Scottish Law Commission

(SCOT. LAW COM. No. 95)

REPORT ON DILIGENCE AND DEBTOR PROTECTION

Volume One

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CHAPTER 5

POINDINGS AND WARRANT SALES

Section A. Introduction

5.1 In Chapter 2, we reached the firm conclusion that, subject to exemptions protecting the standard of living of debtors and their dependants, the compulsory attachment and sale of a debtor's moveable goods, or the threat of sale, is an essential method of satisfying debts and inducing debtors to honour their obligations. We therefore recommended that poindings and warrant sales should not be abolished.[1] To safeguard debtors from undue hardship, however, we also recommended in Chapters 3 and 4 the introduction of new procedures which would give debtors an extension of time to pay their debts free from the threat of diligence.

5.2 These procedures will, however, require the debtor to take the initiative by lodging an application in court. There will be cases in which the debtor does not take this initiative. In other cases, the debtor will default on the instalment or other payments which have been ordered to be paid and diligence will become necessary. The reforms which we propose in this Chapter are designed to complement the safeguards already recommended by making the operation of the diligence of poinding and warrant sale more humane to debtors and to protect them from undue hardship, in cases where, unfortunately, execution of that diligence becomes necessary.

5.3 The procedure in the diligence forms a logical progression which can be prosecuted through its stages quickly or slowly, at the creditor's option, depending on whether it is wished primarily to satisfy the debt out of the proceeds of sale or (as is more usual) to use the threat of stages of the diligence to induce settlement. The diligence has been criticised as cumbersome, but the so-called cumbersome characteristics of the diligence consist entirely of procedures designed to safeguard debtors, creditors or third parties. Some complexity is essential if adequate provision is to be made for such safeguards. Another criticism of the diligence is its expense which can be disproportionately high where the debt is small. On consultation one body suggested that poinding should be incompetent if the likely expenses of poinding and sale exceeded the debt sought to be enforced. We would reject this suggestion because it could lead to small or even moderate sized debts becoming unenforceable against debtors who had no arrestable earnings or assets.

5.4 In this Chapter we discuss the main stages of the procedure in their sequence:[2] the service on the debtor of a charge requiring payment of the debt within a specified period; the poinding (attachment, inventorying and valuation) of the debtor's goods; the application to the court for warrant of sale, and the intimation of the warrant to the debtor; the sale of the poinded goods (or delivery of unsold goods to the creditor); and finally the sheriff's approval of the report of sale. Third party claims in respect of poinded goods can be

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[1] See paras. 2.142 to 2.153.

[2] The warrant to charge and poind is dealt with in Chapter 9.

made at any stage after poinding and are discussed towards the end of this Chapter in Section E.

Section B. Charging the debtor to pay

5.5 The charge is a formal demand in writing served by an officer of the court on the debtor demanding payment of the sums due under the decree within a specified time, in default of which the debtor's goods may be poinded.[1] A charge is an essential preliminary to the diligence of poinding and sale rather than a stage of the diligence. In Consultative Memorandum No. 48 we sought views on whether charges should be retained as an essential preliminary, and if retained what improvements should be made in the form, manner of service and effect of charges. This Section sets out our recommendations on these topics.

Retention of charges before poinding

5.6 The service of a charge has been a necessary preliminary to poinding since 1669[2] except that, under the (now abolished) small debt procedure, a charge was unnecessary if the defender had been personally present in court when decree was granted.[3] The McKechnie Report recommended that, even in these circumstances, a charge should be given since it was doubted whether most debtors would realise the consequences of the grant of decree.[4] Our provisional conclusion in Consultative Memorandum No. 48[5] that charges should be retained as a necessary preliminary to poinding was approved by all those who commented and we would adhere to it.

5.7 The first argument in favour of dispensing with charges is that they are alleged to be unnecessary. Debtors (it is said) should be aware that decree has been granted and that one of the consequences of continued failure to pay will be poinding and sale of their goods. In summary warrant poinding procedure charges are not given and consultation revealed no pressure for their introduction. The other argument is that dispensing with charges would reduce the expense of the diligence. The expense of a charge where the officer has to travel for three miles to serve it ranges from £5.61 to £10.27 depending on the type of decree and whether a solicitor was involved in instructing the officer.[6] In rural areas the expense of a charge can easily exceed £20 due to large mileage charges. We do not find these arguments persuasive.

[1]In this Chapter charge means a charge for payment of money. Other types of charge, such as a charge to deliver goods or remove from a house also exist.

[2]Originally poinding was competent without the need for a prior charge. By custom, the debtor was given 15 days in which to implement the decree (Graham Stewart, p. 337). The Poinding Act 1669, which is still in force, provides that poinders for "personal" debts (debts not secured over heritable property) must first charge and wait for the days of charge to expire before poinding under pain of punishment for spuilzie (illegal interference with moveable goods) and nullity of their diligence. The Debtors (Scotland) Act 1838, s. 4 further provides that "on the expiration of the days of charge it shall be lawful by virtue of such extract [decree of the Court of Session] to poind the moveable effects of the debtor in payment of the sums of money therein mentioned". Similar provision for sheriff court extracts is made by s. 9 of the 1838 Act.

[3]Small Debt (Scotland) Act 1837, s. 13 (now repealed).

[4]Para. 157. In consonance with this recommendation, in summary causes a charge must be given whether or not the defender was present; Summary Cause Rules, rule 91(1); Sheriff Courts (Scotland) Extracts Act 1892, s. 7(1).

[5]Proposition 6 (para. 3.11).

[6]Act of Sederunt (Fees of Messengers-at-Arms) 1978, Act of Sederunt (Fees of Sheriff Officers) 1978 and Act of Sederunt (Alteration of Sheriff Court Fees) 1971, all as amended.

The Edinburgh University Debtors Survey shows[1] that the charge plays an important role in informing the debtor of the existence of the decree and the creditor's intention to enforce it. The comparison with summary warrant diligence is not entirely apt because that diligence is regarded as summary in character and because the creditors concerned (local authorities and central government departments) have procedures designed to ensure that debtors are aware of their debts and liability to diligence in the event of non-payment.

5.8 In our view charges ought to be retained for the following reasons. First, settlement of the debt (or abandonment by the creditor) is often made after a charge has been served.[2] Service of a charge warns the debtor that continued failure to pay may lead to diligence[3] and is a valuable means of eliciting payment in full or by instalments and so preventing further diligence. Secondly, in Chapters 3 and 4 of this report we recommended that a debtor should be entitled to apply for a time to pay order or a debt arrangement scheme only after a charge has been served or diligence has commenced. We considered it to be important that all debtors should be made aware of their right to apply for these safeguards; the easiest way to achieve this is to include such information with a charge, since no document intimating the granting of the decree is normally sent to debtors. Thirdly, there might be resentment if officers were to turn up at debtors' houses to poind without a prior warning that the enforcement process had reached that stage. Even in summary warrant poindings where a charge is not necessary, the general practice of officers is to issue informal warnings.

5.9 We **recommend:**

The service of a charge requiring the debtor to pay the debt should continue to be a necessary preliminary to the execution of a poinding to enforce that debt.

(Recommendation 5.1; clause 115(1).)

Standardising the days of charge

5.10 A charge served on the debtor specifies the number of days within which payment is required. On the expiry of this period (called "the days of charge") without payment, the creditor may proceed to poind. As Table 5A shows, the days of charge vary according to the type of decree on which the charge proceeds and the place where the charge is served.[4]

5.11 In Consultative Memorandum No. 48 we suggested that the days of charge should be 14 but that the courts should have power to shorten or lengthen this period.[5] Commentators were generally in favour of uniformity although one body suggested a longer period where the debtor is outwith Europe. We agree with the principle behind this modification. While 14 days are sufficient for debtors within the United Kingdom, others should have 28 days after service of the charge in which to make payment. In view of this extended period for debtors abroad we think that empowering the courts to

[1]Para. 5.7.

[2]See C.R.U. Diligence Survey (para. 3.5) which estimates that in 1978 there were 46,000 charges and only 20,000 poindings.

[3]Poinding and under Recommendation 6.7 (para. 6.59) an earnings arrestment.

[4]Table 5A does not include charges on decrees of ejection, removing, recovery of heritable property, or delivery of goods or children.

[5]Proposition 11 (para. 3.23). This had also been recommended by the McKechnie Report, para. 156.

TABLE 5A: PERIODS PRESCRIBED FOR THE DAYS OF CHARGE

Decree, etc.	Debtor	Days	Authority
Court of Session decrees	(1) Within Scotland	15	Codifying Act of Sederunt 1913, Book VIII, Schedule A.
	(2) Furth of Scotland	14	Court of Session Act 1868 section 14
Extracts of deeds registered for execution in books of court or Sasines Register	(1) Within Scotland	6	Titles to Land Consolidation (Scotland) Act 1868 section 138; Land Registers (Scotland) Act 1868, section 12
	(2) Furth of Scotland	14	Court of Session Act 1868 section 14
Decrees in Exchequer causes in favour of the Crown	(1) Within Scotland	6	Exchequer Court (Scotland) Act 1856 section 28 and Schedule G
	(2) Furth of Scotland	6	Exchequer Court (Scotland) Act 1856 section 28 and Schedule G
Decrees of Teind Court	(1) Within Scotland	10	Act of Sederunt 17 July, 1925
	(2) Furth of Scotland	60	Act of Sederunt 17 July, 1925
Decrees of sheriff courts (ordinary actions)	(1) Within Scotland	14	Ordinary Cause Rules, rule 13
	(2) Furth of Scotland	14	Ordinary Cause Rules, rule 13
Decrees of sheriff courts (summary causes)	(1) Within Scotland	14	Summary Cause Rules, rule 91(1)
	(2) Furth of Scotland	14	Summary Cause Rules, rule 91(1)
Registered protests of bills of exchange	(1) Within Scotland	6	Bills of Exchange Act 1681 Inland Bills Act 1696
	(2) Furth of Scotland	14	Court of Session Act 1868, section 14
Extract certificates registered under Judgments Extension Act 1868	Within Scotland	15	Codifying Act of Sederunt 1913 B.VI.5
Extract certificates registered under Inferior Courts Judgments Extension Act 1882	Within the Sheriffdom	15	Codifying Act of Sederunt 1913, L.IX.2
Foreign judgments or awards registered under the Administration of Justice Act 1920, Foreign Judgments (Reciprocal Enforcement) Act 1933, or Arbitration International Investment Disputes Act 1966	Within Scotland	15 (or period fixed by Court)	R.C. 248(*f*), 249(11), 249A(7)(3)
Decrees of the Land Court	(1) Within Scotland	7	Crofting Reform (Scotland) Act 1976, section 17(1)
	(2) Furth of Scotland	14	
Orders for recovery of criminal fines and compensation orders	Within or furth of Scotland	14	Criminal Procedure (Scotland) Act 1975, section 411 (as amended).

lengthen or shorten the days of charge on cause shown is an unnecessary refinement.

5.12 We **recommend:**

The present multiplicity of different periods prescribed for the days of charge in a charge for payment should be replaced by a single period. This period should be fixed at 14 days where service is to be made within the United Kingdom and otherwise at 28 days.
(Recommendation 5.2; clause 115(2).)

Postal or hand service of charges?

5.13 Generally a charge must be served by an officer of court on the debtor personally or by one of the substitute modes of service requiring the officer to visit the debtor's dwelling or place of business.[1] These modes of service are conveniently described as "hand service". Hand service requires the presence of a witness who is usually a member of the officer's staff. A charge may be served by post only if the decree on which the charge proceeds is a summary cause decree, and the place of service of the charge is more than 12 miles from the court which granted the decree or is in any of the islands of Scotland or is in any sheriffdom in which there is no resident sheriff officer.[2] The McKechnie and Grant Reports[3] but not the First Ashmore Report[4] favoured the introduction of postal service of charges for all decrees.

5.14 On consultation, our proposal[5] to introduce postal charges for all decrees provoked a mixed reaction. Several commentators argued that charges would lose many of their existing advantages if they were served by post. First, a visit to serve a charge may enable the officer to make an assessment of the debtor's means and to report to the creditor on the likelihood of recovery, thereby preventing unproductive diligence. Second, an officer making contact with the debtor or a member of the debtor's family may be able to arrange an instalment settlement, or to explain the serious consequences of continued non-payment. Third, officers serving charges by hand can sometimes elicit information on the debtor's employment which enable an arrestment of earnings to be used in lieu of a poinding.[6] Fourth, there is evidence that in up to 10% of cases where documents are served by recorded delivery post in connection with civil proceedings, the documents may not reach the defender or debtor[7] and it has been argued that hand service by an officer is much more reliable.

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[1] In the case of summary cause decrees, the charge must normally be served personally on the defender or left in the hands of an inmate at the debtor's dwellingplace or of an employee at the debtor's place of business. If unsuccessful in effecting service by these modes, the officer must deposit the charge in the defender's dwellingplace or place of business through the letter box or by other lawful means or affix it to the door, and in that event send a copy of the charge by ordinary post to the address where the debtor is most likely to be found: see Summary Cause Rules, rule 6. In diligence following Court of Session and sheriff court ordinary action decrees, the normal modes of service of the charge are similar: see Citation Act 1540.

[2] Execution of Diligence (Scotland) Act 1926, s. 2(1)(*b*) as amended by the Sheriff Courts (Scotland) Act 1971, Sched. 1, para. 1. All sheriffdoms have a resident sheriff officer, and we think that the provision should refer to sheriff court districts, since many sheriffdoms are very extensive. See Sched. 7, paras. 12 and 13 of the Bill annexed to this report.

[3] See respectively para. 149 and para. 644.

[4] Pp. 12–13.

[5] Consultative Memorandum No. 48, Proposition 6 (para. 3.11).

[6] We recommend that a charge should be an essential preliminary step to an arrestment of earnings, see Recommendation 6.7 (para. 6.59).

[7] O.P.C.S. Defenders Survey, para. 5.1; Edinburgh University Debtors Survey, paras. 5.1. and 7.4.

5.15 Other commentators argued that the benefits of postal service would outweigh those of hand service. The first and primary advantage of postal service would be the reduction in expense. The current fee for service of a summary cause charge by post is only £2.68 as compared with £5.61 (three miles travelling) and £11.50 (10 miles travelling) for hand service.[1] It was represented to us that this is uneconomic and has been accepted in the past only because there have been so few postal charges. Nevertheless, the fee for service of a charge by post should be appreciably less than the fee for hand service. Second, while we do not have statistics distinguishing between the numbers of "keyhole service" and "personal service" cases,[2] nevertheless, there is reason to suppose that in the majority of cases where a charge is served by hand, the officer is unable to make contact with the debtor though contact may be made with the debtor's spouse from whom the officer may gain information on the potential for recovery or the debtor's employment. Where the officer is unable to hand the charge to the debtor's spouse or other person on the premises, and puts the charge in the letter box, it may be doubted whether this is any more effective than postal service, though it was represented to us that knowledge of a visit by a sheriff officer rather than the postman has more effect in inducing settlements. Third, while personal contact between officer and debtor is far more likely to elicit instalment payments than information in writing explaining the serious consequences of continued default, nevertheless, such information could be given in the charge itself or an accompanying document which might have an effect in a proportion of cases.

5.16 The majority of commentators favoured retention of hand service. Under the present law, where the vast majority of charges are served by hand, far fewer poindings are executed (20,000 in 1978) than charges served (46,000 in that year).[3] Substituting postal service for hand service would, in our view, lead to a substantial increase in the number of poindings because lack of contact between officer and debtor at the charge stage would decrease the opportunity and likelihood of arrangements being made to pay the debt then.

5.17 We **recommend:**

No change should be made in the present law, whereby, with certain statutory exceptions in the case of charges proceeding on summary cause decrees, charges for payment must be served by hand by an officer of court. (Recommendation 5.3.)

Need for witnesses?

5.18 The service of a charge by an officer of court requires the attendance of a witness[4] who signs the certificate of execution of the charge along with

[1]Act of Sederunt (Fees of Messengers-at-Arms) 1978 and Act of Sederunt (Fees of Sheriff Officers) 1978 as amended.

[2]The Edinburgh University Debtors Survey (para. 7.7) reveals that out of 73 poinding cases examined in which charges were (or ought to have been) served, 9 charges were executed by keyhole service.

[3]C.R.U. Diligence Survey, para. 3.5.

[4]Debtors (Scotland) Act 1838, s. 32; Citations (Scotland) Act 1846.

the officer.[1] The only exception to this rule is where a charge proceeding on a summary cause decree is served postally.[2] In Consultative Memorandum No. 48, we asked whether, to reduce expense, the requirement of a witness should be abolished.[3] Of those who commented on this question, most thought that abolition was desirable for summary cause charges, but conflicting opinions were expressed for charges on Court of Session decrees and sheriff court ordinary action decrees. However, the Society of Messengers-at-Arms and Sheriff Officers and others with practical experience of the problems involved were opposed to the abolition of witnesses. The principal argument in favour of abolition is the saving of expense, but the proportion of the total expense of serving a charge attributable to the presence of a witness is one-third or less.[4] Moreover, a witness is necessary for citation and many other diligences so that an officer will invariably be accompanied on business by a witness. Abolishing the requirement of a witness to the service of charges would probably lead to increases in the cost of witnesses for citations and other diligences.

5.19 It was urged on us that charges often achieve their effects in eliciting payment and preventing further diligence only because the officer can make personal contact with the debtor or a member of the debtor's family, advise of the consequences of non-payment, and evaluate whether poinding would be worthwhile. To do this properly an officer must be able to enter the debtor's house; in some areas an unaccompanied officer would not be able to enter in safety. Also the witness provides corroboration of the officer's actings and affords protection to the officer against unfounded averments of misconduct or failure to serve the charge correctly. Expiry without payment of a validly served charge makes the debtor notour bankrupt[5] or apparently insolvent[6] and may lead to the debtor's sequestration or liquidation. The validity or otherwise of a charge is therefore important and the requirement of a witness to the service increases the burden of proof placed on a challenger.

5.20 We **recommend:**

> It should continue to be necessary for an officer of court serving a charge for payment otherwise than by post to be accompanied by a witness.
> (Recommendation 5.4.)

Duration of warrant to charge in decree

5.21 The period after decree within which the creditor may serve a charge is determined by the law of prescription of obligations, which in the case of an obligation to obey a decree of court is 20 years.[7] A charge may, however, be served more than 20 years after the date of the decree if the creditor

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[1]Debtors (Scotland) Act 1838, Sched. 2; R.C. Appendix, Form 44.

[2]Execution of Diligence (Scotland) Act 1926, s. 2(2)(*e*) and Summary Cause Rules, rule 6(3). No witnesses were required under the former small debt procedure although it was normal practice for officers to take witnesses with them.

[3]Proposition 7 (para. 3.15).

[4]For example out of a fee of £7.20 for a summary cause charge instructed by a solicitor and involving three miles travelling, the witness's fee amounts to £1.40.

[5]Bankruptcy (Scotland) Act 1913, s. 5.

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

[7]Prescription and Limitation (Scotland) Act 1973, s. 7 and Sched. 1, para. 2(*a*).

enforces the debt by other diligence[1] (such as an arrestment) or the debtor acknowledges the debt[2] by making payments to account for example. The obligation is not extinguished by prescription unless there has been no enforcement or acknowledgement for a continuous period of 20 years; if the period is interrupted a new prescriptive period begins.

5.22 In Consultative Memorandum No. 48[3] we invited views on a tentative proposal that the creditor should be required to apply to the court for leave to serve a charge where more than a prescribed period (say two years) had elapsed after obtaining the decree. Such a proposal would reduce the threat of enforcement hanging over a debtor's head for 20 years or more. Many of those commenting argued strongly against the proposal. First, short limitation periods would benefit dishonest debtors who managed to evade their creditors. Secondly, a creditor may have a sound reason for not enforcing the decree within the prescribed period. Our consultation did not elicit information on cases in which debtors were prejudiced by delay in enforcement and in the absence of any proven need for leave to charge we have decided against the introduction of such a requirement.

5.23 We **recommend:**

> It is unnecessary to introduce a new rule requiring creditors to obtain leave of the court to serve a charge for payment after a prescribed period has elapsed since the granting of the decree.
> (Recommendation 5.5.)

Duration of a charge and second charges

5.24 Once the days of charge have expired without payment there is no fixed period after which the creditor loses the right to poind in the case of Court of Session and sheriff court ordinary cause decrees. Poindings executed for up to four years after the expiry of the days of charge have been held to be valid.[4] In summary causes, however, an expired charge remains a valid basis for poinding for one year only from the date of the charge.[5]

5.25 In summary causes the right to poind may be reconstituted by service of a new charge.[6] Despite doubts expressed[7] there is nothing to stop a creditor abandoning an existing charge proceeding on a decree other than a summary cause decree and serving a new charge.[8] This seems a necessary rule since a creditor can only petition for sequestration within a period of four months after the constitution of notour bankruptcy[9] or apparent insolvency[10] by expiry of a charge without payment.

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[1]*Ibid.*, s. 7(1)(*a*) as read with s. 9(1).
[2]*Ibid.*, s. 7(1)(*b*) as read with s. 10(1)(*a*).
[3]Proposition 14 (para. 3.32).
[4]See Graham Stewart, p. 338.
[5]Summary Cause Rules, rule 91(2).
[6]Summary Cause Rules, rule 91(2).
[7]*New Day Furnishing Stores Ltd* v. *Curran* 1974 S.L.T. (Sh.Ct.) 20 at p. 21.
[8]*Clark* v. *Hamilton & Lee* (1875) 3 R. 166. It is however essential that proceedings for the suspension of the first charge are not in dependence, except in relation to expenses.
[9]Bankruptcy (Scotland) Act 1913, s. 13.
[10]Bankruptcy (Scotland) Bill 1984, clauses 7 and 8.

5.26 For reasons similar to those set out in paragraph 5.22 above we do not favour any rule whereby leave of the court would be required for poinding after expiry of a prescribed period from the date of service of a charge. We think, however, that the present different time limits on the period between charge and poinding depending on the type of decree (one year for summary cause decrees, no fixed periods but up to three to four years for other decrees) make for unnecessary complication. One year seems too short given that an informal instalment arrangement entered into after the service of a charge may break down only after one year. We suggest a uniform period of two years.

5.27 In Consultative Memorandum No. 48, we sought views on a suggestion that, where a charge has been served and not followed by poinding within a prescribed period (of say three months) then the creditor should notify the debtor by letter of the intention to proceed to a poinding within a specified time.[1] The notification would be made by the creditor not the officer, and the expenses would not be chargeable to the debtor. This proposal elicited a mixed response. Some commentators agreed with it. One commentator agreed in principle but thought the period should be six months. Some commentators thought that a further warning would jeopardise the creditor's position by encouraging the debtor to remove assets, especially in commercial cases. Again, we do not think that the case for this proposal has been made.[2]

5.28 On consultation there was general agreement that no change should be made in the present rule whereby a charge may be withdrawn and a new charge served by the same creditor under the same warrant to charge, and that service of a new charge should not enable a creditor to evade the restrictions (which we discuss below) on repeated poindings and repeated warrants of sale by repeating the whole process on the basis of a new charge.[3] It has however come to our notice that some creditors who serve a second charge on a debtor claim the expenses of the second charge from the debtor. The creditor's entitlement to these expenses is not specifically regulated. We think that such expenses should not be recoverable from the debtor, otherwise subsequent charges could be served oppressively.

5.29 We **recommend:**

To simplify the law, a poinding should be incompetent if executed more than two years after the date of service of a charge. However, it should continue to be competent for a creditor to reconstitute the right to poind by serving a new charge for payment. The expenses of a second or subsequent charge to implement a decree should not be recoverable from the debtor. (Recommendation 5.6; clause 115(4) and (5).)

Modernisation of form of charges

5.30 There is no prescribed statutory form of charge;[4] the styles currently in use refer to the decree and specify what sums are to be paid, by whom to

[1]Proposition 13 (para. 3.32).

[2]We revert below to the question of prior intimation of poinding to avoid forcible entry: see para. 5.79.

[3]Consultative Memorandum No. 48, Proposition 14 (para. 3.32).

[4]*Williamson* v. *McLachlan* (1866) 4 M. 1091 per L. J. C. Inglis at p. 1095.

whom. The McKechnie Report recommended that the charge be accompanied by an explanatory note setting out what the debtor is required to do and the effect of non-payment.[1] This recommendation is supported by the findings of the Edinburgh University Debtors Survey[2] and by comments which we received on consultation to the effect that many debtors simply do not understand the technical words and phrases used in the forms they receive and are confused as to their rights and obligations. In our view it is essential that a charge should be in a prescribed form and so drafted that it can be readily understood by debtors.

5.31 Elsewhere in this report[3] we have recommended that a charge should be used to alert debtors as to their rights to apply for a time to pay order in respect of the debt for which the charge is served or a debt arrangement scheme in respect of that and other debts. The Scottish Association of Citizens Advice Bureaux suggested that, like a summary cause summons,[4] a charge should advise the debtor to consult a Citizens Advice Bureau or other local advice centre if help is needed. We think this is a good idea as prompt action taken at the stage of a charge may prevent further steps being taken in the diligence.

5.32 We **recommend:**

(1) An act of sederunt should prescribe the form of the charge and explanatory notes to be served on the debtor along with a charge, with a view to making the charge more intelligible to debtors.

(2) The charge should specify the decree on which it proceeds and the full amount of the debt (including the expenses of serving the charge) and should demand payment within the days of charge to the creditor or a specified agent.

(3) The charge and other forms served on the debtor in connection with the diligence should indicate that the debtor should consider consulting a solicitor, Citizens Advice Bureau or other local advice centre if advice or assistance is required.

(4) The explanatory note should inform the debtor of the consequences of non-payment, in particular liability to poinding and becoming notour bankrupt or apparently insolvent (which entitles a creditor to petition for the debtor's sequestration), and of the applications that the debtor can make to the court.
(Recommendation 5.7.)

Serving a charge on firms

5.33 In the Court of Session, a firm with a social name (such as "Smith, Jones and Brown") is charged by service at the place of business. But if the firm has a descriptive name ("Modern Builders" for example) then, in addition to service on the firm at the place of business, the officer must charge three partners (if there are as many) personally or at their dwellingplaces.[5] In the

[1] Para. 155.
[2] Para. 7.6.
[3] Chapters 3 and 4.
[4] Summary Cause Rules, Form Q.
[5] Graham Stewart, p. 325.

sheriff court, it is competent to charge a firm (whether it has a descriptive or social name) at the principal place of business without service on the partners.[1]

5.34 On consultation there was agreement with our suggestion[2] that the sheriff court rule was to be preferred. However, we have come to the view that the method of charging a firm cannot be considered in isolation from its capacity to sue and be sued in the Court of Session, the form of decrees against a firm, and the manner in which it is cited. We therefore make no recommendation on this point.

Edictal service of charges

5.35 Edictal service is used where the debtor cannot be found or has no domicile of citation within Scotland. Edictal service of charges on Court of Session decrees is effected by delivering the charge to the Extractor of the Court of Session.[3] In Consultative Memorandum No. 48[4] we expressed doubts as to whether edictal service by itself is effective to bring the charge to the notice of the debtor at all, let alone within the days of charge. The rules of the Court of Session already recognise the inadequacy of edictal service where a summons is concerned, since a copy must also be posted to a defender who has a known residence or place of business furth of Scotland or to his or her Scottish solicitor (if any).[5] We proposed that a similar rule should apply to edictal charges,[6] and all those who commented agreed.

5.36 In Consultative Memorandum No. 48 we suggested similar improvements in edictal service of charges proceeding on sheriff court ordinary cause decrees.[7] Since then edictal service has been abolished for such charges and replaced with service by means of registered or recorded delivery letter.[8] But section 7(6) of the Sheriff Courts (Scotland) Extracts Act 1892 authorising edictal charges remains unrepealed and we take the opportunity of including such a repeal in our draft Bill.[9] In these circumstances we think serious consideration should be given to the abolition of edictal charges on Court of Session decrees. But if such charges are to be retained, we recommend they should be restricted to cases where the debtor has a known residence or place of business furth of the United Kingdom or the debtor's whereabouts are unknown. Where the debtor has a known residence or place of business furth of Scotland but within the United Kingdom the charge should be served by post instead of edictally. For debtors furth of the United Kingdom the edictal charge should be supplemented by posting a copy of the charge to the debtor or his or her Scottish solicitor (if any).

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[1]Ordinary Cause Rules, rule 14(1). This rule is applied to summary causes by Act of Sederunt (Summary Cause Rules, Sheriff Court) 1976, para. 3(2).
[2]Consultative Memorandum No. 48, Proposition 9 (para. 3.18).
[3]Court of Session Act 1850, s. 22. The keeper of edictal citations is now the Extractor of the Court of Session.
[4]Para. 3.17.
[5]R.C. 75(*c*).
[6]Proposition 8 (para. 3.17).
[7]Proposition 8 (para. 3.17).
[8]Ordinary Cause Rules, rule 12.
[9]Sched. 9.

5.37 We recommend above[1] that the days of charge should be standardised at 14 if the debtor is within the United Kingdom and 28 otherwise. For all edictal charges the days of charge should be 28 since if the debtor's whereabouts are unknown the longer period is more appropriate.

5.38 We **recommend:**

If edictal charges on Court of Session decrees are to be retained, an act of sederunt should be made along the following lines:

(1) It should cease to be competent to charge edictally a debtor with a known residence or place of business furth of Scotland but within the United Kingdom. Such a debtor should be charged postally, the days of charge being 14.

(2) A charge should be served edictally where the debtor's whereabouts are unknown or where the debtor has a known residence or place of business furth of the United Kingdom. In the latter case a copy of the charge should be sent by post to the debtor or his or her Scottish solicitor (if any). The days of charge of an edictal charge should be 28 days.

(Recommendation 5.8.)

Section C. Poinding the debtor's goods

5.39 After the charge to pay the debt has expired without payment the creditor may proceed to poind the debtor's goods. The poinding is carried out by an officer of court who goes to the premises where the debtor's goods are situated and inventories and values them. The poinding brings the goods within the control and protection of the court until they are put up for sale and the debtor is prohibited from disposing of them voluntarily. The poinding creditor has the right to satisfy the debt out of the proceeds of sale of the poinded goods, and poinding also creates a preference over other creditors.[2]

Exemptions from poinding for protection of debtor

5.40 In Chapter 2 we recommended the retention of poinding as a method of debt enforcement. Given that a debtor's goods should in principle be capable of being sold to meet debts, the question becomes what exemptions should be allowed. If too many goods are exempt poinding becomes ineffective as a method of enforcing payment of debts; while if too few goods are exempt debtors are forced to live at unacceptably low standards. In Consultative Memorandum No. 48 we considered several possible approaches to giving exemptions,[3] viz:

(1) a list of goods could be prescribed that would always be exempt;

(2) a specified class or category of goods could be prescribed that would always be exempt;

[1]Recommendation 5.2 (para. 5.12).

[2]A poinding creditor's preference is cut down by the debtor's notour bankruptcy or apparent insolvency, sequestration, liquidation, or, in the case of a company, by the appointment of a receiver. The preference may also be defeated if another poinding creditor sells the goods first even though that creditor's poinding was executed later—see Graham Stewart, pp. 364–7.

[3]Paras. 4.18 to 4.22.

(3) a list of goods or a class of goods could be prescribed as exempt subject to:

   (*a*) a monetary ceiling on the value of the goods; or

   (*b*) a condition that the goods must be necessary or reasonably required for debtors and their dependants.

In general Scots law follows the approach in (3)(*b*) above in that certain classes of goods are exempt in so far as they are reasonably necessary for debtors and their families.

5.41 The first approach has some advantages in that it is easily understood and applied, no subjective judgment of need arises, and it is unaffected by changes in the value of money. But the main disadvantage is that the list does not distinguish between valuable and cheap specimens of prescribed goods and debtors may be tempted to use the exemption to evade liability by converting their money into exempt goods. For example if a table and chairs were unconditionally exempt a valuable antique dining table and matching set of chairs would be exempt just as any others.

5.42 On consultation there was little criticism of the existing Scottish approach to exemption; only one commentator suggested that goods to a prescribed value should be exempt. We would reject this as a general approach because debtors' circumstances vary, so that what may be too generous for a single man may not be sufficient for a married man with a wife and children to support. Moreover, in view of the difficulty experienced by officers of court in valuing poinded goods and the unease felt by many debtors at the correctness of such valuations, it would be unwise to make exemptions generally depend on an officer's valuation. Finally an exemption based on a prescribed monetary value tends to become out-of-date due to changes in the value of money, and even if the prescribed limit can be changed by subordinate legislation, Governments may be slow to make the necessary statutory instruments in view of their contentious nature.

5.43 In our opinion the existing approach to exemption—whereby certain classes of goods are exempt in so far as they are necessary for debtors and their dependants—is by and large correct. But reasonable necessity is too high a standard and we would substitute the concept of a reasonable requirement. We turn now to discuss the main classes of exempt goods—domestic furniture and plenishings, clothes and tools of trade.

Domestic furniture and plenishings

5.44 At present in terms of the Law Reform (Diligence) (Scotland) Act 1973 an article in a prescribed list of basic furniture and plenishings is not liable to be poinded if it is situated in a dwellinghouse in which the debtor is residing and it is "reasonably necessary to enable him and any person living in family with him in that dwellinghouse to continue to reside there without undue hardship".[1] The prescribed list at present consists of:[2]

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[1]S. 1(1).
[2]S. 1(2).

beds or bedding material;
chairs;
tables;
furniture or plenishings providing facilities for cooking, eating or storing food;
furniture or plenishings providing facilities for heating.

5.45 In Consultative Memorandum No. 48 we suggested[1] that the best approach to reform was to extend the prescribed list of articles in the 1973 Act so as to include items such as curtains, floor coverings and cleaning implements and we also invited views on what other household goods might be included. On consultation there was general agreement on the foregoing proposals. Nevertheless in view of the wide and continuing concern about poinding and sale of domestic furniture and plenishings we have reconsidered the matter.

5.46 In our reconsideration we have attempted to pay regard to several principles. First, poindings should remain an effective method of debt enforcement. Were the exemptions to become such that nothing poindable could be found in a normal debtor's home, creditors would be deprived of the only diligence which they can use to enforce debts in many cases, with undesirable consequences for creditors (particularly small tradesmen and businessmen), the credit system and the community as a whole. Secondly, selling normal household furniture and plenishings, whose replacement value is very much greater than its sale value, inflicts much greater hardship on the debtor than it confers benefit on the creditor. This harshness can only be partly mitigated by the courts having discretionary powers to refuse to grant warrant of sale where a sale would be unduly harsh[2] or where the proceeds of sale would not be likely to cover the expenses of sale.[3] Some harshness to the debtor is inevitable for a diligence which does not threaten to reduce the debtor's standard of furnishing will not usually operate as a spur to payment of the debt. Finally, any new system of exemptions for household goods must be workable; whatever the merits or demerits of the Law Reform (Diligence) (Scotland) Act 1973 the small number of appeals against poindings suggests that it operates successfully in practice.

5.47 Guided by these principles we recommend that a more extensive list of furniture and plenishings than that contained in the 1973 Act should be exempt. We would include as exempt curtains, carpets, washing machines, one refrigerator, a vacuum cleaner and lights and light fittings subject to their being reasonably required for the use of the debtor or dependants of the debtor. Also the test of "reasonably necessary" to avoid "undue hardship" is we think too severe; it could be argued that in a household with young children a washing machine, iron, refrigerator or vacuum cleaner were labour-saving luxuries and not reasonable necessities. On the other hand we think that for the sort of household postulated they would count as reasonable requirements. Legislation along these lines would, we think, be workable. A

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[1]Proposition 21 (para. 4.30).
[2]See Recommendation 5.30 (para. 5.146).
[3]*South of Scotland Electricity Board* v. *Carlyle* 1980 S.L.T. (Sh.Ct.) 98 and Recommendation 5.30.

prescribed list of exempt articles would give officers of court executing poindings sufficient guidance to deal with the majority of cases, for articles on the list found in normal debtors' dwellinghouses would more often than not meet the test of being reasonably required. On the other hand officers are being given a measure of discretion so that items in excess of the debtor's reasonable requirements or disproportionately valuable items would be liable to be poinded. In order to correct any deficiencies which may become apparent in practice after the legislation has been brought into force we suggest that, as under the existing law, changes may be made to the prescribed list of articles by statutory instrument made by the Secretary of State.[1]

5.48 We **recommend:**

(1) It should not be competent to poind articles in the debtor's dwellinghouse which are reasonably required for the use of the debtor or any member of the debtor's household, being articles of the following descriptions:

beds or bedding;
household linen;
chairs or settees;
tables;
food;
lights or light fittings;
heating appliances;
curtains;
floor coverings;
furniture, equipment or utensils used for cooking, storing or eating food;
one refrigerator;
articles used for cleaning the dwellinghouse or cleaning, mending or pressing clothes;
articles used for safety in the dwellinghouse (such as fireguards);
furniture used for storing clothes, bedding, household linen and articles used for cleaning the dwellinghouse.

(2) The above list of articles should be capable of being amended by regulations made by the Secretary of State by means of statutory instrument subject to negative resolution.
(Recommendation 5.9; clause 43(2), (3) and (7).)

Clothes and child care articles

5.49 At present clothes so far as not extravagant for the social position of the debtor are exempt from poinding.[2] No adverse comments on this exemption were made on consultation and we recommend its retention but with the criterion for exemption being reasonably required by the debtor instead of the somewhat antiquated phrase of not extravagant for the social position of the debtor.

5.50 On consultation two commentators suggested that children's toys and

[1]The Law Reform (Diligence) (Scotland) Act 1973, s. 1(3) empowers the Secretary of State to amend the list prescribed in s. 1(2) by statutory instrument. This power has not been exercised to date.

[2]Graham Stewart, p. 345.

child care articles should also be exempt. We agree provided the articles are for the use of the debtor's children. The Society of Messengers-at-Arms and Sheriff Officers commented that officers of court do not in practice poind such articles; nevertheless we think there is merit in making a specific statutory exemption for these articles.

5.51 We **recommend:**

There should be exempt from poinding:

(*a*) clothing reasonably required for the use of the debtor or any member of the debtor's household; and

(*b*) articles reasonably required for the care or upbringing of any child who is a member of the debtor's household; and

(*c*) toys for the use of any child who is a member of the debtor's household. (Recommendation 5.10; clause 43(1)(*a*), (*e*) and (*f*).)

Tools of trade and similar articles

5.52 Under the common law "tools of the trade" by which the debtor earns a livelihood are exempt.[1] Generally the exemption has been construed as mainly intended for low-income debtors whose "tools of trade" are of relatively small value. Thus the rule has been held to cover the books belonging to a language teacher[2] or the sewing machine of a dressmaker[3] but not the library of a solicitor[4] or the furniture of a hotel keeper.[5] In Consultative Memorandum No. 48 we proposed[6] that any new statutory exemption should be subject to a monetary limit because implements, tools or books used in connection with a trade, profession or business could be worth many thousands of pounds.

5.53 Our proposal evoked a mixed reaction on consultation. The Society of Messengers-at-Arms and Sheriff Officers observed that monetary ceilings would place officers in a difficult position since they would require to value and set aside exempt articles before valuing the articles to be poinded. They suggested that all tools of trade should be poindable and that the sheriff not the officer should decide on the scope of the exemption. The drawback to this suggestion is that unless the debtor applied to the sheriff no exemption for tools of trade would apply. Despite our general reservation about monetary limits expressed above[7] we think that exempting tools of trade up to an appropriate prescribed aggregate value is the simplest and most practicable way to ensure that the exemption is confined to articles of modest value.[8] Some commentators thought our proposed figure of £250 was too low and we would accept this. £500 seems more appropriate and this figure should be capable of being varied by subordinate legislation in line with changes in the value of money.

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[1]Graham Stewart, pp. 345–6 and cases cited there.
[2]*Gassiot* 12 Nov. 1814 F.C. per L. J. C. Boyle.
[3]*McMillan* v. *Barrie and Dick* (1890) 6 Sh.Ct.Reps. 103.
[4]*Pennell* v. *Elgin* 1926 S.C.9.
[5]*Gassiot, supra*, per Lord Robertson quoted with approval in *Pennell* v. *Elgin, supra*.
[6]Proposition 22 (para. 4.31).
[7]Para. 5.42.
[8]Tools of trade in excess of the monetary limit could be released from the poinding on grounds of undue harshness, see para. 5.63 below.

5.54 In Consultative Memorandum No. 48 we proposed[1] that medical aids and books and other educational aids needed for the debtor and members of the debtor's household should be exempt. All those who commented agreed. We would however suggest that a monetary limit of £500 be placed on educational or vocational training material since otherwise material needed by a trainee to a trade, business or profession would attract unlimited exemption, while once the person was trained the exemption for tools of trade would only cover the first £500 worth of articles. We would however place no such limit on medical aids (such as a wheel-chair) since if they are reasonably required by the debtor they should be exempt from poinding however much they are worth.

5.55 Under the Diligence Act 1503 goods used for ploughing cannot be poinded during the ploughing season if other goods are available for poinding. This exemption is similar to the exemption for tools of trade but differs in two respects. First, it does not exempt the goods from poinding permanently but merely delays it until the end of the ploughing season. Second, the exemption is conditional on the availability of other goods which may be poinded in lieu of plough goods. The old case-law defines the ploughing season as varying in different parts of the country according to custom, but "generally . . . may be considered to begin in October and end with June."[2]

5.56 In Consultative Memorandum No. 48, we invited views[3] on whether the exemption should be retained or abolished and, if retained, whether the 1503 Act should be replaced by a modern provision, which would allow a creditor to poind the goods in question, but would provide safeguards permitting the debtor to continue to use them for agricultural operations for a limited period. On consultation, the weight of opinion was marginally for abolishing the exemption. We do not think it possible to justify the retention of a special exemption for "plough goods", or a wider exemption for agricultural implements in modern conditions. We agree with the representation made to us that agriculture is an ordinary business and should be treated on the same footing as all other businesses; that is to say, the new statutory provision on "tools of trade" would apply to agricultural implements but no other or further exemption should apply.

5.57 We **recommend:**

(1) The common law exemption for tools of trade should be replaced by a statutory rule exempting implements, tools, books and other equipment reasonably required in the practice of the profession, trade or business of the debtor or any member of the debtor's household not exceeding in aggregate value £500 (or such other sum as may be prescribed).

(2) The Diligence Act 1503, which makes provision for the temporary and conditional exemption from poinding of "plough goods," should be repealed.

(3) Articles reasonably required for the educational or vocational training of the debtor or any member of the debtor's household should be

[1]Proposition 25 (para. 4.40).
[2]Graham Stewart, p. 345.
[3]Proposition 23 (para. 4.34).

exempt from poinding up to an aggregate value of £500 (or such other sum as may be prescribed).

(4) Medical aids or equipment reasonably required for the use of the debtor or a member of the debtor's household should be exempt from poinding. (Recommendation 5.11; clause 43(1)(*b*), (*c*) and (*d*) and (7) and Schedule 9.)

Residential mobile homes

5.58 A mobile home,[1] such as a residential caravan, is moveable property and hence can be poinded and sold within a matter of weeks or even days, whereas the appropriate form of diligence for attachment of ordinary homes, which are heritable property, is the archaic action of adjudication.[2] We suggested in Consultative Memorandum No. 48[3] that special provision for a sist of poinding was needed to allow the debtor time to obtain alternative accommodation. This is especially important since many mobile homes are situated in rural areas where alternative accommodation may be scarce.

5.59 On consultation, this suggestion was approved by almost all bodies who commented.[4] Some thought that a maximum period of six months should be prescribed for the duration of each period of the sist; others thought the duration should be at the discretion of the sheriff. We tend to agree with the latter view. One body suggested that, if possible, mobile homes should be treated in the same way as heritable property and subject to a process similar to but cheaper than inhibitions. Inhibitions, however, do not enable the inhibiting creditor to sell property but merely prevent the debtor from disposing of it. Moreover, we do not think that purchasers of mobile homes should be required to search the Register of Inhibitions. On the other hand, we do not think it realistic to treat residential mobile homes as being equivalent to other moveable goods. For this reason, we think that special provision is needed to safeguard the owners of such homes from their poinding and sale,[5] although we realise that our recommendation is only in the nature of an interim solution until the question of sale of heritable property for debt is discussed at a later stage of our work on diligence.

5.60 We **recommend:**

(1) Where a caravan or other moveable structure which is the only or principal residence of the debtor is poinded, the debtor should be entitled at any time before warrant of sale is granted to apply to the sheriff for a sist of further proceedings.

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[1]It has been estimated that approximately 3,800 households (some 10,000 people) were living in mobile homes on licensed sites in Scotland in 1975: see Scottish Office Central Research Unit Paper on Residential Mobile Homes in Scotland (1977).

[2]A decree of adjudication (which can only be granted by the Court of Session) entitles the creditor to enter into possession of the property and let it, but no sale can take place until at least 10 years elapse in order to give the debtor an opportunity to redeem on paying the debt.

[3]Proposition 24 (para. 4.35).

[4]One body thought that where the poinding was based on a decree for the price of the mobile home, the provision for a sist of diligence should not apply. We revert to provisions of this type at para. 5.73 below.

[5]See para. 5.242 below for protection against immediate sale by the trustee in sequestration.

(2) The period of the sist should be at the discretion of the sheriff and should be renewable on application for a further period or periods. (Recommendation 5.12; clause 51.)

Applications for release of goods from poinding

5.61 At present if goods which are exempt from poinding are in fact poinded the debtor's remedy, with one exception, is to apply for interdict, or suspension and interdict, of the diligence in relation to those goods. The exception relates to articles of domestic furniture and plenishings exempted by the Law Reform (Diligence) (Scotland) Act 1973.[1] Here a summary procedure (termed an appeal against poinding) using prescribed forms[2] is provided, the debtor being informed of the right to apply to the court by means of a prescribed form left for the debtor with the poinding schedule. If the sheriff is satisfied after hearing the officer, creditor or debtor (if they wish to be heard) that the articles which are the subject of the application are exempt an order is pronounced releasing them. In Consultative Memorandum No. 48 we suggested[3] that the 1973 Act procedure should be extended so as to provide a simple method of having all classes of exempt goods released from poinding. All those who commented agreed. The 1973 Act procedure has as far as we are aware worked well in practice and we would recommend its extension to other cases where the exemption is provided by law to protect debtors and their dependants.

5.62 An application for release under the 1973 Act must be made within seven days after the poinding; there is no express time limit for applications for interdict or suspension and interdict. We recognise that there is a need for finality at an early date as to what goods are included in a poinding, but think that the present seven day period is unduly short, and recommend a period of 14 days instead.

5.63 In Consultative Memorandum No. 48[4] we also sought views on whether other goods, such as personal possessions of sentimental value or small family heirlooms, should be exempt and if so how these goods might be defined. Consultation produced a variety of views ranging from rejection to support subject to a £50 limit on aggregate value. The Society of Messengers-at-Arms and Sheriff Officers suggested that the goods should be poinded and any exemption given by the sheriff. We would adopt this suggestion. Requiring officers of court to grant exemption would place an unfair burden on them in view of the wide variety of articles which could be claimed to be exempt. An advantage of conferring on the sheriff a discretionary power to order release of specific items is that the ground of exemption could be expressed in more general terms than sentimentality. The ground we recommend is that the poinding and sale of the article in question would be unduly harsh. We envisage the power to release might be used not only in relation to articles of little or no commercial value which are of sentimental value to the debtor—a family photograph album for example or small items of personal jewellery such as a wedding ring—but also in relation to articles essential to the debtor's

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[1]See para. 5.44 above.

[2]Act of Sederunt (Appeals against Poinding) 1973 (S.I. 1973/1860).

[3]Proposition 19 (para. 4.23).

[4]Proposition 25 (para. 4.40).

business which have been poinded although other non-essential articles were available. To secure finality we propose that an application for release should be permitted only within 14 days after the date of the poinding.

5.64 Standing the present prohibition on executing a second poinding on the same premises except in respect of goods which were not there at the time of the first poinding,[1] the creditor would be prejudiced if the sheriff released items from the poinding on the grounds of undue harshness. To rectify this we recommend that the sheriff should have power to authorise a poinding of further articles in the debtor's premises.

5.65 We **recommend:**

(1) The sheriff should have power, on application by the debtor made within 14 days after the date of the poinding, to order the release of specified articles from the poinding on the grounds that:

(*a*) the articles were exempt from poinding; or

(*b*) the continuation of the poinding of the articles or their sale would be unduly harsh.

(2) The sheriff on granting an order releasing articles on grounds of undue harshness should have power to authorise a poinding of further articles in the debtor's premises in order to restore the value of the creditor's poinding.

(Recommendation 5.13; clauses 43(4) and (5) and 48.)

Money and negotiable instruments

5.66 It is unclear whether coin and bank notes may be poinded,[2] but the invariable practice is to exclude such items from poindings.[3] In Consultative Memorandum No. 48 we proposed[4] that this practice should become a statutory rule. All those who commented with one exception agreed. The Society of Messengers-at-Arms and Sheriff Officers observed that they frequently came across cases where there were insufficient articles on the debtor's premises to cover the debt but that large sums of cash (in a shop till for example) were available.

5.67 Since money and negotiable instruments are taken by the trustee in a bankrupt's sequestration[5] they ought to be capable of being made available to creditors outwith sequestration. However, poinding and sale would be an inappropriate diligence to attach money since it could not be safely left in the debtor's possession and the later steps of the diligence—advertisement and sale of the poinded goods—are designed to realise property into money. Moreover, there might have to be exemptions to cover the cases where the cash represented social security payments (presently exempt from diligence) or the balance of the debtor's wages after deductions had been made under an arrestment of earnings. We think there is a case for a new diligence against

[1]See paras. 5.131 to 5.134 below.

[2]Graham Stewart, p. 340; Bell, *Commentaries* vol. ii, p. 60; *Alexander* v. *McLay* (1826) 4 S. 439.

[3]McKechnie Report, para. 50; the Report recommended that this practice should continue.

[4]Proposition 17 (para. 4.11).

[5]Bankruptcy (Scotland) Act 1913, s. 97; Bankruptcy (Scotland) Bill 1984, clause 30.

money and negotiable instruments, but we make no recommendations for change in this area of the law in this report.

Poinding by creditor of goods in own possession

5.68 At common law it is competent for a creditor to poind goods belonging to the debtor which are in the creditor's possession.[1] We proposed in Consultative Memorandum No. 48[2] that this should continue to be competent and our proposal was unanimously agreed on consultation. Unless the creditor can poind there would seem to be no other diligence to attach goods (machinery for example) left on the creditor's premises by the debtor since arrestment is confined to items in the hands of third parties. The procedure whereby the creditor poinds and sells the debtor's goods in the creditor's possession is exactly the same as if the goods had been in the debtor's possession, but we deal with the question of notification of the poinding to the debtor in our discussion of poinding procedure.[3]

5.69 **We recommend:**

> **The common law rule whereby a creditor in possession of goods of the debtor may poind those goods should be retained.**
> **(Recommendation 5.14.)**

Poinding by seller

5.70 We turn now to deal with the situation where the creditor has sold goods to the debtor but has retained possession of them. Here the creditor may, if the title of the goods has passed to the debtor, poind them by virtue of the common law rule referred to in paragraph 5.68 and so obtain security for the unpaid price (or any other debt) due by the debtor. In addition, section 40 of the Sale of Goods Act 1979 provides:

> "In Scotland a seller of goods may attach them while in his own hands or possession by arrestment or poinding; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party."

On consultation, there was general agreement with our suggestion[4] that the section should be repealed for the following reasons:

(*a*) The unpaid seller of goods already has adequate remedies under the Sale of Goods Act 1979 and the common law without the addition of a statutory right of attachment.[5]

(*b*) It is unclear whether the "arrestment and poinding" referred to in the section are diligences properly so called or merely pieces of legal

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[1]Graham Stewart, p. 338; *Lochhead* v. *Graham* (1883) 11 R. 201 (poinding by landlord of furniture left by tenant on leased premises); *Tillicoultry* v. *Lord Rollo* (1678) Mor. 10517.

[2]Proposition 16 (para. 4.10)

[3]Para. 5.93 below.

[4]Consultative Memorandum No. 48, Proposition 16(1), para. 4.10.

[5]The unpaid seller has a lien (or right of retention) (ss. 39 and 41–43); a right of stoppage in transit (ss. 39 and 44–46); a right of resale (ss. 39 and 48); and a right to withhold delivery if property has not passed (s. 39).

machinery deriving from an earlier enactment[1] and re-enacted in the Sale of Goods Act but having no value in the context of that Act.[2]

(*c*) Section 40 is arguably inconsistent with section 47 of the Sale of Goods Act 1979.[3] The safeguards in the latter section (for the rights of third parties taking in good faith and for value documents of title for the goods from the purchaser on a sub-sale or pledge) are not expressly applied to the seller's right of attachment under section 40 but only to the rights of lien and stoppage in transit.

(*d*) There is doubt whether a sub-sale by the purchaser has the effect that the original seller loses the right to attach the goods, or whether the original seller who retains possession, may attach the goods notwithstanding the sub-sale.[4]

(*e*) An arrestment is not an appropriate diligence to attach goods in the hands of the creditor.

In short, the section is unnecessary and creates problems out of proportion to its utility.

5.71 One body disagreed with our view that section 40 should be repealed. They argued that the seller's other rights under the Sale of Goods Act are restricted to the situations where the seller is unpaid in respect of the particular goods forming the subject of sale;[5] and that section 40 is an additional protection which lends the sanction of the court to the seller's retention of the goods.[6] We do not find these objections persuasive. We do not see why the Sale of Goods Act should provide for the enforcement of debts other than the price of goods. We understand that section 40 is rarely, if ever, invoked and accordingly its repeal would not deprive creditors of an important protection. Further, if the seller has a right of retention under the Act for the price of the goods, it is difficult to see why provision should also be made for poinding and arrestment (for the expenses of which the debtor would presumably be liable).

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[1]Mercantile Law Amendment (Scotland) Act 1856, s. 3.

[2]Brown, *Sale of Goods* (2nd edn.) pp. 314–8.

[3]This section provides that a seller's lien and right of stoppage in transit are not affected by a sale or other disposition of the goods by the buyer, unless the seller has assented thereto; but the rights are affected where documents of title have been given to the buyer and transferred on a sub-sale to a third party taking in good faith and for value. If the documents are transferred by the original buyer, not on sub-sale but by way of pledge or other disposition, then the lien or right of stoppage in transit is retained but is subject to the rights of the transferee.

[4]For the conflicting views, see Gloag and Irvine, p. 269; Brown, *supra* p. 318 respectively.

[5]Although in the Acts of 1893 and 1979, section 40 appears in a group of sections with the shoulder note "Rights of unpaid seller against the goods", it is generally accepted that the section entitles the seller to poind the goods which are the subject of sale not merely for the price but for any debt due to the seller by the purchaser: see Gloag and Irvine, p. 269; Brown, *op. cit.*, p. 318.

[6]They further argued that section 40 merely states the common law rule as it would in any event apply where the creditor was in the position also of being a seller. It is true that the Sale of Goods Act 1893, by enabling the seller to transfer goods on sale without delivery, made it competent for the seller to poind at common law goods in his or her possession sold and undelivered since property had passed to the debtor. But the section differs from the common law (*a*) in allowing arrestment (as well as poinding) of goods in the seller's hands, and (*b*) in allowing poinding of goods belonging to the seller where the contract of sale postpones transfer of title to the goods.

