Scottish Law Commission

DISCUSSION PAPER NO. 78

ADJUDICATIONS FOR DEBT AND RELATED MATTERS

Volume 2

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This Discussion Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission

The Commission would be grateful if comments on this Discussion Paper were submitted by 30 June 1989.
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DILIGENCE

DISCUSSION PAPER NO.78

ON
ADJUDICATION FOR DEBT AND
RELATED MATTERS

Volume 2

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PART V

REFORM OF ADJUDICATIONS FOR DEBT: FURTHER PROPOSALS

5.1 In Part III in volume 1 of this Discussion Paper, we outlined the main issues in the reform of adjudications of feudal subjects (including registered long leases but excluding debts secured by heritable securities) and in Part IV we summarised our main provisional proposals on the introduction of a new diligence of adjudication and sale replacing the existing diligence of adjudication so far as applying to feudal subjects. In this Part, we set out proposals on other detailed provisions which would apply to the new diligence of adjudication and sale.[1].

(1)Creditor's title to adjudge

5.2 At present, title to adjudge is determined by the rules on title to sue an action and there are cases specially dealing with title to sue actions of adjudication[2]. Under the new procedure, title to adjudge would be conferred by the warrant for adjudication in the extract decree or extract registered document of debt.[3] Accordingly the normal rules on title to use diligences (charge, poinding and arrestment) under an extract decree or registered document of debt would apply to adjudications. Thus where the original creditor has assigned the debt or has died, the assignee or executor must acquire a new warrant in his own name. The Debtors (Scotland) Act 1987 introduces a simple administrative procedure [4] enabling a creditor acquiring right to a decree (before or after extract) or writ registered for execution to obtain a warrant for diligence in his own name on production of the

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[1] A summary of the proposed new procedure is set out at para. 3.44 in volume 1

[2] Graham Stewart, pp. 581-582.

[3] See volume 1, Proposition 3.4 (para.3.17).

[4] Based on the Debtors (Scotland) Act 1838, ss. 7 and 12; Scheds. 5 and 9.

extract decree or writ and the link in title to a clerk of court.[1] This procedure would also regulate cases where adjudication was to be used.

5.3 We provisionally propose:

(1) **The normal rules on title to use diligences (charge, poinding and arrestment) in pursuance of a warrant in an extract decree or extract writ registered for execution should replace the existing rules on title to sue an action of adjudication.**

(2) **In particular, a creditor acquiring right to a decree (before or after extract) or an extract registered writ who wishes to enforce the debt by adjudication should be required to obtain from a clerk of court a warrant for diligence in his own name by using the procedure for completing title to a decree or extract registered writ under the Debtors (Scotland) Act 1987, s.88.**

(Proposition 5.1).

(2) Conjoining creditors?

5.4 Under the present law,[2] two creditors in separate debts cannot raise one summons of adjudication, but one person can adjudge as trustee for several creditors who have assigned their debts to him for that purpose. The summons concludes for what is known as "articulate adjudication" i.e. the principal and interest of each debt is separately accumulated into a capital sum bearing interest and there are separate conclusions for adjudication in

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[1] S.88.

[2] Graham Stewart, pp. 582-583.

respect of each debt. The effect is that each creditor can extract that part of the decree which relates to his own debt.[1] On the other hand, where a creditor raises a summons of adjudication while the first action of adjudication against the same subjects by another creditor is in dependence, the two actions of adjudication may be conjoined.[2] The conjunction can only be effected with the first adjudication.[3] The conjoining of creditors in an adjudication must be distinguished from the equalisation of adjudications used within a year and a day of the first effectual adjudication, which we consider elsewhere.[4]

5.5 The introduction of a new diligence of adjudication and sale would necessitate new rules on conjunction of creditors. We suggest a simple rule that it should not be competent for two or more creditors in separate debts to be conjoined in the same adjudication as creditors. In this way, a number of difficulties in regulating competitions between adjudications and other rights, and procedural complications, would be avoided. At one time, creditors sometimes assigned their debts to a third party for the purpose of enforcing all the debts by one adjudication as a trustee for the creditors. Since the trustee is in a sense the creditor, this device would presumably not infringe a prohibition against conjunction of creditors. The debt of each of the original creditors (the cedents) would have to be separately identifiable if a competition arose with an inhibition since the date when each debt was contracted is a criterion of preference in such a competition. We seek views on this matter.

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[1] Idem; Debts Securities (Scotland) Act 1856, s.5.

[2] Graham Stewart, pp. 610-611.

[3] Idem.

[4] Discussion Paper No. 79 on Equalisation of Diligences.

5.6 We provisionally propose:

(1) **It should not be competent for two or more creditors in separate debts to be conjoined in the same adjudication as creditors.**

(2) **Should it be competent for creditors to assign their debts to a third party to enforce the debts by one adjudication as trustee for the creditors?**

(Proposition 5.2)

(3)**Procedure in obtaining adjudication**

5.7 In summary, under our proposals, a creditor holding a warrant for adjudication would adjudge in pursuance of the warrant by taking the following steps in procedure:

(1) registration of an interim notice of litigiosity (optional);

(2) service of a charge to pay and a document to be called a notice of entitlement to adjudge;

(3) registration of a final notice of litigiosity;

(4) after expiry of the days of charge and a mandatory period of litigiosity without full payment, registration of a document called a notice of adjudication in the property registers;

(5) intimation of the registration of the notice of adjudication to the debtor.

5.8 Our proposals for the introduction of interim and final notices of litigiosity and a mandatory period of delay of 6 or 9 months during which the subjects would be litigious but could not be adjudged are explained in volume 1.[1]

5.9 Charge to pay. On the analogy of poinding, we think that an adjudication should be preceded by a charge to pay which is often successful in eliciting payment and preventing the need for further diligence. The days of charge have recently been standardised at 14 days if the debtor is in the United Kingdom and 28 days if he is outside the United Kingdom or his whereabouts are unknown.[2] The service of a charge would "trigger" the debtor's right to apply for a time to pay order under the Debtors (Scotland) Act 1987. The form of charge would inform the debtor of his liability to poinding in the event of expiry of the days of charge without full payment but the liability of his property to litigiosity and adjudication should be narrated in a separate document.

5.10 Notice of entitlement to adjudge. At the same time as the messenger-at-arms or sheriff officer serves a charge to pay on the debtor at the creditor's instance, he would also serve a document to be called a notice of entitlement to adjudge. This would specify the subjects to be adjudged by a sufficient conveyancing description; refer to any interim notice of litigiosity already registered; state that the creditor is entitled (i) to

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1 See paras. 3.18 to 3.43.

2 Debtors (Scotland) Act 1987, s. 90(3).

register a 'final' notice of litigiosity within 14 days after service of the charge, and (ii) if the debt is not fully paid within the mandatory period (6 or 9 months) following registration of the 'final' notice of litigiosity, to attach the specified property by registering a notice of adjudication within one month after expiry of that period.

5.11 Mode of service. The ordinary modes of service used for charges would apply to the notice of entitlement to adjudge i.e. the writ would normally be served by the officer (messenger-at-arms or sheriff officer) by hand on the debtor personally or in the hands of an inmate at the debtor's dwelling place or an employee at his place of business.[1] Postal service of a charge is only competent on sheriff court summary cause decrees in limited circumstances.[2] Edictal service of a charge on a person outwith Scotland and on certain persons whose whereabouts are unknown are competent on Court of Session decrees.[3] Edictal service of a charge may possibly be competent on a sheriff court decree against a person furth of Scotland or a person whose whereabouts

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[1] Ordinary Cause Rules, rule 10; Summary Cause Rules, rule 6.

[2] viz. if the place of execution is in any of the islands of Scotland, or in any county in which there is no resident sheriff officer, or is more than 12 miles distant from the seat of the court which granted the decree: Execution of Diligence (Scotland) Act 1926, s.2(1)(b).

[3] Court of Session Act 1825, ss.51-53. Section 53 provides that "where a person not having a dwelling-place in Scotland occupied by his family or servants shall have left his usual place of residence, and having been therefrom absent during the space of 40 days, without having left notice where he is to be found within Scotland, he shall be held to be absent from Scotland, and be charged accordingly", ie. edictal citation under s.51 as modified by the Act of Sederunt (Edictal Citations, Commissary Petitions and Petitions for Service) 1971 which provides for service on the keeper of edictal citations (now the Extractor of the Court of Session).

are unknown,[1] but will cease to be competent when the Debtors (Scotland) Act 1987, Sch.8 comes into force.[2] There is an alternative to edictal citation of a charge on a sheriff court decree in the case of debtors outwith Scotland,[3] but when the repeal just mentioned comes into force an edictal service of a charge on a sheriff court decree on a person furth of Scotland will cease to be competent. This seems to leave a gap in the law which may, of course, be filled by Act of Sederunt.

5.12 It will be seen that edictal service of charges is competent against absent debtors in defined circumstances though the law is subject to doubt and change in the case of edictal service of charges on sheriff court decrees. Where a charge is served edictally, it is possible that a restriction should be imposed on the use of adjudication or the sale of the adjudged property, at least where the adjudged property is a dwellinghouse.

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[1] The Sheriff Courts (Scotland) Extracts Act 1892, s.7(6) provides that where the party to be charged is furth of Scotland an edictal charge is competent. If the Court of Session Act 1825, s.53 may be construed as applying to charges on sheriff court decrees, then that provision when read with s.7(6) of the 1892 Act makes edictal service of a charge following a sheriff court decree on a person whose whereabouts are unknown competent in the circumstances defined in the 1825 Act, s.53.

[2] The Debtors (Scotland) Act 1987, Sch. 8 repeals s.7(6) of the Sheriff Courts (Scotland) Extracts Act 1892.

[3] Ordinary Cause Rules, rule 12; Summary Cause Rules, rule 9.

5.13 Re-service of charge. If a creditor had already served a charge and decided at a later time to use adjudication, then he would require to serve a new charge along with the notice of entitlement to adjudge in order to comply with the proposed requirement that the notice must be accompanied by a charge.

5.14. Time limit? We do not propose that there should be any special limit on the time within which the creditor may serve (or re-serve) a charge and the accompanying notice of entitlement to adjudge. Such service would be competent for so long as the debt was due. In other words, service would be competent and effectual during the period of the negative prescription of debts, which in the case of debts due under decrees is the long negative prescription of 20 years.[1]

5.15 Provisional proposals We invite views on the following proposition.

(1) A creditor holding a warrant for adjudication would commence the procedure by serving on the debtor -

(a) a charge to pay the debt within the normal days of charge (to be standardised at 14 or 28 days); and

(b) a document (to be called a notice of entitlement to adjudge) in a form prescribed by statute describing the subjects to be adjudged (by a sufficient conveyancing description); referring to any "interim" notice of litigiosity already registered in terms of Proposition

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

3.5 (para. 3.43 in volume 1); stating that the creditor is entitled to register a "final" notice of litigiosity within 14 days after service of the charge (as mentioned in Proposition 3.5); and stating further that the creditor will be entitled to register a notice of adjudication attaching the subjects for the purpose of sale on expiry of the period mentioned in Proposition 3.5 if the debt is not fully paid within that period.

(2) The notice of entitlement would be served along with the charge by the same mode of service. If a charge had previously been served, a new charge would be necessary.

(3) Where the charge and notice of entitlement to adjudge had been served edictally, should any restriction be imposed on the use of adjudication, or on sale of the adjudged property, at least where it is a dwellinghouse?

(Proposition 5.3).

(4) Notice of adjudication

5.16 Form and content. In the proposed new procedure, the notice of adjudication would be a key document taking the place of a decree of adjudication under existing law. After the expiry of the mandatory period of litigiosity, the debt still not being fully paid, the creditor would adjudge by registering a notice of adjudication. This would (1) design the parties; (2) narrate or refer to the decree or other document of debt containing warrant for adjudication, the execution of the charge and of the notice of entitlement to adjudge,the registration of the "final" notice of litigiosity, the expiry of the charge,the expiry of the mandatory

period of litigiosity and the non-payment of the debt; (3) state the outstanding balance of the debt (i.e. the amount in the charge less any sums paid to account) and the rate of any interest running on the debt if claimed by the creditor; (4) identify the subjects to be adjudged by a sufficient conveyancing description; (5) where the debtor had an unfeudalised right to feudal subjects to be adjudged, narrate that the debtor's title is deducible by reference to the unregistered links in title from the person last infeft; and (6) contain words declaring the creditor's right. The content and form of the notice of adjudication would be prescribed by a form or style enacted in statute. The notice would be signed by a solicitor who would certify that the extract decree and the certificate of execution of charge and notice of entitlement to adjudge had been produced to him. The notice would state the outstanding balance of the debt without certification by the solicitor since payments to account might often be outwith his knowledge. The procedure whereby the adjudging creditor would obtain exhibition or delivery of unregistered conveyances is considered at para.5.19 below.

