attachment theory. In Scots law, there are certain important species of right against a debtor which are not real rights, because they do not have priority over the debtor's bonafide, onerous, singular successors,[13] but which are not purely personal rights either, because they take priority over the rights of the debtor's other creditors under the tantum et tale principle. An example[14] is the right of the grantor of a conveyance to the debtor to reduce the conveyance on the ground of fraud. Borrowing a label from South African trust law,[15] these may be called "protected personal rights". It is a feature of these protected personal rights that they entitle the personal creditor to have the property subject to the right excluded from the debtor's sequestration in bankruptcy. By contrast, arrested property vests in the debtor's trustee in sequestration but the arrester is entitled to a preference over the arrested funds or, as the case may be, the proceeds of sale of the arrested property.[16]

---

7 For the uncertain meaning of "nexus", see Stair Memorial Encyclopaedia vol 8, para 286.

8 Ibid, para 285.

9 *1977 SC 155. See paras 9.10 et seq.*

10 le does not have as its correlative an obligation owed by a particular person or persons.

11 Stair Memorial Encyclopaedia vol 18, para 3.

12 A second test is that a right to a thing is a real right if it attaches directly to the thing and prevails over mala fide and gratuitous singular successors and competing creditors. This however seems difficult to distinguish from personal rights to set aside transfers which are voidable for fraud or breach of trust. A third possible test is effectiveness against creditors: see eg G L Gretton, "The Concept of Security" in D J Cusine (ed), A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday (1987) 126 at p 129, who cites the landlord's hypothec (which is always good against creditors but only sometimes against purchasers). However effectiveness against creditors is more generally regarded as the mark of a special (protected or preferred) personal right.

13 See previous paragraph.

14 Recognised in Bell, Commentaries vol 1, p 299; 309 - 311.

15 See Honore and Cameron, Honore's South African Law of Trusts (4th edn; 1992) p 474: "The beneficiary may be said to have a protected right in personam". Whether the trust beneficiary's personal right in respect of the trust property can be so characterised in Scots law is unclear. The exclusion of trust property from the sequestration of the trustee's own estate may depend on the fact that the trust estate is a separate patrimony from that estate rather than on the protected character of the beneficiary's right. The topic requires further research.

16 Lord Advocate v Royal Bank of Scotland 1977 SC 155 at p 171 per Lord President Emslie; at p 176 per Lord Cameron.

9.8 It may be more accurate therefore to characterise the right of an arrester as an example of a preferred personal right. It is not a purely personal right because in a competition with the debtor's other creditors it is preferred over subsequently intimated assignations and over subsequently executed arrestments and poindings.[17] On the other hand, it is not a pure real right because an arrestment of corporeal moveables does not have priority over a later bonafide purchaser for value acquiring without notice of the arrestment.[18]

9.9 This hybrid character of arrestments, straddling the real/personal dichotomy, is no doubt untidy. It is not however necessarily wrong or anomalous. Our legal system has accommodated other protected or preferred personal rights and there may be good reasons of policy or principle for such an approach. Still less does it suggest that general remedial or clarifying legislation is necessary. This is not to deny that particular rules may require judicial or legislative reform, and it is to one of these that we now turn.

(2) The fictional litigiosity theory of the arrester's preference

9.10 In this Section we consider the impact of the Lord Advocate v Royal Bank of Scotland[19] on the general law governing the ranking of the inchoate diligences of arrestment and poinding, which is widely held to have been misunderstood by the court.[20] The case turned on the construction of the phrase "effectually executed diligence" in the legislation on floating charges.[21]

9.11 The case raises two different issues. The first is whether in competitions between arrestments and floating charges, the Royal Bank case struck a just and reasonable balance between the interests of arresting creditors and the interests of floating charge holders. That is a question of policy with which we are not concerned in this report, and express no opinion on it. We are however concerned with the second issue which is whether, in construing the phrase "effectually executed diligence" in the floating charges legislation,[22] the court gave a correct explanation of the general effect of an arrestment in ranking and, if not, whether that general effect should be defined by statute.

Lord Advocate v Royal Bank of Scotland: arrestment executed between creation and attachment of floating charge

9.12 In Lord Advocate v Royal Bank of Scotland,[23] it was held that an arrestment, executed between the creation and the attachment of a floating charge and not completed by furthcoming, ranks after the floating charge. The question at issue was whether a bare arrestment was "an effectually executed diligence" within the meaning of the floating charges legislation.[24] It was held that it was not and therefore did not prevail over the floating charge.

9.13 Most commentators treat the Royal Bank case as wrongly decided.[25] Our Consultative Memorandum No 72[26] however proceeded as if the Royal Bank case had been rightly decided both as

17 See paras 9.14; 9.16-9.18 below.

18 Bankton, Institute 111,1,32; Kames, Principles of Equity (4th edn) 2, 182; Bell, Principles s 2278; Graham Stewart, pp 127; 176; Scott v Fluyder & Co (1770) Mor Appx "Arrest" No 1; Turner v Mitchell and Rae (1884) 2 Guthrie Sel Sh Cas 152.

19 1977 SC 155.

20 So too lona Hotels Ltd v Craig 1990 SC 330 reached a satisfactory result in policy terms but failed to correct the errors in the Royal Bank case.

21 Companies Act 1985, s 463(1); Insolvency Act 1986, s 55(3): see para 9.12.

22 *Idem.*

23 1977 SC 155.

24 A floating charge created by a company attaches to its property on the commencement of winding up (Companies Act 1985, s 463(1)) or on the appointment of a receiver under the charge (Insolvency Act 1986, ss 53(7) and 54(6)). Attachment of the charge and the exercise by a receiver of his powers are subject to the rights of any person who has effectually executed diligence on all or any part of the company's property: Companies Act 1985, s 463(1); Insolvency Act 1986, s 55(3).

25 See eg W A Wilson, case note, 1978 JR 253; J R Campbell, "Receivers' Powers" (1978) 23 JLSS 275; G L Gretton, "Diligence, Trusts and Floating Charges" (1981) 26 JLSS 57; A J Sim, "The Receiver and Effectually Executed Diligence" 1984 SLT (News) 25; J B St Clair and J E Drummond Young, The Law of Corporate Insolvency in Scotland (2d edn; 1992) pp 213-215; cf J A D H, "Inhibitions and Company Insolvencies: A Contrary View" 1983 SLT (News) 177.

26 Consultative Memorandum No 72 on Floating Charges and Receivers (1986). No report followed on this Consultative Memorandum.

respects (a) the court's analysis of the nature and effect of arrestments and (b) the court's interpretation of the saving for "effectually executed diligence". On the other hand, in a submission of 16 March 1995 to the Department of Trade and Industry[27] we followed a different approach on which the following paragraphs are based.

9.14 An important criticism of the Royal Bank case is that it sought to explain the effect of an arrestment in ranking competitions as based on an out-of-date theory of "litigiosity", ie as a mere personal prohibition against the arrestee parting with the arrested property having no effect in competitions with third parties. In fact, as one writer has explained:

> "in modern Scots law ... the orthodox view has been that an arrestment effects a true attachment - and so can be regarded as a diligence executed on property - with certain important and defined effects which cannot be explained on the principle of litigiosity. The exclusion of a bare arrestment from the scope of the expression 'effectually executed diligence' is therefore at odds with the history and development of the law".[28]

Critics of the decision contend that the status and role of an arrestment has been unjustifiably downgraded. So far as competitions with floating charges are concerned, critics also contend that the court's approach gives insufficient weight either to the statutory hypothesis that a floating charge has effect on attachment as a fixed security[29] or to the rule that an arrestment has priority over a subsequent fixed security, though the solution should lie in the combination of the two. The legal result is not consonant with the intention of Parliament as evident from Hansard[30] - namely that "effectually executed diligence" should mean diligence which had not been rendered ineffectual by the statutory 60 day rule[31] - though that intention has itself been criticised.[32]

The lona Hotels case: arrestment executed before creation of floating charge

9.15 In the later case of lona Hotels Ltd v Crar'g,[33] the competing arrestment was executed before the creation of the floating charge. Distinguishing the Royal Bank case, the First Division held that the arrestment had priority over the floating charge. Lord President Hope observed obiter[34] that the arrester's counsel was right to make no criticism of the Royal Bank case. With respect this may be doubted.

9.16 In lona Hotels the court based its decision on the principle of litigiosity: the debtor could not defeat the arrestment by any posterior voluntary deed. A floating charge executed later is such a deed and is therefore struck at by the principle of litigiosity.[35] The actual result reached in that case is to be welcomed.

The fictional litigiosity theory of the arrester's preference

9.17 Unfortunately, in the lona Hotels case, the court did not correct the fictional litigiosity theory of the arrester's preference laid down in the Royal Bank case. Indeed the lona Hotels case actually lent some support to that theory, and failed to take account of the way in which the law on the effect of arrestments has developed since the eighteenth century.

9.18 The main stages in the development are these.[36] (i) Originally Stair and Erskine[37] based the effects of an arrestment on the principle of litigiosity which prohibits and renders reducible future voluntary

27 In response to their Consultation Paper on Security over Moveable Property in Scotland (November 1994).
28 A J Sim, "The Receiver and Effectually Executed Diligence" 1984 SLT (News) 25 at p 28.
29 Companies Act 1985 s 463(2); Insolvency Act 1986, ss 53(7), 54(6).
30 Hansard, Scottish Standing Committee, 20 June 1961, cols 14 et seq; Sim, 1984 SLT (News) 25 at p 28; Wilson, 1978 JR 253 at p 255.
31 For that rule, see now Bankruptcy (Scotland) Act 1985, s 37(4) applied to liquidation by the Insolvency Act 1986, s 185.
32 Sim 1984 SLT (News) 25 at p 28: the 60 day rule was designed to benefit the general body of unsecured creditors by discouraging a race of diligences and promoting equality among them, but ironically was invoked in the Royal Bank case to benefit the floating charge holder at their expense.
33 1990SC330.
34 1990 SC 330 at pp 334,335.
35 1990 SC at pp 335,336.
36 See A J Sim, "The Receiver and Effectually Executed Diligence" 1984 SLT (News) 25, especially at pp 27,28.
37 Stair, Institutions HI, 1, 39; Erskine, Institute HI, 6, 2 and 19.

deeds by the debtor, (ii) By Erskine's time, however, it had been held by the Court of Session that an arrestment has priority over a later bare (unintimated) assignation[38] and a later bare arrestment,[39] both of which effects can be attributed only to a nexus or attachment and not to litigiosity. The reason is that an intimation of a competing assignation is invariably not a deed by the debtor and a competing bare arrestment cannot be a deed by the debtor, (iii) Erskine[40] sought to reconcile an arrestment's preference over an unintimated assignation with litigiosity by a fictional theory. That theory was that since no assignation can be complete before intimation, intimation is (by a fiction) accounted part of the voluntary deed. The theory is fictional because, as mentioned above, assignation is invariably the act of the third party assignee, not the act of the debtor, (iv) Authorities after Erskine support the arrester's preference but abandon the fiction until in the Royal Bank case the court resurrected the fiction, while at the same time (somewhat inconsistently) questioning its validity.[41] If the rule as to the arrester's preference was accepted (as it was) but the fiction was not valid, why not state the rule without the fiction, ie as creating an attachment? (v) In lona Hotels Ltd, Lord President Hope defended Erskine's fictional approach, observing:[42]

> "In an earlier passage in [the Royal Bank} case at [1977 SC p 168] he [Lord President Emslie] pointed out that the arrestment creates for the arrester a preference over the only form of fixed security which can be created by the voluntary act of a debtor over moveables, namely an assignation in security: see also Erskine, Institutes III. vi. 19; Graham Stewart on Diligence, pp 141-142. The criterion of preference is the date of the arrestment as compared with the date of the intimation of the assignation, on the view that since no assignation can be complete before intimation, intimation is accounted as part of the voluntary deed. Both Lord President Emslie, at p 170, and Lord Cameron, at p 177, questioned the validity of this approach as described by Erskine, but it has the support of Bell, Commentaries, sec 269 and Graham Stewart on Diligence at p 141, and for my part I am content to accept it as sound in law."

(vi) The reference to Bell should be Bell, Commentaries (7th edn) vol 2, p 69. It should be noted, however, that Bell in that passage states the rale of an arrestment's preference over an assignation without subsuming it under the doctrine of litigiosity: he does not there (nor, it seems, anywhere else) approve Erskine's fiction. Moreover, Graham Stewart[43] also states the rule without subsuming it under Erskine's fiction. Indeed Graham Stewart elsewhere[44] expressly states that Erskine's litigiosity theory is:

> "not satisfactory. It would extend the principle of litigiosity in the case of arrestment further than in the case of inhibition, which does not prevent the completion by infeftment of a prior disposition. The true principle seems to be that arrestment, unlike inhibition, is at its date an inchoate attachment, so that the subsequent intimation to the arrestee can only affect the debt as it then exists in him, ie burdened with the prohibition or attachment caused by the arrestment."

So these authorities do not support Erskine's fictional litigiosity theory, (vii) Erskine's litigiosity theory of the arrester's preference was long ago exposed as a fiction by Baron Hume:[43]

> "In our later practice, the principle seems to have found place, to a certain extent at least, (I do not say uniformly and throughout), that the claim of debt is attached by the arrestment, so that the decreet of forthcoming, when given, relates back to the execution - that it lays a nexus or lien on the fund arrested, ... such a nexus as excludes, not only all voluntary measures on the part of the common debtor, (such as litigiosity would prevent), but even to a certain extent, all measures in course of law, and at instance of third parties; over which litigiosity could have no power. Upon this principle, seem to rest these points of our present and settled law and practice... 2. An arrestment

38 Graham v Campbell (1724) Mor 2776.
39 See eg the line of cases from Wallace v Scot (1583) Mor 807 to Brodie v McLellan (1710) Mor 816; Roystown v Brymer (1716) Mor 819; Baynes v Graham (1796) Mor 2904.
40 Erskine, Institute 111,6,19.
41 1977 SC 155 at p 170 and p 177.
42 1990 SC 330 at p 335.
43 Diligence p 141.
44 Ibid, p 145.
45 Baron Hume's Lectures vol VI, p 108, adopted by Lord Deas in Lindsay v London and North-Western Railway Co (1860) 22 D 571 at pp 597-598.

> is preferred to an assignation, though this be prior in date, if the intimation be posterior. Now, no such rule could follow on the principle of litigiosity merely. Litigiosity defeats the voluntary deeds of the debtor only; but intimation is the act of the assignee. The debtor has no part in it, and cannot hinder nor control it."

(viii) An arrestment creates a nexus which gives a preference not only over a bare assignation but also over a bare arrestment[46] the execution of which is never an act of the debtor but always of the competing arresting creditor, (ix) Then again the nexus on arrested goods transmits against the arrestee's executor,[47] a result not explicable by reference to a personal prohibition such as litigiosity implies.[48] (x) It has been pointed out[49] that the leading cases[50] concerning the interpretation of the provisions rendering arrestments ineffectual within 60 days prior to sequestration[51] support the attachment theory.[52]

9.19 The fictional character of Erskine's theory is enough to make it unacceptable in the modern law. As Lord Reid remarked:

> "During early stages of the development of a legal system legal fictions have been invaluable.... But in this day and age I dislike them intensely. Why should we tell lies when the truth will serve our purpose equally well if only we give a little care to the formulation of our principles."[53]

Circles of priorities

9.20 Critics of the Royal Bank case have pointed out[54] that it creates a circle of priorities: an arrestment has priority over a subsequently intimated assignation which has priority over a subsequently attached floating charge which, because of the Royal Bank case, has priority over the arrestment. A similar circle of priorities could also arise if an individual were to grant an assignation and on his death a confirmation as executor-creditor was granted: an arrestment would have priority over a subsequently intimated assignation, which would have priority over the confirmation as executor-creditor, which (under the common law as a higher right created later) would have priority over the arrestment.[55]

9.21 At one time, the need to avoid creating a circle of priorities seemed to provide a powerful argument against the solution in the Royal Bank case. It seems, however, to have been overlooked that long ago Graham Stewart remarked[56] that the arrester's preference can lead to a circle of priorities. Mr J G Birrell has made the same point but in the context of receivership:

> "if the critics of the [Royal Bank} decision are correct, some circularity would be involved in any case where an arrestment is executed and is followed by receivership, which in turn is followed by liquidation within 60 days of the execution of the arrestment. On this basis, the arrestment would confer no priority over the general creditors in the winding up, but the floating charge would rank before the general creditors and after the arrester".[57]

In other words the floating charge would have priority over the general body of creditors in the winding up who (under the 60-day provision) would have priority over the arrestment which (according to the critics of the Royal Bank case) would have priority over the floating charge.

---

46 Graham Stewart, p 137.
47 Earl of Aberdeen v Scot's Creditors (1738) Mor 774-7.
48 Baron Hume's Lectures vol VI, p 108.
49 J R Campbell, (1978) 23 JLSS 275 at p 276.
50 Dow & Co v Union Bank (1875) 2 R 459; McKenzie v Campbell (1893) 21 R 904.
51 Now Bankruptcy (Scotland) Act 1985, s. 37(4).
52 In the Dow & Co case, Lord President Inglis at p 462 observed that an arrestment rendered ineffectual by the provision did not yield a preference to the arrester but that nevertheless it was "an effectual arrestment in other respects; for it has created a nexus on the funds arrested" (i.e. under the law on arrestments) and secured them for the trustee (i.e. under the 60 day provision).
53 (1968) 54 Proceedings of the British Academy 189 at p. 200.
54 Eg A J Sim 1984 SLT (News) 25 at p 26.
55 *Erskine, Institute Kl,6,*\\.
56 Diligence pp 145,146.
57 Stair Memorial Encyclopaedia vol 4, para 663.

9.22 From the foregoing it seems to follow that the cases for and against the Royal Bank decision do not depend on circles of priorities. In any event, there are ways of breaking these circles, eg by multiple-jound ranking of the type used to resolve circles of priority created by subordination agreements and preferences by exclusion including inhibitions.

Conclusion

9.23 We consider that the fictional litigiosity theory of the arrester's preference should be abandoned and replaced by properly formulated principles. In our view however it would be preferable if this result were to be achieved by judicial development of the law rather than by legislation.[58] We therefore make no recommendations for statutory reform of the theory of arrestment.

(3) Sharp v Thomson and competitions between arrestments and assignations

9.24 Another issue concerns the implications of the recent important case of Sharp v Thomson[59] for competitions between arrestments and assignations. In that case the House of Lords held that the right of an uninfeft purchaser of heritable property under a delivered but unregistered disposition prevailed over the right of the receiver under a subsequently crystallised floating charge. The full reach and implications of this controversial decision and dicta stating that delivery of a disposition transfers "a beneficial interest" to the disponee, have been much discussed but are as yet far from clear. A recent commentator has observed:[60]

> "There is nothing in the opinions in Sharp which suggests that the law concerning the priority of arrestments and assignations is affected. Thus an arrestment will still have priority over an assignation which has not been intimated at the time the schedule of arrestment is served (Graham Stewart, The Law of Diligence p 141).
>
> Nevertheless, the logical basis for the priority of an adjudger over the holder of an unrecorded disposition (subject to the outcome of the race to the register) and of an arrester over the holder of an unintimated assignation (that the debtor remains at the relevant time the owner of the property in question) has been removed."

We shall require to consider Sharp v Thomson in connection with our forthcoming report on diligence against heritable property. Otherwise, we shall continue to monitor how the law develops. We regard it as premature to make recommendations in this report on competitions between arrestments and assignations.

(4) Equalisation of diligences

9.25 In our Discussion Paper No 79 on the Equalisation of Diligences,[61] we considered the law relating to the equalisation of diligences outside insolvency processes.

9.26 In the ranking of debts secured by competing diligences, the general common law principle is that the first creditor to attach property by adjudication, arrestment or poinding should enjoy the fruits of the diligence which he has used and that creditors using diligences against the property later should rank only on the reversion by priority of the respective times of attachment. The rule is "first come, first served". The rules on the equalisation of diligences were introduced by statute to qualify the "first come, first served" rule.

---

58 We hope that that result could be achieved without a judicial change in the interpretation of the phrase "effectually executed diligence" in the floating charges legislation. Such a judicial change could reopen the distribution of estates in past receiverships where the creditors had been ranked on the faith of the Royal Bank case. For that purpose legislation would be a better vehicle for reform, since it would be wholly prospective.

59 1997 SC (HL) 66.

60 J G Birrell, "Sharp v Thomson: The Impact on Banking and Insolvency Law" 1997 SLT (News) 151 at p 153.

61 Issued in November 1988.

Equalisation of adjudications: the existing law

9.27 Equalisation of adjudications for debt was introduced by the Diligence Act 1661[62] (as read with the Adjudications Act 1672[63]) long before the introduction of sequestration in bankruptcy in 1772.[64] The 1661 Act proceeds on the narrative that:

> "creditors, in regard they live at distance or upon other occasions are prejudged and prevened (sic) by the more timeous diligence of other creditors so that, before they can know the condition of the common debtor, his estate is comprised and the posterior comprisers have only right to the legal reversion, which may and often doth prove ineffectual to them, not being able to satisfy and redeem the prior comprisings, (their means and money being in the hands of the common debtor) ...".

The 1661 Act provides that all adjudications for personal debts[65] before, or within a year and a day after, the first effectual adjudication should come in pari passu together as if one adjudication had been obtained for the whole of the sums in the several adjudications. The first effectual adjudication was declared to be that in which the first real right and infeftment was completed.[66] The equalised adjudgers have to indemnify the first effectual adjudger for all of his expenses.

9.28 When sequestrations and liquidations were introduced, the equalisation rules were not abolished. Rather sequestrations and liquidations were and are deemed by statute to be constructive adjudications[67] with the effect that the general body of creditors rank pan passu on the proceeds of the first effectual adjudication if the date of sequestration or the commencement of winding up occurs within the statutory equalisation period.

Equalisation of arrestments and poindings: the existing law

9.29 The provisions on the equalisation of the main diligences against moveable property are now set out in the Bankruptcy (Scotland) Act 1985, Sch 7, para 24. It is the product of a long period of experimentation by successive Bankruptcy Acts beginning with the Bankruptcy Acts 1772 and 1783 and it reached more or less its modern form in the Bankruptcy (Scotland) Act 1856.[68] It applies also to liquidation of companies.[69] The current legislation provides that all arrestments and poindings which have been executed within 60 days prior to the constitution of the apparent insolvency (formerly, the notour bankruptcy) of the debtor, or within 4 months thereafter, shall be ranked pari passu as if they had all been executed on the same date.[70] The Act applies to the arrestment of a ship[71] as well as to arrestment of non-maritime subjects and poindings. Further, any creditor judicially producing, within the statutory period just mentioned, in a process relative to the subject of such an arrestment or poinding liquid grounds of debt or a decree for payment is entitled to rank as if he had executed an arrestment or poinding.[72] This last provision means that "equalisation of diligences" is a slight misnomer for this branch of law which really concerns fair sharing of the fruits of diligences.

9.30 The general purpose of equalisation of arrestments and poindings is broadly the same mutatis mutandis as the equalisation of adjudications and is perhaps best described by the preamble to the Bankruptcy Act 1783[73] which narrated that by the common law:

---

62 APS record edn, c 344; 12mo edn, c 62.
63 APS record edn, c 45; 12mo edn, c 19. The equalisation rules in the Diligence Act 1661 applied to the ancient diligence of comprising and to adjudications contra haereditatem jacentem, and were extended to all other adjudications for debt by the Adjudications Act 1672 which abolished comprisings and replaced them with adjudications for debt.
64 Bankruptcy Act 1772.
65 Ie other than debita fundi which are a class of debts secured over land.
66 Or the first exact diligence for obtaining the same, the word "diligence" being in this context a reference to the now obsolete process used by the adjudger to compel the superior to complete the adjudger's title.
67 Bankruptcy (Scotland) Act 1985, s 37(1)(a), applied to liquidations by the Insolvency Act 1986, s 185.
68 Section 12, re-enacted as the Bankruptcy (Scotland) Act 1913, s 10, and now the Bankruptcy (Scotland) Act 1985, Sch 7, para 24.
69 Insolvency Act 1986, s 185.
70 1985 Act, Sch 7, para 24(1).
71 Harvey v McAdie (1888) 4 Sh Ct Reps 254; Munro v Smith 1968 SLT (Sh Ct) 26.
72 1985 Act, Sch 7, para 24(3).
73 Bankruptcy Act 1783 (23 Geo III c 18).

"... the personal estates of such debtors as became insolvent were generally carried off by the diligence of arrestment and poinding, executed by a few creditors, who, from the nearness of their residence to, and connection with such debtors, got the earliest intelligence of the insolvency, to the great prejudice of creditors more remote and unconnected, and to the disappointment of the equality which ought to take place in the distribution of the estates of insolvent debtors among their creditors."

Comparison

9.31 This provision differs considerably from equalisation of adjudications. For example, the equalisation period for arrestments and poindings is defined by reference to the constitution of apparent insolvency, unlike equalisation of adjudications where the equalisation period is defined by reference to the first effectual adjudication. Again, whereas only adjudications of the same subjects are equalised and only adjudgers qualify for pari passu ranking, under this provision arrestments and poindings of different subjects are equalised, and debts not secured by diligences can be ranked pari passu on the proceeds of arrestments and poindings.

The main issues

9.32 In our Discussion Paper No 79, we identified three main issues. The first is whether the law on equalisation goes too far in abridging the "first come, first served" principle, or whether it is ineffective complicating the law without corresponding benefit, and should be abolished. The Paper reached the provisional view that in the case both of adjudications and of arrestments and poindings, the complications outweigh the benefits derived from equalisation and that equalisation should be abolished.

9.33 The Paper went on to argue that if the provisions on equalisation of adjudications and of arrestments and poindings should be retained and reformed, they should not be replaced by one uniform set of provisions.[74] Finally, on the assumption that neither abolition nor fusion would be appropriate, the Paper discussed what detailed reforms are necessary or desirable in relation to the separate systems of equalisation of adjudications and of poindings and arrestments.[75]

Present and future action

9.34 On consultation, the Paper elicited very few responses but most favoured abolition. Nobody supported fusion. We think that it would be convenient for all concerned to consider equalisation of adjudications along with the reform of adjudications for reasons which we give in the next paragraph. This leaves questions as to the abolition or reform of equalisation of arrestments and poindings to be considered in this report at para 9.37 below.