5.72 We **recommend:**

Section 40 of the Sale of Goods Act 1979 (poinding and arrestment by seller of goods in possession of the seller) should be repealed.
(Recommendation 5.15; Bill, Schedule 9.)

Poinding of exempt goods by unpaid seller

5.73 In Consultative Memorandum No. 48 we considered whether an unpaid seller should be entitled to poind goods which had been sold to the debtor and which were in the debtor's possession, even though the goods were such that they would otherwise be exempt from poinding. If, for example, a person bought a bed or a cooker on credit for use in his or her dwellinghouse but failed to pay for it, the creditor would, under the present law[1] and under our Recommendation 5.10 above,[2] not be entitled to poind it to enforce payment. Although this inability to poind could leave the creditor without any diligence, we suggested[3] that an exception to the rules exempting goods from poinding should not be made where the creditor was the unpaid seller of the goods in question. Consultation evoked a mixed response. Two bodies considered that the unpaid seller's entitlement to poind for the price should override the exemption of the goods sold, while one body thought that the unpaid seller should be able to obtain a court order for repossession of the goods sold. One body thought that the court should have a general power to except goods from the exemption provisions. Another body thought that our recommended provisions for sisting diligence against mobile homes[4] should not apply where the diligence was based on a decree for the price of the mobile home. Most commentators, however, considered that an exception related to the price of goods should not be introduced. The seller has the alternatives of not parting with the goods until they are paid for or of securing the price by hire purchase or conditional sale. The officer executing a poinding might have difficulty in identifying the goods as those sold by the creditor. In any event, it is difficult to see why the seller of goods should have advantages not enjoyed by other unsecured creditors.

5.74 We **recommend:**

The seller of goods otherwise exempt from poinding should not be entitled to poind them in order to recover the unpaid price.
(Recommendation 5.16.)

Times when poinding allowed.

5.75 The days on which poindings and other diligences may competently be executed are regulated by common law.[5] It is clear that poindings cannot be executed on Sundays but it is not clear whether, or to what extent, poindings on public holidays are void. We understand that the current practice is not

[1]Law Reform (Diligence) (Scotland) Act 1973, s. 1(2).
[2]Para. 5.48.
[3]Proposition 25(4) (para. 4.40).
[4]Recommendation 5.12 (para. 5.60) above.
[5]Stair, *Institutions* IV. 47.27 states that execution may not be carried out "on the Lord's day or on solemn days appointed by Church or State for humiliation or thanksgiving". Bankton, *Institute* IV 42.3 to 42.5 is to a similar effect. In *Monteith* v. *Hutton* (1900) 8 S.L.T. 250, Lord Kincairney doubted whether a proclamation by the magistrates of a public holiday in Perth in celebration of Queen Victoria's birthday prevented an arrestment from being served, at least if the arrestee's premises were open.

to execute diligence on Sundays, nor on Christmas Day, New Year's Day or Good Friday. In Consultative Memorandum No. 48 we proposed[1] that the days on which a poinding could competently be executed should be regulated by a statutory rule reflecting current practice in order to remove the present uncertainty which can cause difficulties for officers of court who may be liable in damages for not executing diligence timeously.[2] One body thought there was no need for statutory regulation but the other commentators welcomed our proposal.

5.76 A poinding must be executed during the hours of daylight: if it is commenced before sunset and ends while there is still daylight, it will be upheld. If the poinding is not completed in the hours of daylight it must be adjourned to the next day. In some respects, this rule is unduly restrictive. It sometimes requires an officer executing a long poinding in a remote area to stay overnight unnecessarily. By itself the criterion of the hours of darkness may be thought unsatisfactory since they vary in different parts of the country and at different times of the year, and further, for historical reasons, take no account of the invention of the electric light. On the other hand, any rule allowing poinding during the hours of darkness would require to be restricted to the early evening and even then would have to be applied with common sense since the debtor's electricity supply may have been disconnected. Further, some flexibility is needed since a rigid rule will not be uniformly appropriate to all circumstances, for example, cars and other vehicles may never be at the debtor's premises during the permitted hours.

5.77 In Consultative Memorandum No. 48, we suggested that it should not be competent to commence a poinding before 9 a.m. or after 8 p.m. except by leave of the sheriff and that it should be incompetent to continue a poinding after 8 p.m. unless the officer has obtained prior authority from the sheriff or can show reasonable cause in the report of poinding why it was continued after 8 p.m.[3] Except for one body who observed that to regulate this matter was unnecessary and would create complexity and uncertainty, all other commentators on the proposal agreed with the need for regulation. One body suggested that the normal permitted hours should commence at 8 a.m. since many debtors will have left for work by 9 a.m. We would accept this suggestion. Another body thought it was unreasonable that officers should have a discretion to continue with a poinding after 8 p.m. which would be valid provided the sheriff was satisfied at a later date that the officer had a reasonable cause for the continuation. On reconsideration we agree that such a rule would place officers in an invidious position and think that a better solution is to require them to obtain the prior authority of the sheriff to a proposed continuation after the normal permitted hours or a proposed commencement prior to the normal permitted hours.

5.78 We **recommend:**

(1) No poinding should be competent on a Sunday, Christmas Day, New Year's Day or Good Friday nor on such other day as may be prescribed by act of sederunt.

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[1]Proposition 15 (para. 4.4).

[2]*Monteith* v. *Hutton, supra*; and Chapter 8, Section E. below.

[3]Proposition 15(2) and (3) (para. 4.4).

(2) It should be incompetent to commence a poinding before 8 a.m. or after 8 p.m. or to continue a poinding after 8 p.m. without in either case prior authority from the sheriff.
(Recommendation 5.17; clause 44.)

Powers of entry

5.79 Since last century extract decrees (including decrees of registration) have contained a warrant authorising an officer of court to open shut and lockfast places if forcible entry to premises is required to execute the poinding.[1] There is little authority on the scope and incidents of the powers conferred by warrants to open shut and lockfast places. One old manual of practice states that "before breaking open the front or most patent door of a house, the officer should knock six audible knocks on the door, and state who he is, and the purpose of his coming, and if admission be refused, or if no one be in the house, the officer may then competently proceed to enter and enforce his warrant".[2] Preventing an officer of court from gaining entry may constitute the common law crime and delict of deforcement.[3] Deforcement, however, normally implies assault or a show of violence.[4] Where officers of court have been specifically instructed to poind goods they must, if they cannot otherwise gain entry, use the powers of forcible entry unless they are deforced.[5] Officers of court may call on the police if they are deforced or a breach of the peace is committed or if they reasonably anticipate such occurrences on their attempting to gain entry.[6] Where the debtor's goods are in the possession of a third party, poinding is competent but the creditor will normally instruct the alternative diligence of arrestment which can be effected without entry. Forcible entry into the premises of a third party is not normally required, although warrants are not in terms restricted to lockfast places belonging to the debtor.

5.80 We understand that where it appears to an officer of court that nobody is in the premises, and that it is necessary to open a locked door, the practice of officers is generally to write a letter or leave a note for the debtor intimating when the officer will return to effect a poinding. The same practice may be adopted if the officer is refused admission. Only if no contact is made or admission is again refused, will a locksmith (whose fees are ultimately chargeable to the debtor) be engaged to open the door. Any error as to the address or identity of the debtor usually emerges before the premises are forcibly entered. We understand that to avoid the expense of locksmiths, and the risk of damage to locks or doors, officers will sometimes use skeleton keys to obtain entry to unoccupied premises.

5.81 In Consultative Memorandum No. 48 we suggested[7] that extract decrees

[1]Debtors (Scotland) Act 1838, Scheds. 1 and 6; Writs Execution (Scotland) Act 1877, s. 3; Sheriff Courts (Scotland) Extracts Act 1892, s. 7(1).

[2]Gillespie, *Powers and Duties of Sheriff Officers* (1852) pp. 91–2.

[3]Gordon, *Criminal Law* (2nd edn.) pp. 819, 1086; Walker, *Delict* (2nd edn.) pp. 501–2.

[4]*McConnell* v. *Brew* (1907) 23 Sh.Ct.Reps. 261.

[5]*Ibid.*

[6]The duties of the police do not generally encompass the enforcement of civil obligations (*Caldwell* v. *Caldwell* 1983 S.L.T. 610) but the occurrences mentioned in the text are criminal offences.

[7]Proposition 28 (para. 4.52).

should continue to contain a warrant to open shut and lockfast places, since it was difficult to justify the extra expense of an application for a separate warrant. All those who commented agreed. We also suggested that if regulation of the exercise of the power of entry was required it should be done by Practice Notes of the sheriffs principal or by rules of conduct applicable to officers of court. Two commentators in close touch with debtors and their problems, the Scottish Association of Citizens Advice Bureaux and the Scottish Council for Civil Liberties expressed reservations about the manner in which the powers of entry are exercised and we have considered the matter afresh.

5.82 Our preference for regulation by rules of conduct was based on the difficulty of framing clear rules of strict law, applicable to all circumstances, which would achieve the right balance between the creditor's interest in enforcing the decree and the debtor's interest in maintaining privacy. Despite this difficulty we think that some rules of law are required. We would reject any rule enabling debtors to refuse to admit an officer to their dwellinghouses. The notion that a dwellinghouse is a castle should not entail that it can also be a sanctuary in which debtors can store poindable goods and snap their fingers at creditors. If the law permits certain goods to be poinded, then it should also permit officers of court to execute their warrants to poind, whatever the wishes of the debtor. In short, a rule prohibiting forcible entry in all circumstances in inconsistent with the rules allowing certain goods in the debtor's dwellinghouse to be poinded.

5.83 The Edinburgh University Debtors Survey[1] disclosed that where a poinding in the debtor's dwelling is executed in the presence of friends, relatives or children this generates a considerable amount of ill feeling. We do not think that this can be completely avoided unless officers were required to give debtors prior notice of intention to poind in all cases.[2] Prior notice would involve officers in more paperwork and hence increase the expense of the diligence to debtors; it would also give debtors an opportunity to remove their goods so as to defeat any poinding or to make arrangements for resisting the officer's attempts to gain entry on return. Moreover, prior notice could well lead to uncertainty and confusion where the debtor on receipt of a notice comes to some arrangement with the creditor which is not intimated to the officer in time.

5.84 The current practice of officers on finding no-one at home when they call to execute a poinding is to leave a message for the debtor stating their intention to return on a specified future date. Although we recognise that this practice may in some cases enable some debtors to remove their goods or to make arrangements for resisting the officer's attempts to gain entry on return, it is nonetheless in our view a sensible practice in general. We recommend that it should be embodied in a statutory rule whereby the warrant to open shut and lockfast places contained in the extract decree could not competently be used where the dwellinghouse was empty unless prior notice had been

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[1]Para. 7.11.

[2]The Edinburgh University Debtors Survey disclosed (at para. 7.10) that only four out of 75 debtors interviewed were given warning of the day of the proposed poinding and these were all cases in which the officer found nobody at home on a previous call.

given or a special warrant[1] had been granted by the sheriff. One commentator suggested that a poinding should never be carried out in an empty house, but this would enable debtors to defeat diligence simply by absenting themselves. Special warrants are in our opinion necessary to deal with cases where the officer from experience knows, or has reasonable grounds for suspecting, that giving prior notice is likely to result in the poinding being prejudiced or defeated. The Edinburgh University Debtors Survey also disclosed that occasionally poindings are carried out when only young children are present in the house.[2] This practice, apart from causing understandable resentment on the part of debtors, also makes it difficult for the officer to ascertain the number of persons living in the household and hence the exempt items under the provisions of the Law Reform (Diligence) (Scotland) Act 1973 before poinding. We would therefore extend our recommendation regarding empty houses to houses where no adults were present and further recommend that where children but no adults are present the officer should give notice of intention to poind to the local social work department. Where business premises are involved the officer should not be required to give prior notice before using the warrant to open empty premises, because the sense of invasion of privacy is less than for dwellinghouses and there is a greater danger of the poinding being frustrated by removal of the goods.

5.85 We **recommend:**

(1) Warrants for poinding in extract decrees should continue to contain warrants to open shut and lockfast places.

(2) It should not be competent for a warrant to open shut and lockfast places to be used to gain entry to a dwellinghouse where there appears to be nobody or only persons under 16 years present unless the officer:

(*a*) had at least four days previously given notice of intended entry; and

(*b*) if on the first visit only children under 16 appeared to be present, had sent a copy of the notice to the local Social Work Department.

(3) The sheriff should be empowered, on application, to dispense with the requirements in paragraph (2) above if it appears that notice would be likely to prejudice the execution of the poinding.
(Recommendation 5.18; clause 45.)

Procedure in carrying out a poinding

5.86 Having obtained entry to the premises, the officer proceeds to poind the debtor's goods in accordance with rules laid down by the Debtors (Scotland) Act 1838 and the common law. In Consultative Memorandum No. 48, Part IV, we advanced provisional proposals, which were generally approved, for modernisation, clarification and reform of the procedure, and our recommendations follow the pattern of those proposals subject to modifications in the light of comments received. We consider later in the last section of this Chapter the assumptions as to ownership of goods officers are

[1]A special warrant would be obtainable summarily and without intimation of the application to the debtor.
[2]Para. 7.11.

entitled to make and their duties to make enquiries as to the ownership of goods they propose to poind.

5.87 *The existing procedure*. The procedure, as described by Graham Stewart[1] and other authorities, is as follows:

(1) According to the traditional styles of reports of poindings currently, or until recently, in use, the officer first cries three oyezes, and reads the extract decree containing the warrant to poind and the execution of the charge.[2] (A messenger whose credentials are disputed must display the blazon;[3] a sheriff officer, however, has no official credentials.)

(2) The officer must then demand payment of the debt.[4]

(3) Before carrying out the poinding, the officer should make enquiries as to ownership of the goods proposed to be poinded.[5]

(4) If payment in full is not tendered, the officer is in theory required to appoint two persons as valuators, or, in summary cause poindings, one person as valuator.[6] They accept office and take an oath to perform their duties properly.[7]

(5) In theory, the valuators should examine the goods and fix their value.[8]

(6) The officer draws up and signs a schedule of poinding which must specify the goods poinded and the creditor at whose instance they were poinded, and state their values as appraised by the valuators.[9]

(7) The officer makes three "offers back" of the goods to the debtor, or to anyone who appears for the debtor, on payment of the appraised values.[10]

(8) If the debtor refuses to accept the offer back, and the poinding is not otherwise competently interrupted, the officer adjudges and declares the poinding to be complete and the goods to belong to the poinding creditor, and ordains them to remain on the premises under certification that any person intromitting with them may be imprisoned until that person restores them or pays double the appraised value.[11]

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[1]P. 348 and following.

[2]This requirement stems from the common law but is almost certainly directory rather than mandatory, so that its omission would not affect the validity of the diligence: see para. 5.88 below, and it is not in practice followed though the report of poinding often refers to the ceremony.

[3]See Graham Stewart, p. 348: in para. 8.142 below, we suggest that all officers of court should be furnished with official identity cards.

[4]Graham Stewart, p. 348.

[5]See para. 5.218.

[6]Debtors (Scotland) Act 1838, s. 23; Summary Cause Rules, rule 90.

[7]Graham Stewart, p. 348; *Le Conte* v. *Douglas* (1880) 8 R. 175 per Lord Craighill at p. 177.

[8]Graham Stewart, p. 348; in practice, the valuation is done by the officer of court with the "valuator(s)" as witness(es); see para. 5.89 below.

[9]Debtors (Scotland) Act 1838, s. 24.

[10]Graham Stewart, p. 348; in part this stems from the common law and at least one offer back would appear to be mandatory; see para. 5.90 below.

[11]Graham Stewart, p. 348: this formality would appear to be mandatory.

(9) The proceedings must take place before two witnesses (or in a summary cause poinding, one witness) who may be and usually are the two valuators (or valuator).[1]

(10) The officer leaves the poinded goods together with the signed poinding schedule with the possessor.[2] In the case of a poinding of household goods the officer also leaves a notice informing the debtor of the entitlement to appeal to the sheriff within seven days against the poinding.[3]

5.88 *Abolition of opening ceremony*. The opening ceremony with its three oyezes and public reading of the extract decree is an anachronism left over from the time when the goods were appraised both at the debtor's premises and the market cross. The foundation of the present procedure was laid by the Bankruptcy Act 1793,[4] and there is some authority for the view that, since that Act and as a result of it, the opening ceremony has not been necessary in strict law[5] but has been carried forward into modern times by the draftsmen of the published styles of reports of poindings[6] and by officers because of uncertainty whether the statute was intended to abolish the old common law requirement. An unfortunate feature of the present uncertainty is that the officer will sometimes use one of the traditional styles of report but not follow the procedure which it describes, with the result that the report will misstate what actually happened.[7] We think that the opening ceremony in its present form should be expressly abolished, and replaced by a requirement to exhibit the extract decree or other document containing the warrant to poind and the certificate of service of the charge to pay.

5.89 *Valuators and witnesses*. There is at present a gap between the theory and the practice of the law on who should value poinded goods. When the requirement of appointment of two valuators was introduced in 1814,[8] it was probably the intention that the valuators should be independent persons who

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[1]Debtors (Scotland) Act 1838, s. 25; Summary Cause Rules, rule 90. The purpose of requiring witnesses is to identify the poinded goods since they remain in the debtor's premises: *Norman* v. *Dymock* 1932 S.C. 131, 134.

[2]Debtors (Scotland) Act 1838, s. 24.

[3]See Act of Sederunt (Appeals against Poinding) 1973, s. 3 and Form A; Law Reform (Diligence) (Scotland) Act 1973, s. 1(4).

[4]The Bankruptcy Act 1793 (c. 74) s. 3 (otherwise known as the Payment of Creditors Act 1793) dispensed with the need for a second appraisal at the market cross and provided that the officer should leave the poinded goods in the hands of the debtor with a schedule of the goods and a note of their appraised values and thereafter report this to the sheriff. This section was repealed and re-enacted by the Bankruptcy Act 1814 which was in turn repealed and re-enacted with modifications by the Debtors (Scotland) Act 1838, s. 24.

[5]See *McKnight* v. *Green* (1835) 13 S. 342; cf. *J. Ratcliff & Co. Ltd.* v. *McKelvie* 1977 S.L.T. (Sh.Ct.) 64 where the sheriff was of opinion that the opening ceremony was accepted practice "on which Parliament has not yet innovated."

[6]See the forms in Bell, *System of the Form of Deeds* (3rd. edn., 1812) vol. 6, p. 584; Darling, *Powers and Duties of Messengers-at-Arms* (1840) p. 164; Gillespie, *Powers and Duties of Sheriff Officers* (1852) p. 94; Campbell on *Citation* p. 238.

[7]See *J. Ratcliff & Co. Ltd.* v. *McKelvie* 1977 S.L.T. (Sh.Ct.) 64.

[8]Bankruptcy Act 1814, s. 4, replaced by Debtors (Scotland) Act 1838, s. 23.

would be skilled in valuation.[1] In fact, for some considerable time, the officer has valued the goods and the "valuators" (who are usually members of staff of the officer's firm) merely act as witnesses. On consultation there was general agreement with our proposal[2] that the officer should normally value the goods to be poinded, that save in exceptional circumstances no valuator or valuators should be appointed, and that (to save expense) only one witness should attend the poinding and sign the schedule and report of poinding. These proposals were also made by the McKechnie Report,[3] and we adhere to them. While it would be too expensive to require the use of a professional or specialist valuator in all poindings, the officer should be able to bring in such a person if the nature of the goods makes that course of action advisable.

5.90 *The "offer back"*. Though the three "offers back" of the goods at their appraised values are not prescribed by statute, the procedure affords a protection to debtors[4] which has been held an essential formality under the common law[5] although it may be that even under the present law one offer back would be enough. In our view the offer back fails to achieve its objective of allowing the debtor an opportunity to redeem goods at their appraised values, so providing some protection against low valuations. First, the poinded goods can only be offered back to the debtor or person authorised to act for the debtor who is present at the poinding.[6] In household poindings the debtor is frequently not present and any other person who is present may not be authorised to accept the offer back. Secondly, the offer back has to be accepted there and then; most debtors require time to obtain the necessary money. We recommend replacing the offer back by conferring on the debtor an entitlement to redeem all or some of the poinded goods on paying their appraised value at any time within 14 days after the date of the poinding. Where the debtor is present at the poinding the officer should tell the debtor of this right to redeem and this information should also be contained in the schedule of poinding given to or left for the debtor.

5.91 *The poinding schedule*. The traditional styles of poinding schedule specify not only the matters required by statute[7] but also other matters,[8] though it seems that errors in the non-statutory parts of a poinding schedule do not invalidate the diligence.[9] A variety of styles of schedule have been recently

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[1]See Bell, *Commentaries* vol. ii, p. 58. In *Broomberg* v. *Rheinhold & Co. Ltd.* (1944) 60 Sh.Ct.Reps. 45, the officer had placed values on poinded goods and asked the valuators if they agreed: the sheriff observed (at p. 55) "While I am not prepared to go the length of holding that this made the valuation a nullity, I think it is not in accordance with the intention of the Act and is very apt to undermine the essential independence of the valuators".

[2]Consultative Memorandum No. 48, Proposition 27(3) (para. 4.44); para. 4.54.

[3]Paras. 163 and 165.

[4]Goods re-acquired by the debtor through an "offer back" cannot be poinded again for the same debt: *Fiddes* v. *Fyfe* (1791) Bell's Octavo Cases 355.

[5]*Broomberg* v. *Rheinhold & Co. Ltd.* (1944) 60 Sh.Ct.Reps. 45; *South of Scotland Electricity Board* v. *Brogan* 1981 S.L.T. (Sh.Ct.) 8.

[6]*Hogg* v. *Taylor* 1934 S.L.T. (Sh.Ct.) 36; *South of Scotland Electricity Board* v. *Brogan, supra*.

[7]Debtors (Scotland) Act 1838, s. 24, see para. 5.87.

[8]Graham Stewart, p. 349 states that the schedule also narrates the extract decree and warrant, the poinding of the goods, the names and designations of the valuators, and generally the procedure followed by the officer in carrying out the poinding.

[9]*McKnight* v. *Green* (1835) 13 S. 342 per L. J. C. Boyle at p. 346 "Provided there is a schedule with a note or notandum of the appraised value, that is all which is required": *Urquhart & Son* v. *Wood* (1906) 22 Sh.Ct.Reps. 255.

in use (including some which are more appropriate to the now abolished small debt procedure) and some of them are not readily intelligible to ordinary debtors. Our general view that forms served on debtors in connection with diligence should be clear, expressed in modern language and be in prescribed form, applies to the poinding schedule. The schedule should contain the following information; the name of the poinding creditor, the goods which have been poinded and their values as appraised at the poinding, the amount of the debt and expenses (including the expenses of the poinding) due and the person to whom payment of the debt may be made. The schedule should also warn the debtor against removing the poinded goods and inform the debtor of the rights to redeem goods on payment of their appraised value[1] and to apply to the sheriff for release of goods on the grounds of undue harshness or their being exempt from poinding.[2]

5.92 The poinding schedule describes the poinded goods so that they can be identified later when they are put up for sale. One commentator expressed surprise that officers did not label poinded goods or mark them in order to identify them more clearly. We think that such a practice should not be permitted, as it would be humiliating for debtors in that any visitors would be able to see that goods had been poinded.

5.93 Section 24 of the Debtors (Scotland) Act 1838 requires the officer to "deliver" the poinding schedule to the possessor. One body suggested that the officer should be required to serve the poinding schedule on the possessor using one of the legal modes of service. This amendment seems unnecessary. The present practice is to hand over the schedule to the possessor, or if the possessor is not present at the poinding, to leave it in a prominent place on the premises. This practice does not appear to present problems in the normal household or commercial poinding and we do not recommend any change in this respect. At present where the goods have been poinded in the possession of a third party the officer is required to deliver the schedule to the possessor rather than the debtor. We recommend that in this case the officer should be required if reasonably practicable to send a copy of the schedule to the debtor.

5.94 *Time of completion of poinding.* We proposed that the officer should no longer be required orally to adjudge and declare the poinding to be complete and the goods to belong to the poinding creditor. The latter declaration is inappropriate since a poinding does not by itself transfer ownership to the poinding creditor, but merely creates a kind of right in security. It is, however, necessary to establish for various legal purposes when the poinding is complete. Thus, in terms of the bankruptcy legislation a poinding is ineffectual if executed within the period of 60 days before the date of sequestration.[3] It has long been an open question whether a poinding is "executed" for this purpose when at the end of the actual poinding the officer adjudges the goods to belong to the poinding creditor, or when the report of the sale, or of the delivery of the goods to the poinding creditor in default

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[1]See para. 5.90.

[2]See para. 5.65.

[3]Bankruptcy (Scotland) Act 1913, s. 104 and Companies Act 1985, s. 623 re-enacting earlier legislation. See also Bankruptcy (Scotland) Bill 1984, clause 36.

of sale, is lodged.[1] The time of completion of the poinding is also relevant to determine whether, apart from sequestration, a poinding falls to be equalised with another diligence within the prescribed period before and after notour bankruptcy or apparent insolvency;[2] and whether a creditor can be conjoined in a poinding.[3] In order to clarify the law we proposed in Consultative Memorandum No. 48[4] that for all relevant purposes a poinding should be executed when the officer hands the signed poinding schedule to the possessor of the poinded goods or leaves it for the possessor on the premises. Those who commented approved of this proposal and we recommend accordingly.[5]

5.95 We **recommend:**

(1) The procedure in executing a poinding should be as follows:

(*a*) The opening ceremony (the saying of three oyezes and the reading of the extract decree and execution of the charge) should be expressly abolished by statute. The officer should however exhibit the extract decree and execution of the charge on which the poinding proceeds.

(*b*) Before carrying out the poinding the officer should, as at present, demand payment of the debt and expenses and make enquiries of any person present on the premises as to the ownership of the goods proposed to be poinded.

(*c*) The goods should be valued by the officer, but the officer should be entitled to have them valued by a professional valuator if the officer considers that the nature of the goods makes it advisable.

(*d*) The officer should be accompanied by only one witness.

(*e*) If the debtor is present the officer should inform him or her of the right to redeem the goods within 14 days on payment of their values.

(*f*) The officer should prepare a poinding schedule specifying the poinding creditor, the poinded goods, and their values, the amount of the debt and expenses due.

(*g*) An act of sederunt should be made prescribing the form of the poinding schedule which should contain, in addition to the above matters, information on the applications which the debtor may make to the court and the right to redeem.

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[1]Support for this latter view is found in *Tullis* v. *Whyte* 18 June 1817 F.C.; *Samson* v. *McCubbin* (1822) 1 S. 407; *Wm. S. Yuile Ltd.* v. *Gibson* 1952 S.L.T. (Sh.Ct.) 22 but the former view appears to receive recognition in *New Glenduffhill Coal Co. Ltd.* v. *Muir & Co.* (1882) 10 R. 372; *Galbraith* v. *Campbell's Trustees* (1885) 22 S.L.R. 602; *Bendy Bros. Ltd.* v. *McAlister* (1910) 26 Sh.Ct.Reps. 152.

[2]Bankruptcy (Scotland) Act 1913, s. 10; Bankruptcy (Scotland) Bill 1984, Sched. 7, para. 10, (which repeals and re-enacts s. 10).

[3]See Dobie, *Sheriff Court Practice*, pp. 279-80; it may also be relevant in cases of breach of poinding and it fixes the commencement of the period within which the report of poinding must be lodged and the period within which an application for warrant to sell must be made.

[4]Proposition 27 (para. 4.44).

[5]In *Lord Advocate* v. *Royal Bank of Scotland Ltd.* 1977 S.C. 155 the opinion was expressed that an executed poinding not followed by a sale was not an effectually executed diligence on property for the purposes of s. 15(2)(*a*) of the Companies (Floating Charges and Receivers) (Scotland) Act 1972 (now s. 471 (2)(*a*) of the Companies Act 1985). Our recommendation would not affect the position.

(*h*) The officer should, along with the witness, sign the poinding schedule and deliver it to, or leave it in the premises for, the possessor of the poinded goods. Delivery of the schedule should be deemed to be the time of execution of the poinding for all legal purposes. Where the debtor is a different person from the possessor, the officer should if reasonably practicable send a copy of the poinding schedule to the debtor.

(*i*) As at present the officer should leave the poinded goods on the premises in which they were poinded.

(2) The debtor should be entitled to redeem some or all of the poinded goods on payment of their appraised values to the officer of court within 14 days after the execution of the poinding. The officer of court should be under a duty to give the debtor a receipt identifying the redeemed goods and the issue of the receipt should have the effect of releasing the goods from the poinding.
(Recommendation 5.19; clause 46(1), (5), (6) and (8)).

Valuation of poinded goods

5.96 *Time of valuation.* Our recommendation that officers should value the poinded goods when poinding them implies that we reject the alternatives, discussed in Consultative Memorandum No. 48[1] that in order to reduce expense the valuation could be postponed to a later stage in the diligence or be dispensed with altogether. Most of those who commented considered that the disadvantages of these alternatives outweighed the advantages.

5.97 Valuation cannot be dispensed with because, first, the officer is entitled to poind goods only up to the value of the debt and expenses (including expenses likely to be incurred in the sale of the goods)[2] so that some valuation must be carried out at the poinding stage. Secondly, valuation safeguards the debtor in that at the subsequent sale of the poinded goods the debtor is credited with the actual sale price or the valuation whichever is the greater. Thirdly, we recommend above[3] that the debtor should have a right to redeem the goods at their appraised values within a period after valuation. This right serves as a check to undervaluation. Fourthly, we recommend below[4] that the sheriff should have power, on application at any time before warrant of sale is granted, to recall the poinding on grounds that the goods are in aggregate substantially undervalued or that the proceeds of sale of the goods (as measured by the appraised values) are not likely to cover the expenses of sale. The sheriff could not deal with such applications unless a valuation of the goods was available. The first and fourth reasons set out above also lead us to reject the postponement of valuation until after the granting of the warrant of sale. Moreover, the valuation should be at an early stage to assist the creditor in deciding whether it is worth proceeding with the diligence. For these reasons we have recommended that the valuation should, as under the present law, take place when the goods are poinded.

[1]Paras. 4.62 to 4.64; Proposition 31.

[2]*McNeill* v. *McMurchy, Ralston & Co.* (1841) 3 D. 554; *McKinnon* v. *Hamilton* (1866) 4 M. 852.

[3]Recommendation 5.19 (para. 5.95).

[4]Recommendation 5.29 (para. 5.137).

5.98 *The problem of low valuation.* Over a very long period, criticisms have been made from time to time that the values placed by officers of court on poinded household goods are too low.[1] The Edinburgh University Debtors Survey found that the great majority of debtors interviewed were dissatisfied with the valuations placed on their goods.[2]

5.99 It seems to us that in general low valuations can be attributed to three main causes. First, the sale price of second-hand furniture and other household goods is generally well below the price of such items when new. This was recognised by the Payne Committee[3] when considering execution upon goods in England and Wales and by the Crowther Committee[4] in considering repossession of hire purchase goods. Secondly, the value placed on a poinded article is the upset price[5]—the price at which bidding will start for that article in any subsequent sale. Yet because of the poor attendance at sales of poinded household goods held in dwellinghouses of debtors, only in a few cases are goods disposed of at more than their upset price.[6] Thirdly, officers may be liable in damages to creditors for over-valuation, for if goods are delivered to the poinding creditor in default of sale, over-valuation will result in a greater amount being deducted from the debt due to that creditor than can be recouped by resale.[7] Certain allegations that officers deliberately in collusion with second-hand furniture dealers made low valuations have been made in the past, but we are not aware of any evidence substantiating them.

5.100 Our scheme to ensure, in so far as it is possible to do so, that poinded goods are correctly valued consists of several recommendations. First, officers should be under a statutory duty to value an article at its open market value—the price which it can reasonably be expected to fetch at a public auction, rather than its upset price—the price at which bidding would commence for that article.[8] Secondly, we recommend later[9] that, unless the debtor consents, household goods should be sold in an auction room instead of in the debtor's dwellinghouse. The better attendance and likelihood of competing bids at auctions should help ensure that goods attain their market

[1]In *Stewart* v. *Carson* (1900) 16 Sh.Ct.Reps. 115, the sheriff observed: "It is a question whether there should not be some amendment of the law with regard to the sale of poinded and sequestrated effects . . . the clerk of court informs me that it has been a matter of very frequent complaint to him of the low price at which articles . . . are sold". See also *Scottish Gas Board* v. *Johnstone* 1974 S.L.T. (Sh.Ct.) 65.

[2]Paras. 7.14 and 7.15. Of 73 debtors who replied to the relevant questions, 66 said they were dissatisfied with the valuation compared with only seven who were satisfied.

[3]Para. 634.

[4]Paras. 6.6.45 to 6.6.50.

[5]Debtors (Scotland) Act 1838, s. 27.

[6]In 58 of the 94 "personal" (non-business) sales examined in the C.R.U. Warrant Sales Report the goods were adjudged to the poinding creditor in default of sale (para. 38). In 9 of the 36 warrant sales where the goods were sold the price exceeded the appraised value, but generally only by a few pounds (para. 40). Only in three cases was the excess substantial. In a follow-up study of sales executed during 1980 and 1981 the C.R.U. found that in only 15 cases out of 261 "personal" sales did the price exceed the appraised value.

[7]While there are no reported decisions, we understand there have been several cases where actions of damages have been raised or threatened and thereafter settled. Creditors are more likely than consumer debtors to sue officers for mistaken valuations.

[8]We recommend later (Recommendation 5.42, para. 5.199) that the appraised value should operate in a subsequent sale as a reserve price which need not be disclosed.

[9]Recommendation 5.32 (para. 5.161).

value. Thirdly, we recommend later[1] that the sheriff should have power to recall a poinding or refuse to grant a warrant of sale where the goods have been in aggregate substantially undervalued or where the likely proceeds of sale of the goods (as measured by their appraised values) will not cover the likely expenses of sale. The existence of this power and the possibility of its exercise should help ensure that poinded goods are correctly valued. Finally, our recommendation that the debtor should have a right to redeem articles at their appraised values[2] may assist in preventing under-valuations since low valuations may enable or encourage the debtor to exercise the right. On the other hand it has to be recognised that substitution of market values for upset values could prejudice debtors in that it would make it more expensive for them to redeem articles and more likely that sheriffs would grant warrants of sale. Nevertheless, we are of the view that requiring officers to appraise articles at their open market value is in the general interests of all concerned and we recommend accordingly.

5.101 **We recommend:**

An officer valuing poinded goods should be required to value each article on the basis of what it would be likely to fetch if sold on the open market.
(Recommendation 5.20; clause 46(1)(*c*).)

5.102 *Valuation at officer's or creditor's risk.* An officer of court who makes a mistake in appraising the value of poinded goods cannot subsequently, without authority, change the appraised value to rectify the mistake. In a recent case, the sheriff, without expressing a concluded view, suggested that where a sheriff officer discovers such a mistake, it should be immediately reported to the sheriff, and that the sheriff, in the exercise of powers to regulate the poinding, might be able to put the matter to right.[3] There is, however, no clear authority on whether the sheriff has a power to rectify mistakes in valuation[4] nor on the circumstances in which it should be exercised.

5.103 We have considered therefore whether, in order to rectify mistakes in the valuation of poinded goods, the sheriff should have an express statutory power to order a re-appraisal of the goods upon such terms as to expenses as appear just and to make any necessary incidental or consequential orders (for example extending the duration of the poinding or granting a second warrant of sale). It seems to us, however, that in most circumstances debtors would be prejudiced by a re-appraisal of poinded goods. Thus, if the sheriff decided that the original appraised values were substantially below the open market value of goods the poinding should be recalled[5] rather than the goods re-appraised to permit a higher value to be substituted. Allowing a lower valuation to substituted for the original appraised value would normally

[1]Recommendations 5.29 and 5.30 (paras. 5.137 and 5.146).

[2]Recommendation 5.19 (para. 5.95).

[3]*South Side Sawmills* v. *MacGregor* 1981 S.L.T. (Sh.Ct.) 48 at p.51. In this case, the sheriff officer, having discovered a latent defect in a poinded article, substituted at the time of sale of his own accord a value lower than the value appraised at the time of poinding.

[4]In *Wallace Evans and Partners* v. *T. Daly & Co. Ltd.* 1984 S.L.T. (Sh.Ct.) 25, the sheriff held he had no power, once the goods had been delivered to the creditor in default of sale, to substitute lower values for goods which had been damaged after the poinding was executed.

[5]See *Scottish Gas Board* v. *Johnstone* 1974 S.L.T. (Sh.Ct.) 65, and Recommendation 5.29 (para. 5.137).

operate to the prejudice of the debtor, in that the reserve price at the subsequent sale (and hence the sum which the debtor is credited with if the article is not sold) would be less, although a lower valuation might allow the debtor to redeem the article. We think the officer making the valuation (and hence the creditor) should bear the risk of any mistakes in valuation. We deal below[1] with the question of re-valuation following damage or destruction of poinded goods.

5.104 We **recommend:**

> Subject to Recommendation 5.26 (revaluation if the goods are damaged or destroyed) the sheriff should have no power to order a revaluation of poinded goods.
> (Recommendation 5.21; clause 46(7).)

Stopping the poinding by payment of debt

5.105 If the debtor offers to pay the debt at any stage of the poinding, the officer must stop. At present only the principal sum, accrued interest (if charged) and judicial expenses need be tendered and the officer is not entitled to proceed with the diligence to recover the expenses of charging and poinding.[2] If, as we recommend later,[3] the expenses of a diligence are only recoverable by that diligence, the debtor would also have to pay the diligence expenses in order to stop the poinding.

5.106 Payment by cheque is only a conditional payment since there is a certain delay before the cheque is honoured and there is a risk that the cheque will not be honoured. Such a payment does not therefore necessarily stop diligence.[4] In Consultative Memorandum No. 48 we suggested[5] that the poinding should be stopped if the debtor offers payment by a banker's draft or by a cheque supported by a banker's card. Although most of those who commented agreed, we have come to the conclusion that it would be wrong to introduce a statutory rule applying only to poindings requiring the creditor or officer to accept payment in these fashions.

Conjoining other creditors

5.107 Section 23 of the Debtors (Scotland) Act 1838 provides:

> "Where an officer of the law shall proceed to poind moveable effects, he shall, if required, before the poinding is completed, conjoin in the poinding any creditor of the debtor who shall exhibit and deliver to him a warrant to poind . . ."

The officer may refuse to conjoin the second creditor only if there is an objection such as would have entitled the officer to refuse to act in the first place: for example, if the days of charge on the second creditor's decree have

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[1]Para. 5.125.
[2]*Inglis* v. *McIntyre* (1862) 24 D. 541; *Holt* v. *National Bank of Scotland* 1927 S.L.T. 484.
[3]Recommendation 9.9 (para. 9.58).
[4]*Caithness Flagstone Co.* v. *Threipland* (1907) 15 S.L.T. 357.
[5]Proposition 32 (para. 4.67).

not expired.[1] If the officer conjoins the second creditor, sufficient goods must then be poinded to satisfy the claims of both creditors.[2] If there are not enough goods of sufficient value, then the conjoined creditors rank rateably in proportion to their debts in the poinding.[3] In practice, conjoining creditors is necessary only where the debtor has insufficient goods to enable separate poindings under the several decrees to be executed. Section 23 seems to have been designed to deal with the situation where two officers representing different creditors arrive to poind virtually simultaneously, but the real utility of the section lies in the more frequent cases where one officer is instructed by different creditors against the same debtor. This occurs, for example, in commercial debt cases in outlying areas which the officer does not visit daily. The section enables the officer to act for all the instructing creditors.

5.108 In Consultative Memorandum No. 48 we expressed the view[4] that these provisions appeared satisfactory subject to clarification of the exact time when the execution of a poinding was complete for the purposes of section 23. On consultation those who commented generally agreed with our view. We have recommended above[5] that for all legal purposes a poinding should be taken to be executed when the officer delivers the poinding schedule to, or leaves it for, the possessor. Section 23 of the 1838 Act does not exclude the conjunction of a summary warrant creditor with an ordinary creditor. In view of the widely differing procedures in summary warrant poindings and ordinary poindings (no warrant of sale is necessary in summary warrant poindings for example)[6] we think there should be an express rule prohibiting such conjunctions. But there is no reason why two or more summary warrant poindings should not be conjoined with each other.

5.109 We **recommend:**

> **The statutory procedure for conjoining creditors before execution of a poinding should be retained, but it should not be competent to conjoin ordinary creditors and summary warrant creditors.**
> (Recommendation 5.22; clause 46(9).)

Reporting the poinding to the court

5.110 After the poinding has been carried out, the officer must report it to the sheriff within eight days unless the officer can justify the delay.[7] Where by reason of delay, the court refuses to receive the report of poinding, the

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[1]Bell, *Commentaries* vol. ii, p. 58. A creditor who is not entitled to be conjoined may be able to participate in the proceeds of sale of the poinded goods by making a claim under equalization provisions in the bankruptcy legislation, Bankruptcy (Scotland) Act 1913, s. 10, repealed and re-enacted by Bankruptcy (Scotland) Bill 1984, Sched. 7, para. 10.

[2]Graham Stewart, p. 356.

[3]Graham Stewart, p. 366.

[4]Proposition 33 (para. 4.69).

[5]Recommendation 5.19 (para. 5.95).

[6]See Chapter 7 for further details.

[7]See Debtors (Scotland) Act 1838, s. 25. In four of the five sheriffdoms having more than one court district, it is provided by Practice Note that a report of poinding must be made to the sheriff of the sheriff court district in which the goods are situated.

effect is that the poinding is null,[1] and since a second poinding of the same goods is not normally competent,[2] the consequences of delay are serious. On consultation, there was general agreement with our suggestion[3] that a period of 14 days should be allowed. Officers may sometimes have many reports of poindings to prepare and lodge and the time scale can be very tight.[4]

5.111 Section 25 of the 1838 Act prescribes certain particulars which the report must specify.[5] In addition, some at any rate of the somewhat uncertain requirements of the common law should be included in the report.[6] Much of the uncertainty as to what should be included in a report of poinding would presumably be removed if (as we suggested above) the procedure were codified in an enactment. On consultation those who commented agreed with our suggestion,[7] that the form of reports of poinding should be prescribed by act of sederunt. Some of the forms currently in use have not been much altered for the past 150 years and are archaic; a uniform style would make it easier for sheriff clerks to check reports for omissions and inaccuracies.

5.112 The purpose of the report of poinding is to enable the sheriff to supervise the diligence. The sheriff can take note of errors and deficiencies in the report or of the poinding without the need for an application by the debtor.[8] Where the report contains a material error or discloses a material error in the way the poinding was executed the sheriff can refuse to receive the report[9] as a result of which the poinding is null. Since we recommend later[10] that the sheriff should have wide powers to recall a poinding on procedural and other grounds and that these powers may be exercised, not simply on receipt of the report, but at any time up to the granting of warrant of sale, we would restrict the sheriff's powers to refuse to receive a report to the cases where the delay in lodging it was unjustifiable or the officer and witness failed to sign the report.

5.113 We **recommend:**

(1) The officer of court should be required to make a report of poinding in prescribed form to the sheriff within 14 days after the execution of

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[1]All the reported cases e.g. *Miller* v. *Stewart* (1835) 13 S. 483 were decided on a construction of the Bankruptcy Act 1814 (which required the report to be lodged "forthwith"), but on this point these cases remain authoritative in relation to the Debtors (Scotland) Act 1838.

[2]See para. 5.131 below.

[3]Consultative Memorandum No. 48, Proposition 34(1) (para. 4.72).

[4]The critical date is the date of the receipt of the report and we understand that no extension is allowed for postage of the report, though a postal delay of a report which had been timeously posted would perhaps be reasonable cause for receiving the report of poinding late.

[5]These are "the diligence under which the poinding is executed, the amount of the debt, the names and designations of the debtor and of the creditor at whose instance the effects were poinded, the effects poinded, the value thereof, the names and designations of the valuators, the person in whose hands they were left, and the delivery of the schedule . . ".

[6]In particular, whether the "offer back" of the poinded goods to the debtor was made and, in a case where no offer was made, the reasons for omitting the offer; see for example *Allison's (Electrical) Ltd.* v. *McCormick* 1982 S.L.T. (Sh.Ct.) 93.

[7]Consultative Memorandum No. 48, Proposition 34(2), para. 4.72.

[8]*Thornton, Applicant* 1967 S.L.T. (Sh.Ct.) 71.

[9]*Broomberg* v. *Rheinhold & Co. Ltd.* (1944) 60 Sh.Ct.Reps. 45; *Scottish Gas Board* v. *Johnstone* 1974 S.L.T. (Sh.Ct.) 65; *J. Ratcliff & Co. Ltd.* v. *McKelvie* 1977 S.L.T. (Sh.Ct.) 64.

[10]Recommendation 5.29 (para. 5.137).

the poinding (or such longer period as the sheriff may, on cause shown, allow).

(2) The sheriff may refuse to receive a report only on the grounds that it is not signed by the officer and witness or that it was not submitted within the required period.

(3) If the sheriff refuses to receive a report the poinding should cease to have effect.

(Recommendation 5.23; clause 47.)

Disposal of perishable goods

5.114 In terms of section 26 of the Debtors (Scotland) Act 1838 the sheriff has power on the poinding being reported to give orders for the immediate disposal of perishable goods. We think these powers are deficient in that they only arise once the poinding has been reported and that they are restricted to perishable goods. Given that the officer under our recommendations will have 14 days within which to lodge a report of poinding, an application by the debtor or the creditor for an order for immediate disposal should be competent at any time after the poinding has been executed. Perishable seems too narrow a concept; cases can be envisaged (magazines or Christmas cards for example) where the goods would not perish but might be much less valuable by the time they were sold in the normal time span of a poinding. The proceeds of sale should be paid to the creditor, but where only part of the poinded goods are disposed of immediately, the sheriff should have power to order the proceeds of their sale to be consigned in court to await the completion of the diligence in respect of the remainder of the goods.

5.115 We **recommend:**

The sheriff should have power, on an application by either the creditor or the debtor made after the execution of the poinding, to order the immediate disposal of goods which are perishable or likely to deteriorate in value rapidly, and make consequential orders including orders as to the disposal of the proceeds of sale.

(Recommendation 5.24; clause 46(2)(*b*).)

Removal of or interference with poinded goods

5.116 Poinding brings the poinded goods within the control and protection of the court. The goods should not be removed from the premises without the authority of the court and a person who removes them without authority is liable, on summary civil complaint by the creditor, to be imprisoned until the goods are restored or a sum representing double their appraised value is paid to the creditor.[1] Breach of poinding renders the breacher liable in damages to the creditor[2] and is probably also a contempt of court.[3] Poinding also has the effect of prohibiting the debtor from voluntarily disposing of the goods although a third party purchaser who was unaware of the poinding acquires

[1]Debtors (Scotland) Act 1838, s. 30.

[2]*Arnot* v. *Dowie* (1863) 2 M.119; *Angus Bros Ltd.* v. *Crocket* (1909) 25 Sh.Ct.Reps. 323 at p. 326.

[3]Graham Stewart, pp. 222–3 and 357.

a good title.[1] In Consultative Memorandum No. 48[2] we asked for views as to whether the existing remedies for breach of poinding were effective or adequate. Consultation disclosed considerable dissatisfaction with the existing remedies. Accordingly we have devised a new scheme for dealing with breach of poinding rather than attempting to reform the existing summary complaint procedure. First, however, we deal with the topic of authorised removal.

Authorised removal of goods

5.117 A poinding may last for several months and during this period the debtor may wish or require to remove the goods to other premises. For example the debtor may move house or the lease of the premises in which the goods are situated may terminate. At present the sheriff has a statutory power, on application, to give orders for the security of poinded goods.[3] Although the object of this power is apparently to prevent the possessor or others from removing the goods it could be used to authorise their removal to other premises of the debtor. We understand that the view sometimes taken in current practice is that provided the debtor obtains the consent of the poinding creditor, the goods may be removed to other premises without the sheriff's authority. This sensible practice, which avoids the need for an application to the court, should we think be embodied in a statutory rule. Application to the court should however remain competent to deal with cases where the creditor refuses consent to removal of the goods.

5.118 The goods which are removed to other premises remain subject to the poinding. At present this can cause practical problems where the goods are removed to a different sheriffdom or even a different sheriff court district in the same sheriffdom. Unless the poinding process is transferred to the sheriff court to whose jurisdiction the goods have been removed, the original sheriff court has to grant warrant of sale, receive the report of sale and deal with any incidental applications in respect of goods situated outwith its jurisdiction. Such problems would be multiplied in cases where only some of the goods were removed to another sheriff court district, the others remaining in the premises where they were originally poinded. Those with practical experience of the problems suggested that the goods should be poinded again in their new location, as is sometimes done in practice at present. A new poinding would avoid the jurisdictional difficulties and may also make identification of the goods easier since articles are often identified in the poinding schedule and report of poinding by their location within the debtor's premises at the time of the poinding. We would accept this suggestion but think a new poinding should be an option rather than a requirement, since in some cases it would be possible for the original poinding to proceed even though some or all of the goods had been removed to a new location. A creditor who executed a new poinding should be deemed to have abandoned the original poinding as goods cannot be subject to two poindings by the same creditor. The effect of this rule would be that in cases of removal of some of the goods two new poindings might have to be executed; one to repoind the remaining

[1]Graham Stewart, p. 358.

[2]Proposition 35 (para. 4.74).

[3]Debtors (Scotland) Act 1838, s. 26.

goods in the original location, the other to poind again the removed goods in their new location, for if only one poinding was allowed the creditor's security would be lessened.

5.119 Where poinded goods are poinded again the question of liability for the expenses of the original poinding and the new poinding arises. Although it would be possible to devise rules making the debtor liable except where removal was due to circumstances outwith the debtor's control, or to give the court, on application, a power to award expenses as seems fit, we think there would be considerable benefit in a simple rule. We would recommend that where goods are poinded again the debtor should be liable for the expenses of the new poinding while the creditor should have to bear the expenses of the poinding deemed to have been abandoned.

5.120 We **recommend:**

(1) The debtor (or possessor) of poinded goods may remove them to other premises if:

(*a*) the poinding creditor or officer of court consents; or

(*b*) the sheriff, on application, authorises such removal.

(2) Where poinded goods are removed to other premises the creditor should be entitled to poind them again there, and should also be entitled to poind again any goods remaining on the original premises. Where a new poinding of poinded goods for the same debt is executed, the original poinding should be deemed to have been abandoned so that further proceedings in that poinding would be incompetent.

(3) The debtor should be liable for the expenses of the second or subsequent poinding but not for the expenses of the original poinding deemed to have been abandoned.

(Recommendation 5.25; clause 63 and Schedule 1, paragraph 5.)

Unauthorised interference with poinded goods

5.121 Section 30 of the Debtors (Scotland) Act 1838 provides:

> "If any person shall unlawfully intromit with or carry off the poinded effects, he shall be liable on summary complaint to the sheriff of the county where the effects were poinded, or where he is domiciled, to be imprisoned until he restore the effects or pay double the appraised value."

The object of this provision is not punishment but to have the defender ordered to restore the goods or pay double the appraised value, and on failure to obey to have imprisonment ordered to compel obedience.[1] On consultation it was reported to us that imprisonment was a severe sanction which the courts were reluctant to use.[2] Moreover, there is no limit on the period of imprisonment if the intromitter is unable to restore or pay double the appraised value as often happens when the intromitter is the debtor.

5.122 The principal remedy for removal of goods in breach of poinding

[1]*Wilson* v. *McKellar* (1896) 24 R. 254.

[2]16 people have been imprisoned for breach of poinding in the period 1970–83, *Prisons in Scotland* and unpublished information obtained from the Scottish Office.

should be their restoration within a specified period thus restoring parties to the position they were in before the breach occurred. To make an order for restoration effective the sheriff should have power at the same time to grant warrant to officers of court to search for and restore the goods if the goods have not been restored within the specified period. An order for restoration should however not be made against a third party who without knowledge of the poinding acquires the goods for value, since such a third party acquires a good title.

5.123 Where a third party removes articles in breach of poinding and restoration is impossible because the articles have been sold or lost, the creditor should be entitled to have the value of the poinding restored at the third party's expense. On application the sheriff should, we suggest, have power to order the third party to consign in court the appraised value of the articles removed in breach of poinding. It seems to us wrong that under the present law the creditor can receive double the appraised value of the article and possibly be in a better position than if the breach had not occurred. Another method which we suggest for restoring the value of the creditor's security involves empowering the sheriff to authorise a poinding of further goods of the debtor. This power could be useful where the identity of the third party breacher is not known so that orders for restoration or consignation are not possible. But a further poinding should only be authorised where removal of the article has occurred as a result of some fault on the debtor's part (such as failure to look after the articles properly). The creditor should however have to bear the loss if the debtor's premises are broken into and the articles stolen. Finally, breach of poinding should be capable of being dealt with as a contempt of court, but we think that this should be used only as a remedy of last resort and be reserved for cases of flagrant and wilful breach.

5.124 We would extend our recommendations relating to consignation of the appraised value, authorisation of a poinding of further goods and contempt of court to cases where the goods are wilfully damaged or destroyed rather than removed. Where poinded articles are damaged or destroyed in circumstances in which the debtor is at fault[1] we think it unreasonable for the creditor to have to bear the loss. In addition to the power to authorise a poinding of further articles, the sheriff should have power to order a revaluation of the articles in order to avoid the debt being reduced by the appraised values of the articles in their undamaged state.

5.125 We **recommend:**

Section 30 of the Debtors (Scotland) Act 1838 (unlawful intromitter to restore or pay double the appraised value on pain of imprisonment) should be replaced by a new provision on the following lines:

(1) Where the debtor or a third party removes goods in breach of poinding the sheriff should have power, on application by the creditor, to order restoration of the goods within a specified time, and in default of restoration to grant warrant to officers of court to search for and restore the goods.

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[1]See *Wallace Evans and Partners* v. *T. Daly & Co. Ltd.* 1984 S.L.T. (Sh.Ct.) 25.

(2) An order for restoration of the goods should not be competent against a third party who acquires the goods for value and without knowledge of the poinding.

(3) Where goods have been removed, damaged or destroyed in breach of poinding the sheriff should have power, on application, to authorise the creditor to poind further articles of the debtor, or in the case of damaged or destroyed goods to authorise a revaluation of those goods.

(4) Where a third party has removed, damaged or destroyed goods in the knowledge that they were poinded the sheriff should have power, on application, to order that third party to consign in court a sum representing the appraised value of the removed or destroyed goods or a sum representing the diminution in value caused by the damage. The sum consigned in court should, on completion of the diligence in respect of the remainder of the goods, be paid to the creditor in satisfaction of the debt, any surplus being paid to the debtor.

(5) Wilful removal, damage or destruction of articles in the knowledge that they were poinded should be liable to be dealt with as a contempt of court.

(Recommendation 5.26; clauses 64 and 65.)

Duration of poindings

5.126 The time scale for completion of the diligence by application for a warrant to sell the poinded goods and their subsequent sale is flexible. The creditor may apply for a warrant when lodging the report of the poinding or delay to allow the debtor time to pay the debt by instalments or otherwise. The courts have held it to be an implied condition of the Debtors (Scotland) Act 1838 that the poinding should be followed by sale "without undue delay".[1] As originally promulgated in 1973 and 1976, Practice Notes of the sheriffs principal provided in all six sheriffdoms that a poinding should be effective for a period of six months from the date of the poinding but (in five sheriffdoms) the sheriff could extend the period, on application, for a further period though not beyond twelve months from that date.[2] This was a time limit affecting the sale, rather than merely the application for warrant. As a result, however, of decisions holding that the Practice Notes in this respect purported to alter the substantive law and were accordingly *ultra vires*,[3] the Practice Notes were amended or revoked. In all sheriffdoms, it remains, as a matter of substantive law, for the sheriff to decide in each individual case whether there has been undue delay, but those Practice Notes currently in force provide that an application for warrant of sale made within six months of the poinding will generally be granted (if otherwise lawful) without enquiry as to whether there has been undue delay.