5.17 Creation and completion of adjudger's title by registration of notice of adjudication: interests in land. Under the present law, a decree of adjudication for debt has effect as an unrecorded conveyance or as an assignation of such a conveyance for the purpose of completion of title. Different provisions apply to lands, heritable securities, and registrable long leases. We propose to consider heritable securities in a future Discussion Paper. As regards lands, section 62 of the Titles Act of 1868[1] expressly provides that a decree of adjudication for debt (as well as other specified forms of adjudication) has the legal effect of a conveyance of the lands and that "it shall be lawful and

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[1] Titles to Land Consolidation (Scotland) Act 1868.

competent to such adjudger ... to complete feudal titles to said lands, not only (sic) by infeftment on such decree as a conveyance or by using it, for the purpose of infeftment, as an assignation or as one of a series of assignations of an unrecorded conveyance, as the case may be, in the manner provided by this Act." The effect is that the adjudger may complete title by direct registration of the decree in the property registers. Alternatively, where the person whose lands were adjudged was not infeft, the adjudger may complete title by notarial instrument or notice of title using the uninfeft proprietor's unregistered title and the decree of adjudication as links in title. One difficulty here is that, so far as we can ascertain, a decree of adjudication does not have the effect of assigning the writs and evidents relating to the adjudged property.

5.18 We propose some technical modifications of this approach. We suggest that a notice of adjudication should have no legal effect until registered in the property registers (in contrast to a decree of adjudication which has effect in a question with the debtor before registration though generally not with third parties).[1] Registration would both create and complete the adjudger's right. In other words, a notice of adjudication would not itself have effect as an unrecorded conveyance and could not be used as a link in title for the purposes of completion of title by notice of title or notarial instrument or clause of deduction of title in a conveyance by the adjudger in implement of his power of sale. It follows that where the debtor was uninfeft proprietor of the lands adjudged, it would be necessary for the notice of adjudication to narrate that his title is deducible, through the unregistered links in title, from the person last infeft.

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[1] Graham Stewart, p.616.

5.19 We propose later[1] that on its registration, a notice of adjudication would impliedly assign to the adjudger certain rights to the writs and evidents affecting his title. At this interim stage, however, special provision would be necessary to the effect that where the debtor was uninfeft proprietor of feudal subjects referred to in a notice of entitlement to adjudge and the days of charge had expired without full payment, then the creditor would be entitled (1) to demand by notice in the prescribed statutory form delivery or exhibition of any unrecorded conveyance linking the debtor's title to that of the person last infeft within a prescribed period of (say) 4 weeks after service of the notice, and (2) in the event of the debtor's failure to comply with the notice, to make a summary application to the sheriff for an order requiring the debtor or any third party having possession of the writs in question to exhibit or deliver them, which application the sheriff would grant unless the debtor or third party showed cause why the order should not be made. The sheriff's decision should be final. We propose that the sanctions for non-compliance with the sheriff's order should be the normal penalties applicable for contempt of court.

5.20 Creation and completion of adjudger's title: registered leases. The Registration of Leases (Scotland) Act 1857, s.10 provides that when an adjudication of a registered lease has been obtained, against the party vested in the right thereof(ie. the tenant), or his heir, the recording of the abbreviate (as distinct from the decree) of adjudication in the appropriate register shall complete the right of the adjudger to the lease . If the lease is not registered, section 5 of the 1857 Act provides that "the party in right of any such lease" may complete title by recording the

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[1] Proposition 5.9 (para. 5.41).

lease along with a notarial instrument deducing that party's title to the lease. Graham Stewart[1] appears to suggest that an adjudger may use section 5 to complete title to the registered lease, but this is not entirely clear.[2] Similar provisions apply to assignations in security of registered or registrable leases, but we propose to consider these in a future Discussion Paper. We propose that registration in the property registers of a notice of adjudication of the long lease would complete the adjudger's title, abbreviates of adjudication would be abolished, and section 10 of the 1857 Act would no longer apply to adjudications for debt, though remaining applicable to other types of adjudication.

5.21 To cater for the case where a creditor wishes to adjudge a registrable lease which has not yet been registered, we suggest that section 5 of the 1857 Act should be amended to enable the adjudger to register the lease along with a notice of title (the modern equivalent of a notarial instrument) showing the debtor's title either as original tenant, or as succesor or assignee of the original tenant, and a notice of adjudication. The expense of registering the lease and notice of title should be borne by the adjudger. We understand that cases do arise in practice where registrable leases are not in fact registered for a considerable period since the original tenant's successors rely on possession to create a real right under the Leases Act 1449 and only register the lease when it becomes expedient to do so.

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1 p.617.

2 The forms of notarial instrument set out in Schedule C to the 1857 Act are not very apt for use by adjudgers. Moreover, an adjudger is not strictly a party in right of the lease; rather he has an interest in the nature of a security right or nexus over the lease.

5.22 Where a lease expressly excludes assignees and adjudgers, or assignees, it is not adjudgeable.[1] A lease which excludes assignees except with the landlord's consent is in the same position.[2] Where an exclusion of the latter type is qualified by the proviso "which consent shall not be unreasonably withheld", the law is uncertain. One possible solution is that the lease is adjudgeable provided that the adjudger was a person acceptable to a reasonable landlord.[3] Such a solution seems difficult to operate under the present law and even more difficult under the new diligence of adjudication and sale where the condition of acceptability would have to apply to the purchaser from the adjudger. Against this background, two points arise. First, should it be competent to adjudge a tenancy notwithstanding any exclusion in the lease of assignees or adjudgers? In many cases, the element of delectus personae is fictional, and the tenancy may be a substantial asset which should be available to creditors. On the other hand, in some cases, the landlord should be able to select his tenant. Further, many leases contain irritancy clauses having effect on the constitution of the tenant's apparent insolvency, so that the only practical effect of adjudging the tenancy would be to induce the landlord to extinguish it. We invite views. Second, if an exclusion of adjudication of a tenancy is to remain competent, then we suggest that an exclusion of assignees except with the landlord's consent coupled with a clause requiring that the consent should not be unreasonably withheld should be treated as excluding an adjudication.

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[1] Graham Stewart, p. 601.

[2] Paton and Cameron, Landlord and Tenant (1967) p. 153.

[3] Gretton, Inhibition and Adjudication p. 52.

5.23 Machinery of registration in Land Register. In the case of feudal subjects (in which expression we include registered long leases), the notice of adjudication would be registered in the Register of Sasines or, as the case may be, in the Land Register depending on whether registration of title under the Land Registration (Scotland) Act 1979 applied.The registration of an adjudication would not itself induce registration of title,[1] Under the system of registration of title at present, on registration of the adjudger's title under an extract decree of adjudication, the entry in the Proprietorship Section of the Title Sheet showing the debtor as proprietor remains but a further entry is made showing the adjudger as proprietor.[2] An entry is also made in the Charges Section in respect of the security aspect of the decree, which establishes its ranking in competition with other securities. On registration of a decree of declarator of expiry of the legal, the entry relating to the debtor is deleted from the Proprietorship Section. Under the new system which we propose, on presentment of the notice of adjudication for registration of title in the Land Register, an entry would be made in the Charges Section of the Title Sheet but no entry would be made in the Proprietorship Section, reflecting the fact that the adjudication is in the nature of a redeemable security.

5.24 Exclusion of indemnity. At present, where an adjudger is entered as proprietor in the Title Sheet, the Keeper makes an exclusion of indemnity under section 12(2) of the 1979 Act,

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[1] An adjudication would not be a transfer of an interest in land for valuable consideration within the meaning of section 2(1) of the Land Registration (Scotland) Act 1979.

[2] Registration of Title Practice Book (H.M.S.O. 1981) paras. D.4.13 and D.4.14.

narrating that the exclusion is in respect that the authority for the entry is a decree of adjudication subject to the legal. On registration of the decree of declarator of expiry of the legal, the exclusion of indemnity is removed.[1] Under the new system, we propose that the legal in its present form would be abolished and that for the purposes of indemnity, the notice of adjudication would be treated in the same way as a voluntary heritable security. Thus section 12(3) of the 1979 Act would be amended to provide that there would be an automatic exclusion of indemnity where the claim for indemnity related to the amount of the debt secured by the adjudication, on the analogy of paragraph (o) of section 12(3) (which makes corresponding provision for heritable securities), and there would be no exclusion of indemnity by the Keeper under section 12(2) in respect of the legal. The automatic exclusion of indemnity would not be disclosed on the Title Sheet.

5.25 Provisional proposals. We provisionally propose as follows.

(1) **To enable the creditor to acquire and complete title as adjudger, a notice of adjudication would be expede by the adjudger's solicitor the contents of which would be along the lines described in para. 5.16 above.**

(2) **In the case of feudal subjects, including registered long leases(but excluding heritable securities), the adjudger's title should be created and completed by registration of the notice of adjudication in the property registers. This should replace the registration in the property registers of decrees of adjudication for debt and (in the case of registrable long leases) abbreviates of adjudication for debt. Such decrees and abbreviates should be abolished.**

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[1] Idem.

(3) A notice of adjudication would have no legal effect until registered and could not be competently used as a link in title for the purpose of completing title. But where the debtor was uninfeft, the notice of adjudication would narrate that the debtor's title is deducible by reference to the unregistered writs linking the debtor's title to the title of the person last infeft.

(4) Where the subjects to be adjudged are the debtor's interest, whether as original tenant or as a successor of that tenant, in a long lease which is registrable but not yet registered under the Registration of Leases (Scotland) Act 1857, then section 5 of the Act should be amended to make it clear that a creditor may, at his own expense, register the lease along with a notice of title disclosing the debtor's right to the lease, and thereafter register a notice of adjudication attaching the debtor's interest in the lease.

(5) For the purpose of paragraphs (3) and (4) above, the adjudging creditor should have a statutory right, on expiry of the days of charge referred to in the notice of entitlement to adjudge, (a) to demand by statutory notice delivery or exhibition of any unregistered writs within a prescribed period of 4 weeks from service of the demand, and (b) on default in compliance with the demand, to make an intimated summary application to the sheriff for an order against the debtor, or a third party possessor, for delivery or exhibition of the writs. The sheriff's decision should be final. Disobedience of the order should be punishable as a contempt of court.

(6) (a) Should it be competent to adjudge a tenancy under a registered or registrable long lease notwithstanding a clause in the lease excluding assignees or adjudgers of the tenancy?

(b) If however such a clause is to continue to have the effect of excluding adjudgers as under the present law, it should be made clear by statute that the clause excludes adjudgers where it excludes assignation except with the landlord's consent and directs that the landlord's consent is not to be unreasonably withheld.

(7) Where registration was made in the Land Register, an entry should be made in the Charges Section of the Title Sheet, and the present practice of making an entry in the Proprietorship Section should cease.

(8) Section 12(3) of the Land Registration (Scotland) Act 1979 should be amended to provide for an automatic exclusion of indemnity in respect of a claim for indemnity relating to the amount of the debt secured by the adjudication, and the Keeper's practice of excluding indemnity under section 12(2) in respect of the legal should cease with the abolition of the legal in its present form.

(Proposition 5.4).

(5) Intimation of registration of notice of adjudication

5.26 The registration of a notice of adjudication would affect the interests of (a) the debtor; (b) other parties having an interest in the adjudged subjects, such as creditors under standard

securities, or under the older forms of heritable security so far as still subsisting, and possibly other adjudgers; and (c) the general body of the debtor's creditors.

5.27 Under the present law, in a question with the debtor, the unintimated decree of adjudication is a sufficient title for the adjudger because the decree has the effect of a judicial assignation or conveyance and as such does not require intimation.[1] We propose, however, that an adjudging creditor should be required to intimate in a prescribed form and manner the registration of a notice of adjudication to the debtor. In this case, postal (recorded delivery) service should suffice.

5.28 As regards other creditors, a statute of 1856 requires intimation of the summons in the first action of adjudication against particular subjects in the minute book and on the walls of court for 20 days.[2] This procedure is designed to enable other creditors to be conjoined in the process, "in order to lessen the number of adjudications for debt, and the expense to all parties, and to facilitate the pari passu preference of creditors in similar circumstances".[3] As a result of the abolition of actions of adjudication[4] and of the conjunction of creditors in adjudications,[5] we propose that this statutory provision should be repealed.

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[1] Graham Stewart, pp. 615 and 618; Bell, Commentaries vol. 1, p.743; Bruce v. Buckie (1619) Mor. 207.

[2] Debts Securities (Scotland) Act 1856, s.5.

[3] Bell Commission, Second Report, (1835) p.22.

[4] Proposition 3.4 (para. 3.17) in volume 1.

[5] Proposition 5.2 (para. 5.6).

5.29 We do not propose that an adjudger should be under a duty to intimate registration of his adjudication to a heritable creditor or co-adjudger. It would however often be in the adjudger's interest to give such intimation in order to restrict the ranking of a prior heritable creditor in a standard security in respect of future advances.[1] It would also be in the adjudger's interest to use the procedure proposed below whereby the adjudger may require a prior or pari passu heritable creditor to exercise his remedy of sale within a statutory period.[2] It would also be in an adjudger's interest to claim a ranking in any prior or pari passu adjudication and sale. In these circumstances, a formal duty of intimation appears unnecessary.

5.30 Further, we do not think that an adjudger should be under a duty to advertise the registration of the adjudication in the newspapers or Edinburgh Gazette. Such advertisements would add unnecessary expense, and would cause unnecessary humiliation and distress to debtors. Creditors or credit reference agencies can normally identify the debtor's liability to diligence from the public records of court decrees of payment.

5.31 We propose:

(1) **The adjudger should be required to intimate to the debtor by a statutory notice served by postal (recorded delivery) service, registration of the notice of adjudication in the property registers.**

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[1] See Proposition 6.2 (para. 6.14).

[2] Proposition 5.26(2)(para. 5.147).