Equalisation of adjudications to be considered in our report on adjudications

9.35 The Joint Committee[76] feared that if the diligence of adjudication were to be simplified, speeded up and made less expensive, as provisionally proposed by Scot Law Com D P No 78, it would be used a great deal and in most cases to the advantage of individual creditors who have sufficient knowledge of the situation to utilise it to the disadvantage of the creditors as a whole. In the Joint Committee's view, the latter would be best served by sequestration and the disposal of the heritable property of the debtor by the trustee or heritable creditor.

9.36 It may well be, however, that the provisions for the equalisation of adjudications under the Diligence Act 1661,[77] if modernised and reformed, would meet this criticism. They are expressly designed to prevent creditors with prior knowledge of the debtor's insolvency from stealing a march on the general

74 Discussion Paper No 79, Part III.
75 Ibid, Parts IV - VI.
76 le the Joint Committee of the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers.
77 A P S record edn, c 344; 12mo edn, c 62.

body of creditors by using adjudication, - the very mischief identified by the Joint Committee. We therefore intend to consider equalisation of adjudications in our forthcoming report on adjudications.[78]

The case for abolition of equalisation of arrestments and poindings

9.37 The case for abolition of equalisation of arrestments and poindings may be summarised as follows.[79] First, where a debtor is insolvent, fair sharing of his assets among all unsecured creditors is the only way of achieving satisfactory justice for the general body of creditors. While that can generally be achieved in the insolvency processes of sequestration or liquidation, it can hardly ever be achieved by equalisation, even if it is reformed, in the Scottish system of diligence for a number of practical reasons. Moreover if claims for equalisation or fair sharing were to become common, the result might be to impose unduly heavy burdens on creditors instructing poindings or arrestments.

9.38 Having regard to the widespread criticisms of advertisements of warrant sales identifying the debtor[80] we do not think that public opinion would accept newspaper advertisements to attract creditors' claims for fair sharing because of the embarrassment which they would cause to debtors. Such advertisements would also entail unacceptable extra costs. It would be impracticable to introduce special provisions for the admission of claims not instantly verifiable such as exist in sequestrations.[81]

9.39 Second, it follows that fair sharing of the fruits of arrestments and poindings under our system of equalisation must be limited to a relatively narrow class of unsecured creditors whose debts are instantly verifiable and who get to know about the diligence in time to claim a ranking on the proceeds. This necessarily entails that the haphazard operation of the "first come, first served" principle is replaced by another principle which, while it purports to introduce fair sharing, is in fact just as haphazard in its operation as the "first come, first served" principle.

9.40 Third, if equalisation of arrestments and poindings were to be invoked frequently, or if it frequently rendered recourse to general insolvency processes unnecessary, there would be a stronger case for retaining equalisation. But neither result seems likely to be achieved even if equalisation were to be reformed.

9.41 Fourth, it is important to note that equalisation of arrestments and poindings does not, and even if reformed would not, in practice prevent a race of diligences precipitating or aggravating the debtor's insolvency. It follows that abolition of equalisation would not take away an effective safeguard for debtors.

9.42 Fifth, one possible criticism is that the rules on equalisation are unfair to those creditors who are compelled by the rules to share the fruits of their diligences with other more idle or less meritorious creditors. On this view so-called fair sharing legitimises parasitic behaviour on the part of some creditors.[82] So far as Scots law is concerned however we doubt whether the concept of the idle parasite has much relevance. Nor is there evidence suggesting that a creditor who executes diligence first is generally more "meritorious" than a later creditor. Conversely, there is no reason to suppose that creditors executing diligence later are generally more "considerate" or "deserving" than creditors executing diligence first.[83] The fact that one creditor instructs diligence before another against the same debtor is likely to be attributable to fortuitous circumstances having nothing to do with commercial morality.[84] Neither "fair

78 Fifth Programme of Law Reform Scot Law Com No 159 (1997) para 2.13.

79 See Discussion Paper No 79, para 2.9.

80 Report on Diligence and Debtor Protection Scot Law Com No 95 (1985) paras 2.68 and 5.162. Such advertisements are now virtually abolished: see Debtors (Scotland) Act 1987 s 34(5) as read with s 34(2) (restricting sales in debtors' dwellings).

81 Cf Bankruptcy (Scotland) Act 1985, s 49.

82 Cf Report of the Law Reform Commission of British Columbia on Creditors' Relief Legislation: A New Approach (1979) p!7.

83 Cf Report of the Departmental Committee on the Enforcement of Judgment Debts (chairman: the Hon Mr Justice Payne) Cmnd 3909 (1969) para 304.

84 Eg differences in the times of default, in the times when default was identified , and in the time-scale of the routine pre-litigation debt collection practices of the creditors or their agents; whether instalment arrangements were made and, if made, when they were broken; differing assessments of the prospects of recovery; and so on.

sharing" nor temporal priority promotes commercial morality more than the other. Empirical research on creditors did not even mention equalisation as a factor influencing creditors' policies.[85]

9.43 Sixth, the "first come, first served" principle can be justified on the ground that a creditor who takes the trouble of enforcing his debt should enjoy the fruits of it unless the debtor is insolvent and the diligence is superseded by arrangements for fair sharing among all or almost all unsecured creditors. Since equalisation of arrestments and poindings outside sequestration or liquidation does not achieve that object, and is unlikely to do so even if reformed, we believe that the considerable complications of the law which equalisation outside insolvency processes entails are not justified by the benefits. In other words, since considerations of fairness among creditors are evenly balanced, there is insufficient justification for maintaining a complicated system of equalisation rules.

9.44 The complexity was demonstrated by our Discussion Paper No,79,[86] eg in the context of multiple overlapping equalisation periods created by successive constitutions of apparent insolvency.[87] On consultation nobody denied that the law is uncertain, complicated and difficult to apply. This is so even in the case of multiple arrestments of a single fund. The complexity becomes worse if several diligences against different funds are equalised. To attempt to reform the law by eliminating overlapping equalisation periods would lessen the complexity but only at the expense of reducing the scope of fair sharing. Reform would be like pouring new wine into an old bottle.

9.45 We do not think that abolition would be inconsistent with the system of conjoined arrestment orders introduced by the Debtors (Scotland) Act 1987.[88] Such orders are continuing rather than "single shot" diligences and are better adapted to achieve fair sharing since, for so long as the earnings or pensions are payable, all creditors may acquire a share in the proceeds of the diligence.

Consultation

9.46 Though very few consultees commented on Discussion Paper No 79, all supported abolition of equalisation. Mr Craig Connal, an experienced court practitioner, could not recollect ever having to deal with equalisation outwith formal insolvency processes, even where there were multiple arrestments. An expired charge is generally a private matter known only to the creditor. The complexity of the rules was of itself a good reason for their removal. Professor W M Gordon concluded that the reason for the equalisation rules may well be historical rather than practical and that sequestration or liquidation is the way to deal with competition of diligences now. The Committee of Scottish Clearing Bankers considered that there is a strong case for total abolition of the concept of equalisation of diligences except in bankruptcy and said that they supported that course of action in preference to any half measures.

9.47 The Joint Committee said that while diligences were seldom equalised outside bankruptcy proceedings, the power to equalise led to a number of accommodations among creditors as a result of which the proceeds of diligence were shared in cases where bankruptcy proceedings were, for some reason, inappropriate, say because of lack of assets. The Committee considered however that the number of such accommodations occurring was small, with creditors preferring to cut down the diligence by sequestrating, paricularly because of government funding in small asset cases. That government funding has now disappeared.[89] It may be therefore that accommodations among competing creditors of the type referred to by the Joint Committee have once again become more frequent. We do not think however that such accommodations are sufficiently frequent to retain this complex body of law. Moreover we do

85 See B Doig and A Millar, Debt Recovery - A Review of Creditors' Practices and Policies (Scottish Office Central Research Unit) (1981).

86 See PartV.

87 Ibid, paras 5.42 - 5.56; G L Gretton "Multiple Notour Bankruptcy" (1983) 28 JLSS 18.

88 Sections 60 - 66 and Sch 3 (providing foTthsparipassu ranking of creditors on earnings and pensions attached and deducted at source).

89 The Bankruptcy (Scotland) Act 1993, which came into force on 1 April 1993 restricted the right of trust deed trustees to petition for sequestration and removed the State subsidy of the fees and outlays of private practitioner trustees in sequestration. See J Douglas Anderson, 'The Bankruptcy (Scotland) Act 1993 in Operation" (1994) 39 JLSS 363.

not see why creditors' "accommodations" cannot be made against the background of the threat of sequestration rather than equalisation.

9.48 The responses to a questionnaire circulated to those who attended our seminar of 29 April 1995,[90] favoured retention of equalisation but this seems to have been mainly on the footing that an adjudging creditor should not be allowed to steal a march on competing unsecured creditors. One eminent practitioner, Mr A M Hamilton,[91] said that equalisation is vital in adjudication but in the case of poindings and arrestments, there is a question whether equalisation is required outwith sequestration. He suggested that full consultation was required. One body said there was no pressure for reform as evidenced by the small response to Discussion Paper No 79.

9.49 We think however that the opportunity afforded by the present Bill should be taken to abolish equalisation of arrestments and poindings for the reasons given above.[92]

Abolition of equalisation of arrestments and poindings except in formal insolvency proceedings?

9.50 Under insolvency legislation an award of sequestration or winding up order[93] has the effect, in relation to diligence done on the bankrupt's estate, of an arrestment in execution and decree of furthcoming or warrant of sale and a completed poinding in favour of the creditors according to their respective entitlements. The result is that any arrestment or poinding executed before the 60 day period for the rendering ineffectual of arrestments and poindings by sequestration or liquidation[94] but within the statutory equalisation period,[95] will be equalised with the claims of the general body of creditors.[96]

9.51 The Joint Committee suggested to us the abandonment of equalisation of diligences except where sequestration or winding up operated as a deemed arrestment or poinding as above mentioned. The Committee recognised that the effect of apparent insolvency prior to sequestration might be to extend the period of "cutting down" of diligences to almost 6 months.[97] The Committee suggested that this fitted in well with the provisions for the reduction of unfair preferences within 6 months before sequestration or liquidation.[98] Creditors' "accommodations" would be made against the background of the threat of sequestration rather than equalisation. In our view however the retention of the complexities of equalisation in order to extend the pre-sequestration period for cutting down diligences would not be justified.

Recommendation

9.52 While we have not found this to be an easy question, we believe that on balance abolition is the right course.

9.53 We recommend:

(1) The statutory rules on equalisation of arrestments and poindings outside formal insolvency proceedings - which are set out in the Bankruptcy (Scotland) Act 1985, Sch 7, para 24 - should be repealed.

(2) As consequential amendments, the references to arrestments and poindings should be repealed in:

---

90 See para 1.4 above.
91 Convener of the Joint Committee.
92 Paras 9.37 - 9.45.
93 Bankruptcy (Scotland) Act 1985 s 37(l)(b); Insolvency Act 1986, s 185.
94 Bankruptcy (Scotland) Act 1985, s 37(4) and (5); Insolvency Act 1986, s 185.
95 Sixty days before and 4 months after the constitution of apparent insolvency.
96 Stewart v Jarvie 1938 SC 309; Discussion Paper No 79, para 5.30.
97 Eg an arrestment executed 60 days (two months) before apparent insolvency and sequestration within 4 months thereafter.
98 Bankruptcy (Scotland) Act 1985, s 36(1).

(a) the Bankruptcy (Scotland) Act section 37(1) (which among other things makes sequestrations and liquidations constructive arrestments and poindings for the purpose of the rules on equalisation of diligences); and

(b) the Debtors (Scotland) Act 1987, section 13(2) (saving rights to equalisation from the effect of certain orders under Part I of that Act).

(Recommendation 78; Draft Bill, clause 56 and Schedule)

(5) Statutory enactments on ranking of diligences in competition with other rights

(a) The difficulty of statutory regulation

9.54 We have already referred to the difficulty of statutory regulation of the rules of ranking when rejecting the idea of a legislative restatement of the rules for ranking maritime claims and of codifying the rules of ranking of arrestments for demise charterer's debts." Even relatively unambitious statutory provisions on ranking in recent decades have not always been notably successful,[100] though this may be due to lack of adequate, preparatory research.

9.55 A comprehensive codification of the rules of ranking diligences in competition with other diligences and other rights would be especially difficult, because of the sheer number and variety of the types of competition which can arise. For example, some diligences have different priority points in different competitions.[101]

9.56 Then there are Bell's "canons of ranking" ie the rules of multiple-round ranking applicable to inhibitions and other preferences by exclusion, which we shall review in our forthcoing discussion paper on inhibitions. These "canons" though very complex are now well understood, thanks largely to Professor Gretton's influential monograph.[102] It would be counter-productive and dangerous to seek to codify Bell's canons of ranking. On the other hand, it would be odd to codify the easier rules of ranking while leaving the most difficult rules - Bell's canons - to the common law.

9.57 The need for coherence in the rules of ranking means that piecemeal statutory reforms of ranking can be unsatisfactory in a different way. Unless ranking is to resemble Russian roulette[103] the rules of ranking must not vary with the accident of the type of procedure in which those rules are applied.[104] As Sheriff Principal Caplan once observed:

> "It would be most curious and unfortunate if the ranking of creditors was intended to vary according to the accident of events, but our law has hitherto applied general and universal rules for the ranking of creditors. To do otherwise would make ranking a lottery".[105]

These are rules of substantive law not procedure. Traditionally our law is, as it ought to be, rights-based and not remedy-based.

9.58 There is therefore much to be said for the cautious approach of the Debtors (Scotland) Act 1838, section 38 (now repealed) which provided that the free proceeds of a warrant sale "shall... be ordered by the said sheriff to be paid to the poinding creditor ... but subject to the claims of other creditors, to be ranked as by law competent;..."(emphasis added).[106]

---

99 See paras 7.73 - 7.97 above; Recommendation 55 (para 7.97).

100 See eg Halifax Building Society v. Smith 1985 SLT (Sh Ct) 25 at pp 28,29 per Sheriff Principal Caplan commenting on the Conveyancing and Feudal Reform (Scotland) Act 1970, s 27. See also Insolvency Act 1986, s 60(1), analysed below.

101 On arrestments and poindings, see Graham Stewart, pp 137 -141; paras 8.90, 8.91 above.

102 G L Gretton, The Law of Inhibition and Adjudication (2d edn; 1996) especially Chapters 6 and 7.

103 Sheriff Clerk of North Strathclyde at Paisley v Paterson noted 1985 SLT (Sh Ct) 31 at p 33 per Sheriff Principal Caplan.

104 Eg ranking in a multiplepoinding; sequestration; liquidation; receivership; process of sale of secured subjects;and ranking on the fruits of diligence in a diligence process (such as a poinding and warrant sale; arrestment and sale; arrestment and furthcoming; or conjoined arrestment order).

105 Halifax Building Society v Smith 1985 SLT (Sh Ct) 25 at p 29.

106 This formula is likely to have been influenced, if not drafted, by Bell.

(b) Insolvency Act 1986, section 60(1): rules of ranking in receivership

9.59 We have elsewhere criticised the provisions of the Insolvency Act 1986, section 60(1) for applying different rules of ranking in receivership from the rules applicable under the general law.[107] The section provides:

> "60.-(1) Subject to the next section, and to the rights of any of the following categories of persons (which rights shall, except to the extent otherwise provided in any instrument, have the following order of priority), namely-
>
> (a) the holder of any fixed security which is over property subject to the floating charge and which ranks prior to, or part passu with, the floating charge;
>
> (b) all persons who have effectually executed diligence on any part of the property of the company which is subject to the charge by virtue of which the receiver was appointed;
>
> (c) creditors in respect of all liabilities, charges and expenses incurred by or on behalf of the receiver;
>
> (d) the receiver in respect of his liabilities, expenses and remuneration, and any indemnity to which he is entitled out of the property of the company; and
>
> (e) the preferential creditors entitled to payment under section 59,
>
> the receiver shall pay moneys received by him to the holder of the floating charge by virtue of which the receiver was appointed in or towards satisfaction of the debt secured by the floating charge." (emphasis added)

The provision was originally enacted without the bracketed words printed in bold. We revert at para 9.66 below to the apparent reason for including these words.

9.60 It will be seen that under section 60(1), by reason of the bracketed words printed in bold, the holders of fixed securities ranking prior to or part passu with the floating charge (who are specified in paragraph (a)) rank prior to all persons who have effectually executed diligence on any part of the property (as mentioned in paragraph (b)). Now under the general law a competition between an adjudication for debt (which is an effectually executed diligence) and a standard security depends on the temporal priority of the two infeftments: ie first come, first served or a race to the registers. But under section 60(1) a heritable security, though registered later, will always beat an adjudication. This result seems impossible to justify.

9.61 Again on the reasoning in the Iona Hotels case[108] an arrestment or poinding executed prior to the creation of a floating charge is "effectually executed" and thus is ranked under section 60(l)(b). Suppose there is a competition between the arrestment or poinding of a corporeal moveable and a pledge. The orthodox view is that the priority points are the date of execution of the arrestment or completion of the poinding by delivery of the poinding schedule on the one hand[109] and the constitution of the pledge as a real right by delivery on the other hand. Suppose the pledge becomes a real right by delivery after the poinding or arrestment is executed. In a receivership the receiver would be bound to rank the pledge before the poinding or arrestment in violation of the general law which would rank the poinding or arrestment before the pledge. Again this result seems impossible to justify.

9.62 It should be noted that section 60(1) changes the rules of ranking in for example competitions between arrestments and pledges and between adjudications and standard securities eyen though the floating charge has nothing whatsoever to do with a competition between these securities and diligences.

---

107 Discussion Paper No 78 on Adjudication for Debt and Related Matters (1988) vol 2, para 6.44. We repeated these criticisms in unpublished comments dated 16 March 1995 on the DTI Consultation Paper on Security over Moveable Property in Scotland (November 1994) on which this Section is based.

108 1990 SC 330.

109 See para 4.103 above.

9.63 It is not acceptable that in a receivership voluntary securities as a class should willy-nilly have priority over nexus-creating diligences (viz adjudications, poindings and arrestments) as a class in violation of the general law of ranking applicable in every other ranking process.

9.64 Nothing is said in section 60(1) about the ranking of inhibitions, which are not real rights or nexus-creating diligences but preferences by exclusion. At one time, because of the reasoning in the Royal Bank case,[110] it looked as if no inhibition would be given effect in competition with a floating charge because, being a personal diligence creating litigiosity and imposing no nexus on the property, it could not be an "effectually executed diligence" within the meaning given to that term in the Royal Bank case. On the more just reasoning in the Iona Hotels case,[111] effect can probably now be given to an inhibition registered before the grant of the floating charge in a ranking involving a competition with a floating charge.[112]

9.65 To highlight the absurdity, one might ask what would happen if a ranking involving a competition between an adjudication and a standard security were to be held in a process of sale enforcing a standard security under the Conveyancing and Feudal Reform (Scotland) Act 1970 (in which the general law of ranking is mainly applicable). The standard security process is then superseded by a receivership (which, as we have seen, has its own peculiar set of rules on ranking). Are the goalposts to be moved half way through the game?

The need for legislative reform

9.66 The trouble here stems from the words in parentheses set out in bold print in the quotation at para 9.59 above namely "(which rights shall, except to the extent otherwise provided in any instrument, have the following order of priority)". When the provision was originally enacted in the Companies Act 1985, section 476(1), these words did not appear. Apparently representations were made to Government to clarify by statute how the rights specified in that provision were to be ranked by the receiver. As between the categories in paras (a) and (b) of the 1985 Act section 475(1), now the 1986 Act section 60(1) quoted above, the answer is largely provided by the common law of Scotland. This seems to have been overlooked, however, and in response to these representations, the foregoing words in parentheses were inserted by the Insolvency Act 1985, Schedule 6, para 21. The provision was then consolidated as the 1986 Act section 60(1) in the form quoted para 9.59 above. For the reasons given above,[113] there is no easy legislative shortcut towards enabling insolvency practitioners to apply the rules of ranking. Such rules tend to be complex in many legal systems, including English law.

9.67 In our comments of 16 March 1995 on the DTI Consultation Paper,[114] we requested the DTI and their advisers to consider reform of section 60(1) of the 1986 Act bearing in mind that a remedy-based approach to legislation which ignores the general law is inappropriate: justice requires identical cases to be treated identically. At the present time, section 60(1) may not cause too many anomalies in practice because the narrow interpretation given to the term "effectually executed diligence on... the property" means that bare arrestments and poindings are not treated as "effectually executed" for this purpose and generally rank after the floating charge though executed before the charge attached. Adjudications are so rare that in modern practice they hardly ever figure in a ranking. It can scarcely be doubted however that an adjudication is an "effectually executed diligence on... the property" and, in our view, if (as we hope) adjudications are reformed in the relatively near future,[115] amendment of section 60(1) will become even more urgent.

9.68 Unfortunately legislation on diligence would not be an entirely appropriate vehicle for reform, nor is it a simple matter of repealing the words in parentheses in the Insolvency Act 1986, section 60(1)

110 1977 SC 155.
111 1990 SC 330.
112 See Gretton, The Law of Inhibition and Adjudication (2d edn) p 170, and secondary authorities cited at ibid, fn 3.
113 Paras 9.54 - 9.58.
114 Security over Moveable Property in Scotland (November 1994).
115 See our Fifth Programme of Law Reform, paras 2.10 - 2.13.

highlighted in para 9.59 above. Section 60(1) deals with other priorities not affecting diligence which repeal would alter.

Recommendation

9.69 We recommend:

> **In the ranking of claims in a receivership under the Insolvency Act 1986, section 60(1) (distribution by receiver of moneys), diligences as a class should not be automatically postponed to voluntary securities as a class in violation of the general law which should govern their ranking.**

(Recommendation 79)

B. PRIVATE INTERNATIONAL LAW ASPECTS OF ARRESTMENTS

(1) Extra-territorial effect of arrestments

9.70 In our Discussion Paper No 90 on Extra-Territorial Effect of Arrestments and Related Matters we sought views on provisional proposals designed to clarify and amend certain Scottish rules on private international law relating to arrestments. The background to this Paper was the provisional proposal in an earlier discussion paper[116] that the statutory fees proposed in that Paper for arrestees who are banks and other deposit-taking institutions should be based on a sliding scale proportionate to the number of branches in the arrestee's branch net-work. It became important to know whether, as a matter of Scots law, an arrestment would be treated as attaching funds in branches outside Scotland especially (but not only) the English branches of Scottish banks.

9.71 The need for urgent legislation on this matter disappeared when it was decided that the fees should be flat-rate rather than sliding-scale[117] and accordingly the need to know the size of branch networks disappeared. Normally the two Law Commissions conduct projects on private international law issues jointly and we shall not proceed unilaterally with a Report following Discussion Paper No 90.

9.72 In Discussion Paper No 90, we argued that an arrestment served at a branch in Scotland was effectual to attach pecuniary debts, due by the arrestee to the common debtor, which are located outside Scotland, provided that "the arrestee be subject to the jurisdiction and his liability is to account within the jurisdiction"."[8] In other words an arrestment laid at a branch of an arrestee bank in Scotland could attach funds held in an account at an English branch of that bank.[119] In Stewart v Royal Bank of Scotland plc,[m] however, Sheriff Wilkinson came to a different conclusion, holding that an arrestment at a branch of the arrestee bank in Glasgow did not attach a liability to account at a branch of the bank in Cheshire. The learned sheriff held that the highly localised character of banking contracts and practice[121] constituted a speciality on the basis of which previous authority[122] could be distinguished, but accepted that in other types of case a debt located outside Scotland may be arrested if the arrestee is subject to the jurisdiction and liable to account in Scotland.

9.73 We think that this question cannot be settled by sheriff court authority and that eventually it may have to be clarified by a higher court or by legislation. We accept however the representations made to us that legislation requkes multi-lateral discussion at an international level. There must be grave doubts whether the traditional Scottish rule that an arrestment has extra-territorial effect[123] would win international

116 Discussion Paper No 87 on Statutory Fees for Arrestees (1990).
117 See our Report on Statutory Fees for Arrestees Scot Law Com No 133 (1992).
118 Anton, Private International Law (1st edn; 1967) p 112.
119 Cf McNaim v McNairn 1959 SLT (Notes) 35 (deposit account with building society).
120 1994 SLT (Sh Ct) 27.
121 Including the fact that the information necessary for an accounting between banker and customer was localised at a particular branch.
122 McNairn v McNaim 1959 SLT (Notes) 35.
123 See eg McNaim v McNaim 1959 SLT (Notes) 35.

acceptance except as part of reciprocal international treaty arrangements. We note that in several European countries provisional and protective measures may only be ordered in respect of assets within the territorial jurisdiction of the court.[124] The traditional Scottish rule was developed before the European Judgments Convention introduced international arrangements for the exercise of an auxiliary jurisdiction to order provisional and protective measures on the dependence of proceedings in other European States.[125]

(2) Protection from double exaction

9.74 There is however one private international law doctrine considered in our Discussion Paper No 90[126] which, in our view, could properly be dealt with by unilateral legislation applying to Scotland only. This concerns the protection of arrestees from what is called in England double jeopardy, and in Scotland double distress. "Double distress" has a technical meaning in Scots law where it is used as the test of whether an action of multiplepoinding is competent. In its strict original sense, it meant competition created by rival diligence but it has acquired the wider meaning of "a double claim to one fund or property on separate and hostile grounds".[127] In view of the ambiguity we adopt the term "double exaction" in this report. Double exaction involves the situation where an arrestee whose debt due to a defender is, or is likely to be, subject to a "foreign" garnishee order or attachment, is required to pay the arrested or attached debt twice over in the Scottish and foreign proceedings, that is to say, once to the arrester in an action of furthcoming or multiplepoinding in Scotland and a second time to the common debtor who successfully raises an action for payment in the other country.

9.75 The problem of double distress or double exaction suffered by arrestees springing from orders in different countries was first brought to our attention in discussions with representatives of the Committee of Scottish Clearing Bankers. Their interest stemmed from the risk of being required by an English court's judgment to pay in England to a common debtor a credit balance on an account kept in an English branch of a Scottish bank which has been arrested under a Scottish warrant for diligence and perhaps made furthcoming to the creditor holding the warrant.