[1]*Henderson* v. *Grant* (1896) 23 R. 659; *New Day Furnishing Stores Ltd* v. *Curran* 1974 S.L.T. (Sh.Ct.) 20; *City Bakeries Ltd.* v. *S. & S. Snack Bars and Restaurants Ltd.* 1979 S.L.T. (Sh.Ct.) 28.

[2]In the sixth sheriffdom, Glasgow and Strathkelvin, if the application for warrant of sale was made before the end of the sixth month, the sale could take place in the seventh month.

[3]*Post Office* v. *Gorham* (unreported) Sheriffdom of Tayside, Central and Fife, 22 March 1977; *Holbourne (Granite House) Ltd* v. *Kelly* (unreported) Glasgow Sheriff Court (Sheriff Principal Reid) 14 December 1979; *United Dominions Trust* v. *Stark* 1981 S.L.T. (Sh.Ct.) 58.

5.127 What the appropriate period between the execution of a poinding and an application for warrant of sale should be depends to some extent on how the diligence is viewed. We concentrate on this period here as the question of what period should elapse between the granting of a warrant of sale and the sale involves different issues which we discuss later.[1] We would stress that once a warrant of sale has been applied for, the duration of the poinding ceases to be governed by the one-year time limit (with extensions if granted), but is regulated by the terms of the warrant of sale or by those terms as amended, or if warrant of sale is refused the poinding ceases to have effect forthwith. If poinding and sale were regarded primarily as a means of obtaining payment of the debt from the proceeds of sale of the debtor's goods, a period of 2–3 months would be adequate. On the other hand, if creditors are to continue to use the threat to sell poinded goods to obtain payment of the debt by instalments, then the poinding must endure for a considerable period to allow time for such instalments to be paid. In Consultative Memorandum No. 48 we inclined to the latter view and proposed that a poinding should endure for a period of one year with the possibility of extension by court order for a further period or periods. Most of those who commented agreed with our view, only two arguing for a short period.

5.128 The first argument in favour of a short period for poindings is that moveable goods should not be subject for too long a period to poinding which does not by itself transfer ownership of the goods to the creditor, but which prevents the debtor from dealing with them. The debtor must keep them on the premises; cannot exchange them for other goods; and if they are damaged, the debtor may be blamed. We doubt, however, whether in practice the restrictions on disposal cause debtors sufficient inconvenience to require that poindings be of very short duration. Secondly, it has also been said that delay in completing the poinding may be unfair to other creditors since they are prevented from obtaining a right to the goods. It is true that a poinding may induce the debtor to pay the poinding creditor before other creditors. But the argument overlooks the facts that a second poinding creditor who executes warrant of sale first will have priority[2] and that the other creditors can share in the proceeds of sale if they lodge a claim at the proper time,[3] though they may not be entitled to share in payments to account made under pressure of the poinding.[4] In most consumer debt cases, to require the poinding creditor to incur the expense of a warrant sale will rarely assist other creditors. A third argument against allowing poindings to endure for a lengthy period is that debtors will usually have been subject to pressure by the creditor to pay the debt for some considerable time before their goods were poinded. On the other hand, there are cases where it is only at the stage of poinding that the debtor is moved to make serious efforts at payment. In other cases, the debtor's circumstances may have changed from a position of insolvency to a position where the debt can be paid by instalments. Yet another argument

[1]See para. 5.167

[2]Graham Stewart, p. 366.

[3]Within the period of 60 days before and four months after the debtor's notour bankruptcy or apparent insolvency; Bankruptcy (Scotland) Act 1913, s. 10 repealed and re-enacted by Bankruptcy (Scotland) Bill 1984, Sched. 7, para 10.

[4]The bankruptcy legislation (see previous footnote) appears to impose a duty to account to other creditors only if the poinding creditor "shall carry through a sale".

against delay is that the social impact on debtors and their families of the threat of warrant sale is such that they should not be subjected over too long a period to that threat.

5.129 In the light of consultation, however, we remain of the view that poindings should continue to be capable of being operated as a spur to instalment settlements. Where household goods have been poinded it is generally in the interest of neither the creditor nor the debtor that they be sold. The duration of the poinding should therefore be such as to allow most debts to be paid within it by instalments of reasonable amount. The C.R.U. Diligence Survey conducted in 1978 found that in 55% of the cases where goods had been poinded the principal sum was less than £100, in 74% of cases the principal sum was less than £200 and nearly one-half (42%) of poindings were for between £50 and £200.[1] When judicial and diligence expenses have been added on, a slightly above average debt would be in the range of £150–200. This could be satisfied over a period of a year by instalments of £3–4 per week, which would have been a reasonable figure for debtors on low incomes. We think that this analysis based on 1978 statistics still holds good today since it is likely that the size of the debt and the instalments affordable by debtors have increased in the same proportion. In order to deal with larger debts, and cases where the debtor can only afford small instalments, the sheriff should have power to extend the duration of the poinding on application by the creditor for such a period as appears necessary to allow the debt to be paid by instalments or otherwise. Such an application would, however, have to be made before the period of a year had elapsed, because otherwise there would be no subsisting poinding capable of extension. Further extensions should be possible. Where an application for an extension is made, the poinding should continue pending the determination of the application even though the one year period (or that period as extended) elapses after the lodging of the application and before its determination. Were this not the rule, applications for extension would have to be lodged well before the end of the year or extended period in case there were delays in granting them (perhaps because they were opposed).

5.130 **We recommend:**

(1) Unless a warrant of sale has been applied for while the poinding remains effective, a poinding should cease to have effect on the expiry of a period of one year after the date of its execution. The sheriff should, however, have power on application by the creditor to extend the duration of the poinding by such period as appears reasonable to allow the debtor to pay off the debt by instalments or otherwise as agreed between the creditor and the debtor and to grant a further extension or extensions.

(2) An application for extension of a poinding should be made before the expiry of the one-year period or the period of a previous extension, but the poinding should not cease to have effect pending the determination of such an application.

(Recommendation 5.27; clause 62(1) and (2).)

[1]Annex D, Table (5).

Restrictions on second poindings

5.131 To prevent evasion of the implied statutory condition that a warrant sale must be effected without undue delay, it has been held that a second poinding of the same goods in the same premises under the same extract decree is invalid.[1] Moreover, where a creditor purports to poind for a second time goods in the same premises under the same extract decree, and when the value of the poinded articles in the first poinding was less than the debt due, a presumption is raised that the goods referred to in the officer's schedule of the second poinding are the same as the goods covered by the first poinding.[2] In four of the six sheriffdoms, Practice Notes of the sheriffs principal now expressly prohibit or restrict second poindings of goods (not merely the *same* goods but *any* goods) in the same premises by the same creditor unless the debtor has brought into the premises poindable goods which were not in the premises when the first poinding was executed. In the Sheriffdom of Glasgow and Strathkelvin a second poinding is prohibited unless the sheriff on cause shown grants leave, and in the Sheriffdom of South Strathclyde, Dumfries and Galloway there is no Practice Note regulating poindings.

5.132 On consultation, commentators agreed with our suggestion that, to prevent evasion of time-limits on the duration of poindings, the present restriction on second poindings should be retained and embodied in statute rather than Practice Notes. The Society of Messengers-at-Arms and Sheriff Officers suggested however that second poindings should be allowed in certain circumstances such as where the goods were found to be the property of third parties, or where they had been disposed of in breach of poinding. We would agree that a complete prohibition on second poindings would be too harsh on creditors, and elsewhere in this report in the course of discussion of other topics (such as breach of poinding or a third party's goods) recommend that where a poinding has been prejudiced through no fault of the creditor or officer, one of the remedies of the creditor should be an entitlement to execute a second poinding notwithstanding the general prohibition. Gathering together these scattered recommendations we suggest that a second poinding should be competent if:

(*a*) a time to pay order is made which recalls the poinding and gives the debtor time to pay the debt by instalments, and the order is recalled due to the subsequent default of the debtor or otherwise;[3]

(*b*) a debt arrangement scheme comes into force and the poinding is recalled giving the debtor time to pay the included debts over a period of time, and the scheme ceases to have effect or is revoked due to the subsequent default of the debtor or otherwise;[4]

(*c*) the sheriff has ordered release of certain articles on grounds of undue harshness;[5]

(*d*) some or all of the poinded goods have been removed with consent of the creditor or authority of the sheriff to other premises;[6]

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[1]*New Day Furnishing Stores Ltd* v. *Curran* 1974 S.L.T. (Sh.Ct.) 20.
[2]*New Day Furnishing Stores Ltd.* v. *Curran* 1974 S.L.T. (Sh.Ct.) 20.
[3]See para. 3.96 above.
[4]Recommendation 4.42 (para. 4. 285).
[5]Recommendation 5.13 (para. 5.65).
[6]Recommendation 5.25 (para. 5.120).

(*e*) articles have been removed in breach of poinding in circumstances where the debtor is at fault;[1]

(*f*) articles have been destroyed or damaged in breach of poinding in circumstances where the debtor is at fault;[2]

(*g*) articles have been released by the creditor or the sheriff on the ground that they belong to a third party.[3]

5.133 Where the creditor has executed a second poinding while the first poinding subsists (for example if an article has been removed from the first poinding in breach of poinding and cannot be restored), it would be advantageous to the creditor to be able to have the two poindings conjoined so that they thereafter proceed as a single poinding. In this way two applications for warrant of sale, two sales and two reports of sale would be avoided. We think that the sheriff should have power, on application by the creditor, to order the poindings to be conjoined. This power should not be capable of being exercised if a warrant of sale of the goods comprised in either the first or the second poinding had already been granted, otherwise the debtor would lose the right to object to the granting of a warrant to sell the goods contained in the other poinding.

5.134 We **recommend:**

(1) In order to prevent evasion of time limits on the duration of poindings the present restriction on second poindings (incompetent in respect of goods on the same premises under the same extract decree except for goods brought onto the premises after the first poinding) should be set out in statute rather than Practice Notes of the sheriffs principal. The statutory rule should however be subject to the exceptions mentioned in paragraph 5.132.

(2) The sheriff should have power, on application by the creditor, to make an order conjoining two poindings by the same creditor at any time before warrant of sale is granted in either poinding.
(Recommendation 5.28; clauses 50 and 69.)

Recall of poinding

5.135 Under the present law a poinding may be held null on the grounds of its invalidity at any time after execution. Apart from this the sheriff has powers to refuse to receive a report of the poinding on grounds of irregularities in the execution of the poinding or deficiencies in the report.[4] At the stage of an application for warrant of sale, warrant may be refused if the proceedings in the diligence are irregular[5] and, in a recent development[6] also on equitable grounds where the proceeds of sale of the pointed goods are likely not to

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[1]Recommendation 5.26 (para. 5.125).
[2]*Ibid.*
[3]Recommendation 5.48 (para. 5.229).
[4]See para. 5.112.
[5]*Clark* v. *Clark* (1824) 3 S. 143; *Clark* v. *Hinde Milne & Co.* (1884) 12 R.347.
[6]*South of Scotland Electricity Board* v. *Carlyle* 1980 S.L.T. (Sh.Ct.) 98.

exceed the expenses of their sale. These powers may be exercised on application by the debtor or by the sheriff at his or her own instance.[1]

5.136 Later in this Chapter we recommend[2] that the sheriff should have more extensive powers than at present to refuse to grant warrant of sale. In short warrant may be refused if the poinding is invalid or has ceased to have effect, the granting of a warrant of sale would be unduly harsh, the goods are in aggregate substantially undervalued, or the proceeds of sale of the goods are likely not to exceed the expenses of their sale. The sheriff may refuse to grant warrant of sale on any grounds other than undue harshness even in the absence of an objection by the debtor. However, we can see no justification for confining the sheriff's powers to the stage of the diligence when the creditor applies for warrant of sale. If circumstances are such that an application for warrant of sale would be refused and the poinding thus terminated, then the sheriff should have power, on an application made by the debtor at any time between the execution of the poinding and the grant of warrant of sale, to recall the poinding. The debtor should not have to remain under the threat of sale until the creditor chooses to apply for a warrant. However, with the exception of invalidity of the poinding or its ceasing to have effect, the powers of recall prior to an application for grant of warrant of sale should be exercised only on application by the debtor. The debtor's application should be intimated to the creditor in order to give the creditor an opportunity to answer the debtor's averments. Similarly where the sheriff proposes to recall a poinding on his or her own motion that fact should be intimated to both debtor and creditor.

5.137 We **recommend:**

(1) A poinding should be capable of being recalled by the sheriff at any time before the creditor applies for a warrant of sale on the same grounds as the sheriff may refuse to grant a warrant of sale in terms of Recommendation 5.30.

(2) The sheriff may recall a poinding which is invalid or which has ceased to have effect without an application for recall being made by the debtor. Otherwise the power to recall should be exercised only on an application by the debtor. The debtor and creditor should be given an opportunity to make representations before an order for recall is made. (Recommendation 5.29; clause 49(1) to (4).)

Section D. Selling the poinded goods

5.138 At one time warrant of sale was granted along with a warrant to charge and poind. This was the position in letters and precepts of poinding before 1793,[3] and in diligence on small debt decrees until small debt procedure was abolished in 1976. Now all poinding creditors must apply to the sheriff for warrant to sell the poinded goods in order to complete the diligence. In this Section we consider the application for warrant to sell, the arrangements

[1]See for example *Thornton, Applicant* 1967 S.L.T. (Sh.Ct.) 71; *New Day Furnishing Stores Ltd* v. *Curran* 1974 S.L.T. (Sh.Ct.) 20.

[2]Recommendation 5.30 (para. 5.146).

[3]Bankruptcy Act 1793, s. 5. The relevant provisions were re-enacted with modifications by the Bankruptcy Act 1814 and thereafter by the Debtors (Scotland) Act 1838.

made for the sale in the warrant of sale, intimation of the warrant to the debtor, the conduct of the sale, and the report of sale to the sheriff.

Application for warrant of sale

5.139 The Debtors (Scotland) Act 1838, section 26 provides that "if no lawful cause be shewn to the contrary" the sheriff shall, if required, grant warrant of sale. Apart therefore from a power to approve with or without modifications the officer's arrangements for sale (such as the time and place of sale),[1] the sheriff has a limited jurisdiction to decide whether warrant of sale should be granted at all. At one time it was thought that this jurisdiction was merely "ministerial" (that is to say, administrative or executive in character). In the exercise of this jurisdiction, the sheriff has a power, indeed a duty, to decide whether or not the proceedings are on the face of it regular[2] (for example whether the goods are exempt from poinding). The sheriff may also decide whether the goods are so grossly undervalued or otherwise so irregularly valued as to make the poinding a nullity.[3] Objections may be taken by the sheriff even if none are raised by the debtor or a third party.[4]

5.140 Until recently, it was generally thought that the sheriff's power to refuse warrant of sale was strictly limited to cases where the proceedings were irregular, and that the sheriff had no discretion to refuse warrant of sale on equitable grounds: if the proceedings were regular, the sheriff had to grant warrant; if they were not regular, the sheriff could not grant warrant.[5] In the recent case of *South of Scotland Electricity Board* v. *Carlyle*,[6] however, the sheriff principal upheld a sheriff's decision refusing warrant of sale on the ground that the expenses of the sale would be likely to exceed the proceeds derived from it and would only add to the defender's indebtedness. The result of the decision seems to be that the sheriff is entitled to refuse warrant of sale on grounds of "expediency", and that holding a sale is inexpedient if its result would be to impoverish the debtor, or at least to add to the debt, without financially benefiting the creditor. On the other hand, in comparing the likely proceeds of sale and the diligence expenses, only the expenses subsequent to the warrant of sale are taken into account. The proceeds of sale do not require to cover the whole expenses of the charge and poinding (as well as the expenses of sale) since the "creditor is entitled to take these steps in

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[1]These are set out in the draft warrant submitted by the officer or solicitor to the sheriff along with the execution of poinding on which is endorsed the crave for warrant of sale.

[2]See *Clark* v. *Clark* (1824) 3 S. 143 at p. 144 (where the court held that the sheriff's power "is merely ministerial and only entitles him to take cognizance of objections arising as to the *ex facie* regularity of the diligence"); *Clark* v. *Hinde Milne & Co.* (1884) 12 R. 347 per Lord Shand at p. 354 " . . . the judge must examine the proceedings and satisfy himself of the regularity of what has taken place and of the applicant's right to a warrant"; *Jack* v. *Waddell's Trs.* 1918 S.C.73.

[3]*Scottish Gas Board* v. *Johnstone* 1974 S.L.T. (Sh.Ct.) 65 (an application for warrant of sale); *Le Conte* v. *Douglas* (1880) 8 R. 175, (an action of reduction).

[4]*Thornton, Applicant* 1967 S.L.T. (Sh.Ct.) 71; *New Day Furnishing Stores Ltd* v. *Curran* 1974 S.L.T. (Sh.Ct.) 20; *City Bakeries Ltd* v. *S. & S. Snack Bars and Restaurants Ltd* 1979 S.L.T. (Sh.Ct.) 28; *South of Scotland Electricity Board* v. *Carlyle* 1980 S.L.T. (Sh.Ct.) 98.

[5]See *City Bakeries Ltd* v. *S. & S. Snack Bars and Restaurants Ltd supra*, per Sheriff Kearney at p. 29.

[6]1980 S.L.T. (Sh.Ct.) 98. We understand that in several other recent unreported cases prior to *Carlyle*, the sheriff had refused warrant of sale on equitable grounds but this appears to have been a novel practice.

attempting to enforce his decree and ascertain the extent of his debtor's poindable effects".[1]

5.141 In Consultative Memorandum No. 48 we discussed possible criteria for the refusal of warrant of sale.[2] On consultation only one body suggested that the sheriff should have an unfettered discretion to refuse or grant the warrant. But we do not think that an unfettered discretion is appropriate for it would not afford those involved in diligence sufficient guidance as to whether or not warrants would be granted until a considerable number of decisions had been reported. There was no dissent on consultation from our proposal that the sheriff should retain the existing powers to refuse warrant on the grounds of gross under-valuation of the goods or some other irregularity in the proceedings, and these grounds should be specified in statute.

5.142 In our Consultative Memorandum No. 48 we found it unnecessary to state a view on whether *South of Scotland Electricity Board* v. *Carlyle*[3] was correctly decided in law since we suggested that the general policy underlying the decision is sound and should be placed on an unchallengeable statutory basis.[4] On consultation there was general agreement by all those who commented. One body suggested that warrant of sale should be refused unless the whole diligence expenses and a prescribed proportion of the debt were likely to be recovered out of the proceeds of sale. In our view this goes too far; a creditor should be entitled to recover all or part of the expenses of poinding and charge even if the debt is not reduced. There is no doubt that of the admittedly few warrant sales which took place in 1977,[5] in a small but significant number the proceeds of sale did not cover the expenses of advertisement and sale.[6] A further unpublished study undertaken by the Central Research Unit indicates that although the decision in *Carlyle* was being generally followed there were still warrants of sale being granted in 1980 and 1981 where the proceeds of sale did not meet the expenses of sale.[7] Such diligence is in our opinion oppressive since it harms the debtor without benefiting the creditor. We would reject the argument that a creditor should be allowed to make an example of a few debtors by pursuing diligence against them to the bitter end in order to persuade others to settle their debts promptly.

5.143 In Consultative Memorandum No. 48 we rejected[8] a specific ground of refusal of warrant of sale based on a comparison between the likely proceeds of sale and the expenses of sale and proposed instead a general ground based on harshness and unconscionability. On reconsideration we think that it would offer more guidance to those involved if there was an express statutory ground

[1]*South of Scotland Electricity Board* v. *Carlyle, supra*, at p. 100

[2]Paras. 5.24 to 5.32.

[3]1980 S.L.T. (Sh.Ct.) 98.

[4]Proposition 38 (para. 5.32).

[5]285 in 1977; 289 in 1978.

[6]The C.R.U. Warrant Sales Report shows that of the 94 reports of sales of household goods in 1977 which were available for examination, the proceeds of sale did not cover the expenses of advertisement and sale in 10 cases (10%), did not cover the total diligence expenses in 19 cases (20%), and did not cover the total judicial and diligence expenses in 37 cases (39%).

[7]6 cases out of 261 reports of sales of household goods which were available for examination.

[8]Proposition 38(2) (para. 5.32).

for refusal of warrant of sale where the likely proceeds of sale would not exceed the likely expenses of sale. There is, however, in our opinion still room for a general ground of refusal based on harshness which was agreed on consultation. Even if creditors generally abandon or at least delay diligence where it would be inhumane to proceed—where the debtor's spouse was dying in hospital for example—this might not always be the case. We envisage that the courts would interpret "undue harshness" (which we prefer to the term "harsh and unconscionable" used in our proposal) as being something beyond hardship, so limiting a refusal of warrant of sale on this ground to exceptional cases.

5.144 At present there is no procedural rule requiring that the debtor be given an opportunity to object to the grant of a warrant of sale[1] except in some sheriffdoms where Practice Notes of the sheriffs principal require service of applications made later than six months after the execution of the poinding. Our proposal[2] that all applications for warrant of sale should be intimated to the debtor who should be entitled to object to the granting of a warrant was generally agreed on consultation, especially in view of the extension of the grounds on which sheriffs may refuse warrant of sale, and we recommend accordingly. In order to assist debtors we think that the copy of the application for warrant of sale should be accompanied by a notice in prescribed form informing the debtor of the right to object, to make other applications to the court[3] or to redeem some or all of the poinded goods at their appraised values.[4]

5.145 We understand that problems arise in cases where the sheriff refuses to grant a warrant of sale with the result that the poinding terminates. Creditors often do not intimate this fact to the debtor or possessor of the goods who consequently are left in a state of uncertainty as to their rights and obligations in respect of the goods. We recommend that the sheriff clerk should make the necessary intimation.

5.146 We **recommend:**

(1) An application for warrant to sell poinded goods should be intimated by the creditor to the debtor along with a notice in prescribed form informing the debtor of the rights to redeem, to object to the granting of the application, and to make various applications to the court.

(2) The sheriff should have power to refuse to grant a warrant to sell on the grounds that:

(*a*) the poinding is invalid or has ceased to have effect; or

(*b*) the goods are in aggregate substantially undervalued; or

(*c*) the likely proceeds of sale would not exceed the likely expenses of sale; or

(*d*) it would be unduly harsh in the circumstances to grant a warrant.

[1]Under an Act of Sederunt of 6 March 1833, the application for warrant of sale is made by the creditor, officer or solicitor endorsing on the report of the poinding a short crave: see Graham Stewart, p. 358; *British Relay Ltd* v. *Keay* 1976 S.L.T. (Sh.Ct.) 23 at p. 24; *New Day Furnishing Stores Ltd.* v. *Curran* 1974 S.L.T. (Sh. Ct.) 20.

[2]Proposition 38(1)(para. 5.32).

[3]For example for a time to pay order.

[4]Recommendation 5.19 (para. 5.95).

(3) The sheriff should be entitled to exercise the powers in (*a*), (*b*) and (*c*) of paragraph (2) above on his or her own motion as well as on an objection being made by the debtor, but should only be able to refuse warrant on ground (*d*) on an objection being made by the debtor to this effect.

(4) Where the sheriff refuses to grant a warrant of sale and the poinding is thereby terminated, the sheriff clerk should be under a duty to intimate this to the debtor (and possessor if a different person from the debtor).
(Recommendation 5.30; clause 52.)

Redemption of goods on payment of appraised value

5.147 We recommended earlier in this Chapter that the "offer back" to the debtor of the goods at their appraised values by the officer when conducting a poinding should be replaced by an entitlement of the debtor to redeem the goods at their appraised values at any time within 14 days after the date of the poinding.[1] We consider that a right of redemption should also arise at the stage of the application for warrant to sell. The creditor's application for warrant to sell marks for the debtor a new and more urgent stage in the diligence, making it appropriate that the debtor be given a further opportunity to avoid a sale by redeeming the goods. We suggest that this opportunity should be available for seven days following the receipt by the debtor of intimation of an application for warrant of sale.

5.148 Once the sheriff has granted warrant of sale of the poinded goods, however, the debtor should have no further entitlement to redeem. Redemption on the eve of sale would cause considerable practical problems and the expenses so far incurred in arranging the sale might well become irrecoverable. Redemption of some of the goods could render the sale of the remainder uneconomic and so frustrate the warrant of sale granted by the court. We also think that the debtor should not be entitled to redeem the goods in the interval between the expiry of the 14 day period after the execution of the poinding and the application for warrant of sale. If, for example, debtors could compel the release of particular goods piecemeal on payment of small amounts (representing perhaps the regular instalments agreed with the creditor), the officer's fees for dealing with the release of the goods would mount up and this would be in the interests of neither the creditor nor the debtor. Moreover, there would be an increased risk that confusion would arise as to what goods remained in the poinding. These considerations suggest that in the period between the expiry of the 14 day period after the execution of the poinding and application for warrant of sale, during which instalment arrangements for settlement of the debt operate with varying degrees of success, the debtor should not be entitled to redeem.

5.149 The fact of redemption by the debtor ought to be properly evidenced and reported to the court, as otherwise disputes may arise as to what goods remain in the poinding, and the court in dealing with the application for warrant of sale may be unaware of the current situation. On the debtor tendering the appraised value of an article, the officer of court should be

[1]Recommendation 5.19 (para. 5.95).

under a duty to issue a receipt identifying the article and having the effect of releasing it from the poinding. Where redemption takes place within the 14 day period after execution of the poinding but before the officer lodges the report of poinding the redemption should be mentioned in the report. If the report has been lodged but no application for warrant of sale has been made, any redemption should be noted by the creditor or officer in the application to sell the remainder of the goods; while any redemption made after an application for warrant of sale has been made should be reported forthwith to the court, since the sheriff must know what goods are included in the poinding in view of the various grounds on which warrant of sale may be refused, in particular that the likely proceeds of sale of the goods will not exceed the likely expenses of their sale.

5.150 **We recommend:**

(1) On receiving intimation of an application for warrant of sale the debtor should be entitled to redeem some or all of the poinded goods on payment of their appraised values to the officer of court within a period of seven days after receipt of the intimation.

(2) The officer of court should be under a duty to give the debtor a receipt identifying the redeemed goods. The issue of a receipt should have the effect of releasing the specified goods from the poinding. The officer should be required to report the redemption forthwith to the court. (Recommendation 5.31; clause 53(2), (3) and (5).)

Arrangements for sale made in the warrant of sale

Location of sale

5.151 The Debtors (Scotland) Act 1838, section 26 provides that the sheriff must grant warrant of sale by public roup (auction) "at such place with such public notice of the sale, as may appear to the sheriff most expedient for all concerned". The sheriff must fix the place of sale in the warrant; the warrant cannot be in general terms leaving it to the officer to insert the place of sale later.[1] Except in one or two areas, nearly all warrant sales of household goods take place in the debtor's residence. Until recently, the practice (which had been followed for many years[2]) was to order one advertisement in a specified newspaper circulating in the area where the goods were to be sold.

5.152 The result was that a sale in the debtor's residence necessarily meant that the debtor's name and address were identified in the advertisement of the sale so that his or her indebtedness was publicised to the local community. This practice was widely criticised. In November 1980, members of the Society of Graphical and Allied Trades withdrew their co-operation from the publication of advertisements of warrant sales[3] and shortly thereafter the Scottish Newspaper Proprietors' Association recommended that their members should not publish such advertisements. It appears that this "ban" on warrant sale advertisements was not restricted to sales in debtors' dwellings but

[1] *McVicar* v. *Kerr* (1857) 19 D. 948.
[2] The McKechnie Committee (para. 167) noted the practice in 1958.
[3] See e.g. *The Scotsman* 28 November 1980; *The Glasgow Herald* 28 November 1980.

extended to all warrant sales, including sales of commercial goods on business premises.

5.153 As a consequence, four different modes of giving public notice of warrant sales are now used. First, public notice by newspaper advertisement is used in areas of Scotland where newspapers circulate which still accept warrant sale advertisements. Second, in many areas, the only public notice ordered is by way of intimation on the notice board of the court granting the warrant. Third, in one sheriffdom the court orders in some cases that handbills advertising the sale be circulated in the locality of the debtor's residence or other place of sale in addition to intimation on the court notice board. This is a reversion to an older practice which had been followed before newspaper advertisement became the common form of public notice. Fourth, in some areas the practice is to remove goods to an auction room for sale together with other non-poinded goods so that the advertisement of the auction suffices and does not identify the debtor.

5.154 Our Consultative Memorandum No. 48 was issued in October 1980 and therefore did not take account of the "ban" on newspaper advertisements of warrant sales, or public notice on court notice boards and by handbills. In that Memorandum, we proposed[1] that (as is the practice elsewhere in the United Kingdom) warrant sales should not take place in the debtor's residence unless the debtor consents and the poinded goods should normally be removed for sale to an auction room.

5.155 The grounds for requiring sales in auction rooms may be summarised as follows:

(*a*) The Edinburgh University Debtors Survey[2] and other evidence discloses that the humiliation and distress inflicted by newspaper advertisements identifying debtors and publicising their indebtedness is deeply resented by the debtors and indeed the advertisement is often feared more than the sale itself. The advertisement is not effective in inducing potential bidders to attend sales in debtors' residences, and its primary role is as an inducement to payment; this was not the intention of Parliament when it enacted the 1838 Act.

(*b*) Apart from the advertisement, it is likely that debtors generally are also distressed by the actual holding of a sale in the home far more than they would be by a sale in an auction room.

(*c*) As the McKechnie Report recognised,[3] it seems likely that better prices for the poinded goods would be obtained because of the competition which usually occurs at a sale in a public auction room but which is generally lacking at a warrant sale in the debtor's dwellinghouse.[4] Requiring a sale in a public auction room is the most that can be done to ensure that poinded household goods are sold at their market value, and the procedure is more likely to be accepted as fair to all concerned.

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[1]Proposition 41 (para. 5.40).

[2]Para. 8.6.

[3]Para. 172.

[4]The large proportion of warrant sales in which the goods are adjudged and delivered to the poinding creditor, or sold at the upset price, suggests that competition is rare.

5.156 These arguments were accepted by most of those who commented. It was, however, represented to us that poinding and sale is effective in enforcing debts mainly because a sale in the home with attendant publicity is so disliked that debtors find some way of paying their creditors before these steps are reached. If goods were to be sold in auction rooms without publicity identifying the debtor, fewer debtors would pay up and (so the argument ran) more sales would be necessary. We have little doubt that the practice of advertising and holding sales in debtors' homes is generally regarded as an unwarrantable intrusion on their privacy and is no longer acceptable. Moreover, if goods are to be sold in auction rooms the threat to remove the goods from the home to the auction room will constitute a very effective spur to payment of the debt.

5.157 It was also argued that once a decree for payment of a debt had been granted the matter ceased to be private and advertisement of the debtor's position served a useful purpose in that small traders in the locality are warned not to give further credit to that debtor. Large traders are able to find out about the decrees through Stubbs Gazette and other credit reference agencies, but small shopkeepers cannot or at least do not. Other creditors are, it was argued, entitled to know of the impending warrant sale so that they can take steps to share in the proceeds. It is probably true that small shopkeepers will no longer be warned against giving further credit to the debtor in question, but we do not think this factor is decisive as most small shopkeepers trade on a cash basis. So far as sharing by other creditors is concerned, it is almost unknown in modern practice for them to claim to participate in the proceeds of a warrant sale of household goods.[1]

5.158 Our proposal that a sale of household goods should be held in an auction room, unless the debtor consents to a sale in the house, presents considerable problems, especially in the case of poindings in areas remote from auction rooms. It is true that the cost of advertising the sale and the fee and travelling expenses of the auctioneer could be set against the cost of removing the poinded goods to the nearest auction room, and that in some cases arrangements could be made for uplifting poinded goods along with other goods (whether poinded or non-poinded) destined for the same auction room. But in a substantial proportion of cases it would be more expensive to hold the sale in an auction room rather than in the debtor's house, and the creditor would be unlikely to recover the extra expense by the higher prices expected for goods sold in the competitive conditions of an auction room. In Consultative Memorandum No. 48 we invited views on three options to deal with this problem.[2] These were that the sheriff should have power to direct the sale to be held in a debtor's dwellinghouse notwithstanding the debtor's refusal to consent, that the sale should be held in premises other than an auction room, or that an Exchequer subsidy should be provided towards the cost of removal to the nearest auction room. Most of those who commented

[1]Small creditors are not aware of their right to claim to participate under s. 10 of the Bankruptcy (Scotland) Act 1913 (repealed and re-enacted by para. 10 of Sched. 7 to the Bankruptcy (Scotland) Bill 1984). Moreover, it is unclear as a matter of law whether or how the provision would operate in the common household goods case where there are no proceeds of sale but the goods are made over to the creditor in default of sale.

[2]Proposition 41 (para. 5.40).

favoured the second option. We would reject the first option as this would entail warrant sales outwith the main centres of population generally being held in debtors' dwellinghouses. We favour a combination of the second and third options. If the cost of removal to the nearest auction room is such that the likely expenses of sale there will exceed the likely proceeds of sale with the result that the sheriff will refuse to grant warrant of sale, the officer or creditor should have an opportunity to find suitable alternative premises nearer to hand. Government assistance could take the form of making premises available (such as a room in nearby offices or in the sheriff court) or cash payment towards hiring premises or removal expenses.

5.159 In our view the only way in which the wide public concern about sales of pointed household goods in dwellinghouses (which involve distressing publicity, invasion of privacy and in many cases failure of the goods to attain a reasonable price) can be met is by requiring the sale to be held elsewhere unless the debtor consents to a sale in the house. Furthermore some element of Government assistance seems inevitable because otherwise poinding and sale will cease to be an effective diligence or spur to payment against debtors who live above a certain distance from auction rooms. We would stress that our recommendations only apply to the sale of goods in debtors' dwellinghouses; sales in other premises belonging to the debtor such as a shop or an office should continue to be competent, whether or not the debtor consents, since there is not the element of invasion of domestic privacy in these cases.

5.160 We think the opportunity should be taken to regulate the rights of third parties on whose premises it is desired to hold the warrant sale. At present, it seems that a third party has no right to object[1] and on consultation, those commentators who expressed a view thought that the third party's consent should be obtained and produced to the sheriff before warrant of sale in those premises was granted. On reconsideration we have come to the view that there should be a procedure for overriding the lack of consent where the poinded goods are of such a nature (a heavy crane for example) that removal to other premises for sale would be unreasonable. We suggest that the sheriff should have power, on cause shown, to dispense with the third party's consent but that this power should only be available in respect of non-residential premises. Where goods were poinded in a third party's dwellinghouse, both the debtor and the third party occupier should be required to consent to a sale being held there, and there should be no machinery for overriding a refusal to consent by either.

5.161 We **recommend:**

(1) A warrant of sale should not provide for sale in a dwellinghouse unless the debtor (and the occupier of the dwellinghouse if a different person) consents in writing to a sale being held there.

(2) Where the consent or consents required in paragraph (1) above are not given, the sale should normally be required to be held in an auction room specified in the warrant of sale. But if the expenses of removal to the nearest auction room would be likely to exceed the proceeds of sale of the goods there, the sheriff may direct that the sale be held in

[1] *McNaught and Co.* v. *Lewis* (1935) 51 Sh.Ct.Reps. 138.

other premises made available by the creditor if such other premises appear suitable and the occupier of those premises consents in writing to their use, but if no other suitable premises are available the sheriff should refuse to grant a warrant of sale.

(3) Where goods have been poinded in a dwellinghouse and the creditor is unable to find other suitable premises for holding a sale, assistance should be given by the Government, either by making Government premises available or by subsidising the removal of goods to the nearest auction room or other suitable premises.

(4) The sheriff should not grant a warrant of sale to sell poinded goods in premises (other than a dwellinghouse or an auction room) occupied by a third party unless the third party occupier consents in writing, provided that if the goods have been poinded in those premises and their nature is such that it would be unreasonable for them to be removed for sale, the sheriff should have power to direct that the sale be held in those premises notwithstanding the lack of consent by the third party occupier. (Recommendation 5.32; clause 54(1) to (5).)

Advertising the sale

5.162 In order to avoid clandestine or collusive sales public advertisement of the sale is essential. One of our reasons for recommending that poinded household goods should generally be sold in auction rooms is that, in these cases, any advertisement of the sale would not mention the debtor as the goods would normally be sold along with other goods, so that a general advertisement of the sale would suffice for all. In view of the distress caused to debtors by advertisements which named them, we think there should be a specific prohibition against any advertisement which names the debtor or discloses that the goods offered for sale are poinded goods, except where the sale is to take place on the debtor's premises. In these cases (sales on the debtor's commercial premises or the rare sale in a dwellinghouse with the debtor's consent) identification of the debtor by name and publication of the address of the premises is inevitable, although it may be unnecessary to reveal the fact that the goods have been poinded or that the sale is a warrant sale.

5.163 To avoid misunderstandings, and perhaps also to facilitate the provision of premises by third parties, we think that any advertisement of the sale of poinded goods to be held on a third party's premises (other than an auction room) should be required to state that the goods do not belong to the third party. This requirement would be in addition to the requirement not to name the debtor or disclose that the goods were poinded.

5.164 We understand that most hire, hire purchase and conditional sale agreements require the hirer or purchaser to notify the supplier if the goods are poinded, but many debtors may fail or forget to do this. Third party owners of goods which have been poinded (such as finance companies involved with hire purchase goods) rely to some extent on public advertisements of sales in order to find out about sales of their goods. Our recommendation that most public advertisements of sales will not disclose the identity of the debtor would prejudice third party owners. To prevent this, prescribed details of forthcoming sales should be displayed on a public notice board in the sheriff

court. In our view this publicity would not inflict anything like the same humiliation and distress on debtors as newspaper advertisements or hand bills do.

5.165 Section 26 of the Debtors (Scotland) Act 1838 provides that public notice of the sale must be given between eight and 20 days before the sale takes place. The intention was to secure the attendance of bidders at the sale although in many cases this is not achieved. We think that statutory time limits are unnecessary and that the sheriff should have power to regulate the timing of the public notice when granting warrant of sale. This power would only be appropriate in non-auction room sales; where the goods are to be sent to an auction room for sale the arrangements for any public notice could be left to the auctioneers.

5.166 We **recommend:**

(1) Where the sale is to be held in an auction room or premises other than the debtor's premises, the public notice of the sale should not name the debtor or disclose that the goods consist of or include poinded goods.

(2) Where the sale is to be held in premises occupied by a third party, then in addition to the prohibition in paragraph (1) above, the public notice should state that the goods are not those of the occupier.

(3) The sheriff should continue to direct in the warrant of sale the form and timing of public notice to be given in any sale on premises other than an auction room.

(4) Prescribed particulars of every sale should be displayed on the public notice board of the court which granted the warrant of sale.
(Recommendation 5.33; clause 56(3)–(6).)

Time of sale

5.167 Section 26 of the Debtors (Scotland) Act 1838 requires the sheriff in granting warrant of sale to specify the time (the time of the day and the date) at which the sale is to take place. For goods to be sold in auction rooms it may not be possible for the time of sale to be ascertained when an application for warrant of sale is made. Furthermore, a fixed time of sale is inflexible and where the arrangements have to be changed due to unforeseen circumstances an application to the sheriff for a fresh warrant of sale becomes necessary. On the other hand a warrant of sale which did not state any time by which the goods had to be sold would be undesirable as the debtor could remain subject to the threat of sale (and the goods could remain poinded) indefinitely. Since a statutory time limit might be too long for some areas and too short for others, we think the sheriff in granting warrant should specify a period within which the sale must take place.

5.168 We recommend above[1] that a poinding should cease to have effect a year after its execution, unless extended by the sheriff. This rule does not apply once warrant of sale has been applied for. In order to preserve the creditor's security during the period allowed for sale specified in the warrant,

[1]Recommendation 5.27 (para. 5.130).

the poinding must not lapse. We therefore suggest that the granting of the warrant should have the effect of extending the poinding until the sale is carried out or the specified period elapses without a sale having been held.[1]

5.169 We **recommend:**

Instead of the warrant of sale specifying the time and date of the sale it should specify a period within which the sale must take place. The granting of the warrant should have the effect of extending the duration of the poinding until the sale is executed or the warrant expires unexecuted at the end of the specified period.
(Recommendation 5.34; clauses 55(4) and 62(3).)

Appointment and functions of auctioneer and officer

5.170 Under the present law, the persons responsible for the conduct of a warrant sale are the auctioneer and the judge of the roup. The functions of the judge of the roup, who is appointed in the warrant of sale,[2] are (*a*) to open the sale, to supervise the sale, to intervene if any irregularity occurs and to close the sale;[3] (*b*) if the goods are not sold, to deliver the goods to the poinding creditor;[4] and (*c*) to make a report of the sale (or delivery) to the sheriff within eight days.[5] The practice is for an officer of court to be appointed judge of the roup, the advantage being that if the officer does not carry out the functions properly, he or she may be disciplined by the sheriff principal. There is also an advantage in appointing the officer who executed the poinding lest any dispute arise as to the identity of the poinded goods.

5.171 Clearly someone has to be appointed to make arrangements for the sale, make arrangements for the goods to be removed if they are to be sold in an auction room or other premises, supervise the sale and make a report on the sale to the court. We received no comments on consultation that would lead us to recommend any alteration in the current practice of appointing an officer of court to perform these functions. We envisage that the officer who poinded the goods would normally be appointed in order to avoid any mistakes as to the identity of the goods to be sold. The officer's attendance at the sale might be thought superfluous in the cases where the poinded goods are offered for sale in an auction room. In Consultative Memorandum No. 48 we suggested[6] that to save expense an officer should no longer be required to attend. The auctioneer could report to the officer who would in turn report to the sheriff. The creditor rather than the officer would be responsible for taking delivery of unsold goods although most creditors would probably authorise the auctioneer to sell the goods to the highest bidder (notwithstanding any reserve price) in order to avoid this. On consultation this suggestion provoked a mixed reaction. The main justification in our opinion for the presence of the officer is the avoidance of delay in making a report to the sheriff. It is generally a week or so before auction rooms account to the sellers, yet an officer of

[1]Further extension may be available as the result of an instalment agreement (para. 5.194) or by the grant of an amendment to the warrant (para. 5.188).
[2]Debtors (Scotland) Act 1838, s. 26.
[3]*Strachan* v. *Auld* (1884) 11 R. 756.
[4]Debtors (Scotland) Act 1838, s. 27.
[5]*Ibid.*, s. 28.
[6]Proposition 45 (para. 5.52).

court has only eight days (14 under Recommendation 5.44 below) in which to lodge in court a report of the sale together with an account of the balance due to or by the debtor. An officer who was present would, however, be in a position to take a note of the prices fetched by the articles and could submit the report without delay. We would not favour imposing a statutory duty on auctioneers to account to officers, within say seven days, as this might well deter them from accepting poinded goods especially as the duty would have to be backed by sanctions such as penalties for contempt of court or criminal fines. Other advantages of the officer's attendance at the sale would be that arrangements could be made on behalf of the creditor in respect of any unsold goods, and that a cancellation of the sale could be authorised if the debtor paid the debt at the last minute.

5.172 **We recommend:**

The warrant of sale should continue to appoint an officer of court to make arrangements for the sale, to supervise or attend the sale, and to make a report to the court.
(Recommendation 5.35; clauses 55(5), 59(1) and 61(1).)

5.173 The auctioneer is also appointed by the sheriff in the warrant of sale. This power stems from the common law. At the time when Consultative Memorandum No. 48[1] was issued, the general practice was to appoint an auctioneer for all sales, the person appointed being someone who, alone or with others, carried on business as an auctioneer and who was independent of the officer or creditor.[2] In some sheriff court districts, however, the officer of court appointed as judge of the roup could also be appointed as auctioneer where the goods were sold in pursuance of a summary cause decree.[3] Where an auctioneer is appointed, that person (or his or her firm) is usually a member of the Incorporated Society of Valuers and Auctioneers (Scottish Branch) or the Scottish Association of Auctioneers. In the case of a sale in an auction room an auctioneer of that sale room is appointed.

5.174 In Consultative Memorandum No. 48 we discussed whether an officer of the court should be able to act as both auctioneer and supervisor in cases where goods were not sold in auction rooms.[4] The main disadvantage of the practice of appointing a separate auctioneer is the extra expense which can be disproportionately high for goods of relatively small value.[5] Moreover, the Incorporated Society of Auctioneers and Valuers (Scottish Branch) informed us that it is not easy to obtain the services of an auctioneer to conduct warrant sales at present. This is perhaps because of the travelling involved and the likelihood that the sale will be cancelled after arrangements have been made.

[1]October 1980.

[2]This practice developed following *Cantors Ltd* v. *Hardie* 1974 S.L.T. (Sh.Ct.) 26 where the appointment of an employee, partner or employer of the officer as auctioneer was disapproved.

[3]See *Allison's (Electrical) Ltd.* v. *McCormick* 1982 S.L.T. (Sh.Ct.) 93 for a summary of the practices in various sheriffdoms at January 1981.

[4]Paras. 5.47 to 5.51.

[5]Unpublished data collected by the Central Research Unit in their investigation of warrant sales show that in 1977 in the case of commercial goods sold by an auctioneer, the fee varied between 1% and 23% (average 6%) of the proceeds (including appraised values of unsold goods) of sale. Where the proceeds were under £500 the auctioneer's fee amounted on average to 9% of the proceeds.

5.175 It has been argued that the appointment of an independent auctioneer makes it appear that every effort has been made to obtain a fair price for the goods; on this view the auctioneer:

> "should be independent of the sheriff officers who nominate him and act as judge of the roup. Otherwise it cannot be said that the judge of the roup will be seen to be 'there to see fair play on both sides at the sale and to interfere if anything irregular is done'."[1]

On the other hand officers of court can be disciplined if they fail to conduct warrant sales fairly and these disciplinary sanctions, rather than the appointment of another person to act as auctioneer (ultimately at the debtor's expense), should be sufficient protection for debtors.

5.176 It would be a strong argument in favour of requiring auctioneers if their appointment resulted in the goods being sold for higher prices than if officers acted as auctioneers. From the C.R.U. Warrant Sales Report however, it appears that, in 1977, in over three-quarters of sales held at business premises, the items were either sold at their appraised values or delivered as unsold to the creditor. Because of the low level of attendance at such warrant sales, the professional skills of auctioneers are seldom needed.

5.177 On consultation, reaction was divided but most of those who commented favoured removal of the prohibition against appointment of officers of court as auctioneers in summary cause sales and retention of the prohibition in other cases. The Practice Notes currently in force (in the Sheriffdom of South Strathclyde, Dumfries and Galloway there is no Practice Note) are now along these lines although an officer of court may be appointed to act as auctioneer in ordinary auction sales if an auctioneer is unavailable. We think the appointment should be regulated by statute rather than by Practice Notes and the common law. The provisions we recommend would follow those contained in the current Practice Notes but in our opinion the value of the goods being auctioned is more relevant than the type of decree being enforced. Where the goods are valued at more than £1,000 an auctioneer should if possible be appointed to sell them. Only where the services of a professional auctioneer cannot be obtained should an officer of court or other suitable person be appointed. On the other hand where the goods are valued at £1,000 or less the court may appoint an officer of court as auctioneer to conduct the sale. Where the court intends to appoint an officer of court to conduct the sale[2] it should in order to save trouble and expense, appoint the same officer as is appointed to make arrangements for and supervise the sale. In these circumstances, where only a single officer is present at the sale, we think a witness should be required to be in attendance to provide an independent account of what occurred if the proceedings are challenged.

5.178 We **recommend:**

(1) Provision should be made by statute rather than by Practice Notes regulating the appointment of persons to conduct warrant sales. Where the sale is to be held in premises other than an auction room:

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[1]*Cantors Ltd.* v. *Hardie* 1974 S.L.T. (Sh.Ct.) 26, at p. 28.

[2]We envisage that the officer who executed the poinding would normally be appointed in order to avoid mistakes as to the identity of the goods to be sold.

(*a*) if the goods are valued at more than £1,000 (or such other sum as may be prescribed by act of sederunt) the sheriff should appoint an auctioneer to conduct the sale, but if an auctioneer is not available an officer of court or other suitable person may be appointed;

(*b*) if the goods are valued at or less than the above sum the sheriff may appoint either an officer of court or an auctioneer to conduct the sale.

(2) If an officer of court is appointed to conduct the sale he or she should normally be the officer appointed to make arrangements for and supervise the sale, in which case a witness should be required to be in attendance at the sale.
(Recommendation 5.36; clauses 55(6) and 59(2).)

Intimation of arrangements for sale to debtor

5.179 Section 26 of the Debtors (Scotland) Act 1838 requires the sheriff to order intimation of the warrant of sale to the debtor (and to the possessor of the poinded goods if a different person) at least six days before the date of the sale. The intention was to give the debtor adequate notice of the sale and the Act contemplates that intimation might be made after the sale has been advertised. In practice, intimation is made by the officer as soon as the warrant of sale is granted in order to give warning not only of the sale but the impending advertisement, which as the Edinburgh University Debtors Survey suggests[1] is often as powerful an inducement to payment of the debt as the threat of sale.

5.180 In terms of our previous recommendation[2] the officer of court rather than the sheriff would make detailed arrangements for the sale although the sale would have to take place within the period stipulated by the sheriff in the warrant of sale. Therefore intimation of the warrant of sale alone will no longer inform the debtor of the time when the sale is to be held. We think the officer should intimate the proposed date for the sale to the debtor as soon as the arrangements have been made. Intimation of the warrant of sale should also be made to debtors so that they know that the sale is taking place by authority of the sheriff. This scheme would retain the option, open to creditors under the existing law, of intimating the warrant of sale as soon as it has been granted. This practice should not be discouraged since intimation leads many debtors to settle, thus reducing the number of warrant sales that have to be carried out. On the other hand to save expense officers may (as at present) wish to intimate the warrant and the arrangements made for sale at the same time. While intimation of the warrant of sale should be made before or at the same time as intimation of the date arranged for the sale, it should not be competent to intimate the warrant later, because debtors are entitled to know that the officer's arrangements are in pursuance of a warrant granted by the court.

5.181 In Consultative Memorandum No. 48[3] we sought views on whether

[1]Para. 7.24.
[2]Recommendation 5.34 (para. 5.169) above.
[3]Proposition 40 (para 5.34).

intimation of the warrant of sale should be done by an officer serving a copy of the warrant on the debtor by hand.[1] At present intimation is normally made by recorded delivery post, and although hand service is competent, only the fee for postal service can normally be charged.[2] On consultation opinion was in favour of retaining the present law, which in our opinion strikes the correct balance between saving expense and the greater likelihood of settlement if personal contact can be made between officers and debtors.

5.182 Where goods are to be removed from the premises in which they are situated to an auction room or other premises for sale the debtor (and possessor if a different person) should be given adequate notice of the removal. We think that such notice should be given not less than seven days before the date fixed for the removal of the goods. The officer should also be under the duty of informing the debtor (and possessor) of the place of sale.

5.183 We **recommend:**

(1) The officer of court appointed to arrange the sale should be under a duty to intimate the date of the sale as soon as it has been arranged to the debtor (and possessor if different), and not later than the date of that intimation, to serve a copy of the warrant of sale on the debtor (and possessor if different).

(2) Where the goods are to be removed from the premises in which they are situated for sale the officer should give the debtor (and possessor if different) not less than seven days' notice of the date fixed for removal and the place to which the goods are to be removed for sale.
(Recommendation 5.37; clause 56(1) and (2).)

Removal of goods

5.184 Where goods are to be removed for sale the officer should attend the debtor's premises at the time fixed for the removal for three reasons. First, powers of entry and search might be needed to facilitate the uplifting of the goods. Second, the officer should identify the pointed goods and supervise their removal. Third, an officer present at the uplifting of the goods could be authorised by the creditor to receive payment of the debt on the creditor's behalf, or even to conclude an instalment settlement with the debtor and cancel the removal which would be permitted on one occasion only.[3]

5.185 We **recommend:**

The officer should either carry out or at least supervise the uplifting and removal of the poinded goods from the debtor's premises. For use, if necessary, in uplifting the goods, the warrant of sale should include a warrant authorising the officer to open shut and lockfast places.
(Recommendation 5.38; clause 55(2) and (3).)

5.186 In principle, it appears that a poinding creditor cannot release or withdraw some goods from a poinding and proceed to a warrant sale of the

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[1]See para. 5.13 for what "hand service" means.

[2]Citation Amendment (Scotland) Act 1882, ss. 3 and 6; *Lochhead* v. *Graham* (1883) 11 R. 201. The sheriff may on cause shown allow the hand service fee.

[3]See Recommendation 5.41 (para. 5.197).

remaining goods.[1] Thus, the poinding creditor is not entitled to hold back poinded goods from the sale on the ground that they have deteriorated or to refuse to credit the debtor with the appraised values.[2] This rule would require modification, however, if goods are to be removed to sale rooms. It may be, for example, that the balance of the debt has been reduced since the time of the poinding by payments to account so that some only of the poinded goods require to be removed for sale. In such cases, the officer should be entitled to uplift only such part of the poinded goods as, according to their appraised values, would satisfy the debt, interest and expenses, and to withdraw the remaining goods from the poinding. Subject to this exception, we think that the rule is sound and that, since creditors may choose when to apply for warrant of sale, they must bear the risk of deterioration attributable to the passage of time.[3] On consultation, one body observed that a power to remove part only of the goods would place an unreasonable responsibility on the officer. The officer could not in all cases know whether it was safe to withdraw goods from a poinding until after the outcome of the sale. The answer to this objection is that officers have a similar responsibility when they carry out a poinding since they are entitled to poind only up to the amount of the debt and expenses likely to be incurred in the sale of the goods. Moreover, at the stage of removal the officer has a note of the appraised values and should be able to estimate with some accuracy what the expenses will amount to. In the rare case where more goods are removed to a sale room than are required to satisfy the outstanding balance of the debt, interest and expenses, then the expense of returning the unsold goods to the debtor should be borne by the creditor.

5.187 We **recommend:**

> Where goods are to be removed for sale the officer should be entitled to uplift and remove only such part of the poinded goods as, according to their appraised values, would satisfy the outstanding balance of the debt, interest and expenses, and should withdraw the remaining goods from the poinding. (Recommendation 5.39; clause 53(1).)

Alterations to arrangements made for sale

5.188 Under our recommendations the warrant of sale will appoint a named officer to arrange and supervise the sale,[4] appoint a person (whether that officer, an auctioneer or another suitable person) to conduct the sale,[5] and will specify the place of sale,[6] and the period within which the sale is to be held.[7] Occasionally it will happen that the arrangements made for the sale by the officer fall through so that new arrangements become necessary. Where new arrangements can be made within the terms of the warrant of sale the officer should, we think, be entitled to proceed to carry out the sale after intimating

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[1]We recommend in Section E below that the officer should be empowered to withdraw goods claimed by third parties.

[2]*Cantors Ltd.* v. *Hardie* 1974 S.L.T. (Sh.Ct.) 26 at p. 30.

[3]If the deterioration (other than fair wear and tear) is due to the conduct of the debtor or a third party, then the offender will be liable for wrongful interference with poinded goods.

[4]Recommendation 5.35 (para. 5.172).