(2) The adjudger should not, however, be under a duty to intimate his adjudication to prior, pari passu or postponed heritable creditors or co-adjudgers, or to give public notice of the adjudication in the newspapers or Edinburgh Gazette.

(Proposition 5.5).

(6) Effect and incidents of adjudication

(a) Adjudication not to convert accrued interest into interest-bearing sum.

5.32 Under the present law, a decree of adjudication has the effect of accumulating the debt due to the adjudger - principal,accrued interest and expenses - into a single sum on which interest runs though the decree does not mention interest. As a general rule, other modes of diligence do not have that effect in modern practice and though registration of an expired charge in the Register of Hornings does have that effect under an old statute,[1] the Debtors (Scotland) Act 1987, s.90(8) abolishes registration of expired charges which is never used in modern practice. We can see no reason why adjudication should continue to have the special privilege of accumulation. Since a heritable security secures interest accruing after infeftment at the appropriate rate if specified in the registered deed, and a poinding or arrestment secures interest accruing after execution of the diligence[2], an adjudication should secure simple interest accruing after the adjudger's infeftment.

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[1] Debtors (Scotland) Act 1838, ss.5 and 10

[2] See Debtors (Scotland) Act 1987, s. 45 (poindings); McDonald and Halket v. Wingate (1825) 3 S. 494 (arrestment).

5.33 We propose:

The registration of an adjudication should no longer have the effect of accumulating the principal sum, interest and expenses into a capital sum bearing interest thereafter, and accordingly the new diligence of adjudication and sale should secure interest accrued and continuing to accrue until sale or foreclosure but not interest on accrued interest.

(Proposition 5.6).

(b) "Apparent insolvency"

5.34 Under the Bankruptcy (Scotland) Act 1985, s.7(1)(c)(iv), a decree of adjudication has the effect of creating "apparent insolvency" within the meaning of that Act unless it is shown that when the decree was granted the debtor was willing and able to pay his debts as they become due. An expired charge has a similar effect.[1] Since in the new procedure which we propose, an expired charge will precede every adjudication for debt and since apparent insolvency thus constituted continues until the debtor becomes able to pay his debts and pays them as they become due,[2] there would seem to be little practical point in providing that the registration of a notice of adjudication would re-constitute apparent insolvency of new.

5.35 We propose therefore that:

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[1] Bankruptcy (Scotland) Act 1985, s.7(1)(c)(iii).

[2] Ibid, s.7(2)(b).

If as we proposed above an expired charge becomes an esential prelude to registration of a notice of adjudication, then such registration should not constitute or re-constitute apparent insolvency in the statutory sense and accordingly the Bankruptcy (Scotland) Act 1985, s.7(1)(c)(iv) (decree of adjudication to constitute apparent insolvency) should be repealed.

(Proposition 5.7).

(c) Vesting "tantum et tale"

5.36 The real right to a nexus over the adjudged property which vests in the adjudging creditor on the date of registration of the adjudication, by virtue of the duly registered extract decree of adjudication, is subject to certain exclusions which are normally described by reference to the general common law principle (applicable to arrestments and poindings as well as adjudications)[1] that the creditor takes the property "tantum et tale" as it stood in the hands of the debtor, and subject to certain conditions and qualifications attaching to it. Thus the adjudging creditor is bound by a prior latent trust over the adjudged subjects created in favour of a third party beneficiary.[2] The tantum et tale principle, however, only applies to real conditions affecting the property[3] and to conditions which affect the constitution of the real right in the debtor.[4] It does not apply to personal obligations under which the debtor has come with respect to the property. Thus if the debtor is the beneficial owner, his personal obligation to convey the property to a third

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[1] Graham Stewart, pp. 68, 128-129, 620-621.

[2] Heritable Reversionary Co. v. Millar (1892) 19 R. (H.L.) 43 at p.48 per Lord Watson; Thomson v. Douglas Heron and Co. (1786) Mor. 10229.

[3] Gibson v. Hunter Home Designs Ltd. 1976 S.C. 23 at pp. 29-30 per Lord Cameron; Graham Stewart, p.620.

[4] Mansfield v. Walker's Trs. (1833) 11 S. 813 at p.822 per Lord Corehouse, affd. 1 S. & McL. 203; Graham Stewart, p.620.

party, even for onerous causes, will not affect an adjudger.[1] Even where the personal obligation has been implemented by delivery of a conveyance to a third party, an adjudger infeft before the third party will be preferred.[2]

5.37 The tantum et tale principle applies also to sequestrations.[3] The bankrupt's estate for example vests in the permanent trustee by virtue of the act and warrant which has the same effect with respect to heritable property as inter alia "a decree of adjudication for payment and in security of debt, subject to no legal reversion" in the trustee's favour.[4] In our Report on Bankruptcy[5] we concluded that it would be unwise to put the adaptability of the tantum et tale principle at risk by attempting to make it the subject of express statutory statement. In our view, that conclusion applies with equal force to adjudications. Thus while legislation introducing the new diligence of adjudication and sale should ensure that the tantum et tale principle applies to that diligence, the legislation should not attempt to define the content of that principle.

5.38 We propose:

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[1] E.g. Mitchells v. Ferguson (1781) Mor. 10296; Heritable Reversionary Co. v. Millar (1892) 19 R. (H.L.) 43 at pp. 47-48 per Lord Watson; Gibson v. Hunter Home Designs Ltd. 1976 S.C. 23.

[2] Mitchells v. Ferguson (1781) Mor. 10296.

[3] Goudy, p.249; Gibson v. Hunter Home Designs Ltd. 1976 S.C. 23; Bankruptcy (Scotland) Act 1985, s.31(1)(b).See para. 6.23 below.

[4] Bankruptcy (Scotland) Act 1985, s.31(1)(b); see para.6.17 below.

[5] Para. 11.22.

It should be made clear by statute that the common law principle known as vesting tantum et tale (under which the right which an adjudger acquires over the adjudged property, by registration of a decree of adjudication in the property registers, is subject to certain conditions and qualifications affecting the debtor's title to the property as it stood at the date of that registration) should apply in relation to the registration of a notice of adjudication under the new diligence of adjudication and sale. The content of that common law principle should not, however, be defined by statute but should be left to be developed by the courts.

(Proposition 5.8)

(d) Assignation of writs

5.39 Under the present law, it seems that a decree of adjudication does not have the effect of assigning the writs relating to the adjudged property. The adjudger takes the adjudged property tantum et tale and thereafter acquires a title as full owner at the expiry of the legal on obtaining a declarator of its expiry. In the new diligence of adjudication and sale, it is proposed that the adjudger will have a power of sale and though the registered notice of adjudication will confer on the adjudger a kind of security right or nexus over the debtor's interest in the adjudged property, it follows from the tantum et tale principle that neither the notice of adjudication nor the adjudger's conveyance in exercise of the power of sale to the third party purchaser will cure any defects in the debtor's title which affect the constitution of the debtor's right. Where the debtor's right is registrable in the Sasines Register, the adjudger will require to

satisfy any purchaser of the adjudged subjects that there is no defect in the debtor's title which would adversely affect the purchaser's title. Similarly, where the title to the adjudged subjects of the person last infeft was registered in the Land Register, and the debtor's right to the subjects depends on unregistered writs, these writs will require to be examined by the adjudger and any purchaser from him. Moreover, where the title of the person last infeft was registered in the Land Register with no indemnity or limited indemnity (i.e. where the Keeper has excluded indemnity in whole or in part under the Land Registration (Scotland) Act 1979, s.12(2)), the pre-registration writs relating to the exclusion of the indemnity will require to be examined by the adjudger and any purchaser from him.

5.40 Under the Conveyancing and Feudal Reform (Scotland) Act 1970, s.10(4), the statutory forms of standard security have the effect, unless specially qualified, of importing an assignation of the title deeds, including searches, and all conveyances not duly recorded, affecting the security subjects or any part thereof, with power on sale to deliver them to the purchaser subject to prior rights of third parties and to assign to the purchaser any rights to have the title deeds made forthcoming. Since an adjudication is an involuntary transfer in which (unlike a standard security) the debtor-proprietor does not grant any deed, no qualification of the assignation of writs will be possible and accordingly in an adjudication the adjudger's rights to demand delivery or exhibition of the writs and to transfer those rights to a purchaser on sale will have to be specifically regulated by statute. Section 16 of the Land Registration (Scotland) Act 1979 provides that a deed conveying an interest in land will unless specially qualified import an assignation of the writs in the terms set out in that section,

which have some advantages over s.10(4) of the 1970 Act. We set out specific proposals in the next paragraph based partly on elements of these two provisions, but with modifications adapting them to the special circumstances of adjudications.

5.41 We invite views on the following proposition.

(1) **Where the title of the person last infeft in subjects later adjudged is registered in the Sasines Register, the duly registered notice of adjudication should import an assignation to the adjudger of the writs (title deeds and searches and all links in title not duly recorded). In particular it should:**

(a) impose on the debtor and any custodian of the writs an obligation:

(i) to deliver to the adjudger all writs in his possession relating to the interest adjudged; and

(ii) to exhibit to the adjudger and his successors at his or their expense on all necessary occasions any writs which remain in the debtor's possession and which relate partly to the interest adjudged;

(b) import an assignation by the debtor to the adjudger of any right which the debtor may have to require the custodian of undelivered writs to exhibit them;

(c) impose on the adjudger and his successors an obligation to exhibit any delivered writs relating partly to other subjects on all necessary occasions to any party having an interest in them; and

(d) confer powers on the adjudger in the event of sale, subject to the prior rights of other persons in the writs, to deliver the writs in his possession to the purchaser and to assign to the purchaser and his successors any rights he may have to exhibition of undelivered writs by their custodian.

(2) Where the title of the person last infeft is registered in the Land Register, a duly registered notice of adjudication:

(a) should have the effect of assigning to the adjudger any right which the debtor may have to possession or exhibition of any unrecorded conveyances linking his title to that of the person last infeft; and

(b) if the title of the person last infeft is registered with exclusion of indemnity under s. 12(2) of the Land Registration (Scotland) Act 1979, should have the same effect with respect to pre-registration writs relating to the exclusion as is provided by the rules in para. (1) above in relation to a title recorded in the Sasines Register.

(3) The debtor should be bound, on demand, to give to the adjudger particulars of the last known custodian of any writs in respect of which the debtor's right to exhibition

has been assigned to the adjudger under the foregoing rules.

(4) The sheriff should have power, on a summary application by the adjudger, to make an order enforcing any right of the adjudger under the foregoing paragraphs against the debtor or other custodian of the writs. Disobedience of the order should be punishable as a contempt of court.

(Proposition 5.9).

(e) Character of debt as heritable or moveable

5.42 At common law, an adjudication used to enforce a moveable debt has the effect of changing the character of the debt from moveable to heritable.[1] If that is still the law, one consequence would be that, on the adjudger's death, the debt would not be treated as part of the adjudger's estate in computing the amount of legal rights (i.e. jus relicti, jus relictae and legitim). Graham Stewart comments[2] that the common law may have been altered by the Titles to Land Consolidation (Scotland) Act 1868, s.117 which (as subsequently amended) has the effect that a "heritable security" (a) is moveable in the general succession of the creditor; (b) remains heritable quoad fiscum; and (c) does not belong to the widow jure relictae (nor to the widower jure relicti[3]) and is not to be treated as part of the creditor's moveable estate in computing the legitim fund. The expression "heritable security" is defined by s.3 of the 1868 Act in terms wide enough to cover a decree of adjudication for debt. The effect is that a debt secured by an adjudication for debt, like a debt secured by a voluntary heritable security, is not subject to legal rights which are now only exigible from moveable estate. We do not consider this consequence further because in our Consultative Memorandum No. 68 on Intestate Succession and Legal Rights[4] (published in September 1986), we invited views on the reform of legal rights and provisionally propose that if they are retained, they should be exigible from the whole estate without distinction between heritage and moveables. The character of the debt secured by adjudication may therefore cease to be important in the context of legal rights in succession to the creditor.

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[1] Graham Stewart, pp. 627-628.

[2] Ibid, p.628, fn.1.

[3] Married Women's Property (Scotland) Act 1881, s.6.

[4] Propositions 20 (para. 4.39) and 22 (para. 4.49).

5.43 A second consequence of the rule concerns the incidence of liability for a debt due by a deceased person in a question between his successors or representatives. While a creditor of a deceased person may recover his debt out of any part of that person's estate, nevertheless in a question between the deceased's successors and representatives, the common law rule is that "moveable debts" must be paid from the moveable estate and "heritable debts" from the heritable estate.[1] Thus, for example, where a heritably secured debt is not fully paid out of the proceeds of sale of the security subjects, the remainder of the deceased debtor's heritable estate is liable for the deficiency in a question between the debtor's representatives and successors.[2] This rule may require review in due course but meanwhile we do not think that an adjudication should convert a moveable debt into a heritable debt for the purpose of this rule. A debt secured by adjudication differs from most or all other "heritable debts" insofar as in the case of a debt secured by adjudication the act by which the debt is converted into a heritable debt is that of the adjudging creditor whereas in other heritable debts, generally that act is the act of the debtor, eg in voluntarily granting a heritable security which is then registered.[3]

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[1] This common law rule is preserved by the Succession (Scotland) Act 1964, s.14(3).

[2] Bell's Tr. v. Bell (1884) 12 R.85.