9.76 The problem was then highlighted by the judgment of the House of Lords in the English case of Deutsche Schachtbau v SIT Co,[128] which illuminates many of the issues of legal policy in this domain and suggests a solution.

English law: the Deutsche Schachtbau case

9.77 If the English courts have jurisdiction over the garnishee (equivalent to arrestee), they have jurisdiction to make a garnishee order absolute whether or not the debt is located within the jurisdiction but will almost always not make such an order if the debt is located outside the jurisdiction. In the converse case where a debt attached by a garnishee order nisi is located with the jurisdiction, it was held by the House of Lords in the Deutsche Schachtbau case[129] that if there is a real and substantial risk that the garnishee may be required by a foreign court to pay the debt twice over, the court should refuse to exercise its jurisdiction to make the garnishee order absolute even if the foreign court exercised an exorbitant jurisdiction in making its order.

9.78 In that case two foreign companies, Deutsche Schachtbau-Und Trefbohrgesellschaft m.b.H ("DST") and the R'As al-Kaimah Oil Co (Rakoil), entered into an agreement for the exploration of oil in one of

---

124 See eg Malley and Layton, European Civil Practice paras 48.59 (Belgium);49.59 (Denmark); and 55.60 (the Netherlands). On the other hand the French courts (ibid, para 50.59) and in theory the Italian courts (ibid, para 53.59) may attach assets located outside their territory in some circumstances.

125 European Judgments Convention, article 24; Civil Jurisdiction and Judgments Act 1982, s 27.

126 Extra-Territorial Effect of Arrestment and Related Matters (1990).

127 Wilson, Debt (2d edn) para 11.5 (citing Russel v Johnston (1859) 21 D 886 at p 887 per Lord Kinloch). The cases are difficult to reconcile: idem ; Dobie, Sheriff Court Practice p 514. The purpose of an action of multiplepoinding is to establish the rights in funds or other property to which there are competing claims. To avoid the technicalities of double distress, the term "double jeopardy" was used in Discussion Paper No 90 though that may have a technical meaning in English law.

128 [1990] 1 AC 295.

129 Idem.

the States in the Persian Gulf, R'As al-Kaimah ("the State"). The agreement contained a clause providing for the settlement of all disputes by arbitrators appointed in Geneva under the rules of the International Chamber of Commerce. In March 1979, DST referred a dispute to arbitration in Geneva and obtained a substantial award. Rakoil, acting in breach of the arbitration clause, instituted proceedings in the Civil Court in the State and obtained rescission of the whole agreement and damages for misrepresentation. Neither party took any part in the proceedings by the other, and for a period neither the award nor the judgment was enforced. In June 1986, however, DST discovered that an English company, Shell International Petroleum Co Ltd, ("Sitco") owed money to Rakoil as the price of oil purchased by Sitco from Rakoil and obtained leave to enforce their arbitration award in England. The Government of the State, having obtained a judgment against Sitco for the cost of the oil, on the grounds that in selling the oil Rakoil had been acting as agent on its behalf, announced that it would not conduct any further trade with Sitco, until payment of the cost of the oil was made. The Civil Court, having arrested a ship chartered to an associate company of Sitco in apparent breach of the law of the State, announced that it would not release the ship until payment of the cost of the oil was made. In the meantime, DST obtained a gamishee order absolute against Sitco. The Court of Appeal dismissed Sitco's appeal against the making of the order. The House of Lords reversed the Court of Appeal's decision. Lord Templeman, dissenting, observed[130] that the jurisdiction claimed by the Civil Court was exorbitant three times. First, in the order made against DST usurping the jurisdiction confided by Rakoil and the State to arbitration in Geneva; second, in the order made against Sitco in favour of the State which was not a party to the contract with Sitco and in usurpation of jurisdiction;[131] and third, in the order arresting the ship belonging to Sitco's associate company which was grossly exorbitant.[132] Further, Rakoil was the servant of the State and the Civil Court was not independent of the State. He concluded that the English court should not be influenced by the threats of the State or by the coercive detention of the ship of Sitco's associate company.

9.79 Discretionary factors: commercial pressure irrelevant. Lord Oliver and Lord Goff[133] held that the garnishee order absolute should not be made. There were three possible grounds on which this decision might have been reached. The first was the commercial pressure to which Sitco was subjected, eg by the State's announcement that it would not trade with Sitco until the cost of the oil was paid. This factor was regarded as irrelevant. Lord Goff said that "as a general rule, commercial pressure cannot of itself be enough to render it inequitable to make an order absolute",[134] and approved[135] the reasoning of Hobhouse J at first instance when he said:

> "Any process of enforcement makes life more complicated for the gamishee. It may even lead to the judgment debtor venting his wrath in some way on the innocent garnishee. It may seriously damage the trading reputation and relationships of the garnishee in a particular trade or part of the world. But the administration of justice should not, without more, defer to such considerations. Just as Mareva injunctions or giving evidence on subpoena, etc, may cause such problems for the party affected, which he would much prefer to avoid, so here the mere commercial interests of Sitco cannot be allowed to defeat the ends of justice. There are obvious practical reasons which support this policy. The measure of commercial advantage and disadvantage, particularly in an international field, is very difficult to investigate and evaluate with any accuracy and depends upon the expression of opinions, which have to make assumptions about events which, ex hypothesi, have not yet occurred. Further, if the court were to allow such considerations to affect the administration of justice, it would provide obvious encouragement to defaulters to try and frustrate execution by imposing just such commercial pressures on the garnishee".

130 [1990] 1 AC 295 at p 341.

131 The sale of the oil to Sitco by Rakoil was under a contract which provided that the validity, construction and performance of the contract was to be governed by the law of England and that any dispute in connection with the agreement was to be referred to arbitration under the International Arbitration Rules of the London Court of International Arbitration: [1990] 1 AC 295 at p 334.

132 The ship was owned by a Panamanian corporation unconnected with Sitco and was chartered to a company which was an associate of, but separate from, Sitco. The State law did not permit the arrest of a vessel for a non-maritime debt which was not the liability of the owner or charterer: [1990] 1 AC 295 at p 335.

133 With whom Lord Keith and Lord Brandon concurred.

134 [1990] 1 AC 295 at p 352.

135 Ibid at pp 352, 353, citing [1988] 2 Lloyd's Rep 294, 300.

9.80 Discretionary factors: foreign court a tool of judgment debtor. In response to a submission by DST that the Civil Court's judgment was a sham in the sense that the Civil Court was not acting in accordance with the law as understood in the State but as a tool of the executive of the State, Lord Oliver said[136] that the feature of the case which gave him most concern was the virtual identification of the judgment debtor (Rakoil) with the State in whose Civil Court judgment against the garnishee had been obtained and the serious doubt whether the Civil Court could in any real sense be regarded as independent of the judgment debtor itself. "The possibility has, therefore, to be faced that what the Court in England is confronted with is no more than illegitimate executive action under the cloak of legitimate legal process".[137] It was held however that that possibility could not be regarded as clearly established on the evidence. Lord Goff nevertheless remarked that:[138]

> "had those facts been established, they would have raised a difficult question whether such an exercise of power by a court could, on the facts of the case, properly be regarded as an order by a court of law at all, but should rather be regarded as an act of executive power by the State and so should be categorised with commercial pressure and as such be irrelevant to the making of a garnishee order absolute. I wish also to state that, in cases such as the present, the courts of this country must not shrink from the task of making the necessary assessment of the situation, reluctant though they will be to do so".

9.81 Discretionary factors: risk of double jeopardy to garnishee paramount. The House of Lords held that the English court considering the making of a garnishee order attaching a debt located in England was not automatically bound to assume as a matter of law that foreign courts would recognise the order as discharging the debt,[139] but must have regard to the factual question whether there is a real and substantial risk that a foreign court would not recognise the order and enforce the debt against the garnishee who would then have to pay the debt twice over. Furthermore where such a risk was shown it did not matter that the foreign court was exercising an exorbitant jurisdiction in making the order for payment against the garnishee. Lord Goff of Chieveley characterised the question as one of policy not susceptible to a logical answer, and of balancing the interest of the garnishor against that of the garnishee. He remarked[140]:

> "Powerful arguments of policy can be advanced in favour of either solution - the one favouring the interests of the garnishor in levying lawful execution upon the property of the judgment debtor, and the other favouring the interests of the garnishee. On the one hand, it can be said that the garnishee must ordinarily have to bear the consequences of any commercial pressure which may be inflicted upon him by a powerful judgment debtor, which may have serious financial consequences for him; it is not unreasonable, it may be argued, that he should likewise bear the consequences of action by some foreign court, invoked by the judgment debtor, which departs from the accepted norms of private international law. On the other hand, it can be said that the principle which is here being applied is that a garnishee order absolute should not be made where it is inequitable to do so, and further that it is accepted in the authorities that it is inequitable so to do where the payment by the garnishee under the order absolute will not necessarily discharge his liability under the attached debt, there being a real risk that he may be held liable in some foreign court to pay a second time. To deprive the garnishee of the benefit of this equity merely because the court which may hold him liable a second time is not acting in accordance with accepted principles of international law would not be right, especially bearing in mind that the garnishee is a wholly innocent party who has been dragged into somebody else's dispute, and that the judgment creditor has the opportunity of seeking elsewhere for assets of the judgment debtor which he may seize in satisfaction of the judgment debt".

Later he said[141]:

---

136 [1990] 1 AC 295 at p 343, 344.
137 Idem.
138 7Wdatp358.
139 [1990] 1 AC 295 at pp 354-356.
140 Ibid at p 355.
141 Ibid at pp 357, 358 agreeing with Hobhouse J at first instance.

"if the gamishee shows that he is in fact exposed to a real risk of being required by a foreign court to pay the debt a second time, it does not of itself matter that the risk which the garnishee shows to exist is one of being so required by a foreign court which does not have, by English law, or by generally accepted rules of international law, jurisdiction to make such an order. This is because the crucial feature is the reality of the risk".

9.82 Lord Oliver concurred observing[142] that disapproval of the conduct of the judgment debtor should not be allowed to outweigh the injustice likely to be suffered by the garnishee whose involvement arose simply from the accident of residence in England which provided the requisite element of situs for the debt sought to be garnished. The fact that the foreign judgment had been irregularly obtained by the exercise of an exorbitant jurisdiction made no difference to the garnishee.
"However irregularly he will, as a result of the order being made absolute, be compelled to pay the same debt twice over, and it sweetens the pill not at all to be told that one such payment has been irregularly extracted from him"[143].

9.83 The need for a safeguard under Scots law against double exaction. It seems to us that an innocent arrestee should not be compelled to pay a debt twice over in pursuance of separate proceedings in different countries which conform to the laws of these countries. The Scottish courts do not have precisely equivalent powers to those which the English courts assumed in the Deutsche Schachtbau case,[144] since warrants of arrestment in execution are granted as of right and do not specify a particular arrestee. By contrast in England and Wales the grant of a garnishee order is a discretionary power of the court which specifies the garnishee to whom it is directed. Furthermore, in Scotland an incoming foreign judgment or decree-arbitral, once recognised and registered at common law or under statute for the purposes of enforcement,[145] is invariably treated as equivalent to a decree of the Scottish courts and a general warrant for diligence not specifying an arrestee is granted. At that stage it is not known whether arrestment will be used let alone whether, if an arrestment were to be used, the arrestee would be subject to double distress. The various judicial discretionary powers to refuse recognition or enforcement of the incoming foreign judgment, eg on grounds of public policy, are not well adapted to protect an arrestee from double distress. Even in the case of the judicial discretionary grant of warrant for diligence on the dependence recommended in Part 3 above, it may be that the court will often grant a general warrant for diligence not specifying a particular arrestee.

9.84 One type of Scottish equivalent to the English power would be a power to recall a Scottish arrestment or other Scottish diligence ex post facto on the ground of the need to protect the arrestee from double exaction. In our Discussion Paper No 90 we sought views on a provisional proposal to introduce such a ground of recall.[146]

9.85 It is conceivable that recall of an arrestment might be granted under the present law.[147] It is a general principle of Scots law that a debtor is not required to pay the same debt twice over.[148] This is the basis of various doctrines[149] including the title of a fundholder to raise an action of multiplepoinding to avoid double distress. Where claims on an arrested fund are made both by an arrestee and third party, generally a multiplepoinding will be sustained.[150] Where however an arrestment is valid under the private international rules of Scots law,[151] it is doubtful whether it can be recalled on the ground of a substantial

142 Ibid at p 343.
143 Idem.
144 [1990] 1 AC 295.
145 See RCS 1994, Chapter 62; Maher and Cusine, Chapter 11.
146 Discussion Paper No 90, paras 3.47-3.60.
147 Cf Mitchell v Strachan (1869) 8 M 154.
148 The relevant brocards are ius non patitur idem bis solvi (the law does not suffer the same debt to be paid twice) (Stair, Institutions1,1',9; Moore's Exors v McDermid (1913) 1 SLT 278 atp 279; and bona fides non patitur ut idem bis exigatur (good faith does not allow the same debt to be exacted twice) (D.50,17,57; Stair, Institutions 1,18,5; IV,40,33).
149 Eg the defence of bona fide payment; the rule that only the payer has a title to sue a condictio indebiti.
150 Dobie, Sheriff Court Practice pp 514,515.
151 In respect that the Scottish court has undoubted jurisdiction over the arrestee.

risk that a court in another country is likely to refuse to recognise the Scottish arrestment and compel the arrestee to pay a second time, ie to the common debtor. The grounds of recall of arrestments in execution are limited and have hitherto been confined to formal incompetence or irregularity. On consultation there was general agreement that there was at least a doubt about the adequacy of the court's powers which should be removed.

9.86 Arrestment in Scotland: attachment or decree outside Scotland. In Discussion Paper No 90 we proposed[152] that the Scottish courts should be empowered, on the application of the arrestee, to recall a creditor's arrestment of his debtor's funds where there was a real and substantial risk that the arrestee would be required by legal process (as distinct from commercial pressure) to pay those funds to the debtor a second time in another part of the United Kingdom or in a foreign country.

9.87 Action or decree in Scotland against innocent third party subject to foreign attachment. Another situation where double exaction might occur is where a foreign court makes an attachment order of funds in the hands of a third party having by the foreign law extra-territorial effect and attaching, or purporting to attach, a debt located in the foreign country and also located in Scotland by the local laws; the defender in the foreign proceedings may demand payment of the debt in Scotland; the third party may refuse payment in reliance on the foreign attachment; and if the Scottish courts do not recognise the foreign attachment the defender in the foreign proceedings may then obtain, in a Scottish action, a decree for payment of the debt under the contract or for damages for non-payment. In such a case, the innocent third party would be at risk of double exaction but the Scottish courts would be powerless to protect him from that risk even if a power to recall arrestments, on the lines discussed in the immediately preceding paragraph, was introduced. The double exaction may arise not only from legal process in the foreign country (eg a Gulf state) but, as in the Deutsche Schachtbau case, in other foreign countries (eg other Gulf states) recognising the judgment in the first-mentioned foreign country. If the Scottish courts did not recognise the foreign judgment or the foreign attachment, they would ex hypothesi be bound to grant decree and would be unable to prevent the enforcement of the decree by the usual modes of diligence - poinding, earnings arrestment, conjoined arrestment order, arrestment and furthcoming, inhibition and adjudication. Accordingly, we proposed[153] that the Scottish courts should be empowered to recall or restrict not merely Scottish arrestments, but other modes of diligence in the circumstances just described. It has, in our view, to be recognised that a debt may be enforceable in two or more countries by attachment in the hands of innocent third parties not concerned with the action. If by the accident of the third party having a domicile in Scotland, he is liable under Scots law to pay the debt here and if he is liable also under foreign law to pay in a foreign country, the third party should be as much entitled to protection as he would be if the double exaction arose from the use of a Scottish arrestment not recognised abroad in the case outlined in paragraph 9.86 above.

Consultation

9.88 A majority of consultees agreed with our proposals. In a case where there is an action in Scotland against a third party subject to a foreign attachment,[154] both the Joint Committee and the Committee of Scottish Clearing Bankers suggested that a power to recall diligence did not go far enough and that the court should be empowered to refuse decree. We accept this suggestion subject to the modification that the court should supersede extract[155] rather than refuse decree.[156]

9.89 The debtor in the foreign process may submit a claim in the third party's sequestration or liquidation in Scotland. Generally claims are allowed or rejected in the first place by the permanent trustee or liquidator subject to an appeal to the court.[157] If the claim is accepted by the trustee or liquidator, we

152 Ibid, para 3.60, Proposition 5(1).
153 Discussion Paper No 90, para 3.60, Propositions 5(2) and (3).
154 Proposition 5(2).
155 We are grateful to Professor G Maher for this suggestion.
156 Where there is an arrestment in Scotland and a foreign attachment or decree, it was represented to us that provision should also be made for the case where the arrestee obtempered the arrestment in breach of a foreign injunction. It is however difficult to see how the Scottish courts or Scots law could protect the arrestee in such a case.
157 Bankruptcy (Scotland) Act 1985, s 49; Insolvency (Scotland) Rules 1986, r 4.16 (SI 1986/1915).

propose that the third party should be entitled to appeal against the acceptance.[158] In such an appeal, the sheriff should have the same power to reject the claim as we recommend he should have to supersede extract in an action for payment. These provisions would rarely be invoked, but are right in principle and were accepted on consultation.[159]

9.90 There are two other points. First, we consider that such powers should be exercisable only where the risk of double exaction arises from a legal process which does or may result in enforcement proceedings in another country and not where that risk arises from commercial pressure. Second, the Scottish courts should not be precluded from granting relief by reason only of the fact that the foreign legal process is, in the eye of Scots law, irregular and exorbitant. Both points are consistent with the Deutsche Schachtbau case[160] and were endorsed by a majority of consultees.

9.91 We recommend:

(1) Where there is a real and substantial risk that diligence in Scotland and comparable measures in a country outside Scotland may be executed against the same person for the same debt so that he is at risk of being unjustifiably compelled to pay the debt twice over, then the Scottish court should have a discretionary power, on the application of that person:

(a) to supersede extract of decree in an action for payment of the debt against him; or, as the case may be,

(b) to suspend, interdict, recall, restrict or sist the Scottish diligence, in order to protect him from that risk.

(2) In a sequestration or liquidation, the sheriff should have power to uphold an appeal against a claim by a creditor in order to protect the debtor from the risk of double exaction.

(Recommendation 80; Draft Bill, clause 52)

C. APPLICATION TO THE CROWN

9.92 In many cases a Government Department will be the pursuer or creditor, or act in a like capacity.[161] Subject to the general limitations contained in the Crown Proceedings Act 1947, we think that, in accordance with precedent,[162] the legislation following hereon should apply to the Crown as it applies to others in those capacities. The Crown should be bound by the legislation in its capacity as an arrestee also in accordance with precedent[163] and, in ranking competitions, in its capacity as a singular successor of the defender or debtor.[164]

9.93 On the other hand, the 1947 Act prohibits interdicts and orders for specific implement against the Crown and at common law diligence cannot be executed against the Crown. The statutory protection from arrestment of Crown ships and aircraft[165] should also be preserved.

9.94 We recommend:

Subject to the protection for the Crown contained in the Crown Proceedings Act 1947 and Administration of Justice Act 1956, section 47(7), the legislation following hereon should

158 Bankruptcy (Scotland) Act 1985, s 49(6); Insolvency (Scotland) Rules, rale 4.16. This would be a special ground of appeal since only the sheriff on appeal, not the trustee or liquidator as adjudicator of claims, would be empowered to reject the claim.
159 Ibid, para 3.60, Proposition 5(4).
160 [1990] 1 AC 295; see paras 9.76-9.82 above.
161 Eg as petitioner, counterclaimer, or claimant in third party notice procedure.
162 Debtors (Scotland) Act 1987, s 105.
163 Mulvenna v The Admiralty 1926 SC 842; Debtors (Scotland) Act 1987, s 105.
164 See Appendix A, Draft Bill, clauses 14, 21 and 55.
165 Administration of Justice Act 1956, s 47(7).

apply to the Crown in its capacity as pursuer, creditor, petitioner, counterclaimer, claimant in third party notice procedure, arrestee and singular successor of the defender or debtor.

(Recommendation 81; Draft Bill, clause 60)

D. OTHER MATTERS CONSIDERED ON WHICH NO LEGISLATION IS RECOMMENDED

(1) Limits on amounts arrestable

The existing law and practice

9.95 Arrestment on the dependence. Where a pecuniary debt due by the arrestee to the defender is arrested on the dependence of a Court of Session action or sheriff court ordinary cause, the schedule of arrestment normally states that it arrests in the hands of the arrestee a specified sum of money, qualified by the words "more or less", due by the arrestee to the defender, together with all moveable things in the arrestee's hands belonging or pertaining to the defender.[166] The specified sum is usually computed by aggregating the principal sum sued for and an estimated amount for judicial expenses.[167]

9.96 In Ritchie v McLachlan,[m] it was established that where the schedule of an arrestment on the dependence defines the arrested sum as being a particular amount "more or less", the arrestment in fact attaches all sums due by the arrestee to the defender.

9.97 In the case of a sheriff court summary cause arrestment on the dependence, we understand that the schedule of arrestment (the form of which is not prescribed by any enactment) usually states that it arrests in the hands of the arrestee all sums of money owing to the defender and all goods and effects in the arrestee's custody belonging to the defender, "and that to an amount or extent not exceeding the value of £X sterling". The words "more or less" are omitted. This style seems to be modelled on the style of schedule of arrestment on the dependence prescribed for the old small debt action under the (now repealed) Small Debt (Scotland) Act 1837, Schedule C. In the latter style, the sum specified was the statutory upper limit of the small debt court's jurisdiction. Whether the sum now in practice inserted in the summary cause schedule of arrestment is the upper jurisdictional limit of the summary cause procedure (currently £1,500 of principal sum exclusive of interest and expenses), or a sum computed in the same way as in other schedules of arrestment, may vary according to the practice of sheriff officer firms. It is difficult to see why the repealed 1837 Act style should still be followed.

9.98 Arrestment in execution. The case of Ritchie v McLachlan[169] involved an arrestment on the dependence. We have not traced any reported case which considers whether the same rule applies to arrestments in execution. The secondary authorities do not expressly discuss that question, and so far as they give any guidance, point different ways.[170] In practice a schedule of arrestment in execution[171] is in very similar terms to a schedule of arrestment on the dependence, the main difference being that expenses chargeable against the debtor are normally specified. A schedule of arrestment in execution of a summary cause decree is normally in similar terms to other schedules of arrestment in execution, inter alia because the statutory style in the 1837 Act, Schedule C, did not apply to arrestments in execution of small debt decrees, and was therefore not followed on the introduction of the summary cause procedure. Normally the schedule of arrestment in execution will specify a sum computed by aggregating, and will specify separately, the principal sum decerned for, the judicial expenses of process, the dues of extract, possibly

166 RCS, r 16.15(l)(b), Appendix, Form 16.15-B.

167 It may be that as a result of the coming into force of the Debtors (Scotland) Act 1987, section 93(2), in practice the expenses of the arrestment on the dependence will also be included in the specified sum.

168 (1870) 8 M 815.

169 Idem.

170 Graham Stewart, pp 37 and 134, states the rule in Ritchie v McLachlan when discussing arrestments generally, and gives the impression that he considered that it applies to arrestments in execution. Wilson, Debt (2d edn) para 11.10, p 136 gives the effect of the case only in the context of arrestment on the dependence. The McKechnie Committee's Report, paras 42-46 discuss the rule in the same context only.

171 See RCS, rl6.15(l)(f), Appendix, Form 16.15-E.

the interest accrued to the date of arrestment if claimed, and the expenses of the diligence (ie the prescribed fees of the messenger-at-arms or sheriff officer and the solicitor's instruction fee).

9.99 It seems to be the better view that even an arrestment in execution attaches more than the specified sums if the words "more or less" qualify those sums. Thus the prescribed form of conclusion in an action of furthcoming[172] concludes for payment by the arrestee to the arresting pursuer of:

(a) the sum of (amount in words and figures); or

(b) whichever is the lesser of:-

(i) such sum as may be owing by the arrestee to (name of debtor) and has been arrested in his hands by the pursuer; and

(ii) such sum as shall satisfy the pursuer in (specify principal sum due and interest, in terms of the decree constituting the debt or otherwise, and expenses of the action in which that decree was obtained).

This conclusion presupposes that the pursuer will be entitled to payment of interest from the arrested property or money, being interest accrued up to the date of payment of the principal sum. And the formula "such sum as shall satisfy the pursuer" shows that arrested subjects may exceed the specified sums.

The McKechnie Report's recommendations

9.100 The McKechnie Committee[173] received representations:[174]

> "as to the excessive and sometimes oppressive use of this form of diligence where it is used without limitation of effect. The Committee of Scottish Bank General Managers told us of the embarrassment that may be caused to a customer in carrying on his business where the whole of his funds in a bank are attached by an unrestricted arrestment. They suggested that any arrestment on the dependence should be effective only to the extent of the creditor's claim and a reasonable sum for the expenses of the action. The same suggestion was made to us by the two legal societies".

The Committee accepted that view remarking that "the arrestee and the debtor should know the extent of, and liability under, an arrestment on the dependence".[175] The Committee recommended:[176]

> "that an arrestment on the dependence should arrest "£X or such less sum as may be owed by you to the debtor", the specified sum being reached by reference to the amount of the creditor's claim with the addition of a reasonable sum - normally not more than twenty per cent of the claim - in respect of expenses, including the expenses of an action of furthcoming if required. It would of course always be open to the creditor to lodge a further arrestment in respect of expenses if the proceedings were unexpectedly protracted or if the sum sued for was increased".

The Committee further observed[177] that their recommendation:

> "would not prevent a creditor from lodging several arrestments on the dependence in respect of all the bank accounts, company holdings, etc, known to belong to his debtor. As, however, a creditor does not always know the extent of the funds held by an arrestee for the debtor, he cannot judge whether that arrestment will give him sufficient cover. Where several arrestments are lodged the debtor's remedy is to move the court to recall or restrict one or more of them. An application for the recall or restriction of an arrestment is seldom taken, however, because normally the creditor is ready to withdraw an arrestment when it is shown to him that sufficient to cover his claim is caught by another of his arrestments".

---

172 See RCS, Appendix, Form 13.2-B(8).
173 McKechnie Report, para 43.
174 From the Law Society of Scotland and Society of Writers to the Signet.
175 McKechnie Report, para 44.
176 Idem.
Ill Ibid, para 45.