[5]Recommendation 5.36 (para. 5.178).

[6]Recommendation 5.32 (para. 5.161).

[7]Recommendation 5.34 (para. 5.169).

the new arrangements for sale (and removal as the case may be) to the debtor. To remove any possibility of creditors or officers altering the arrangements simply in order to put further pressure on debtors to pay by way of repeated communications with them, we propose that, once the arrangements made for sale have been intimated to the debtor the officer should not be entitled to alter them, unless new arrangements are necessary due to reasons for which neither the creditor nor the officer can be held responsible (for example the auction room cancelling the sale in which the poinded goods were to have been included).

5.189 Circumstances may also arise, either before or after the officer has made arrangements for the sale, whereby it becomes impossible to implement the warrant of sale in accordance with its terms. Thus, for example the officer or auctioneer might fall ill,[1] the auction room might go out of business, or bad weather might make it impossible to remove the goods for sale within the period specified in the warrant. Provided the circumstances preventing the warrant being implemented are such that neither the creditor nor the officer can be held responsible for them, we think that the sheriff should have power, on application by the creditor, to make an appropriate amendment to the warrant.

5.190 It would in our view be wrong for an application for amendment of the warrant of sale to provide the debtor with an opportunity to challenge the creditor's entitlement to sell the poinded goods, or another opportunity to redeem goods at their appraised values. The creditor's entitlement was conferred by the granting of the original warrant which the debtor had an opportunity to oppose on various grounds,[2] and the creditor should not be at risk of losing this entitlement simply because a minor amendment of the warrant has become necessary. However, the sheriff should remain able to take note of any invalidity of the poinding or the fact that it has at the date of application for amendment ceased to have effect, and so refuse the application and indeed recall the poinding.[3] The sheriff should also be empowered to refuse to grant the amendment sought if of the opinion that the proposed amendment of the warrant is unsuitable.

5.191 An application for an amendment to a warrant of sale would require to be made within the period specified for holding the sale in the warrant, because if this period expires with no sale having been held the poinding ceases to have effect.[4] The making of an application for amendment should have the effect of extending the duration of the poinding at least until the application is disposed of, since the circumstances giving rise to the application may have occurred just before the expiry of the specified period. Where an application for amendment is granted the poinding should continue to have effect either for the period specified in the original warrant, or for an extended period where the sheriff has granted an extension. Generally on refusal of an application for amendment the poinding should cease to have effect

[1]In appointing an officer to supervise the sale, the warrant usually appoints another officer or officers on a "whom failing" basis to make provision for the first officer's illness.

[2]Recommendation 5.30 (para. 5.146).

[3]Recommendation 5.29 (para. 5.137).

[4]Recommendation 5.34 (para. 5.169).

forthwith. But to meet the case where the application is refused as unnecessary, (for example where the sheriff takes the view that the original warrant can be implemented albeit with difficulty), the sheriff should have power to make other provision for the duration of the poinding.

5.192 On granting an application for amendment of a warrant of sale the sheriff should have power to make any necessary incidental and consequential orders, including an order requiring a copy of the warrant as amended to be served on the debtor. Earlier in this Chapter, in the context of an application for warrant of sale, we recommended[1] that the sheriff clerk should intimate the refusal of the application (and hence the termination of the poinding) to the debtor (and possessor of the poinded goods if a different person). We would extend this recommendation to applications for amendment in cases where the effect of refusal is to bring the poinding to an end.

5.193 We **recommend:**

(1) The creditor or officer should be entitled to alter within the terms of the warrant for sale the arrangements made for sale after intimation of those arrangements to the debtor, only if the alteration is necessary because of circumstances for which neither the creditor nor the officer is responsible.

(2) The sheriff, on application by the creditor or officer, should have power to amend the warrant of sale if the original warrant cannot be executed in accordance with its terms due to circumstances for which neither the creditor nor the officer is responsible, and to make any necessary incidental and consequential orders.

(3) An application for amendment of a warrant of sale should require to be made within the period for holding the sale specified in the warrant. The application should be intimated to the debtor. The sheriff, on a motion by the debtor or on his or her own motion, should refuse the application if the poinding was invalid or has ceased to have effect, or the amendment proposed is unsuitable.

(4) The poinding should not lapse pending the determination of an application. Where the application is granted the poinding should continue to have effect until the sale is held or the period specified for holding the sale elapses, whichever is the sooner. Where the application is refused the poinding should cease to have effect forthwith, unless the sheriff directs otherwise. The sheriff clerk should intimate any cessation of the poinding to the debtor (and possessor of the poinded goods if different).

(Recommendation 5.40; clauses 57 and 62(4).)

Instalment arrangements after grant of warrant of sale

5.194 While there is nothing inherently unlawful in an application for a second warrant of sale it has been held[2] that this second application, like the first, must be sought without undue delay. The effect of this decision is that, where an instalment arrangement is made after warrant of sale and the

[1]Recommendation 5.30 (para. 5. 146).

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

arrangement breaks down, the creditor is not normally able to obtain a second warrant of sale. Generally the creditor must have the sale carried out on the date specified in the warrant or lose altogether the right to sell.

5.195 It would often be in the interests of both creditor and debtor if the arrangements for sale made in pursuance of the warrant could be cancelled and the duration of the poinding extended to allow the debtor time to pay by instalments. In Consultative Memorandum No. 48 we put forward proposals[1] whereby arrangements made for sale could be cancelled and on this being reported to the sheriff the poinding would be extended for six months from the date of the report. Cancellation would however be incompetent after goods had been removed for sale in order to avoid administrative and legal complications. These proposals were generally agreed to by those who commented. One body thought that the above proposals were too complex, and that it would be better to leave detailed procedure to the discretion of the sheriff so making statutory rules unnecessary. We think, however, that a diligence requires regulation by rules and that the presence of rules would remove the need for applications to the court. Another body expressed the view that our proposals were too restrictive and that creditors and debtors should have greater freedom to cancel. But there has to be finality in the diligence process; the entitlement to cancel on one occasion only and postpone the sale for six months in our opinion strikes the correct balance between finality and flexibility.

5.196 On breakdown of the instalment agreement the creditor should be entitled to make fresh arrangements to sell the poinded goods. In most cases arrangements for sale could be made within the terms of the original warrant after allowing for the fact that the effect of reporting the agreement to the court is to extend the period within which a sale must be held to six months from the date of the report. Thus, unless the arranging officer (or auctioneer if one was appointed) or the place of sale specified in the warrant required to be changed, the creditor would be able to instruct the officer to make new arrangements for the sale without further application to the court. Where a change was necessary the creditor would have to apply to the sheriff for an amendment of the warrant under the procedure outlined in paragraphs 5.188 to 5.193 above. As in the cases where no instalment agreement had been made the sheriff should only be empowered to amend the warrant if satisfied that it is necessary for reasons for which neither the creditor nor the debtor is responsible. Such reasons might include a withdrawal of consent by a third party or the debtor to a sale in his or her premises although such consent was given at an earlier stage when the warrant of sale was applied for.

5.197 We **recommend:**

(1) After the grant of warrant of sale the creditor should be entitled, on one occasion only, to cancel the arrangements for sale for the purpose of allowing time for an agreement for payment of the debt to have effect.

(2) It should not be competent to cancel under paragraph (1) above after the goods have been removed for sale.

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[1]Proposition 37 (para. 5.22).

(3) A report of the agreement should be lodged in court forthwith by the creditor or officer, whereupon the duration of the poinding would be extended for a period of six months from the lodging of the report.

(4) On breakdown of an agreement the creditor should be entitled to sell the goods without further application to the court, provided the sale takes place within the six months' extension and the warrant can otherwise be implemented according to its terms. In other cases, the creditor should have to apply to the sheriff for an amendment of the warrant as in Recommendation 5.40 or a direction that the sale be held in the same premises notwithstanding that the required consents no longer subsist.

(Recommendation 5.41; clauses 58 and 62(5).)

The sale

5.198 *Appraised value as a reserve price.* Under the existing law the value put on an article at the poinding operates as an upset price (the price at which bidding commences for it) in the subsequent sale.[1] In Consultative Memorandum No. 48 we proposed[2] that the appraised values should be treated as undisclosed reserve prices. In conducting an auction an auctioneer normally starts by inviting bids at a moderately high level and, if no bids are made, lowers the price to stimulate interest with a view to working it up as bids are made. The goods would we think be more likely to fetch a better price with undisclosed reserve prices than with upset prices. All those who commented agreed but on reflection we think that there might be an advantage in some cases in disclosing the reserve to potential bidders.

5.199 We **recommend:**

The appraised value of a poinded article should be treated in the subsequent sale as a reserve price which need not be disclosed to bidders.
(Recommendation 5.42; clause 59(3).)

5.200 *Unsold goods.* If an article is not sold, because no bid is made at or above the upset (or reserve) price it is made over to the poinding creditor, and the debtor is credited with the appraised value.[3] On consultation, it was pointed out to us that the creditor may wish the goods to be sold to the highest bidder even though the highest bid was below the upset or reserve price, in order to save the trouble and expense of removing the goods or putting them up for sale again later. We think this would be a useful facility for creditors provided the debtor was credited with the appraised value of the goods.

5.201 In a sale in the debtor's premises the proper practice is that the goods which have been made over to the creditor in default of sale should be removed immediately after the sale or on the day of the sale. If there is a short delay before removal the officer should remain on the premises as there is no entitlement to re-enter. In Consultative Memorandum No. 48 we suggested[4]

[1]Debtors (Scotland) Act 1838, s. 27. In terms of Recommendation 5.20 (para. 5.101) above, the appraised value would be the open market value.
[2]Proposition 29 (para. 4.57).
[3]Debtors (Scotland) Act 1838, s. 27.
[4]Proposition 47 (para. 5.56).

that the creditor should have a prescribed period (of say 24 hours) in which to uplift the goods. Some commentators thought that this period was too short, but the Society of Messengers-at-Arms and Sheriff Officers observed that if the sale is in the debtor's house, the goods should be removed on the same day. We accept this point but a longer period, which we suggest should be three days, seems reasonable where the goods are put up for sale on the debtor's business premises, as heavy machinery or articles requiring specialised transport might be involved. In order to prevent officers having to remain on the premises until the goods are uplifted we recommend that the officer should be authorised to re-enter (by force if necessary) in order to enable the creditor to uplift the goods.

5.202 In sales of goods in the debtor's dwellinghouse, the creditor often simply abandons unsold goods to the debtor. There have, however, been cases where the creditor has used the threat of collecting the goods to put pressure on the debtor to make further payments. To prevent such a practice we further proposed that the ownership in the unsold goods should not pass to the creditor unless and until the goods were removed within the prescribed period. On reflection we think a delayed passing of ownership creates problems and leaves the debtor responsible for the security of the goods until the creditor uplifts them. Our preferred solution is for the ownership to pass immediately to the creditor but to revert to the debtor if the creditor failed to uplift them within the prescribed period. Because of the prohibition against second poindings, the creditor would not normally[1] be entitled to poind again for the same debt articles the ownership of which had reverted to the debtor.

5.203 We **recommend:**

(1) The ownership of goods which are not sold should pass to the creditor but the creditor should be permitted to instruct the auctioneer to sell an article to the highest bidder even if the bid is less than the appraised value. The debtor should however still be credited with the appraised value.

(2) Where goods are put up for sale on the debtor's premises and remain unsold, the ownership passing to the creditor by virtue of paragraph (1) above should revert to the debtor on the expiry of the times mentioned below unless:

(*a*) where the sale was held in the debtor's dwellinghouse the creditor uplifts them by 8 p.m. or such time as may be prescribed on the day of sale;

(*b*) where the sale was held in other premises belonging to the debtor the creditor uplifts them by 8 p.m. or such time as may be prescribed on the third day after the sale.

(3) The officer of court should be entitled to remain on or re-enter the premises to enable the creditor to uplift the goods.
(Recommendation 5.43; clause 59(3), (5), (6) and (8).)

[1]Articles could be repoinded if the debtor removed them to premises other than those in which they were originally poinded.

Report of sale

5.204 *Lodging the report.* Within eight days from the date of the sale, the officer presents a report of the sale to the sheriff. The report details the creditor and debtor; specifies the warrant of sale; sets out the date on which the sale was carried out and by whom; and contains a statement of whether each item was sold or delivered to the creditor, and the price at which each article was sold. The whole expenses of the diligence are itemised and a statement of the balance due by or to the debtor is made. The report of sale has two purposes: to provide an independent accounting, through the auditor of the sheriff court, between the debtor and creditor;[1] and to enable the court to check that the sheriff's warrant of sale has been properly carried out. These aims would suggest that a report should be made to the sheriff even if the proceedings following the warrant of sale have not reached the stage of a sale.[2] For some considerable time, however, it has been the practice that only where a sale has been held is a report on the proceedings made to the sheriff.

5.205 It follows from this practice that, in over 90% of the cases in which warrant of sale is granted by the courts, the courts make no check on the way in which the warrant has been implemented, or on the diligence expenses, except in the rare event where a complaint has been made. Because of the accounting and other errors identified in recent reported cases, and other evidence of errors identified by the research undertaken on our behalf, we suggested in Consultative Memorandum No. 48,[3] that a report should also be made to the sheriff, in cases where no sale was held because the debt was paid or the creditor abandoned the diligence. Those who commented doubted whether it was necessary or appropriate to burden the creditor or debtor with the expense of the officer's fee for reporting in such cases. Moreover, it was suggested the proposal would involve sheriff clerks in a considerable amount of extra work. On reconsideration we have come to the view that the best method of preventing abuses in diligence which does not reach the stage of a sale is to have spot checks and inspections of officers' work by an official appointed on an *ad hoc* basis by the court.[4]

5.206 We also suggested that eight days gave officers too little time in which to lodge the report of sale and proposed a period of 14 days. This was agreed on consultation as was our suggestion that reports of sale should be in a single prescribed form instead of the wide variety of styles presently in use. A standard form would assist the court staff in checking reports and detecting errors.

5.207 We **recommend:**

> The report of sale (which should be in a form prescribed by act of sederunt) should be made to the sheriff within 14 days after the date of the sale.
> (Recommendation 5.44; clause 61(1) and (3).)

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[1]See *Cantors Ltd.* v. *Hardie* 1974 S.L.T. (Sh.Ct.) 26.

[2]After the Debtors (Scotland) Act 1838 was enacted, it was the practice for the execution of the intimation of the warrant of sale to the debtor to be returned to the sheriff clerk together with a note of expenses to date for taxation: see McGlashan *Sheriff Court Practice* (2nd edn., 1842) paras. 1679–80. We understand that this practice has not been followed for many years.

[3]Paras. 5.57 to 5.59 (Proposition 48).

[4]See Chapter 8 (paras. 8.67 to 8.73) for further details.

5.208 *Sheriff's powers on dealing with report.* Although the procedure for auditing and checking reports of sale was at one time open to criticism,[1] a procedure has since been introduced in all sheriffdoms to ensure that reports of sale are properly checked and the expenses taxed. On receiving the report, the sheriff signs an interlocutor remitting it to the auditor of court (or sheriff clerk as auditor) for taxation. The auditor then adds a docket to the report stating that the report has been examined and setting out the balance due to or by the debtor.[2] Finally, the sheriff adds a further docket approving the report after allowing, if necessary, both creditor and debtor an opportunity of commenting on any points made by the auditor. This practice should in our opinion be embodied in statutory rules. The sheriff may approve the report of sale with or without amendments, as a result of an application made by the debtor or creditor, or on his or her own motion, or may refuse to approve it.[3] Refusal of approval probably renders the whole diligence null but this is not entirely clear.[4]

5.209 Although no adverse comments on these procedures were made on consultation, we think some amendments are necessary. First, the sheriff should not have power to refuse to receive a report; if a report is submitted however late it should be dealt with. Secondly, the sheriff should have an express power to declare the diligence null, but this power should be limited to cases where there has been some substantial irregularity in the way the sale was conducted or some fundamental defect in the report of sale which cannot be put right. In our opinion nullity of the diligence is an inappropriate penalty to impose for failure without good cause to lodge a report timeously; it benefits the debtor and prejudices the creditor, whereas the person who ought to be penalised is the officer who conducted proceedings irregularly or failed to report properly. A more appropriate sanction for failure or delay without reasonable cause in lodging a report would in our view be to require the officer (with or without other disciplinary sanctions) to forego all or part of the fees for the diligence. Thirdly, nullity of the diligence should not affect the title of any third party who has acquired the poinded goods in good faith and for value. Finally, the report of sale is at present made to the court so that debtors are often unaware of how much they still owe after the sale. This problem will become more acute when nearly all household goods are sold outwith the debtor's dwellinghouse. The sheriff clerk should inform the debtor of the result of the sale, perhaps by sending a copy of the report as finally taxed and approved.

5.210 We **recommend:**

(1) The present procedure for auditing and checking reports of sale should be embodied in statute.

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[1] *Cantors Ltd.* v. *Hardie* 1974 S.L.T. (Sh.Ct.) 26.

[2] The auditor may also draw to the attention of the sheriff any matter which seems to call for further investigation, such as an unrealistic valuation of the goods: *Lombard North Central Ltd* v. *Wilson* (unreported) Glasgow Sheriff Court, October 1980.

[3] *Cantors Ltd.* v. *Hardie supra; British Relay Ltd.* v. *Keay* 1976 S.L.T. (Sh.Ct.) 23; *South Side Sawmills* v. *Macgregor* 1981 S.L.T. (Sh.Ct.) 48.

[4] Graham Stewart, p. 361 states that a report of sale should be lodged within the statutory period to prevent any question arising. In *McGhie* v. *Mather* (1824) 3 S. 339, (a case on the Bankruptcy Act 1814 in which the same requirement was imposed) it was held that a delay of 36 days after the sale did not render the diligence null.

(2) Where the officer refuses or delays without reasonable cause to lodge a report of sale, the sheriff should have power to report the officer to the appropriate disciplinary authority (Court of Session or sheriff principal) and to find the officer liable for all or part of the expenses of the diligence, but should not have power to refuse to receive the report.

(3) If there has been a substantial irregularity in the diligence the sheriff should have power to declare the diligence null. Nullity of the diligence should not affect the title of any third party purchasing the goods in good faith at the sale or subsequently.

(4) The sheriff clerk should send the debtor a copy of the report of sale as approved or intimate the sheriff's order nullifying the diligence. (Recommendation 5.45; clause 61(2), (4), (5), (9) and (10).)

Disposal of proceeds of sale

5.211 Following the report of sale, the sheriff may order the officer to consign the proceeds of sale in the hands of the sheriff clerk.[1] The power to order consignation is discretionary and rarely exercised but may be needed where, for example, another creditor with a decree or other document of debt has lodged a claim in the proceedings to share in the proceeds of sale under the equalisation provision in the bankruptcy legislation.[2] In the absence of consignation, the officer usually pays the net proceeds of sale to the poinding creditor. Where a claim for equalisation is made after the payment to the creditor, the creditor is bound to consign the funds, since until the expiry of the period for equalisation of diligence on notour bankruptcy or apparent insolvency or the cutting down of diligence by sequestration, the funds are deemed to be still technically in the hands of the court.[3] Difficulties could, however, arise if for example there had been an overpayment or if a claim for equalisation was made after the payment and the creditor could no longer be traced.

5.212 On consultation, three different views were expressed on the manner of dealing with the proceeds of sale. Some thought that the proceeds should be consigned in court until the time when the sheriff approved the report of sale; others thought that the officer should retain the proceeds until that time; while yet others thought that the present practice of payment to the creditor, unless the sheriff ordered consignation, should be retained. No person suggested consignation or retention until the expiry of the statutory periods for equalisation or cutting down of the diligence. We did not, however, receive evidence that the present practice causes problems, and moreover the practice appears just since the creditor has already had to wait long enough for the money. If the officer makes a mistake (in the summation of an account or charging of a fee for example) resulting in an overpayment or underpayment to the creditor, then it will normally be a simple matter to rectify the mistake,

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[1]Debtors (Scotland) Act 1838, s. 28.

[2]Bankruptcy (Scotland) Act 1913, s. 10, repealed and re-enacted by the Bankruptcy (Scotland) Bill 1984, Sched. 7, para. 10. It is not clear whether or how a claim could be made under these provisions where the goods are delivered in default of sale to the poinding creditor.

[3]*Gillon & Co. Ltd.* v. *Christison* (1909) 25 Sh.Ct.Reps. 283.

and ultimately the aggrieved party should be protected by the officer's bond of caution. Accordingly, we do not propose any change in the law.

5.213 The 1838 Act does not make express provision for the case where the sale produces a surplus. This is curious since the (now repealed) Small Debt (Scotland) Act 1837 provided that it should be paid to the debtor or consigned if the debtor cannot be found.[1] There is however clear authority that any balance due to the debtor must be paid over,[2] and we think that this should be done by the officer. The cases in which warrant sales produce a surplus are unusual.

5.214 We **recommend:**

No change should be made in the present law and practice whereby the proceeds of a warrant sale are consigned in court by the officer only if the sheriff so directs. The officer should be under a duty to pay any surplus to the debtor or the debtor's agent, or to consign the surplus in court if the debtor or agent cannot be found.
(Recommendation 5.46; clause 60.)

Section E. Inclusion in poindings of the goods of third parties

5.215 The inherent difficulty of distinguishing the goods of the debtor from the goods of third parties presents problems in poindings. In the common case of the poinding of household goods, the problems are exacerbated by the widespread use of hire purchase and hiring agreements relating to consumer durables and are likely to be further aggravated by the recently proposed statutory presumption of common ownership of household goods by married couples.[3]

5.216 In this branch of the law, the primary problem is how best to reconcile the protection of the property rights of innocent third parties with the need to ensure that poindings are not stopped, by spurious claims by or on behalf of third parties, to an extent that undermines the effectiveness of the diligence. It may seem axiomatic that a creditor should not be entitled, nor an officer empowered, to poind and sell the goods of A for B's debts. This is indeed the primary principle which the courts apply in determining whether the goods of a third party should be excluded from a poinding, or whether an interdict should be granted prohibiting a warrant sale of that party's goods, or whether that party can recover the goods after the proceedings from the poinding creditor to whom they have been delivered in default of sale or, as the case may be, from a purchaser in good faith and for value at the sale. On the other hand, to impose strict liability on an officer for mistakenly including the goods of third parties in a poinding would place an impossible burden on officers. Determination of moveable property rights can raise difficult questions of fact and law which often cannot be resolved at the stage of a poinding. The rule is therefore that, if an officer makes certain enquiries, and reports the third party's claims to the court, the third party's goods can be competently poinded, but at a later stage the goods can be excluded by the sheriff from the poinding

[1]S. 20.
[2]Graham Stewart, p. 361.
[3]Family Law (Scotland) Bill 1984, clause 25.

or warrant sale, on the application of the third party, if he or she is the true owner.

5.217 It follows that the general question whether a creditor is or should be entitled to poind the goods of A for B's debts does not receive a simple affirmative or negative answer, and is perhaps best approached by considering the following specific questions:

(*a*) What duties are, and ought to be, imposed on officers of court with a view to ensuring, so far as practicable, that the goods of third parties are excluded from a poinding and warrant sale?

(*b*) What remedies are, and ought to be, available to a third party owner of goods mistakenly or wrongly included in a poinding to recover the goods before the warrant sale?

(*c*) Following a warrant sale, what should be the rights and remedies of the third party owner, and of either the poinding creditor to whom the goods are delivered or, as the case may be, a purchaser in good faith and for value?

(*d*) What special provision, if any, is needed where the goods belong to the debtor's spouse?

Officer's duties when poinding

5.218 The officer's powers, duties and liabilities with respect to the poinding of the goods of third parties are governed by common law rules which have been supplemented, in some sheriffdoms, by Practice Notes of the sheriffs principal. The current position is as follows:

(*a*) As a general rule, if goods are in the debtor's possession, the officer may treat them as the debtor's property and include them in the poinding though the true owner may later claim the goods in an application to the sheriff.[1] The rule has to be applied with common sense however, and in cases where the debtor's business involves the deposit of customers' goods (for example auctioneers, laundries and garages) the rule that ownership is presumed from possession would not justify the poinding of those goods.

(*b*) If an officer poinds a third party's goods on a third party's premises, the poinding of those goods is normally inept.[2] Before proceeding to poind, therefore, the officer should ascertain whether the debtor is the owner or tenant in occupation of the premises where the goods are located,[3] for example, by checking the Valuation Roll.

(*c*) At one time, it was the orthodox view that where goods were in the debtor's possession the onus was on the debtor or third party to claim

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[1]Graham Stewart, p. 351.

[2]*Ibid.*, p. 352; *Thompson* v. *A. G. fur Glasindustrie* (1917) 2 S.L.T. 266; *Broomberg* v. *Rheinhold & Co. Ltd.* (1944) 60 Sh.Ct.Reps. 45 at pp. 54–5: but see *McLean* v. *Boyek* (1894) 10 Sh.Ct.Reps. 10 for a case where the officer was held justified in poinding the goods formerly belonging to the debtor in a third party's hands.

[3]*Idem;* see also *Jack* v. *McCaig* (1880) 7 R. 465 per Lord Deas at p. 468: "Every man who is going to execute a poinding of furniture is bound to inquire whether it belongs to the individual for whose debt he is going to poind. He is further bound to inquire whether he is the proprietor or the tenant of the house".

that the goods belonged to the third party.[1] The fact that hire purchase agreements relating to household goods were common did not place on officers the onus of enquiring into the true ownership of the goods.[2] But in 1953 (in a case concerned with the title to goods rather than the officer's duties in carrying out a poinding), Lord President Cooper observed *obiter* that enquiry should be made.[3]The practice of officers did not, however change until, in certain sheriffdoms, Practice Notes were made in 1976 requiring a sheriff officer, before carrying out a poinding, to enquire of the debtor if any of the goods proposed to be poinded are the subject of a hire purchase agreement or are otherwise the property of a third party. No fee is allowed for poinding goods which are not the property of a debtor except on cause shown. There are older authorities to the effect that the officer need not listen to statements by the debtor or any other person who is not the person claiming ownership,[4] but it is doubtful whether the courts would now follow these authorities.

(*d*) Where a claim or statement as to ownership is made by or on behalf of a third party, it depends on circumstances whether the officer is justified in not poinding the article in question or, alternatively, in poinding it and mentioning the claim or statement in the report of poinding. The orthodox view, expressed by Graham Stewart, is that, as the poinded goods are not removed from the premises, "it would seem permissible and will be advantageous in most cases for the officer to execute the poinding and leave the matter for the decision of the Sheriff".[5]

(*e*) Where a claim is made and no documentary evidence is produced, the common law rule seems to be that the officer should delay poinding and examine the claimant on oath as to the ownership of the goods and how the goods came to be in the debtor's possession.[6] At any rate this rule applied where the claim was made by the third party though, as already mentioned, there was authority for the view that the officer was not bound to listen to claims made by the debtor that the goods belonged to a third party.[7] Now the Practice Notes of the sheriffs principal mentioned above provide that where a debtor claims that goods are subject to a hire purchase agreement but refuses, or is unable,

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[1]Graham Stewart, pp. 351–2.

[2]*Singer Manufacturing Co.* v. *Beale & Mactavish* (1905) 8 F. (J) 29 per Lord Johnston at p. 32: "If the Singer Company and others peril their machines on contracts of [hire purchase] they must either rely on the honesty and alertness of their customers, or themselves attend to their own interests. They cannot require the sheriff officers to act as detectives on their behalf".

[3]*George Hopkinson Ltd.* v. *N.G. Napier & Son* 1953 S.C. 139 at p. 147: "I do not think that it is an overstatement of the position today to say that any creditor proposing to poind the furniture in an average working-class dwelling is put on his inquiry as to whether the furniture is the property of his debtor or is only held by him upon some limited title of possession. The possession of the furniture *per se* goes only a short distance towards establishing a presumption of ownership".

[4]Graham Stewart, pp. 352–3.

[5]P. 353.

[6]Graham Stewart, p. 352. In *Cameron* v. *Cuthbertson* 1924 S.L.T. (Sh.Ct.) 67, it was held by the sheriff-substitute that an officer's failure to put a third party claimant on oath and make inquiry into the claim rendered the poinding inept.

[7]Graham Stewart, pp. 351–2.

to produce evidence to that effect, the sheriff officer may poind the goods but must note the debtor's claim in the report of the poinding. The Practice Notes also provide that no fee for poinding articles is allowed if the debtor subsequently establishes that they were in fact subject to a hire purchase agreement.

(*f*) If documentary evidence (such as a hire purchase, conditional sale or hiring agreement) is produced, it seems that the officer has a measure of discretion. Graham Stewart's opinion is that "it would seem reasonable that production of a written title, fortified by the oath of the claimant, would be sufficient to stop the poinding".[1] The practice of officers of court, however, is to accept documentary evidence, without an oath, unless the document appears collusive. Only if ownership is doubtful on the evidence should the officer proceed and leave the third party to make an application to the sheriff.[2]

(*g*) Failure by the officer to specify in the report of poinding that a claim has been made by or on behalf of a third party is a breach of a mandatory requirement which will render the whole poinding null.[3]

5.219 These provisions are not altogether satisfactory. First, the main question is whether a positive duty should be placed on the officer to enquire before poinding whether the goods belong to the debtor or a third party. The common law is unclear on whether the officer has such a duty, and Practice Notes of the sheriffs principal imposing such a duty have not been made in all sheriffdoms and may not in any event technically bind messengers-at-arms. On consultation almost all commentators agreed that the duty to make enquiries was a desirable safeguard for third parties and we think therefore that provision should be made to that effect. We recommend that this provision should be in statute so that it would apply uniformly throughout Scotland and to messengers-at-arms as well as sheriff officers.

5.220 Second, on the question of the persons to whom officers should address their enquiries, the Practice Notes provide only that enquiry be made of the debtor. In many cases, however, the debtor is not present, nor indeed is the third party owner. In household poindings, the debtor's spouse may often be present and able to provide information or evidence as to his or her own rights or those of hire purchase or rental companies. Most commentators agreed with our suggestion that the officer should make such enquiries of the debtor, or other person on the premises, as are reasonable in the circumstances.[4] We think however it is unnecessary and inappropriate for an officer of court to put the debtor or other person on oath before making enquiries.

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[1]*Ibid.*, p. 353.

[2]Bell *Commentaries* vol. ii, p. 59: "Where the evidence of the property is perfectly clear on the part of the claimant the messenger ought to stop; expressing in his execution the grounds of his forbearance. Where the property is doubtful, he ought to proceed, leaving it to the claimant to make good his right before the sheriff".

[3]See *Maxwell* v. *Controller of Clearing House* 1923 S.L.T. (Sh.Ct.) 137; *Cameron* v. *Cuthbertson* 1924 S.L.T. (Sh.Ct.) 67: failure to note the third party's claim could prejudice the third party in a subsequent claim for the goods. It might also prejudice the third party's entitlement to the expenses of a subsequent successful claim or action of interdict against the warrant sale: cf. *Anderson* v. *Jackson* (1920) 36 Sh.Ct.Reps. 237.

[4]Consultative Memorandum No. 48, Proposition 51(1) (para. 6.7).

5.221 Third, the duties of the officer when a claim is made by or on behalf of a third party should, in the interests of uniformity, be regulated by statute instead of leaving the matter to be governed partly by the common law and partly by Practice Notes. The basic rule should, as at present, be that goods which are in the possession of the debtor are presumed to be owned (either solely or in common with a third party[1]) by the debtor and hence poindable. Clearly, the officer should continue to be under a duty to note any claim made as to the ownership of poinded articles in the report of poinding. Beyond that we think it is impracticable to lay down rigid rules. The officer has to be given a discretion in view of the wide variety of circumstances that may be encountered; whether the article should be poinded or excluded will depend on the nature of the claim, the credibility of the person making it, the nature of the goods, and whether satisfactory documentary or other corroborative evidence is available. We do not think an officer should be precluded from poinding an article which on the face of it belongs to the debtor simply because many articles of that sort are commonly hired or bought on hire purchase, or because an unsupported assertion is made that the article belongs to a third party. On the other hand if the officer knows or ought to know from the whole circumstances (including any claim) that the article does not belong to the debtor then it should not be poinded. To illustrate these rules consider an officer executing a domestic poinding. The officer would be entitled to poind the television set even though televisions are commonly hired or bought on hire purchase, and even though the debtor or a member of the debtor's family states that it is hired. The officer may desist from poinding if satisfied that the claim is true, although he or she would probably err on the side of caution and include it, unless some corroboration of the claim (for example a rental payment book, a notice on the back of the set, or a statement made by the hirers as a result of a telephone call) emerged. A wrongly included article may be excluded later on production of satisfactory evidence of a third party's ownership, but the rule against second poindings prevents officers returning to the premises to poind articles they decided not to poind on the occasion of their first visit.

5.222 In some, but not all, sheriffdoms Practice Notes regulate the fees that an officer is entitled to charge the creditor for poinding goods which turn out not to belong to the debtor. We think that provision should be made by amending the existing acts of sederunt[2] so that the regulations would apply throughout Scotland and to messengers-at-arms as well as to sheriff officers. Depending on the content of the amendment, consideration may have to be given by the competent authorities to the need for statutory provisions to regulate the separate issue of the creditor's entitlement to recover fees paid to the officer from the debtor against whom diligence was executed.

5.223 We **recommend:**

(1) The powers and duties of officers in connection with the poinding of goods in the debtor's premises should be regulated by statute rather than the present mixture of common law and Practice Notes of the

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[1]See paragraphs 5.230 to 5.235.

[2]Act of Sederunt (Fees of Messengers-at-Arms) 1978 and Act of Sederunt (Fees of Sheriff Officers) 1978 as amended.

sheriffs principal. The statute should make provision on the following lines:

(*a*) The officer should be entitled to presume that an article in the possession of the debtor is owned by the debtor either solely or in common with a third party.

(*b*) An officer should be bound to make enquiries of any person present at the poinding about the ownership of articles proposed to be poinded. It should cease to be competent for an officer to examine a person on oath as to ownership of such articles. Any claim made should be noted in the report of poinding.

(*c*) An officer should not be entitled to rely on the above presumption if he or she knows or ought to know (whether as a result of the enquiries or otherwise) that the article does not belong to the debtor.

(*d*) An officer may still rely on the above presumption even though the article is such as is commonly hired or purchased on hire purchase or conditional sale agreement or an assertion is made unsupported by other evidence that the article does not belong to the debtor.

(2) The entitlement of officers of court to charge fees for poinding goods which do not belong to the debtor should be regulated by act of sederunt.

(Recommendation 5.47; clause 46(1)(*a*)(iii), (3) and (4).)

Remedies of a third party whose goods have been poinded

5.224 The third party's remedies depend in part on the stage which the diligence has reached. In between the lodging of the report of the poinding and the granting of a warrant of sale the third party may either claim ownership by lodging a minute in the poinding process[1] or apply in separate proceedings for an interdict prohibiting the creditor from proceeding to obtain warrant of sale together with an action for delivery of the goods if so desired.[2] After the granting of a warrant of sale interdict remains competent but a minute is incompetent.[3] Where the goods have been put up for sale, the third party can recover unsold goods from the poinding creditor to whom they have been delivered[4] and can also recover goods from a purchaser.[5] The third party may also be entitled to claim damages from the officer or creditor.[6]

5.225 We understand that most standard form hire or hire purchase agreements require the debtor to notify the finance company or other owner if the goods are poinded. The owner who finds out about the poinding by this or other means (through the advertisement of sale for example) may contact the officer and produce the hire or hire purchase agreement to the officer as

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[1] *Lamb* v. *Wood* (1904) 6 F. 1091.

[2] Burn Murdoch, *Interdict* p. 189. Such an interdict is only competent in the sheriff court.

[3] *Philp* v. *Stuart* (1959) 75 Sh.Ct.Reps 109; Dobie, *Sheriff Court Practice* p. 280. Interdict proceedings after warrant are competent in both the Court of Session and the sheriff courts; *Jack* v. *Waddell's Trs.* 1918 S.C. 73.

[4] *George Hopkinson Ltd.* v. *N.G. Napier & Son* 1953 S.C. 139.

[5] *Carlton* v. *Miller* 1978 S.L.T. (Sh.Ct.) 36.

[6] Graham Stewart, p. 771; *Boyle* v. *James Miller and Partners Ltd.* 1942 S.L.T. (Sh.Ct.) 33; *Macintyre* v. *Murray and Muir* (1915) 31 Sh.Ct.Reps. 49.

proof of ownership. The officer will then normally exclude the goods from the poinding. On consultation this sensible practice, which avoids the need for legal proceedings, was approved. We think that any doubts about its competence should be removed by embodying it in statute. We would, however, recommend two minor improvements; first, the officer should mention the release in the report of poinding, the application for warrant of sale or the report of sale, or, if the goods are released after the application for warrant of sale has been lodged but before warrant has been granted, the officer should forthwith report the release to the court; secondly, the officer should secure the debtor's consent to release as the ownership of the goods may be a matter of dispute between the debtor and third party.

5.226 On consultation, commentators agreed with our suggestion[1] that after warrant of sale has been granted, the third party owner should be able to claim the goods by minute rather than by the more cumbersome procedure of interdict or suspension and interdict. The general rule is, however, that if a claim by minute is competent the other procedures are not and one body suggested that interdict and suspension and interdict should remain as competent alternatives. We would agree, for in cases of urgency a court might entertain an application for interim interdict where it might not entertain a minute.

5.227 In Consultative Memorandum No. 48 we suggested[2] that where the sheriff makes an order releasing a third party's goods from the poinding, the sheriff should also have power to authorise a poinding of further goods so that the creditor is not prejudiced by the reduction in the value of the poinding. This was generally approved on consultation and we would extend this suggestion to those cases where the goods are released by the officer. Rather than the sheriff specifically authorising a further poinding, we recommend that a release of goods either by the sheriff or the officer should automatically authorise the creditor to carry out a further poinding.

5.228 In Consultative Memorandum No. 27[3] we suggested that a purchaser of goods in good faith at a judicial sale should acquire a statutory title to the goods preferable to that of the third party owner, provided the sale had been properly conducted after due advertisement. In Consultative Memorandum No. 48[4] we pointed out that such a rule would create differences between different classes of purchasers where the sale was conducted in an auction room, and proposed[5] that the purchaser of poinded goods should have no better rights to obtain a good title than a purchaser of unpoinded goods at the sale.[6] We also proposed for clarification that since the appraised value of unsold goods is deducted from the debt, the creditor to whom they are delivered should be regarded as an acquirer for value. There was no dissent from these proposals on consultation. We think that the law already achieves

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[1]Proposition 52 (para. 6.10).

[2]Proposition 52 (para. 6.10).

[3]Memorandum on Corporeal Moveables: *Protection of the Onerous Bona Fide Acquirer of Another's Property* (1976), para. 50.

[4]Para. 6.11.

[5]Proposition 53 (para. 6.13).

[6]As a general rule a purchaser acquires no better title to the goods than the seller had: Sale of Goods Act 1979, s. 21.

the results of our proposals, but we may require to reconsider the topic in the context of a general review of the rights of purchasers of goods who act in good faith.

5.229 We **recommend:**

(1) An officer of court should be entitled to release goods from the poinding if a third party produces satisfactory evidence of ownership unless the debtor disputes the third party's ownership.

(2) The officer should report any release of goods to the court in the report of poinding, application for warrant of sale or report of sale depending on the stage at which the goods are released. Where goods are released while an application for warrant of sale is pending the officer should forthwith report the release to the court.

(3) It should be provided by act of sederunt that, without prejudice to any other remedy, a claim of ownership of poinded goods by a third party should be capable of being made by a minute lodged in the poinding process even after warrant of sale has been granted.

(4) Where any article has been released by the officer or the sheriff on the ground that it belongs to a third party, the creditor should be entitled to poind further articles in the debtor's premises.

(5) No change should be made in the law relating to the remedies available to a third party whose goods have been sold at a warrant sale or delivered to the poinding creditor in default of sale.
(Recommendation 5.48; clause 66.)

Third party co-owners

5.230 In recent years there has been an increasing tendency for the ownership of household goods to be spread more evenly between husbands and wives. Nowadays the goods are often no longer the husband's exclusive property; they may be owned in common or belong solely to the wife. In Consultative Memorandum No. 48 we drew attention[1] to the problems this causes in domestic poindings since one spouse's goods are not liable to be poinded for the debts of the other spouse, and goods owned in common by both spouses are not liable to be poinded for the debts of either.[2] Since then the Family Law (Scotland) Bill 1984 has been introduced, clause 25 of which provides that a married couple are presumed to own their household goods in common unless the contrary is proved. Domestic poindings might therefore cease to be an effective method of enforcing debts if and when the Bill is enacted unless some provision is made.

5.231 While it would be possible to make an exception to the presumed common ownership of a married couple's household goods for the purposes of carrying out poindings, it seems to us that a more radical solution is necessary. The underlying difficulty in this area is the common law rule that property which is owned in common by the debtor and a third party cannot

[1]Para. 6.16.
[2]This rule is not restricted to married couples, but applies to any co-owners. Graham Stewart, p. 346.

be poinded for the debts of either.[1] Provided the interests of the other owner or owners are adequately protected, we recommend that common property should be capable of being poinded and sold in order to enforce a debt of one of the owners.[2] If this recommendation were implemented one of the legal consequences of holding property in common with others will be that it is liable to be poinded and sold for the debts of any of the other co-owners. Such a rule seems to us to be right in principle and capable of producing reasonable and fair results. Although the problem of common ownership arises mainly with married couples, we think it would be artificial to restrict our recommendation to them and leave the property of other types of co-owners immune from diligence. The result of such a restriction would be that poinding would be allowed in the case of spouses where there was only a presumption of common ownership, but prohibited in other cases where common ownership was a fact rather than a presumption.

5.232 The protection we would provide for the non-debtor co-owner consists of an entitlement to obtain release of the property on payment of the debtor's share of its appraised value, or to be credited with a proportion of the proceeds of sale if the property is sold. The release should be capable of being made by the officer (with the consent of the debtor in order to avoid problems where common ownership is disputed), or by the sheriff on application by the non-debtor co-owner, in a similar fashion to our recommendations dealing with the release of property which is wholly owned by a third party.[3] To prevent the creditor being prejudiced by a release of goods, the creditor should be entitled to poind further articles in the debtor's premises.

5.233 We recommend earlier in this Chapter[4] that the sheriff should have power to release goods from a poinding on the grounds that their continued poinding or sale would be unduly harsh in the circumstances. We would extend this recommendation to goods which are owned in common so that a third party co-owner as well as the debtor could apply for release on these grounds.

5.234 Our recommendation to make poinding of common property competent implies that we reject an alternative approach whereby goods belonging to the debtor's spouse could be poinded for debts which relate to goods obtained or services rendered for the general use and enjoyment of the debtor and his or her family.[5] Such a scheme is in our view impracticable; before executing a poinding an officer would have to investigate the marital status of the debtor and ascertain whether the debt sought to be enforced was a "family debt". Furthermore, the recently proposed statutory presumption of co-ownership of household goods by a married couple[6] will result in most cases in there

[1]Graham Stewart, p. 346.

[2]Property held jointly should remain unpoindable since each owner has no separate interest in the property capable of being attached for debt.

[3]Recommendation 5.48 (para. 5.229).

[4]Recommendation 5.29 (para. 5.137).

[5]Such a provision exists in Northern Ireland; Judgments Enforcement (Northern Ireland) Order 1981 (S.I. 1981/226), art. 32(*d*). But we understand that household goods are hardly ever seized there.

[6]Family Law (Scotland) Bill 1984, clause 25.

being few items of household goods which could be taken to belong solely to the debtor's spouse.

5.235 **We recommend:**

(1) It should become competent to poind and sell goods owned in common by the debtor and a third party or parties to enforce a debt due by the debtor.

(2) To protect the interests of co-owners, the officer should be entitled to release co-owned goods from the poinding if a third party co-owner tenders the debtor's share of the appraised value, unless the debtor denies the third party's claim to co-ownership.

(3) The sheriff should have power, on application by a third party co-owner, to order release of any goods if satisfied that they are co-owned and the applicant pays the debtor's share of their appraised value to the creditor.

(4) The sheriff should also have power to order release of co-owned goods if satisfied that their continued poinding or sale is in the circumstances unduly harsh to the third party co-owner.

(5) In order to restore the value of the poinding where co-owned goods have been released by the officer or the sheriff, the creditor should, on release, automatically become entitled to carry out a poinding of further articles in the debtor's premises.

(6) Where co-owned goods are sold or delivered to the creditor in default of sale, the creditor should be liable to pay to the co-owner a sum representing that co-owner's share of the proceeds of sale of the goods, or their appraised value in the case of unsold goods.
(Recommendation 5.49; clause 67.)

Section F. Miscellaneous

No poinding on the dependence of an action

5.236 Warrants to charge and poind are only granted in execution of extract decrees or liquid documents of debt,[1] and it is thus incompetent to charge and poind on the dependence of an action or in security of a debt payable in the future. As the McKechnie Committee recognised,[2] it seems at first sight difficult to justify a rule whereby arrestment on the dependence is permitted but poinding on the dependence is not permitted. In Consultative Memorandum No. 48, however, we suggested[3] that warrant for poinding should not be available on the dependence, or in security of future debts, on the grounds that in practice arrestment is generally a quicker, cleaner and cheaper diligence and less often attended by unpleasant consequences; that it has been traditional in Scotland to use an arrestment rather than a poinding as a diligence of first resort; and that diligence on the dependence, or indeed poindings, should not be made more widely available than is necessary.

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[1]See as to decrees, Debtors (Scotland) Act 1838, Scheds. 1 and 6; Sheriff Courts (Scotland) Extracts Act 1892; Summary Cause Rules, rule 89(2) and Forms U1–U5, U7–U14; as to extract registered deeds, Writs Execution (Scotland) Act 1877; as to protests of bills of exchange, Bills of Exchange Act 1681 and Inland Bills Act 1696.

[2]Paras. 48–49.

[3]Proposition 2 (para. 2.3).

5.237 On consultation, one body observed that an arrestment on the dependence may deprive a defender of funds to meet ordinary running expenses whereas a poinding does not deprive the debtor of the use and possession of property, though the debtor cannot sell it. They suggested that a warrant for poinding on the dependence should be automatically available subject to the same provisions for restriction and recall as apply to arrestments on the dependence. Another body suggested that a pursuer should be entitled to obtain a warrant for poinding on the dependence, not automatically as of right, but on showing cause to the court why such a warrant should be granted. This suggestion has been dealt with by the Maxwell Committee who recommended that the Court of Session should have a discretionary power, on application by the pursuer, to make an order securing moveable property in the hands of a defender on the dependence of an action in that court.[1] As this discretionary power has been the subject of a recommendation made by another advisory body we do not make any recommendations concerning it in this report. Most of those who commented, however, generally agreed with our proposal. With the possible exception of the case where a special warrant is granted on cause shown, we consider that poinding on the dependence or in security should remain incompetent.

5.238 We **recommend:**

> The diligence of poinding should not be available in security of debts payable in the future, nor should it be automatically available on the dependence of a court action. We make no recommendation as to whether the Court of Session should have power to make an order securing moveable property on the dependence of an action in that court.
> (Recommendation 5.50.)

Extension of exemptions to other diligences

5.239 The exemptions from poinding apply not only to ordinary poindings but also to summary warrant poindings[2] and poindings of the ground by heritable creditors.[3] Tools of trade appear to be exempt from arrestment in the hands of third parties,[4] but domestic furniture and plenishings may be arrested because the Law Reform (Diligence) (Scotland) Act 1973 which exempts certain basic items applies only to poindings and to items which are situated in a debtor's dwellinghouse.[5] In a case of sequestration for rent only clothes and perhaps tools of trade are exempt so that all the furniture may be sold.[6]

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[1]Paras. 14.8–14.25. The order would be enforced in Scotland by the ordinary procedure of poinding and would thus be a type of poinding on the dependence which, on final judgment, would be converted into a poinding in execution followed ultimately by warrant of sale. This recommendation appears to be a response to European cases which suggest that the Scottish courts would be required by Community law to give effect to comparable orders of courts in E.E.C. Member States made on the dependence of actions in those courts. It has not been implemented to date.

[2]Law Reform (Diligence) (Scotland) Act 1973, s. 1(5).

[3]Graham Stewart, p. 501.

[4]*Steele* v. *Eagles* 1922 S.L.T. (Sh.Ct.) 30.

[5]S. 1(1).

[6]Graham Stewart, p. 466: the 1973 Act is limited to poindings, s. 1(1).

5.240 There was general agreement on consultation with our proposal[1] that the exemptions should apply to rent sequestrations and to arrestments of goods (other than domestic furniture and plenishings). On reconsideration we have come to the conclusion that the exemptions we recommend for domestic furniture and plenishings should apply in the case of arrestments. Arrestment of the debtor's household goods in the hands of a removal or storage firm would cause even more hardship than if they had been poinded in the home, since in the latter case the debtor at least would have the use of them pending sale.

5.241 Another area where the rules relating to exemption of domestic furniture and plenishings from diligence appear to be in need of reform concerns furnished lettings. Where a poinding is executed in such premises for a debt of the tenant the exemptions will apply to items belonging to the tenant and the landlord's goods cannot be poinded for the tenant's debt. However, where the debtor is the landlord the whole furniture and plenishings (except items belonging to the tenant) can be arrested (or perhaps poinded) and sold since the Law Reform (Diligence) (Scotland) Act 1973 does not apply to arrestments and only applies to poindings in premises in which the debtor is residing. We understand that cases of this sort arise from time to time and cause considerable distress to tenants whose homes are suddenly displenished to enforce their landlord's debts.

5.242 The exemptions from poinding designed to protect debtors and their families also apply to sequestrations under the bankruptcy legislation.[2] We recommend earlier in this Chapter[3] that the sheriff should have power to sist proceedings where a mobile home has been poinded in order to allow the debtor time to find alternative accommodation. We think the courts should have similar powers where a bankrupt's sequestrated estate includes a mobile home.

5.243 Our recommendations on poindings include regulation of the times when poinding may be competently carried out,[4] the powers and duties of officers in entering dwellinghouses[5] and the sheriff's powers to release items from a poinding on the ground of undue harshness.[6] We would extend these recommendations to sequestrations for rent or feuduty since poindings and sequestrations are similar in procedure and effect to each other.

5.244 We **recommend:**

(1) The exemptions from poinding set out in Recommendations 5.9 to 5.11 (clothes, tools of trade, household goods) should apply to arrestment of the debtor's goods in the hands of a third party.

(2) Where household goods are situated in premises in which a person other than the debtor is living, the same exemptions from arrestment

[1]Proposition 26 (para. 4.41).
[2]Bankruptcy (Scotland) Act 1913, s. 98, and Bankruptcy (Scotland) Bill 1984, clause 32(1).
[3]Recommendation 5.12 (para. 5.60).
[4]Recommendation 5.17 (para. 5.78).
[5]Recommendation 5.18 (para. 5.85).
[6]Recommendation 5.13 (para. 5.65).

and poinding should apply as would apply if that person were the debtor.

(3) The court should have power, on application by the bankrupt, to sist sequestration proceedings in connection with a mobile home which is the only or principal residence of the bankrupt.

(4) The exemptions from diligence, the time when diligence is competent, the officer's powers and duties in connection with entry to dwelling-houses, the sheriff's powers to sist proceedings in connection with a mobile home, and the sheriff's powers to release articles on grounds of undue harshness should apply to sequestrations for rent or feuduty as they do to poindings.

(Recommendation 5.51; clauses 43(2)(*b*) and 124, and Schedule 7, paragraph 35.)

Poinding of ships

5.245 At common law the only competent diligence for attaching ships is arrestment and sale.[1] In Consultative Memorandum No. 48 we identified two statutory exceptions (Merchant Shipping Act 1894, section 693 and Prevention of Oil Pollution Act 1971, section 20) to this general rule which refer to poinding, adopted perhaps as an analogue of the English process of distress, and proposed[2] removal of these anomalies by substituting the correct Scottish diligence of arrestment and sale. All those who commented agreed. We have identified three further statutory exceptions[3] and recommend that in all these cases ships should be attached by arrestment.

5.246 We **recommend:**

The diligence for attaching ships and other vessels in Scotland under specific statutory provisions should be arrestment and sale rather than poinding and sale.

(Recommendation 5.52; Bill, Schedule 7, paras. 3, 11, 14, 16 and 32.)

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[1]Graham Stewart, p. 242; McMillan, *Scottish Maritime Practice*, p. 56.

[2]Proposition 18, (para. 4.12).

[3]Harbours, Docks and Piers Clauses Act 1847, s. 46; Illegal Trawling (Scotland) Act 1934, s. 1(4); British Fishing Boats Act 1983, s. 5.

CHAPTER 6

ARRESTMENT OF EARNINGS

Section A. Preliminary

6.1 In Chapter 2, we referred in general terms to the need to replace the present system of arrestments of earnings (under which an arrestment only attaches pay due on the next pay day) with a new system of continuous diligence against earnings which would avoid the need for repeat arrestments to enforce a debt. Such a system would also make it easier to justify an increase in exemption levels so that debtors would be left with sufficient exempt earnings for the subsistence of themselves and their families. In this Chapter we explain in more detail the need for a continuous diligence against earnings to enforce debts and put forward specific recommendations for the introduction of such a diligence, which we call an "earnings arrestment" (Sections A to C). The enforcement of maintenance debts raises special problems considered in Section D, where we advance proposals for the introduction of a modified form of earnings arrestment, which we call a "current maintenance arrestment". As the name implies the object of this diligence is to ensure, so far as practicable, that current maintenance is paid more or less as it falls due so that substantial arrears do not arise. In Section E we recommend the introduction of conjoined arrestment orders which enable more than one creditor to attach the debtor's earnings at the same time. Section F deals with some questions common to earnings arrestments and current maintenance arrestments.

6.2 It is important to note that we are concerned here with arrestments of wages, salary and pensions. Arrestments of a debtor's other property in the hands of third parties (such as stocks and shares; money in bank accounts; and moveable goods) are not affected by our recommendations in this Chapter and will continue to be competent.[1] Arrestments of funds other than earnings normally attach not merely the income produced by the funds but the funds themselves. Repeat arrestments are therefore not required and accordingly a continuous diligence against such funds is unnecessary and inappropriate.

6.3 We would emphasise that the introduction of a continuous arrestment of earnings or pensions would not in any way involve discrimination against debtors who are employees or pensioners. Indeed, self-employed debtors and debtors having investment income are now, and under our proposals will continue to be, normally less well protected than employees from arrestment. As a general rule, arrestments of the funds and income of self-employed persons, and of debts due to them, do not attract any exemptions (such as apply to wages arrestments) to protect standards of living. And, as already indicated, debtors having income from investments (such as stocks and shares) generally stand to lose by arrestment not only the income but also the

[1] As we mentioned in Consultative Memorandum No. 47, Part V, we propose to examine some aspects of arrestments, including arrestments on the dependence, in a later consultative memorandum.

investment which produces the income, again without exemption.[1] On consultation, there was virtually unanimous support (only one body dissenting) from our view that arrestments, which in this context are very effective, should continue to apply in such cases.[2]

Section B. The need for continuous diligence against earnings

The present law

6.4 A brief explanation of the way in which arrestments of earnings work at present may be helpful. Where a creditor obtains a court decree for payment of a debt, the extract (an official authenticated copy) of the decree contains a warrant of the court enabling the creditor to instruct an officer of court (sheriff officer or messenger-at-arms) to arrest the debtor's wages. A new application for warrant of arrestment is almost always unnecessary.[3] The officer serves a schedule of arrestment on the debtor's employer which, in the normal case, attaches a prescribed proportion (half the balance over £4 per week[4]) of the instalment of the debtor's wages due for the pay period in which the arrestment is served.[5] Earnings for subsequent pay periods are not attached by the arrestment. Where the arrestment is used to enforce aliment, rates or taxes, the whole of the earnings for the pay period in question, and not merely a prescribed proportion, is arrested.[6] The effect of an arrestment is that the employer cannot pay the arrested wages to the employee but must hold them for the benefit of the arresting creditor. An employer who pays the debtor in breach of the arrestment is liable to pay the arrested sum again to the arresting creditor and, in exceptional cases, may be liable to proceedings for contempt of court.