[3] McLaren, Wills and Succession (3rd edn.) vol. 2, p.1309, defines "heritable debts" as including registered heritable securities, pecuniary real burdens, debts secured by trusts over heritable property, claims for meliorations and penalties stipulated for resumption of possession by a proprietor, or for his failure to renew a lease.

5.44 The only other consequence which we have traced is that a debt secured by an adjudication becomes itself attachable by adjudication at the instance of a creditor of the adjudger. We intend to revert to this question in a later Discussion Paper relating to miscellaneous issues, but that question is severable from the general question whether an adjudication should change the character of a debt from moveable to heritable. We suggest that it should not have that effect.

5.45 We propose:

In the new diligence of adjudication and sale, the registration of a notice of adjudication to enforce a moveable debt should not have the effect of changing the character of the debt from moveable to heritable.

(Proposition 5.10).

(7)Adjudger's remedies against adjudged subjects.

5.46 We have already proposed that the new diligence should take the form of an attachment of heritable property followed by a procedure for its sale, with foreclosure as a subsidiary remedy available only in default of sale, and that the legal period of redemption should be drastically reduced[1] and have made some other proposals,[2] including proposals for significant restrictions on the existing powers of adjudgers to enter into possession. We now set out more detailed proposals on the remedies of the adjudger. These remedies would include, in addition to sale and foreclosure, powers relating to maintenance, alterations etc. of the adjudged property where the debtor defaults in obligations imposed on him with respect to those matters.

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[1] Proposition 3.2 (para 3.7) in volume 1.

[2] See volume 1, Part III, passim.

(a) Power of sale

(i) Notice of commencement of sale procedure

5.47 Our proposals on the adjudger's power of sale are to some extent modelled on the procedure for sale by a heritable creditor enforcing a standard security under Part II of the Conveyancing and Feudal Reform (Scotland) Act 1970 but with very extensive modifications. We think that the initial steps in the procedure entitling a heritable creditor to exercise his power of sale under a standard security - calling up notice; default notice; or the constitution of "apparent insolvency" followed by a judicial warrant of sale - are not appropriate in the case of adjudications. We propose instead that after registration of the notice of adjudication, and certain other procedures [1] the adjudger should serve a notice in a prescribed statutory form on the debtor stating his intention to sell the adjudged subjects in exercise of his power of sale unless in the meantime the debt is paid together with the expenses of the diligence incurred up to the date of the tender of payment.

5.48

The procedure for sale of adjudged property should be commenced by service on the debtor of a notice in a form

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[1] eg. giving the debtor, and any co-owner, an opportunity to apply for restriction of an adjudication; giving any co-owner an option to purchase the debtor's pro indiviso share at valuation or to apply to the sheriff for an order restricting adjudication and sale to that share;and where the adjudged subjects include the home of the debtor or a co-owner or the spouse or ex-spouse of either, obtaining their consent or the sheriff's authority to the sale. See the Summary of the procedure at volume 1 para. 3.44.

prescribed by statute stating that the adjudged subjects will be sold unless the debt is paid together with expenses of the diligence incurred to the date of tender of payment.

(Proposition 5.11).

(ii) Requirements as to mode and procedure of sale

5.49 In a poinding and warrant sale of moveable goods, it is required by statute that the sale should be by public auction[1] and despite the many criticisms of warrant sales this feature has never been criticised so far as we are aware. The market for heritable property is very different, however, and experience in the context of heritable securities has shown that very often the easiest way of obtaining the best price for heritable property is a sale by private bargain. Thus at one time, a creditor in a bond and disposition in security was only entitled to sell the security subjects by public auction. In 1966 the Halliday Committee on Conveyancing Legislation and Practice remarked[2] that this restriction on the creditor's power of sale was "probably the greatest disadvantage of this form of security". They continued:[3] "The number of sales effected by public exposure [i.e. public auction] has much diminished in modern practice, since a sale can often be effected on more advantageous terms by private negotiation and the requirement of public exposure is inconvenient in the sale of certain kinds of property such as individual flats in tenements." The Committee therefore recommended that the procedure for sale under existing bonds and dispositions in security and the new form of standard security should allow sale by private bargain subject to certain safeguards, which included retention of the rule that public auction should be necessary as a

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[1] Debtors (Scotland) Act 1987, s.31(1) replacing Debtors (Scotland) Act 1838, s.26.

[2] Cmnd. 3118, para. 111.

[3] Idem.

pre-requisite of foreclosure.[1] We have little doubt therefore that sales should be competent by private bargain as well as by public auction.

5.50 In formulating a new procedure for sale under the reformed diligence of adjudication, it seems to us that the choice lies between two models, namely (1) the procedure for sales under bonds and dispositions in security regulated by the Conveyancing (Scotland) Act 1924 as amended and extended by Part III of the Conveyancing and Feudal Reform (Scotland) Act 1970 and (2) the procedure for sale under standard securities regulated by Part II of that Act. The procedure for sale under a standard security is much simpler and more flexible than the procedure in a sale under a bond and disposition in security. In particular the specific requirements in the latter procedure as to (1) the content of advertisements, (2) the minimum requirements as to the period for advertisements, (3) the particular newspapers, (4) the interval between advertisement and exposure or contract of sale, and (5) the place of public auction, are omitted. Their omission springs from the view that the creditor's general duties to advertise and to obtain the best price are sufficient safeguards for debtors.

5.51 We provisionally conclude that the procedure for sales under standard securities would be preferable as a model for adjudications. It seems to us likely that the additional specific requirements applying to sales under bonds and dispositions in security would not in fact operate as more effective safeguards. There already is a body of case law on the fiduciary duties of heritable creditors to obtain the best price they reasonably can.[2] We propose later that the procedure should always be operated by

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[1] Idem.

[2] E.g. Davidson v. Scott 1915 S.C. 1120; Aberdeen Trades Council v. Shipconstructors and Shipwrights Association 1949 S.C. (H.L.) 45 at p.65; Rimmer v. Thomas Usher and Son Ltd 1967 S.L.T. 7.

solicitors.[1] Solicitors are likely to be scrupulous in observing"the best price principle" if only to minimise the risk of a damages claim by the debtor or by a creditor.

5.52 We have considered whether an additional safeguard should be provided. Both types of procedure for sales under heritable securities provide for an application to the sheriff for decree of foreclosure in circumstances where the heritable creditor is unable to find a purchaser at a price not exceeding the amount of the secured debt and any prior or pari passu debts. This amount may bear no relation to the value of the adjudged property. We note that the Halliday Committee, in recommending sales by private bargain under bonds and dispositions in security, recommended as a safeguard for debtors "that the price should not be less than the market value at the time as determined by an independent professional valuer instructed by the creditor".[2] There is an analogy in the appraised values of poinded goods, the amounts of which are credited to the debtor if the goods are delivered to the poinding creditor in default of sale.[3] On the other hand, the Halliday Committee's recommendation was not implemented and, so far as we are aware, the absence of provision for appraised values in standard security sales has not attracted criticism. It may be persuasively argued that the value of the property is simply what it fetches when it is properly advertised for sale. For these reasons, we do not favour the use of appraised values for the purpose of fixing an upset or reserve price. To safeguard debtors against foreclosure at too low a price, we suggest later [4] that in an application for decree of foreclosure the sheriff should be empowered to order further attempts at sale at an upset or reserve price fixed by him following a valuer's report. This should suffice to protect debtors.

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[1] See para. 5.185 ff.

[2] Cmnd. 3118, para. 111.

[3] Debtors (Scotland) Act 1987, s.37(9) superseding Debtors (Scotland) Act 1838, s.27; Scottish Gas Board v. Johnstone 1974 S.L.T. (Sh.Ct.) 65.

[4] See para. 5.107.

5.53 We invite views on the following:

(1) **A sale of adjudged subjects should be effected either by public auction or private bargain.**

(2) **The requirements as to the conduct of a sale should be modelled on those applicable to sales enforcing standard securities. Accordingly the creditor should be under general duties -**

(a) **to advertise the sale; and**

(b) **to take all reasonable steps to ensure that the price at which all or any of the adjudged subjects are sold is the best that can be reasonably obtained.**

(3) **No provision should be made for an appraised value for the purpose of fixing an upset or reserve price at the sale, except in a sale ordered by the sheriff in an application for decree of foreclosure as mentioned at para. 5.107.**

(Proposition 5.12)

(iii) Sale in lots

5.54 It is suggested that the adjudger should be entitled to sell the adjudged subjects in lots, as where the subjects include flatted houses in a tenement.[1] It would be useful if the adjudger were to have the same powers as a heritable creditor in a voluntary security (a) to apportion feuduty and similar burdens; and (b) to execute a deed of declaration of conditions creating rights and

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[1] We discuss at para.5.103 below whether exposure to sale of the whole property by public auction should be a condition of foreclosure in default of sale, with the effect that sale in lots by private bargain should not be attempted until after the exposure of the whole subjects for sale by public auction. We reject however that condition of foreclosure.

imposing obligations reasonably required for the management, maintenance and use of any part of the subjects to be held in common.[1] The power to execute and register the deed would arise immediately after the subjects, or any of them, were sold, but the conditions would be agreed by the adjudger and purchaser in the contract of sale.

5.55 **An adjudger should be entitled to sell in lots, to apportion feuduty and similar burdens and to execute a deed of declaration of conditions relating to subjects held in common or subject to a regime of common interest.**
(Proposition 5.13).

(iv) Disposition on sale and warrandice

5.56 Disposition The sale would be implemented by a disposition (or assignation in the case of a registered long lease) by the adjudger-seller in favour of the purchaser. In a case where the adjudger's power of sale depended on the consent of a debtor or co-owner etc., or on the sheriff's authority, a reference might be made in the narrative clause of the disposition to the document in which the consent or authority was given or alternatively the consenting party might also sign the disposition. No clause of assignation of the writs would be necessary unless it was desired to qualify the assignation implied by statute.[2]

5.57 Warrandice. As regards the constitution and transmission of obligations of warrandice in favour of the purchaser of the

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[1] Conveyancing (Scotland) Act 1924 s.40, as amended by the Conveyancing and Feudal Reform (Scotland) Act 1970 s.37.

[2] Land Registration (Scotland) Act 1979, s. 16.

adjudged subjects, two cases have to be considered. First, as regards the grant of an obligation of warrandice by the adjudger himself, since the adjudger will take the debtor's title tantum et tale with all its imperfections, the adjudger might wish to grant warrandice of title "from fact and deed"[1] rather than "absolute warrandice".[2] The warrandice clause however would be settled by contract and a purchaser would be likely to insist on absolute warrandice.The adjudger's power of sale would be conferred by operation of law rather than the debtor's deed and accordingly, in contrast to the case of a disposition on a sale in implement of a heritable security,there should be no obligation on the debtor to ratify, approve and confirm the adjudger's sale and disposition.[3]

5.58 Second, we think that a purchaser of the adjudged subjects should be entitled to enforce any obligation of warrandice relating to the adjudged subjects which is owed by a predecessor in title of the debtor to the debtor. Where the obligation of warrandice is constituted in an original feu charter or feu contract by the superior in favour of the original feuar, the obligation will transmit with the lands in favour of the feuar's singular successors without assignation, on the theory that there is privity of contract between the superior and the singular successors of the original feuar.[4] Accordingly, the purchaser from the adjudger will have a direct right against the superior to enforce the superior's obligation of warrandice contained in the original feudal grant, and this right is not dependent on any

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[1] Ie. an obligation to make good loss caused by the adjudger's own past and future acts.

[2] Ie. an obligation to make good loss arising from any defect in the adjudger's title, whether due to his own acts or to a prior defect in title.

[3] Cf. Conveyancing (Scotland) Act 1924, s. 41(1).

[4] Lennox v. Hamilton (1843) 5 D 1357; Duke of Montrose v. Stewart (1863) 4 Macq. 499, affg. (1860) 22D. 755; Hope v. Hope (1864) 2 M. 670.

assignation by the debtor to the adjudger or by the adjudger to the purchaser. On the other hand, where the relationship between the original grantor and grantee of the obligation of warrandice is that of disponer and disponee rather than superior and vassal, the legal position is more complicated. In the case of an obligation of relief or warrandice against ministers' stipends or other public burdens granted in a disposition, it is well settled that the right to enforce the obligation does not transmit to singular successors unless it is expressly assigned, and for this purpose an assignation of the writs does not suffice.[1] We are unclear how far obligations of warrandice as to such collateral matters are still of importance in modern conveyancing practice, and would be grateful for comments.

5.59 In the case of an obligation of warrandice of title, there is a conflict of authority. Stair took the view that an express assignation of warrandice or assignation of the writs, was necessary for transmission of the right of recourse under the obligation of warrandice[2], whereas Bankton[3] and Erskine[4] stated that the right of recourse is conveyed by the disposition itself without any such assignation. For long the conflict did not matter in practice since dispositions either expressly or by implication invariably assigned the writs which, even on Stair's

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[1] Marquis of Breadalbane's Trs. v. Horne (1842) 1 Bell 1; Marquis of Breadalbane v. Sinclair (1846) 5 Bell 353; Spottiswoode v. Seymer (1853) 15D 458. For a short form of assignation, see Conveyancing (Scotland) Act 1874, s. 50, Sch. M.

[2] Stair, Institutions II, 3, 46.

[3] Bankton, Institute, II, 3, 123.