On consultation, it was pointed out to us that nowadays creditors are often not prepared to withdraw arrestments.

Criticism of the existing law

9.101 The large sums of money which can be arrested and the lack of any relationship between the assets frozen and the sum sued for has often been criticised over the years.[178] The injustice of the system is plain to see. Sums far in excess of what is reasonably required to protect the creditor's interests can be attached and it is then up to the debtor to prove a case for recall or restriction.

Discussion Paper and consultation

9.102 In our Discussion Paper[179] we put forward proposals for the introduction of limits on amounts arrested on the dependence and slightly different limits on amounts arrested in execution.

9.103 Arrestment on the dependence. In the light of comments on our Paper, we think that limits imposed by law on amounts arrested on the dependence are unnecessary having regard also to our recommendation for a wide judicial discretion to grant warrant with or without restrictions and conditions.[180] It was rightly said that the sum sued for is often not a sound basis for determining the amount arrestable because many claims are inflated random sums. The provision for interest is vitiated by dependence on an unrealistic principal sum. It is often difficult to make an accurate estimate of judicial expenses beforehand. The Faculty of Advocates remarked that the suggested formula was arbitrary, likely to be difficult to work and often likely to afford insufficient protection in relation to judicial expenses and interest. It was therefore suggested to us that all these matters should be determined by the judge to whose discretion the grant of warrant is consigned. We agree with these representations.

9.104 Arrestment in execution. In the case of arrestments in execution, different considerations apply. In these cases the grant of warrant will not be discretionary. The amount of the principal sum and the judicial expenses will be known. The amount of accrued interest also will be known. So in some respects the case is stronger for introducing upper limits on the amounts arrested.

9.105 There are, however, three reasons for not introducing upper limits. First, there is the well nigh insuperable difficulty of estimating the expenses of actions of furthcoming, which are rare but could be raised and defended. In principle, these expenses should be recoverable out of the arrested fund.[181] Yet at the stage of executing an arrestment it is impossible for the creditor to know whether a furthcoming will be necessary and if raised whether it will be defended.

9.106 Second, while debtors tend to have accounts with one bank only, it is a disadvantage of the fixed limit that the creditor may arrest in the hands of two arrestees and each arrestment will then still cover the stated amount. It was represented to us that there is no easy way to regulate this and discretionary recall or restriction would be the appropriate remedy. Under the present law, the grounds for recall of an arrestment in execution are extremely narrow being (apart from formal irregularity) as a general rule limited to cases where the debt has been paid or otherwise extinguished or has become unenforceable.[182] The ground of nimiety (excessiveness) and oppression is only a ground of recalling diligence on the dependence. Erskine explains:

> "But arrestments, if they be grounded either upon formal decrees or on registered obligations, cannot be loosed on caution; because where a creditor's ground of debt is constituted by the sentence

178 See, eg, Levy v Gardiner 1964 SLT (Notes) 68; Taylor Woodrow Construction v Sears Investment Trust 1991 SC 140; Henderson v George Outram & Co Ltd 1993 SLT 824; Costain Building and Civil Engineering Ltd v Scottish Rugby Union pic 1994 SLT 573; Interconnection Systems Ltd v Holland 1994 SLT 777.

179 Discussion Paper No 84, paras 2.148-2.150.

180 See Part 3.

181 Cf Debtors (Scotland) Act 1987, s 93(2).

182 Graham Stewart, p 196; Stair Memorial Encyclopaedia vol 8, sv "Diligence and Enforcement of Judgments", para 303.

of a judge, the debtor can have no pretence to demand a loosing, since he ought to make payment, which will effectually discharge the arrestment".[183]

This principle remains valid. Consultation did not reveal wide support for introducing nimiety as a ground of recalling arrestments in execution.

9.107 Third, the same principle justifies an arrestment in execution not directly related to the sum decerned for. Since the debt has been found due, the debtor's remedy is to pay the debt which will have the effect of extinguishing the arrestment.

9.108 We recommend:

Legislation imposing upper limits on the amounts of money attachable by arrestment should not be introduced.

(Recommendation 82)

(2) Arrestment of bank or other accounts in which earnings are paid

9.109 Our attention has been drawn by more than one body to the problem of arrestments of bank or other accounts into which debtors' earnings are paid. Such an arrestment is thought to attach the whole credit balance and as a result debtors are often left with insufficient money to support themselves and their families. Scots law has always protected earnings against diligence to some extent. Prior to the Wages Arrestment Limitation (Scotland) Act 1870 there was a common law rule ("the beneficium competentiae") which exempted from an arrestment of earnings a reasonable amount for the subsistence of the debtor and any dependants.[184] The 1870 Act provided that an arrestment (other than for an alimentary debt or rates or taxes) attached only one half of a workman's weekly wage in excess of £1 per week. This amount was updated by the Wages Arrestment Limitation (Amendment) (Scotland) Act 1960 so that only half the balance over £4 per week was arrestable. This common law rule and the statutory provisions were abolished by the Debtors (Scotland) Act 1987 which introduced a new diligence against earnings called an earnings arrestment.[185] An earnings arrestment attaches only a proportion of the debtor's net earnings which are paid each pay day.[186] Net earnings below a prescribed amount (currently £63 per week or £273 per month) are exempt and the arrestable proportion increases with the amount of the debtor's net weekly or monthly earnings. The maximum rate of deduction is 50% and this applies to the slice of earnings in excess of £540 per week.

9.110 The statutory protection in relation to arrestment of earnings applies only to earnings in the hands of the employer and does not extend to earnings which have been paid into a bank or other account. It seems that alimentary income payments (which include earnings) which enjoy some protection under the common law do not retain their alimentary character once they have been paid.[187] The prevailing view is therefore that an arrestment of a bank account into which earnings have been paid attaches the whole of the credit balance at the time of arrestment. In one sheriff court case,[188] 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 only in the employer's hands but also after it had been lodged in the employee's bank account, provided the sum was identifiable and not mixed with other funds. A debtor might also obtain relief from the hardship caused by the arrestment by applying to the court for a time to pay order.[189] If such an order is granted the debtor is given time to pay the sum due under the decree by instalments. The arrestment may be recalled or restricted and the execution of further arrestments during the currency of the time to pay order is incompetent.[190]

183 Erskine, Institute 111,6,12.
184 Shanks v Thomson (1838) 16 S 1353.
185 Section 46.
186 Section 49 and Sch 2.
187 Graham Stewart, pp 93-101.
188 Woods v Royal Bank of Scotland (1913) 1 SLT 499.
189 Debtors (Scotland) Act 1987, s 5.
190 1987 Act, s 9.

9.111 In Consultative Memorandum No 49[191] we invited views on the question whether the exemption of earnings from arrestment should be extended to earnings which had been paid into 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. In view of that response we made no recommendations to change the law in our Report on Diligence and Debtor Protection.[192] We do not make any such recommendation in this report either. While we are aware of the problem we are uncertain as to its scale and the amount of hardship thereby occasioned to debtors. At this stage there does not seem to be any easy solution to the problem. It would not be sensible to prohibit arrestment of any bank account into which earnings were paid, because a large part of the credit balance could well consist of other sums that should not be protected from attachment by creditors. It would be difficult and time-consuming to evaluate the extent to which the balance consisted of the debtor's current earnings. Most people pay sums other than earnings into their bank accounts so that in order to determine the proportion of the balance one might have to look at payments in and withdrawals over a considerable period of time. Even if the only sums paid into a bank account were earnings there is the question of how far savings out of past earnings should be protected or whether the protection should extend to the last payment of earnings only.

9.112 A substantial amount of work would have to be undertaken in order to prepare and consult upon possible solutions. A project of this size could not be accommodated within our current programme of work which we are committed to complete over the next few years.[193]

(3) Protection of pensions from arrestment

9.113 We received representations from a solicitor to the effect that the lump sum due to employees on retiring from their occupational pension schemes should be arrestable. Most schemes provide for a lump sum to be paid to a member of a scheme on retirement together with a pension payable during the member's life (and usually a pension to the member's surviving spouse as well).

9.114 Pension rights under an occupational pension scheme are protected against diligence by sections 91 to 94 of the Pensions Act 1995.[194] Section 91(l)(b) provides that where a person "is entitled, or has an accrued right, to a pension under an occupational pension scheme ... the entitlement or right cannot be charged ...". As regards Scotland references to a charge are to be read as references to a right in security or a diligence.[195] "Pension" includes any benefit under the scheme and any part of any pension and any payment by way of pension.[196] An "occupational pension scheme" is defined in section 176 of the 1995 Act by reference to section 1 of the Pension Schemes Act 1993.[197] The pension rights cannot be assigned and courts cannot competently make any order which would have the effect of preventing a person receiving the pension benefits under an occupational pension scheme.[198] Section 94(1) enables regulations to be made excepting classes of scheme from the above provisions or modifying the operation of those provisions in their application to public service pension schemes.[199]

9.115 Arrestments of earnings in execution of a decree etc are competent against the periodic payments made under a pension scheme. However, section 73(3)(d) of the Debtors (Scotland) Act 1987 excludes from earnings subject to any arrestment of earnings "any occupational pension payable under any enactment which precludes the assignation of the pension or excepts it from diligence". As mentioned above, occupational pension schemes are protected from diligence.

---

191 Proposition 39 (para 4.13).
192 Scot Law Com No 95 (1985), para 6.286.
193 Fifth Programme of Law Reform Scot Law Com No 159 (1997).
194 Brought in to force on 6 April 1997 by the Pensions Act 1995 (Commencement Order No 10) 1997 (SI 1997/664).
195 Section 94(3)(a).
196 Section 94(2).
197 Which is as follows: "'Occupational Pension Scheme' means any scheme or arrangement which is comprised in one or more instruments or agreements and which has, or is capable of having, effect in relation to one or more descriptions or categories in employments so as to provide benefits, in the form of pensions or otherwise, payable on termination of service, or on death or retirement, to or in respect of earners with qualifying service in an employment of any such description or category".
198 1995 Act, s91(l)(a), (2).
199 See Occupational Pension Schemes (Assignment, Forfeiture, Bankruptcy etc) Regulations 1997 (SI 1997/785).

9.116 There is no such protection for private pension schemes or their predecessors retirement annuity contracts. There is some disquiet as to the difference of treatment, but it can be argued that membership of most occupational pension schemes, especially those in the public service sector, is compulsory whereas private pension? are voluntary. We make no recommendations for change in this Report because the legislation protecting occupational pension schemes has been enacted very recently. Furthermore we have not consulted upon the need for any changes.

Part 10 Summary of Recommendations

A NEW SYSTEM: JUDICIAL AUTHORISATION OF DILIGENCE ON DEPENDENCE (PART 3)

Nature of diligence on the dependence as extraordinary remedy

1. Diligence on the dependence securing sums already due should no longer be ordinarily exercisable by a pursuer as of right but should be treated as an extraordinary remedy available only where its use is justified by special circumstances.

(Para 3.3; Draft Bill, clauses 1 and 24)

Applications made to a judge.

2. The court should have a discretionary power, exercisable by a judge on the pursuer's application, to grant or to refuse to grant warrant for diligence on the dependence, subject where appropriate to restrictions or conditions.

(Para 3.5; Draft Bill, clause 1)

Form of application

3.(1) The procedure in an application for warrant for diligence on the dependence should be regulated partly by statute and partly by act of sederunt. The procedure should so far as practicable be the same in the Court of Session and the sheriff court, whether the warrant is to be inserted in the summons or initial writ, or to be granted at a later stage in the depending action.

(2) An ex parte application should be competent for warrant to execute diligence on the dependence before commencement of the action by service of the summons or initial writ.

(3) An application for warrant for diligence on the dependence should be intimated to the defender unless the applicant in an ex parte application satisfies the court that warrant should be granted without such prior intimation.

(4) In an intimated application for warrant, there should be a hearing, attended by the parties' legal representatives, only if the application is opposed by the defender. In an ex pane application for warrant, there should be a hearing, attended by the applicant's legal representative, in every case on the need to dispense with intimation and on the question whether the warrant should be granted.

(5) We reject the proposal that a warrant for diligence on the dependence granted ex parte should expire automatically after a short statutory period unless, at a hearing within that period, the pursuer shows cause why the warrant should continue in force.

But this recommendation presupposes that in an application for recall of a warrant granted ex pane without intimation to the defender, the onus should be on the pursuer to justify the continuance of the warrant as proposed at Recommendation 30(1) below.

(Para 3.27; Draft Bill, clause 1(1), (3) and (4))

Grounds for granting warrant

4. In an application to the court for the discretionary grant of warrant for diligence on the dependence, the warrant should only be granted where it appears to the court:

(a) that there is a real and substantial risk that, in the event of the pursuer obtaining decree, the enforcement of the decree may be frustrated or materially prejudiced by:

(i) the fact that the defender is insolvent or verging on insolvency; or

(ii) the defender removing assets from the jurisdiction, or disposing of, burdening, removing, concealing or otherwise dealing with his assets; and

(b) that it would be reasonable to grant the warrant, with or without restrictions or conditions, having regard to the pursuer's prospects of success on the merits, and all the other relevant circumstances of the case.

(Para 3.45; Draft Bill, clause 1(1) and (2))

Powers of court

5.(1) In disposing of or dealing with an application for warrant for diligence on the dependence, the court should have power:

(a) to grant a warrant for inhibition on the dependence or arrestment on the dependence or both; or

(b) to grant the warrant subject to restriction of its terms; or

(c) to refuse to grant the warrant; or

(d) to refuse to grant the warrant exparte, to order intimation of the application to the defender, and such other interested person (if any) as the court thinks fit, and to appoint a time for a hearing of the application at which objections may be made.

(2) The court's power to restrict the warrant mentioned at para (l)(b) above should include power:

(a) to limit a warrant for inhibition on the dependence to subjects specified in the warrant or to except subjects so specified from the scope of the warrant; and

(b) to limit a warrant for arrestment on the dependence to particular funds or property, or to except particular funds or property from the scope of the warrant, and also power to restrict the amount which an arrestment will secure, or in respect of which an inhibition will have effect, to an amount less than the amount of the sums claimed in the depending action.

(Para 3.52; Draft Bill, clause 1(1), (3), (5) and (6))

Liability of pursuer for wrongful or unjustified diligence on the dependence

6. A pursuer should be liable in damages to the defender, or to a third party having an interest in the property arrested or affected by the inhibition, for patrimonial loss arising directly from his use of diligence on the dependence if (a) the warrant was obtained or executed wrongfully, or (b) it was unreasonable for the pursuer to apply for the warrant.

(Para 3.63; Draft Bill, clause 6)

Caution or consignation by pursuer

7. The court should be empowered to require the pursuer, as a condition of granting warrant for diligence on the dependence, to give security by way of caution or consignation or otherwise for meeting any liability which he may incur for wrongful or unjustified diligence on the dependence.

(Para 3.71; Draft Bill, clause 4)

Caution or consignation by defender

8. Where in an opposed application for warrant for diligence on the dependence at which the defender appears, the court decides to refuse to grant warrant, or to grant a restricted warrant, the court should have power to impose a condition making the refusal or restriction dependent on the defender finding caution for, or consigning, an amount not exceeding the sum claimed, together with a reasonable sum allowed for expenses.

(Para 3.75; Draft Bill, clause 1(7))

Warrants for diligence on the dependence securing future or contingent debts

9. Our recommendations on warrants for diligence on the dependence securing debts already due, liability for wrongful or unjustified diligence and related matters, should extend to diligence on the dependence securing future or contingent debts, including aliment and financial provision on divorce or nullity of marriage, and should replace the Family Law (Scotland) Act 1985, section 19.

(Para 3.89; Draft Bill, clauses 1 - 7; Schedule)

Jurisdiction of the sheriff to grant warrant for inhibition on the dependence

10. Jurisdiction should be conferred on the sheriff to grant warrant for inhibition on the dependence.

(Para 3.97; Draft Bill, clause 2)

Incidence of liability for expenses of using arrestment and inhibition on the dependence

11.(1) The court should award the pursuer the taxed expenses of obtaining warrant for, and executing, an arrestment on the dependence except to the extent that the court modifies or refuses them on the ground that:
(a) he was unreasonable in applying for the warrant; or
(b) the modification or refusal is otherwise reasonable in the circumstances including the result of the action.

(2) Where warrant for arrestment or inhibition on the dependence is granted but in the court's opinion the pursuer was unreasonable in applying for the warrant, the defender should be entitled to his expenses in opposing the application for warrant unless the court modifies or refuses them on the ground that it is reasonable to do so in the circumstances including the result of the action.

(3) Subject to the foregoing, the court should have a discretion to award or refuse the expenses of obtaining, or opposing, the grant of warrant for diligence on the dependence, and of executing an arrestment on the dependence.

(4) The expenses of obtaining, or opposing, the grant of warrant for diligence on the dependence should be decerned for as expenses of process in the action.

(5) The expenses of executing an arrestment on the dependence, so far as chargeable against the defender under the foregoing proposals, should be recoverable by forthcoming or other diligence in accordance with the common law and the Debtors (Scotland) Act 1987, section 93(2).

(Para 3.111; Draft Bill, clause 7)

Introduction of new diligence of interim attachment

12. It should be competent for the court to make an order granting warrant for the attachment of specified moveable goods owned by the defender on the dependence of an action for payment, which would normally have effect for a prescribed period, after decree for payment and disposal of the action, to allow time for the pursuer to poind the goods. This new form of diligence should be known as an interim attachment.

(Para 4.34; Draft Bill, clauses 8 and 16(1))

Form and grant of warrant, and execution of interim attachment

13.(1) The form of warrant for interim attachment, and the schedule of interim attachment implementing the warrant, should be prescribed by act of sederunt and the warrant, or a document referred to in the warrant, should specify the particular moveable goods affected by the attachment.

(2) A warrant for interim attachment should only be granted by a Lord Ordinary or sheriff in accordance with the principles and procedures set out in Part 3 for the discretionary grant of warrants for diligence on the dependence, with any necessary modifications.

(3) (a) The interim attachment should be executed by the service of a schedule of interim attachment,
(b) The modes of service, which should be prescribed by act of sederunt, should be the same as in the service of a schedule of arrestment.

(Para 4.38; Draft Bill, clause 8(l)-(4))

Exceptions and exemptions by law from interim attachment

14.(1) Only poindable subjects should be liable to interim attachment. The following categories of corporeal moveables should be exempt from interim attachment, namely:
(a) articles specified in the Debtors (Scotland) Act 1987 section 16(1) (which exempts certain articles wherever situated from poinding) irrespective of the value of the articles, and accordingly the monetary limits on the exemptions in paragraphs (b) and (d) of section 16(1) should not apply to exemptions from interim attachment;
(b) all articles belonging to the defender located in a dwelling-house (whether the defender's or a third party's) or its curtilage at the time of the grant of the warrant for interim arrestment;
(c) articles of a perishable nature or likely to deteriorate substantially and rapidly in condition or value; and
(d) raw material acquired by the defender for manufacture or stock-in-trade acquired by him for re-sale.

(2) The following articles should not be exempt from interim attachment, namely:
(a) a mobile home, such as a caravan or houseboat, which is the only or principal residence of the defender; and
(b) a vehicle of the defender within the curtilage of a dwelling-house.

(Para 4.52; Draft Bill, clause 8(1), (5) and (6))

Interim attachment of articles in common ownership

15.(1) Articles owned in common (pro indivisd) by the defender and a third party should be attachable by interim attachment. Such a third party should not have a higher right than the defender to deal with the article eg by taking it out of the jurisdiction.

(2) The court however should have power to release the article from the interim attachment if the third party pays the market value of the debtor's interest.

(Para 4.55; Draft Bill, clause 11)

Court's jurisdiction over interim attachment etc

16.(1) It should be competent for the court to make ancillary orders with respect to the interim attachment, including orders as to the security or location of attached articles; orders allowing temporary removal from the jurisdiction; and warrants to dismantle.

(2) The courts should have the same powers with respect to arrestments on the dependence.

(Para 4.58; Draft Bill, clause 23(1))

Restriction and recall

17.(1) While the action is in dependence, the rules and procedures relating to the restriction and recall of arrestments and inhibitions on the dependence recommended in Part 5 below should apply to the recall and restriction of interim attachments. Where the interim attachment continues in effect after decree for payment, recall should be granted only on the more limited grounds on which an arrestment in execution may be recalled.

(2) Where a dispute arises, between the parties or with a third party, as to the validity of an interim attachment in whole or in part, the court should have power to resolve the dispute, at least provisionally, by a recall, restriction or other order.

(Para 4.61; Draft Bill, clause 53)

Duration and cessation of interim attachment

18.(1) An interim attachment should cease to have effect (generally or in relation to particular articles) on judicial recall of the interim attachment and also:

(a) when the action of payment is finally disposed of in the defender's favour and decree of absolvitor or dismissal has been granted;

(b) on the lapse of the period of 6 months after the disposal of the action in which decree for payment was granted;

(c) on the execution of a poinding of the articles subject to the interim attachment to enforce the same claim; or

(d) on the pursuer extra-judicially releasing goods from the interim attachment.

In special ckcumstances, the court should have power to extend the duration of the interim attachment if it is reasonable to do so.

(2) The Debtors (Scotland) Act 1987, section 95(1) (certain diligences terminated by payment or tender of full amount owing) should be amended so as to apply to interim attachments.

(3) Where the interim attachment of an article ceases to have effect because it has been superseded by a poinding as mentioned in para (l)(c) above, then in any competition of creditors relating to that poinded article, the poinding should rank as if it had been executed at the time when the interim attachment was executed.

(Para 4.66; Draft Bill, clauses 16 and 21(b)(i))

Expenses

19.(1) The rules recommended above as to liability for the expenses of applying for and opposing a warrant for arrestment on the dependence should apply in relation to interim attachment.

(2) Provision should be made on the lines of the Debtors (Scotland) Act 1987, section 93(1), to the effect that any expenses chargeable against the defender incurred in the service of a schedule of interim attachment of articles belonging to him should be recoverable from him either by a poinding and sale of those articles executed to secure the same claim or by a confirmation of the pursuer as executor-creditor of estate of the defender comprising those articles, but not by any other legal process. Any such expenses not so recovered by the time when the diligence in question is completed or otherwise ceases to have effect should cease to be chargeable against the defender. Where the pursuer is entitled to the expenses of executing interim attachment but fails to obtain decree in his action, special provision should enable him to obtain a warrant to charge and poind.

(3) Where however the interim attachment is recalled by a time to pay order or superseded by an insolvency process, the expenses should remain chargeable and recoverable in the same way as is provided, in relation to poinding expenses, by the Debtors (Scotland) Act 1987, sections 93(4) and (5).

(Para 4.69; Draft Bill, clause 18)

Ascription of sums recovered while interim attachment is in effect etc

20.(1) Any sums secured by an interim attachment and paid to account while it subsists should be ascribed first to the expenses (chargeable against the defender) of applying for and executing the interim attachment; thereafter to the interest accrued to the date of execution of the interim attachment; and finally to the principal sum and interest accrued after the date of execution.

(2) Where the interim attachment is followed by a diligence of poinding and sale enforcing the same claim, and sums are recovered by that diligence or paid to account of the sums recoverable by it while it subsists, then in applying the rules on ascription of payments in the Debtors (Scotland) Act 1987, section 94(2), any unpaid expenses of the interim attachment recoverable by the poinding and sale should be treated in the same way as the expenses of the poinding and sale are treated under section 94(2)(a)(i).

(Para 4.71; Draft Bill, clause 19)

Time to pay directions in decrees and time to pay orders

21. The power of the court to sist, recall or restrict arrestments under the Debtors (Scotland) Act 1987, Part I, should apply in relation to interim attachments.

(Para 4.73; Draft Bill, clause 15)

Interim attachment on dependence of foreign proceedings

22. The Civil Jurisdiction and Judgments Act 1982, section 27 (which empowers the Court of Session to grant warrants for arrestment and inhibition on the dependence of certain proceedings outside Scotland) should be amended so as to enable the Court to grant warrant for interim attachment on the dependence.

(Para 4.75; Draft Bill, clause 17)

Duties imposed by interim attachment on defender and third parties

23.(1) An interim attachment should have the effect of prohibiting the defender from:
(a) transferring ownership of an attached article to a third party whether for onerous causes or not; or
(b) creating a real right in security over an attached article in favour of a third party.

(2) Infringement by the defender, or by a third party (such as an agent or singular successor of the defender) who knows that the article in question is attached, of the foregoing prohibition should be treated as a breach of the interim attachment and be liable to be dealt with as a contempt of court.

(3) A party in breach of an interim attachment should be liable in damages to the pursuer for patrimonial loss resulting from the breach.

(Para 4.83; Draft Bill, clauses 10 and 13)

Prohibition of removal, damage or destruction of attached articles

24.(1) An interim attachment should have the effect of prohibiting:
(a) the defender, or a third party who knows that an article is attached, from removing it furth of Scotland without the consent in writing of the pursuer or the authority of the court; and
(b) such a third party from removing it from the defender's possession and control without the defender's consent.

(2) Where an attached article is removed (with or without the defender's consent) from the defender's possession or control by a third party with or without knowledge that it is attached, the court should have power to order the person in possession (who may be the third party or someone else) to restore it to the defender or to make it available to the pursuer within a specified period, and for that purpose to grant an ancillary search warrant. But such an order should not be made, or if made should be recalled, where the article has been acquired for value and without knowledge of the interim attachment.

(3) Any of the following acts, namely:
(a) the wilful damage, destruction or unauthorised removal from Scotland of an attached article by the defender, or by a third party who knows that the article is attached; and
(b) the wilful removal by such a third party of an attached article from the defender's possession and control,
should be treated as a breach of the interim attachment, and be liable to be dealt with as a contempt of court.

(4) The court should be empowered to order a party, who damages, destroys or removes an attached article in breach of the interim attachment, to consign a sum in court to make good the resulting deficiency in value.

(Para 4.88; Draft Bill, clauses 10, 12 and 23(2), (3), (4))

Duty to assist officer of court authorised to poind

25. Subject to any orders made by the court, the defender, and any third party concerned, should be obliged in due course not to conceal but to make attached articles available to an officer of court authorised to poind in security of a claim secured by the interim attachment.