6.5 The arrestment, however, does not by itself require or even authorise the employer to pay the arrested sum to the creditor. Before paying that sum to the creditor, the employer should obtain the authority of the debtor-employee. If this authority (which may be given orally or in writing) is refused, the creditor can obtain payment by raising an action of furthcoming which the debtor or employer can defend.[7] It is generally not in the interest of the

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[1]As an exception to these general rules, property held in an alimentary trust and part at least of the current income of the trust are exempt from arrestment, but arrears and the excess current income above a suitable aliment fixed by the court are arrestable. We do not propose any change in this rule.

[2]The types of income which should be subject to earnings arrestments are discussed in more detail at paras. 6.32 to 6.48.

[3]The only exception is that a special application must be brought where the arrestment is used in security of a future or contingent debt; such cases are very rare.

[4]Wages Arrestment Limitation (Scotland) Act 1870 as amended by the Wages Arrestment Limitation (Amendment) (Scotland) Act 1960, s. 1.

[5]An arrestment normally attaches only debts presently due but an arrestment of certain "termly payments" will attach the whole term's payment though the future part of the term's payment is not yet due at the time of the arrestment. Earnings are treated as termly payments for this purpose: Graham Stewart, p. 53; *Marshall* v. *Nimmo & Co.* (1847) 10 D. 328 at pp. 329, 331; cf. *Shiel & Co. Ltd.* v. *Skinner & Co.* (1934) 50 Sh. Ct. Reps. 101. Earnings paid in advance or payable for the next pay period will not be attached because they are not presently due at the time of the arrestment.

[6]Wages Arrestment Limitation (Scotland) Act 1870, s. 4.

[7]For example, the debtor may allege that the debt has been paid and the employer may allege that no wages were due at the time of the arrestment. Either may found on a defect invalidating the arrestment, such as a material error in the form of the arrestment schedule or in the mode of service.

employee-debtor to refuse to authorise payment since refusal may lead to liability for the expenses of an action of furthcoming. Actions of furthcoming of arrested earnings are relatively rare.

Criticisms of the existing system

6.6 The two main criticisms which may be made of the present system are, first, the relatively frequent need for a creditor to repeat an arrestment in order to clear a debt and, second, the excessive amount which an arrestment requires the employer to deduct from the debtor's pay.

6.7 A single arrestment of pay will generally not recover the whole of a debt due under a decree for payment. It has been estimated that the average debt sued for in summary cause actions in 1978 was about £102,[1] and that 55% of arrestments laid in that year were used to enforce debts of over £100.[2] Even though a substantial proportion (nearly one-half) of the debtor's pay is attached by an arrestment, several arrestments are usually needed to recover the whole debt unless an informal arrangement is made between the debtor and the creditor for payment immediately or by instalments. Out of about 6,000 first arrestments of earnings laid in 1978, nearly 30% (1,700, 28.3%) were repeated at least once. The total number of arrestments against earnings in 1978 is estimated to have been about 8,700, made up of 6,000 first arrestments, 1,700 single repeat arrestments and 1,000 multiple repeat arrestments.[3] Where arrestments are repeated, in almost all cases the debtor is liable to meet the expense of the first arrestment and the repeats.[4]

6.8 On consultation there was general agreement with our view that the level of repeat arrestments is unduly high and could be eliminated or substantially reduced only by the introduction of a continuous diligence against earnings.

6.9 As indicated above, for debts other than aliment, rates or taxes, wages are arrestable to the extent of one-half of the surplus above £4 per week. In our Consultative Memorandum No. 49[5] we pointed out that the effect of this formula is to reduce the household income of a married man with two children earning an average wage to near supplementary benefit level if the formula is applied to net wages or well below it if the formula is applied to gross wages.[6] Many debtors whose wages are arrested, however, earn below the national average and in their case the hardship is correspondingly greater. Where the debt is aliment, rates or taxes, the whole wages can be arrested, leaving the debtor with no earnings for that pay period. The present formula

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[1]C.R.U. Court Survey, para. 3.6.

[2]C.R.U. Diligence Survey, para. 4.10; Annex D, Table (5). The arrestments in question cover arrestments of earnings and funds other than earnings but it is thought that the percentage relating to earnings is not significantly lower than 55%.

[3]C.R.U. Diligence Survey, para. 3.6. The multiple repeat arrestments ranged from arrestments repeated twice to arrestments repeated thirteen times. The majority were repeated twice only.

[4]Except in those few cases where the arrestment does not attach sufficient money to cover the expense of the arrestment: see Wages Arrestment Limitation (Scotland) Act 1870, s. 2.

[5]Paras. 1.9 and 1.10.

[6]The C.R.U. Arrestment Survey para. 25 shows that a few employers operated the formula on gross wages. We do not find it necessary to express a view on whether the formula should apply to gross or net wages since we propose to clarify the law: see para. 6.72 below.

produces harsh results especially if repeated arrestments are made; indeed, in many cases the debtor's family can only meet their essential household expenses by defaulting on other commitments or delaying payment of other debts.[1]

6.10 Accordingly, a major objective of reform should be to increase the amount of wages exempt from diligence. It might be thought that this could be relatively easily achieved by increasing the level of exempt wages under the Wages Arrestment Limitation (Scotland) Act 1870.[2] It seems likely, however, that if that exemption were raised significantly, creditors would have resort to repeated arrestments even more than at present and the diligence would become even more expensive for debtors. It seems to us therefore that, in order to raise the subsistence exemption to a realistic level in a way which secures a reasonable return to a creditor using the diligence, it would be necessary to spread the arrestment of earnings over a longer period by introducing a continuous diligence against earnings.

6.11 To sum up, the two main criticisms of the existing system could be met by introducing a continuous diligence against earnings with higher exemption limits. Although the proportion deducted from each individual payment of the debtor's wages would be less than under the present system, we think that the total amount recovered in the long run by the creditor towards satisfaction of the debt would be likely to be greater.

Objections to a continuous diligence

6.12 A system of continuous diligence against earnings, however, might have some disadvantages; and, indeed, the risk of these led the McKechnie Committee in their Report to reject such a system.[3] The possible disadvantages are that:

(*a*) a continuous diligence against earnings would cause additional expense and inconvenience to employers;

(*b*) it would increase the risk of debtors being dismissed from their jobs;

(*c*) it would induce debtors to leave their jobs;

(*d*) it would impose hardship on debtors and discriminate against those in steady employment; and

(*e*) it would penalise considerate creditors, encourage immediate arrestment and discourage voluntary instalment settlements.

6.13 *Inconvenience and expense to employers*. A system of continuous diligence against earnings would require employers to make deductions from earnings of smaller sums over longer periods than at present. But the methods recommended below[4] for calculating the amount to be withheld from the debtor's pay would we believe in most cases be relatively easily applied by

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[1]See the findings of the Edinburgh University Debtors Survey, paras. 6.3 and 6.4 referred to at para. 2.67 above.

[2]Such an increase may be achieved by Order in Council under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, s. 3, but the power conferred by that section has not been exercised.

[3]Paras. 54 to 56.

[4]Recommendation 6.9 (para. 6.76).

employers. And to some extent the additional burdens on employers would be offset by the elimination of repeat arrestments. Although we suggest that employers should be entitled to charge a fee for the work involved,[1] we concede that this sum would fall short of adequate remuneration. We sympathise with the position of employers and we have been particularly careful in framing our recommendations to try to impose the minimum of additional burdens upon them. Nevertheless we consider that the likelihood of increased work for employers is not a decisive consideration; on consultation, the employers who commented did not object to continuous diligence against earnings.

6.14 *Dismissal by employers*. It is possible that the work and inconvenience involved in operating an arrestment and, in some cases, the suspicions about an employee which an arrestment may arouse in the mind of an employer, may tempt the employer to dismiss the employee. There is however little evidence that dismissal occurs on any significant scale in Scotland, and the legislation on unfair dismissal would be likely to prevent the practice from developing if continuous diligence against earnings were introduced. We revert to this point later,[2] but we do not find much force in the argument that the introduction of a continuous diligence against earnings instead of single or repeated arrestments would lead to more dismissals.

6.15 *Inducing debtors to leave their jobs*. Even at present debtors may change or give up their jobs to evade repeated arrestment of wages.[3] It is possible that there would be a greater incentive for debtors to do this if continuous diligence against earnings was introduced. In our view however debtors, particularly those who see a definite end to their liabilities towards their creditors, would be no more likely to change jobs to evade a continuous diligence than to avoid repeated arrestment of wages, especially when each deduction will be lower and therefore more bearable.

6.16 *Hardship to debtors*. Undoubtedly hardship to debtors would result if the present rules (under which nearly half the debtor's wages are attachable in each pay period) were to be applied to a continuous diligence. An important objective of continuous diligence, however, is that the deductions from wages made each week can be decreased if the diligence is spread over a reasonable period; this would cause less hardship to debtors than large deductions concentrated in one or two weeks.[4]

6.17 We do not think there is much force in the argument that a continuous diligence would discriminate against those in steady employment. The existing system of arrestment, after all, cannot be used against unemployed or self-employed debtors and may be difficult to use against many casual workers (whose employer is often not easily traced); but we are not aware of criticism of the present system of arrestments of wages on the ground that it is discriminatory.

6.18 *Encouraging diligence*. At present, a creditor, whose arrestment is

[1]Recommendation 6.21 (para. 6.125).

[2]See para. 6.282 below.

[3]The Edinburgh University Debtors Survey, (para. 6.6) found that out of 25 debtors whose wages had been arrested, one had left employment.

[4]Edinburgh University Debtors Survey, para. 6.3.

postponed to a prior arrestment in one pay period, may in the following pay period be the first or only creditor to lay an arrestment. Direct competition between arresting creditors is therefore uncommon.[1] In the case of a continuous diligence against earnings, the likelihood of competition will increase; the later creditors will be "shut out" for the duration of the existing diligence; and creditors may be tempted to lay arrestments quickly to avoid being pre-empted by other creditors. This criticism has some weight, especially where the debtor has few assets other than wages. However, the recommendations we make below[2] will allow sums deducted to be shared amongst all creditors who are in a position to do diligence against the debtor's earnings.

6.19 Another argument against a continuous diligence against earnings is that the threat of moderate deductions spread out over a lengthy period would be insufficient to induce debtors to settle their debts voluntarily. The present system, whereby a large proportion of the debtor's wages is arrested often operates as a spur to informal arrangements for payment of the debt, usually by instalments which may be more than the debtor can reasonably pay. A continuous diligence against earnings, on the other hand, is based on a different and more acceptable premise, namely that the diligence should itself recover reasonable instalments and should not operate so harshly as to compel the parties to work outwith it. Even so we think that the existence of earnings arrestments will induce the majority of debtors to settle without an arrestment having to be laid on.

Conclusion

6.20 The proposals contained in Consultative Memorandum No. 49 for the introduction of a continuous diligence against earnings were welcomed by those consulted. Nobody preferred to retain the present system. The Scottish Association of Citizens Advice Bureaux commented that even the informal arrangements entered into after an arrestment has been served often proved too onerous for debtors to keep up. Some support for this comes from the findings of the Edinburgh University Debtors Survey that although half the debtors whose wages were arrested came to an informal arrangement, only one (out of seven) did not subsequently default.[3] Our new system of earnings arrestments endeavours to remove this defect by regulating the deductions from earnings in a way which would not be too onerous to debtors. In our view the advantages of a continuous diligence against earnings easily outweigh the disadvantages.

The form of continuous diligence against earnings

6.21 Having concluded that a system of continuous diligence against earnings should be introduced we turn to consider what form that diligence should take. The choice lies between two different schemes. The first, which we call an "earnings arrestment" is modelled on the existing diligence of arrestment

[1]The C.R.U. Arrestment Survey, para. 29 discloses that only nine employer firms out of 28 interviewed had, in all their experience, ever known two or more arrestments to be served during the same pay period.

[2]In Section E of this Chapter.

[3]Figure 1 (page 23).

of wages and salary. The principal features of earnings arrestments are as follows.

(*a*) The earnings arrestment would be preceded by a charge to pay the debt within a certain number of days specified in the charge on pain of execution of an earnings arrestment.

(*b*) The warrant to charge and lay an earnings arrestment would be contained in the court decree, and there would be no need for the creditor to make a special application to the court for authority to arrest earnings.

(*c*) On each pay day, the employer would be required to deduct from the debtor's pay a sum calculated in accordance with a sliding scale of deductions laid down by statutory rules and tables.

(*d*) The employer would be bound, without the need for a decree of furthcoming or authorisation by the debtor, to remit the deducted sum to the creditor, and the remittance would be made directly rather than indirectly through the court.

(*e*) The earnings arrestment would last until the debt was paid.

Somewhat similar systems of enforcement against earnings exist in Australia, Canada and the United States of America.[1]

6.22 The other option is a system of court orders, which we call for convenience attachment of earnings orders, on the lines of the procedure introduced in England and Wales in 1970 and now governed by the Attachment of Earnings Act 1971. The main features of this system may be summarised as follows.

(*a*) A creditor seeking to recover a decree debt by deductions from earnings would have to apply to the court for an attachment of earnings order.

(*b*) The court would inquire into the debtor's financial position, resources and liabilities and would fix an appropriate deduction from the debtor's earnings.

(*c*) The order would require the employer on whom it had been served to deduct the amount specified in the order on each pay day and remit it to the court for disbursement to the creditor.

(*d*) The order would last until the debt was paid or the debtor changed employment.

6.23 In our Consultative Memorandum No. 49 we sought views on two similar provisional schemes for recovering ordinary civil debts, though there were differences of detail.[2] All those who commented expressed support for

[1]New South Wales, District Court Act 1973, s. 98(3); British Columbia, Family Relations Act R.S.B.C. 1972, s. 36(3); California, Code of Civil Procedure, s. 682.3.

[2]The first option (which we called an extended arrestment) resembled earnings arrestments such as we now recommend but with two main differences, namely (i) it would have lasted for a fixed period of months and would have required to be re-served if the debt had not been satisfied within that period; (ii) the employer would only be bound to remit the sum if authorised, either by the debtor or by a decree of furthcoming, to do so. We explain later why we have rejected these different features. The second option (which we called an "earnings transfer order" since the order would not merely "attach" a proportion of the debtor's earnings but would require it to be paid or transferred to the creditor) was closely modelled on attachment of earnings orders.

a system of continuous earnings arrestments rather than a system of court orders attaching or transferring earnings, and we adhere to our provisional view that earnings arrestments would be preferable.

6.24 We concede that attachment of earnings orders would have some advantages. The deduction from earnings would be fixed by the court at a level which took into account the whole financial circumstances of the individual debtor. Thus the court would be able to have regard to the number of dependants being supported by the debtor and the contributions to household income being made by other members of the debtor's household. By contrast, the statutory rules and tables regulating the deductions to be made under an earnings arrestment could not be varied to meet the individual circumstances of particular debtors. It may be said that attachment of earnings orders would benefit debtors with one pay packet and many dependants. On the other hand, the sliding scale deduction scheme for earnings arrestments which we recommend below[1] minimises the rigidity of deductions based on statutory rules. Moreover, where the debtor's income fluctuates considerably, as might happen in the case of a salesman remunerated by commission or a person with fluctuating overtime payments, the statutory sliding scale would produce a fairer result than a fixed deduction specified in an attachment of earnings order. In cases where the statutory tables did not relieve hardship sufficiently, it would generally be open to the debtor to apply for a time to pay order in which the instalments would reflect the debtor's ability to pay and which would recall the earnings arrestment.

6.25 From the standpoint of debtors, attachment of earnings orders would also have certain disadvantages. Diligence expenses are generally chargeable against the debtor and the expenses connected with an attachment of earnings order would be substantially more than the expenses of executing an earnings arrestment since the expenses of the court procedure would have to be borne by the debtor. Moreover, in a creditor's application for an attachment of earnings order, the debtor would be compelled to submit to a means enquiry, and new sanctions, such as fines or imprisonment, would require to be introduced in the field of civil debt enforcement to deal with debtors who refused or delayed disclosure of their means. Furthermore, if (as we believe, for reasons to be noted shortly) the introduction of attachment of earnings orders would induce very many creditors to rely instead on poinding and warrant sale procedures whereas earnings arrestments would not have that result, then we think that the balance of advantage from the standpoint of debtors tips decisively in favour of earnings arrestments.

6.26 Our consultation and the research commissioned for this report strongly suggest that creditors in Scotland would much prefer earnings arrestments to attachment of earnings orders. An earnings arrestment could be executed under the authority of the warrant in the extract decree, the only preliminary step under our recommendations being the relatively simple one of the service of a charge. By contrast, attachment of earnings order procedures would entail the expense, uncertainty and trouble of an application to the court; delay while the court obtained and considered details of the debtor's financial circumstances, including in a proportion of cases orders requiring the debtor

[1]Recommendation 6.9 (para. 6.76).

to attend the court for examination in person as to means; and the making of an attachment of earnings order which would then have to be served on the debtor's employer. It seems to us likely that, faced with a choice between instructing a poinding and making an application to the court for an attachment of earnings order (as opposed to instructing the officer of court to serve an earnings arrestment), very many creditors in Scotland would instruct poindings.

6.27 On consultation it was generally agreed that such a consequence would be undesirable. As we indicated in Chapter 2 there is a long tradition in Scotland whereby creditors who know the name and address of the debtor's employer will generally instruct an arrestment of earnings in preference to a poinding and it appears from the research and consultation that this beneficial tradition would almost certainly not survive the introduction of attachment of earnings orders. In Scotland, creditors rely on enforcement against earnings in preference to enforcement against goods in the debtor's possession more than do their counterparts in England and Wales where (as in Scotland) execution against goods in the debtor's possession is not preceded by a court application involving a means enquiry. In 1978, (the last year for which comparisons can be made), in Scotland for every first arrestment of wages (i.e. not counting repeats) there were eight charges and as few as three poindings whereas in England and Wales in the same year, for every application to the county court for attachment of earnings there were 10 warrants of execution against goods and for every county court attachment of earnings order actually made, there were as many as 20 warrants of execution against goods.[1] These cross-border comparisons support our view that creditors are likely to regard earnings arrestments as more effective diligences than attachment of earnings orders and are less likely to have recourse to the alternative of poinding and warrant sale procedures than they would if attachment of earnings orders were introduced.

6.28 Once an extract of a decree has been issued to the creditor an earnings arrestment could be used without further reference to the court. But attachment of earnings orders would impose new and substantial burdens on the resources of the courts: in processing the application, in obtaining and considering information about the debtor's financial circumstances, in making the order, and once the order was in operation in collecting money from the employer and disbursing it to the creditor. If the present scale of use of arrestments were maintained for attachment of earnings orders, more court staff would be necesssary, the cost of which would have to be borne either by debtors or by the public purse. Furthermore, as we indicated in Chapter 2, obtaining accurate and complete information about the financial circumstances of debtors and their families, either by way of forms or means enquiries, is a difficult and often lengthy task.[2]

6.29 In our view earnings arrrestments would have considerable advantages over attachment of earnings orders and we therefore conclude that continuous

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[1]See Consultative Memorandum No. 49, para. 1.33. In 1974/75, creditors in Scotland relied on enforcement against earnings rather than enforcement against goods even more heavily than in 1978, and much more so than in England and Wales in that period: see Consultative Memorandum No. 49, para. 1.31.

[2]See para. 2.91.

diligence against earnings should take the form of earnings arrestments rather than attachment of earnings orders.

6.30 We **recommend:**

(1) A new system of continuous diligence against earnings (called earnings arrestments) should be introduced and arrestments in their present form should cease to be available as a diligence against earnings.

(2) An earnings arrestment would require the debtor's employer to deduct sums calculated in accordance with legal rules from the debtor's net earnings on each pay day occurring after service of the earnings arrestment.

(3) An earnings arrestment would require the employer, without the need for a decree of furthcoming or mandate from the debtor, to pay the sums deducted under paragraph (2) above forthwith to the arresting creditor, subject to a procedure allowing the debtor and the employer to contest an earnings arrestment on the grounds that it is invalid or has ceased to have effect.

(Recommendation 6.1; clauses 72(1) and (2)(*a*), 75(1) and 78(1).)

Section C. Earnings arrestments

6.31 In this Section we discuss earnings arrestments and put forward detailed recommendations on the provisions which would be needed to introduce this new diligence against earnings into the law of Scotland.

Sums arrestable by earnings arrestment

Earnings of employees

6.32 In Consultative Memorandum No. 49 we proposed[1] that an earnings arrestment should only be available to attach the pay and certain other sums due by the employer of an employed individual.[2] All those who commented agreed. We do not think that it is either necessary or desirable to apply earnings arrestments to the income of companies, partnerships and unincorporated associations, since repeat arrestments against the income of such bodies do not present practical problems, and there is no pressure for such an amendment of the law.[3] The creditors of such bodies can use ordinary arrestments[4] or other diligences to attach their assets (such as investments, bank accounts, trade debts or heritable property) themselves and thus any income produced by them. Moreover, the concept of a subsistence exemption is out of place in relation to companies and other bodies. We have, therefore, excluded companies, partnerships and unincorporated associations from our recommendations.

6.33 On consultation, there was virtually unanimous agreement that the

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[1]Propositions 2 and 3 (paras. 2.2 to 2.13).

[2]Employer includes the payer of an arrestable pension; see Recommendation 6.3 (para. 6.45) below.

[3]Arrestments against commercial debtors are much less common than other arrestments: between 3% and 6% of all arrestments served in 1978 were against such debtors (C.R.U. Diligence Survey, para. 4.1 and Table 1). They are, however, very important in commercial legal practice and the cases which do occur often involve large sums.

[4]By an ordinary arrestment we mean an arrestment according to the existing law and practice.

funds and income of self-employed persons should be arrestable by ordinary arrestments rather than earnings arrestments. The variety of income sources of the self-employed and the irregularity and fluctuations in the amounts of the payments made to them combine to make it impractical to apply earnings arrestments. For example, shopkeepers, plumbers, solicitors or accountants receive income from the many customers to whom they supply goods or services. There is no one person on whom an earnings arrestment could be served to attach such self-employed persons' income, and there is no one person in a position to calculate the subsistence exemption. Some self-employed people such as doctors, dentists, opticians, advocates and solicitors often receive the whole or a substantial proportion of their income from one source.[1] Even in these cases we think that earnings arrestments would be inappropriate. The sums are paid irregularly so that exemptions for subsistence expressed as a certain sum per week or month would be difficult or impossible to apply. Moreover, such self-employed persons have to pay the expenses of their offices or practices. A fair exemption for personal subsistence would therefore be difficult to establish without a lengthy means enquiry, which it is one object of earnings arrestments to avoid. Again, we would stress that an ordinary arrestment would be more effective and since it does not attract a subsistence exemption, no discrimination against employed persons is involved in applying ordinary arrestments rather than earnings arrestments to the income of the self-employed.

6.34 An individual's income may come from many sources, including salary or wages, pensions,[2] social security benefits,[3] rents, dividends and interest. We do not think that earnings arrestments should be used to attach rents. Rent is unlikely to be the main source of a debtor's income and, where it is, the rents are likely to be due from a number of tenants. Moreover, many tenants could not cope with the calculations involved in administering earnings arrestments. With regard to dividends and interest, as already mentioned, ordinary arrestments attach the shares and deposits themselves and therefore the income arising from them.[4] Thus there is no need to provide for a continuous diligence against dividends and interest.

6.35 The present statutory limitations on wages arrestment are anachronistic in so far as they apply only to "the wages of all labourers, farm servants, manufacturers, artificers and workpeople".[5] In practice the provisions are almost invariably applied to salaried employees also.[6] Our view, which was approved on consultation, is that earnings arrestments should be applied to salaries as well as wages. The distinction between the two concepts is imprecise

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[1]The Area Health Boards pay for services rendered to National Health Service patients. Faculty Services Limited collect and disburse advocates' fees. Legal Aid Committees make payments to solicitors in respect of legal aid and legal advice and assistance work.

[2]See para. 6.40 below.

[3]See para. 6.43 below.

[4]As to shares, see Graham Stewart, pp. 231, 240, 847–9; *Sinclair* v. *Staples* (1860) 22 D. 600; *American Mortgage Co.* v. *Sidway* 1908 S.C. 500; *Stenhouse London Limited* v. *Allwright* 1972 S.C. 209.

[5]Wages Arrestment Limitation (Scotland) Act 1870, s. 1. For some time after 1870 the scope of this provision was much litigated, but the last reported case seems to be *Thomson* v. *Cohen* (1915) 32 Sh.Ct.Reps. 15.

[6]C.R.U. Arrestment Survey, para. 26.

and, since it turns on the nature of the employee's work, it is irrelevant in the present context.

6.36 In Consultative Memorandum No. 49, we suggested[1] the following definition of the earnings which should be attachable by earnings arrestment:

> "any sums payable by way of wages or salary (including any fees, bonus, commission, overtime pay or other emoluments payable in addition to wages or salary by the person paying the wages or salary or payable under a contract of service)."[2]

The emoluments covered by this definition would include contractual payments such as holiday pay,[3] sick pay or lay-off pay, as well as certain non-contractual statutory rights to remuneration such as maternity pay,[4] statutory sick pay,[5] sick pay during periods of notice,[6] pay during suspension on medical grounds[7] and guarantee payments on lay-off when work is not available.[8] On the other hand, there is authority in England and Wales to the effect that a similar formula does not include credits paid to the managers of a holiday fund.[9] Lump sums due by way of damages or compensation[10] or reimbursement of travelling and other expenses would also be excluded.

6.37 On consultation, the above definition of earnings was approved, but it was suggested that a redundancy payment (or the proportion representing loss of future income) should be attachable by earnings arrestment. Another organisation suggested that damages for personal injury or defamation should be similarly attachable since such damages if awarded to a bankrupt would be claimable by the trustee in sequestration.[11] We would agree that redundancy payments and damages for personal injury and defamation should be attachable. We think, however, that the appropriate diligence should be an ordinary arrestment. Earnings arrestments having a fixed deduction level and a weekly or monthly subsistence exemption are not suitable to attach lump sums.

6.38 In Consultative Memorandum No. 49, we also suggested that an earnings arrestment should attach, in addition to "earnings" (as defined above) payable as from the date when the earnings arrestment took effect,

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[1]Para. 2.11.

[2]Modelled on the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, s. 1(2)(*a*) (which exempts earnings from arrestment on the dependence) and the Attachment of Earnings Act 1971, s. 24(1)(*a*).

[3]Including accrued holiday pay if payable by the employer. Where the employer has made payments into a holiday fund held by managers or trustees, such sums would not be attachable by an arrestment served on the employer.

[4]Employment Protection (Consolidation) Act 1978, s. 33.

[5]Social Security and Housing Benefits Act 1982, s. 1.

[6]Employment Protection (Consolidation) Act 1978, s. 49, Sched. 3.

[7]*Ibid.*, ss. 19 and 20.

[8]*Ibid.*, ss. 12–18.

[9]*London County Council* v. *Henry Boot and Sons Ltd* [1959] 3 All E.R. 636; cf. C.R.U. Arrestment Survey, para. 14.

[10]E.g. redundancy payments or compensation for unfair dismissal (under the Employment Protection (Consolidation) Act 1978), compensation for dismissal on grounds of race, sex or marital status (under the Race Relations Act 1976 or the Sex Discrimination Act 1975) or damages at common law or under the Health and Safety at Work Act 1974.

[11]*Jackson* v. *McKechnie* (1875) 3 R. 130.

all other sums for which the employer was liable to account to the employee at that date, whether or not they were "earnings". The object was to relieve a creditor from the need, or to remove the temptation, to serve an ordinary arrestment as well as an earnings arrestment, in order to attach sums other than earnings which might happen to be due. On reflection, we consider that such a provision might be confusing for employers, that it would complicate the law unduly, and that few creditors are likely to incur the expense of serving an ordinary arrestment as well as an earnings arrestment on the off-chance that it might attach sums other than earnings.[1] Where a creditor has good reason to believe that such additional sums may be due, however, an ordinary arrestment could also be served to attach them.

6.39 We **recommend:**

(1) An earnings arrestment should attach a certain amount (calculated in accordance with our recommendations below) of the debtor's earnings payable on each pay day after the date when the earnings arrestment takes effect until the debt for which the arrestment is served is satisfied or the arrestment otherwise ceases to have effect.

(2) Earnings for this purpose should be defined to mean any sums payable to the debtor by way of wages or salary (including any fees, bonus, commission, overtime pay, or other emoluments payable in addition to wages or salary or payable under a contract of service).

(3) Sums not attachable by earnings arrestment due by the employer to the employee should be attachable by an ordinary arrestment.
(Recommendation 6.2; clauses 72(1), 73(1) and 75(2).)

Pensions, annuities and liferents

6.40 As a general rule, an arrestment of a pension, annuity or liferent, like an arrestment of wages, attaches the instalment due for the period in which it is served together with any unpaid arrears in respect of previous periods.[2] To this rule, there are two main exceptions. First, arrestment of an alimentary pension or alimentary liferent attaches (in addition to unpaid arrears) the current instalment only insofar as it exceeds a suitable aliment for the recipient and his or her family.[3] Second, the enactments regulating statutory occupational pension schemes (for example schemes for the police, firemen, teachers, civil servants, local government officers, National Health Service and Armed Forces personnel, and Members of Parliament) invariably have provisions protecting the pension from attachment by sequestration or diligence. Although there is some doubt on the point, the generally held view is that the whole of each instalment of a statutory occupational pension subject to such a provision is exempt, not merely the amount of the instalment required for

[1]If such an arrestment should prove abortive, the creditor would not be entitled to recover the expenses of the arrestment from the debtor, see para. 9.48.

[2]Graham Stewart, p. 52. Where the instalments are payable in advance, an arrestment will only attach unpaid arrears (if any). See *Smith and Kinnear* v. *Burns* (1847) 9 D. 1344.

[3]*Officers' Superannuation and Provident Fund etc.* v. *Cooper* 1976 S.L.T. (Sh.Ct.) 2. The whole instalment is arrestable where the arrestment is based on a debt which is itself "alimentary". Wilson and Duncan, *Trusts, Trustees and Executors*, pp. 96–97.

a suitable aliment.[1] Where the pension is not protected from diligence by legislation or its alimentary character, an arrestment will attach the whole instalment.[2]

6.41 On consultation, there was general agreement that pensions should be attachable by a continuous diligence. Since pensions may be seen as a form of deferred pay and are (unless protected) subject to attachment of earnings orders in England and Wales,[3] we think that in Scotland they should be arrestable by earnings arrestments. We note that disablement or disability pensions are not subject to attachment of earnings orders in English law[4] and we suggest that such pensions should not be attachable in Scotland by earnings arrestments or indeed ordinary arrestments.

6.42 On consultation, there was also general agreement with our provisional proposal that even pensions declared alimentary at common law should be subject to continuous diligence. The effect would be to avoid the need for repeated arrestments of the excess of the alimentary pension above a suitable aliment, and to give exemptions by legal rules without the need for applications to the court to fix a suitable aliment.[5]

6.43 The McKechnie Report[6] recommended in 1958 that statutory occupational pensions should be arrestable subject to the same limitations as arrestments of wages and this view found favour with those who commented on Consultative Memorandum No. 49.[7] On reflection, we do not think that it is for us to recommend changes in the many special superannuation enactments, but we draw the matter to the attention of the competent authorities. Such a change in the law should only be recommended by an advisory body with United Kingdom terms of reference. We would add that our recommendations are not intended to allow attachment of old age pensions or pensions, allowances and benefit payable under general social security legislation, which are exempt from diligence by statute.[8]

6.44 In Consultative Memorandum No. 49[9] we also sought views on whether liferents and annuities (whether declared alimentary or not) should be attachable by a continuous diligence. While this received some support on consultation, we think that earnings arrestments should not apply to liferents or to annuities (except those which are for past services and thus akin to a pension). Liferents are often paid at long intervals (such as half-yearly) so

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[1]See *Borthwick* v. *McRitchie* (1908) 24 Sh.Ct.Reps. 374 and *MacFarlane* v. *Glasgow Corporation* (1934) 50 Sh.Ct.Reps. 247 (exemption total); but cf. *Macdonald's Tr.* v. *Macdonald* 1938 S.C. 536 (relating to s. 98(2) of the Bankruptcy (Scotland) Act 1913 which confers upon the court powers analogous to its common law powers to fix a suitable aliment) which suggests that the exemption does not apply to the excess above a suitable aliment.

[2]*Irvine and Shepherd* v. *McLaren* (1829) 7 S. 317.

[3]Attachment of Earnings Act 1971, s. 24(1)(*b*).

[4]*Ibid.*, s. 24(2)(*d*).

[5]In general, future instalments of alimentary income cannot be attached and the court will not fix a suitable aliment in respect of those instalments: *Cuthbert* v. *Cuthbert's Trs.* 1908 S.C. 967, 971.

[6]Para. 108.

[7]Proposition 5(2) (para. 2.19).

[8]E.g Child Benefit Act 1975, s. 12; Social Security Pensions Act 1975, s. 48; Supplementary Benefit Act 1976, s. 16; see Crown Proceedings Act 1947, s. 46, proviso (*b*).

[9]Proposition 5(1) (para. 2.19).

that the problem of repeat arrestments is relatively unimportant. Also, alimentary liferents are not so common that the existing power of the courts to allow an arrestment to attach the excess above a suitable aliment for the liferenter imposes a serious burden on the courts.[1] These arguments may apply to annuities, but in addition instalments of annuities often consist partly of income and partly of capital and in such cases are not analogous to wages or salary.

6.45 We **recommend:**

(1) Pensions (including annuities for past services and periodic payments by way of compensation for loss of office or employment) should be attachable by earnings arrestments.

(2) Pensions or allowances payable in respect of disablement or disability, however, should not be attachable by earnings arrestments.

(3) Provided the amount deductible under an earnings arrestment is fixed in accordance with our recommendations below, a pension which is alimentary at common law should be attachable by earnings arrestment notwithstanding the common law exemption.

(4) The competent authorities should consider whether the various enactments regulating specific public sector occupational pension schemes should be amended to enable creditors to attach such pensions by earnings arrestments.

(5) The foregoing recommendations are not intended to allow attachment of pensions, allowances and benefit payable under social security legislation.

(6) We make no recommendation to change the law on the arrestment of liferents or annuities (other than annuities for past services).
(Recommendation 6.3; clause 73(1)(*c*), (2)(*a*), (*d*), (*e*) and (*f*).)

Pay of merchant seamen and the armed forces

6.46 Two categories of pay currently exempt from arrestment—merchant seamen's pay and armed forces' pay—should not in our opinion be affected by our recommendations. In 1977, the Department of Trade issued a consultative document to interested bodies suggesting that, in modern conditions, it was doubtful whether there was still a case for the exemption of merchant seamen's pay from arrestment. In the light of consultation, however, a compromise solution was effected by the Merchant Shipping Act 1979, section 39(2) and (3) whereby the exemption of the wages of seamen on fishing boats was abolished, and the wages of all seamen were made arrestable for sums due under decrees of aliment, financial provision on divorce and other "maintenance orders" but not under other decrees. In the light of this recent legislation it would not be appropriate for us to re-open the topic. It would follow from our principal recommendation, however, that it would be competent to attach by earnings arrestment (*a*) the pay of a seaman of a fishing boat and (*b*) the pay of any other seaman only for arrears

[1]An arrestment of an instalment of a non-alimentary liferent attaches the whole instalment. Such liferents are rarely the liferenter's sole source of income.

due under a decree for aliment, financial provision on divorce or other maintenance order.[1]

6.47 The pay of members of the armed forces and women's services administered by the Defence Council is not arrestable.[2] The Defence Council will, however, on application by the creditor, usually make periodic deductions from the debtor's pay to settle the debt. In Consultative Memorandum No. 49 we proposed[3] that the pay of members of the armed forces and women's services should be exempt from the proposed new form of earnings arrestments on the ground that earnings arrestments would be very similar to the arrangements entered into by the Defence Council. Most of those consulted agreed with our proposal; those opposed did not point to the failure of the present system to work satisfactorily, but rather objected to the principle that some persons should be protected from arrestment. We see no need to disturb the current practice.

6.48 **We recommend:**

No changes should be made to the recently revised rules on the exemptions from arrestment of merchant seamen's pay, or the rules whereby the pay of members of the armed forces and women's services administered by the Defence Council is exempt from diligence.
(Recommendation 6.4; clause 73(2)(*b*) and (*c*).)

Debts enforceable by earnings arrestment

Debts due at date of execution

6.49 Arrestment against earnings and pensions on the dependence of an action was abolished by section 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966. Clearly, it should also be incompetent to use the new form of earnings arrestments against earnings or pensions on the dependence.

6.50 Arrestments in security of future or contingent debts due under decrees or liquid documents of debt (such as decrees or bonds for payment of future aliment) are competent[4] but very rare. In view of the fact that the amounts involved would normally be small, it is unlikely that a creditor would wish to arrest earnings in security. An earnings arrestment is a completed diligence in that the employer deducts certain sums from the debtor's earnings each pay day and remits them forthwith to the creditor. On the other hand a diligence in security envisages the debtor's funds or property being set aside for, but not handed over to, the creditor in order to meet that creditor's future or contingent debt. In our view earnings arrestments should be used only to enforce debts which are currently due at the date of the arrestment. A creditor in a future or contingent debt should, however, remain entitled to use an arrestment in security against funds other than earnings.

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[1]Sums currently due would be attachable by a current maintenance arrestment, see Section D of this Chapter.

[2]At common law, the pay of all Crown servants was not arrestable but this was changed by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, s. 2, which, however, retained the exemption for the armed forces and women's services.

[3]Proposition 4 (para. 2.16).

[4]See *James* v. *James* (1886) 13 R. 1153; Graham Stewart, pp. 15 and 22.

6.51 We **recommend:**

It should be incompetent to use an earnings arrestment to enforce a debt which is not due at the date of execution of the arrestment.
(Recommendation 6.5; clause 72(2)(*a*).)

Interest

6.52 The next question for consideration is to what extent interest due under a decree should be recoverable by earnings arrestment. The form of schedule of arrestment in general use states that the arrestment attaches all sums of money due by the arrestee to the debtor until payment is made to the arresting creditor of the principal sum, interest at a specified rate from a specified date until payment, and the expenses of the court action, under deduction of sums paid to account. The officer will normally endorse on the schedule of arrestment a statement of the debt—the principal sum and court expenses (which are attached by the arrestment), the solicitor's fee (if any) for instructing the arrestment and the officer's arrestment fee[1] (which are not attached by the arrestment), less payments to account. Thus in arrestments of wages, though the rate of interest is referred to in the schedule of arrestment, it is almost always excluded from the statement of the debt. One reason is that creditors find it difficult to compute the interest (which is calculated on a day-by-day basis) in the common case where a series of payments to account have been made at different dates, and accordingly they normally do not seek to recover it.

6.53 Having regard to the need for a simple procedure, we proposed in Consultative Memorandum No. 49[2] that the amount of interest attachable by an earnings arrestment should be the interest accrued up to the date of the service of the earnings arrestment, but that such interest should only be attached if, and to the extent that, the amount is specified in the arrestment schedule. This proposal was agreed by those who commented and we adhere to it. During the period for which the earnings arrestment has effect, interest would continue to run on the principal sum and might be recovered by other diligence (including a subsequent earnings arrestment). We do not however anticipate that in future creditors would be any more likely to seek to use an arrestment to recover interest accrued after the service of an earnings arrestment than they are under the present system.

6.54 We **recommend:**

An earnings arrestment should attach (in addition to the principal sum and judicial expenses due under the decree) interest accrued up to the date of service of the earnings arrestment, but only if, and to the extent that, the amount of interest is specified in the schedule of arrestment.
(Recommendation 6.6; clause 77(1)(*a*) and (*b*) and (2).)

Introduction of prior charge

6.55 Under the present law, an extract court decree contains a warrant for all lawful diligence, including immediate arrestment.[3] Accordingly, the creditor

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[1]Recovery of expenses of executing earnings arrestments is dealt with later in Chapter 9.
[2]Proposition 6.2 (para. 2.26).
[3]Debtors (Scotland) Act 1838, ss. 2 and 9; R.C. 65; Sheriff Courts (Scotland) Extracts Act 1892, ss. 4 and 7; Summary Cause Rules, rule 89(2).

is entitled to lay an arrestment of wages without further application to the court. In some other legal systems, a creditor holding a decree has to apply to the court for a wage attachment or wage "garnishment" order. This would, we think, be a pointless formality in Scottish procedure.

6.56 At present, an extract decree is warrant for immediate arrestment of the debtor's earnings and other funds and no charge needs to be served as a necessary preliminary to arrestment. In Chapter 3 we recommend that the debtor should be entitled to make an application for a time to pay order only after a charge has been served or an arrestment of funds other than earnings has been executed. We made this recommendation because in our opinion an application for a time to pay order should only be competent after the first steps of diligence have occurred. To allow earlier application might undermine the continued effectiveness of the system of enforcement, and lead to a great number of applications. Moreover, we consider it to be important that all debtors should be made aware of their right to apply for time to pay; the easiest way to achieve this is to include such information with a charge, since no document intimating the granting of a decree is usually sent to the debtor.

6.57 Making the service of a charge an essential preliminary to an earnings arrestment will, we hope, reduce the number of earnings arrestments that might otherwise be executed. In the diligence of poinding there is a sharp drop between the number of charges served and poindings executed;[1] the charge brings home to the debtor the seriousness of the situation and the creditor's intention to do diligence. Also service of a charge often enables officers of court to discover by contact with the debtor or his or her spouse whether the debtor is employed and if so to recommend use of arrestment rather than poinding. The Society of Messengers-at-Arms and Sheriff Officers, commenting on our proposal to introduce a continuous diligence against earnings, thought that there was a danger that creditors would instruct earnings arrestments immediately rather than enter into negotiated instalment arrangements. Prior service of a charge would lessen this danger to some extent. These considerations lead us to recommend that a charge should become an essential preliminary to an earnings arrestment. We would stress that this recommendation will not affect a creditor's right to instruct immediate arrestment of the debtor's funds other than earnings—such as a bank or building society account.

6.58 Our discussion has up to now been on the basis that an earnings arrestment is enforcing one debt. We see no reason why a single earnings arrestment should not be capable of enforcing more than one debt due by the same debtor to the same arresting creditor, provided a charge has previously been served in respect of each debt and the schedule of arrestment itemises the debts and specifies the decrees or other documents constituting the debts.

6.59 We **recommend:**

(1) An extract decree or other writ containing a warrant for diligence should authorise an earnings arrestment without the need for a further application to the court.

[1]C.R.U. Diligence Survey, para. 3.5. 46,000 charges served. 20,000 poindings executed. These are estimated figures for 1978.

(2) The service of a charge should be an essential preliminary to the service of an earnings arrestment. However, it should continue to be competent to serve an arrestment against funds other than earnings without first serving a charge.

(3) It should be competent to serve an earnings arrestment to enforce more than one debt due by the debtor to the same creditor providing a prior charge has been served in respect of each debt.
(Recommendation 6.7; clauses 77(3) and 112(1)(i), Schedule 7, paragraphs 8 and 10.)

Duration of earnings arrestments

6.60 An earnings arrestment could either endure until the sums recoverable thereunder were paid or could endure for a limited period fixed by law. In Consultative Memorandum No. 49 we proposed[1] that earnings arrestments should endure for seven months (or such other period as might be prescribed) and this proposal met with general agreement on consultation. Nevertheless we have now come to the view that an earnings arrestment should, in the normal course of events, endure till the debt is paid.[2] We deal with the termination of earnings arrestments by recall or events other than satisfaction of the debt later.[3]

6.61 For the creditor the advantage of indefinite duration is that the debt is paid without further action. There is no need to serve a further arrestment or arrestments if the first fails to recover the debt in full. An indefinite duration earnings arrestment is also easier for the employer; instead of processing several arrestment schedules served at intervals to recover a substantial debt there is only one schedule which is operated without a break. Debtors also benefit from an indefinite duration earnings arrestment since they do not have to bear the creditor's expenses in serving repeat earnings arrestments. One of the major defects we identified in the existing law of wages arrestment[4] is the necessity for repeat arrestments unless a voluntary instalment settlement can be agreed and implemented. Only an indefinite duration earnings arrestment eliminates this defect completely.

6.62 It might be objected that in the case of a large debt an earnings arrestment would have to endure for a long time—years perhaps—in order to pay off the debt. Too long a period might be a psychological barrier to payment and might induce debtors to leave their jobs. We doubt whether this would be so, and anyway it seems to us that in this respect there is no difference between a series of arrestments repeated over a long period and a single arrestment for the same total period.

6.63 The amount deducted from the debtor's pay in pursuance of an earnings arrestment will be calculated in accordance with statutory rules. Although the rules we recommend below[5] would leave debtors with a considerably higher

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[1]Proposition 15 (para. 2.55).
[2]An earnings arrestment may be recalled (para. 6.91) or cease to have effect by virtue of the debtor's sequestration (para. 6.103).
[3]See para. 6.104 below.
[4]See para. 6.7 above.
[5]See para. 6.76.

proportion of their pay than they are left with at present under an arrestment of wages, the rules have, of necessity, to be framed with the average debtor in mind. Hardship could be caused to debtors with unusually heavy commitments—such as several dependent children—and it might be argued that such hardship would be exacerbated by the earnings arrestment having an indefinite duration rather than a short fixed period. But the debtor would suffer exactly the same hardship from a series of arrestments which the creditor repeated in order to recover the debt in full as from a single arrestment of the same duration. Furthermore, we have made recommendations to take account of the possibility of hardship. In terms of these recommendations a debtor subjected to an earnings arrestment could apply to the court for a time to pay order,[1] or, in certain circumstances, a debt arrangement scheme.[2] On granting a time to pay order the court would recall the earnings arrestment and allow the debtor to pay the outstanding balance of the debt by instalments set with regard to the debtor's financial circumstances.

6.64 One of the more difficult problems associated with a continuous diligence against earnings is how to avoid the first arresting creditor "shutting out" later creditors who may otherwise resort to poindings or extra-judicial methods in order to recover their debts. The solution we put forward in Consultative Memorandum No. 49[3] was to allow a later creditor the choice of waiting until the first creditor's earnings arrestment expired and then serving an earnings arrestment, or applying to the court for a conjoined arrestment order in which both creditors would share in the deductions made from their debtor's earnings. A reasonably short duration for an earnings arrestment (a few months) improves the attractiveness of the first choice to the later creditor and we also put forward the idea that for 10 days after the first arresting creditor's earnings arrestment expired that creditor should not be entitled to serve a repeat arrestment. The object of this latter proposal was to allow the later creditor to serve an earnings arrestment while the original creditor is precluded from competing. On reconsideration, however, we have come to the conclusion that a switching over of creditors every few months in order to give each a chance of recovering part of his or her debt would be confusing for creditors, troublesome for employers and provide only a facade of equality. We are now of the opinion that the best method of securing equal treatment for creditors (outwith sequestration or a debt arrangement scheme) is by means of conjoined arrestment orders, and to that end we recommend a simple administrative procedure for obtaining these orders.[4]

6.65 One body on consultation put forward the view that an arrestment for a particular debt should last only three months; if the debt was not then satisfied it should become unenforceable by earnings arrestment. In our view, such a limitation would severely prejudice an arresting creditor without necessarily protecting the debtor since another creditor could still lay an arrestment. It might also drive creditors into using poindings or extra-judicial methods in order to recover their debts.

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[1]See Chapter 3 of this report.
[2]See Chapter 4.
[3]Propositions 15, 16, 16A and 21.
[4]See paras. 6.229 to 6.236 below.

6.66 We **recommend:**

Without prejudice to Recommendations 6.12(2) and 6.16(1) (recall and cessation of earnings arrestments) an earnings arrestment should have effect on each pay day after service of the schedule on the employer until the debt recoverable by the arrestment has been satisfied.
(Recommendation 6.8; clause 75(2).)

Amount deductible under an earnings arrestment

The deduction formula

6.67 As already indicated, one of the main objectives of earnings arrestments is to allow debtors to retain a larger amount than at present from their pay, while securing to the creditor a reasonable return from the diligence over a period. The deductions from pay must be fixed by a formula which can be applied reasonably easily by employers and which has regard to the interests of both creditors and debtors. If the deductions are too small, debts will be paid too slowly to the prejudice of creditors. If the deductions are too large, debtors and their families may suffer hardship, and the debtors may be forced to leave their jobs to the prejudice, not only of themselves, but also of the creditor and possibly the employer.

6.68 In Consultative Memorandum No. 49,[1] we invited views on several models for deduction rules which we discussed in detail. In summary, these models are as follows:

(i) *Fixed sum in sterling exempt.* This simple model would allow all earnings above a fixed sum expressed in sterling to be arrestable. It was used in Scotland between 1870 and 1960[2] and is used in some other jurisdictions. An important disadvantage of this model is that it allows too great a deduction for debtors in the middle and upper income ranges. For example, with an exemption of £35 per week a debtor earning £60 would have £25 deducted while a debtor earning £150 has £115 deducted. Above the exemption limit debtors would simply be working for their creditors.

(ii) *Fixed percentage of earnings exempt.* Some legal systems exempt a fixed percentage of the debtor's earnings; thus in the United States of America federal law enacts a minimum exemption of 75% of disposable earnings for all states. This keeps step with inflation, whereas a fixed sum does not. But if a large percentage is exempt so as to prevent hardship to low income debtors, high income debtors are left with more than enough for reasonable subsistence (see the illustrative example in paragraph 6.69). High income debtors should not be able to maintain a good standard of living at the expense of their creditors.

(iii) *Fixed percentage of earnings above fixed sum.* In this model the amount deducted is a fixed percentage of the balance above a fixed sum. It

[1]Paras. 2.69 to 2.88.

[2]The Wages Arrestment Limitation (Scotland) Act 1870, as originally enacted, provided a fixed exemption of 20 shillings per week which was raised in 1924 to 35 shillings. The Wages Arrestment Limitation (Amendment) (Scotland) Act 1960 replaced the fixed sum formula by the present formula exempting £4 plus half the balance of the weekly wage.

has been in force in Scotland since 1960, the fixed sum being £4 per week and the percentage 50%. Where (as has happened in Scotland) the fixed sum is not updated to keep pace with inflation, it can be unfair to low paid debtors and the creditors of high income debtors.

(iv) *Fixed percentage exemption with fixed sum threshold.* Another model combining the fixed sum and fixed percentage exemptions exempts a percentage of the debtor's weekly wage with the proviso that the exempted amount must not fall below a certain prescribed sum. For example, where the percentage exemption was 80% and the prescribed sum was £35, persons earning £40, £50 and £60 per week net, would retain £35, £40 and £48 respectively. By prescribing a further exempt sum for each dependant, allowance can be made for a debtor with a family to support. But this would require employers to ascertain the existence of dependants.

(v) *Slilding scale percentage deductions.* The disadvantage of a model with a single fixed percentage deduction is that it is not possible to set a deduction level which is fair at the same time to both high and low income debtors (see illustrative example in paragraph 6.69). This disadvantage can be met by introducing a sliding scale of percentage deductions whereby a small proportion of the lowest income brackets would be deducted but the percentage deduction would increase as the earnings rise through successive income brackets. Such a model is used in some jurisdictions including France. A fixed sum threshold can also be provided, below which no deductions are made.

(vi) *Exemption by reference to supplementary benefit scale rates.* Some legal systems define exemptions by reference to a statutory formula (such as the minimum hourly wage) which is continually uprated to keep pace with inflation. In this country, supplementary benefit scale rates are uprated annually but are too complex and difficult for employers to apply in an earnings arrestment system.

(vii) *Fixed percentage of "taxable pay" for a pay period.* Another possibility would be to use the debtor's P.A.Y.E. tax code upon the view that if the debtor's "taxable pay" for P.A.Y.E. purposes provides a measure of ability to pay tax out of earnings, it might also provide a measure of ability to pay creditors out of earnings. This would however require extra calculations by employers; it is likely to be too complicated; and in any event the code number actually in operation may not clearly reflect the commitments of the taxpayer-debtor even to the extent to which such commitments are taken into account in code numbers.[1]

In Consultative Memorandum No. 49, we examined the advantages and disadvantages of these different models. Those who commented agreed with us that either a sliding scale percentage deduction (head (v) above) or a fixed percentage exemption with a fixed sum threshold (head (iv) above) should be adopted and most commentators preferred the sliding scale model.

6.69 In our view the sliding scale model has a decisive advantage over the fixed percentage exemption with fixed sum threshold model, in that under the

[1]For example, the code number may be decreased to repay tax over-deducted, or increased in order to collect tax due from other income which has not suffered deduction of tax at source.

latter if the percentage exemption is set high in order to protect low paid debtors, it allows well paid debtors to retain too great a sum; while if the percentage exemption is set low, low paid debtors suffer excessive deductions. An example may help in clarifying this point.

Amounts deducted (£) under various models

Net weekly earnings of debtor (£)	40	60	80	100	200	400
Sliding scale model(1)	1	5	9	13	38	133
Fixed percentage exemption 90%(2)	4	6	8	10	20	40
Fixed percentage exemption 70%(2)	5	18	24	30	60	120

Notes:

(1) The sliding scale deductions are those recommended by us and set out in Table A of Schedule 3 to the draft Bill annexed to this report.

(2) The fixed sum exemption is £35, the same figure as the zero deduction level in our sliding scale model.

It may be argued that most highly paid debtors usually have higher commitments than low income debtors and can thus only afford to have about the same proportion of their earnings deducted to meet their debts. We do not find this "station in life" argument acceptable as it would result in highly paid debtors being allowed to continue to enjoy their high standard of living at the expense of their creditors.

6.70 One possible disadvantage of the sliding scale model is that it would involve the employers in elaborate calculations. This we think can be avoided by having statutory deduction tables and the draft Bill annexed to this report contains such tables.[1] The schedule of arrestment would include a copy of the statutory tables together with brief explanatory notes.[2] Instead of having to do a series of calculations an employer merely has to look up in the appropriate table the amount to be deducted for the particular net earnings of the employee debtor.

6.71 In view of these considerations we have adopted the sliding scale model with a fixed sum threshold below which all earnings should be exempt from arrestment in order to protect the really low paid. We suggest a figure of £35 per week, which falls roughly midway between the short term supplementary benefit rate for a single person (£28.05 in 1984–85) and that for a couple (£45.55 in 1984–85).

6.72 The C.R.U. Arrestment Survey discloses variations in employers' practices in applying the present statutory limitation formula to gross or net earnings. We think that this problem should be met by a provision making it clear that the percentages should be reckoned on net or disposable earnings which should be clearly defined for this purpose. We would adopt the definition of attachable earnings in the Attachment of Earnings Act 1971[3] which refers to pay after deduction of income tax and certain social security and superannuation scheme contributions. This is not the same as "take home

[1]See Sched. 3.
[2]Recommendation 6.20 (para. 6.122) below.
[3]Sched. 3, para. 3.

pay" since it does not cover S.A.Y.E., union dues and other "voluntary" deductions.