[4] Erskine, Institute, II, 3, 31.

view, sufficed.[1] But it has recently been observed [2] that, in the case of registered land, the underlying theory assumes importance because the effect of the Land Registration (Scotland) Act 1979, s. 3(5) seems to be that, on registration of an interest in land in the Land Register, existing clauses of assignations of writs cease to have effect.[3]

5.60 Against this background, we think that it will be necessary to provide by statute that where the debtor whose property has been adjudged has a right of recourse under any obligation of warrandice granted by any of his predecessors in title (other than the superior) in respect of the adjudged property or any matter accessory to that property, it should be competent for the adjudger, by inserting a clause in the disposition implementing his power of sale, to assign that right of recourse to the purchaser as if that right had been expressly assigned by the debtor to the adjudger. Such a provision is certainly necessary if Stair's theory is correct, because there is no assignation by the debtor to the adjudger. It may still be necessary if the theory of Bankton and Erskine is correct since these jurists seem to say that the right of recourse is carried by a disposition:[4] in the case of an adjudication, there is no disposition by the debtor to the adjudger. Nor is it clear that the special statutory assignation of writs which we proposed above[5] would carry the predecessor's obligation of warrandice, and even if it did, an assignation of writs

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1 See eg. Montgomerie Bell, Lectures on Conveyancing (3rd edn., 1881) pp. 690-691; Menzies Lectures on Conveyancing (2nd edn., 1900) p.616.

2 See K G C Reid, "Warrandice in the Sale of Land" in A Scots Conveyancing Miscellany (ed. D. J. Cusine) 152 at p. 169.

3 It should be noted that the State indemnity which underwrites the Land Register does not render traditional grants of warrandice otiose in the case of registered land: see Registration of Title Practice Book, Chapter H.3.

4 Bankton, Institute, II, 3, 123; Erskine Institute II, 3, 31.

5 See Proposition 5.9 (para. 5.41).

ought not to be relied on for this purpose in the face of s. 3(5) of the 1979 Act.

5.61 We propose:

(1) **The sale should be implemented by a disposition, or assignation in the case of a registered long lease, by the adjudger in favour of the purchaser.**

(2) **It should be provided by statute that where a debtor whose property has been adjudged has a right of recourse under any obligation of warrandice granted by any of his predecessors in title (other than the superior) in respect of the title to the adjudged property or of any matter accessory to that property, it should be competent for the adjudger to insert, in the disposition implementing his power of sale, a clause assigning that right of recourse to the disponee, as if that right had been expressly assigned by the debtor to the adjudger. In the case of an obligation of warrandice granted by the superior in the original feu grant, such a clause is unnecessary.**

(Proposition 5.14).

(v) Statutory protection of bona fide purchaser's title

5.62 If the new diligence is to be effective, it is necessary that a bona fide purchaser for value at a sale of the adjudged subjects should be protected against the reduction of his title on the ground that the debt had ceased to exist or that the procedure had been irregularly executed. Without such protection, the

adjudger may fail to find a purchaser, or the price may be adversely affected by the risk of reduction of the purchaser's title. In either event, the debtor or a co-owner as well as the adjudger may be prejudiced in cases where the title is in reality not reducible simply because the risk of reduction will exist in all cases. In the case of registered titles, the Keeper would refuse to grant an entitlement to indemnity in respect of the purchaser's registered interest, if there were no statutory protection against reduction.

5.63 In the case of standard securities the title of a purchaser of the secured subjects is protected from reduction if the registered disposition expressly bears to be in implement of the heritable creditor's power of sale, and if the procedure is ex facie regular.[1] The latter condition requires the purchaser's solicitor, and in the case of registration of title the Keeper's staff, to inspect the documents relating to the procedure. The procedure in the new diligence of adjudication and sale[2], however, is more complicated than the procedure in a sale enforcing a standard security and it would sometimes be a well nigh impossible task for the solicitor or Keeper's staff to check the ex facie validity of the procedure.

5.64 In these circumstances we suggest that the protection from reduction should be conditional upon the delivery to the purchaser and the subsequent registration of a certificate by the solicitor executing the diligence stating that, to the best of his

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[1] Conveyancing (Scotland) Act 1924, s.41 as amended by the 1970 Act, s. 38.

[2] See the summary of the procedure in volume 1 at para. 3.44.

knowledge and belief,[1] the procedure in the diligence has been validly executed. Such a certificate should also preclude any interdict against completion of title. However, the debtor, any co-owner, or a spouse or ex-spouse of either, who may be prejudiced by the irregular execution of the diligence should have a right to claim damages from the adjudger and the solicitor executing the diligence. We propose later[2] that the diligence should always be executed by a solicitor whose actings would be underwritten by the Guarantee Fund and professional indemnity insurance.

5.65 We propose:

(1) **For the protection of the title of a purchaser of adjudged subjects, it should be provided by statute that where:**

(a) **the disposition (or assignation of a registered lease) by the adjudger in favour of the purchaser expressly bears to be in implement of the adjudger's power of sale; and**

(b) **a certificate in a form prescribed by statute is delivered to the purchaser which bears to be granted**

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[1] Not all steps in procedure will be carried out by the solicitor executing the diligence. The charge and notice of entitlement to adjudge, and possibly other writs, will be served by a messenger-at-arms or sheriff officer and a professional auctioneer will conduct the sale if it is by public auction.

[2] Proposition 5.33 (para. 5.191).

by the solicitor executing the diligence and states that to the best of the solicitor's knowledge and belief the procedure in the diligence has been validly executed, (which certificate shall be registrable at or after the registration of the disposition in the property registers),

the title of the purchaser should not be reducible on either of the following grounds, namely:

(i) that the debt had ceased to exist; or

(ii) that the procedure in the diligence of adjudication and sale had been irregularly executed,

unless either of these facts appeared on the registers or was known to the purchaser at the time when the price was paid.

(2) Where such a disposition and certificate has been delivered by the adjudger to the purchaser in exchange for the price, it should not be competent for any person to obtain, on either of the foregoing grounds, interdict prohibiting the purchaser from completing title to the subjects sold.

(3) The foregoing proposals are without prejudice to any right of the debtor, or a co-owner, or any spouse or former spouse of either, or any other interested person:

(a) to obtain, before the time of delivery of the disposition and certificate, interdict against further proceedings in the diligence; or

(b) to claim, before or after such delivery, from the adjudger, or the solicitor executing the diligence, or both, damages for loss arising from wrongful execution of the diligence.

(Proposition 5.15).

(vi) Disburdenment of subjects sold, application of proceeds of sale, and ranking problems

5.66 As under the present law, the existence of a prior adjudication or heritable security[1] already affecting subjects should not prevent a creditor from adjudging them. Clearly in the case of concurrent adjudications, or of concurrent adjudications and heritable securities, affecting the same subjects, only one of the competing creditors should exercise the remedy of sale or foreclosure, to recover his own debt and any prior, pari passu or postponed debts. We discuss later[2] possible rules for selecting the appropriate creditor entitled to exercise that remedy. At this stage, we assume that a particular creditor is entitled to exercise that remedy under those rules.

5.67 In relation to a sale under a standard security, the 1970 Act[3] provides that on recording of the purchaser's disposition the subjects sold are disburdened of the security and of other securities and diligences ranking pari passu with it or postponed to it (s.26(1)); preserves unaffected the rights of a creditor under a prior security but gives the selling creditor the like right as the

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[1] e.g. a standard security, or pecuniary real burden at common law, or statutory charging order.

[2] See para.5.133 et seq.

[3] Conveyancing and Feudal Reform (Scotland) Act 1970.

debtor to redeem the security (s.26(2)); directs the selling creditor to apply the proceeds of sale in accordance with a specific order of priority (s.27(1)); and provides for discharge of the selling creditor on consignation of moneys in court where the creditor is unable to obtain a receipt or discharge otherwise (s.27(2) and (3)).

5.68 Some of these provisions, especially ss. 26(1) and 27(1), and cognate provisions relating to bonds and disposition in security,[1] have recently been the subject of conflicting decisions[2] and of academic commentary.[3] In these authorities, the main issue has been the ranking of the claims of inhibitors (ie. creditors who have used the diligence of inhibition against the debtor) on the proceeds of sale of security subjects by a heritable creditor. In a forthcoming Discussion Paper, we shall discuss inhibitions. In this Discussion Paper, we assume that inhibitions will be retained in broadly their present form and seek views on what provisions would be necessary to accommodate inhibitions in the rules of ranking on the proceeds of sale of adjudged subjects.

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[1] Titles to Land Consolidation (Scotland) Act 1868, ss. 122 and 123.

[2] See George M. Allan v. Waugh's Tr. 1966 S.L.T. (Sh.Ct.) 17; McGowan v. A. Middlemas and Sons Ltd. 1977 S.L.T. (Sh.Ct.) 41; Bank of Scotland v. Lord Advocate 1977 S.L.T. 24; Abbey National Building Society v. Shaik Aziz 1981 S.L.T. (Sh.Ct.) 29; Ferguson & Forster v. Dalbeattie Finance Co. 1981 S.L.T. (Sh.Ct.) 53; Halifax Building Society v. Smith 1985 S.L.T. (Sh.Ct.) 25; Sheriff Clerk of North Strathclyde at Paisley v. Patterson noted 1985 S.L.T. (Sh.Ct.) 31.

[3] Love, Meston and Cusine, "Ranking of Inhibitors" (1977) 22 J.L.S.S. 424; Gretton, "Inhibitions, Securities, Reductions and Multiplepondings" (1982) 27 J.L.S.S. 13 and 68; Gretton, "Inhibitions and Standard Securities" 1985 S.L.T. (News) 125; Gretton, Inhibition and Adjudication p. 104 ff.

5.69 Disburdenment of subjects sold. We propose that provision should be made for the disburdenment of subjects which have been sold by an adjudger broadly on the lines of section 26(1) of the 1970 Act which applies to pari passu and postponed heritable securities. Thus it should be provided that where an adjudger has sold the adjudged subjects or any part thereof, and grants a disposition expressly in implement of his power of sale in favour of the purchaser or his nominee, then on the registration of the purchaser's title in the property registers, the subjects should be disburdened of the adjudication and all other diligences and heritable securities ranking pari passu with or postponed to that adjudication. Section 26(1) has to be read with section 27(1) of the 1970 Act making the selling creditor a trustee of the proceeds of sale and directing him to pay prior, pari passu and postponed debts.[1] Presumably such a provision and provisions for intimation to creditors whose securities and diligences appear on the property registers would suffice to protect such creditors. We revert to s.27(1) later.

5.70 Disburdening subjects of prior heritable securities. A problem however arises in disburdening the subjects sold of prior heritable securities.Section 26(2) of the 1970 Act provides that where on a sale under a standard security, the security subjects remain subject to a prior security, the recording of the disposition to the purchaser(or registration of the purchaser's title under the 1979 Act) shall not affect the rights of the creditor in that security, but the selling creditor shall have "the like right as the debtor to redeem the security". The debtor's right of redemption of a standard security may be limited by contract.[2] Where the debtor has a right to redeem a prior security, we think that a

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[1] Section 27(1) is quoted at para. 5.84 below.

[2] Conveyancing and Feudal Reform (Scotland) Act 1970, s. 18(1) and (1A) respectively amended and inserted by the Redemption of Standard Securities (Scotland) Act 1971.

postponed adjudger, like a postponed standard security-holder, should also have a right to redeem it.

5.71 Where, however, the debtor has no right to redeem the prior heritable security, the question arises whether the adjudger should be entitled:

(a) to sell the adjudged subjects but only under burden of the prior security; or

(b) to redeem the prior security and to give the purchaser a title disencumbered of it but only with the consent of the prior secured creditor. Failing such consent within a statutory time-limit, the adjudication would cease to have effect; or

(c) to redeem the prior security and give the purchaser a title disencumbered of it, notwithstanding that the debtor is not entitled to redeem it?

We propose later that a prior (or pari passu) heritable creditor should have a title to exercise his remedies of sale etc. which would be preferable to the adjudger's title to exercise his remedies though with an obligation to account to the adjudger.[1] But the foregoing questions would remain relevant because the prior heritable creditor might not wish to sell the subjects and we propose that if he does not use his remedies within a statutory period, the adjudger should be entitled to apply to the sheriff for authority to exercise his remedies, in lieu of the exercise by the heritable creditor of his remedies.[2] Moreover, if an adjudger could not redeem a prior heritable security, the prior heritable creditor might have no incentive to use his own remedies of sale.

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[1] Proposition 5.26(1)(para. 5.147).

[2] Proposition 5.26(2)(para. 5.147)

5.72 The first of the foregoing options is broadly that enacted in section 26(2) of the 1970 Act. Its disadvantage is that if a selling adjudger could only give a purchaser a title encumbered with a prior security which the adjudger, the purchaser and the purchaser's singular successors could not redeem, the incumbrance would be likely to reduce the price paid for the debtor's interest in the property significantly below the price which that interest would have fetched if sold free of the incumbrance. In other words, if property worth £50,000 is burdened with a "non-redeemable" security for £25,000, it is unlikely that any purchaser would pay anything like the other £25,000. We think that the resulting injustice to debtors would greatly outweigh any benefit to prior heritable creditors deriving from their privilege of preventing redemption and disencumbrance. We do not think that a provision allowing a forced sale blighted by a prior non-redeemable security would be acceptable to public opinion. We concede that such blighted sales by a postponed creditor can occur in terms of s. 26(2) of the 1970 Act where the postponed creditor is the holder of a standard security. But the analogy is not exact. A postponed standard security is voluntarily granted by the debtor and he has only himself or his advisers to blame for incurring the risk of a blighted sale. By contrast, an adjudication is not voluntarily granted by the debtor who cannot therefore be fixed with the responsibility for assuming that risk. We provisionally reject this option.