(Para 4.90; Draft Bill, clause 10(d))

Competition with defender's singular successor

26. Where in breach of an interim attachment ownership of an attached article is transferred to a singular successor of the defender taking gratuitously or knowing that the article is attached, the transfer should be voidable at the instance of the pursuer. An interim attachment however should not affect the title of a purchaser who has acquired ownership of the attached article for value and without knowledge that the article is attached.

(Para 4.101; Draft Bill, clause 14)

Interim attachment to have same priority in ranking of creditors as poinding; clarification of ranking of poinding in sequestration

27.(1) In a competition with the claims of creditors of the defender, whether secured by voluntary securities or diligences or unsecured, an interim attachment should have the same priority or preference in ranking (if any) as if the attached article had been poinded by the pursuer on the date of the execution of the interim attachment. This is subject to the provisos that the interim attachment is followed up without undue delay, and that the pursuer obtains decree in the depending action.

(2) For avoidance of doubt, it should be made clear by statute that in a sequestration of the debtor's estate, the nexus imposed on a poinded article by the execution of a poinding gives the poinder a preference, in a competition with the general body of the debtor's creditors, over the proceeds of sale of the poinded article, but subject to the statutory 60 days rule mentioned in the next recommendation.

(Para 4.112; Draft Bill, clauses 21 and 55)

The 60 days rule in insolvency proceedings and interim attachment

28. Section 37(4) and (5) of the Bankruptcy (Scotland) Act 1985, as extended by the Insolvency Act 1986, section 185 (which relate to the effect of sequestration and liquidation in rendering ineffectual arrestments and poindings executed within 60 days prior to the date of sequestration or the commencement of the winding up of a company) should apply to interim attachments. Where an interim attachment of goods prior to the 60 days period is followed up by a poinding of those goods within that period, the creditor should nevertheless remain entitled to any preference derived from the interim attachment.

(Para 4.114; Draft Bill, clause 22)

Interim attachment and confirmation as executor-creditor by same creditor

29. Where the creditor follows up his interim attachment with a confirmation as executor-creditor, the confirmation should terminate the interim attachment and the ranking of the confirmation on the previously attached goods should depend on the date of interim attachment.

(Para 4.116; Draft Bill, clauses 16(2)(b) and 21(b)(ii))

RECALL AND RESTRICTION OF DILIGENCE ON DEPENDENCE (PART 5)

Grounds of recall and restriction and incidence of onus

30.(1) Where the warrant for diligence on the dependence has been granted in an application which has not been intimated to the defender, and the defender applies for recall or restriction, the onus should rest on the pursuer to satisfy the court that the warrant, or as the case may be the specific diligence, in question should continue in force.

(2) The court should continue to have a discretionary power to recall or restrict diligence on the dependence on the ground that the diligence is irregular, incompetent or ineffective.

(3) It should be made clear by statute that a purported warrant for arrestment on the dependence may be recalled on the ground of its invalidity.

(4) In an application for recall or restriction, the court should have regard to the same principles as are proposed in Recommendation 4 (para 3.45) for regulating the initial grant of warrant. These should replace the existing test that the diligence is "nimious (excessive) and oppressive".

(Para 5.10; Draft Bill, clause 53)

Jurisdiction and procedure

31 .The provisions on petition procedure in the Debtors (Scotland) Act 1838, section 21 should be repealed.

(Para 5.14; Draft Bill, Schedule)

Title to apply for recall or restriction

32. (1) It should be made clear by statute that any person having an interest to apply for recall or restriction of a diligence used on the dependence of a sheriff court ordinary cause, summary cause or small claim should have a title to apply to the sheriff in whose court the action depends.

(2) Any party having an interest should have a title to apply for the recall or restriction of an arrestment in execution or inhibition in execution on the ground that the warrant is invalid or that the diligence is irregular, incompetent or ineffective.

(Para 5.30; Draft Bill, clauses 53 and 54(1))

Special and general recall of diligences and recall of warrant

33. It should be provided by statute that the court has power to make:
(a) an order recalling or restricting a specific arrestment, inhibition or interim attachment used on the dependence or in security;
(b) an order recalling or restricting a warrant for any of those diligences;
(c) an ancillary order; and
(d) an order attaching conditions to a decision granting or refusing to grant any such order, including conditions as to caution or consignation.

(Para 5.38; Draft Bill, clause 53)

Admiralty arrestments

34.(1) Our recommendations on recall and restriction of arrestment on the dependence should apply to the recall and restriction of an admiralty arrestment on the dependence of a ship or cargo on board ship.

(2) The court should have power to restrict or recall, with or without conditions, the arrestment in rem (of a ship, cargo or other maritime res) securing a maritime lien on the ground that:
(a) the warrant is invalid;
(b) the diligence is otherwise irregular, incompetent or ineffective; or
(c) it is reasonable to make the order.

(3) The same rules should apply to the arrestment in rem of a ship under section 47(3)(b) of the Administration of Justice Act 1956 to secure the implementation of a non-pecuniary decree in place of the existing power to recall (under the proviso to the 1956 Act, section 47(5)) on caution or security being found for implementation of the decree.

(Para 5.43; Draft Bill, clauses 53 and 54(2))

Expenses of recall or restriction or extra-judicial discharge and registration.

35. The difficulties as to the expenses of applications for recall identified at paras 5.44 - 5.47 above should be resolved by the courts without the need for primary legislation.

(Para 5.48)

Abolition of letters of loosing arrestment

36. Letters of loosing arrestments (whether in security, on the dependence, in rem or in execution) should be Abolished and the Arrestments Act 1617 (clerk of court to receive caution when receiving bill for letters of loosing) should be repealed.

(Para 5.54; Draft Bill, clause 49(1) and (3) and Schedule)

Abolition of separate judicial remedy of loosing arrestments of non-maritime subjects

37. To simplify the law, loosing as a separate type of order or legal concept should be abolished in relation to arrestments of non-maritime subjects, without prejudice to the court's power to make orders of recall and restriction subject to conditions to achieve the same effect as loosing.

(Para 5.62; Draft Bill, clause 49(1) and (2))

Retention of judicial remedy of loosing arrestments of maritime subjects

38. The court should continue to possess power, in an application for recall, restriction or loosing, to loose an arrestment on the dependence or an arrestment in rem of a ship or its cargo, ie to make an order authorising the applicant or his nominee to move the ship, or the cargo, or both, from the place where the ship or cargo is situated for such purposes and subject to such conditions, or further order, if any, as the court thinks fit, including caution or consignation.

(Para 5.70; Draft Bill, clause 49(2)(a))

39. Rule 48(1) of the Summary Cause Rules (power of sheriff clerk to loose arrestment on dependence) should be amended by substituting "recalled" for "loosed".

(Para 5.74)

Jurisdiction in applications for restriction or recall

40. (1) The present rule should continue under which an application for restriction or recall of a diligence on the dependence is made to the court (Court of Session or sheriff court) which granted the warrant, while the action is still in dependence.

(2) The sheriff should have exclusive jurisdiction to restrict or recall diligence in execution.

(3) An application for restriction or recall of a diligence in execution should be competent in any sheriff court.

(Para 5.78; Draft Bill, clauses 53(8)(b) and 54(1))

DILIGENCE ON THE DEPENDENCE: MISCELLANEOUS (PART 6)

Proceedings in which diligence on the dependence competent

41.(1) Warrants for diligence on the dependence should continue to be available in actions for payment of a principal sum of money, including actions concluding for a random sum (such as damages or count, reckoning and payment) and should not be available in actions in which the only pecuniary conclusion or crave is for expenses or, in the case of inhibition on the dependence, where the only conclusion which can be secured is one for expenses.

(2) Where warrants for diligence on the dependence are available in counterclaims and claims in

third party notice procedure, the recommendations in this report should apply with any necessary modifications.

(3) Warrants for inhibition on the dependence should continue to be available in actions for specific implement of obligations adfactumpraestandum relating to heritable property, so far as competent under the present law.

(4) Warrants for diligence on the dependence should be available in Court of Session petitions containing a prayer for a decree for payment of a sum of money other than expenses.

(Para 6.13; Draft Bill, clauses 1, 3 and 45)

Service of arrestment and interim attachment before commencement of action

42. (1) Where an arrestment on the dependence is executed prior to the service of the summons or initial writ, the existing rule should be retained under which the arrestment falls unless the summons or writ is served within a prescribed period after the date of execution of the arrestment. The current period of 20 days should be changed to 21 days. The rule as so amended should apply also to interim attachment.

(2) Section 17 of the Debtors (Scotland) Act 1838 should be re-enacted with the modification that the reference to a requirement for the summons to call within a prescribed period is omitted.

(3) The requirement that a sheriff court arrestment on the dependence used prior to the service of the initial writ or summons must be reported to the sheriff clerk, should be abolished by act of sederunt.

(Para 6.20; Draft Bill, clauses 5, 9 and Schedule)

Registration of notice of inhibition before service of summons

43.(1) Where a warrant of inhibition on the dependence is granted by a judge under the new provisions recommended above, the pursuer should be entitled to register in the personal register a notice of inhibition prior to the date of service of the summons or initial writ. The inhibition would take effect from the date of registration of the notice of inhibition if the inhibition and the execution thereof are registered within 21 days after that date. The Titles to Land Consolidation (Scotland) Act 1868, s 155 (which regulates notices of inhibition) should be amended accordingly.

(2) The notice of inhibition procedure should apply to a warrant of inhibition on the dependence granted by the sheriff as well as to such a warrant granted by a Lord Ordinary.

(Para 6.24; Draft Bill, clause 58)

Procedure for preventing diligence on the dependence

44.(1) It should remain incompetent to register a caveat against diligence on the dependence.

(2) No change should be made in the existing law on interdict against diligence on the dependence.

(Para 6.28)

Ranking of diligence on the dependence in other processes

Arrestment on the dependence

45. Where a creditor arresting on the dependence claims a ranking in an action of multiplepoinding or furthcoming, the court entertaining the multiplepoinding or forthcoming should have power to make any of the following orders, namely:

(a) an order delaying distribution of the fund in media until the creditor's action for payment is finally disposed of;
(b) an order allowing distribution in disregard of the arrestment on the dependence, if the court is Satisfied that the creditor has unduly delayed in pursuing his action;
(c) an order as at (a) above coupled with an order recalling the arrestment on the dependence and taking effect on the expiry of a specified period unless the creditor obtains decree for payment within that period;
(d) an order requiring consignation of sufficient funds to meet the amount or likely amount of the creditor's claim and authorising an interim distribution to the other competing creditors; and
(e) an order authorising distribution of the fund in disregard of the creditor's arrestment on the dependence reserving the creditor's right of recovery from the other creditors and requiring the other creditors to find caution to secure that right.

(Para 6.40; Draft Bill, clause 20)

Inhibition on the dependence

46. Where an inhibitor on the dependence claims a ranking in a multiplepoinding or on the proceeds of sale of subjects under heritable security, the court seized of the multiplepoinding or ranking should have similar powers in relation to the inhibition on the dependence as are proposed in Recommendation 45 above in relation to arrestment on the dependence.

(Para 6.42; Draft Bill, clause 20)

The negative prescription of arrestment

47.(1) The Debtors (Scotland) Act 1838, section 22, should be replaced by a new statutory provision setting out clearly the law on the negative prescription of arrestments on the dependence and other arrestments, on the following lines.

(2) An arrestment on the dependence of an action should (if not insisted in) prescribe on the expiry of three years after the date when the decree for payment was extracted, unless the debt is future or contingent and the time for payment does not arrive till after that date, in which event paragraph (4) below should apply.

(3) An arrestment in execution of an extract decree for payment of a debt presently due, or other extract registered document relating to such a debt, should (if not insisted in) prescribe on the expiry of three years from the date of execution of the arrestment.

(4) An arrestment in security of a future debt or a contingent debt should (if not insisted in) prescribe on the expiry of three years after the date when the debt becomes payable.

(Para 6.54; Draft Bill, clause 48 and Schedule)

No adjudication on the dependence or in security

48.(1) Adjudications on the dependence should not be introduced in Scots law.

(2) The diligence of adjudication in security of future or contingent debts should be abolished.

(Para 6.58; Draft Bill, clause 51 and Schedule)

Diligence in security of future or contingent debts constituted by decree or liquid documents of debt

•"49.(1) The Court of Session on petition and the sheriff on summary application should have power to grant warrant for arrestment and inhibition in security of a future or contingent debt due under a decree or extract registered document of debt on the same grounds and subject to the same conditions as under our recommendations the courts would grant warrant for diligence on the dependence for debts already due and future or contingent debts.

(2) The foregoing procedure would replace procedure by application presented in the Signet Office of the General Department of the Court of Session.

(Para 6.64; Draft Bill, clause 50)

Appeals

50.(1) An appeal or reclaiming motion should be competent against an interlocutor granting or refusing:
(a) a warrant for diligence on the dependence or in security or for arrestment in rem of a ship securing a non-pecuniary claim; or
(b) the recall or restriction of:
(i) a diligence on the dependence or in security;
(ii) an arrestment in rem;
(iii) an arrestment or inhibition in execution; or
(iv) a warrant for such diligence.

(2) Such interlocutors should be included in the list in the Sheriff Courts (Scotland) Act 1907, section 27, of classes of interlocutor of the sheriff which are appealable without leave to the sheriff principal.

(3) No change should be made in the present law and practice under which the grant of warrant for an arrestment in rem to secure a maritime lien is not subject to review by way of appeal or reclaiming motion against the grant of warrant.

(4) Provision for reclaiming should be made by act of sederunt rather than primary legislation.

(5) Appeals to the Court of Session from the sheriff or sheriff principal should be governed by the general rule laid down by the Sheriff Courts (Scotland) Act 1907, section 28(d) (which allows such appeals with leave).

(6) The execution of a warrant for:
(a) diligence on the dependence; or
(b) an arrestment in rem of a ship securing a non-pecuniary claim,
should not be prohibited or rendered ineffectual by the making of an appeal or reclaiming motion against the grant of the warrant, or against any condition attached to the warrant. The Sheriff Courts (Scotland) Act 1907, section 29 (effect of appeal) should be amended accordingly.

(7) In consonance with the present law on recall of diligence, an interlocutor:
(a) recalling or restricting:
(i) a diligence on the dependence or in execution;
(ii) an arrestment in rem; or
(iii) a warrant for such diligence or any order which is incidental, consequential or ancillary to the warrant; or
(b) loosing an arrestment of a ship,

should not take effect until either the period for an appeal against the interlocutor has expired without an appeal being made or, if such an appeal has been made, until the matter has been finally determined in favour of recall, restriction or loosing or until the appeal has been abandoned. The foregoing references to an appeal include a reference to a reclaiming motion.

(8) (a) As a general rule interlocutors under the legislation following hereon, other than those mentioned in paras (1) and (2) above, should be subject to appeal or reclaiming only with leave.

(b) We do not however recommend any change to the rule under which a Court of Session interlocutor granting authority to move an arrested vessel or cargo may be reclaimed against without leave.

(c) The Court of Session should be empowered, by act of sederunt, to make further categories of interlocutors of the sheriff under the legislation following hereon appealable without leave, in addition to the interlocutors specified in the Sheriff Courts (Scotland) Act 1907, section 27.

(Para 6.78; Draft Bill, clause 57)

ADMIRALTY ARRESTMENTS AND ACTIONS (PART 7)

Terminology: maritime hypothecs or liens

51. In the legislation following on this report, the word "lien", when used as a synonym for a maritime hypothec in the sense of Scots law, should be qualified by the adjective "maritime", and the resulting term "maritime lien" should be expressly defined as a hypothec over a ship, cargo or other maritime res.

(Para 7.8; Draft Bill, clauses 28(2), 33(2) and 59)

Definition of admiralty actions

52.(1) Admiralty actions in Scots law should continue to be defined by reference to the list of claims specified in the Administration of Justice Act 1956, section 47(2) (which restricts the competence of admiralty arrestments to arrestments securing claims specified in that list), with the addition of "respondentia".

(2) The same definition should apply directly to the admiralty jurisdiction of the sheriff court.

(3) The definition should be enacted in primary legislation rather than rules of court.

(Para 7.44; Draft Bill, clause 26)

Competence of arrestment on dependence of claim for "damage received by a ship"

53. An arrestment on the dependence of an action should continue to be competent in respect of "damage received by a ship", as where the arrested ship is not that concerned in the action but a different ship wholly owned by the defender in the action.

(Para 7.49; Draft Bill, clauses 26(l)(a) and 27)

Sheriff court procedure in admiralty actions

54. Separate rules of court (modelled on the Court of Session Rules) governing procedure in admiralty actions in the sheriff court should be introduced.

(Para 7.51; Draft Bill, clause 44)

Sheriff court arrestments in rent and actions in rem

55.(1) It should be provided by statute that a warrant to arrest in rem a ship or other maritime res granted by a sheriff-court should be capable of execution (a) within the territorial jurisdiction of that sheriff court; or (b) anywhere in Scotland without a warrant of concurrence if the ship or res were within the territorial jurisdiction when the warrant was granted.

(2) It should not be competent to circumvent the foregoing rule by obtaining a warrant of concurrence from the sheriff clerk of a different sheriff court, and accordingly warrants of concurrence relating to arrestments in rem should be incompetent.

(3) Section 4 of the Sheriff Courts (Scotland) Act 1907, (which inter alia confers on the sheriff admiralty jurisdiction in maritime causes and proceedings, provided that the defender is amenable to the sheriff's jurisdiction) should be amended to make it clear that the sheriff's jurisdiction in an admiralty action in rem directed against a ship or cargo is founded on an arrestment in rem of the ship or cargo notwithstanding that the owners or persons interested in the ship or cargo are not, or not otherwise, amenable to the sheriff's jurisdiction.

(Para 7.56; Draft Bill, clauses 42 and 43)

Warrant to arrest in rem enforcing maritime lien: legal right rather than discretionary remedy

56. A warrant for arrestment in rem of a ship and other maritime property in an admiralty action in rem enforcing a maritime lien should continue to be available to the pursuer as of right.

(Para 7.75; Draft Bill, clause 28(1))

Enforcement of maritime lien by arrestment against freight

57. It should continue not to be competent for the pursuer in an action in rem enforcing a lien encumbering freight to arrest in rem the freight in the hands of the person liable to pay the freight.

(Para 7.85)

Arrestment in rem under Administration of Justice Act 1956, section 47(3)(b), securing non-pecuniary claim

58. In proceedings having a non-pecuniary conclusion for enforcement of a claim mentioned in paragraphs (p) to (s) of section 47(2) of the Administration of Justice Act 1956, the court's power to grant warrant for an arrestment in rem under section 47(3)(b) of that Act should be discretionary and exercisable only by a Lord Ordinary or sheriff.

(Para 7.92; Draft Bill, clause 29(1))

Arrestment of ship on dependence as discretionary interim remedy

59. Recommendations 1 (diligence on the dependence to be extraordinary remedy available only in special circumstances) and 2 (introducing judicial discretionary grant of warrant for diligence on the dependence) should apply to a warrant for arrestment of a ship on the dependence of an admiralty action in personam. Recommendations 3-8 should apply accordingly.

(Para 7.98; Draft Bill, clause 27(1) and (3))

Definition in section 47(2) of claims for which arrestment on dependence competent

60.(1) In the legislation following this report, in re-enacting the Administration of Justice Act 1956, section 47(1)(a) (which makes it competent to arrest in certain circumstances a ship on the

dependence if it is the ship with which the depending action is concerned) it should be made clear that the arrestment is competent only if the defender is the owner of the ship, or a share in the ship, at the time of the execution of the arrestment.

(2) In our recommended legislation replacing the 1956 Act, section 47(3)(a), (which provides for the arrestment of a ship on the dependence of an action to enforce a claim specified in paragraphs (p) to (s) of section 47(2) of that Act), it should be made clear that the arrestment may be of a share in a ship or of the ship.

(Para 7.106; Draft Bill, clause 27(1) and (2))

Right to re-arrest same ship, or to arrest a second sister ship, on dependence

61. It should be made clear by statute that where a ship has been arrested on the dependence of an action to secure a claim mentioned in the Administration of Justice Act 1956, section 47(2)(a) to (o), then:

(a) that ship may not be arrested on the dependence again; and

(b) while the first-mentioned arrestment is in effect, no other ship owned by the defender may be arrested on the dependence,

to secure the same claim unless, in an application by the pursuer for a new warrant of arrestment on the dependence to secure that claim, the court is satisfied not only that the criteria for the grant of warrant are met but also that there is special cause to grant the warrant, with or without conditions.

(Para 7.110; Draft Bill, clause 31)

Protection of owners of arrested ships: pursuer's liability and counter-security

62. (1) Recommendation 6 (liability for wrongful or unjustified diligence) and 7 (caution or consignation by pursuer) should apply to wrongful or unjustified admiralty arrestments on the dependence and arrestments in rem under the Administration of Justice Act 1956, section 47(3)(b) securing non-pecuniary claims.

(2) Where in an admiralty action the pursuer unreasonably and without good cause uses an admiralty arrestment in rem to enforce a maritime lien, or purported maritime lien, against a ship or other maritime property he should be liable in damages for loss caused as a direct result to another party to the action or to a person having an interest in the ship or property.

(3) The court in an admiralty action should be empowered; as a condition of granting warrant for an admiralty arrestment in rem or on the dependence, or of refusing to recall or to restrict such a warrant or arrestment, to require the pursuer to provide security for any loss which may be incurred by another party to the action, or by a person having an interest in the ship or property, as a direct result of the arrestment having been wrongful or unjustified.

(4) The court should have power to vary or recall any order mentioned in para (3) above, with or without conditions.

(Para 7.124; Draft Bill, clauses 32 and 33)

Other aspects of admiralty arrestments

63.(1) The rules relating to the expenses of an arrestment on the dependence should apply in relation to the arrestment on the dependence of a ship.

(2) The expenses of an arrestment in rem to enforce a maritime lien and the expenses of sale should continue to be recoverable as part of the expenses of the action in rem.

(3) The expenses of an arrestment in rem under section 47(3)(b) of the Administration of Justice Act 1956 should be discretionary.

(Para 7.135; Draft Bill, clause 34)

Arrestment of cargo on board ship

64.(1) No change should be made in the common law rule under which cargo on board a ship may be arrested but cannot be competently poinded.

(2) Recommendations 1 (diligence on the dependence to be extraordinary remedy available only in special circumstances) and 2 (introducing judicial discretionary grant of warrant for diligence on the dependence) should apply to a warrant for arrestment of cargo on the dependence of an action in personam. Recommendations 3-8 should apply accordingly.

(Para 7.139; Draft Bill, clause 30)

Administration of Justice Act 1956, section 47, inapplicable to arrestments on dependence of cargo on board ship

65. In re-enacting the provisions of section 47 of the Administration of Justice Act 1956, it should be made clear that the restrictions which those provisions impose on property on the dependence of an action do not apply to an arrestment on the dependence of cargo on board a ship.

(Para 7.142; Draft Bill, clauses 27 and 30)

Arrestment of cargo in defender's possession on board ship

66. It should be made clear by statute that it is competent to arrest cargo on board a ship where the cargo is in the possession of the defender or his servants or employees.

(Para 7.148; Draft Bill, clause 40(l)(a))

Arrestment of cargo at sea and edictal service

67. It should continue to be incompetent to arrest cargo on board a vessel on passage.

(Para 7.152; Draft Bill, clause 41)

Effect of arrestment of cargo in relation to the ship's movement and arrestee's dealings with cargo

68. An arrestment of cargo on board a ship, in dry dock or at a recognised anchorage, should have, until the arrested cargo is unloaded, the same effect in immobilising the ship as the arrestment of the ship herself would have, subject to the powers of the court to grant ancillary warrants and orders as to the dismantling and movement of the ship, and as to the unloading of the cargo.

(Para 7.160; Draft Bill, clause 40(2))

Admiralty jurisdiction and its territorial limits

69.(1) The legal definition of the territorial limits on the landward side of admiralty jurisdiction for the purpose of determining the place where a cause of action must arise if the action is to be treated as an admiralty action, is uncertain in Scotland and (it is thought) England and Wales. Legislative reform should however properly be advanced by an advisory body with United Kingdom terms of reference.

(2) Subject to paragraphs (3) and (4) below, it should be provided by statute that an arrestment of a ship or her cargo, whether:

(a) in rem; or
(b) on the dependence of an admiralty or ordinary action in personam; or
(c) in execution of decree in an action in personam (whether an admiralty action or an ordinary action for payment),

may be competently executed wherever the ship or cargo is situated within Scotland, whether in tidal or non-tidal waters or on land below or above the flood-mark.

(3) However, an arrestment of a ship's cargo in the owner's possession:
(a) on the dependence of an admiralty or ordinary action in personam; or
(b) in execution of decree in an action in personam (whether an admiralty action or an ordinary action for payment),

should only be competent while the cargo is on board the ship, (without prejudice to an arrestment of landed or transhipped cargo in a third party's hands under RCS, r 13.6).

(4) Nothing in the foregoing recommendations should affect the rule that the arrestment of a ship, or of cargo on board a ship, which is afloat may be executed while the ship is at anchorage and not while she is on passage.

(Para 7.181; Draft Bill, clauses 39, 40(l)(b) and 41)

The definition of "ships" attachable by admiralty arrestments

70. In the context of admiralty actions and arrestments under Scots law, the concept of a "ship" should be defined as meaning any description of vessel used in navigation and not propelled by oars. The concept of "sea-going ship" should not be introduced.

(Para 7.190; Draft Bill, clause 59)

Admiralty jurisdiction and aircraft

71.(1) Provision should be made by statute, making it clear that:
(a) the law of towage and pilotage applies to aircraft while waterborne as it applies to vessels; and
(b) claims in respect of the towage and pilotage of waterborne aircraft are enforceable by way of admiralty action in personam, and by arrestment in the hands of the defender or debtor.

(2) Except in cases of admiralty actions involving salvage, towage and pilotage of aircraft, admiralty procedures and arrestments should not apply to aircraft.

(Para 7.205; Draft Bill, clause 46)

Warrants to dismantle poinded aircraft

72. It should be competent for a creditor who proposes to poind an aircraft, to apply, before executing the poinding, for an order for dismantling the aircraft exercisable at or after the execution of the poinding, without prejudice to the creditor's right to apply after the execution of the poinding for such an order under the Debtors (Scotland) Act 1987, section 21(l)(a).