6.73 The C.R.U. Arrestment Survey also discloses variations between employers in adapting the present statutory limitation formula of £4 per week plus one-half of the balance to monthly pay periods. Some use £4 per month plus one-half of the balance, others use £16 per month, yet others use £17.50 per month (£4 multiplied by 52 and divided by 12 rounded up to a convenient figure). We think therefore that provision has to be made directing employers how to operate an earnings arrestment where the debtor in question is paid at regular intervals other than a week or a whole number of weeks—calendar months for example. Table A in Schedule 3 to the draft Bill sets out the deductions for weekly paid employees, while Tables B and C in Schedule 3 to the draft Bill deal respectively with monthly debtors and debtors who are paid at regular intervals other than a week or a month or a whole number of weeks or months.

6.74 Some debtors receive, in addition to their basic earnings, payments of overtime, commission or bonus of variable amounts and frequency. In some cases—salesmen for example—the commission is the larger part of the remuneration, with only a small retainer being paid regularly. In the interests of simplicity we recommend that any additional payments paid on the same day together with the basic pay should be aggregated with that pay and treated as being due for the same period. To do otherwise would require the employer to do separate calculations for each element in the debtor's earnings. There would also be the problem of ascertaining the precise periods for which the additional payments were in fact payable and complex statutory rules would be necessary to deal with all the possible situations. Where the additional payment is paid other than on a regular pay day, again for simplicity, we recommend that the employer should deduct 20% of it. We think the number of such payments will be few as employers find it convenient to pay additional payments along with regular earnings. Furthermore, it would always be open to a debtor who might be harshly treated by the operation of the 20% rule to request the employer to pay the bonus or additional payment on the same pay day as the regular pay.

6.75 The figures in the recommended statutory deduction tables may become out of date over the years due to inflation or other causes. In order to reflect changes in the value of money the tables should be capable of being varied by the Secretary of State by means of regulations by statutory instrument subject to negative resolution. Officers of court executing an earnings arrestment after the regulations have come into force would serve a prescribed form schedule of arrestment containing the varied tables on employers. Given the length of time an earnings arrestment can endure, we think any variation should be capable of applying to a subsisting arrestment as well. There is, however, the practical problem of bringing the variation to the notice of the employer in question. The debtor or the creditor should be entitled to send a notice in prescribed form containing the varied tables to the employer, and on receipt the employer should be bound to give effect to the varied tables in making deductions from the debtor's earnings on subsequent pay days. But we consider that an employer should be entitled to give effect to the varied

tables on becoming aware of their existence in some other way. For example, the employer may be sent a prescribed form notice in connection with another arrestment, or trade organisations may bring the regulations to their members' attention.

6.76 We **recommend:**

(1) The amount deducted from a debtor's net earnings in pursuance of an earnings arrestment should be calculated in accordance with statutory tables based on the sliding scale model. Separate tables should be provided for weekly and monthly paid employees and employees paid at other regular intervals.

(2) Net earnings means the earnings which remain payable after deduction of income tax, social security contributions and superannuation scheme contributions.

(3) Overtime, bonus, commission and other payments paid in addition to the debtor's regular earnings should:

(*a*) if paid on the same day as the regular earnings, be aggregated with the regular earnings for the purpose of calculating the amount to be deducted;

(*b*) if paid separately, be subject to a deduction of 20%.

(4) The statutory tables and percentage specified in paragraph (3)(*b*) above should be capable of being varied by regulations made by the Secretary of State by statutory instrument subject to negative resolution. The varied tables and percentage should apply to an earnings arrestment executed after the coming into force of the regulations and to a subsisting earnings arrestment where either the creditor or the debtor has intimated in prescribed form the regulations to the employer. An employer should be entitled, but not bound, to give effect to the regulations in connection with a subsisting arrestment on becoming aware of their existence otherwise than by intimation in prescribed form.
(Recommendation 6.9; clauses 73(3), 76 and 95 and Schedule 3.)

Court's power to vary deductions

6.77 Before the limitation rules were introduced by the Wages Arrestment Limitation (Scotland) Act 1870, it was the practice of the courts to make orders, under the common law rule known as the *beneficium competentiae*, exempting a proportion of the debtor's pay from arrestment.[1] The statutory limitation rules were introduced in part to get rid of the uncertainty and variations in practice to which the court's exercise of its common law power had given rise. But in theory a debtor in need can still apply to the court to order, in the exercise of its old common law power, an exemption above the 1870 Act limit.[2] It appears, however, that this common law power of the court is little known and rarely applied to earnings[3] except in bankruptcy pro-

[1]*Shanks* v. *Thomson* (1838) 16 S. 1353.

[2]Wages Arrestment Limitation (Scotland) Act 1870, s. 2 (which provides that the surplus above the exempt wages shall still be liable to arrestment "as before the passing of this Act").

[3]See, however, *Thomson* v. *Cohen* (1915) 32 Sh.Ct.Reps. 15.

ceedings.[1] Debtors in need can rely instead on other assistance such as urgent needs payments from the Department of Health and Social Security,[2] financial assistance from local social work departments,[3] or money from friends and relatives.[4]

6.78 In Consultative Memorandum No. 49 we suggested[5] that the court should not have power on application by the debtor to alter the amount statutorily exempt from earnings arrestment under either the existing common law powers or a new statutory provision. Many earnings arrestments would susbsist for only a few months, so that applications have to be disposed of quickly; yet evaluation of the applicant's means and liabilities would take a considerable time. Moreover, if debtors became aware of the court's powers, the courts might be flooded with applications so that the advantages of simplicity and ease of operation of earning arrestments would be lost. On consultation, the balance of opinion was in favour of our proposals. In recommending adoption of them, we would point out that a debtor who found an earnings arrestment financially oppressive would be entitled to make an application to the court for a time to pay order.[6]

6.79 We **recommend:**

Without prejudice to any other remedy open to the debtor, the courts should not retain their common law powers to order lower deductions from arrestments of earnings than the deductions laid down by statute. The courts should not have a special statutory power to vary the deduction levels in earnings arrestments.
(Recommendation 6.10; clause 72(3).)

Maintenance, rates and tax arrears

6.80 Under the Wages Arrestment Limitation (Scotland) Act 1870, section 4, the statutory limitation on arrestment of wages does not apply in the case of arrestments for "rates and taxes imposed by law". In theory, the rates or tax defaulter has the right to apply to the court to reserve a suitable aliment under the common law *beneficium competentiae* but this right is rarely exercised, if ever. The practical effect is that the whole of the debtor's wages are arrestable for rates and taxes.[7] A continuous diligence against earnings should not attach the debtor's whole earnings over a prolonged period. Even in the case of a single arrestment, the McKechnie Report[8] observed that rates defaulters and their families should be left with enough to live on. Clearly, to strip debtors of all their earnings over a prolonged period would be self-defeating since it would compel them to leave their jobs. Such a provision

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[1] *Caldwell* v. *Hamilton* 1919 S.C. (H.L.) 100; *Young* v. *Turnbull* 1928 S.N. 46; *Webster* v. *Douglas* (1933) 49 Sh.Ct.Reps. 294; *Birrell's Tr.* v. *Birrell* 1957 S.L.T. (Sh.Ct.) 6; *Cochran's Tr.* v. *Cochran* (1958) 74 Sh.Ct.Reps. 75.

[2] Supplementary Benefits Act 1976, s. 4 as amended by the Social Security Act 1980.

[3] Social Work (Scotland) Act 1968, s. 12.

[4] Edinburgh University Debtors Survey, para. 6.3.

[5] Proposition 17(4) (para 2.94).

[6] See Chapter 3 above.

[7] At present Inland Revenue and Customs and Excise tax debts constituted by summary warrant cannot be enforced by arrestment. In Chapter 7 we recommend that arrestment including earnings arrestment should become a competent diligence for these debts.

[8] Para. 92.

would not even safeguard the public purse since the debtors would often be forced to rely on supplementary benefit. On consultation,[1] all who commented agreed that an arrestment for rates or taxes should not prevail over the normal exemption from earnings arrestment.

6.81 The statutory limitation rule also does not apply in the case of arrestments enforcing "an alimentary allowance or payment", so that such an arrestment attaches the debtor's entire wages. Although we recommend below[2] that a special type of arrestment (called a current maintenance arrestment) should be introduced to recover instalments of current maintenance as they fall due, arrears of maintenance could still be recovered by ordinary earnings arrestments.[3] In such cases, we think that maintenance arrears should be treated in the same way as rates and tax arrears and other civil judgment debts.

6.82 We **recommend:**

The normal rules on deductions from earnings set out in Recommendation 6.10 above should apply to earnings arrestments for the recovery of arrears of maintenance, rates and taxes.
(Recommendation 6.11; clause 76.)

Direct payment to creditor and recall of arrestment

6.83 As we have seen, an arrestment of wages does not require or even authorise the employer to pay the arrested sum to the arresting creditor. The arrestment is merely an inchoate diligence attaching or "freezing" the debtor's pay in the hands of the employer-arrestee. The creditor can only compel payment by obtaining decree in an action of furthcoming. While this appears complex, the system operates far more simply in practice. Once an arrestment is served on the employer, the creditor is normally paid without the need for an action of furthcoming. The debtor may authorise the employer to pay the arrested sum to the creditor, and normally does so if the debt is admitted, since refusal to authorise payment would merely render the debtor liable for the expenses of an action of furthcoming. In short, actions of furthcoming are rarely brought in respect of arrested earnings.[4]

6.84 Under present law and practice an employer should obtain from the debtor a written or oral mandate authorising payment to the arresting creditor of the arrested sums. The research on this matter presents conflicting evidence. On the one hand, the interviews with employers in the C.R.U. Arrestment Survey[5] suggest that employers normally do in fact obtain a mandate, usually in writing, before releasing the arrested sum. On the other hand a few employers interviewed (three out of 22 having experience of arrestments) did

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[1]Consultative Memorandum No. 49, Proposition 42 (para. 4.16).
[2]Section D of this Chapter.
[3]Recommendation 6.28(1) (para. 6.175).
[4]The published statistics on the number of sheriff court actions of furthcoming (138 as ordinary causes and 233 as summary causes disposed of during 1983; Tables 9 and 10, *Civil Judicial Statistics Scotland 1983*) do not reveal how many related to arrestments of earnings. (Information supplied prior to publication by Scottish Courts Administration). It is thought that such actions are rare; only two employers out of 28 interviewed in connection with the C.R.U. Arrestment Survey had ever had experience of furthcomings. (para. 23).
[5]Para. 23.

not obtain mandates since they (mistakenly) regarded the schedule of arrestment itself as providing sufficient authority not only to deduct the arrested sum but also to pay it to the creditor.[1] Moreover, evidence from interviews with debtors in the Edinburgh University Debtors Survey suggests that the practice of not obtaining mandates is more widespread.[2]

6.85 We tentatively proposed in Consultative Memorandum No. 49[3] that an earnings arrestment should have effect as a series of consecutive arrestments, so that the employer would, each pay day, hold the arrested portion of the debtor's earnings and await the debtor's mandate or creditor's action of furthcoming. Although there was general agreement with this proposal, on reflection we think that it would be far simpler if an earnings arrestment authorised, and indeed required, the employer to pay the arrested portion forthwith to the creditor. As was pointed out to us by two bodies on consultation, it would be inconvenient for an employer to have to get a new mandate every pay day, particularly if the debtor was paid weekly or was stationed away from the department handling the arrestment. Employers would feel obliged to retain such mandates to guard against any possible future challenge by debtors. Moreover, repeated mandates may increase the risk that debtors would be tempted to withhold them unreasonably.

6.86 It may be objected that if an earnings arrestment were to require the employer to pay the creditor, it is a completed rather than an inchoate diligence and the term "arrestment" is therefore inapt. This objection, however, seems more theoretical than real, and we think that the traditional terminology of "arrestment" should continue to be used.

6.87 There remains, however, the point that, if the employer must pay the creditor without mandate or decree of furthcoming, then both the employer and the debtor should be entitled to challenge the validity of the earnings arrestment. There is, unfortunately, some doubt in the existing law as to the circumstances in which an application for recall of an arrestment in execution may be brought. There is also the view that if an arrestment is not properly executed and is therefore technically null, it should be ignored and it is incompetent for the arrestee to seek recall.[4] Such a rule would however leave the employer in an invidious position. We think there should be express statutory provisions entitling both the employer and the debtor to apply to the court for recall of an earnings arrestment on the grounds that it is invalid or has ceased to have effect as between the debtor and creditor.[5]

6.88 In addition to disputes about the validity of an earnings arrestment there may be a dispute about the way in which it is being operated by the employer. For example the employer may be miscalculating net earnings or failing to use the deduction tables properly. We think the court should have power to determine such a dispute while the arrestment is subsisting: otherwise the error may continue to be made for a long time. In determining a dispute

[1]Para. 23.

[2]Of the 25 debtors subjected to arrestment who were interviewed, only 10 said that they gave their permission (nine in writing and one orally) to the release of the arrested wages.

[3]Proposition 18(1) para. 2.106.

[4]*Brand* v. *Kent* (1890) 20 R. 29, 31.

[5]See para. 6.105 below.

the court should be able to give directions as to the correct mode of operation of the earnings arrestment.

6.89 When the court determines the dispute about the mode of operation of an earnings arrestment it would be convenient if it had power in the same proceedings to order payments to be made by one party to another. The payments ordered by the court should bear interest, at the normal decree rate, running from a date to be decided by the court in making the order. A creditor would be entitled, under the rules on compensation, to set off any payment ordered to be made to the debtor against the unpaid balance of the debt being enforced by the earnings arrestment.

6.90 We think that any claim in respect of deductions made under an earnings arrestment should be required to be made within a reasonably short period, lest employers should feel obliged to keep records of deductions made for at least the prescriptive period of five years.[1] Although prudent employers may for other reasons wish to retain their pay records for such a period, they should not in our opinion be burdened with having to keep records for such a long period simply to meet the possibility that a question relating to an arrestment (which is primarily a matter between the creditor and the debtor) might arise some time in the future. We therefore suggest a period of one year after which no claim may be made by either the debtor or the creditor against the employer in respect of deductions made, or which should have been made, under an earnings arrestment.

6.91 We **recommend:**

(1) An earnings arrestment should not only (as under existing law) require the employer to make a deduction from the debtor's earnings on each pay day while it is in force, but also require the employer to pay forthwith the arrested sums to the creditor.

(2) The employer and the debtor (and the creditor in the case of determination of a dispute) should be entitled to apply to the court for an order recalling the earnings arrestment or determining any dispute as to the manner of its operation. The court in determining a dispute should have power to order payment to be made by one party to another, with interest from a date to be specified at the rate normally applicable to decrees.

(3) A claim by a creditor or debtor against the employer in respect of deductions made, or which should have been made, under an earnings arrestment should be incompetent after one year from the date when the deduction was made or should have been made.
(Recommendation 6.12; clauses 75(1), 78(1) and (2) and 95(4).)

Commencement of operation of earnings arrestment

6.92 The C.R.U. Arrestment Survey shows clearly that the place where an arrestment of wages is served, and the person to whom it is given, can be important factors in determining whether the arrestment can be applied by the employer conveniently or at all to the debtor's pay on the next pay day

[1]Prescription and Limitation (Scotland) Act 1973, s. 6 and Sched. 1.

following the arrestment, and also whether the arrestment is kept confidential.[1] Implementing arrestments of earnings is usually part of the normal work of the employer's pay section, or of a particular member of staff responsible for payment of earnings. Large companies often administer arrestments at the head office but an arrestment may be served at a branch office where the staff may be inexperienced in dealing with arrestments. Sometimes, an arrestment may be served on a branch office before the employee is paid, but may not reach the appropriate office until after the employee has been paid.[2] Indeed, an employer who receives an arrestment of pay too late for convenient operation may decide to apply it to the instalment of pay next following the instalment to which it should have been applied in strict law.[3]

6.93 Because of differences in the internal structure of organisations and their methods of administering arrestments of earnings, it is not possible to frame legal rules which will ensure that such arrestments are served at the most appropriate place or on the most appropriate person to facilitate compliance with the arrestments. In Consultative Memorandum No. 49,[4] however, we suggested that provision should be made giving the employer more time in which to operate an arrestment of earnings. We suggested that an earnings arrestment should only come into operation on the expiry of a prescribed period after the date of service of the schedule of earnings arrestment on the employer. This suggestion was generally welcomed by those who commented. The Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers, however, expressed concern that a period of delay would result in the earnings arrestment being ineffective if the debtor left the employment immediately after service of the arrestment and might enable employers, who often feel loyalty towards their employees, to defeat the arrestment. While we concede that such risks exist, we do not think that evasion will frequently occur. We note that in England and Wales an employer is not bound to comply with an attachment of earnings order until the lapse of seven days from the date of service of the order, but the employer may choose to comply with the order within that period.[5]

6.94 In deciding what period should be allowed, regard must be had to the varying practices of employers in administering wages and salaries including the calculation of the sums payable and the making up and distribution of the pay packets.[6] Smaller employers generally calculate pay manually on local premises, and the whole process is carried out over one or two days. Medium and larger employers generally use computers for calculating pay and the process is more complex as the relevant information on overtime for example has to be ascertained and sent from each workplace to the computer staff. This may take several days. The day on which the computer is run varies for weekly and monthly paid staff. Again, there are various practices, having various degrees of flexibility, in making up and distributing wages, in the use of security firms to make up and distribute wages paid in cash, and in the

[1]See C.R.U. Arrestment Survey, paras. 15 and 17–20.
[2]C.R.U. Arrestment Survey, para. 19.
[3]*Ibid.*, para. 28.
[4]Proposition 11(1) (para. 2.47).
[5]See Attachment of Earnings Act 1971, s. 7(1).
[6]See C.R.U. Arrestment Survey, paras. 11–4.

sending of instructions to local offices to withdraw money from the bank and to distribute the wages locally.

6.95 Having regard to these practices, we think that seven days from the date of service of the earnings arrestment schedule would be a reasonable period, though we concede that in the case of larger employers a longer period might cause less inconvenience to them.

6.96 We recommended earlier in this Chapter[1] that the employer should in operating an earnings arrestment deduct each pay day a sum calculated by reference to the period since the immediately preceding pay day. Where the employer fails to make a deduction on the first pay day after service of the schedule of arrestment, because it falls within the seven day period, but deducts on the second pay day, the deduction should be calculated by reference to the period from the second pay day to the first pay day. The employer should not be required to add to the deduction made on the second pay day the sum that would have been deducted on the first pay day had the employer chosen to put the earnings arrestment into effect then.

6.97 We **recommend:**

(1) An employer should be bound to give effect to an earnings arrestment schedule on any pay day occurring seven days or more after the date of service of the schedule.

(2) An employer should be entitled, but not bound, to give effect to an earnings arrestment schedule on any pay day occurring within seven days after the date of service of the schedule.

(3) An employer who does not give effect to an earnings arrestment until a pay day occurring after the expiry of the seven day period should not be required to make any deduction in respect of a pay day which fell within the seven day period.
(Recommendation 6.13; clauses 75(1) and (2)(*a*) and 95(2) and (3).)

Liability of employer for failure to operate

6.98 An arrestee who disposes of an arrested fund in breach of a valid arrestment is liable to pay again to the arresting creditor.[2] Exceptionally an arrestee may also be liable to be punished for contempt of court.[3] But an arrestee incurs no liability by simply retaining the arrested funds until the arrestment is recalled or a decree of furthcoming is obtained.

6.99 An earnings arrestment requires the employer to deduct a portion of the debtor's earnings on each pay day and pay it over forthwith to the arresting creditor.[4] We now deal with the question of a suitable sanction to enforce this duty. In our view a civil sanction would be sufficient; an employer who fails to give effect to an earnings arrestment remains liable to the creditor and could have an action for payment of the sums due under the arrestment brought by the creditor and would be liable for the expenses of that action.

[1]Recommendation 6.9 (para. 6.76).
[2]Graham Stewart, pp. 125–35.
[3]Graham Stewart, pp. 222–3.
[4]Recommendation 6.12 (para. 6.91).

The employer should not be entitled to recover from the debtor any earnings paid to the debtor previously in breach of an arrestment.

6.100 We **recommend:**

Failure by an employer to pay sums due to the arresting creditor under an earnings arrestment should render the employer liable to an action for payment of the sums without a right of recovery from the debtor.
(Recommendation 6.14; clause 75(3).)

Effect of sequestration

6.101 Under section 104 of the Bankruptcy (Scotland) Act 1913, sequestration of the debtor renders an arrestment (or poinding) ineffectual in a question with the trustee in the sequestration if the arrestment (or poinding) was executed within 60 days prior to the date of the sequestration. In *Johnson* v. *Cluny Estates Trustees*[1] it was held that the arrestment is only rendered ineffectual by section 104 if it is still subsisting at the date of sequestration: payments of the arrested sums made within the 60 day period in pursuance of a furthcoming or a mandate by the debtor are not affected by the section.

6.102 In Consultative Memorandum No. 49, we suggested[2] that a sequestration should render ineffectual an earnings arrestment in so far as the arrestment had attached earnings falling due within the 60 day period before sequestration, and we also sought views on whether the rule in *Johnson* v. *Cluny Estates Trustees* should apply, that is to say, whether the earnings arrestment should be rendered ineffectual only if it were still in operation at the date of sequestration. These issues were discussed on the premise that an earnings arrestment would have effect as a series of consecutive inchoate diligences attaching earnings on each pay day, but we now recommend[3] that the employer must pay the deductions made on each pay day forthwith to the creditor. Accordingly, the retention of the rule in *Cluny Estates Trustees* would mean that the trustee would not be able to claim any earnings arrested in the 60 day period, unless perhaps in the tiny proportion of cases where the sequestration was intimated to the employer before the arrested earnings were paid over to the creditor. We have referred elsewhere[4] to the conflicting policy considerations involved in deciding whether to retain or abandon the rule in *Cluny Estates Trustees* but these considerations relate mainly to arrestments of funds other than earnings. We do not think it would be appropriate to require a creditor who has received payment of arrested earnings to surrender the payment to the trustee for the benefit of the general body of creditors.

6.103 We **recommend:**

The debtor's sequestration should render an earnings arrestment ineffectual in a question with the trustee so far as the arrestment relates to earnings

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[1]1957 S.C. 184.
[2]Proposition 40(1) (para. 4.14).
[3]Recommendation 6.12 (para. 6.91).
[4]See our Bankruptcy Report, para. 13.12.

payable after the date of sequestration, but it should not affect deductions made before that date
(Recommendation 6.15; clause 98(2).)

Termination of earnings arrestments

6.104 There are two aspects of termination of earnings arrestments; first, the arrestment ceasing to have effect as between debtor and creditor, and secondly, the employer ceasing to operate the arrestment. We deal with these aspects in turn.

6.105 Earlier in this Chapter we recommended that an earnings arrestment should cease to have effect as between debtor and creditor (or the debtor's trustee in sequestration) when the debt enforced by the arrestment has been satisfied[1] or when the debtor is sequestrated.[2] Other situations where the earnings arrestment should cease to have effect include recall of the arrestment by the court, abandonment of the arrestment by the creditor, the debt becoming unenforceable by diligence and the debtor ceasing to be employed. Although the last-mentioned situation may seem self-evident, employers involved in arrestment of earnings would, we think, welcome an express rule on cessation of employment so that they need not retain an earnings arrestment against the unlikely event of the debtor becoming re-employed later.

6.106 Regarding termination as between debtor and employer, we consider that it would place an unfair burden on employers to require them to cease operating an earnings arrestment as soon as they become aware that it has ceased to have effect as between debtor and creditor. Employers should not be placed in a position of having to judge whether the earnings arrestment had in fact ceased to have effect because they might have to make enquiries or seek confirmation of statements made to them before they felt they could safely stop deducting. In order to remove this burden we consider that an employer should be entitled, but not bound, to continue operating an earnings arrestment until intimation in prescribed form is received of the fact of the arrestment ceasing to have effect or until the debtor ceases employment. It would be too rigid to impose a statutory duty on employers to continue operating until intimation. For example, an employer may calculate from the amounts deducted from the debtor's pay and knowledge of the amount of the debt that the debt has been satisfied. In such a case the employer should be entitled, but not bound, to cease deducting without waiting for the creditor to intimate.

6.107 If intimation is necessary who is to intimate? Where the court recalls the earnings arrestment we think that the sheriff clerk should be required to intimate the recall order to the employer, the debtor and the arresting creditor.[3] This would ensure that the employer is promptly notified. Where the debtor is sequestrated intimation should be capable of being given by any

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[1]Recommendation 6.8 (para. 6.66).
[2]Recommendation 6.15 (para. 6.103).
[3]We have already recommended in the case of recall on the granting of a time to pay order that intimation should be by the sheriff clerk and by the administrator on the coming into force of a debt arrangement scheme; see Chapters 3 and 4 respectively.

person. Although we envisage that the trustee in sequestration[1] would normally be the person to intimate to the employer, the arresting creditor or other creditors or even the debtor should be able to bring the sequestration to the employer's notice.

6.108 In the case of satisfaction of the debt or the debt becoming unenforceable by diligence, the creditor should be under a duty to intimate this fact to the employer as soon as reasonably practicable so that the employer ceases making deductions. It would place too great a responsibility on employers to require them to keep a running total of amounts remitted so that they could calculate for themselves when the debt was satisfied. Furthermore, where the creditor has received payments to account of the debt outwith the arrestment since it was laid on, the employer could not calculate when the debt was satisfied. The creditor should also intimate to the employer as soon as reasonably practicable that the debt has become unenforceable by diligence.

6.109 An employer who failed to cease making deductions from a debtor's pay after intimation by the creditor would be in breach of contract and could be sued by the debtor for the amount of the deductions wrongly made. But we have not found it easy to devise an appropriate sanction to enforce the duty of the creditor to intimate to the employer the satisfaction of the debt or its unenforceability by diligence. Intimation by the creditor is necessary if earnings arrestments are to work properly; in the absence of intimation an employer may go on deducting and the creditor go on receiving sums under an earnings arrestment long after it should have stopped because the fact of satisfaction or unenforceability was known only to the creditor. The problem is that the creditor has no interest to intimate, while the existing civil remedies based on unjust enrichment and damages for wrongful diligence would merely result in the creditor having to repay without further penalty any deductions received under the arrestment after it had ceased to have effect in law. We do not think that creditors should be subjected to criminal penalties (fines or imprisonment) for failure to carry out their duties in connection with earnings arrestments; and since the creditor's duty of intimation does not stem from a court order, contempt of court cannot be invoked as a sanction to enforce it. We have concluded that the court should have power, on application by a debtor, to order the creditor to pay to the debtor a sum not exceeding twice the amount the creditor received under the arrestment after it ceased to have effect with interest at the normal decree rate.[2] A discretionary penalty seems appropriate since the degree of fault in failing to intimate as soon as reasonably practicable may range from forgetfulness to deliberately ignoring the duty. As well as a sanction to enforce the creditor's duty the penalty may be seen as a kind of solatium for wrongful diligence. This penalty would be over and above the creditor's common law obligation to repay the amounts received after the arrestment ceased to have effect with interest.

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[1]Under the Bankruptcy (Scotland) Bill 1984, clauses 13 and 24, there will always be a trustee, interim or permanent, appointed on every sequestrated estate.

[2]This rate is currently 12%. R.C. 66 (Court of Session decrees); Sheriff Courts (Scotland) Extracts Act 1892, s. 9 (sheriff court decrees).

6.110 We **recommend:**

(1) In addition to an earnings arrestment ceasing to have effect on the debtor's sequestration, it should cease to have effect as between debtor and creditor when:

(*a*) the debt due has been satisfied; or
(*b*) the debt due becomes unenforceable by diligence; or
(*c*) the creditor abandons the arrestment; or
(*d*) the arrestment is recalled by the sheriff.

(2) The clerk of the court should intimate in prescribed form to the employer, debtor and creditor the making of an order recalling an earnings arrestment.

(3) The creditor should be under a duty of intimating in prescribed form to the employer as soon as reasonably practicable the fact that the debt has been satisfied or has become unenforceable by diligence. Sums received by the creditor after the debt has been satisfied or has become unenforceable by diligence should be recoverable by the debtor with interest at the rate normally applicable to decrees from the date of receipt to the date of payment.

(4) The employer should be entitled, but not bound, to continue to operate an earnings arrestment until receiving intimation in prescribed form that the arrestment has ceased to have effect or until the debtor ceases to be employed.

(5) Where the sheriff is satisfied, on an application by a debtor, that the creditor failed to intimate as soon as reasonably practicable satisfaction of the debt or its unenforceability by diligence, the sheriff may order the creditor to pay the debtor a sum not exceeding twice that recoverable by the debtor in terms of paragraph (3) above.
(Recommendation 6.16; clauses 75(2), (5), (6) and (7), 78(1) and 95(5)(*a*).)

Prescription of earnings arrestments

6.111 Section 22 of the Debtors (Scotland) Act 1838 provides:

"All arrestments shall hereafter prescribe in three years instead of five; and arrestments which shall be used upon a future or contingent debt shall prescribe in three years from the time when the debt shall become due and the contingency be purified."

There are difficulties in construing this section. In *Jameson* v. *Sharp*[1] the arrestment of a vested interest in a trust was held to have prescribed three years after the arrestment and the provisions of the section as to the time when prescription begins to run on "future" debts was ignored. On the basis of this decision, it has been suggested that "future" is used in the section to mean "contingent".[2] Section 22 is of little importance in relation to arrestments of wages and salary under the present law. It would be inappropriate to apply this provision to earnings arrestments for these remain effective as long as the debt is unpaid and the employer is required to pay over the arrested sums to the creditor without the need for any furthcoming. Moreover, we recommend

[1](1887) 14 R. 643.
[2]Wilson, *The Law of Scotland Relating to Debt* (1982) p.13.

above[1] that earnings arrestments should not be competent to enforce future or contingent debts.

6.112 We **recommend:**

Section 22 of the Debtors (Scotland) Act 1838 (which deals with prescription of arrestments) should not apply to earnings arrestments.
(Recommendation 6.17; Schedule 7, paragraph 2.)

Procedural aspects

Mode of service on employer

6.113 An arrestment to enforce a sheriff court summary cause decree may be served on the employer by registered or recorded delivery service or at the creditor's option by what may be conveniently called "hand service".[2] By "hand service" (a non-technical term) we mean personal service or one of its three substitutes: service on an employee or inmate; letter-box or "keyhole" service; or "affixing" service. The C.R.U. Arrestment Survey[3] suggests that most schedules of arrestments of earnings, including summary cause arrestments, are executed by hand service though some employers with places of business away from the main centres of population receive arrestments by recorded delivery. A schedule of arrestment to enforce a sheriff's ordinary court decree must be served by hand. In all sheriff court arrestments served otherwise than by post or personally, a copy of the schedule of arrestment must also be sent by registered or recorded delivery letter to the arrestee.[4] Schedules of arrestment proceeding on Court of Session decrees can only be served by hand but the rule requiring postal copies does not apply.

6.114 The McKechnie Report in 1958 recommended that "service of arrestments by registered post should be made competent but that . . . service by an officer should be retained as a competent alternative to postal service, the additional expense being recoverable only when it can be shown that such service was expedient in the interests of justice."[5] The McKechnie Report however was considering arrestments of all types and not merely arrestments of earnings. In the case of earnings arrestments, we think that questions of urgency will not arise sufficiently frequently to require that hand service should be competent in the first instance.

6.115 As the C.R.U. Arrestment Survey discloses,[6] the main problem in this area is how to direct an earnings arrestment schedule to the department or person responsible for administering arrestments when the internal structure of organisations and their methods of handling pay and arrestments vary greatly from employer to employer. We doubt whether hand service makes it any more likely than postal service that the proper person will receive the

[1]Recommendation 6.5 (para. 6.51).
[2]Execution of Diligence (Scotland) Act 1926, s. 2(1)(*a*) as amended by the Sheriff Courts (Scotland) Act 1971, Sched. 1.
[3]Para. 17.
[4]Ordinary Cause Rules, rule 111. There are doubts whether personal service on a company is competent and the safest course is to serve a post copy of sheriff court arrestments in all cases of hand service on companies.
[5]Para. 148.
[6]Paras. 11–4, 17–22; and see para. 6.92 above.

schedule of earnings arrestment timeously. Moreover, such schedules should be treated as confidential, and we think that postal service would normally be as effective as hand service in maintaining confidentiality. Registered/recorded delivery service might be even more effective in these respects if (in addition to the note on the envelope directing the Post Office to return to the sender where delivery of the letter cannot be made), the envelope were clearly marked "Arrestment of earnings" to warn the employer.

6.116 On consultation there was support for a proposal[1] that a witness should not be required to the service of an earnings arrestment. We also think that provision should be made determining priority as between earnings arrestments received by post on the same date. In the case of ordinary arrestments priority is determined by the time of service[2] and we would adopt that rule for earnings arrestments.

6.117 We **recommend:**

(1) The normal mode of service of all schedules of earnings arrestment should be by recorded delivery or registered letter (which at present is competent only in the case of arrestment on sheriff court summary cause decrees).

(2) It should be provided by act of sederunt that the envelope containing a schedule of earnings arrestment should be clearly marked "Arrestment of earnings" in addition to the direction to the Post Office to return undelivered letters to the sender.

(3) Hand service of an earnings arrestment schedule should be used only if the registered or recorded delivery letter cannot be delivered.

(4) A witness should not be required to the service of an earnings arrestment schedule.

(5) Where an employer receives two or more schedules of earnings arrestment relating to the same debtor on the same date effect should be given to the schedule received first if the employer is aware of the different times of receipt, otherwise the employer may choose which schedule to give effect to.

(Recommendation 6.18; clauses 86(3) and 96(2).)

Intimation to debtor

6.118 Clearly, if the debtor's right to challenge an earnings arrestment[3] is to be of value, the execution of the arrestment must be brought to his or her attention. At present, arrestments of wages are usually intimated by the employer to the debtor,[4] but there is no requirement that it be intimated by the creditor to the debtor. Officers of court serving arrestments by hand do not, for understandable and proper reasons, ask to meet the debtor concerned.[5] The longer duration and greater complications involved in earnings arrestments suggest that the laying of such an arrestment should be intimated to the

[1]Consultative Memorandum No. 49, Proposition 10(3) (para. 2.39).
[2]Graham Stewart, pp. 137–8.
[3]See Recommendation 6.12 (para. 6.91).
[4]Edinburgh University Debtors Survey, para. 6.3.
[5]C.R.U. Arrestment Survey, para. 37.

debtor. We think that the extra cost involved would be justified by these considerations.

6.119 We **recommend:**

The officer of court serving an earnings arrestment schedule on the debtor's employer should, if reasonably practicable, at the same time serve a copy of the schedule on the debtor by registered or recorded delivery letter. Only if service cannot be effected by this means should hand service be used. Failure to serve a copy should not affect the validity of service of the arrestment schedule.
(Recommendation 6.19; clause 96(1) and (2).)

Modernisation of forms and guidance for employers

6.120 The forms of schedule of arrestment and the officer's certificate of service of the arrestment are regulated by the common law and practice. Criticisms of the forms have been made from time to time.[1] The McKechnie Report observed that arrestees often do not appreciate the import of the schedule and recommended that there should be a standard form of arrestment containing an explanatory note with information to the arrestee as to its effect and the obligations under it.[2] In Consultative Memorandum No. 49 we proposed[3] that a modernised form of schedule of earnings arrestment should be prescribed by act of sederunt and that an explanatory booklet should be published by H.M. Stationery Office for the guidance of employers in operating earnings arrestments. The schedule of earnings arrestment should also draw attention to this booklet.

6.121 All those who commented agreed with the need for modernised prescribed forms. Two bodies however suggested that it would be more useful, particularly to small employers, if the directions for operating earnings arrestments were set out in the schedule of arrestment or in a form sent with the schedule. Small employers might be unable to obtain a booklet in time to process the occasional earnings arrestment. The C.R.U. Arrestment Survey[4] tends to support this argument: small employers, who received arrestments infrequently, often relied on the printed notes which generally appear on schedules of arrestment in common form. While there may be a need for an explanatory booklet as well, we think that the schedule of earnings arrestment itself should contain notes for the guidance of employers. Our recommendation that the deductions in the case of weekly or monthly earnings should be ascertained by reference to statutory tables[5] should simplify the employers' task in the vast majority of cases. The statutory tables should be part of the schedule of arrestment, together with such further information and guidance as is thought appropriate.

6.122 We **recommend:**

Modern forms of schedule of earnings arrestment and the officer's certificate

[1]C.R.U. Arrestment Survey, para. 22.
[2]Para. 153.
[3]Proposition 12 (para. 2.49).
[4]Para. 22.
[5]Recommendation 6.9 (para. 6.76).

of service of the earnings arrestment should be prescribed by act of sederunt. The statutory deduction tables, together with such further information as is considered appropriate for the guidance of employers, should be included in the prescribed form of schedule.
(Recommendation 6.20; clause 75(2)(*a*).)

Identification of debtor

6.123 Employers, especially large organisations, sometimes have difficulty in identifying the employee to whom an arrestment applies, for example where two employees have the same name, or where there is a discrepancy between the debtor's address shown in the schedule and the employer's records.[1] The McKechnie Report recommended that "the arresting creditor should be required to submit to the arrestee sufficiently detailed particulars of the debtor to enable the arrestee, e.g. the National Coal Board, readily to identify the employee in question".[2] We have sympathy with this proposal but do not think that fuller and better particulars can be inserted in the schedule of earnings arrestment. We think that the employer will usually be in a better position to ascertain the relevant information than is the creditor or officer, and that creditors or officers will give such aid in identification as they can to employers since they have an interest to do so. We conclude therefore that it would be impractical to require that a schedule of earnings arrestment should specify sufficiently detailed particulars of the debtor over and above the name and address to enable the employer readily to identify in every case the debtor to whom the schedule applies. This conclusion was supported by those who commented on a proposal to that effect in Consultative Memorandum No. 49.[3]

Employer's fee for operating

6.124 The employer will be put to a certain amount of trouble and expense in dealing with an earnings arrestment. The C.R.U. Arrestment Survey[4] discloses that some employers deduct a fee when operating an arrestment of wages. This fee is deducted from the sums remitted to the creditor and so is ultimately borne by the debtor. We proposed in Consultative Memorandum No. 49 that, as in England and Wales, the employer should be entitled to a fee chargeable directly against the debtor as a contribution towards expenses.[5] A realistic fee would probably be too high,[6] and we suggested a flat rate fee of 50p[7] since the work involved would not vary in proportion to the amounts deducted. Those who commented agreed that a fee should be chargeable and most agreed with our suggestion of 50p. Those who disagreed with that sum suggested sums ranging from 25p to £1.

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[1]See C.R.U. Arrestment Survey, para. 21.
[2]Para. 154.
[3]Proposition 13(1) (para. 2.50).
[4]Para. 32.
[5]Proposition 20 (para. 2.111).
[6]C.R.U. Arrestment Survey, para. 32.
[7]The same fee is chargeable by employers in England and Wales on each occasion on which a deduction and remittance is made under an attachment of earnings order. Attachment of Earnings Act 1971, s. 7(4) and Attachment of Earnings (Employer's Deduction) Order 1980 (S.I. 1980/558).

6.125 **We recommend:**

An employer should be entitled to deduct a fee of 50p (or such other sum as may be prescribed) on each occasion on which a deduction is made from the debtor's pay in pursuance of an earnings arrestment. The fee should be deducted from the exempt earnings payable to the debtor rather than from the arrested sum payable to the creditor. The employer should give the debtor a statement of the fee deducted along with the statement showing deduction of the arrested sum.
(Recommendation 6.21; clause 97.)

Mode of payment by employer

6.126 In practice employers usually send the arrested proportion of pay to the creditors or their agents without furthcoming or mandate and even without a request, although strictly speaking they are not entitled to do so.[1] Sometimes the debtor will settle the debt and the employer will retain the arrested sum until evidence of payment is received from the debtor. In Consultative Memorandum No. 49 we raised the question of whether the sums attached by an earnings arrestment should be remitted directly to the creditor or whether they should be sent to the court for disbursement to the creditor. We concluded[2] that payment through the court would cause delay and have considerable staffing implications for the courts since thousands of arrestments are laid every year.[3] Payment through the court would not be necessary[4] in order to provide proper accounting between the debtor, creditor and employer since the debtor would have the deductions recorded in the pay slips,[5] the employer would have duplicate pay slips and a note of the remittances sent to the creditor, while the creditor would have a record of the remittances received. Those consulted agreed. One large employer suggested that the employer should be entitled to pay over the sums deducted at the end of the period of earnings arrestment rather than have to make periodic payments. This suggestion was however made against the background of an earnings arrestment enduring for a period of a few months only. Now that an earnings arrestment would in terms of our recommendations last until the debt is satisfied, it would be wrong to keep creditors out of their money for perhaps years rather than months, particularly bearing in mind that some creditors may themselves be persons of modest means, and that no interest will be payable to the creditor by virtue of that arrestment in respect of any time after it is laid on.

6.127 The employer must give the debtor an itemised pay statement every time a payment of wages or salary is made and this statement should include a statement of variable deductions from the gross wages or salary,[6] including presumably a sum deducted in implement of an arrestment. While most employers note the deduction on the statement of pay (often describing it as

[1]C.R.U. Arrestment Survey, para. 34.
[2]Proposition 19 (para. 2.109).
[3]The C.R.U. Diligence Survey estimated that about 6,000 first arrestments of wages were laid in 1978 (para. 3.6).
[4]In the case of conjoined arrestment orders (para. 6.223 and following) the involvement of the court is essential since staff there have to divide the deductions amongst the conjoined creditors.
[5]See next paragraph.
[6]Employment Protection (Consolidation) Act 1978, s. 8.

a "special deduction") it appears that some employers may not always comply with this statutory duty.[1] However, we envisage that employers would be notified by the explanatory notes annexed to the earnings arrestment schedule of their duty to inform the debtor of the deductions made on each pay day.

6.128 The employer should be entitled to remit the arrested sums to the creditor by some convenient mode. Employers should not be required, for example, to pay creditors in cash and the mode of payment should be such as to enable them to obtain a receipt. Having considered several different modes of payment, we conclude that employers should have statutory authority to pay by crossed cheque marked "a/c payee, not negotiable" rather than by cash. This raises the problem that, whereas most ordinary creditors have bank accounts, some ordinary creditors and many maintenance creditors do not. However, it is easy for a creditor to open an account with a joint stock bank, trustee savings bank or Post Office Girobank into which cheques could be paid. Post Office Girobank branches are widespread. Payment by this mode is necessary because payment by the two modes of payment through banks otherwise than by cheque—bank giro slips and "BACS transfer"[2]—do not have any mechanism for providing the payer with a receipt. By contrast, an unindorsed cheque which appears to have been paid by the banker on whom it is drawn is evidence of the receipt by the payee of the sum payable by the cheque.[3]

6.129 Although we are against payments in cash there is one situation where an arresting creditor should be entitled to cash payments. If a cheque from the employer of a remittance due under an earnings arrestment is dishonoured, the creditor should be entitled to demand payment of that remittance and subsequent remittances in cash.

6.130 We **recommend:**

(1) Sums deducted from the debtor's earnings by an employer in pursuance of an earnings arrestment should be paid forthwith direct to the arresting creditor and not through a court collection department.

(2) Without prejudice to any other mode of payment which may be agreed between the employer and the creditor who has laid an earnings arrestment, the employer should be entitled to remit the arrested sums to the creditor or other person specified in the arrestment schedule (*a*) by postal letter enclosing a crossed cheque payable to the creditor bearing on it the words "not negotiable; a/c payee" together with a written statement of the pay period to which the payment relates, or (*b*) by such other method as may be prescribed.

(3) If a cheque in terms of paragraph (2) above is dishonoured the creditor should be entitled to demand payment of that remittance and subsequent remittances in cash.
(Recommendation 6.22; clause 75(1) and (4).)

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[1] C.R.U. Arrestment Survey, para. 33; Edinburgh University Debtors Survey, para. 6.3.
[2] A "BACS transfer" is a system operated by Banking Automated Clearing System Ltd. whereby payments between banks are cleared by computers.
[3] Cheques Act 1957, s. 3.

Section D. Current maintenance arrestments

The need for current maintenance arrestments

6.131 Under the present law, whereas an ordinary creditor can only arrest just under one-half of the debtor's weekly earnings, a creditor enforcing "an alimentary allowance or payment" can arrest the whole of the maintenance debtor's earnings.[1] This is the only difference between arrestments securing maintenance and other arrestments under the existing law. There is no continuous diligence against earnings that is available for the recovery of maintenance. As we indicated in our Consultative Memorandum No. 49,[2] however, it is a feature of maintenance (aliment and periodical allowance on divorce) that the maintenance creditor will wish to recover current maintenance as well as arrears. We suggested that it should be competent for the maintenance creditor to use a continuous diligence against earnings to recover current maintenance instalments falling due while the diligence subsists as well as arrears.[3] This was generally agreed by those who commented.

6.132 We propose therefore that the main aim of reform should be to introduce an effective diligence for the recovery of *current* maintenance out of the maintenance debtor's earnings, (which form of diligence we call a "current maintenance arrestment"). We have reached this conclusion for two main reasons.

6.133 First, it seems to us better to prevent arrears arising at all by attaching current maintenance than to allow current maintenance to fall significantly into arrears and then to provide for their recovery after they have arisen. Aliment and periodical allowance differ from other civil judgment debts insofar as the court which made the award has, subject to some exceptions and qualifications discussed below,[4] already assessed the maintenance debtor's ability to pay when it quantified the amount of the periodic instalments. If the court has performed this function properly, then it would seem right in principle—other circumstances remaining unchanged—for the whole of the maintenance instalments to be deducted from earnings at source.

6.134 Second, if aliment and periodical allowance are to achieve their objective of maintaining or supporting the creditor, then the instalments must be paid punctually and this strongly suggests that the new form of arrestments of earnings should recover current maintenance rather than arrears. In saying this, we have not overlooked the fact that, if our Report on *Aliment and Financial Provision* is implemented, periodical allowance on divorce would be treated in law not simply as a maintenance or support obligation but as a means of giving effect to a number of principles insofar as those principles could not be given effect by payment of a capital sum or a transfer of property.[5] Nevertheless, the principles include the fair sharing of the economic burden of child-care, fair provision for adjustment from married status to independence

[1]Wages Arrestment Limitation (Scotland) Act 1870, s. 4: likewise at common law the partial exemption of personal earnings from arrestment does not apply to arrestments enforcing alimentary debt.

[2]Para. 3.7.

[3]*Idem.*, also Proposition 24(2) (para. 3.9.).

[4]See para. 6.145.

[5]Recommendations 31 and 39(*a*). See also Family Law (Scotland) Bill 1984, clause 13(2).

and the relief of grave financial hardship.[1] To a large extent therefore the object of periodical allowance would, as in the case of aliment, still be current support.

6.135 It could, we suppose, be argued that if arrears of maintenance are allowed to mount up over a period, the object of paying maintenance, the support of the creditor, must have been accomplished by other means. On this view, arrears of maintenance have lost their alimentary character, may be regarded as a kind of bonus not needed for the maintenance creditor's support, and should therefore not be recoverable. We think that this line of argument goes too far. The fact that the maintenance creditor has survived without receiving maintenance does not necessarily imply that the object of the maintenance has been accomplished by other means. The object of aliment is not to maintain the creditor at a bare subsistence level but at a level which is reasonable having regard to the parties' means and resources and their "station in life". Further, the maintenance creditor may have borrowed from relatives or friends to make good the shortfall in income. Moreover, to make arrears of maintenance irrecoverable would present a temptation to maintenance debtors to abscond or otherwise to evade payment for as long as possible. We consider therefore that a maintenance creditor should be entitled to recover maintenance arrears by an earnings arrestment as well as current maintenance by a current maintenance arrestment.

6.136 We have already recommended in our Report on *Aliment and Financial Provision*[2] that the court should have power to vary or recall a decree for aliment or periodical allowance with retrospective effect. Clearly, if this power were conferred on the courts, it could be used in some cases to reduce, or to discharge altogether, arrears which had accumulated. But that report contemplated that the power could only be exercised where there had been a change in circumstances since the original decree, and we do not think that the mere non-payment of maintenance and accumulation of arrears would be treated as a change of circumstances for this purpose. We revert to the enforceability of arrears below.[3]

6.137 The difficulties experienced by maintenance creditors in collecting and enforcing aliment and periodical allowance have been considered by the reports of previous official advisory bodies, notably the McKechnie and Finer Reports. The McKechnie Report, adopting a suggestion of the Morton Report,[4] recommended the introduction in Scotland of a system of collection of maintenance by the sheriff clerks on the model of the collecting officer system of the magistrates' courts in England and Wales.[5] The McKechnie Report recommended, however, that the sheriff clerks should not have enforcement functions such as the English collecting officers possess.[6] The

[1]Recommendations 31–36 (paras. 3.35 to 3.112). See also Family Law (Scotland) Bill 1984, clause 9.

[2]Recommendations 22 (paras. 2.113 to 2.117) and 39(*d*) (para. 3.125). See Family Law (Scotland) Bill 1984, clauses 5 and 13(4).

[3]Para. 6.167.

[4]Report of the Royal Commission on *Marriage and Divorce* (1956) Cmd. 9678, Recommendation 69 (Scottish) (para. 984).

[5]Recommendations 83–91.

[6]Recommendation 86 (paras. 286–8; 292).

Finer Report, whose terms of reference extended to Great Britain as a whole, placed much more emphasis than did the Morton or McKechnie Report on the role of supplementary benefit as the main support of maintenance creditors and on the difficulties arising from the interaction between the private law obligation of maintenance and the public law obligation of support administered by the Department of Health and Social Security through the supplementary benefit code. We revert to this topic at paragraph 6.139 below.

6.138 It seems to us that an effective system of current maintenance arrestments would go a considerable way towards solving some of the main problems identified by the McKechnie Report. As we have seen,[1] the McKechnie Committee rejected the idea of a continuous diligence against earnings and do not seem to have considered continuous diligence for maintenance debts alone. In their view, the main problem was how to improve the system of *collecting* current maintenance. They considered that a system of court collection of maintenance would have the following advantages:

(*a*) It would relieve maintenance creditors of the burden of collection which, in the McKechnie Committee's opinion, was too onerous for them.

(*b*) Collection of maintenance by the courts would be more efficient than the present system of collection by solicitors.[2]

Clearly, however, an effective system of current maintenance arrestments securing payment of current maintenance would relieve a maintenance creditor of the burden of collection for so long as the debtor remained in employment. Even if the McKechnie Committee were right in their view that court collection of maintenance would be more efficient than collection by solicitors, it would not of itself solve the problem of enforcement and would require a considerable increase in the staffing of the sheriff courts and in public expenditure, whereas current maintenance arrestments would have a relatively small impact on public expenditure and manpower. There would remain the problem that maintenance creditors often do not keep records of arrears. This problem should, however, become less important if, as its name implies, a current maintenance arrestment secures current maintenance. Although we recommend later[3] that default should be made a precondition of current maintenance arrestment, it should nevertheless not be necessary to ascertain the precise amount of arrears before a current maintenance arrestment was used. The onus would be on debtors to prove the absence of sufficient arrears to constitute default if they were to challenge the validity of a current maintenance arrestment. We think that current maintenance arrestments would help to solve many of the problems identified by the McKechnie Report at far less cost to the public purse than a system of collecting officers would entail. We concede that the effect would be to place the burden on employers but, if it

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[1]See para. 6.12 above.

[2]The argument here was that collection of maintenance is largely a mechanical process best done in bulk by a large organisation using routine procedures. The present system of collection by solicitors involves a dispersal of effort which is uneconomic and the absence of routine procedures results in the work being tackled spasmodically. The largely routine work of collection does not require the skills of highly paid solicitors but should be undertaken by less well paid clerical staff.

[3]Recommendation 6.25 (para. 6.155).

be accepted that earnings arrestments should be competent, then it seems to us to make little difference to the employer that the debt being enforced is current maintenance rather than arrears.

Maintenance creditors and supplementary benefit

6.139 There remains the question of how current maintenance arrestments would affect the large number of maintenance creditors who receive supplementary benefit. If a maintenance creditor holding a decree for aliment claims benefit, the first duty of the Department of Health and Social Security is to meet her or his needs by way of supplementary benefit on the basis of assessed requirements and resources. The practice of the Department will however vary according to circumstances, namely whether the level of aliment awarded is insufficient (when taken with the claimant's other resources) to meet needs and whether the sums due are paid regularly, intermittently or never. Broadly speaking, if aliment is being paid regularly, it will be taken into account in fixing the level of benefit payable; and if default occurs in any week, additional benefit will be paid to make good the deficiency. If aliment is not being paid at all, benefit will be paid in full on the understanding that arrears subsequently paid will be remitted to the Department. If aliment is being paid intermittently, the Department will, depending on circumstances, either pay benefit in any week once it is satisfied that the aliment has not been paid, or pay benefit in full on a regular basis, on the understanding that arrears subsequently received will be remitted to the Department.

6.140 A maintenance creditor receiving supplementary benefit normally has little incentive to do diligence to enforce payment of maintenance since the amount recovered will simply reduce entitlement to benefit. The existing practice of the Department is to give maintenance creditors information about their rights to enforce their maintenance decrees but not to press them to take enforcement proceedings.[1] We have framed our recommendations regarding current maintenance arrestments on the basis that this policy will continue.

6.141 Having paid benefit, the Department may seek to recover the cost from the liable relative either by arranging a voluntary agreement or as a last resort by taking its own legal proceedings.[2] In certain cases the Department may, with the consent of the maintenance creditor, request the liable relative to pay aliment due under the decree to the Department rather than the maintenance creditor. The object of such arrangements "diverting" payment to the Department is to enable them to pay benefit in full to the maintenance creditor on a regular basis so that the creditor does not need to claim additional benefit on each occasion when the liable relative defaults. This is clearly to the advantage of the maintenance creditor. However, it involves the Department in additional administrative action; it can lead to difficulties in obtaining the debtor's consent; and, because it involves intervening in what the Finer Report called "a finely balanced situation",[3] it is restricted to cases where

[1]Leaflet B.O. 100 set out in Appendix 4 to the Supplementary Benefit Handbook (1977 edition).

[2]Supplementary Benefits Act 1976, ss. 18, 19 and 25. See Finer Report, paras. 4.462 to 4.465 for the practice of Department of Health and Social Security officials in arranging voluntary arrangements whereby liable relatives undertake to reimburse the Department for the cost of benefit.

[3]Para. 4.469.

payment is being made irregularly. We think that the system of current maintenance arrestments could be adapted so as to enable the Department to obtain diversion of alimentary payments without the debtor's consent. We revert to this at paragraph 6.199 below. Moreover, there seems no reason why orders for periodical payments in favour of the Department to enable them to recover the cost of benefit should not be enforceable by current maintenance arrestments since the level of payments is based on the maintenance debtor's ability to pay.[1]

6.142 Current maintenance arrestments would therefore assist supplementary benefit claimants who choose to enforce their maintenance decrees, and would also assist the Department to recover the cost of benefit either by facilitating diversion arrangements or by enabling the Department the more easily to enforce decrees in their own name for the reimbursement of the cost of benefit. It should be noted that, while the Finer Report emphasised the role of supplementary benefit as the first source of financial support for one parent families,[2] a substantial proportion of maintenance creditors are not dependent on supplementary benefit.

Impact on maintenance defaulters

6.143 Current maintenance arrestments would be likely to have different impacts on different categories of maintenance defaulter. Four categories of case can be distinguished.