5.73 The second option, redemption and disencumbrance only with the consent of the prior heritable creditor, would undermine seriously the usefulness of the new diligence if, as seems possible, adjudication were quite frequently used against property burdened

with a heritable security which the debtor is barred by agreement from redeeming.

5.74 We provisionally prefer the third option, namely that an adjudger should be entitled to redeem a prior heritable security and give the purchaser an unencumbered title though the debtor is barred from redeeming it. We do not think that this option would seriously undermine the policy of the Redemption of Standard Securities (Scotland) Act 1971 which was designed to protect fixed long term commercial loans, and long term loans by building societies to house purchasers, from the unfettered power of redemption given to debtors by the 1970 Act, s. 18(1) as originally enacted. An agreement barring premature redemption by the debtor would still bind the debtor.

5.75 Although it is an argument which cuts both ways, we suspect that a debtor who becomes apparently insolvent in the statutory sense, by reason of the expired charge which under our proposals would precede an adjudication, is likely to default on the prior loan and that the prior heritable creditor will almost always wish to have the security subjects realised. It is significant in this context that the constitution of the debtor's apparent insolvency is itself a default under standard condition 9 in Schedule 3 to the 1970 Act, [1] entitling the heritable creditor to serve a default notice and exercise his remedies on default.

5.76 We assume that in practice, where the adjudged subjects are sold disencumbered of the prior heritable security, the adjudger would normally require to deliver to the purchaser either a discharge of the heritable security at the date of settlement of the sale, or a letter of obligation to deliver such a discharge. We

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[1] 1970 Act, Sch. 3, standard condition 9(2)(b) as amended by the Bankruptcy (Scotland) Act 1985, s. 75(9).

further assume that this matter does not require specific regulation.

5.77 We suggest that a selling adjudger should not merely be entitled to redeem a prior heritable security but should be bound to do so except where the debtor consents in writing to a sale without such redemption. Since the policy underlying the proposed right of the adjudger to redeem is the protection of the debtor from a forced sale blighted by a prior security, the debtor's consent to such a sale seems essential. Section 27(1)(b) of the 1970 Act requires the selling creditor in a standard security to pay, out of the proceeds of sale, the whole amount due under any prior security "to which the sale is not made subject". While the quoted words are not entirely clear, they presumably refer to a contract of sale in which the selling creditor undertakes to redeem the prior security so that the property sold will not remain subject to the security. In relation to adjudications, we suggest the policy should be that the adjudger should pay, out of the proceeds of sale, the whole amount due under any prior security unless, with the debtor's concurrence, the adjudger has agreed with the purchaser that the property sold should remain subject to the prior security. We revert to this below.

5.78 It may be that the right of the debtor to redeem heritable securities ranking pari passu with, or postponed to, the selling creditor's security is also limited by contract. Section 26(2) of the 1970 Act does not however restrict the selling creditor's right to redeem the security to cases where the debtor in the pari passu or postponed security is entitled to do so. Accordingly, s.27(1)(c) and (d) rule and the security of a pari passu or postponed heritable creditor will be redeemed if the proceeds of sale suffice. We see no reason to change this rule.

5.79 We propose:

(1) On the analogy of the Conveyancing and Feudal Reform (Scotland) Act 1970, s. 26(1), it should be provided that where an adjudger has sold the adjudged subjects or any part thereof, and grants a disposition (or assignation of a registered long lease) expressly in implement of his power of sale in favour of the purchaser or his nominee, then on the registration of the purchaser's title in the property registers, the subjects should be disburdened of that adjudication and all other diligences and heritable securities ranking pari passu with or postponed to that adjudication.

(2) An adjudger exercising his power of sale should be entitled to redeem a prior heritable security affecting the adjudged property and to give the purchaser an unencumbered title, notwithstanding that the debtor is barred by agreement from redeeming the prior security.

(3) The adjudger should be bound to exercise the foregoing right of redemption unless the debtor has consented to a sale in which the adjudger and purchaser agree that the property sold should remain subject to the prior security.

(4) On the analogy of the 1970 Act, s. 26(2), it should be provided that where the adjudger exercises his power of sale and the property sold remains subject to a prior security (whether a voluntary security or a diligence creating a real right), the registration of the purchaser's

title in the property registers should not affect the rights of the creditor in the prior security.

(5) The adjudger should be both entitled and bound to redeem a heritable security ranking pari passu with or postponed to his adjudication notwithstanding that the debtor is barred by agreement from redeeming it.

(Proposition 5.16).

5.80 Protection of purchaser's title from reduction by an inhibitor. We assume in this Discussion Paper that inhibitions will continue to be competent and it is for consideration whether additional provision should be made dealing with inhibitions. There is some doubt whether s.26(1) is in its terms effective to protect the purchaser's title against an inhibition. Thus it has been held in the sheriff court[1] that the wording of s.26(1), especially the use of the word "disburden", shows that s.26(1) is aimed at disburdening the property sold of heritable securities and diligences (e.g. adjudications) which create "real burdens", but not inhibitions. On the other hand, in an earlier Outer House decision[2] construing broadly analogous provisions in s.123 of the 1868 Act (which relates to the effect of a disposition in implement of sale under a bond and disposition in security), it was held that such a disposition disencumbered the lands sold of an inhibition. No doubt an inhibition is merely a prohibitory diligence creating no nexus or real right, but it may be "equivalent to a real

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[1] Halifax Building Society v. Smith 1985 S.L.T. (Sh.Ct.) 25 at p.28.

[2] Bank of Scotland v. Lord Advocate 1977 S.L.T. 24.

incumbrance"[1] which a purchaser is entitled to see cleared off the personal register before he pays the price.

5.81 Leaving aside these questions of statutory interpretation, the main question is what the policy should be. Under the present law, it is well settled that an adjudication is reducible at the instance of an inhibitor if the adjudication proceeded on a debt voluntarily "contracted" after the registration of the inhibition. Thus Erskine[2] remarks "The diligence [of inhibition] strikes against the voluntary debts and deeds of the inhibited i.e. against all rights granted by him to which he was not obliged anterior to the inhibition ..." and he continues "... inhibition does not strike against judicial rights e.g. against an adjudication of the debtor's estate, recovered after inhibition, upon a debt contracted before it; because adjudication is not truly the deed, either voluntary or necessary, of the debtor who lies under the inhibition, but of the law. But an adjudication led upon a bond posterior in date to the inhibition is subject to reduction, because its only foundation is a bond granted voluntarily by the debtor after that diligence". (emphasis added). This right of reduction forms the legal basis of the inhibitor's right to claim a preference over posterior debts in a competition with adjudgers and in any process of ranking on the proceeds of sale of the debtor's heritable

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[1] McLure v. Baird 19 November 1817 F.C. at p.28 per Lord President Campbell, cited Abbey National Building Society v. Shaik Aziz 1981 S.L.T. (Sh.Ct.) 29 at pp. 30-31. But see Gretton "Inhibitions, Securities, Reductions and Multiplepoindings" Part I, (1982) 27 J.L.S.S. 13 at p.15.

[2] Institute II, 11,11; see also Stair, IV, 35, 21; Bell, Principles s.2309; Commentaries, vol.2, p.139; Graham Stewart, pp.560-561; Halifax Building Society v. Smith 1985 S.L.T. (Sh.Ct.) 25 at p.28.

property,[1] which type of process includes at present (in addition to processes of ranking on the debtor's general estate such as sequestrations, liquidations, trust deeds for creditors and composition contracts) processes of ranking on the proceeds of a sale of specific property under a heritable security, and clearly should in future include processes of ranking on the proceeds of sales of adjudged property. Any other solution would deprive an inhibition of effect in an important class of case.

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[1] Halifax Building Society v. Smith 1985 S.L.T. (Sh.Ct.) 25 at p.28; Stair IV, 25, 21. In Abbey National Building Society v. Shaik Aziz 1981 S.L.T. (Sh.Ct.) 29 it was observed (at p.30) that "the inhibitor's preference flows from his right to adjudge" but that cannot be right since every unsecured creditor holding a decree for payment has a right to adjudge.

5.82 We suggest that the policy should be that if due intimation is made to the inhibitor by the adjudger of the impending sale, so that the inhibitor may claim his preference out of the proceeds of that sale, then the adjudication and sale should not be reducible at his instance. It is thought that an inhibitor cannot interdict a judicial sale by a heritable creditor, his remedy being to claim a preference or to reduce the sale and adjudge. Bankruptcy legislation[1] confers immunity from challenge by the inhibitor without specifying the remedy by which challenge is effected. A sequestration is closely analogous to a reformed adjudication since it operates as an adjudication for debt (albeit subject to no legal reversion)[2] and confers on the permanent trustee a power of sale. On this analogy, it could be provided that the exercise by the adjudger of any power of sale or other power in respect of the adjudged subjects "shall not be challengeable on the ground of any prior inhibition (reserving any effect of such inhibition on ranking)". Whereas an inhibitor may be treated as having had notice of a sequestration, he cannot be deemed to have had notice of an adjudication and sale. We think therefore that any such provision should be subject to the condition that the adjudger had duly intimated the impending sale to the inhibitor and registered a certificate of execution of that intimation in the personal register. The effect we wish to achieve is not only that the purchaser's title should be immune from successful challenge but also that the continued existence of an undischarged inhibition on the personal register should not be treated as an infringement of any obligation undertaken by the adjudger or his agent in favour of the purchaser of the adjudged property to exhibit or deliver a search showing clear records.[3] It is thought that a provision on the lines just described would have the desired effect.

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[1] Bankruptcy (Scotland) Act 1985, s.31(2).

[2] Ibid., s.31(1)(b).

[3] Cf. Dryburgh v. Gordon (1896) 24 R. 1.

5.83 We propose:

On the analogy of the Bankruptcy (Scotland) Act 1985, s. 31(2), it should be provided that the exercise by an adjudger of any power of sale or other power in respect of the adjudged subjects shall not be challengeable on the ground of any prior inhibition (reserving any effect of such inhibition on ranking). This immunity from challenge should only arise however if the adjudger had duly intimated the sale, or impending sale, to the inhibitor and registered a certificate of execution of that intimation in the personal register.

(Proposition 5.17).

5.84 Application of proceeds of sale: ranking problems. The disposal by the heritable creditor of the proceeds of sale of a standard security is regulated by s.27(1) of the 1970 Act, which provides:

> "27.-(1) The money which is received by the creditor in a standard security, arising from any sale by him of the security subjects, shall be held by him in trust to be applied by him in accordance with the following order of priority-
>
> (a) first, in payment of all expenses properly incurred by him in connection with the sale, or any attempted sale;
>
> (b) secondly, in payment of the whole amount due under any prior security to which the sale is not made subject;
>
> (c) thirdly, in payment of the whole amount due under the standard security, and in payment, in due

proportion, of the whole amount due under a security, if any, ranking pari passu with his own security, which has been duly recorded;

(d) fourthly, in payment of any amounts due under any securities with a ranking postponed to that of his own security, according to their ranking,

and any residue of the money so received shall be paid to the person entitled to the security subjects at the time of sale, or to any person authorised to give receipts for the proceeds of the sale thereof."

5.85 We have proposed that the expenses properly incurred by a creditor in executing the diligence of adjudication (including the charge which preceded it) should be chargeable against the debtor.[1] Where the selling adjudger has to pay prior, pari passu or postponed claims of creditors, the expenses of sale, and any attempted sale,[2] should rank before all of those claims including prior claims, because those expenses are in effect incurred on behalf of all of those creditors. The other expenses of the selling adjudger's diligence, however, (including e.g. the prior charge and the registration of the notice of litigiosity and notice of adjudication) would rank in the same way as the principal sum in a question with the competing creditors (i.e. after the prior claims and before the postponed claims) since these expenses were incurred only for the benefit of the selling adjudger.

5.86 The main question arising on s.27(1) is to what extent (if at all) it changes or regulates the rules of ranking on the proceeds of sale, especially the ranking of inhibitions. This depends

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[1] Proposition 3.15(para. 3.101) in volume 1.

[2] i.e. including the expenses of the service of the notice of commencement of the sale procedure; obtaining consent to sale; the advertisement of sale; and conveyancing expenses.

in part on the meaning of the word "security" in paras. (b), (c) and (d) of s.27(1). A number of conflicting views have been expressed.

5.87 On one view, s.27(1) governs ranking and since the word "security" allegedly does not cover an inhibition, inhibiting creditors have no claim. In other words, on this view, the selling creditor is not accountable to "unsecured" creditors, including creditors holding an inhibition.[1] This view has been disapproved and not followed on the ground that s.27(1) was not intended to alter the general law on ranking. "It would be most curious and unfortunate if the ranking of creditors was intended to vary according to the accident of events, but our law has hitherto applied general and universal rules for the ranking of creditors. To do otherwise would make ranking a lottery".[2]

5.88 A second view is that s.27(1) governs ranking but the word "security" in paras. (b) and (d) of s.27(1) has to be extensively construed so as to refer not only to voluntary securities (e.g. a standard security) and to diligences imposing a nexus and creating a real right (e.g. adjudications) but also to the preference over subsequent deeds and debts created by an inhibition.[3] Since para. (c) refers to a pari passu security "duly recorded" in the Sasines Register, it does not cover an inhibition, which would be either prior or postponed to a standard security: despite judicial dicta[4] there seems no reason why it should not cover an adjudication registered in the property registers on the same date as the standard security. This view has also been criticised on the

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[1] Ferguson and Forster v. Dalbeattie Finance Co. 1981 S.L.T. (Sh.Ct.) 53 at p.54.