(Para 7.207; Draft Bill, clause 47)

ARRESTMENTS OF SHIPS ON DEPENDENCE OF ACTIONS AGAINST DEMISE CHARTERERS (PART 8)

Arrestment on the dependence of the particular ship in action against demise charterer

73.(1) In our recommended re-enactment of the Administration of Justice Act 1956, section 47(l)(a) (which permits an arrestment, on the dependence of an action in personam enforcing a claim mentioned in section 47(2), of the ship with which the action is concerned) should be amended so as to permit an arrestment on the dependence of such an action where, at the time of the execution of the arrestment, the defender is the demise charterer of the ship.

(2) Recommendations 1 (diligence on the dependence to be extraordinary remedy available only in special circumstances) and 2 (proposing the judicial discretionary grant of warrant for diligence on the dependence) should apply to a warrant for arrestment of a third party's ship on the dependence of an admiralty action in personam against a demise charterer. Recommendations 3 - 8 should apply with any necessary modifications.

(Para 8.57; Draft Bill, clause 27(l)(a))

Judicial sale in execution of decree against demise charterer after arrestment on dependence

74.(1) Where a ship belonging to a third party is arrested on the dependence by a creditor of the demise charterer, the arrestment should be converted by decree for payment into an arrestment in execution and accordingly it should be competent to complete the diligence by a judicial sale of the ship.

(2) It should be made clear by statute that the creditor is entitled to sell the interests of the owners of all the shares in the ship.

(3) Rules of court should require that the owner of the demise chartered ship be given an opportunity to redeem the ship by paying the sum due to the creditor.

(4) In other respects the ordinary procedure for sale of a ship under the Rules of the Court of Session, rule 46.5 should apply. But express provision should be made by primary legislation, in terms similar to rule 46.5, disencumbering the ship on sale and requiring the court to rank the owner and any other claimants on the free proceeds of sale.

(Para 8.63; Draft Bill, clause 36)

Arrestment of third party's ship to found jurisdiction in action against demise charterer

75. In an admiralty action in personam against the demise charterer of a ship, it should be competent for the pursuer to arrest the ship to found jurisdiction.

(Para 8.70; Draft Bill, clause 35)

Competition between arresting creditors of owner and of demise charterer

76.(1) In any process of ranking on a fund derived from the judicial sale of a ship which is or was chartered by demise, any arrestment of the ship (or a share in the ship) by a creditor of the owner of the ship (or the share) should have priority over any arrestment on the dependence of the ship by a creditor of the demise charterer.

(2) Otherwise, competitions in ranking between arrestments of a ship by the demise charterer's creditors and other rights over the ship should be left to the common law.

(Para 8.94; Draft Bill, clause 37)

Ranking of arrestments in sequestration etc

77.(1) In the sequestration or liquidation of the owner of a ship, a creditor of the demise charterer who has arrested the ship on the dependence should be entitled to claim a dividend or preference (if any) in the liquidation or sequestration from the proceeds of sale of the ship but from no other asset of the owner.

(2) In the liquidation of the owner of the ship or the sequestration of his estate, the rules for the rendering ineffectual of prior arrestments and poindings under the provisions of the Bankruptcy (Scotland) Act 1985, section 37(4) and (5) and the Insolvency Act 1986, section 185, should apply to an arrestment of the ship by a creditor of the demise charterer as they apply to an arrestment by a creditor of the owner of the ship.

(Para 8.99; Draft Bill, clause 38)

MISCELLANEOUS ASPECTS OF DILIGENCE (PART 9)

Equalisation of arrestments and poindings

78. (1) The statutory rules on equalisation of arrestments and poindings outside formal insolvency proceedings - which are set out in the Bankruptcy (Scotland) Act 1985, Sch 7, para 24 - should be repealed.

(2) As consequential amendments, the references to arrestments and poindings should be repealed in:

(a) the Bankruptcy (Scotland) Act section 37(1) (which among other things makes sequestrations and liquidations constructive arrestments and poindings for the purpose of the rules on equalisation of diligences); and

(b) the Debtors (Scotland) Act 1987, section 13(2) (saving rights to equalisation from the effect of certain orders under Part I of that Act).

(Para 9.53; Draft Bill, clause 56 and Schedule)

Insolvency Act 1986, section 60(1): rules of ranking in receivership

79. In the ranking of claims in a receivership under the Insolvency Act 1986, section 60(1) (distribution by receiver of moneys), diligences as a class should not be automatically postponed to voluntary securities as a class in violation of the general law which should govern their ranking.

(Para 9.69)

Action or decree in Scotland against innocent third party subject to foreign attachment

80.(1) Where there is a real and substantial risk that diligence in Scotland and comparable measures in a country outside Scotland may be executed against the same person for the same debt so that he is at risk of being unjustifiably compelled to pay the debt twice over, then the Scottish court should have a discretionary power, on the application of that person:

(a) to supersede extract of decree in an action for payment of the debt against him; or, as the case may be,

(b) to suspend, interdict, recall, restrict or sist the Scottish diligence,

in order to protect him from that risk.

(2) In a sequestration or liquidation, the sheriff should have power to uphold an appeal against a claim by a creditor in order to protect the debtor from the risk of double exaction.

(Para 9.91; Draft Bill, clause 52)

Application to the Crown

81. Subject to the protection for the Crown contained in the Crown Proceedings Act 1947 and Administration of Justice Act 1956, section 47(7), the legislation following hereon should apply to the Crown in its capacity as pursuer, creditor, petitioner, counterclaimer, claimant in third party notice procedure, arrestee and singular successor of the defender or debtor.

(Para 9.94; Draft Bill, clause 60)

Limits on amounts arrestable

82. Legislation imposing upper limits on the amounts of money attachable by arrestment should not be introduced.

(Para 9.108)

Appendix A

Diligence (Scotland) Bill

ARRANGEMENT OF CLAUSES

PART I

DILIGENCE ON DEPENDENCE

Reform of law relating to diligence on dependence

Clause

1. Application for warrant for arrestment or inhibition on dependence.
2. Sheriff's warrant to inhibit on dependence.
3. Inhibition on dependence of action for specific implement.
4. Consignation or finding of caution by pursuer as respects arrestment or inhibition on dependence.
5. Execution of arrestment before service of summons.
6. Pursuer's liability for loss resulting from arrestment or inhibition on dependence.
7. Expenses as respects warrant for arrestment or inhibition on dependence.

Introduction of new form of diligence on dependence: interim attachment

8. Interim attachment of corporeal moveables.
9. Execution of interim attachment before service of summons or initial writ.
10. Conduct forbidden by interim attachment.
11. Interim attachment of common property.
12. Consignation by person who is in breach of interim attachment.
13. Liability for loss resulting from breach of interim attachment.
14. Voidability of certain transfers of ownership of property subject to interim attachment.
15. Powers of court in relation to effect of time to pay direction or time to pay order on interim attachment.
16. Cessation of interim attachment.
17. Interim attachment in relation to certain proceedings commenced outwith Scotland, etc.
18. Expenses as respects interim attachment.
19. Ascription.

Ranking

20. Extension of court's powers in certain actions of multiplepoinding and furthcoming etc.
21. Priority derived from interim attachment.
22. Effect of sequestration on interim attachment.

Ancillary orders

23. Ancillary orders as respects property subject to arrestment on dependence or interim attachment.

Abolition of certain procedures

24. Warrant for arrestment or inhibition on dependence no longer obtainable as of right.

Application of Part I

25. Application of Part I restricted.

PART II

ADMIRALTY ACTIONS AND ARRESTMENTS

The expression "admiralty action"

26. Definition of "admiralty action".

Arrestment of ships and cargoes

27. Arrestment of ship or share in ship on dependence of admiralty action in personam against owner or demise charterer.
28. Arrestment of ship etc. in rem to enforce a maritime lien.
29. Arrestment of ship in rem to secure non-pecuniary claim.
30. Arrestment of cargo on dependence.

Further and multiple arrestments

31. Restriction on further or multiple arrestments of ships on dependence.

Protection against wrongful or unjustified arrestments

32. Consignation or finding of caution by pursuer.
33. Liability for wrongful or unjustified arrestment of ship or cargo.

Expenses

34. Expenses as respects warrant for arrestment of ship in rem to secure non-pecuniary claim or of ship or cargo on dependence.

Special provision as respects demise charterers

35. Arrestment of ship to found jurisdiction in action against demise charterer.
36. Sale of ship in execution of certain interlocutors against demise charterer.
37. Ranking of creditors on sale of ship (or share in ship) held on demise charter.
38. Ranking of demise charterer's arresting creditor in owner's sequestration etc.

Execution of arrestment of ship or cargo: positional factors etc.

39. Position of ship as factor in its arrestment.
40. Factors in arrestment of cargo.
41. No arrestment while ship on passage.

Admiralty actions in sheriff court

42. Jurisdiction of sheriff as respects admiralty action in rem.
43. Warrant for arrestment in rem in admiralty action in rem in sheriff court.
44. Regulation of procedure and practice in admiralty actions in sheriff court.

PART I

MISCELLANEOUS AND GENERAL

Application to counterclaims etc.

45. Counterclaims, claims in third party notice procedure and applications by petition.

Aircraft

46. Towage and pilotage of waterborne aircraft.
47. Warrant to dismantle aircraft.

Prescription and loosing of arrestments

48. Prescription of arrestments.
49. Loosing of arrestrnent no longer competent as respects certain subjects.

Diligence in security

50. Application for warrant for diligence in security of future or contingent debt.
51. Abolition of adjudication in security.

Prevention of double exaction

52. Prevention of double exaction.

Recall etc. of diligence

53. Application for recall etc. of diligence on dependence or in security.
54. Special applications of section 53.

Poinding

55. Poinding: creation of preference in sequestration or liquidation.

Equalisation of certain arrestments and poindings : repeal

56. Repeal of provisions of Bankruptcy (Scotland) Act 1985 as to equalisation of certain arrestments and poindings.

Appeals

57. Amendment of provisions as to appeals in Sheriff Courts (Scotland) Act 1907 etc.

Consequential amendments

58. Consequential amendments of Titles to Land Consolidation (Scotland) Act 1868.

General

59. Interpretation.
60. Application to Crown.
61. Repeals.
62. Short title, commencement and extent.

SCHEDULE:—
Repeals.

DRAFT

OF A

BILL

TO

Make further provision as regards Scotland about arrestments and inhibitions, poinding, admiralty arrestments and jurisdiction in admiralty actions; to make new provision for the interim attachment of corporeal moveable property on the dependence of an action in Scotland; to apply to aircraft waterborne there the law relating to the towage and pilotage of ships; to make new provision" for the dismantling of aircraft poinded there; to abolish there loosing of arrestments as respects certain subjects and adjudication in security; and for connected purposes. A.D. 1997.

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:

PART!

DILIGENCE ON DEPENDENCE

Reform of law relating to diligence on dependence

Application for warrant for arrestment or inhibition on dependence.

1.—(1) Whether before or after the summons or initial writ in an action in which there is a conclusion or crave for the payment of a sum of money (other than the expenses of the action) has been served on the defender, the court may on the application of the pursuer grant warrant for arrestment on the dependence of the action or for inhibition on its dependence if satisfied-

(a) that the defender-

(i) is insolvent or verging on insolvency; or

(ii) is likely, by removal, disposal, burdening or concealment of all or some of his assets, or by otherwise dealing with them, to defeat or prejudice enforcement of decree; and

(b) that it is reasonable in all the circumstances to grant the warrant.

(2) Without prejudice to the generality of paragraph (b) of subsection (1) above, the court may, in determining for the purposes of that subsection what is reasonable in all the circumstances, have regard in particular to the pursuer's apparent prospects of succeeding on the merits in the action.

(3) The application shall be intimated to the defender by the pursuer unless the court, having heard the pursuer, is satisfied that there are special circumstances which make it appropriate to dispense with such intimation; and the court may require intimation to be made by the pursuer to such other person as it thinks fit.

(4) In any case-

(a) where the application is duly intimated but is not opposed, the court may determine it without a hearing;

(b) where, by virtue of subsection (3) above, intimation of the application is not made to the defender and the court has not, under that subsection, required that it be made to any other person, the court shall, before determining the application, hear the pursuer as to the matters on which, if it is to grant the application, it requires to be satisfied in terms of subsection (1) above;

(c) other than one mentioned in paragraph (a) or (b) above, the court shall-, before determining the application, hear as to those matters the pursuer and whoever is opposing the application.

(5) The court may provide-

(a) in granting warrant under subsection (1) above, that the diligence shall be subject to such restrictions or conditions as the court may specify;

(b) in refusing, after a hearing under paragraph (c) of subsection (4) above, an application under subsection (1) above, that refusal is subject to compliance by the defender, or by whoever else may be opposing the application, with such conditions as the court may specify; or

(c) in imposing under paragraph (a) above, after a hearing under paragraph (c) of subsection (4) above, restrictions or conditions, that the imposition is subject to compliance by the defender with such conditions as the court may specify.

(6) Without prejudice to the generality of paragraph (a) of subsection (5) above, by provision under that paragraph the diligence in question may be limited to (or from that diligence there may be excepted)-

(a) particular property; or

(b) funds not exceeding such value as the court may specify.

(7) Without prejudice to the generality of paragraphs (b) and (c) of subsection (5) above, by provision under either of those paragraphs the defender may be required-

(a) to consign into court such sum; or

(b) to find such caution, or to give such other security,

as the court thinks fit; provided that, where or in so far as the conclusion or crave mentioned in subsection (1) above is for the payment of a sum of money which is quantifiable, the sum required to be consigned or in respect of which caution is to be found or security given shall not exceed the payment concluded for or craved as is mentioned in subsection (1) together with such amount as, for the time being, the court considers it reasonable to allow for expenses which might be payable to the pursuer.

(8) On the application of any person claiming an interest, the court may, conditionally or unconditionally, vary or recall a restriction, condition or requirement which it has, under subsection (5) above, imposed.

Sheriff's warrant to inhibit on dependence.

2. It shall be competent to apply to the sheriff for warrant for inhibition on the dependence of an action in the sheriff court; and it shall cease to be competent to apply for letters of inhibition on the dependence of any such action.

Inhibition on dependence of action for specific implement.

3.—(1) Whether before or after the summons or initial writ in an action in which there is a conclusion or crave for specific implement of an obligation to convey heritable property to the pursuer or to grant in his favour a real right in security, or some other right, over such property, has been served on the defender, the court may, on the application of the pursuer, grant as respects that property, or some part of that property, warrant for inhibition on the dependence of the action if satisfied as is mentioned in paragraphs (a) and (b) of section 1(1) of this Act.

(2) Subsections (2) to (5), (6)(a), (7) with the exception of its proviso and (8) of section 1 of this Act shall apply as respects an application under subsection (1) above as they apply as respects an application under subsection (1) of that section.

Consignation or finding of caution by pursuer as respects arrestment or inhibition on dependence.

4.—(1) The court may, as a condition of its granting warrant for arrestment on the dependence of an action or for inhibition on its dependence, require the pursuer-

(a) to consign into court such sum; or

(b) to find such caution or give such other security,

as it thinks fit, in respect of liability which might arise by virtue of section 6 of this Act.

(2) On the application of any person claiming an interest, the court may, conditionally or unconditionally, vary or recall a requirement which it has, under subsection (1) above, imposed.

Execution of arrestment before service of summons.

5. Where an arrestment on the dependence of an action in the Court of Session is executed before the summons is served on the defender, the arrestment shall cease to have effect on the expiry of 21 days after the date of execution if the summons has not by then been so served.

Pursuer's liability for loss resulting from arrestment or inhibition on dependence.

6. Where as a direct and proximate result of the execution of an arrestment or inhibition in pursuance of a warrant granted under section 1(1) or 3(1) of this Act the defender or some other person having an interest in the property arrested, or as the case may be in the property affected by the inhibition, suffers patrimonial loss, the pursuer shall be liable to him for that loss if either-

(a) the warrant was obtained, or the arrestment or inhibition executed, wrongfully; or

(b) when the pursuer applied for the warrant he was being unreasonable in doing so.

Expenses as respects warrant for arrestment or inhibition on dependence.

7. — (1) A pursuer shall be entitled to such expenses, as taxed, as he has incurred in obtaining, and as the case may be in executing, warrant for an arrestment on the dependence of an action, or in obtaining warrant for inhibition on its dependence, unless (or except in so far as) the court modifies or refuses them on the ground that-

(a) when the pursuer applied for the warrant he was being unreasonable in doing so; or

(b) it considers such modification or refusal to be reasonable having regard to all the other circumstances, including the outcome of the action.

(2) Where warrant for arrestment on the dependence of an action, or for inhibition on its dependence, has been granted but the court considers that when the pursuer applied for the warrant he was being unreasonable in doing so, the defender shall be entitled to such expenses, as taxed, as he may have incurred in opposing the application unless (or except in so far as) the court modifies or refuses them on the ground mentioned in paragraph (b) of subsection (1) above.

(3) Subject to subsections (1) and (2) above, the court may make such finding as it thinks fit as respects entitlement to such expenses as may have been incurred-

(a) in obtaining, and as the case may be in executing, warrant for arrestment on the dependence of an action or in obtaining warrant for inhibition on its dependence; or

(b) in opposing an application for such warrant.

(4) Expenses incurred as is mentioned in subsections (1) to (3) above in obtaining, or in opposing an application for, a warrant shall be treated as expenses of process.

(5) Subsections (1) to (4) above are without prejudice to any provision made by any enactment, or rule of law, as to the recovery of such expenses chargeable against the defender as are incurred in executing an arrestment on the dependence of an action.

Introduction of new form of diligence on dependence: interim attachment

Interim attachment of corporeal moveables.

8. — (1) Subject to subsection (5) below, whether before or after the summons or initial writ in an action in which there is a conclusion or crave for the payment of a sum of money (other than the expenses of the action) has been served on the defender, the court may on the application of the pursuer grant warrant for attachment, on the dependence of the action, of poindable corporeal moveable property-

(a) owned by the defender (irrespective of whether the property is in his possession); and

(b) specified in the warrant or in a document specified in the warrant,

if the court is satisfied as to the matters mentioned in paragraphs (a) and (b) of section 1(1) of this Act.

(2) Any such attachment shall be executed by service of a schedule of interim attachment on the defender by an officer of court; and that officer shall sign a certificate of execution accordingly.

(3) An attachment for which warrant is granted under subsection (1) above shall be known as an "interim attachment".

(4) Sections 1(2) to (8), 4 and 6 of this Act shall apply as respects an application under subsection (1) above and warrant for (or execution in pursuance of warrant for) interim attachment, as they apply as respects an application under subsection (1) of section 1 and warrant for (or execution in pursuance of warrant for) arrestment or inhibition.

(5) Poindable corporeal moveable property is exempt from interim attachment if it comes within any of the following categories-

(a) subject to subsection (6) below, property which, at the time the warrant is granted, is in any dwellinghouse or within the curtilage of any dwellinghouse;

(b) property which is perishable or is otherwise likely to deteriorate rapidly and substantially in condition or value;

(c) where the defender is engaged in trade, property which he has acquired-

(i) to be sold by him (whether or not after adaptation); or

(ii) as a material for a process of manufacturing for sale by him, in the ordinary course of that trade,

and in determining for the purposes of subsection (1) above whether any other property is exempt from poinding, the monetary limits in paragraphs (b) and (d) of subsection (1) of section 16 of the Debtors (Scotland) Act 1987 shall be disregarded.

1987 c.18.

(6) In paragraph (a) of subsection (5) above, "property" does not include-

(a) a caravan, houseboat or other form of mobile home; or

(b) a motor vehicle.

Execution of interim attachment before service of summons or initial writ.

9. Where an interim attachment is executed before the summons or initial writ is served on the defender, the attachment shall cease to have effect on the expiry of 21 days after the date of execution if the summons, or as the case may be the initial writ, has not by then been so served.

Conduct forbidden by interim attachment.

10. An interim attachment requires the defender, or any third party, subject to any order under section 23 of this Act-

(a) not to-

(i) damage or destroy;

(ii) transfer his ownership of;

(iii) remove from Scotland; or

(iv) create a real right in security over, or otherwise encumber,

any article in relation to which the attachment has effect;

(b) in the case of any such third party, not to remove any such article from the possession or control of the defender without his consent;

(c) as respects any such article, not to do any other thing prejudicial to the effectiveness of the attachment; and

(d) not to conceal any such article from, or decline to or neglect to make it available to, an officer of court authorised to execute a poinding in a case where the warrant to poind was granted by virtue of the conclusion or crave in relation to which the warrant for attachment was granted,

and the breach of any of those requirements, wilfully and without lawful authority, by a person who knows that the attachment has been executed shall constitute a breach of the attachment and may be dealt with as a contempt of court.

Interim attachment of common property.

11.—(1) In section 8(1) of this Act, the reference to property owned by the defender includes a reference to property owned in common by him and a third party.

(2) Where, on an application made by a third party, the court is satisfied that an article subject to interim attachment is owned in common by the defender and him, it may, if the third party undertakes to consign into court a sum equal to the value of the defender's interest in the article, order that the article be released from interim attachment when the sum is consigned.

(3) When the action is disposed of, the sum consigned (with any interest which has accrued on that sum) shall-

(a) in a case in which there is a final interlocutor for payment to the pursuer of a sum of money, whether as a principal sum or as expenses, be paid to him in satisfaction, or partial satisfaction, of that interlocutor (any surplus amount being paid to the defender); or

(b) in any other case, be returned forthwith to the third party.

(4) If payment of, or out of, the sum consigned falls to be made under paragraph (a) of subsection (3) above, the court shall make an order providing that the defender's share of ownership of the article released from interim attachment shall vest in the third party, on such date as shall be specified in the order, unless the defender in the meantime pays him a sum equivalent to the amount payable under that paragraph.

(5) For the purposes of subsection (3) above-

(a) a final interlocutor is obtained when an interlocutor-

(i) cannot be recalled or altered; and

(ii) is not subject to review; and

(b) an action is disposed of-

(i) in the case mentioned in paragraph (a) of that subsection, on the date on which a final interlocutor for payment to the pursuer of a sum of money as a principal sum is obtained unless, on a later date, the pursuer obtains a final interlocutor for expenses in the action, in which case it is disposed of on that later date; and

(ii) in any other case, on the date on which a final interlocutor disposing of the merits in the action is obtained.

Consignation by person who is in breach of interim attachment.

12.—(1) Where a person is in breach of an interim attachment, the court may order him to consign into court such sum as it considers requisite; and it shall, in determining that sum, have regard to the price which the article in question would have been likely to fetch, if sold on the open market on the day on which the order is made, had he not acted as he did.

(2) So much of any sum consigned into court under subsection (1) above as remains after any decree for payment in the action is satisfied shall (with any interest which has accrued on the sum consigned) be returned to the consignor.

Liability for loss resulting from breach of interim attachment.

13. Where as a direct and proximate result of the breach of an interim attachment the pursuer suffers patrimonial loss, the person in breach shall be liable to the pursuer for that loss.

Voidability of certain transfers of ownership of property subject to interim attachment.

14. Where ownership of property subject to interim attachment is transferred to a singular successor of the defender, the transfer shall be voidable at the instance of the pursuer if (either or both)-

(a) it is a transfer other than for value;

(b) at the time of transfer the singular successor knows that the property is so subject,

provided that at the time when the pursuer initiates proceedings under this section the interim attachment, or a preference for the pursuer created by virtue of the interim attachment and of either or both of sections 21 and 55 of this Act, has effect.

Powers of court in relation to effect of time to pay direction or time to pay order on interim attachment.

1987 c.18.

15. Sections 2(3), 3(l)(b), 6(3), 8, 9(2)(e) and 10(l)(b) of the Debtors (Scotland) Act 1987 (powers of court, when making a time to pay direction or time to pay order or at certain other times relative to such a direction or order, to recall, restrict or vary an arrestment etc. or sist a diligence) shall apply in relation to an interim attachment as they apply in relation to an arrestment on the dependence of an action.

Cessation of interim attachment.

16.—(1) Subject to subsections (4) to (6) below and without prejudice to subsection (2) below, to sections 9, 11, 18 and 53 of this Act and to section 95(1) of the Debtors (Scotland) Act 1987 (which specifies diligences terminated by payment or tender of full amount owing), an interim attachment shall cease to have effect on the occurrence of any of the following-

(a) where the pursuer has obtained a final interlocutor for payment of all or part of a principal sum concluded for or craved in the action on the dependence of which warrant for the attachment was granted, the expiry of a period of six months after the action is disposed of or of such longer period after such disposal as the court may allow;

(b) where the final interlocutor is of absolvitor or dismissal as respects the conclusion or crave in question, the granting of that interlocutor;

(c) the release, by virtue of subsection (3) below, of every article attached,

and in the said section 95(1), as the first paragraph, insert-

"(aa) an interim attachment;".

(2) An interim attachment shall cease to have effect in relation to a specific article on the occurrence of either of the following-

(a) the article is poinded in execution of any such final interlocutor as is mentioned in paragraph (a) of subsection (1) above;

(b) the pursuer is confirmed, by virtue either of any such final interlocutor as is so mentioned or of a final interlocutor for expenses in the action, as executor-creditor on the defender's estate and the estate to which he confirms comprises the article.

(3) The pursuer may at any time consent in writing to a specific article being released from interim attachment; and the release shall take effect when that consent is notified to the court.

(4) An application made under paragraph (a) of subsection (1) above may be granted only if-

(a) it is made before the expiry of the period of six months mentioned in that paragraph (or, if the court has already allowed a longer period 'on an earlier such application, before the expiry of the longer period last so allowed); and

(b) the court is satisfied that exceptional circumstances make it reasonable to grant the application.

(5) Without prejudice to subsections (l)(b) and (c) and (2)(a) and (b) above, if an application is timeously made under paragraph (a) of subsection (1) above, the paragraph shall not operate as respects the interim attachment before the application is determined (or withdrawn).

1987 c.18.

(6) A period during which an order under section 6(3) of the Debtors (Scotland) Act 1987 (interim order sisting diligence) or under section 9(4) of that Act

(restriction on steps which can be taken in diligence) is in effect shall be disregarded urcalculating the period mentioned in paragraph (a) of subsection (1) above.

(7) For the purposes of subsection (1) above-

(a) a final interlocutor is obtained when an interlocutor-

(i) cannot be recalled or altered; and

(ii) is not subject to review; and

(b) an action is disposed of on the date on which the final interlocutor mentioned in paragraph (a) of that subsection is obtained unless, on a later date, the pursuer obtains a final interlocutor for expenses in the action, in which case it is disposed of on that later date.