6.144 First, there are those maintenance debtors who deliberately flout maintenance decrees, being able but unwilling to pay. Here, we think a diligence securing current maintenance would be useful.

6.145 Second, some maintenance debtors cannot afford to pay because the awards of maintenance were unrealistically high when made by the court. To the extent that this problem can be solved, the solution must lie, not in the reform of enforcement, but in reforms of the substantive law and of court procedure. We have made recommendations in our Report on *Aliment and Financial Provision* to reform and clarify the law in this area so as to provide assistance to the courts in tackling this problem. Where a maintenance debtor has two households to support on one wage, we have recommended that the court in awarding maintenance for the first household should be empowered to take into account the debtor's responsibilities to maintain dependent members of the second household whether or not they are legally entitled to aliment from the debtor.[3] We also considered the problem that the courts may award maintenance without sufficient information of the needs and resources of the parties and recommended that in addition to its existing powers (to defer decree until information is provided for example) the court should have power to order either party to furnish information about his or her financial

[1]Supplementary Benefits Act 1976, ss. 18 and 19: see para. 6.149 below.

[2]The Finer Report (para. 5.6, Table 5.1) pointed out that in Great Britain in 1971 supplementary benefit was the main (i.e. largest single) source of income of 200,000 fatherless families (one-half of the total number of all fatherless families other than widows' families). Maintenance was the main source of income of only 50,000 fatherless families.

[3]Recommendation 19 (para. 2.110): Recommendation 45 (para. 3.189). See also Family Law (Scotland) Bill 1984, clauses 4(3) and 11(6).

affairs (such as a pay slip) or those of a child.[1] To meet the case where the maintenance debtor does not defend the action though unable to pay the amount claimed, we recommended that the court should have power in all cases to award less than the amount claimed even if the claim is undisputed.[2] The courts at present naturally do their best to avoid making awards which turn out to be unrealistically high but we think the reforms suggested above would assist in preventing inflated awards.

6.146 Third, some maintenance debtors are able to pay a maintenance award at the time when the court order was made but become unable to do so through a change in circumstances. In this case, the debtor's remedy is to apply to the court to vary or recall the award, and in our Report on *Aliment and Financial Provision* we recommended that the court should be empowered to backdate the variation or recall.[3] Maintenance debtors may at present be reluctant to apply for a variation, but their reluctance might well be overcome given a system of current maintenance arrestment since the whole of the maintenance instalment would be deducted at source from their pay.

6.147 Fourth, some maintenance debtors are able and not unwilling to pay, but find the temptation to spend rather than pay too strong. Where such a maintenance debtor is not put under pressure to pay by the creditor, arrears can accumulate to the point where the debtor can no longer pay. We think that a system of current maintenance arrestments would be very useful in this category of case.

6.148 We **recommend:**

(1) A new form of continuous arrestment of earnings (called a current maintenance arrestment) should be introduced to facilitate the recovery of current maintenance (aliment and periodical allowance and analogous orders) as it falls due.

(2) Accordingly, a current maintenance arrestment, which should normally have effect until the obligation to pay maintenance ceases, should require the employer of a maintenance debtor, on every pay day, to deduct from the debtor's net earnings the whole of the maintenance due for the period since the last pay day and to pay it forthwith to the maintenance creditor, except to the extent that the earnings are exempt as recommended in Recommendation 6.27 below.
(Recommendation 6.23; clauses 72(2)(*b*) and 79(1) and (2).)

Types of decree enforceable

6.149 Clearly, the types of decree enforceable by current maintenance arrestment should include decrees awarding aliment whether under common law or statute, and periodical allowance on divorce. It should also include obligations to pay maintenance contained in bonds or agreements registered

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[1]Recommendations 17(e) (para. 2.94), 24 (para. 2.133), and 40(*a*)(x) (para. 3.146). See also Family Law (Scotland) Bill 1984, clause 20.

[2]Recommendation 17(*d*) (para. 2.94): see also Family Law (Scotland) Bill 1984, clause 3(1)(*d*). In *Terry* v. *Murray* 1947 S.C. 10, it was held that in an undefended action of affiliation and aliment, the court has no discretion to award a lower amount than that claimed: the court does have such a power in divorce actions: *Gould* v. *Gould* 1966 S.C. 88.

[3]Paras. 2.113 to 2.116, Recommendation 22 (para. 2.117). Recommendation 39(*d*) (para. 3.125); Family Law (Scotland) Bill 1984, clauses 5 and 13(4).

for preservation and execution in the books of court. On the other hand, common law claims constituted by decree for reimbursement of aliment provided to the debtor or alimentary dependants of the debtor in the past, while treated as alimentary for some arrestment purposes at common law, should be enforceable by ordinary earnings arrestments rather than current maintenance arrestments. These are claims by third parties who are not in need of aliment themselves, and in such cases the decree is for payment in a lump sum rather than by weekly or other periodic amounts. There are a number of decrees or orders in favour of government departments or local authorities which require a liable relative to contribute towards the support of persons in receipt of supplementary benefit[1] or children in the care of a local authority.[2] While these decrees or orders are in the nature of claims by third parties not in need of aliment themselves for reimbursement of the cost of benefit or maintenance, the decrees or orders make provision for payment by weekly or other periodic amounts, based on the debtor's ability to pay: they resemble therefore alimentary decrees and orders and should be enforceable by current maintenance arrestments. In addition non-Scottish maintenance orders registered in Scotland for enforcement under statute would also be enforceable by current maintenance arrestment.[3]

6.150 Current maintenance arrestments are designed to collect maintenance due each week, month or other interval; the employer being required to deduct from the debtor's earnings each pay day the amount of maintenance due for the period since the last pay day. It would be possible to devise rules so as to permit the expenses of the action in which maintenance was awarded and other incidental lump sums such as inlying expenses in an action for affiliation and aliment to be recovered by a current maintenance arrestment. In our opinion the complexity of the rules which would be required and the additional burden they would impose on the employer would be out of all proportion to the advantage. Other diligences remain available to recover such lump sums connected with maintenance orders.

6.151 We **recommend:**

A current maintenance arrestment should be competent to enforce decrees for aliment and periodical allowance, alimentary bonds and agreements registered for execution, decrees and orders for periodical payments for the recovery of the cost of supplementary benefit or the cost of maintaining children in the care of local authorities and comparable non-Scottish maintenance orders registered in Scotland for enforcement. It should not however be competent to enforce by way of a current maintenance arrestment expenses awarded in connection with maintenance actions or

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[1]Supplementary Benefits Act 1976, s. 18 (recovery of cost of benefit from liable relative); s. 19(8) (decrees of affiliation and aliment in favour of Secretary of State, and orders "diverting" payments under decrees of affiliation and aliment, to recover cost of benefit).

[2]Social Work (Scotland) Act 1968, s. 80(6) (contribution orders in respect of children in care, enforceable in like manner as decree for aliment); s. 81 (decrees of affiliation and aliment in favour of local authority, and orders "diverting" payments under decrees of affiliation and aliment, to recover contributions to the maintenance of children in care); Guardianship Act 1973, s. 11(3) (orders for payment by parents of weekly or periodic sums to local authority towards maintenance of child who is in care by virtue of a court order in custody proceedings between parents).

[3]See para. 6.206 below.

other lump sums such as inlying expenses awarded in an affiliation decree, or decrees constituting claims at common law by third parties for reimbursement of the cost of aliment provided to maintenance debtors or their alimentary dependants in the past.
(Recommendation 6.24; clauses 72(2)(*b*) and 74.)

Need for default after intimation

6.152 The question arises whether it should be a prior condition of a current maintenance arrestment that the maintenance debtor has defaulted in payment of one or more instalments of maintenance. Since the main object of the new form of diligence would be to recover current maintenance, default is not a logically necessary precondition and slightly complicates the law. Further, it may be argued that if default were not a precondition of a current maintenance arrestment, no stigma would attach to it. On the other hand, a good payer may justifiably resent the use of such a diligence, and it would be difficult to defend the imposition on employers of the relatively onerous duties which the diligence entails unless there had been default. Solicitors would find it difficult to advise their clients against doing diligence immediately the decree became enforceable and unnecessary current maintenance arrestments might be laid on. Moreover, if the amount payable was not a "small maintenance payment" for tax purposes, the debtor would be able to deduct income tax at the basic rate, but where a current maintenance arrestment had been served on the employer, then (as we recommend below),[1] the employer would deduct the whole of the maintenance instalment and pay it to the creditor without deducting tax and accounting for it to the Inland Revenue. Some debtors therefore would be in a worse financial position as a result of the use of current maintenance arrestments until their coding had been altered after review by their income tax inspector. We conclude that prior default should be a precondition of the first use of a current maintenance arrestment.

6.153 Debtors ought to be notified of the granting of the maintenance decree before a current maintenance arrestment is used against their earnings, otherwise they may inadvertently default in paying maintenance simply because they were not aware of the terms of the decree. In connection with summary cause instalment decrees it is at present a source of complaint that some debtors lose the right to pay by instalments because by the time they become aware that decree has been pronounced the dates for payment of the first two instalments have already passed.[2] Notification should be in a manner prescribed by act of sederunt, and should be made by the creditor rather than the clerk of court because the creditor needs to know whether notification was duly effected prior to default before a current maintenance arrestment can be instructed. Moreover, where the obligation is contained in an alimentary bond or agreement no court is involved so that notification would have to be made by the creditor in this case. The prescribed form of notification should warn the debtor of the consequences of default.

6.154 The prescribed form of notification could be served on the debtor at any time after the maintenance decree is granted or the alimentary bond is

[1]Recommendation 6.29 (para. 6.180).
[2]Edinburgh University Debtors Survey, para. 5.8.

registered for execution. The form should contain a warning to the debtor that if at the end of one month from the date of notification or at any time thereafter, there were at least three instalments of maintenance due and unpaid a current maintenance arrestment could be served. We adopt this formula for default because it seems to us to work equally well for the case where arrears have accrued (perhaps under a decree granted before the proposed legislation comes into force) and the case where the decree had just been granted. In the former case the debtor ought to be given a short period in which to pay off the arrears, and in order to avoid a current maintenance arrestment thereafter, the debtor would also require to keep up payments of current instalments. In the latter case the debtor is being given an opportunity to comply voluntarily with the decree before diligence is done. This formula would enable an arrestment to be laid against a debtor who had been in arrears a long time ago but who had paid regularly since then. But it would complicate the law to deal with the problem of "stale defaults". Moreover, the likelihood of a current maintenance arrestment being laid on in such situations is remote, since the maintenance creditor would not receive any advantage thereby.

6.155 We **recommend:**

(1) It should be competent to lay a current maintenance arrestment only if:

(*a*) the debtor had received notification in prescribed form of the maintenance decree setting out the maintenance obligation; and

(*b*) at any time after four weeks from the date of notification at least three instalments of maintenance are due and unpaid.

(2) The notification should warn the debtor of the consequences of default and should be made by, or on behalf of, the creditor rather than by the clerk of court.

(Recommendation 6.25; clause 82(1).)

Amount deductible under a current maintenance arrestment

The deduction formula

6.156 A number of detailed rules are required to enable employers to calculate the sums to be deducted under a current maintenance arrestment. These rules have to be kept as clear and simple as possible in order to ease the burden on employers.

6.157 An employer operating a current maintenance arrestment should be required to deduct from the debtor's net earnings every pay day the amount of maintenance due for the period from the previous pay day to the pay day in question. This formula avoids any difficulties arising from "mismatch" of the dates when maintenance is due (usually in advance) and earnings are due (usually in arrears). It also copes with bonuses, commission and other such extra payments whether paid at the same time as the regular earnings or separately. Finally under this formula there is no need to ascribe payments of earnings to particular periods in order to discover whether maintenance due for those periods has been paid out of previous earnings. Such ascription can present difficulties in the case of bonuses and similar extra payments.

6.158 The amount of maintenance due for the period from the previous pay day to the pay day on which the employer operates the current maintenance arrestment would be the number of days in the period multiplied by the daily rate of maintenance. Normally courts award maintenance at specified weekly or monthly rates, although quarterly, half-yearly or even annual rates are also possible.[1] In order to simplify the task of the employer we suggest that the conversion of the weekly, monthly or other rate contained in the maintenance decree into a daily rate should be done by the creditor or officer of court so that the schedule of arrestment served on the employer would set out simply the daily rate. Where the rate was weekly, the daily rate is arrived at by dividing that rate by seven. A monthly rate would be converted into a daily rate by multiplying by 12 and dividing by 365. This conversion avoids difficulties that might be caused due to every calendar month not containing the same number of days.

6.159 An example may help illustrate the mode of operation of a current maintenance arrestment. The maintenance decree is for £28 per week (£4 a day) and the debtor is normally paid weekly.

Date	Debtor's net earnings (£)	Amount deducted (£)
Friday 1st	100	28
Friday 8th	130	28
Friday 15th	70	28
Wednesday 20th	40 (overtime)	20
Friday 22nd	100	8

6.160 Deductions would be made from the employee's net earnings and we would adopt the same definition of net earnings as we recommend for earnings arrestments.[2] In terms of this definition net earnings are gross earnings less income tax and certain social security and superannuation scheme contributions.

6.161 We **recommend:**

(1) A current maintenance arrestment schedule should specify the rate of maintenance to be deducted by the employer from pay as a daily rate. The daily rate should be derived from the rate of maintenance expressed in the decree in accordance with rules set out in statute.

(2) The employer should be required to deduct every time earnings are paid to the debtor while the current maintenance arrestment is in operation, the maintenance due for the period from the day on which earnings were last paid to the debtor to the day in question. The maintenance due would be the number of days in the period multiplied by the daily rate.
(Recommendation 6.26; clauses 79(4) and (5) and 81(1).)

[1]Dobie, *Sheriff Court Styles*, p. 25.
[2]See Recommendation 6.9 at para. 6.76 above.

Exempt earnings

6.162 We recommended above[1] that no deductions should be made under an earnings arrestment if the debtor's earnings were below a certain "threshold", which we suggested should be £35 per week having regard to current supplementary benefit scale rates. We think that the same sum should apply to current maintenance arrestments. On a daily basis this sum amounts to £5 per day. The following example illustrates the operation of the exemption level.

6.163 A man liable to pay £50 per week aliment for his wife and three children normally earns £100 per week net. His employer deducts £50, remits it to the wife and pays the balance of £50 to the man. One week the man earns only £80 net. The employer cannot deduct the full £50 due that week since this would leave the man with only £30 which is below the £35 per week exemption level. Instead the employer pays the man his exempt earnings of £35 and remits the balance of £45 to the wife.

6.164 We have considered whether, in addition, a current maintenance arrestment should also attract an exemption of (say) one-half or one-third of the maintenance debtor's disposable earnings above the fixed sum threshold. The aim would be to protect maintenance debtors in cases where the maintenance award had become, through a material change in circumstances, unduly high. This, however, would be inconsistent with the principle, referred to above, that the court's award of maintenance is based on the debtor's ability to pay.[2] We think, therefore, that a maintenance debtor in such circumstances should apply to the court for a downward variation of the maintenance decree.

6.165 In order to take account of changes in the value of money we recommended that the figure of £35 per week (which represents the sum below which earnings are not arrestable by earnings arrestment) should be variable by the Secretary of State by regulations.[3] We would extend this recommendation together with our provisions setting out how such regulations should affect subsisting and future earnings arrestments[4] to current maintenance arrestments.

6.166 We **recommend:**

(1) The first £5 of a debtor's daily net earnings (as defined in Recommendation 6.9(2)) should be exempt from arrestment by a current maintenance arrestment, but no other exemption should apply.

(2) The sum mentioned above should be capable of being varied by regulations made by the Secretary of State by statutory instrument subject to negative resolution. The varied sum should apply to a current maintenance arrestment executed after the coming into force of the regulations and to a subsisting arrestment where either the creditor or the debtor has intimated in prescribed form the regulations to the employer. An employer should be entitled, but not bound, to give

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[1]Recommendation 6.9 (para. 6.76) and Table A in Sched. 3 to the Bill annexed to this report.
[2]Para. 6.133.
[3]Recommendation 6.9 (para. 6.76).
[4]Recommendation 6.9 (para. 6.76).

effect to the regulations in connection with a subsisting arrestment on becoming aware of their existence otherwise than by intimation in prescribed form.

(Recommendation 6.27; clauses 68(1)(*b*), (3) and (4), and 95(1).)

Enforcement of arrears of maintenance

6.167 Since a current maintenance arrestment can only be executed where a maintenance debtor is in default, the creditor will be due arrears of maintenance even at the start of the process of enforcing current maintenance by means of the arrestment. These pre-service arrears may range from a few weeks arrears to arrears that have built up over several years. Arrears (post-service arrears) can also arise during the currency of an arrestment, for example if the debtor falls sick or the debtor's earnings are insufficient on one or more occasions to satisfy the maintenance instalments. We deal with the problem of pre-service arrears first since they are more likely to be substantial sums.

6.168 We have considered a number of solutions for recovery of pre-service arrears. First, it could be provided that such arrears could not be recoverable at all by diligence against earnings. We think however that this would be unfair to maintenance creditors and it would tempt maintenance debtors to evade payment for as long as possible.

6.169 A second solution would be to make a limited amount of arrears (say one month's) recoverable out of earnings by means of a current maintenance arrestment. These arrears could be paid off in small amounts over say the first year of operation. These small amounts would form an additional deduction made by the employer each pay day over and above the maintenance due. It is however difficult to justify securing an arbitrary amount of arrears, and the complications in the law and the additional burden placed on the employer in our opinion outweigh the advantages.

6.170 A variant of the second solution would be that the creditor would be entitled to apply to the court for an upward variation of the maintenance decree for a specified period, so that the pre-service arrears could be converted into additional current maintenance recoverable out of earnings by means of the current maintenance arrestment over that period. After careful consideration we have come to the view that the complications outweigh the advantages. The creditor would have to go to court while the employer would have to remember to change from the higher rate to the lower rate at the end of the specified period.

6.171 We have come to the conclusion that it is not possible to modify current maintenance arrestments so as to enable them to collect arrears of maintenance or other lump sums, as well as current maintenance, without making the legislation unduly complex and imposing undue burdens on those involved. A maintenance creditor wishing to recover arrears of maintenance while enforcing payment of maintenance by means of a current maintenance arrestment would therefore have to use other diligence to recover the arrears. The most attractive alternative diligence would probably be an earnings arrestment, and it might become the general practice for maintenance creditors

to lay an earnings arrestment for arrears and other sums[1] at the same time as laying a current maintenance arrestment.

6.172 We concede that allowing recovery of arrears by a concurrent earnings arrestment against the earnings of maintenance debtors may well result in an increase in the burdens placed on employers, since two arrestments might be served in most maintenance cases. Another disadvantage is that maintenance debtors would have deducted from their net earnings not only the maintenance due, but also the amount deductible under the earnings arrestment rules. Where the arrears and other sums included in the earnings arrestment were substantial, these extra deductions could last for many months or even years. We did consider prohibiting a maintenance creditor from enforcing payment of arrears of maintenance by way of an earnings arrestment while a current maintenance arrestment laid by that creditor was in operation. Such a prohibition might, however, effectively deny the creditor any chance of recovering arrears until the maintenance obligation ceased in those cases where the only assets readily attachable by diligence were earnings. Moreover, it is difficult to justify treating arrears of maintenance differently from any other debt which could be enforced by a concurrent earnings arrestment. If, as we recommend later,[2] employers should be required to operate a current maintenance arrestment and an earnings arrestment at the same time, this duty should not depend on the nature of the debt sought to be enforced by the earnings arrestment.

6.173 We turn now to post-service arrears—arrears which arise during the currency of a current maintenance arrestment because the debtor's earnings are from time to time insufficient to meet the maintenance due. With some hesitation we recommend the same solution as we put forward for pre-service arrears—that without prejudice to the use of other diligence including a concurrent earnings arrestment, arrears should not be recoverable by means of the current maintenance arrestment. We gave considerable thought to a scheme whereby the employer would carry forward post-service arrears from pay day to pay day and make additional deductions from later earnings where they were sufficient to meet such deductions as well as the current maintenance. Such a scheme would be particularly useful in the case of a debtor—such as a commission salesman—whose earnings fluctuate considerably. Collection of post-service arrears however would unduly complicate current maintenance arrestments, and the calculations and record keeping involved would impose what might be thought of as an unacceptable burden on employers. Moreover, in the case of two or more maintenance creditors sharing in a conjoined arrestment order, the rules on distribution of sums deducted from the debtor's earnings amongst the creditors would become almost impossibly difficult if arrears were included. With regret we have come to the conclusion that the additional difficulties that would be occasioned by inclusion of post-service arrears are not worth it in order to cater for a small number of cases. Where arrears arise because of fluctuations in the debtor's earnings, arrestment of the debtor's bank account or an earnings arrestment may prove effective

[1]These could include the expenses of the maintenance action (see para. 6.175 below) and the expenses of serving the current maintenance arrestment schedule (see para. 9.58 below) as neither of these are recoverable by the current maintenance arrestment.

[2]Recommendation 6.45 (para. 6.249).

diligences to recover them. Where post-service arrears arise regularly and accumulate the debtor should consider applying to the court for a downward variation of the maintenance obligation since a rate of maintenance which the debtor consistently cannot meet would seem to be too high.

6.174 Under the present law, interest on arrears of maintenance may be recovered by an arrestment although we understand that this is very rarely done. Because maintenance periods and pay days will often not coincide, there may be a small amount of arrears on which interest could run in strict law in the case of many current maintenance arrestments. Again where the earnings are insufficient to meet the maintenance due for a period, arrears will accrue and interest thereon may begin to run. To avoid these complications we think that interest should not accrue on arrears of maintenance which may arise during the currency of a current maintenance arrestment. Where arrears have accumulated before the current maintenance arrestment was laid, the maintenance creditor would be entitled to recover interest on the arrears by an earnings arrestment.

6.175 A maintenance creditor might wish to enforce payment of the expenses of the action in which maintenance was awarded as well as arrears of maintenance and current maintenance. We argue in paragraph 6.172 above that there should be no distinction between arrears of maintenance and an ordinary debt unconnected with maintenance for the purpose of allowing enforcement by an earnings arrestment concurrently with a current maintenance arrestment. The same argument applies with equal force to the use of an earnings arrestment to enforce payment of expenses. Furthermore, prohibition of a concurrent earnings arrestment for expenses could lead to the Legal Aid fund having difficulty in recovering them. Where a maintenance creditor receives legal aid for the maintenance action the Law Society of Scotland is entitled to recover unpaid expenses awarded against the maintenance debtor.[1] We think they should not be barred from recovering these by way of earnings arrestment merely because the maintenance creditor is recovering current maintenance by means of a current maintenance arrestment. Yet different rules for legally aided and non-legally aided creditors would create an unjustifiable anomaly.

6.176 We **recommend:**

(1) Arrears of maintenance (whether arising before or after the execution of a current maintenance arrestment) should not be recoverable by a current maintenance arrestment, but the maintenance creditor may enforce payment of the arrears by other diligence, including an earnings arrestment operated concurrently against the same earnings.

(2) Interest should not run on any arrears of maintenance which may arise during the subsistence of a current maintenance arrestment.
(Recommendation 6.28; clauses 72(2)(*a*), 79(7) and 85(1).)

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[1]Rule 6(1), Act of Sederunt (Legal Aid Rules) 1958, (S.I. 1958/1872).

Payment without deduction of tax

6.177 Aliment and periodical allowance due under decrees are payable under deduction of tax at the basic rate[1] unless they are "small maintenance payments" in the statutory sense.[2] The current statutory limits are payments to a spouse or ex-spouse of £33 per week or £143 per month; to a person under 21 for his or her own benefit of £33 per week or £143 per month; or to any person for the benefit of a person under 21 of £18 per week or £78 per month.[3] Payments under maintenance bonds or agreements are paid under deduction of tax whatever their amounts. Where tax is deducted, the maintenance debtor must on request furnish the creditor with a certificate of deduction of tax.[4]

6.178 The majority of payments of aliment and periodical allowance are "small maintenance payments" in the statutory sense. In 1980, the small maintenance payment limits were uprated from £21 to £33 per week for a spouse or an ex-spouse and from £12 to £18 for children under 21[5] and it has been estimated that in divorce actions in the same year, the average amount of periodical allowance awarded to ex-spouses was £18 per week, and the average amount of aliment awarded for a child was £9.30.[6]

6.179 We think that employers should not be required to ascertain whether the maintenance is paid gross or under deduction of tax or what the current statutory small maintenance payments are. If this information were given in the schedule of arrestment, it would become out of date as and when the statutory limits for small maintenance payments were uprated, and in addition the employer would have to change the deduction with every change in the basic rate of tax. Presumably an employer deducting tax from the remittances to the creditor would also have to furnish, on request, a certificate of deduction of tax and account for the tax to the Inland Revenue. If on the other hand the maintenance deducted by the employer were paid gross the Inland Revenue could still claim tax from the maintenance creditor. We suggest that the complications involved in requiring the employer to deduct tax would impose an exessive burden on employers.

6.180 We **recommend:**

> An employer operating a current maintenance arrestment should not be required to deduct tax from payments to the maintenance creditor notwithstanding that the maintenance payments secured by the current maintenance arrestment are not "small maintenance payments" for the purposes of the income tax code.
> (Recommendation 6.29; clause 79(5)(*a*).)

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[1]Income and Corporation Taxes Act 1970, ss. 52 and 53; (which refer to "annual payments" but this expression is deemed to include aliment and periodical allowance).

[2]*Ibid.*, s. 65 as amended by the Finance Act 1982, s. 33.

[3]*Idem.* See *Finnie* v. *Finnie* 1984 S.L.T. 109 and 439.

[4]*Ibid.*, s. 55(1): the duty may be enforced at the instance of the creditor, s. 55(2). The certificate shows the gross amount of the payment, the amount of tax deducted and the actual amount paid.

[5]Income Tax (Small Maintenance Payments) Order 1980 (S.I. 1980/951).

[6]B. Doig, *The Nature and Scale of Aliment and Financial Provision on Divorce in Scotland* (1982) Scottish Office Central Research Unit Papers paras. 6.13 and 6.17.

Recall or challenge of current maintenance arrestments

6.181 We have recommended that the employer or debtor should be entitled to apply to the court for the recall of an earnings arrestment on the ground that it is invalid or has ceased to have effect and that the employer, debtor or creditor should be entitled to apply for resolution of a dispute about the way in which the arrestment is being operated.[1] We would extend this recommendation to current maintenance arrestments.

6.182 The debtor should in our opinion also be entitled to have a current maintenance arrestment recalled if the court is satisfied that the debtor is unlikely to default again in paying maintenance. While we do not think this power would be exercised very often, it could be of use where the debtor obtains a better job which enables him or her to meet the maintenance obligation more easily and to secure the payment of current maintenance by way of a banker's standing order.

6.183 We **recommend:**

> The court should have the same powers to recall, or resolve a dispute about the operation of, a current maintenance arrestment and to make consequential orders for payment as it has in connection with an earnings arrestment in terms of Recommendation 6.12 above. In addition the court should, on application by the debtor, have power to recall a current maintenance arrestment if it is satisfied that the debtor is unlikely to default again in paying maintenance.
> (Recommendation 6.30; clause 83(1) to (3).)

Duration of current maintenance arrestments

6.184 In order to avoid the need for repeat arrestments, we recommend above[2] that an earning arrestment should normally endure until the debt due has been discharged. We would adopt the same approach to current maintenance arrestments—that the arrestment should continue to have effect for so long as the obligation to pay maintenance continues to exist or be enforceable by diligence. In reaching this conclusion, we have been influenced by the recommendation, which we consider later,[3] that in a competition between an earnings arrestment for an ordinary debt and a current maintenance arrestment the ordinary creditor's earnings arrestment would not be "shut out" indefinitely by the current maintenance arrestment and, indeed, if there were insufficient income to meet both arrestments, the ordinary creditor's earnings arrestment would have priority.

6.185 When dealing with earnings arrestments we made recommendations relating to termination of the arrestment by various events (such as satisfaction of the debt) and termination of the employer's duty to operate the earnings arrestment. Briefly, satisfaction of the debt, the debt becoming unenforceable by diligence, abandonment of the arrestment by the creditor, sequestration of the debtor, recall of the arrestment, and the debtor ceasing employment would terminate the arrestment; but the employer would be entitled, but not

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[1]Recommendation 6.12 (para. 6.91).
[2]Recommendation 6.8 (para. 6.66).
[3]Paras. 6.246 to 6.249.

bound, to continue operating the arrestment until proper notification of the termination was received. We would extend these recommendations to current maintenance arrestments, but there are several aspects of current maintenance arrestments which have no parallels in earnings arrestments and which we now discuss.

6.186 Unlike a decree for payment of a debt, a maintenance decree may be varied, superseded or recalled by a subsequent order. For example a decree for periodical allowance in favour of an ex-wife may be varied on a material change in her, or her ex-husband's, circumstances; a decree for aliment may be superseded by a decree for periodical allowance; or an award of aliment *pendente lite* may lapse with the dismissal of the action. A maintenance obligation may also cease on the occurrence of certain events such as death of the maintenance creditor, remarriage of the person in receipt of periodical allowance, or a child to (or for) whom aliment was awarded in divorce proceedings attaining the age at which the award of aliment ceases (currently 16).

6.187 A current maintenance arrestment against a debtor's earnings may enforce more than one maintenance obligation due by that debtor provided the payee in each obligation is the same person[1]—a periodical allowance payable to an ex-wife and aliment payable to her on behalf of the children, for example. If one of the obligations is varied, superseded, recalled or ceases, the current maintenance arrestment enforcing it and the other obligations should cease to have effect in its entirety. It would be possible to provide that the unaltered obligation should continue to be enforceable by the subsisting current maintenance arrestment with the creditor notifying the employer of the change in the varied or cancelled obligation. But this introduces another entity—a notice of variation—and makes for complexity. In our opinion the simplest solution is that on any change in the rates of maintenance payable in terms of the obligations enforced by a current maintenance arrestment the subsisting arrestment should cease to have effect and the creditor should be entitled to serve a new arrestment schedule setting out the new aggregate rate of maintenance to be enforced.

6.188 The employer should be entitled, but not bound, to continue operating a current maintenance arrestment enforcing a maintenance obligation until notification in prescribed form is received of the arrestment ceasing by virtue of the obligation having been varied, recalled, superseded or ceasing. The proper person to notify the employer is, in our view, the creditor because in many cases the facts will be within the creditor's knowledge and a new current maintenance arrestment will have to be served to give effect to the varied obligation. If the creditor fails as soon as reasonably practicable to notify the employer who as a result continues to operate the current maintenance arrestment, the debtor could apply to the court for recall of the arrestment on the ground that it has ceased to have effect as between debtor and creditor. The creditor who receives payments as a result of the employer continuing to operate the arrestment is under a common law duty to repay them to the debtor. In addition, in line with our recommendation in the context of earnings

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[1]See Recommendation 6.48 (para. 6.259).

arrestments,[1] we suggest that the court should have power, on application by the debtor, to order the creditor to pay to the debtor a sum not exceeding twice the amount of the payments received. An employer who, fails to cease making deductions from a debtor's pay after receiving notification by the creditor, would be in breach of contract and could be sued by the debtor for the amount of deductions wrongly made.

6.189 We **recommend:**

(1) A current maintenance arrestment should cease to have effect as between debtor and creditor when:

(*a*) the creditor abandons the arrestment; or

(*b*) the arrestment is recalled by an order of the court; or

(*c*) the debtor is sequestrated; or

(*d*) the obligation being enforced is varied, recalled, or superseded by a court order, ceases to be enforceable by diligence or otherwise ceases to be due, and where more than one obligation is being enforced by the current maintenance arrestment by the variation, recall, supersession, unenforceability, or cessation of any one of the obligations.

(2) The clerk of the court should intimate in prescribed form to the employer, debtor and creditor the making of an order recalling a current maintenance arrestment.

(3) An arresting creditor should be under a duty to intimate to the employer in prescribed form as soon as is reasonably practicable that the arrestment has ceased to have effect by virtue of a variation, recall, supersession, cessation of enforceability by diligence, or cessation of the obligation or one of the obligations being enforced by the arrestment. Any sum received by the creditor under the arrestment after the arrestment had ceased to have effect should be recoverable by the debtor with interest at the rate normally applicable to decrees from the date of receipt to the date of repayment.

(4) The employer should be entitled, but not bound, to continue to operate the current maintenance arrestment until notification in prescribed form that the arrestment has ceased to have effect is received or until the debtor ceases employment.

(5) Where the sheriff is satisfied, on an application by a debtor, that the creditor failed to intimate as soon as reasonably practicable that the arrestment had ceased to have effect by virtue of any of the circumstances in paragraph (3) above, the sheriff should have power to order the creditor to pay to the debtor a sum not exceeding twice the sum recoverable by the debtor from the creditor under paragraph (3) above. (Recommendation 6.31; clauses 83(1), (4), (5), (6), (7) and (8); 95(5) and 98(2).)

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[1]Recommendation 6.16 (para. 6.110).

Effect of new maintenance orders

6.190 A current maintenance arrestment is not to be competent unless and until the maintenance debtor has defaulted.[1] Where a maintenance decree which is being enforced by a current maintenance arrestment is varied or superseded by a new maintenance decree or has ceased to have effect in part, a new current maintenance arrestment schedule setting out the new daily rate of maintenance payable has to be served on the employer.[2] We do not think it would be either necessary or desirable for further default to be required before the varied decree, or the new decree, becomes enforceable by a new current maintenance arrestment. A maintenance debtor who has already defaulted might well default again under the varied decree, and we do not consider the debtor could justifiably feel aggrieved if default was not required whenever the decree is varied. From the standpoint of the employer, it seems better to allow continuity of deductions than to have a break in continuity whenever the decree is varied. A new requirement of default might discourage maintenance creditors from applying for a variation, to keep pace with inflation for example. The strongest case for requiring further default would be where a maintenance decree was varied so as to include a new alimentary creditor, for example where aliment for a child, on a change in custody, is ordered to be paid to a wife already receiving aliment under the decree. It might be thought that default in payments for the wife should not count as default in payments for the child. But, in our view, it would be impracticable, and of dubious value, to make an exception in such cases. We think therefore that further default should again become a necessary precondition of a current maintenance arrestment only where an existing current maintenance arrestment had ceased to operate, and where a reasonable period, which we suggest should be three months, has elapsed without a new current maintenance arrestment schedule being served.

6.191 Since current maintenance arrestments secure the maintenance at the level fixed for the time being in the decree, new maintenance orders superseding, or orders expressly varying or recalling, existing maintenance orders will immediately and directly affect any current maintenance arrestment securing the existing order as soon as the new order, or the variation or recall, comes into operation. At the present time the court may make several awards of maintenance within a short period affecting the same people. For example, on the breakdown of marriage, a wife may obtain first an interim order and then a "final" order for aliment for herself and the children in a sheriff court action; thereafter, she may obtain an interim order for aliment for herself and the children in a divorce action and then an order for periodical allowance and a "final" order for aliment for the children in the divorce decree. On each occasion, a new warrant for diligence for enforcement of the new order is issued.

6.192 We think that, in determining whether to make a new award, the court should be given information as to any current maintenance arrestment enforcing existing awards. This might prevent small and unnecessary changes in the existing rate of maintenance and therefore in the levels of deductions from earnings, and prevent unnecessary expense in intimating the termination

[1]Recommendation 6.25 (para. 6.155).
[2]See paras. 6.184 to 6.189 above.

of the old current maintenance arrestment and in serving a new current maintenance arrestment.

6.193 There remains the problem that, unless the court postpones the coming into operation of a decree varying an existing decree, or (as the case may be) a new decree superseding an existing decree, the employer will be deducting instalments at the rate specified in the original decree until intimation of the cessation of the old decree and service of a new current maintenance arrestment schedule, though the original decree which forms the warrant for diligence and the rate of maintenance specified in it have been superseded. Two different situations have to be distinguished, namely where the new decree varies or supersedes a decree for aliment or periodical allowance, and where a decree for aliment in favour of a spouse is superseded on divorce by a decree for periodical allowance payable to that spouse.

6.194 In the first type of case, delay may not matter greatly. The creditor would in practice delay until an extract of the new decree becomes available[1] so that the employer could be notified of the cessation of the original decree and served with a new schedule at the same time. The employer would continue deducting at the original rate until intimation and service, and under Recommendation 6.32 would not be liable for "wrongful" deductions. Any shortfall in deductions caused by the delay in intimation and service could be enforced by other diligence.[2] Any action by the maintenance debtor to recover sums wrongly deducted under the varied or superseded decree would be met by the creditor's counter-claim for sums under the varied decree. It might be thought that to require the court to postpone the coming into operation of the new decree would elevate the machinery of enforcement above the substantive law: if the court decides that a variation is just, it arguably ought to have immediate effect.

6.195 On the other hand, diligence is, as it ought to be, a matter of strict law, and the system should allow time for the maintenance creditor to intimate the change from the old rate of deductions to the new rate of deductions before that change takes place. We think therefore that when a decree for aliment or periodical allowance, which was being enforced by a current maintenance arrestment, is varied or superseded by a new court decree, the court should have an express statutory power to delay the coming into operation of the new decree to allow time for the employer to be informed, by service of an arrestment schedule, of the new rate of deductions.

6.196 In the second class of case, where a decree for periodical allowance on divorce supersedes a decree for aliment in favour of a spouse, the alimentary decree lapses immediately on divorce and it would be inappropriate to provide for an alimentary obligation to continue after divorce. There will be a time lag between the cessation of the alimentary obligation and the service of a new current maintenance arrestment requiring deductions of the periodical

[1]Extracts cannot normally be obtained until a certain period has elapsed since the decree was granted. This period is eight days for Court of Session decrees and 14 days for sheriff court decrees.

[2]In the event of the decree being varied downwards the debtor could recover the over-deductions by an action for payment against the creditor, but in many cases the debtor's claim would be compensated by arrears of maintenance owing.

allowance. This time lag is inevitable because of the delay in obtaining an extract decree of divorce containing the warrant for service of a new current maintenance arrestment, but would not in practice matter greatly. The spouse granted periodical allowance would intimate the termination of the alimentary decree to the employer and the debtor should have a similar right if the creditor failed to do so. A new current maintenance arrestment would be laid by the maintenance creditor after the decree had been extracted. As already mentioned default would not have to be established afresh. In many cases we would expect that the maintenance creditor would simply intimate the cessation of the aliment decree and serve a new arrestment schedule under the new decree for periodical allowance at the same time. Any claim for reimbursement of aliment overpaid by the debtor would normally be met by a counter-claim for unpaid periodical allowance by the creditor.

6.197 The new current maintenance arrestment should specify the date on which the relative maintenance decree varying or superseding the original decree takes effect. If the schedule was served before that date, the employer would (subject to one qualification) be required to comply with it as from the first pay day after that date. Thus, if a pay period straddled effective periods of successive current maintenance arrestments, the employer would not be required to apportion deductions as between the two diligences. The qualification to this rule would be that, as already recommended for earnings arrestments,[1] the employer would not be liable for not complying with the current maintenance arrestment within seven days after it was served.

6.198 **We recommend:**

(1) It should be provided by act of sederunt that in any action in which an application for aliment or periodical allowance is made, and in any application for variation of a decree for aliment or periodical allowance, the applicant should be required to furnish the court with such particulars within his or her knowledge as may be prescribed as to any existing maintenance decree against the other party to the application, and any existing current maintenance arrestment or earnings arrestment enforcing that decree.

(2) Where a maintenance decree, which was being enforced by a current maintenance arrestment, is varied, or superseded by a new maintenance decree, then:

(*a*) further default should not be a necessary prelude to enforcement, by a current maintenance arrestment, of the new decree within three months after the current maintenance arrestment enforcing the original decree had ceased to operate; and

(*b*) the court should have an express statutory power to delay the coming into operation of the new decree to allow time for intimation to the employer of the cessation of the original decree and service of a new current maintenance arrestment enforcing the varied or new decree. Where, however, a decree for aliment in favour of a spouse is superseded by an award of periodical allowance on divorce

[1]Recommendation 6.13 (para. 6.97).

in favour of that spouse, the court should not postpone the coming into operation of the decree for periodical allowance.

(3) Where a maintenance decree, which was being enforced by a current maintenance arrestment, ceases to be effective in part, further default should not be a necessary prelude to enforcement, by a new current maintenance arrestment, of the remaining obligation or obligations in the decree within three months after the current maintenance arrestment enforcing the whole decree ceased to have effect.

(4) Where a new current maintenance arrestment is served under a new maintenance order or a varied order before the date specified in that order, the employer should apply the new maintenance rate specified in the schedule as from the first pay day following that date. But the employer should not be liable for failing to comply with a current maintenance arrestment within a period of seven days after the date of the service of the arrestment schedule.

(Recommendation 6.32; clauses 82(3), 84 and 95(2).)

Diversion to the Department of Health and Social Security

6.199 We referred above[1] to the practice of the Department of Health and Social Security in arranging the diversion to itself of sums due to maintenance creditors under their decrees as reimbursement for the cost of supplementary benefit paid to them. We noted there that diversion arrangements (which benefit the maintenance creditors) are difficult to accomplish in Scotland at present because they require the debtor to agree to pay the maintenance to the Department instead of to the creditor. If an obligation to pay maintenance were being enforced by a current maintenance arrestment, diversion could be readily accomplished without the consent of the debtor, by the employer paying over the deductions to the Department instead of to the arresting maintenance creditor. Such an arrangement should require the creditor's consent, however, and should lapse on withdrawal of that consent or, since the purpose of diversion is reimbursement of benefit provided, if the creditor ceases to be in receipt of supplementary benefit.

6.200 We **recommend:**

(1) A maintenance creditor in receipt of supplementary benefit and current maintenance under a current maintenance arrestment or a conjoined arrestment order may authorise in writing the Department of Health and Social Security to receive sums payable under the arrestment or order. The Department should intimate the authorisation to the employer or the sheriff clerk as the case may be who should be bound thereafter to pay to the Department the sums due to the maintenance creditor.

(2) The authorisation may be withdrawn by the maintenance creditor and should lapse on the maintenance creditor ceasing to be in receipt of supplementary benefit. The Department should forthwith intimate the withdrawal or lapse of the authorisation to the employer or sheriff clerk.

(Recommendation 6.33; clause 94.)

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[1]Para. 6.141.

Application of certain earnings arrestment recommendations

6.201 Earlier in this Chapter we make recommendations dealing with the mode of service of earnings arrestments,[1] priority among earnings arrestments served postally on the same date,[2] intimation of service of an earnings arrestment on the employer to the debtor,[3] the time within which an employer is required to comply with an earnings arrestment,[4] the sanction against the employer for failure to comply with an earnings arrestment,[5] the form of an earnings arrestment,[6] the employer's fee for operating an earnings arrestment,[7] the mode of payment of sums deducted by virtue of an earnings arrestment,[8] the limitation of claims against the employer arising out of operation of an earnings arrestment,[9] and the prescription of arrestments.[10] We would extend all of these recommendations to current maintenance arrestments.

6.202 We **recommend:**

> Recommendations 12(3), 13, 14, and 17 to 22 should apply to current maintenance arrestments as they apply to earnings arrestments.
> (Recommendation 6.34; clauses 79(6), 86(3), 95(2) to (4), 96(1) and (2) and 97 and Schedule 7, paragraph 2.)

Incoming non-Scottish maintenance orders

Preliminary

6.203 So far we have discussed earnings arrestments and current maintenance arrestments on the footing that the debt sought to be enforced was constituted by a decree from a Scottish court. We now turn to examine the situation where the debt is constituted by a foreign order registered for enforcement in Scotland. We confine our discussion of foreign orders to maintenance orders as the need for special provisions is by and large confined to them.

6.204 We expect that the use of the reformed diligences on non-Scottish orders enforceable in Scotland will not present undue difficulties, but special provisions will be necessary to ensure that the new system of current maintenance arrestments and earnings arrestments will operate satisfactorily in the case of non-Scottish maintenance orders registered in Scotland under the relevant statutory regimes. Five separate categories of such "incoming orders" have to be considered:

(i) maintenance orders of courts in England and Wales and in Northern Ireland registered in the sheriff courts in Scotland under Part II of the Maintenance Orders Act 1950;

(ii) maintenance orders made in certain "reciprocating countries" (mainly in the Commonwealth) being either provisional orders confirmed by

[1]Recommendation 6.18 (para. 6.117).
[2]*Ibid.*
[3]Recommendation 6.19 (para. 6.119).
[4]Recommendation 6.13 (para. 6.97).
[5]Recommendation 6.14 (para. 6.100).
[6]Recommendation 6.20 (para. 6.122).
[7]Recommendation 6.21 (para. 6.125).
[8]Recommendation 6.22 (para. 6.130).
[9]Recommendation 6.12(3) (para. 6.91).
[10]Recommendation 6.17 (para. 6.112).

courts in Scotland or final orders registered in the sheriff courts under Part I of the Maintenance Orders (Reciprocal Enforcement) Act 1972;

(iii) maintenance orders made in the Republic of Ireland and registered for enforcement in Scotland under an Order-in-Council of 1974[1] (which applies Part I of the 1972 Act with modifications);

(iv) maintenance orders made in "Hague Convention countries"[2] and registered for enforcement in Scotland under an Order-in-Council of 1979[3] (which likewise applies Part I of the 1972 Act with modifications); and

(v) maintenance orders made in Member States of the European Communities which will become enforceable in Scotland on registration when the European Judgments Convention[4] and Part I of the Civil Jurisdiction and Judgments Act 1982 come into operation.

Some of these categories overlap in the sense that a foreign creditor may be entitled to use one or other of two (or more) of them.[5] Clearly the solutions adopted must remain within the framework set by the statutory provisions since these have been enacted in pursuance of the international treaty obligations of the United Kingdom, or, in the case of the 1950 Act, are reciprocal with other parts of the United Kingdom.

6.205 It should be noted that authentic instruments and court settlements (such as agreements equivalent to Scottish bonds and agreements registrable for execution) are enforceable in the same manner as court judgments or orders under the European Judgments Convention, Articles 50 and 51, and the Civil Jurisdiction and Judgments Act 1982. Section 13 of the 1982 Act allows modifications to be made to the normal enforcement procedures to accommodate such instruments and settlements. The competent authorities may require therefore to adapt our proposals in their application to enforceable instruments and settlements.

Enforceability by current maintenance arrestment

6.206 The principal constraint on legislative freedom is that a non-Scottish maintenance order in each of the five categories, when registered in Scotland for enforcement, will become enforceable in the same manner as if it were

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[1]Reciprocal Enforcement of Maintenance Orders (Republic of Ireland) Order 1974 (S.I. 1974/2140) made under Part III of the Act of 1972.

[2]Countries which are parties to the Convention on the recognition and enforcement of decisions relating to maintenance obligations concluded at The Hague on 2 October 1973. (The countries in question at present consist of Czechoslovakia, France, Norway, Portugal, Sweden and Switzerland).

[3]Reciprocal Enforcement of Maintenance Orders (Hague Convention Countries) Order 1979 (S.I. 1979/1317).

[4]The Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters signed at Brussels on 27 September 1968, together with the Protocol annexed, and the Accession Convention of 9 October 1978.

[5]E.g. an Irish maintenance order could be enforced under the 1974 Order or the European Judgments Convention, while a French order could be enforced under the Hague Convention Order or the European Judgments Convention: see European Judgments Convention, Arts. 55–59.

an order of the registering Scottish court.[1] At present, the competence of a particular mode of diligence is generally determined by the nature of the property attached but in the case of current maintenance arrestments, the crucial factors are that the debt being enforced must be one for maintenance, or reimbursement of the cost of benefit provided by a public authority, and that the decree is one for periodical payments. These tests should, we think, be applied to incoming foreign maintenance orders; any incoming maintenance order not satisfying these tests (such as an order against a father for payment of the inlying expenses connected with the birth of his illegitimate child) would be enforceable by an arrestment, earnings arrestment or poinding but not by a current maintenance arrestment.

6.207 We **recommend:**

> A non-Scottish maintenance order (including an authentic instrument or court settlement within the meaning of the European Judgments Convention and an order in favour of a public authority for reimbursement of the cost of maintenance provided by it) registered in Scotland for enforcement should be enforceable by current maintenance arrestment only if it provides for periodical payments to be made by the maintenance debtor.
> (Recommendation 6.35; clause 74.)

Need for default

6.208 In the case of a Scottish decree we recommend earlier that a current maintenance arrestment cannot be served unless the debtor has received intimation in prescribed form and remains in default four weeks later (or any time thereafter).[2] Many non-Scottish maintenance orders have considerable arrears accrued by the time they are registered for enforcement in Scotland. In these cases we think it would be unfair to the creditor to give the debtor a further opportunity to clear the arrears before diligence can be done; a current maintenance arrestment should therefore be competent as soon as the order becomes enforceable in Scotland.[3] But where no certificate of arrears is lodged with the incoming maintenance order the intimation and default provisions applicable to non-Scottish decrees should be followed.

6.209 We **recommend:**

> Where a certificate of arrears is produced to the registering court at the time of registration of the incoming maintenance order, it should be competent for the maintenance creditor to serve a current maintenance

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[1]English, Welsh and Northern Irish orders: Act of Sederunt (Maintenance Orders Acts, Rules) 1980 (S.I. 1980/1727) rule 15, Act of Sederunt (Maintenance Orders Acts, Rules) 1980 (S.I. 1980/1732) rule 14; Republic of Ireland orders: Reciprocal Enforcement of Maintenance Orders (Republic of Ireland) Order 1974, Sched. 2, para. 8(1); Hague Convention country orders: Reciprocal Enforcement of Maintenance Orders (Hague Convention Countries) Order 1979, Sched. 3, para. 8(1); European Community orders: Civil Jurisdiction and Judgments Act 1982, s. 5(4); Reciprocating country orders: Maintenance Orders (Reciprocal Enforcement) Act 1972, s. 8(1).

[2]Recommendation 6.25 (para. 6.155).

[3]Some orders are enforceable on registration, but for orders registered under the Civil Jurisdiction and Judgments Act 1982 (European Judgments Convention, Arts. 36 and 39), and the Reciprocal Enforcement of Maintenance Orders (Republic of Ireland) Order 1974 (Sched. 2, para. 8(1A)), a period of one month after intimation of registration to the debtor must elapse during which only protective measures may be taken.

arrestment without the need to satisfy the requirements of notice and default proposed in Recommendation 6.25 above.
(Recommendation 6.36; clause 82(2).)

Payment to creditor
6.210 Where a non-Scottish decree is being enforced in Scotland by a current maintenance arrestment or an earnings arrestment the employer should not be required to remit sums to persons outwith the United Kingdom. Usually the applicant would have a solicitor in Scotland who instructed the diligence and to whom payment could be made, especially since almost all incoming orders will attract legal aid. In the unusual case where a foreign creditor acts without legal assistance, that creditor should be required to nominate a person to whom payment should be made and the name and address of the person so nominated should be stated on the schedule of arrestment served on the employer.

6.211 We **recommend:**

Provision should be made by act of sederunt that where a non-Scottish order is enforced by a current maintenance arrestment or an earnings arrestment, the schedule of arrestment served on the employer should specify the name and address of a person within the United Kingdom to whom deductions are to be remitted.
(Recommendation 6.37.)

Variation by subsequent orders
6.212 Where a Scottish maintenance order is varied or superseded by a new order changing the rate of maintenance, we have recommended[1] that the court in Scotland should have power to postpone the date of coming into operation of the new order. This postponement enables the creditor to intimate the cessation of the old rate of deductions under the original order and at the same time to serve a new current maintenance arrestment schedule specifying the new rate of deductions.

6.213 While the power of postponement can and should be extended to Scottish courts in granting a variation of a foreign maintenance order registered in Scotland, it cannot be extended to foreign courts unless the various international conventions are re-negotiated. As regards an order granted by a non-Scottish court varying the rate of maintenance due under an order registered for enforcement in Scotland, it has to be accepted that the current maintenance arrestment being operated in Scotland will not always collect the maintenance due by the debtor, because of the inevitable time lag between the date when the variation takes effect as between debtor and creditor and the date when the employer starts to deduct from the debtor's earnings at the varied rate. Given prompt registration of the variation order for enforcement in Scotland, the difference between maintenance due and maintenance collected is likely to be small and any claim by the debtor for return of overpayments would usually be met by a counter-claim for unpaid arrears of maintenance. The employer, however, should be entitled (but not bound) to

[1]Recommendation 6.32 (para. 6.198).

carry on deducting at the existing rate until notified in prescribed form of the existing current maintenance arrestment ceasing to have effect by reason of the variation.

6.214 We **recommend:**

Where a Scottish court grants an order varying a non-Scottish maintenance order registered for enforcement and the order is being enforced by a current maintenance arrestment, the court should have power to postpone the coming into operation of the variation to allow the change from the old rate to the new rate to be made without a break in the continuity of deductions.
(Recommendation 6.38; clause 84.)

Cancellation of registration

6.215 The prescribed officer of the Scottish court in which a non-Scottish maintenance order is registered for enforcement may cancel the registration if of the opinion that the debtor has ceased to reside in Scotland.[1] Where the order was being enforced by a current maintenance arrestment cancellation of the registration would render future payments under the order unenforceable by diligence; nevertheless the employers are entitled to continue making deductions until this fact is intimated to them. The foreign creditor should we think be bound to notify the employer as soon as reasonably practicable, and on failure to do so, should be liable to the same sanctions as a Scottish creditor who fails to intimate (repayment of the amounts received to the debtor together with a penalty imposed at the discretion of the court). As an additional safeguard to the debtor the prescribed officer cancelling the order should be required (so far as reasonably practicable) to notify the employer of the cancellation. Where the employer does not receive notification from either of these sources, the debtor would be entitled to apply to the court for recall of the arrestment on the ground that it had ceased to have effect due to the cancellation of the registration of the maintenance order.

6.216 The procedure would be slightly different if the cancelled order was being enforced along with other debts in a conjoined arrestment order. In this case notification should be made to the sheriff clerk of the court operating the order who would arrange for the conjoined order to be varied by that court and would then serve the variation order on the employer.

6.217 We **recommend:**

(1) It should be provided by act of sederunt that where the registration of a non-Scottish maintenance order registered for enforcement in Scotland is cancelled because the debtor has ceased to reside in Scotland, the prescribed officer of the court in which the order is registered should so far as reasonably practicable intimate the cancellation in prescribed form:

(*a*) if the cancelled order was being enforced by a current maintenance arrestment, to the employer operating that arrestment; or

[1]See Maintenance Orders (Reciprocal Enforcement) Act 1972, s. 10(2), for example.

(b) if the cancelled order was being enforced by a conjoined arrestment order, to the sheriff clerk of the court dealing with the conjoined arrestment order.

(2) The creditor in the maintenance order whose registration was cancelled should be bound as soon as reasonably practicable to intimate in prescribed form the cancellation to the employer or the sheriff clerk as the case may be, and in the case of failure Recommendation 6.31(5) (imposition of a discretionary penalty) should apply.
(Recommendation 6.39; clause 83(6) and (8).)

Section E. Conjoined arrestment orders

The problem of competing arrestments

6.218 It is important to find a fair and practicable solution to the problem of competition between two or more creditors who use or seek to use arrestments simultaneously against the same debtor's pay. In the absence of such a solution, later creditors would be "shut out" by the first arresting creditor for a considerable period and so might resort to poindings or extra-judicial methods of collecting their debts. Indeed, the McKechnie Committee recommended[1] against the introduction of a continuous diligence against earnings mainly because a creditor's fear of being shut out would, in their opinion, have encouraged a race of diligences.