[2] Halifax Building Society v. Smith 1985 S.L.T. (Sh.Ct.) 25 at p.29 per Sheriff Principal Caplan.

[3] Halifax Building Society v. Smith 1985 S.L.T. (Sh.Ct.) 25 at pp.28-29.

[4] Ibid., at p.29.

ground that s.27(1) does not deal with ranking. It is concerned (so the argument runs) with the rights and obligations of creditors in heritable (standard) securities and not with any claims which unsecured creditors might have on any surplus.[1] The second view also entails that if an inhibition were a security within the meaning of s.27, then the inhibitor would have to be paid before all other unsecured creditors, even pre-inhibition creditors who had arrested the free proceeds due to the debtor in the hands of the secured creditor, because s.27 directs that security holders be paid directly and in preference to other parties.[2] But under the rules of ranking, an inhibitor ranks pari passu with other unsecured creditors whose debts were contracted before the registration of the inhibition.[3]

5.89 A third view is that while s.27(1) is concerned with the ranking of voluntary heritable securities inter se and possibly with diligences imposing a nexus and creating a real right (e.g. adjudications), it does not change the general common law rules of ranking. Section 27(1), on this view, is supplemented by the common law, and in particular the rules on the ranking of inhibitions.[4] While this view is attractive, one difficulty is that if Parliament had intended that the common law rules of ranking

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[1] See Gretton, "Inhibitions and Standard Securities" 1985 S.L.T. (News) 125. A similar point is made by Love, Meston and Cusine, "Ranking of inhibitors" (1977) 22 J.L.S.S. 424 at p.425 commenting on Bank of Scotland v. Lord Advocate 1977 S.L.T. 24 which held that the ranking of an inhibition on the free proceeds of a bond and disposition in security is governed by ss.122 and 123 of the Titles to Land Consolidation (Scotland) Act 1868 (which correspond to ss. 26 and 27 of the 1970 Act).

[2] Gretton, supra, 1985 S.L.T. (News) 125 at p.125.

[3] Idem, Bell, Commentaries vol. 2, p.139.

[4] Gretton, "Inhibitions, Securities, Reductions and Multiplepoindings" (1982) 27 J.L.S.S. 13 and 68; Gretton, "Inhibitions and Standard Securities" 1985 S.L.T. (News) 125.

should apply, it could easily have enacted an express saving of these rules. It cannot be disputed that s.27(1) governs the ranking of "securities" whatever that word means, and it is difficult to see why s.27(1) should have enacted incomplete rules on ranking.

5.90 We express no concluded view as to the true meaning and effect of s.27(1) since we think that any legislation using it as a model for adjudications should make modifications to remove the uncertainty surrounding it. One possible solution would be to follow the precedent of the Debtors (Scotland) Act 1838, s.28, which provides that the net proceeds of a warrant sale of poinded goods are to be paid to the creditor "but subject to the claims of other creditors to be ranked as by law competent." We think, however, that a provision on these lines would not only give insufficient guidance to the adjudger and others but would leave a gap in the law. There is no common law on the ranking of creditors on the proceeds of a judicial sale of adjudged subjects since such a sale would under our proposals be a new remedy in adjudications. Moreover, provision of an abbreviated procedure for payment of prior, pari passu and postponed debts secured by real securities (voluntary securities and diligences) would be necessary as a minimum and that cannot safely be left to the common law.

5.91 Clearly it would be inappropriate in legislation on adjudications to attempt to re-enact the whole rules of ranking. It should however be possible to amend and extend s.27(1) so as to remove the main uncertainties which relate primarily to inhibitions. We think that express provision should be made directing the adjudger to pay, out of the net proceeds of sale, debts heritably secured not only by voluntary real securities (e.g.

standard securities and pecuniary real burdens)[1] and involuntary real securities (e.g. statutory charging orders under specific enactments)[2] but also by adjudications in broadly the order mentioned in s.27(1). Except to the extent that ranking of voluntary securities inter se had been altered by agreement,and subject to the special priority over prior voluntary securities accorded to most charging orders[3] and possibly to rules on equalisation of adjudications[4] these securities and adjudications would generally rank inter se by priority of infeftment as under the existing law. While the statutory order of priority would include adjudications which impose a nexus and create a real right to a kind of security interest, it would not include inhibitions since "an inhibition is a prohibitory diligence only, not a real security on the lands".[5] The statutory order of priority should, however, be expressly made subject to the effect of an inhibition in ranking. The reason for this difference in approach is that an inhibition does not create a real right and its priority in ranking does not depend on priority of infeftment (for there is no infeftment) but on its own special and very complicated rules, embodied in the five "canons of ranking" set out in Bells Commentaries[6] and

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[1] As to pecuniary real burdens, see Part VIII below. We propose there the abolition of pecuniary real burdens but there could still be transitional cases of lands affected by such burdens.

[2] See the discussion of statutory charging orders in Part IX below.

[3] See paras. 9.16 to 9.19 below; cf. para. 9.32.

[4] See our Discussion Paper No. 79 on Equalisation of Diligences. We propose there that equalisation of diligences should be abolished but that, if this proposal were rejected, new rules on equalisation should be enacted.

[5] Bell, Commentaries, vol. 2, p.346.

[6] Vol. 2, p.413.

approved in Baird and Brown v. Stirrat's Trs.[1]. Thus in a scheme of ranking on the proceeds of a judicial sale of heritable estate, an inhibition does not strictly speaking give the inhibitor the same kind of preference over subsequent real securities (voluntary securities and adjudications) as a real security gives over subsequent real securities. Rather it gives the inhibitor such a dividend from the funds as he would have drawn if (a) voluntary securities granted after the inhibition had not been granted, and (b) debts contracted after the inhibition, whether heritably secured by an adjudication or a voluntary security, or unsecured, had not been contracted.[2]

5.92 We propose:

Express statutory provision should be made for the disposal by the adjudger of the proceeds of sale on the following lines.

(a) The adjudger's expenses chargeable against the debtor incurred in connection with the sale and any attempted sale, would be a first charge on the proceeds of sale, but the other expenses so chargeable incurred in executing the diligence and the charge preceding it would be treated for ranking purposes in the same way as the debt due to the adjudger.

(b) As regards the net proceeds of sale the order of priority of payment of debts heritably secured, over the subjects sold, by a voluntary security (e.g. a standard security) or a charging order under a specific

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[1] (1870) 10 M. 414.

[2] Baron Hume's Lectures, vol.VI, p.77.

enactment or an adjudication would be set out as mentioned in para. (c) below. But this order of priority, and the claims of any creditors arresting the adjudger's liability to account to the debtor for the surplus, would be expressly made subject to the effect of any inhibition in ranking under the general law, (i.e. its effect in conferring on the inhibiting creditor a right to draw such a dividend from the net proceeds of sale as he would have drawn if a post-inhibition voluntary security had not been granted by the debtor or if post-inhibition debts, including debts secured by a security or adjudication, had not been contracted).

(c) Subject to the ranking of any inhibitions as mentioned above, the net proceeds of sale would be applied by the adjudger -

(i) first, in payment, in accordance with their ranking among themselves, of any debts heritably secured over the subjects sold by a security or adjudication (hereafter a "secured debt") being debts which rank in priority to his own debt but this duty should not arise in respect of prior voluntary securities which the adjudger is not entitled to redeem;

(ii) second, in payment of his own debt or, as the case may be, of his own debt and any other secured debt ranking pari passu with his own debt in their due proportions; and

(iii) third, in payment, in accordance with their ranking among themselves, of any secured debts having a ranking postponed to his own debt.

Any surplus remaining should be paid to the debtor or his agent unless, and except to the extent that, it has been attached by arrestment in the adjudger's hands.

(Proposition 5.18).

5.93 Inhibitor's title to demand payment. Another issue is raised by a recent commentator, who remarks "the law is that since inhibition is 'only a negative or prohibitory diligence' and 'vests no real right' it follows that 'the inhibitor has not ... without adjudication any active title on which he can demand payment'. In other words, where there is a sale by a heritable creditor, an inhibitor, like any unsecured creditor, has no right to be paid directly from the proceeds unless he has adjudged (before the sale) or arrested (after it)."[1] An earlier statement of this view[2] was rejected by the Sheriff Principal in Halifax Building Society v. Smith[3] on the ground that if "the preference created by the inhibition governs the ranking then it is hard to justify interference with the normal ranking of arrestments and if the arrestments are themselves to govern ranking the inhibition does indeed become a valueless ornament." Moreover, "the abbreviation of the procedure in relation to the inhibitor applies equally to the postponed security holder for he obtains direct repayment without following the necessary procedural steps which would arise on

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[1] Gretton, "Inhibitions and Standard Securities" 1985 S.L.T. (News) 125 at p.125 (citation references omitted).

[2] Gretton, "Inhibitions, Securities, Reductions and Multiplepoindings" Part 2, (1982) 27 J.L.S.S. 68.

[3] 1985 S.L.T. (Sh.Ct.) 25 at p.30.

default. Indeed there may not even be a default."[1] In a riposte[2] it was pointed out: "As Bell makes clear in his canons of ranking and as the First Division made clear in Baird and Brown ... inhibition works by taking some existing ranking and then adjusting it as between the inhibitor and post-inhibition parties (if there are any post-inhibition parties, if not, the inhibition is without effect). It is precisely for this reason that inhibition ranking always involves two "rounds". The first round is provided by some area of the law outwith the law of inhibition such as the law of adjudication or the law of arrestment (see the first canon). The second round then partially rearranges the first round so as to give effect to the inhibition. Without a first round there cannot be a second round. Consequently if the inhibitor has neither adjudged (while the property was still unsold) nor arrested (after the sale) then he does not and cannot enter the first round ranking and so likewise cannot enter the second round." We think that this matter should be clarified by express statutory provision.

5.94 **Views are invited on:**

(a) **whether an inhibiting creditor should be entitled to obtain a ranking in a diligence of adjudication and sale merely by lodging a claim with the selling adjudger or in an action of multiplepoinding if there is one; or**

(b) **whether it should be a condition of the inhibiting creditor's claim that he has either adjudged the subjects before the sale or arrested the proceeds after the sale.**

It is suggested that option (b) is preferable. (Proposition 5.19)

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1 Idem.

2 Gretton, 1985 S.L.T. (News) 125 at p.126.

5.95 Preferred debts. In a sequestration or liquidation, the funds arising from the bankrupt's estate so far as not attached by voluntary securities are distributed among the creditors in accordance with an order of priority prescribed by statute.[1] After meeting certain expenses, "preferred" debts as defined rank before "ordinary" debts (i.e. unsecured by voluntary security) and "postponed" debts.[2] The scope of the preferred debts has been recently limited by statute to certain PAYE deductions by employers, taxes and duties payable to the Board of Customs and Excise, certain social security contributions, occupational pension scheme contributions, and certain benefits to employees.[3] In one case of a ranking on the free proceeds of sale under a standard security, the ordinary creditors conceded that a local authority's claim for one year's rates (then a preferred debt in sequestration) ranked before the unsecured debts since it was a statutory preference.[4] In another case,[5] preferred claims for rates and tax were conceded priority but the Lord Advocate subsequently decided not to insist on his claim for a preference for tax arrears because it was considered that, despite the concession, the claim to a preference had no foundation in law. And in yet another case,[6] a local authority did not insist in a purported preferential claim for rates.

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[1] Bankruptcy (Scotland) Act 1985, s.51 and Sch. 7; Companies Act 1985, ss. 613 and 614, Sch. 19.

[2] Idem.

[3] Idem.

[4] Abbey National Building Society v. Shaik Aziz 1981 S.L.T. (Sh.Ct.) 29 at p.29.

[5] Sheriff Clerk of North Strathclyde at Paisley v. Paterson noted 1985 S.L.T. (Sh.Ct.) 31 at p.32.

[6] Halifax Building Society v. Smith 1985 S.L.T. (Sh.Ct.) 25.

5.96 It seems to us that the statutory preferences apply only in sequestrations and liquidations and not in common law processes of ranking. We reach this view both on general principles of statutory interpretation and also having regard to authoritative decisions[1] holding that statutory changes to the common law rules of ranking in sequestrations do not affect common law processes of ranking.

5.97 It should be noted that the Inland Revenue collector of taxes has a privileged claim enabling him to take advantage of diligences by other creditors against moveables (including poindings, arrestments and sequestrations for rent)[2] but there is no corresponding provision applying to adjudications of heritable property. One of the many anomalous effects of this is that if an inhibitor claims a preference in a common law ranking by arresting funds in the hands of a heritable creditor, his claim is subject to the Inland Revenue privileges, but if his claim is made without such an arrestment, his claim is not subject to that privilege. In our Report on Diligence and Debtor Protection[3] we recommended that the privileged claim in respect of tax should be abolished together with the corresponding privileged claim for rates. The latter claim was abolished by the Debtors (Scotland) Act 1987.[4] It is understood that the Government is now

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[1] See e.g. the cases on valuation and deduction of securities - Kirkaldy v. Middleton (1841) 4 D.202; University of Glasgow v. Yuill's Trs. (1882) 9 R.643.