Interim attachment in relation to certain proceedings commenced outwith Scotland, etc.

17. In section 27 of the Civil Jurisdiction and Judgments Act 1982 (provisional and protective measures in absence of substantive proceedings)-

(a) in subsection (1), after paragraph (b) (and before the word "and" which immediately follows that paragraph) insert-

"(bb) subject to subsection (2)(c), grant a warrant for the interim attachment of any poindable corporeal moveable property situated in Scotland;"; and

1982 c. 27.

(b) in subsection (2)(c), for the words "and (b)" substitute ", (b) and (bb)".

Expenses as respects interim attachment.

18.—(1) Subsections (1) to (4) of section 7 of this Act shall apply in relation to a warrant for interim attachment as those subsections apply in relation to a warrant for arrestment on the dependence of an action.

(2) Subject to subsection (4) below, any expenses chargeable against the defender which are incurred in executing an interim attachment shall be recoverable from him either-

(a) by a poinding and sale of the attached property-

(i) where warrant to poind is granted by virtue of the conclusion or crave in relation to which the warrant for attachment was granted; or

(ii) if the final interlocutor is of absolvitor or dismissal as respects that conclusion or crave, where warrant to charge and poind is granted under and for the purposes of this subsection; or

(b) by confirmation of the pursuer as executor-creditor on the defender's estate, where the estate to which he confirms comprises the attached property,

but not by any other legal process; and when any such expenses cease to be recoverable in pursuance of this subsection, they cease to be chargeable against the defender.

(3) Subsection (4) below applies where an interim attachment is-

(a) recalled under section 9(2)(e) of the Debtors (Scotland) Act 1987 (recall of arrestments etc. on making of time to pay order);

1987 c.18.

(b) in effect immediately before the date of sequestration (as defined in section 12(4) of the Bankruptcy (Scotland) Act 1985) of the defender's estate;

1985 c.66.

(c) in effect immediately before the presentation of a petition for an administration order, in relation to the defender, under Part II of the Insolvency Act 1986;

1986 c.45.

(d) in effect against property of the defender immediately before a floating charge attaches to all or part of that property under section 53(7) (consequence of appointment of receiver by holder of floating charge) or 54(6) (consequence of such appointment by court) of the Act of 1986;

(e) in effect immediately before the commencement of the winding up, under Part IV or V of the Act of 1986, of the defender; or

(f) rendered unenforceable by virtue of the pursuer entering into a composition contract or acceding to a trust deed for creditors or by virtue of the subsistence of a protected trust deed (as defined in paragraph 8 of Schedule 5 to the Act of 1985).

(4) Where this subsection applies-

(a) the expenses which were chargeable against the defender shall remain so chargeable; and

(b) if the defender's obligation to pay the expenses is not discharged under or by virtue of the time to pay order, sequestration, administration order, receivership, winding up, composition contract or trust deed for creditors, those expenses shall be recoverable from him in pursuance of subsection (2) above.

Ascription.

19.—(1) Any sums secured by an interim attachment and, while the attachment is in effect, paid to account of the sums recoverable from the defender shall be ascribed to the following in the order in which they are mentioned-

(a) the expenses incurred in obtaining warrant for and in executing the attachment;

(b) such interest as has accrued, in respect of the principal sum to which the conclusion or crave for payment relates, as at the date of execution;

(c) that principal sum together with such interest as has accrued after that date.

1987 c.18.

(2) In section 94 of the Debtors (Scotland) Act 1987 (ascription of sums recovered by poinding and sale etc.), in subsection (2)(a), at the end of sub-paragraph (i) there shall be added the words "and, where the diligence is a poinding and sale, of any interim attachment, on the dependence of the action by virtue of which the warrant to poind was granted, of property to which that diligence relates".

Ranking

Extension of court's powers in certain actions of multiplepoinding and furthcoming etc.

20.—(l)Where-

(a) in an action of furthcoming or multiplepoinding; or

(b) in a ranking on the proceeds of sale of property subject to a heritable security,

a claim to rank is made by a creditor who has executed diligence on the dependence of another action (in this section referred to as the "relevant action"), the court may, without prejudice to any other order that it may make, make any of the orders mentioned in subsection (2) below.

(2) The orders referred to in subsection (1) above are-

(a) an order postponing distribution of the fund in medio until the relevant action is disposed of;

(b) where the court is satisfied that the creditor has delayed unreasonably in bringing, or in the conduct of, the relevant action, an order distributing the fund in medio notwithstanding that diligence has been executed on the dependence of that action;

(c) where the court is satisfied that the creditor has delayed unreasonably in bringing, or in the conduct of, the relevant action, an order-

(i) postponing distribution of the fund in medio until such date as may be specified; and

(ii) providing, if the creditor has not by that date obtained an interlocutor disposing of the merits in the relevant action, for recall with effect from that date of the diligence executed on the dependence;

(d) an order-

(i) requiring consignation of sufficient funds to meet the creditor's claim; and

(ii) allowing an interim distribution to the other creditors ranking in the action; and

(e) an order distributing the fund in media before disposal of the relevant action but-

(i) reserving to the creditor in that action a right to recover his claim in the action from the other creditors; and

(ii) requiring the other creditors to find caution for the amount of that claim.

(3) For the purposes of subsection (2) above, an action is disposed of-

(a) in a case in which the pursuer obtains a final interlocutor for payment to him of a sum of money as a principal sum, on the date on which that interlocutor is obtained unless, on a later date, he obtains a final interlocutor for expenses in the action, in which case it is disposed of on that later date;

(b) in any other case, on the date on which a final interlocutor disposing of the merits in the action is obtained,

and for the purposes of this subsection a final interlocutor is obtained when an interlocutor cannot be recalled or altered and is not subject to review.

Priority derived from interim attachment.

21. For the purposes of any enactment or rule of law as to ranking or preference-

(a) where an interim attachment has been executed, then provided that it has been followed up without undue delay and the pursuer has obtained an interlocutor for payment of all or part of the sum concluded for or craved, that attachment shall be treated as if it were a poinding of the property attached, executed when the attachment was executed; and

(b) where an interim attachment has ceased to have effect in relation to any article-

(i) by virtue of paragraph (a) of section 16(2) of this Act, the poinding of the article in question shall be taken to have been executed;

(ii) by virtue of paragraph (b) of that section, the confirmation of the executor-creditor on the estate in question shall, as respects that article, be taken to have occurred,

when the attachment was executed.

Effect of sequestration on interim attachment. 1985 c.66.

22. In section 37 of the Bankruptcy (Scotland) Act 1985 (effect of sequestration on diligence)-

(a) after subsection (4) insert-

"(4A) No interim attachment of the estate of the debtor (including any estate vesting in the permanent trustee under section 32(6) of this Act) executed-

(a) within the period of 60 days before the date of sequestration and whether or not subsisting at that date; or

(b) on or after the date of sequestration,

shall be effectual to create a preference for the person to whom warrant for the attachment was granted."; and

(b) after subsection (5) insert-

"(5AA) Subject to sections 7 and 18 of the Diligence (Scotland) Act 1997,

a person whose interim attachment is executed within the said period of 60 days shall be entitled to payment, out of the attached estate or out of the proceeds of its sale, of the expenses incurred in-

(a) obtaining the warrant for interim attachment;

(b) executing that attachment; and

(c) taking any further action in respect of the diligence.".

Ancillary orders

Ancillary orders as respects property subject to arrestment on dependence or interim attachment.

23.—(1) Where property is subject to an arrestment used on the dependence of an action or to interim attachment, the court may, on an application under this section by any person claiming an interest, make such order as to the use, keeping or security of that property as it thinks fit; and without prejudice to the generality of this section any such order may authorise the temporary removal of the property to a place outwith Scotland or include warrant to dismantle the property.

(2) Without prejudice to sections 10 and 14 of this Act, where property subject to interim attachment comes into the possession or control of a third party (and is no longer in the possession or control of the defender) the court may, on an application under this subsection by any person claiming an interest, make an order requiring the possessor for the time being of the property, within a period specified in the order, to restore the property to the defender or, as it thinks fit, an order requiring the possessor to give the property into the possession or control of the pursuer; except that, where the court is satisfied that the possessor acquired ownership of the property for value and without knowledge of the interim attachment, it shall-

(a) refuse the application; or

(b) if it has already granted the application, recall the order (and any warrant granted under subsection (3) below on the application for that order).

(3) If, on an application under subsection (2) above, it appears to the court that the property in question is likely to be found in premises specified in that application it may in granting the application grant warrant, if it considers it reasonable in all the circumstances to do so, for officers of court to search for the property in those premises and if they find it to restore it to the defender or give it into the possession or control of the pursuer, according to what is required of the possessor by the order applied for.

(4) A warrant under subsection (3) above shall be authority to open lockfast places for the purpose of its execution.

(5) Without prejudice to subsection (2)(b) above, the court may, conditionally or unconditionally, vary or recall any order made by it under this section.

Abolition of certain procedures

Warrant for arrestment or inhibition on dependence no longer obtainable as of right.

24. Any procedure or practice by which-

(a) a pursuer inserting in the summons an appropriate form of warrant for arrestment on the dependence of the action or for inhibition on its dependence obtains authority for diligence as of right when the summons is signeted or signed, shall be inapplicable as respects any summons which is on or after the date on which this section comes into force presented to be signeted or signed;

(b) a pursuer craving in the initial writ warrant for arrestment on the dependence of the action obtains authority for diligence as of right when a warrant of citation which includes the appropriate form of warrant for arrestment is signed, shall be inapplicable as respects any initial writ for which warrant of citation is on or after that date signed; or

(c) a sheriff clerk may issue a precept of arrestment, shall be inapplicable as respects any initial writ, defences or liquid document of debt which, for

the purpose of such a precept being issued, is on or after that date produced 4o him.

Application of Part I

25. Subject to the provisions of Part II of this Act, the foregoing provisions of this Part of this Act, with the exception of sections 5, 20, 23 and 24, do not apply in relation to an admiralty action.

Application of Part I restricted.

PART II

ADMIRALTY ACTIONS AND ARRESTMENTS

The expression "admiralty action"

26.—(1) An admiralty action is an action having a conclusion or crave appropriate for the enforcement of a claim arising out of one or more of the following-

Definition of "admiralty action".

(a) damage done or received by any ship;

(b) loss of life, or personal injury, sustained in consequence of any defect in a ship or in her apparel or equipment;

(c) loss of life, or personal injury, sustained in consequence of the wrongful act, neglect or default of-

(i) the owners, charterers or persons in possession or control of a ship;

(ii) a ship's master or crew; or

(iii) any other person if it is a wrongful act, neglect or default for which the owners, charterers or persons in possession or control of a ship are responsible,

being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from it or in the embarkation, carriage or disembarkation of persons on, in or from it;

(d) the International Convention on Salvage 1989 as it has effect under section 224 of the Merchant Shipping Act 1995;

1995 c. 21.

(e) any contract for or in relation to salvage services;

(f) any agreement relating to the use or hire of any ship whether by charterparty or otherwise;

(g) any agreement relating to the carriage of goods in any ship whether by charterparty or otherwise;

(h) loss of, or damage to, goods carried in any ship;

(i) general average;

(j) any bottomry bond or contract of respondentia;

(k) towage;

(1) pilotage;

(m) the supply of goods or materials to a ship for her operation or maintenance;

(n) the construction, repair or equipment of any ship;

(o) liability for dock charges or dues;

(p) liability for payment of wages of a master or member of the crew of a ship;

(q) master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner;

(r) any dispute as to the ownership or right to possession of any ship or as to the ownership of any share in a ship;

(s) any dispute between co-owners of any ship as to the ownership, possession, employment or earnings of that ship;

(t) the mortgage or hypothecation of any ship or of any share in a ship;

(u) any forfeiture or condemnation of any ship, or of goods which are being, or have been, carried, or have been attempted to be carried, in any ship, or for the restoration of a ship or any such goods after seizure.

(2) In subsection (1) above-

"goods" includes baggage; and

1995 c.21. "master" has the same meaning as in the Merchant Shipping Act 1995,

and in paragraph (e) of that subsection, the reference to salvage services includes services rendered in saving life from a ship and the reference to any claim arising out of any contract for or in relation to salvage services includes any claim arising out of such a contract whether or not arising during the provision of such services.

Arrestment of ships and cargoes

Arrestment of ship or share in ship on dependence of admiralty action in personam against owner or demise charterer.

27.—(1) Whether before or after the summons or initial writ in an admiralty action in personam has been served on the defender, the court may, on the application of the pursuer, grant warrant for the arrestment on the dependence of the action of a ship, or of a share in a ship, if satisfied as is mentioned in paragraphs (a) and (b) of section 1(1) of this Act; but either-

(a) the ship must be the ship with which the action is concerned and, at the time when the arrestment is executed, the defender must own at least one share in it or be its demise charterer; or

(b) all the shares in the ship must, at that time, be owned by the defender.

(2) There shall not be granted in respect of a conclusion or crave appropriate for the enforcement of a claim arising as is mentioned in any of paragraphs (r) to (u) of section 26(1) of this Act, a warrant for the arrestment on the dependence of the action of any ship other than the ship to which the conclusion or crave relates or of any share in a ship other than that ship.

(3) Subsections (2) to (8) of section 1 of this Act shall apply in relation to an application under subsection (1) above as they apply in relation to an application under subsection (1) of that section.

Arrestment of ship etc. in rem to enforce a maritime lien.

28.—(1) In an admiralty action in rem, the ship, cargo or other maritime res with which the action is concerned shall be arrested in rem and accordingly the pursuer shall include a warrant for arrestment in rem in the summons or, having craved such warrant in the initial writ, shall obtain a warrant of citation which includes the appropriate form of warrant for arrestment in rem; and the warrant for arrestment in rem when duly signeted, or as the case may be the warrant of citation when duly signed by the sheriff or sheriff clerk, shall be authority for the arrestment.

(2) Warrant for the arrestment of property in rem in enforcement of a maritime lien shall be effective as authority for the detention of a ship, cargo or other maritime res only if obtained in pursuance of subsection (1) above.

Arrestment of ship in rem to secure non-pecuniary claim.

29.—(1) Whether before or after the summons or initial writ in an admiralty action in personam which has a non-pecuniary conclusion or crave appropriate for the enforcement of a claim arising as is mentioned in any of paragraphs (r) to (u) of section 26(1) of this Act has been served on the defender, the court may, on the application of either (or any) party, grant warrant for the arrestment in rem of the ship with which the action is concerned if satisfied that it is reasonable in all the circumstances to grant the warrant.

(2) There shall not be granted in respect of a conclusion or crave appropriate for the enforcement of a daim so arising, a warrant for the arrestment in rem of any ship other than the ship to which the conclusion or crave relates.

(3) A warrant granted under subsection (1) above shall have effect as authority for the detention of the ship as security for the implementation of the decree of the court so far as it affects that ship.

(4) An application under subsection (1) above shall be intimated as the court thinks fit; and subsections (5), (7) and (8) of section 1 of this Act shall apply in relation to that application as they apply in relation to an application under subsection (1) of that section (except that the references in subsection (5) to a hearing under paragraph (c) of subsection (4) of that section shall be disregarded).

Arrestment of cargo on dependence.

30.—(1) Whether before or after the summons or initial writ in an action in personam has been served on the defender the court may, on the application of the pursuer, grant warrant for the arrestment on the dependence of the action of a cargo on board a ship if satisfied as is mentioned in paragraphs (a) and (b) of subsection (1) of section 1 of this Act.

(2) Subsections (2) to (8) of the said section 1 shall apply in relation to an application under subsection (1) above as they apply in relation to an application under subsection (1) of that section.

Further and multiple arrestments

Restriction on further or multiple arrestments of ships on dependence.

31.—(1) In an action which is an admiralty action by virtue of any of paragraphs (a) to (q) of section 26(1) of this Act, a warrant for arrestment on the dependence of the action shall be spent in so far as relating to the arrestment of a ship once arrestment of any ship is executed in pursuance of the warrant; and where a warrant is so spent then except in respect of a claim different from that in respect of which the ship was arrested a court shall not-

(a) grant a further warrant for the arrestment, on the dependence of that or any other action, of that ship; or

(b) while the arrestment of that ship subsists, grant a warrant for the arrestment, on the dependence of that or any other action, of any other ship in which, for the time being, the defender owns at least one share,

unless satisfied not only as to the matters mentioned in paragraphs (a) and (b) of section 1(1) of this Act but also that there is some special reason to grant it (as for example, but without prejudice to the generality of this subsection, that though the arrestment subsists it has been breached).

(2) Subsection (1) above applies irrespective of whether the arrestment is authorised before this section comes into force.

Protection against wrongful or unjustified arrestments

Consignation or finding of caution by pursuer.

32.—(1) The court may, as a condition of its-

(a) granting warrant for the arrestment of a ship or cargo on the dependence of an action;

(b) granting warrant, under section 29(1) of this Act, for the arrestment in rem of a ship; or

(c) refusing to recall or restrict an arrestment, or warrant, such as is mentioned in paragraph (a) or (b) above or an arrestment in rem under, or warrant obtained in pursuance of, section 28(1) of this Act,

require the pursuer-

(i) to consign into court such sum; or

(ii) to find such caution or give such other security,

as it thinks fit, in respect of any liability which might arise by virtue of section 33 of

this Act.

(2) On the application of any person claiming an interest, the court may, conditionally or unconditionally, vary or recall a requirement which it has, under subsection (1) above, imposed.

(3) In paragraph (c) of subsection (1) above, the reference-

(a) to an arrestment, is to an arrestment executed in pursuance of a warrant granted or obtained on or after the coming into force of this section; and

(b) to a warrant, is to a warrant so granted or obtained.

Liability for wrongful or unjustified arrestment of ship or cargo.

33. — (1) Where as a direct and proximate result of the execution, in pursuance of a warrant granted-

(a) under section 27 of this Act for the arrestment of a ship, or under section 30 of this Act for the arrestment of a cargo, on the dependence of an action; or

(b) under section 29(1) of this Act, for the arrestment of a ship in rem,

the defender or some other person having an interest in the thing arrested suffers patrimonial loss, the pursuer shall be liable to him for that loss if either-

(i) the warrant was obtained, or the arrestment executed, wrongfully; or

(ii) when the pursuer applied for the warrant he was being unreasonable in doing so.

(2) Where, to enforce a maritime lien, a ship, cargo or other maritime res is arrested in rem but the arrestment is executed wrongfully or unreasonably in pursuance of (or purportedly in pursuance of) a warrant granted on or after the coming into force of section 28 of this Act and as a direct and proximate result the defender or some other person having an interest in the thing arrested suffers patrimonial loss, the pursuer shall be liable to him for that loss.

Expenses

Expenses as respects warrant for arrestment of ship in rem to secure non-pecuniary claim or of ship or cargo on dependence.

34.—(1) A pursuer shall be entitled to such expenses, as taxed, as he has incurred in obtaining, and as the case may be in executing, warrant for the arrestment of a ship or cargo on the dependence of an action unless (or except in so far as) the court modifies or refuses them on the ground that-

(a) when the pursuer applied for the warrant he was being unreasonable in doing so; or

(b) it considers such modification or refusal to be reasonable having regard to all the other circumstances, including the outcome of the action.

(2) Where such warrant has been granted but the court considers that when the pursuer applied for it he was being unreasonable in doing so, the defender shall be entitled to such expenses, as taxed, as he may have incurred in opposing the application unless (or except in so far as) the court modifies or refuses them on the ground mentioned in paragraph (b) of subsection (1) above.

(3) Subject to subsections (1) and (2) above the court may make such finding as it thinks fit as respects entitlement to such expenses as may have been incurred-

(a) in obtaining, and as the case may be in executing, warrant for the arrestment of a ship or cargo on the dependence of an action; or

(b) in opposing an application for such warrant.

(4) Expenses incurred as is mentioned in subsections (1) to (3) above in obtaining, or in opposing an application for, a warrant shall be treated as expenses of process.

(5) Where warrant has been granted under section 29(1) of this Act for the arrestment of a ship in rem, the court may make such finding as it thinks fit as

respects entitlement to such expenses as may have been incurred-

(a) in obtaining that warrant and as the case may be in executing the arrestment; or

(b) in opposing the application for the warrant.

(6) Subsections (1) to (4) above are without prejudice to any provision made by any enactment, or rule of law, as to the recovery of such expenses chargeable against the defender as are incurred in executing an arrestment on the dependence of an action.

(7) Subsections (1) to (5) above apply only as respects a warrant granted on or after the coming into force of this section.

Special provision as respects demise charterers

Arrestment of ship to found jurisdiction in action against demise charterer.

35. In an admiralty action in personam in which the defender is the demise charterer of the ship with which the action is concerned, the court may, on the application of the pursuer, grant warrant to arrest the ship to found jurisdiction.

Sale of ship in execution of certain interlocutors against demise charterer.

36.—(1) Where a ship has been arrested on the dependence of an admiralty action against a person who was, at the time when the arrestment was executed, the demise charterer of the ship with which the action is concerned and-

(a) the pursuer has obtained an interlocutor for payment of all or part of the sum concluded for or craved; and

(b) the interlocutor cannot be recalled or altered and is not subject to review,

the court may, on the application of the pursuer, make an order for the sale of the ship.

(2) Provision may be made by act of sederunt as to notifying the owner of a ship in respect of which an order under subsection (1) above has been, or may be, made-

(a) at such time as may be specified in the act of sederunt, of the making of the order or, as the case may be, that an order may be made; and

(b) that he may prevent the-

(i) making; or

(ii) implementation,

of such an order by paying, within such time as may be so specified, the sum due under the decree.

(3) Where a ship is sold by virtue of subsection (1) above, the proceeds of the sale shall be consigned into court and the court shall-

(a) adjudge the ship to belong to the purchaser freed and disburdened of all incumbrances affecting it; and

(b) rank and prefer any claims made to the proceeds of sale.

Ranking of creditors on sale of ship (or share in ship) held on demise charter.

37. In any competition among creditors which arises in relation to the proceeds of sale of a ship (or share in a ship) which is or was held on demise charter, any arrestment of that ship (or share) which was executed, at any time before the sale, by a creditor of the owner of that snip (or share) shall have priority over any arrestment of the ship executed on the dependence of an admiralty action by a creditor of the demise charterer.

Ranking of demise charterer's arresting creditor in owner's sequestration etc.

38.—(l)Where-

(a) a ship is arrested on the dependence of an admiralty action against the demise charterer of the ship; and

(b) at any time after the execution of such arrestment-

(i) the estate of the owner of the ship is sequestrated; or

(ii) where the owner of the ship is a company, the company is wound up,

the creditor who executed the arrestment shall be entitled to rank in the sequestration or, as the case may be, in the winding up, but only on the proceeds of any sale of the ship.

1985 c. 66.

(2) For the purposes of any sequestration such as is mentioned in subsection (l)(b)(i) above, subsections (4) and (5) of section 37 of the Bankruptcy (Scotland) Act 1985 (effect of sequestration on diligence) shall apply as respects an arrestment of a ship executed by a creditor of a demise charterer as those provisions apply as respects such an arrestment executed by a creditor of the owner of a ship.

1986 c. 45.

(3) For the purposes of any winding up such as is mentioned in subsection (l)(b)(ii) above, subsections (l)(a) (in so far as applying subsections (4) and (5) of the said section 37), (2)(a), (c) and (d), (3) and (4) of section 185 of the Insolvency Act 1986 (application of provisions of 1985 Act concerning diligence etc. to winding up of companies) shall apply as mentioned in subsection (2) above.

Execution of arrestment of ship or cargo: positional factors etc.

Position of ship as factor in its arrestment.

39. The competence of executing an arrestment of a ship is not affected by the fact that the ship is in non-tidal rather than in tidal waters or on land above the flood-mark rather than below it.

Factors in arrestment of cargo.

40.—(1) The competence of executing an arrestment of cargo on board a ship is not affected by the fact that-

(a) the cargo is in the possession of the defender or of an employee of his; or

(b) the ship is in non-tidal rather than in tidal waters or on land above the flood-mark rather than below it.

(2) An effect of any such arrestment is that the ship is, until the cargo is unloaded or the arrestment ceases to have effect, fixed as if itself arrested; and application-

(a) for warrant to dismantle the ship; or

(b) for authority to move the ship or cargo,

may be made accordingly.

No arrestment while ship on passage.

41. Neither a ship nor its cargo shall be subject to the execution of an arrestment while the ship is on passage.

Admiralty actions in sheriff court

Jurisdiction of sheriff as respects admiralty action in rem.

1907 c.51.

42. In the first proviso to section 4 of the Sheriff Courts (Scotland) Act 1907 (jurisdiction of the sheriffs), after the word "provided" insert-

"- (a) jurisdiction in any admiralty action in rem ("admiralty action" being construed in accordance with section 26 of the Diligence (Scotland) Act 1997) shall be founded on the arrestment in rem of the ship, cargo or other maritime res with which the action is concerned; and

(b) in any other action or proceedings,".

Warrant for arrestment in rem in admiralty action in rem in sheriff court.

43. In an admiralty action in rem brought in the sheriff court, a warrant for arrestment in rem-

(a) may, in a case where the ship, cargo or other maritime res with which the action is concerned was within the sheriffdom when the warrant was granted, be executed anywhere in Scotland; but

(b) in any other case, may be executed within the sheriffdom only.

Regulation of procedure and practice in admiralty actions in sheriff court.

1971 c.58.

44. The Sheriff Courts Rules Council shall, as soon as practicable after the coming into force of this section, prepare and submit to the Court of Session under section 34(2) of the Sheriff Courts (Scotland) Act 1971 (keeping under review by the Council of procedure and practice in civil proceedings in the sheriff court) draft rules

designed to deal with admiralty actions in the sheriff court.

PART III

MISCELLANEOUS AND GENERAL

Application to counterclaims etc.

Counterclaims, claims in third party notice procedure and applications by petition.

45. This Act shall apply (in so far as it is practicable for it to do so) in relation to-

(a) counterclaims;

(b) claims in third party notice procedure; and

(c) applications made by petition,

and to parties to them as it applies in relation to actions and to pursuers and "defenders in actions; and in any act of sederunt under section 5(1) of the Court of Session Act 1988, or section 32 of the Sheriff Courts (Scotland) Act 1971, made in consequence of the provisions of this Act, the Court of Session shall include such modifications as it considers requisite to take account of this section.