6.219 At present, when two or more creditors serve arrestments on the debtor's employer in the same pay period, priority is given to the creditor whose schedule is served first.[2] The later arrestment will only attach the balance (if any) of attachable wages left after the first arrestment. Where the first arrestment is based on an ordinary debt and the second is based on aliment, rates or taxes, the first arrestment will attach the surplus wages above the statutory subsistence exemption (£4 per week plus half the remaining wages) and the later arrestment will attach the balance since the subsistence exemption does not apply to arrestments to enforce alimentary decrees, rates or taxes.[3]

6.220 The problem of competition under the present law is not serious,[4] and a creditor who fails to gain priority in a particular pay period has the opportunity to serve first in subsequent pay periods. However, if (as we recommend) earnings arrestments are to have effect until the debts are paid[5] and current maintenance arrestments are to endure until the maintenance obligations cease,[6] there is an increased risk that further arrestments would be served while an existing arrestment subsisted. We consider in this Section the ways in which more than one creditor could share in the debtor's earnings, dealing first with the case of competing earnings arrestments before turning to current maintenance arrestments and "mixed" cases.

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[1] Paras. 54–6.

[2] Graham Stewart, p. 137, except in the case of Exchequer arrestments; Exchequer Court (Scotland) Act 1856, s. 30.

[3] Wages Arrestment Limitation (Scotland) Act 1870, s. 4.

[4] The C.R.U. Arrestment Survey, para. 29 discloses that only nine firms (out of 28 interviewed) had ever experienced the situation where two creditors attempted to arrest a particular employee's pay in the same week.

[5] Recommendation 6.8 (para. 6.66).

[6] Recommendation 6.31 (para. 6.189).

Second arrestment to be ineffectual

6.221 In Consultative Memorandum No. 49 we considered[1] whether an employer should be required to give effect to a later earnings arrestment served during the subsistence of a prior earnings arrestment by sharing the arrested wages between the two arresting creditors. We rejected this on the ground that it would impose too heavy a burden on employers. Almost all of those who commented agreed with this view.

6.222 We **recommend:**

> Employers should not be required to operate more than one earnings arrestment against a debtor's pay at any one time and accordingly it should be provided by statute that an earnings arrestment served during the currency of another earnings arrestment against the same debtor's pay should be ineffectual.
> (Recommendation 6.40; clause 86(1).)

Fair sharing amongst creditors

6.223 We think that some provision should be made for fair sharing of the proceeds of an earnings arrestment in those cases where a creditor shut out by an earlier earnings arrestment does not wish to wait until the expiry of that arrestment. In Consultative Memorandum No. 49 we sought views on several different methods of sharing.

6.224 One of these methods was to apply section 10 of the Bankruptcy (Scotland) Act 1913[2] to earnings arrestments. This section provides for the equalisation of poindings and arrestments, and claims by creditors holding liquid documents of debt, used or made within a period of 60 days before and four months after notour bankruptcy. While this provision is sometimes used in the case of arrestments of bank accounts, it is rarely, if ever, used in relation to arrestments of pay. It is an already complicated provision and applying it to earnings arrestments would make it even more complicated. We rejected this solution and indeed proposed[3] that it should be made clear that this provision does not apply for the purpose of equalisation of earnings arrestments with other diligences on notour bankruptcy.[4] All those consulted agreed with this. Equalisation would be unduly troublesome to the arresting creditor especially if more than one later creditor claimed, and would impose too heavy a burden on some categories of creditors, such as maintenance creditors.

6.225 Another option considered in Consultative Memorandum No. 49[5] was that a later creditor, whose earnings arrestment had proved ineffective by reason of a prior subsisting earnings arrestment, should be entitled to claim a share in the sums arrested after notification of the claim to the arresting creditor. This option would be simpler than equalisation under the bankruptcy legislation but it suffers from similar defects—the arresting creditor would act as an unpaid and perhaps inefficient collector on behalf of the claiming

[1]Para. 2.114.
[2]Sched. 7, para. 10 of the Bankruptcy (Scotland) Bill 1984 replaces section 10 of the 1913 Act.
[3]Proposition 21(3) (para. 2.125).
[4]Or apparent insolvency, Bankruptcy (Scotland) Bill 1984, clause 7.
[5]Paras. 2.117 and 2.118 and Proposition 21(2)(*a*) (para. 2.125).

creditors—and it found little favour on consultation. We have therefore rejected this option.

6.226 Since neither the employer nor the first arresting creditor should have to assume the burden of disbursing the proceeds of an earnings arrestment to other creditors, the alternative is to give that function to the court. We suggested in Consultative Memorandum No. 49[1] that the court on application by a later creditor should make an order akin to an attachment of earnings order available in England and Wales.[2] While this suggestion was generally approved on consultation, we now recommend a simpler solution. In making an attachment of earnings order the court was to have inquired into the debtor's financial circumstances and fixed an appropriate amount for the employer to deduct from the debtor's earnings each pay day. But it seems unnecessary to require a means test and a discretionary deduction level merely because more than one creditor seeks to arrest the same debtor's pay. We now envisage that a creditor "shut out" by a prior earnings arrestment should be entitled to apply to the court for a conjoined arrestment order which would require the employer to make exactly the same deductions as for an earnings arrestment. The main difference between a conjoined arrestment order and an earnings arrestment from the employer's point of view would be that the employer sends the deductions to the court for distribution amongst the conjoined creditors rather than to an arresting creditor. Making a conjoined arrestment order would be an administrative act and such an order would be very much cheaper and quicker to obtain than an attachment of earnings order.

6.227 The later creditor should be able to obtain information from the employer as to when the subsisting earnings arrestment expires. Armed with this information, the creditor could then decide whether to wait for the earnings arrestment to expire or whether to apply to the court for a conjoined arrestment order. This and other details of conjoined arrestment orders are discussed in the following paragraphs.

6.228 We **recommend:**

(1) A creditor whose earnings arrestment is, or would be, ineffectual by reason of an existing earnings arrestment by another creditor should be entitled to apply to the court for an order (called a "conjoined arrestment order") requiring the employer to pay the sums deducted on each pay day into court for disbursement to the original creditor and the applicant creditor.

(2) Earnings arrestments should be expressly excluded from provisions in the bankruptcy legislation equalising poindings and arrestments executed within certain periods before or after notour bankruptcy or apparent insolvency.
(Recommendation 6.41; clauses 87(1) and 93 and Schedule 7, paragraph 38.)

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[1]Proposition 21(2)(*b*) (para. 2.125).
[2]See paras. 6.22 and 6.23 above for further details of such orders.

Orders conjoining earnings arrestments

Obtaining an order

6.229 A later creditor whose earnings arrestment has been rendered ineffectual by reason of an existing earnings arrestment should be able to discover sufficient information about the existing arrestment to enable the court to make a conjoined arrestment order. This information consists of or includes the name and address of the prior creditor, the sum due to that creditor (at the date of service of the prior creditor's schedule of earnings arrestment[1]) and the date on which the schedule was served. Under the present law an arrestee has no legal duty to assist an arresting creditor by disclosing the existence and details of a prior arrestment,[2] but we think that an employer should be under such a duty where a second earnings arrestment is served during the currency of an existing arrestment against the same debtor's pay. To assist the employer, the schedule of earnings arrestment might be accompanied by a detachable or separate form which the employer could complete and return to the arresting creditor.

6.230 If the employer fails to comply with this duty we think the later creditor should be entitled to apply to the sheriff court for an order requiring the employer to give the necessary information. The employer would be liable for the expenses of such an application. In the unlikely event of a refusal to comply with the order the employer would be liable to proceedings for contempt of court.

6.231 Relying on the information supplied by the employer, the later creditor might either wait for the existing earnings arrestment to expire and then serve an earnings arrestment, or apply to the court for a conjoined arrestment order. The application would contain particulars of both creditors and the amount of their debts, and particulars of the debtor and the employer. Under our recommendations the amount recoverable by an earnings arrestment consists of the debt, interest accrued to the date of service of the schedule[3] and the expenses of service of the prior charge and schedule,[4] provided that these sums are specified in the schedule. We would extend this to conjoined arrestment orders so that the amount recoverable under an order by a creditor who applies for it would be the debt, interest accrued to date of application and the expenses of serving a prior charge and applying for the order,[5] but only to the extent that these sums were specified in the application.

6.232 So far it has been assumed that a later creditor must first have served an ineffectual earnings arrestment before becoming entitled to apply for a conjoined arrestment order. We think it would be an unnecessary formality for a creditor, who can obtain by other means the information necessary for an application, to be required to serve an earnings arrestment which obviously will be ineffectual. Provided the later creditor is in a position to arrest the

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[1]See para. 6.242 below.

[2]The absence of such a duty of disclosure is consonant with sheriff court authority to the effect that an arrestee has no duty to assist an arresting creditor by disclosing whether or not funds belonging to the debtor have been arrested. *Veitch* v. *Finlay and Wilson* (1894) 10 Sh.Ct.Reps. 13.

[3]Recommendation 6.6 (para. 6.54).

[4]Recommendations 9.7(1) (para. 9.36) and 9.9(1) (para. 9.58).

[5]See Recommendations 9.8(4) (para. 9.44) and 9.9(1) (para. 9.58).

debtor's earnings having served a prior charge and can obtain the necessary information, an application for a conjoined arrestment order should be competent. However, the employer should only be under a duty of supplying information to a later creditor who actually serves an earnings arrestment schedule.

6.233 The fact that the large majority of debt decrees emanate from the sheriff court suggests that that court, rather than the Court of Session, is the appropriate forum for conjoined arrestment order applications. Moreover, the sheriff courts are located throughout Scotland making access for the parties and their agents cheaper and easier and making it easier also for court officials to give informal advice and assistance.

6.234 Providing the later creditor's applications for a conjoined arrestment order was competent and complete the making of the order would be in the nature of an administrative act. We therefore suggest that it should be made by the sheriff clerk rather than the sheriff unless the sheriff clerk decides otherwise or an interested party applies for the application to be called before the sheriff.[1] We do not think the application need be intimated to the first arresting creditor, the debtor and the employer. In the rare case where there is a dispute about the applicant creditor's debt it could be dealt with by recall or variation of the conjoined arrestment order after it has been made, but to require intimation of every application would be to complicate the procedure in order to deal with a very small number of problem cases. Once the conjoined arrestment order was made the sheriff clerk would serve copies on the employer, the creditors concerned and the debtor.[2]

6.235 A conjoined arrestment order should have the same effect as an earnings arrestment in rendering ineffectual a later earnings arrestment served by a different creditor on the employer in respect of the same debtor's earnings.[3] However, later creditors whose earnings arrestments were thereby rendered ineffectual should be allowed to share in the debtor's earnings by having their debts included in the conjoined arrestment order. We have considered whether there should be any restriction on the number of creditors entitled to participate in a conjoined arrestment order. We have concluded, however, that it would be difficult to justify an arbitrary fixed limit on the number of creditors.

6.236 We **recommend:**

(1) Where during the subsistence of an earnings arrestment a later earnings arrestment is served, the employer should be under a duty to disclose, as soon as reasonably practicable, to the later creditors:

(*a*) the name and address of the first arresting creditor;

(*b*) the total amount due to the first arresting creditor as at the date of service of that creditor's earnings arrestment; and

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[1]A similar provision is made for sheriff court summary causes; Summary Cause Rules, rule 18(1) and (2).

[2]By registered or recorded delivery letter, or by hand service by officer of court if for any reason the letter could not be delivered.

[3]See Recommendation 6.40 (para. 6.222).

(*c*) the date of service and place of execution of the first creditor's earnings arrestment.

(2) A creditor should have a title to apply for a conjoined arrestment order if entitled to serve an earnings arrestment on the debtor's employer, whether or not the creditor has served an earnings arrestment which is ineffectual because of a subsisting earnings arrestment.

(3) Power to make a conjoined arrestment order should be conferred on the sheriff court rather than the Court of Session.

(4) The amount recoverable under a conjoined arrestment order by the later creditor who applies for an order should be the principal sum and judicial expenses due under the decree, interest accrued to the date of application, the expenses of the prior charge and the expenses of the application for the order but only if, and to the extent that, the sums are specified in the application.

(5) It should be provided by act of sederunt that the creditor's application should contain sufficient information to enable the court to make an order without a hearing including:

(*a*) the applicant's name, address and amount of the debt due at the date of application;

(*b*) the first arresting creditor's name and address, the sum due to that creditor at the date of service of that creditor's earnings arrestment and the place of execution of that earnings arrestment; and

(*c*) the name and address of the debtor and of the employer.

(6) It should be provided by act of sederunt that a conjoined arrestment order may, in the absence of objections or special circumstances, be made by a sheriff clerk instead of a sheriff.

(7) The sheriff clerk should serve in the prescribed manner a copy of the conjoined arrestment order on the employer, the debtor and the creditors.

(8) An earnings arrestment served during the currency of a conjoined arrestment order affecting the same debtor's earnings should be ineffectual. The employer should be under a duty to inform the arresting creditor which court granted the order. A later creditor should be entitled to apply to that court to participate in the existing conjoined arrestment order.

(9) If the employer fails without reasonable excuse to discharge the duty in paragraph (1) or (8) above, the creditor should be entitled to apply to the sheriff court having jurisdiction over the employer for an order requiring the employer to disclose the required information.

(Recommendation 6.42; clauses 86(4) and (5), 87(1), (2), (6), (7), (9) and (11) and 88(1), (2), (4) and (5).)

Operation by employer

6.237 The conjoined arrestment order would supersede the existing earnings arrestment in favour of the first arresting creditor and would require the employer to pay future sums deducted from the debtor's pay to the court. In our discussion of earnings arrestments we saw the utility of providing a short

period after service before the employer was required to give effect to it,[1] in order to give the employer time to make the necessary arrangements. We think a similar arrangement should be made to facilitate the transition between an earnings arrestment and a conjoined arrestment order.

6.238 The amounts deducted from the debtor's earnings under a conjoined arrestment order would be the same as under the earnings arrestment which it supersedes. From the employer's standpoint, the main change would be that the sums deducted would be sent to the court instead of to the original arresting creditor.

6.239 A conjoined arrestment order like an earnings arrestment would be a completed diligence requiring the employer to deduct the arrested sums on each pay day and to remit them forthwith to the court. The appropriate sanction against an employer who wilfully fails to give effect to a conjoined arrestment order should, we suggest, (in line with our recommendation for earnings arrestments) be a civil sanction—making the employer liable to the sheriff clerk (as representing the creditors) for any deductions that would have been received but for the default. But since a court order is involved we consider that a flagrant breach in open defiance of the court should also be liable to be punished as a contempt of court.[2]

6.240 We recommended earlier[3] that an employer should be entitled to a fee of 50p, or such other sum as may be prescribed, every time a deduction is made from the debtor's pay under an earnings arrestment. We think a similar fee should be allowed for deductions in pursuance of a conjoined arrestment order.

6.241 We **recommend:**

(1) An employer should be bound to give effect to a conjoined arrestment order on any pay day occurring seven days or more after the date of service of the order.

(2) An employer should be entitled, but not bound, to give effect to a conjoined arrestment order on any pay day occurring within seven days after the date of service of the order.

(3) The conjoined arrestment order should supersede the subsisting earnings arrestment as soon as the employer gives effect to the order. The conjoined arrestment order should direct the employer to deduct from the debtor's earnings on each pay day until further order, a sum calculated in accordance with the rules applicable to an earnings arrestment, and to remit such deductions forthwith to the court.

(4) Recommendation 6.22 (payment by employer by cheque or otherwise) should apply to conjoined arrestment orders as it applies to earnings arrestments.

(5) The employer should be entitled to deduct a fee of 50p (or such other sum as may be prescribed) on each occasion on which a deduction is

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[1]Paras. 6.92 to 6.97.
[2]Exceptionally breach of arrestment may be treated as contempt of court, Graham Stewart, pp. 222–3.
[3]Recommendation 6.21 (para. 6.125) above.

made from the debtor's pay under a conjoined arrestment order. The fee should be deducted from the exempt earnings payable to the debtor and the employer should give the debtor a statement of the fee deducted along with the statement showing the deduction made under the conjoined arrestment order.

(6) An employer who fails to comply with a conjoined arrestment order should be liable to pay the sheriff clerk the sums that would have been received if the order had been complied with, without a right of recovery from the debtor. In addition, a failure which is wilful and without reasonable excuse should be capable of being treated as a contempt of court.

(Recommendation 6.43; clauses 87(1), (3) and (13), 89(2) and (7), 95(2) and 97.)

The court's role

6.242 The court's primary role in a conjoined arrestment order is to ingather payments from the debtor's employer and to account to the participating creditors according to their ranking. As regards ranking, no priority should be given to unpaid aliment, rates or taxes. We recommended earlier that such debts should have no privileges in an earnings arrestment;[1] it would be inconsistent therefore to give them a privileged status in conjoined arrestment orders. We propose that the creditors in a conjoined arrestment order should be paid rateably in proportion to the size of the debts due to each. For this purpose, however, the debt of the original arresting creditor should be taken to be the sum due as at the date of service of that creditor's earnings arrestment schedule and specified in that schedule, rather than the balance outstanding at the date of service of the later earnings arrestment schedule or the date of the application for the order or of the order itself. Use of this figure rather than the balance due at a later date would give the original arresting creditor a small measure of priority over the later creditor since the original creditor's share of the sums received by the court would be calculated by reference to a larger sum. We think it only fair and reasonable that the original arresting creditor should receive this small measure of priority; otherwise he or she might be required to accept very small amounts over a very long period while one or more later creditors received the lion's share. Furthermore, use of the amount of the original debt avoids the employer having to work out the balance due at the date of service of a later creditor's schedule of arrestment. The debt of the later creditor should be taken to be the sums (debt, interest and expenses) due and specified in the application for the conjoined arrestment order. If other creditors subsequently applied to be conjoined, their debts should likewise be taken to be the sums specified in their respective applications. The above rule would apply for the purpose of ranking only: a conjoined arrestment order should continue until all the debts due to the participating creditors have been satisfied.

6.243 The frequency of distribution by the court to the creditors of the sums received under a conjoined arrestment order should be as prescribed, payments every month for example. With each payment, the court should send to each

[1]Recommendation 6.11 (para. 6.82) above.

of the creditors details of the total amounts received from the employer during the accounting period together with a note of how these amounts have been divided among the creditors. When a creditor's debt is satisfied or the conjoined arrestment order itself terminates, the court should send a complete account of its intromissions to that creditor (or to all creditors) and a copy to the debtor.

6.244 We **recommend;**

(1) The court should apportion between the creditors in a conjoined arrestment order rateably according to their debts, all sums received from the employer.

(2) For the purpose of calculating the shares due to the creditors, the debt of the original arresting creditor should be taken to be the sums due at the date of service on the employer of that creditor's earnings arrestment schedule and specified in that schedule, and the debt of the creditor who applied for the conjoined arrestment order and any subsequent conjoined creditor should be taken to be the sums (debt, interest and expenses) due and specified in their application to the court.

(3) There should be no preference for arrears of aliment, rates or taxes in a conjoined arrestment order.

(4) Provision should be made by act of sederunt regulating the disbursement by the court to the conjoined creditors of their share of the collected sums, including such matters as the frequency of payment, notification of the details of the ranking of the creditors, and an account of the court's intromissions on termination of the order.
(Recommendation 6.44; clause 90 and Schedule 4.)

Competitions involving current maintenance arrestments

6.245 We recommend above[1] that a later creditor who serves an earnings arrestment during the subsistence of an existing earnings arrestment should be entitled to apply to the court for a conjoined arrestment order, in which subsequent creditors could also be conjoined. We now turn to consider situations involving current maintenance arrestments.

One current maintenance arrestment and one earnings arrestment

6.246 Under the present law, priority between arrestments is by priority of the times of laying the arrestments, but where the first arrestment is an ordinary debt and the second an arrestment for aliment, the first arrestment will attach only the surplus earnings above the statutory subsistence exemption while the later arrestments for aliment will attach the whole remaining earnings, since there is no exemption from arrestment when the debt is for aliment.[2] If the present system is replaced by current maintenance arrestments and earnings arrestments, we do not think that it would be reasonable to allow one arrestment to "shut out" or supersede the other, given the length of time each may subsist. In a competition between a current maintenance

[1]Recommendation 6.41 (para. 6.228).
[2]See para. 6.219.

arrestment and an ordinary earnings arrestment, it should be possible for both arrestments to be laid and to have effect against the same earnings, but the remainder of the debtor's earnings should not be reduced below the fixed sum threshold of £35 per week (or £5 per day) which we recommend for both types of arrestment. This would be fairer to the debtor than the present law on arrestment for maintenance under which all the earnings are arrestable.

6.247 The question of priority would then become: which arrestment should abate first if there were insufficient earnings above the fixed sum threshold to satisfy both? The following table shows how a solution giving priority to the ordinary creditor would operate in practice assuming a maintenance award of £20 per week and assuming also that the deductions under the earnings arrestment are as set out in Table A of Schedule 3 to the draft Bill.

Debtor's net weekly earnings	Ordinary creditor receives	Maintenance creditor receives
£100	£13	£20
£80	£9	£20
£60	£5	£20
£50	£3	£12*
£40	£1	£4*

* Affected by £35 threshold.

If the rule on priorities were reversed so that the earnings arrestment abated first, then the result is illustrated by the following table.

Debtor's net weekly earnings	Ordinary creditor receives	Maintenance creditor receives
£100	£13	£20
£80	£9	£20
£60	£5	£20
£50	Nil*	£15*
£40	Nil*	£5*

* Affected by £35 threshold.

6.248 We recognise that in England and Wales, attachment of earnings orders securing maintenance have priority over other attachment of earnings orders,[1] and that a similar rule applies to enforcement against earnings in some other legal systems. We do not think, however, that such a rule should be adopted in Scotland. First, the rule in bankruptcy sequestrations is that a maintenance creditor cannot rank for current maintenance. The reason is that maintenance is due only when the debtor has surplus income and an insolvent debtor cannot be said to have a surplus. The general rule is therefore that a maintenance creditor must follow the maintenance debtor's fortunes.[2] We acknowledge that in making an order against the after-acquired earnings of

[1]Attachment of Earnings Act 1971, Sched. 3, para. 8.
[2]*Symington* v. *Symington* (1875) 3 R. 205.

bankrupts, the court will allow them to retain some earnings as aliment for their family living with them, lest a priority for creditors induce them to leave their jobs. But we do not think that this reasoning is applicable where (as is postulated here) the maintenance creditor is living separate and apart from the maintenance debtor. Second, the debtor's dependants would not be given priority if they were living in family with the debtor and being alimented in kind rather than in cash: it seems difficult to justify giving separated dependants who are alimented in cash a better right. Third, in most cases of competing arrestments, the debtor will be insolvent, and the maintenance decree should be varied downward or recalled. The ordinary creditor has no title to apply for this to be done and it seems unfair that the creditor should suffer loss simply because the maintenance debtor fails to make such an application. Fourth, in many cases the maintenance creditor can rely on supplementary benefit for support if maintenance fails; an ordinary creditor cannot make good a bad debt in this way. For these reasons, we think that an earnings arrestment securing an ordinary debt should have priority over a current maintenance arrestment. We concede that in some cases, the debtor might obtain credit unwisely or irresponsibly in the knowledge that, in a competition between creditors, the ordinary creditors will have priority, but this is an inescapable consequence of the long-standing general rule, which is generally thought to be sound, that a maintenance creditor must follow the maintenance debtor's fortunes.

6.249 We **recommend:**

> It should be competent to lay both a current maintenance arrestment and an earnings arrestment against the same earnings and if, in these circumstances, there is only one arrestment of each type, a conjoined arrestment order should be incompetent. The employer should operate both arrestments simultaneously and if there were insufficient earnings above the fixed sum threshold to satisfy both arrestments, the employer should give priority to the earnings arrestment.
> (Recommendation 6.45; clauses 85 and 87(4).)

Two or more current maintenance arrestments

6.250 Cases may arise occasionally of competitions between two or more current maintenance arrestments. For example, a man may owe aliment to his separated wife, periodical allowance to a former wife by a previous marriage as well as aliment for children by both marriages. In such cases we think that the creditors concerned should share in deductions made from the debtor's earnings by means of a conjoined arrestment order in the same way as ordinary creditors. Thus a current maintenance arrestment served during the currency of another current maintenance arrestment should be ineffectual,[1] but the second creditor should be entitled to apply to the court for a conjoined arrestment order, and current maintenance arrestments should be expressly excluded from the ambit of equalisation provisions in bankruptcy legislation.[2] It would be undesirable on cost and manpower grounds if a maintenance creditor could enforce, by means of a conjoined arrestment order, two or more maintenance obligations which he or she could enforce by way of a

[1]Recommendation 6.40 (para. 6.222).
[2]Recommendation 6.41 (para. 6.228).

current maintenance arrestment specifying the total daily rate of maintenance payable in terms of the obligations, and we recommend a rule prohibiting this.

6.251 The procedure we recommend for obtaining a conjoined arrestment order where the arrestments in question are earnings arrestments should also be used where the arrestments are current maintenance arrestments.[1] The conjoined arrestment order for the current maintenance arrestments would, like an earnings arrestment conjoined order, on being served on the employer, supersede the current maintenance arrestment which was being operated. The conjoined order would specify an aggregate daily rate being the total of the daily rates of the maintenance obligations the order enforces. The employer would operate the order in the same way as a current maintenance arrestment. Thus each pay day the employer would deduct a sum being the product of the aggregate daily rate and the number of days since the last pay day. But if there were insufficient net earnings above the £5 per day threshold to pay this sum in full, whatever net earnings there were in excess of the threshold would be remitted to the court for distribution among the maintenance creditors. We think that in this case the maintenance due to each maintenance creditor should abate rateably in proportion to the daily rates of current maintenance payable to them respectively. This would be a fairer solution than giving priority according to the dates of the maintenance decrees or the dates of service of the current maintenance arrestments.

Example 1

A man normally earns £100 per week net and is due to pay maintenance of £30 a week to his ex-wife and children and £10 per week to his present wife.

The employer every pay day deducts £40 and sends it to the court. The court pays £30 to the ex-wife and £10 to the present wife.

Example 2

The same man earns £59 net one week. The employer that week deducts £24 (£59–£35) and sends it to the court. The court pays £18 (three-quarters of £24) to the ex-wife and £6 (one-quarter of £24) to the present wife.

6.252 We **recommend:**

(1) A second current maintenance arrestment served during the currency of an existing current maintenance arrestment should be ineffectual, and current maintenance arrestments should be expressly excluded from provisions in the bankruptcy legislation equalising poindings and arrestments executed within certain periods before or after notour bankruptcy or apparent insolvency. A creditor whose current maintenance arrestment is or would be ineffectual by reason of an existing current maintenance arrestment or conjoined arrestment order should be entitled to apply to the court for a conjoined arrestment order or to be included in the existing order, and the procedure in Recommendation 6.42 above should apply.

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[1]Recommendation 6.42 (para. 6.236).

(2) The conjoined arrestment order should require the employer to deduct and pay to the court the maintenance at the specified rate (being the aggregate of the daily rates due to the original creditors) so far as there were net earnings above the fixed sum threshold of £5 per day. The court would disburse the sums received to the maintenance creditors. In the event of there being insufficient net earnings to satisfy both maintenance creditors, the court would divide the amount deducted in proportion to the daily rates of current maintenance payable to each.

(3) It should be incompetent for a maintenance creditor to enforce by way of a conjoined arrestment order two or more maintenance obligations which he or she could enforce by a single current maintenance arrestment against the debtor's earnings.
(Recommendation 6.46; clauses 86(2), (4) and (5), 87, 88, 89(3), 90 and 93 and Schedules 4 and 7, paragraph 38.)

Three or more arrestments of different types
6.253 Where an ordinary creditor and a maintenance creditor both seek to attach the same earnings of their debtor, the employer is to be required to give effect to both the earnings arrestment and the current maintenance arrestment simultaneously, and accordingly a conjoined arrestment order would be incompetent.[1] Where this situation exists and yet another creditor, whether an ordinary creditor or a maintenance creditor, also seeks to attach the debtor's earnings we think that a conjoined arrestment order should be made. A "mixed three creditor" conjoined order would also arise by addition of another creditor of a different type to an existing order conjoining either two ordinary creditors or two maintenance creditors. The ranking of the three creditors within such a conjoined order would be as follows:

(*a*) where there were two ordinary creditors and one maintenance creditor, the two ordinary creditors would share the amount that would have been deducted by an earnings arrestment rateably according to the value of their debts. The maintenance creditor would receive the current maintenance due unless the debtor's net earnings were insufficient to allow this, in which case the ordinary creditors would receive priority.

(*b*) where there were two maintenance creditors and one ordinary creditor the ordinary creditor would have priority and receive the full amount that would be deducted by an earnings arrestment. The two maintenance creditors would receive their current maintenance in full, but in the event of insufficient net income their claims would abate rateably in proportion to the amounts of current maintenance payable to each of them respectively.

The following examples may help to demonstrate the operation of these rules. The deductions for the ordinary creditors are in accordance with Table A of Schedule 3 to the draft Bill.

Example 1
The debtor earns £100 per week net. He owes £100 to one creditor and £200 to another creditor while he is due to pay his ex-wife £20 per week.

[1]Recommendation 6.45 (para. 6.249).

The employer remits each week a total of £33 to the court, made up of £13 for the ordinary creditors and £20 for the maintenance creditor. She receives her maintenance in full, the creditor owed £100 gets one third of £13 per week, while the other creditor (owed £200) gets two-thirds of £13 per week.

Example 2

The debtor earns £50 per week net. He owes £100 to a creditor and is due to pay £10 per week to his ex-wife and £10 per week to his present wife. The employer remits £15 per week to the court calculated as follows. He first deducts £3 in respect of the ordinary creditor's debt leaving £47 of net earnings. He then deducts £12 leaving the debtor with £35—the weekly threshold figure. The two maintenance creditors abate equally and so share the £12, getting £6 per week each.

6.254 More complex "mixed" orders can be envisaged involving four or more creditors. The ordinary creditors would share rateably in the amount that would have been deducted by an earnings arrestment, and the maintenance creditors take their maintenance out of any balance above the £5 per day threshold, abating rateably if there were insufficient sums above this threshold.

6.255 We **recommend:**

In a conjoined arrestment order with three or more creditors and involving both ordinary creditors and maintenance creditors, the sum that would be deducted under an earnings arrestment should be paid to the ordinary creditor, or if more than one to the ordinary creditors as a class sharing rateably according to the amount of their debts. The maintenance creditor or creditors should receive their maintenance out of any balance above the fixed sum threshold, abating rateably between themselves according to the daily rates of current maintenance payable to each if there is more than one maintenance creditor and insufficient earnings to satisfy all.
(Recommendation 6.47; clauses 89(4), 90 and Schedule 4.)

Definition of maintenance creditor

6.256 It is necessary to make clear what is meant by "a maintenance creditor" for two purposes, namely (i) the proposed rule that it should be incompetent to enforce by way of a conjoined arrestment order two or more maintenance obligations due to the same creditor if the obligations could be enforced by a current maintenance arrestment,[1] and (ii) the proposed rule that where two or more different maintenance creditors seek to use a current maintenance arrestment against the same maintenance debtor's earnings, the situation should be resolved by a conjoined arrestment order.[2] One option would be that, for these purposes the person for whose support the maintenance was payable should be treated as the maintenance creditor. This, however, would mean that conjoined arrestment orders would be needed following the many divorce decrees in which there were awards of aliment to two or more children, or periodical allowance to the divorced spouse and aliment to one or more children, with the result that collection of most maintenance awards would

[1]Recommendation 6.46(3) (para. 6.252).
[2]Recommendation 6.46(1) (para. 6.252).

be undertaken by the courts. This would be undesireable, if only on manpower and cost grounds.

6.257 Another option, which we prefer, is to treat the payee, for this purpose, as the creditor whether payment is received on his or her own behalf or in a fiduciary capacity, or as tutor or curator for the children,[1] and whether the various maintenance obligations are contained in a single decree or in separate decrees. This, we think, is a practical rule which could be easily operated. In a common case where a divorce decree awards periodical allowance to the wife and finds the child entitled to aliment, but awards payment to the wife as tutor or curator, she would be treated, for the purpose of arrestments, as the maintenance creditor for both obligations. She could choose whether or not to enforce both maintenance obligations in the one current maintenance arrestment, but it would be incompetent for her to enforce each obligation separately by means of two current maintenance arrestments, or to apply for a conjoined arrestment order unless other creditors had executed arrestments.

6.258 Under various statutory provisions the Secretary of State[2] or a local authority[3] can obtain orders for periodical payments to be made reimbursing them for benefit or the cost of accommodation they have supplied to people (usually children) whom the debtor is liable to maintain. We would recommend that the rules set out in the preceding paragraph should also apply to these orders. Where the maintenance order is a non-Scottish order registered in Scotland for enforcement, we think that the rules applicable to Scottish maintenance orders should be adopted whether the non-Scottish order is in favour of an official, an authority or an individual.

6.259 We **recommend:**

For the purposes of Recommendation 6.46(1) (two or more maintenance creditors cannot use current maintenance arrestments simultaneously against the same debtor) and Recommendation 6.46(3) (a maintenance creditor not entitled to use conjoined arrestment order to enforce two or more obligations if current maintenance arrestment could be used) a maintenance creditor should be defined as the payee in a maintenance obligation whether the payee is an individual, an official or an authority.
(Recommendation 6.48; clause 80(1) and (3).)

Arrears of maintenance

6.260 In our discussion of arrears of maintenance we recommended[4] that a maintenance creditor should not be entitled to enforce arrears of maintenance by means of a current maintenance arrestment but that arrears would remain enforceable by other diligence including an earnings arrestment while a current maintenance arrestment laid by that creditor was in operation. A similar rule should apply to conjoined arrestment orders, so that a maintenance creditor

[1]See *Huggins* v. *Huggins* 1981 S.L.T. 179; *Finnie* v. *Finnie* 1984 S.L.T. 109 and 439.
[2]See for example Supplementary Benefits Act 1976, ss. 18 and 19.
[3]See for example Social Work (Scotland) Act 1968, ss. 80 and 81.
[4]Recommendation 6.28(1) (para. 6.176).

could include in the order the arrears as an ordinary debt and the current maintenance.

6.261 We also recommended[1] that no interest should run on arrears of maintenance which arise during the operation of a current maintenance arrestment. This rule should be extended to conjoined arrestment orders containing a maintenance obligation.

6.262 We **recommend:**

(1) It should be competent for a conjoined arrestment order to enforce arrears of maintenance and current maintenance payable to the same creditor.

(2) No interest should run on arrears of maintenance arising during the operation of a conjoined arrestment order which is enforcing current maintenance.
(Recommendation 6.49; clause 87(8).)

Termination and variation of conjoined arrestment orders

6.263 There are two aspects of termination of conjoined arrestment orders: first, the order ceasing to have effect as between one or more of the conjoined creditors and the debtor, and, secondly, the order ceasing to be operated against the debtor's earnings by the employer. We deal with these in turn.

6.264 In paragraphs 6.103 and 6.189 we recommended that the sequestration of the debtor should render an earnings arrestment and a current maintenance arrestment ineffectual. We would extend this principle to conjoined arrestment orders since the effect of sequestration should be the same whether one or more than one debt was being enforced against the debtor's earnings. Sums deducted on pay days occurring before the date of sequestration should therefore be handed over to the conjoined creditors whether or not the sheriff clerk had received or disbursed them before sequestration, but sums deducted after the date of sequestration should be claimable by the trustee and should be recoverable from the sheriff clerk or the creditors.

6.265 The problem of termination of a conjoined arrestment order on satisfaction of some or all of the debts has given us some difficulty. One scheme would be for a conjoined arrestment order to endure only until the remaining conjoined creditors could competently enforce their debts by earnings or current maintenance arrestments. In a simple case of two ordinary creditors the conjoined arrestment order on this scheme would be brought to an end as soon as one of the debts was satisfied. The remaining creditor could subsequently serve an earnings arrestment to recover the balance of the debt. The advantage of this scheme is that the court would be involved only for so long as it was necessary to divide the deductions made by the employer amongst the various creditors. The other scheme, which we favour, is that a conjoined arrestment order should endure until the debts of all the conjoined creditors have been satisfied. The principal advantage of this latter scheme is that the employer would not be faced with a change in practice when the conjoined arrestment order was replaced by an earnings or current maintenance

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[1]Recommendation 6.28(2) (para. 6.176).

arrestment. The employer would carry on deducting and remitting to the court under the conjoined arrestment order until informed that all the debts have been satisfied. Where the last debt was a maintenance debt the conjoined arrestment order would thus endure until the obligation to pay maintenance ceased.

6.266 In Chapters 3 and 4 of this report we recommended that a conjoined arrestment order should be recalled following the granting of time to pay orders in respect of all the conjoined debts or on the coming into force of a debt arrangement scheme. Other grounds of recall should, by analogy with earnings and current maintenance arrestments, be that the conjoined arrestment order is invalid or has ceased to have effect. A conjoined arrestment order might be invalid, for example, if it was incorrectly served on the employer or one of the conjoined "debts" was not in fact due when the order was made. As discussed in previous paragraphs a conjoined arrestment order would cease to have effect on the debtor's sequestration[1] or on the last debt remaining in the conjoined order being satisfied (or in the case of a maintenance debt, ceasing to be due) or becoming unenforceable by diligence.[2] Apart from invalidity and ceasing to have effect, creditors should be entitled to apply for recall on the grounds that they no longer wish their debts to be collected by means of a conjoined order. Creditors can abandon an earnings arrestment or a current maintenance arrestment if they so wish and we see no reason for abandonment not to be available in respect of conjoined arrestment orders.

6.267 We turn now to look at termination from the employer's point of view. A conjoined arrestment order is an order of the court which requires the employer, on pain of being in contempt of court, on each pay day to make certain deductions from the debtor's earnings and remit them forthwith to the court. We think it is essential for the protection of the employer that this duty is brought to an end (subject to a minor exception) only on receipt of a further order from the court. Moreover, since the court is in charge of the conjoined arrestment order on behalf of the conjoined creditors, it would make for confusion if the order could be brought to an end simply by some action on the part of a creditor or the debtor.

6.268 The minor exception mentioned in the preceding paragraph is where the debtor ceases to be employed. It would be unnecessarily formal in our view for an employer in this situation to have to apply to the court for recall of the conjoined arrestment order. It might be thought that there is no need for an express rule—ceasing employment is self-evidently a terminating event since the employer no longer has any earnings to operate the conjoined arrestment order on. But we think an express statutory rule to this effect would be welcomed by employers who might otherwise feel obliged to retain an order against the unlikely possibility of the debtor being re-employed later.

6.269 We would recommend the same approach to variation as we recommend in the preceding paragraphs for termination. Thus an employer would be under a duty to continue to deduct in accordance with the original conjoined

[1]Para. 6.264.
[2]Para. 6.265.

arrestment order until a court order varying the order had been intimated. The court should have power to vary a conjoined arrestment order where a debt due to a creditor is satisfied, ceases, becomes unenforceable by diligence, or where a creditor no longer wishes the debt to be enforced by means of the conjoined arrestment order.

6.270 We **recommend:**

(1) The employer should continue to operate a conjoined arrestment order until the debtor ceases employment or until intimation of the recall or variation of the order by the court is received.

(2) In addition to the court's power to recall a conjoined arrestment order following the granting of a time to pay order or on the coming into force of a debt arrangement scheme, the court should, on application, recall a conjoined arrestment order if it is satisfied that the order is invalid or has ceased to have effect or if all the conjoined creditors (or the last remaining creditor) apply for recall.

(3) A conjoined arrestment order should cease to have effect on the sequestration of the debtor, or on all the debts included in the order (or the last remaining debt in the order) being satisfied, ceasing, or becoming unenforceable by diligence.

(4) The court should, on application, vary a conjoined arrestment order if:

(*a*) a debt due to a creditor is satisfied or becomes unenforceable by diligence; or

(*b*) a creditor no longer wishes to have the debt included; or

(*c*) in the case of maintenance the obligation to pay maintenance ceases, is recalled or varied, or becomes unenforceable by diligence. (Recommendation 6.50; clauses 87(10), 92(1) to (4) and 98(2).)

Procedural provisions

6.271 We have just recommended that a conjoined arrestment order should be varied when one of the debts included in the order is satisfied, or recalled when the last debt is satisified. We turn to consider who should have the responsibility of keeping track of payments made to creditors and applying for variation or recall of the conjoined arrestment order.

6.272 It is impracticable for employers to work out when the various creditors' debts are satisfied since they are not aware of the amounts distributed by the court to each of the conjoined creditors, nor would they be aware of a maintenance obligation ceasing (through remarriage of the creditor for example). We think the appropriate person to apply for variation or recall is the sheriff clerk who administers the order on behalf of all the creditors. In cases where there is no maintenance debt included in the conjoined arrestment order and no payments were made to creditors otherwise than under the order, the sheriff clerk has all the information required to work out when each creditor's debt is satisfied. To ensure that a conjoined arrestment order is varied or recalled promptly, a creditor should be under a duty to inform the sheriff clerk as soon as reasonably practicable when the debt is

satisfied or has become unenforceable by diligence, or in the case of a maintenance order, the obligation to pay maintenance has ceased.

6.273 In the context of earnings and current maintenance arrestments we recommended that payments received by a creditor under an arrestment after it had ceased to have effect should be recoverable by the debtor.[1] In addition, as a sanction to compel the creditor to intimate cessation of the arrestment to the employer and as a kind of solatium for wrongful diligence, the court should have power to award a penalty payable by the creditor to the debtor where the court was satisfied the creditor had failed to intimate as soon as reasonably practicable.[2] We would extend these recommendations to conjoined arrestment orders. The sums overpaid to a non-intimating creditor should be repaid to the sheriff clerk, rather than the debtor, for distribution to other creditors still conjoined. The other creditors should be entitled to receive the same disbursements as they would have received had the overpaid creditor intimated cessation of entitlement under the order at the proper time. However, the sum ordered to be paid by the creditor by way of discretionary penalty should be payable to the debtor as the other creditors should not be entitled to share in this.

6.274 We would confer a title to apply for recall or variation of a conjoined arrestment order on the debtor, any creditor, the employer, the sheriff clerk, and the debtor's trustee in sequestration. In many cases we envisage the application being made by the sheriff clerk in chambers before the sheriff, for example where recall of the order is sought because the last remaining creditor's debt has been satisfied. In other cases, such as an application by the debtor for recall on the grounds of invalidity, the application would have to be intimated to all interested parties and a hearing might be necessary. In view of the wide variety of possible circumstances we think the procedure should be regulated by act of sederunt rather than by statute.

6.275 Where a recall or variation order is granted we think that it should be intimated to the various interested parties by the sheriff clerk. Sheriff clerks will probably be the applicants in many cases and keeping everyone informed can be seen as part of their duty to ensure that conjoined arrestment orders run smoothly. Intimation should be made to the employer, debtor, creditors and in the case of recall on the grounds of the debtor's sequestration, to the trustee in sequestration if the sheriff clerk knows of the trustee's whereabouts. The employer would not, however, need to be informed unless there was a consequential change in the amount to be deducted from the debtor's earnings. For example, where one ordinary creditor's debt is satisfied but there were still two other ordinary creditors included in the conjoined arrestment order, no intimation need be made because the employer makes the same deduction however many ordinary creditors are included.

6.276 We **recommend:**

(1) A creditor whose debt is included in a conjoined arrestment order should be under a duty to inform the sheriff clerk when the debt is

[1]Recommendation 6.16 (para. 6.110) (earnings arrestments); Recommendation 6.31 (para. 6.189) (current maintenance arrestments).

[2]*Ibid.*

satisfied or ceases to be enforceable by diligence, and in the case of maintenance when the obligation to pay maintenance ceases. Sums received by a creditor after satisfaction of the debt, the debt becoming unenforceable by diligence or, in the case of maintenance, where the obligation to pay maintenance ceases, should be recoverable by the sheriff clerk with interest at the rate normally applicable to decrees from the date of receipt to the date of payment. The sheriff clerk should distribute the sums recovered among the remaining creditors as if the repaying creditor had ceased to be conjoined in the order.

(2) Where the sheriff is satisfied, on an application by the debtor, that the creditor failed to intimate as required in paragraph (1) above, the sheriff may order the creditor to pay the debtor a sum not exceeding twice that recoverable by the sheriff clerk in terms of paragraph (1) above.

(3) An application for variation or recall of a conjoined arrestment order should be capable of being made by the debtor, a creditor, the employer, the sheriff clerk operating the order and the debtor's trustee in sequestration.

(4) The sheriff clerk should be under a duty to intimate the granting of an order varying or recalling a conjoined arrestment order to the debtor, the creditors, and the debtor's trustee in sequestration if the trustee's whereabouts are known. Intimation should be made to the employer of any recall and any variation resulting in a change in the amount to be deducted from the debtor's earnings.
(Recommendation 6.51; clauses 91(4) to (8) and 92(2) and (5).)

Disputes about operation of conjoined arrestment orders

6.277 Earlier in this Chapter we recommended[1] that the court should have power to resolve disputes about the mode of operation of an earnings or current maintenance arrestment. Such a power would be useful to correct any errors while the diligence was still in operation. We think such a power would also be useful in connection with conjoined arrestment orders.

6.278 We **recommend:**

The court, on application by the debtor, the sheriff clerk, a creditor or the employer should have power to determine a dispute as to the manner of operation of a conjoined arrestment order. The court in disposing of the application should have power to order one of the parties to pay to another sums which had been deducted or retained in error with interest.
(Recommendation 6.52; clause 91(1) and (2).)

Intimation of new deduction tables

6.279 We recommended earlier that the Secretary of State should be empowered to vary the deduction levels contained in the statutory tables used in connection with earnings arrestments[2] and also the level of exempt earnings in connection with current maintenance arrestments[3] by means of regulations made by statutory instrument. These variations could affect the deductions

[1]Recommendations 6.12 (para. 6.91) and 6.30 (para. 6.183).
[2]Recommendation 6.9 (para. 6.76).
[3]Recommendation 6.27 (para. 6.166).

to be made by an employer operating a conjoined arrestment order. Since we consider the varied tables and level of exempt earnings ought to apply to conjoined arrestment orders in operation at the date of variation as well as orders made thereafter the sheriff clerk should be under a duty to intimate any variation to the employer as soon as it comes into force.

6.280 We **recommend:**

The sheriff clerk should be under a duty to intimate to an employer operating a conjoined arrestment order any variation in the statutory deduction tables applicable to earnings arrestments, or the level of exempt earnings applicable to current maintenance arrestments. The employer should be entitled, but not bound, to give effect to such a variation on any pay day occurring within seven days of the date of intimation, but should be bound to give effect to such a variation on any pay day occurring thereafter.
(Recommendation 6.53; clauses 89(6) and 95(2).)

Section F. Miscellaneous

6.281 We conclude this Chapter with an examination of issues incidental to the foregoing recommendations. These are the prohibition of dismissal of employees as a result of diligence against earnings, the prohibition or restriction of diligence against bank accounts or other accounts into which wages are paid, and the jurisdiction of the courts in connection with various applications.

Dismissal of employees whose earnings are arrested

6.282 Because of their continuous effect, earnings arrestments, conjoined arrestment orders and current maintenance arrestments would be more burdensome for employers to administer than arrestments in common form are at present. There is therefore a danger that employers may dismiss employees whose earnings are subjected to continuous diligence. At present, it seems that dismissal as a result of arrestment of wages occurs infrequently,[1] and that the majority of employees dismissed are those who do not have the qualifying service[2] to complain of unfair dismissal. It may, however, be unsafe to assume that this state of affairs would continue after the introduction of continuous diligence against earnings. In Consultative Memorandum No. 49

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[1]The C.R.U. Arrestment Survey (para. 39) discloses that only one employer out of 22 interviewed had dismissed an employee within the previous few years as the result of an arrestment. The other employers said they would not dismiss an employee simply because of an arrestment of wages. The Edinburgh University Debtors Survey (para. 6.3) discloses that some of the debtors whose wages were arrested were or felt themselves to be under threat of dismissal, but no-one had been dismissed nor was there any evidence that they were about to be dismissed. The Advisory, Conciliation and Arbitration Service informed us that they could only trace one industrial tribunal unfair dismissal case involving arrestment, but that in a small number of cases—no more than, say, six a year—arrestment is given as the reason or one of the reasons for termination of their employment by people who do not have the qualifying service to complain of unfair dismissal.

[2]The period is one year for most people in employment before 1 June 1985, but is two years for people commencing employment on or after that date and for people employed by small organisations; Employment Protection (Consolidation) Act 1978, ss. 64 and 64A as amended by Employment Act 1982, s. 20 and Sched. 2, para. 5(1) and Unfair Dismissal (Variation of Qualifying Period) Order 1985.

we expressed the view[1] that it was likely that dismissal resulting from an earnings arrestment would be held unfair in the statutory sense.[2] In order to clarify the matter and to protect those employees without the necessary qualifying service, we sought views on whether provision should be made specifically prohibiting an employer from dismissing an employee wholly or mainly on the ground of diligence against the employee's earnings.[3]

6.283 Most of those who commented on consultation were opposed to making any specific provisions prohibiting dismissal for arrestment, mainly on the ground that the existing legislation—the Employment Protection (Consolidation) Act 1978—provides adequate protection.[4] One body thought that a specific provision dealing with arrestment or other diligence against earnings might call into question the adequacy of the protection afforded in other areas, and that it was undesirable to make provisions for Scotland which had no parallel in England and Wales.[5] On the other hand, a few of those consulted thought that specific provisions were desirable, particularly to deal with those employees not covered by the unfair dismissal provisions.

6.284 We think that provisions applying only in Scotland would need to command more than the minority support for legislation which emerged on consultation. In these circumstances, we have decided not to make any recommendation to change the law in this respect. If, however, experience were to show that dismissal became a problem, the need for legislation should be reconsidered.

Tracing earnings paid into bank or other accounts

6.285 Increasingly, employers pay their employees by cheque or by direct transfer to the employee's bank account.[6] The enactments limiting wages arrestable in execution of a decree, and prohibiting the arrestment of earnings on the dependence of an action,[7] do not expressly protect the earnings when they are deposited in a bank or savings account or otherwise invested. Likewise, there seems no authority for the view that alimentary income payments (which at common law include personal earnings) retain their alimentary character once they have been paid. The prevailing view is therefore that the exemption only applies to earnings in the employer's hands. In one sheriff court case,[8] however, it was held that a statutory provision that certain sums due to injured employees under Workmen's Compensation legislation "shall not be capable of being attached", protected the sum not merely in the employer's hands but also where it had been lodged in the employee's bank account, provided the sum was identifiable and not mixed with other funds.

[1]Para. 4.6.

[2]Employment Protection (Consolidation) Act 1978, s. 57(1) and (2).

[3]Proposition 38 (para. 4.10).

[4]See generally Ewing and Maher "Arrestment of wages and unfair dismissal" 1979 S.L.T. (News) 185.

[5]There are no provisions in England and Wales dealing with prohibition of dismissal as a result of attachment of earnings orders. The Payne Report (para. 608) recommended against the introduction of such provisions.

[6]C.R.U. Arrestment Survey, para. 12.

[7]Wages Arrestment Limitation (Scotland) Act 1870; Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, s. 1.

[8]*Woods* v. *Royal Bank of Scotland* (1913) 1 S.L.T. 499.

6.286 In Consultative Memorandum No. 49,[1] we invited views on the question whether the exemptions of earnings from arrestment should be extended to earnings paid in to a bank or savings account or converted to some other form into which they might be traceable. Those who commented on this proposal unanimously rejected it. Several commentators thought it would be difficult to frame effective and fair rules on tracing earnings, where for example they had become mixed with other funds. In view of this response, we make no recommendations to change the law.

Jurisdiction

6.287 We turn to consider which courts should have jurisdiction to hear the various applications we recommend earlier in this Chapter. We have already recommended[2] that the sheriff courts should have exclusive jurisdiction to grant conjoined arrestment orders on the grounds that the vast majority of debt decrees emanate from the sheriff courts, and the sheriff courts are spread throughout Scotland making access for litigants and employers easier. Moreover, if the Court of Session were also to grant conjoined arrestment orders it would have to maintain staff to ingather and disburse payments, which would be an unnecessary duplication of effort.

6.288 It would clearly be sensible to confer jurisdiction to deal with applications relating to conjoined arrestment orders (for variation or recall for example) on the courts which granted the orders in question—that is the sheriff courts. We also think that the sheriff courts should have exclusive jurisdiction to deal with applications relating to earnings arrestments and current maintenance arrestments. In addition to the points made in connection with conjoined arrestment orders, which apply with equal force to arrestments of earnings, there is also the point that since the amounts at stake are likely to be modest, the Court of Session would be an inappropriate forum. It might be argued that the Court of Session should at least have jurisdiction to deal with applications relating to arrestments of earnings proceeding on its own decrees, but we think that the advantage lies in having all applications dealt with by the sheriff courts. In the case of poindings the sheriff courts control the diligence whether the decree being enforced is a sheriff court or a Court of Session decree.[3]

6.289 Given that the sheriff courts rather than the Court of Session should have jurisdiction, the selection of an appropriate sheriff court for a particular application arises. Where an existing earnings or current maintenance arrestment is the subject of an application we think that the court in whose jurisdiction the arrestment was executed should deal with the case, and where an existing conjoined arrestment order is involved the court which made the order in question should have jurisdiction. We would adopt a similar solution for applications for conjoined arrestment orders; the appropriate sheriff court would be the court in whose jurisdiction the existing earnings or current maintenance arrestment was executed. Jurisdiction based on the place of execution is more likely than any other jurisdictional ground to identify the court of the place of business at which the employer administers the existing

[1]Proposition 39 (para. 4.13).
[2]Recommendation 6.42(3) (para. 6.236).
[3]See Chapter 5.

arrestment. It can be applied to Court of Session arrestments or where the debtor or creditor resides outwith Scotland, and, in the case of applications for conjoined arrestment orders, it would generally avoid the risk that conflicting orders may be made in different courts. Moreover, it is consistent with the scheme of the Civil Jurisdiction and Judgments Act 1982 whereby, in proceedings concerned with the enforcement of judgments, exclusive jurisdiction is conferred upon the courts where the judgment has been or is to be enforced.[3]

6.290 A person applying for a conjoined arrestment order or seeking to challenge an arrestment or conjoined arrestment order might not be able to find out where the arrestment was executed or the order was made. We suggest that an application should also be capable of being made to any sheriff court in whose jurisdiction the employer has an established place of business. The application could subsequently be transferred to a more appropriate sheriff court if necessary.[4]

6.291 We **recommend:**

(1) The sheriff courts should have exclusive jurisdiction to:

   (*a*) grant conjoined arrestment orders; and

   (*b*) deal with applications for variation or recall of, or disputes regarding the mode of operation of, earnings arrestments, current maintenance arrestments and conjoined arrestment orders.

(2) An application under paragraph (1)(*a*) above should be made to the sheriff court in whose jurisdiction the place of execution of the earnings or current maintenance arrestment is situated. An application under paragraph (1)(*b*) above should be made to the sheriff court that granted the conjoined arrestment order in question or in whose jurisdiction the place of execution of the earnings or current maintenance arrestment in question is situated.

(3) It should also be competent to make an application under paragraph (1) above to a sheriff court in whose jurisdiction the debtor's employer has an established place of business.
(Recommendation 6.54; clause 99.)

[1]Sched. 8, para. 4(1)(*d*).
[2]Under Rule 19 of the Ordinary Cause Rules.