1988 c.36.
1971 c.58.

Aircraft

Towage and pilotage of waterborne aircraft.

46.—(1) Where services which, were they provided for a ship, would constitute towage or pilotage are provided for an aircraft while it is waterborne, any claim arising as respects those services shall for the purposes of any enactment or rule of law be regarded as a claim arising as respects towage or pilotage.

(2) Without prejudice to the generality of subsection (1) above or to the competence of granting warrant for the arrestment of an aircraft in the possession of anyone other than the defender, it shall be competent to grant warrant for the arrestment of an aircraft on the dependence of an action where-

(a) the aircraft is the aircraft with which the action is concerned; and

(b) the conclusion or crave in respect of which the warrant is granted is appropriate for the enforcement of a claim arising as respects towage or pilotage,

but at the time the arrestment is executed the aircraft shall require to be in the possession of the defender.

(3) Where, the arrestment of an aircraft on the dependence of an action having been executed in pursuance of a warrant granted under subsection (2) above-

(a) the pursuer has obtained an interlocutor for payment of all or part of a sum concluded for or craved in the action; and

(b) the interlocutor cannot be recalled or altered and is not subject to review,

the court may, on his application, make an order for the sale of the aircraft.

(4) Where an aircaft is sold by virtue of subsection (3) above, the proceeds of the sale shall be consigned into court and the court shall-

(a) adjudge the aircraft to belong to the purchaser freed and disburdened of all incumbrances affecting it; and

(b) rank and prefer any claims made to the proceeds of sale.

Warrant to dismantle aircraft.

1987 c.18.
1892 c.17.
1877 c.40.

47.—(1) In each of sections 87(2) of the Debtors (Scotland) Act 1987 (effect of warrant contained in extract decree for payment of money etc.), 7(1) of the Sheriff Courts (Scotland) Extracts Act 1892 (import of warrant for execution) and 3 of the Writs Execution (Scotland) Act 1877 (power to execute diligence by virtue of warrant), after paragraph (a) insert-

"(aa) in so far as the warrant has the effect of authorising the poinding of an aircraft in the possession of the debtor, the dismantling of that aircraft after, or (but only where the decree is granted on or after the coming into force of section 47 of the Diligence (Scotland) Act 1997)

when, the poinding is executed;".

(2) Subsection (1) above is without prejudice to any application-

(a) under section 23 of this Act;

1987 c.18.

(b) under section 21(l)(a) of the Debtors (Scotland) Act 1987 (application for order for security of poinded articles); or

(c) for the dismantling of an aircraft in an action hi relation to a claim which, under section 46(1) of this Act, falls to be regarded as a claim arising as respects towage or pilotage.

Prescription and loosing of arrestments

Prescription of arrestments.

48.—(1) An arrestment which is not insisted in prescribes-

(a) where it is on the dependence of an action, three years after a final interlocutor is obtained by the pursuer for payment to him of all or part of a principal sum concluded for or craved;

(b) where it is in execution of an extract decree or other extract registered document relating to a due debt, three years after the date on which it is executed; or

(c) where it enforces a future or contingent debt, three years after the date on which the debt becomes due.

(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

1987 c.18.

(b) is subject to an interim order under section 6(3) of the Debtors (Scotland) Act 1987 (order pending disposal of application for time to pay order),

there shall be disregarded, in computing the period at the end of which the arrestment prescribes, the period during which the time to pay direction, time to pay order or interim order is in effect.

(3) Nothing in this section shall apply to an earnings arrestment, a current maintenance arrestment or a conjoined arrestment order.

(4) Subsections (1) and (2) above apply irrespective of whether the arrestment is executed, or warrant for it obtained, before this section comes into force.

(5) For the purposes of subsection (l)(a) above, a final interlocutor is obtained when an interlocutor cannot be recalled or altered and is not subject to review.

Loosing of arrestment no longer competent as respects certain subjects.

49.—(1) Subject to subsection (2) below, any power of the court to loose an arrestment is hereby abolished.

(2) Subsection (1) above shall not affect-

(a) any enactment or rule of law relating to the loosing of an arrestment of a ship or its cargo; or

(b) the exercise of any other power of the court to recall or restrict an arrestment.

1617 c.!7(S.).

(3) The Arrestments Act 1617 (which makes provision as regards the lodging of caution on an application for the loosing of an arrestment) is hereby repealed.

Diligence in security

Application for warrant for diligence in security of future or contingent debt.

50.—(1) On the application of the pursuer the court may, if satisfied as to the matters mentioned in paragraphs (a) and (b) of subsection (1) of section 1 of this Act, grant warrant for-

(a) arrestment; or

(b) inhibition,

in security of a future or contingent debt due under a decree; and subsections (3) to (8) of that section (with the exception of the proviso to subsection (7)) shall apply as respects an application under this subsection as they apply as respects an application under subsection (1) of that section.

(2) Sections 4, 6 and 23(1) and (5) (with the exception of the words "Without prejudice to subsection (2)(b) above") of this Act shall apply as respects any warrant granted in pursuance of subsection (1) above as they apply as respects a warrant granted under section 1 of this Act.

(3) In subsection (1) above "decree" includes any document which has been registered for execution in the Books of Council and Session or, as the case may be, in the appropriate sheriff court books kept for any sheriffdom.

Abolition of adjudication in security.

51. Any enactment or rule of law enabling adjudication in security to be used shall cease to have effect.

Prevention of double exaction

Prevention of double exaction.

52.—(1) A court may-

(a) in granting decree for payment in any action, supersede extract, on the application of the defender, if it considers that the execution of diligence on the extract would give rise to a substantial risk of the occurrence of double exaction;

(b) on the application of any person claiming an interest, recall, suspend, interdict, sist or restrict diligence for which it has granted warrant if it considers that a substantial such risk has arisen.

(2) Double exaction occurs where, for the same debt, diligence is completed twice over against the same person or against his property, that is to say-

(a) by virtue of legal proceedings in Scotland; and

(b) by virtue of legal proceedings in a country or territory outwith Scotland (however diligence, and completion of diligence, might be described or categorised in that country or territory).

1985 c.66.

(3) In section 49 of the Bankruptcy (Scotland) Act 1985 (adjudication of claims), after subsection (6) insert-

"(6A) Without prejudice to the generality of his powers by virtue of subsection (6) above, the sheriff may uphold an appeal under that subsection against the acceptance of any claim if he considers that such acceptance would give rise to a substantial risk of the occurrence of double exaction (as defined in section 52(2) of the Diligence (Scotland) Act 1997).".

Recall etc. of diligence

Application for recall etc. of diligence on dependence or in security.

53.—(1) Subject to section 54 of this Act, this section applies as respects a warrant for diligence-

(a) on the dependence of an action; or

(b) in security of a future or contingent debt due under a decree,

any such warrant being referred to in this section as a "relevant warrant".

(2) Any person claiming an interest may apply to the court under this subsection for any of the following orders-

(a) an order recalling or, to such extent as may be specified in the order, restricting a relevant warrant;

(b) if an arrestment, inhibition or interim attachment has been executed in pursuance of a relevant warrant, an order recalling or, to such extent as

may be specified in the order, restricting that arrestment, inhibition or, as the case may be, interim attachment;

(c) an order determining any question relating to the validity, effect or operation of a relevant warrant;

(d) an order ancillary to any of the orders mentioned in paragraphs (a) to (c) above.

(3) Where an application is made under subsection (2) above the court may, subject to subsection (5) below, make an order under subsection (2) if satisfied-

(a) that the warrant is invalid;

(b) that, the warrant being valid, the arrestment, inhibition or interim attachment, as the case may be, executed in pursuance of the warrant is irregular, incompetent or ineffective; or

(c) that neither sub-paragraph of section l(l)(a) of this Act applies and that it is reasonable in all the circumstances to make such an order.

(4) The court shall not make an order under subsection (3)(c) above if-

(a) the relevant warrant is an interim attachment which remains in effect after the grant of a final interlocutor such as is mentioned in paragraph (a) of section 16(1) of this Act; and

(b) the period of six months mentioned in that subsection has not expired.

(5) In granting or refusing an application under subsection (2) above the court may impose such conditions (if any) as it thinks fit; and, without prejudice to the generality of this subsection, by such a condition the defender may be required-

(a) to consign into court such sum; or

(b) to find such caution, or to give such other security,

as the court thinks fit.

(6) Where-

(a) the court under section 1(3) of this Act dispenses with the requirement for intimation to the defender and grants warrant for diligence on the dependence of an action; and

(b) the defender applies for an order under subsection (2)(a) or (b) above,

the onus shall be on the pursuer to satisfy the court that the order in question should not be granted.

(7) Where-

(a) an order is made under subsection (2) above; or

(b) a condition is imposed by virtue of subsection (5) above,

any person claiming an interest may apply to the court for variation of that order or, as the case may be, condition; and the court may if it thinks fit vary the order or condition in question.

(8) In this section-

(a) "decree" shall be construed in accordance with section 50(3) of this Act; and

(b) references to the court are, in relation to any application, references to the court which granted the relevant warrant.

(9) This section applies irrespective of whether the diligence in question is executed, or warrant for it obtained, before this section comes into force.

Special applications of section 53.

54.—(1) Subsections (2), (3)(a) and (b), (7)(a) and (9) of section 53 of this Act shall apply as respects a warrant for arrestment or inhibition in execution as those

subsections apply as respects a relevant warrant except that any references in those subsections to the court are, in relation to a warrant for arrestment or inhibition in execution, references to any sheriff court.

(2) Subsections (2), (3) (with the exception, in paragraph (c), of the words from the beginning of that paragraph to "and"), (5), (7) and (9) of section 53 of this Act shall apply as respects a warrant for arrestment in rent such as is mentioned in sections 28(1) and 29(1) of this Act as those subsections apply as respects a relevant warrant.

Poinding

Poinding: creation of preference in sequestration or liquidation. 1985 c.66. 1986 c.45.

55. In any competition with a permanent or interim trustee or with a liquidator, a poinding is, subject to the provisions of the Bankruptcy (Scotland) Act 1985 and of the Insolvency Act 1986, effectual to create a preference for the poinder.

Equalisation of certain arrestments and poindings: repeal

Repeal of provisions of Bankruptcy (Scotland) Act 1985 as to equalisation of certain arrestments and poindings.

56. In Schedule 7 to the Bankruptcy (Scotland) Act 1985, paragraph 24 (which makes provision for arrestments and poindings executed within sixty days prior to the constitution of the apparent insolvency of a debtor or within four months thereafter to rank pan passu as if they had all been executed on the same date) shall cease to have effect.

Appeals

Amendment of provisions as to appeals in Sheriff Courts (Scotland) Act 1907 etc. 1907 c.51.

57.—(1) The Sheriff Courts (Scotland) Act 1907 shall be amended in accordance with subsections (2) and (3) below.

(2) In section 27 (appeal to sheriff principal), after paragraph (B) insert-

"(BB) Granting or refusing-

(i) a warrant for diligence on the dependence of an action or for diligence in security; or

(ii) a warrant for the arrestment in rem of a ship on an application under section 29(1) of that Act (arrestment of ship in rem to secure non-pecuniary claim),

or recalling, refusing to recall, restricting or refusing to restrict a diligence mentioned in sub-paragraph (i) or (ii) of this paragraph, an arrestment or inhibition in execution or a warrant for any of those diligences;".

(3) In section 29 (effect of appeal), at the end add-

"An appeal by virtue of sub-paragraph (i) or (ii) of section 27(BB) of this Act shall not prevent immediate execution of a warrant mentioned in either of those sub-paragraphs.".

(4) From time to time the Court of Session may, as respects any category of interlocutor pronounced under or by virtue of this Act, by act of sederunt-

(a) insert such additional paragraph into section 27 of the Act of 1907 as it thinks fit; and

(b) make such amendments (if any) to section 29 of that Act and to subsection (5)(a) below as it considers appropriate having regard to any paragraph so inserted.

(5) An interlocutor-

(a) recalling or restricting-

(i) a diligence mentioned in sub-paragraph (i) or (ii) of section 27(BB) of the Act of 1907, an arrestment or inhibition in execution or an arrestment in rem in enforcement of a maritime lien; or

(ii) a warrant for any diligence so mentioned or for any such arrestment or inhibition;

(b) recalling or restricting an order which makes provision incidental, consequential or ancillary to any such interlocutor as is mentioned in paragraph (a) above; or

(c) loosing an arrestment of a ship or its cargo,

shall not take effect until the period for appeal against the interlocutor has expired without such appeal being made or, where such appeal is made within that period, until the matter has been finally determined or the appeal has been abandoned.

(6) The amendments made by subsections (1) to (3) above shall have effect as regards, and subsection (5) above shall apply to, an interlocutor irrespective of whether it is pronounced (or any diligence as respects which it is pronounced is executed) before this section comes into force.

Consequential amendments

Consequential amendments of Titles to Land Consolidation (Scotland) Act 1868. 31 & 32 Viet. c. 101.

58.—(1) The Titles to Land Consolidation (Scotland) Act 1868 shall be amended in accordance with the following subsections.

(2) In section 155 (inhibition effective from date of registration of notice of inhibition etc.)-

(a) the words from ", whether" to "Session," shall cease to have effect; and

(b) for the words from "same", where it first occurs, to "same", where it secondly occurs, substitute "inhibition is used, and the date on which the warrant for inhibition was granted".

(3) In Schedule (PP.) (form of notice of inhibition), for the words from-

(a) "letters" to "be]" substitute "inhibition"; and

(b) "Signeted" to "signeting]" substitute "Warrant for inhibition was granted on [insert date of grant]".

General

Interpretation.

59.—(1) In this Act, unless the context otherwise requires-

"admiralty action" shall be construed in accordance with section 26 of this Act;

"court" means the Court of Session or the sheriff;

"diligence on the dependence" means, as respects an action, arrestment on the dependence of the action, inhibition on its dependence or interim attachment;

"interim attachment" shall be construed in accordance with section 8(3) of this Act;

"interlocutor" includes decree or judgment;

"maritime lien" means a hypothec over a ship, cargo or other maritime res;

"officer of court" means a messenger-at-arms or a sheriff officer; and

"ship" means any description of vessel used in navigation and not propelled by oars.

(2) Unless the context otherwise requires, any reference in any other enactment (whether an enactment in force before this section comes into force, an enactment coming into force thereafter or an enactment inserted by this Act) to "diligence on the dependence" shall be construed in accordance with subsection (1) above.

Application to Crown.

1947 c.44.

60. Without prejudice to the Crown Proceedings Act 1947-

(a) this Act binds the Crown as pursuer, creditor, petitioner or counterclaimer in any cause, as claimant in third party notice procedure, as arrestee or as singular successor to a defender or debtor; but

(b) nothing in this Act shall authorise-

(i) the execution of diligence in respect of any claim against the Crown; or

(ii) the arrestment, detention or sale of any of Her Majesty's ships or Her Majesty's aircraft (within the meanings respectively assigned to those expressions by section 38(2) of the Crown Proceedings Act 1947) or of any cargo on board any such ship. 1947 c. 44.

Repeals.

61. The enactments mentioned in the Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule.

Short title, commencement and extent.

62.—(1) This Act may be cited as the Diligence (Scotland) Act 1997.

(2) This section comes into force on the passing of this Act, but otherwise the provisions of this Act shall come into force on such day as the Secretary of State may by order made by statutory instrument appoint.

(3) This Act extends to Scotland only.

SCHEDULE Section 61.

REPEALS

Chapter	*Short title*	*Extent of repeal*
1617 c. 17 (S.)	The Arrestments Act 1617.	The whole Act.
1 & 2 Viet. c. 114.	The Debtors (Scotland) Act 1838.	The whole Act, except section 32.
31 & 32 Viet. c. 101.	The Titles to Land Consolidation (Scotland) Act 1868.	In section 155, the words from ", whether" to "Session,".
		In section 159, the words "or in security".
4 & 5 Eliz. 2, c. 46.	The Administration of Justice Act 1956.	Section 47.
		In section 48, paragraphs (b) to (d); and in paragraph (f) the definitions of "goods" and "master" and the definition of "towage" and "pilotage".
1985 c. 37.	The Family Law (Scotland) Act 1985.	Section 19.
1985 c. 66.	The Bankruptcy (Scotland) Act 1985.	In section 7(l)(c)(iv), the words ", either" and "or in security ".
		In section 31(l)(b), the words "and in security".
		In section 37(1), paragraph (b) and the word "and" immediately preceding that paragraph.
		In Schedule 7, paragraph 24.
1987 c. 18.	The Debtors (Scotland) Act 1987.	In section 13, subsection (2).

Appendix B

DILIGENCE (SCOTLAND) BELL
TABLE RELATING CLAUSES OF THE DRAFT BILL TO RECOMMENDATIONS OF THE REPORT

Bill: Clause	Report: Recommendation	(Paragraph)
KD	1	(3-3)
	2	(3.5)
	3(1), (2)	(3.27)
	4	(3.45)
	5(1)	(3.52)
	9	(3.89)
	41(1)	(6.13)
1(2)	4(b)	(3.45)
	9	(3.89)
1(3)	3(3)	(3.27)
	5(1)	(3.52)
	9	(3.89)
1(4)	3(4)	(3.27)
	9	(3.89)
1(5), (6)	5	(3.52)
	9	(3.89)
1(7)	8	(3.75)
	9	(3.89)
2	9	(3.89)
	10	(3.97)
3	9	(3.89)
	41(3)	(6.13)
4	7	(3.71)
	9	(3.89)
5	9	(3.89)
	42	(6.20)
6	6	(3.63)
	9	(3.89)
7	9	(3.89)
	11	(3.111)
8	12	(4.34)
	13	(4.38)
	14	(4.52)
9	42(1)	(6.20)
10	23(1), (2)	(4.83)
	24(1), (3)	(4.88)
	25	(4.90)
11	15	(4.55)

Bill: Clause "	Report: Recommendation	(Paragraph)
12	24(4)	(4.88)
13	23(3)	(4.83)
14	26	(4.101)
15	21	(4.73)
16	12	(4.34)
	18	(4.66)
	29	(4.116)
17	22	(4.75)
18	19	(4.69)
19	20	(4.71)
20	45	(6.40)
	46	(6.42)
21	18(3)	(4.66)
	27(1)	(4.112)
	29	(4.116)
22	28	(4.114)
23(1)	16	(4.58)
23(2), (3), (4)	24(2)	(4.88)
24	1	(3.3)
25	Application of Part I restricted	
26	52	(7.44)
	53	(7.49)
27	53	(7.49)
	59	(7.98)
	60	(7.106)
	65	(7.142)
	73	(8.57)
28	51	(7.8)
	56	(7.75)
29	58	(7.92)
30	64	(7.139)
	65	(7.142)
31	61	(7.110)
32	62	(7.124)
33	51	(7.8)
	62	(7.124)
34	63	(7.135)
35	75	(8.70)
36	74	(8.63)
37	76	(8.94)

Bill: Clause	Report. Recommendation	(Paragraph)
38	77	(8.99)
39	69(2)	(7.181)
40(1)(a)	66	(7.148)
40(l)(b)	69(2)	(7.181)
40(2)	68	(7.160)
41	67	(7.152)
	69(4)	(7.181)
42	55(3)	(7.56)
43	55(1), (2)	(7.56)
44	54	(7.51)
45	41(2), (4)	(6.13)
46	71	(7.205)
47	72	(7.207)
48	47	(6.54)
49	36	(5.54)
	37	(5.62)
	38	(5.70)
50	49	(6.64)
51	48(2)	(6.58)
52	80	(9.91)
53	17	(4.61)
	30	(5.10)
	32(1)	(5.30)
	33	(5.38)
	34	(5.43)
	40(1)	(5.78)
54(1)	32(2)	(5.30)
	40(2), (3)	(5.78)
54(2)	34	(5.43)
55	27(2)	(4.112)
56	78	(9.53)
57	50	(6.78)
58	43	(6-24)
59	51	(7.8)
	70	(7.190)
60	81	(9.94)

Bill: Clause	Recommendation	Report: (Paragraph)
Schedule	9	(3.89)
	31	(5.14)
	36	(5.54)
	42(2)	(6.20)
	47(1)	(6.54)
	48(2)	(6.58)
	78	(9.53)

Appendix C

TABLE SHOWING EQUIVALENT PROVISIONS IN THE ADMINISTRATION OF JUSTICE ACT 1956, SECTION 47(2), THE DILIGENCE (SCOTLAND) BILL, CLAUSE 26(1), THE SUPREME COURT ACT 1981, SECTION 20 AND THE BRUSSELS ARREST CONVENTION 1952, ARTICLE 1

Administration of Justice Act 1956, Section 47(2)	*Diligence (Scotland) Bill, Clause 26 (1)*	*Supreme Court Act 1981, Section 20*	*Brussels Arrest Convention of 1952, Article I*
s47(2)(a) damage done by any ship.	cl 26(1)(a)	s20(2)(e)	art l(l)(a)
s47(2)(a) damage received by any ship.	cl 26(1)(a)	s20(2)(d)	None
s47(2)(b) loss of life or personal injury due to any defect in a ship, her apparel or equipment.	c!26(l)(b)	s20(2)(f)	art l(l)(b)
s47(2)(b) loss of life or personal injury due to the wrongful act, neglect or default of the owners, charterers etc.	cl 26(l)(c)	s20(2)(f)	art l(l)(b)
s47(2)(c) the Salvage Convention 1989 (as substituted by Merchant Shipping (Salvage and Pollution) Act 1994, Sch 2, para 4.)	cl 26(l)(d)	s20(2)(j)(i) (as substituted by Merchant Shipping (Salvage and Pollution) Act 1994, Sch 2, para 6.)	art l(l)(c)
s47(2)(ca) any contract for or in relation to salvage services (as substituted by Merchant Shipping (Salvage and Pollution) Act 1994, Sch 2, para 4.)	cl26(l)(e)	s20(2)(j)(ii) (as substituted by Merchant Shipping (Salvage and Pollution) Act 1994, Sch 2, para 6.)	artl(l)(c)

-Administration of Justice Act 1956, Section 47(2)	*Diligence (Scotland) Bill, Clause 26 (1)*	*Supreme Court Act 1981, Section 20*	*Brussels Arrest Convention of 1952, Article 1*
s47(2)(d) any agreement relating to the use or hire of any ship whether by charterparty or otherwise.	cl 26(l)(f)	s20(2)(h)	art l(l)(d)
s47(2)(e) any agreement relating to carriage of goods in any ship whether by charterparty or otherwise.	cl 26(l)(g)	s20(2)(h)	artl(l)(e)
s47(2)(f) loss of, or damage to, goods carried in any ship.	c!26(l)(h)	s20(2)(g)	aitl(lXf)
s47(2)(g) general average.	cl 26(l)(i)	s20(2)(q)	art l(l)(g)
s47(2)(h) any bottomry bond.	cl 26(1)0) (with the addition of "or contract of respondentia ")	s20(2)(r)	art l(l)(h)
s47 (2)(i) towage.	c!26(l)(k)	s20(2)(k)	art l(l)(i)
s47(2)0) pilotage.	cl 26(1)(1)	s20(2)(l)	art 1(1)0)
s47(2)(k) supply of goods or materials to a ship for her operation or maintenance.	cl 26(l)(m)	s20(2)(m)	artl(l)(k)
s47(2)0) construction, repair or equipment of any ship.	cl 26(l)(n)	s20(2)(n)	art 1(1)0)
s47(2)(m) liability for dock charges or dues.	cl26(l)(o)	s20(2)(n)	art 1(1)0)

Administration of Justice Act 1956, Section 47(2)	*Diligence (Scotland) Bill, Clause 26 (1)*	*Supreme Court Act 1981, Section 20*	*Brussels Arrest Convention of 1952, Article 1*
s47(2)(n) liability for payment of wages of a master or member of the crew of a ship.	cl 26(l)(p)	s20(2)(o)	art l(l)(m)
s47(2)(o) master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner.	cl 26(l)(q)	s20(2)(p)	-art l(l)(n)
s47(2)(p) dispute as to the ownership or right to possession of any ship or as to the ownership of any share in a ship.	cl 26(l)(t)	s20(2)(a)	art l(l)(o) disputes as to title to or ownership of any ship. (No reference to 'possession'.)
s47(2)(q) dispute between co-owners of any ship as to the ownership, possession, employment or earnings of that ship.	cl26(l)(s)	s20(2)(b)	art l(l)(p)
s47(2)(r) mortgage or hypothecation of any ship or any share in a ship.	cl 26(l)(t)	s20(2)(c)	art l(l)(q)
s47(2)(s) any forfeiture or condemnation of any ship, or of goods which are being, or have been, carried, or have been attempted to be carried, in any ship, or for the restoration of a ship or any such goods after seizure.	cl 26(l)(u)	s20(2)(s)	None

Appendix D

List of those who submitted written comments on the principal discussion and consultation papers referred to in this Report

Association of Scottish Chambers of Commerce

Auditor of Court of Session

Building Societies Association

Commissioners of Customs and Excise (VAT Control Division C)

Committee of Scottish Clearing Bankers

Mr R C Connal, Messrs McGrigor Donald, Glasgow

Court of Session Judges

Mr R E M Davidson, Messrs Dorman Jeffrey & Co, Glasgow

Faculty of Advocates

Mr T Gardiner, Messrs McClure Naismith Anderson and Gardiner, Glasgow

Professor W M Gordon, Faculty of Law, University of Glasgow

Professor G L Gretton, Faculty of Law, University of Edinburgh

Mr IG Inglis, Messrs Maclay, Murray & Spens, Edinburgh

Mr G Jamieson, Messrs Walker Laird, Paisley

Joint Committee of Law Society of Scotland and Society of Messengers-at-Arms and Sheriff Officers

Law Society of Scotland (Law Reform Committee)

Mr N A Lightbody, Principal Solicitor (Corporate Services), Scottish Homes

Sheriff N McPartlin, Elgin

Mr A Mennie, Advocate

Principal Clerk of Session and Justiciary

Regional Sheriff Clerks

Mr T H Scott, Solicitor of Inland Revenue for Scotland (now retired)

Scottish Courts Administration

Sheriff Court Rules Council

Sheriffs' Association

Society of Sheriff Court Auditors

Printed in the UK for The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office
Dd 293531 CIO 3/98 J40990 CCN 003808