[2] Taxes Management Act 1970, s.64.

[3] Scot. Law Com. No. 95 (1985) paras. 7.93-7.105, Recommendation 7.19 (para. 7.106).

[4] Section 74(4) repealing Local Government (Scotland) Act 1947, s. 248.

considering the position with respect to the taxes privilege.[1] The same considerations suggest that preferred debts in sequestration and liquidation should not have a preferential status in adjudications. (1) The debtor may not be insolvent and even if he is he may have sufficient funds to satisfy the preferred debts. (2) While we have sympathy with the view that the rules on ranking should be universally applicable in sequestrations, liquidations and diligence, that principle has never been fully implemented in legislation and ought not to be regarded as sacrosanct. (3) It would not be right to apply the preference in respect of fiscal debts to adjudications in Scotland when corresponding preferences are not applied to the modes of enforcing judgment debts against immoveable property elsewhere in the United Kingdom.

5.98 **A claim for tax arrears which would be either a statutory "preferred debt" in a sequestration or liquidation or a privileged claim against the proceeds of diligence against moveables, should not be treated as a privileged claim against the proceeds of sale of adjudged subjects.**

(Proposition 5.20).

5.99 Discharge on consignation. On the analogy of s.27(2) of the Conveyancing and Feudal Reform (Scotland) Act 1970, an adjudger

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[1] This privilege applies to Inland Revenue taxes and is very different from the preferences in sequestrations and liquidations: see para. 5.95.

who has been unable for any reason (e.g. the death or absence of another secured creditor) to obtain a receipt or discharge of any payment which he is required to make in applying the proceeds of sale, should be entitled to consign the payment in the appropriate sheriff court for the person appearing to have the best right to it. Consignation would operate as a discharge, of which a certificate by the sheriff clerk would be sufficient evidence.

5.100

Provision should be made on the lines of s.27(2) of the Conveyancing and Feudal Reform (Scotland) Act 1970 enabling an adjudger who has exercised his power of sale to obtain a discharge on consignation of any payment he is required to make from the proceeds of sale for which he cannot otherwise obtain a receipt or discharge.
(Proposition 5.21).

(b) Foreclosure in default of sale

5.101 Under the present law a decree of declarator of expiry of the legal is a decree of foreclosure by another name since its effects are to "foreclose" the debtor's right to redeem the adjudged subjects, to extinguish his right of ownership, and to convert the adjudger's interest, which is in the nature of an attachment or "security" burdening the debtor's interest, into a full right of ownership. In the proposed new diligence of adjudication and sale, actions and decrees of declarator of expiry of the legal would be abolished and the adjudger would acquire a right of ownership only if he had first attempted to sell the adjudged subjects. We propose that the provisions on foreclosure

of adjudged property should be modelled on the statutory provisions on foreclosure of the right to redeem standard securities.[1]

5.102 Foreclosure would thus be a judicial remedy taking the form of a decree of foreclosure granted by the sheriff on an application by the adjudging creditor. We understand that security subjects advertised or exposed for sale under the 1970 Act almost always find a purchaser and that foreclosure is most unusual. The reason is presumably that heritable property is generally a valuable and marketable asset and, if so, it seems likely that foreclosure of adjudged property would likewise be most unusual.

5.103 Conditions of competence of applications for decree of foreclosure. An application for decree of foreclosure would only be competent in the following circumstances. (a) The adjudger must have exposed the adjudged subjects for sale by public auction (cf. 1970 Act, s.28(1)). An attempt to sell by private bargain would not suffice. (b) The 1970 Act, s.28(1) appears to provide that the whole of the subjects must be exposed for sale in one lot.[2] If some lots had already been sold by private bargain, this would be impossible. One option is, therefore, that sale in lots by private bargain should not be attempted until after the exposure of the whole subjects for sale in one lot by public auction. An alternative option, which we prefer, would be to provide that, where part of the adjudged property had been sold in lots by private bargain, it would be a condition of foreclosure that the remaining lots (not the whole of the adjudged property) must have been exposed for sale at a public auction. Otherwise the facility of a sale by private bargain might lose its advantages. (c) The

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[1] Conveyancing and Feudal Reform (Scotland) Act 1970, s.28.

[2] Halliday, p.206.

1970 Act, s. 28(1), provides that the price at which the subjects are exposed to sale must not have exceeded the amount of the debt "secured" by the adjudication and any diligence or security ranking prior to or pari passu with it. While the 1970 Act, s.28(1) refers only to "securities", this probably includes a reference to "securities" created by diligences as well as voluntary securities. Since the value of the security subjects may bear no relation to the amount of the secured debt, the policy underlying this provision is not altogether clear. It may be designed to ensure that a foreclosing adjudger does not have to pay the debtor the difference between the debt and a higher price at which he acquired the property by foreclosure. A disadvantage of the provision is that it seems to permit an application for foreclosure where a house worth say £50,000 is advertised at say £25,000 and does not find a buyer. However, the risk of this occurring appears remote. The provision has to be read along with certain safeguards for debtors. One such safeguard is that the creditor must take all reasonable steps to ensure that the price at which all or any of the security (or adjudged) subjects are sold is the best that can reasonably be obtained, the sanction being an action of damages by the debtor.[1] Another safeguard is the sheriff's power, discussed below,[2] to order further attempts at sale at an upset or reserve price fixed by him following a valuer's report. This power would be closely modelled on the sheriff's powers in foreclosure of standard securities. If there have been no criticisms of the procedure in foreclosure of standard securities (and we are not aware of any), it would seem reasonable to use that procedure as a legislative model.(d) The creditor must have failed to find a purchaser at the specified price or, having so failed, have succeeded in selling only part of the adjudged subjects at a price less than the amount secured by his adjudication and

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[1] Proposition 5.12(2)(b) at para. 5.53 above.

[2] See para. 5.107.

any prior or pari passu adjudication or security (1970 Act, s.28(1)). There would be nothing to stop exposure for sale at a higher price in the first instance. (e) The 1970 Act, s. 28(1) provides that two months must have elapsed from the date of the first exposure. It seems that where exposure has initially been made at a price higher than provided for by the statute, the two month period would begin to run from the date of the exposure at the price provided for by the statute.[1] We are uncertain about the need for the two-month period and invite views.

5.104 Challenge of statement of debt. In his application for decree of foreclosure, the adjudger would specify the amount due under the principal obligation secured by the adjudication. If the amount is challenged, it would be sufficient for the purposes of the application that the amount stated is not less than the price at which exposure has been made or the price received on a sale of part of the adjudged subjects (cf. 1970 Act, s.28(2)).

5.105 Procedure. On analogy with the 1970 Act, s.28(3) the application for foreclosure would be served, on the debtor, and the creditor in any adjudication or heritable security affecting the adjudged subjects as disclosed by either a search in the Sasines Register for 20 years or an examination of the title sheet of the security subjects in the Land Register. Under the 1970 Act, s.28(3), the period of search in the Sasines Register is reckoned back 20 years from the last date to which the appropriate Minute Book of the Sasines Register had been completed at the time when the application was made. This starting point for the period of search may therefore be several months prior to the date of the application. We have proposed[2] that an adjudication must be registered within a statutory period after registration of

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[1] Halliday, p.206.

[2] Proposition 3.5(3)(para. 3.43).

a notice of litigiosity affecting the adjudged subjects, which period might be 10 months. We now propose that the application for foreclosure should be served on any creditor who had registered such a notice of litigiosity within the 10 months (or other statutory period) prior to the date of the application for foreclosure, as disclosed by a search in the personal register. This would disclose any creditor who would become entitled to register an adjudication within the 10 months (or other statutory period) following the date of the application.

5.106 The sheriff would have a discretion to order such intimation and enquiry as he thought fit: (1970 Act, s.28(4)).

5.107 Powers of court. We propose that the sheriff should have the following powers:

(a) to defer granting decree of foreclosure for a period not exceeding 3 months to allow the debtor time to pay the whole amount due under the principal obligation secured by the adjudication (1970 Act, s.28(4)) ;

(b) to appoint the adjudged subjects or the unsold part thereof (i) to be re-exposed for sale by public auction at an upset or reserve price fixed by the sheriff (in which auction the adjudger would be entitled to bid and purchase), or (ii) to be re-advertised for sale by private bargain at such a price and in default of sale re-exposed for sale by public auction at that price;

(c) to assist him in exercising any of the foregoing powers, the sheriff should have an ancillary power, exercisable of

his own motion or on application, to remit to a valuer to value the subjects and report. In the absence of an order by the sheriff as to the expenses of the valuation, the expenses would be payable by the adjudger in the first instance and chargeable against the debtor as part of the diligence expenses, but the sheriff should have a discretionary power to relieve the debtor of liability for the valuation expenses.

(d) to grant decree of foreclosure (1970 Act, s. 28(4)).

The power at head (b) is an expanded version of the sheriff's power under s.28(4) of the 1970 Act which is confined to appointing re-exposure to sale by public auction. We think that the option to order an attempt at sale by private bargain before public auction is attempted could be useful. The power at head (c) has been devised by us. We understand that the fee for a valuation not importing any guarantee or responsibility on the part of the valuer for structural defects or the condition of the property would not be likely to exceed £100 in the case of most residential properties.

5.108 Contents of decree of foreclosure. On analogy with the 1970 Act, s.28(5), the decree of foreclosure would contain:

(a) a declarator that, on registration of an extract of the decree in the Sasines or Land Register, any right to redeem the adjudication will be extinguished and that the creditor will acquire right to the adjudged subjects or the unsold part thereof at the price at which the subjects or the unsold part were last exposed for sale;

(b) a proper conveyancing description (whether particular or by reference) complying with the requirements of recording in the Sasines Register including a reference to conditions or clauses affecting the subjects and a warrant for registration, or, as the case may be, a description by reference to the title sheet of the foreclosed interest in accordance with the Land Registration (Scotland) Act 1979, s.15.

5.109 Effect of registration of extract decree of foreclosure. On analogy with the 1970 Act, s.28(6), the effect of registering the extract decree of foreclosure in the Sasines or Land Register would be as follows.

(a) The debtor's right to redeem the adjudication would be extinguished.

(b) The creditor would acquire a real right to the debtor's interest in the adjudged subjects to which the decree relates as if the debtor had conveyed that interest to the creditor by an absolute and irredeemable conveyance and as if the conveyance had been duly recorded in the Sasines Register, or the title to the interest had been registered in the Land Register, at the time when the extract decree was recorded or registered.

(c) The subjects would be disburdened of the adjudication and any adjudication or security (eg a voluntary security or charging order) postponed to it.

(d) The subjects would remain burdened by any adjudication or security ranking prior to to pari passu with the creditor's adjudication,[1] and would also continue to be affected by any prior inhibition affecting the adjudged subjects; (inhibitions are not referred to in the 1970 Act, s.28(6) but this seems to be an oversight).

(e) The creditor would have the like right as the debtor to redeem any prior or pari passu adjudication or security. Though this would not require to be stipulated, the creditor would in effect be bound to satisfy any prior inhibitor's claim as the price of clearing the personal registers of the inhibition, under pain of reduction of the adjudication and decree of foreclosure.

(f) The outstanding balance of the debt, if any, would remain due and enforceable by other diligence.

5.110 Remedies of prior and pari passu creditors against foreclosing adjudger. Where on foreclosure, the foreclosing adjudger's right to the property remains burdened by an adjudication or heritable security ranking prior to, or pari passu with, the foreclosing adjudger's adjudication, a procedure for enforcing the prior or pari passu preference should be provided. While court applications should be kept to a minimum, we suggest that this is a narrow area where the sheriff should intervene. We propose that any prior or pari passu adjudger wishing to enforce his adjudication against the foreclosing adjudger should be required to apply to the sheriff for authority to sell and to exercise any

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[1] As to the enforcement of the prior or pari passu right against the foreclosing adjudger, see next paragraph.

other remedy available to a heritable creditor or adjudger as the case may be. The sheriff should have power to grant authority to exercise the remedy of sale, and any other remedy competent to a heritable creditor or adjudger as the case may be, subject to such conditions and modifications of the legal procedure as he thinks fit, and where there is more than one prior or pari passu creditor, subject to such orders as he thinks fit regulating the suspension and revival of remedies applying to the securities and adjudications of the creditors not authorised to exercise their remedies.

5.111 A case could conceivably arise where an adjudger forecloses and thereafter a pari passu or prior creditor seeks to foreclose and thereby leave the original foreclosing adjudger with nothing in circumstances where, if the property had been sold at the price at which the foreclosing adjudger acquired the property under the decree of foreclosure, he would have been entitled to payment of part of the proceeds of sale. We suggest therefore that the sheriff should be empowered, in lieu of granting decree of foreclosure to the prior or pari passu creditor, to grant a decree against the foreclosing adjudger for payment to the prior or pari passu creditor of the amount which the prior or pari passu creditor would have obtained if the adjudged property had been sold at the price at which the foreclosing adjudger acquired right to the property under the decree of foreclosure.

5.112 Similar rules for standard securities. If provisions on the lines set out in paras. 5.110 and 5.111 are thought to be necessary for adjudications, it is suggested that the similar provision should be made for standard securities to fill the gap left by the 1970 Act's omission to deal with these matters.

5.113 Immunity of foreclosing adjudger's title from challenge on ground of irregularity in procedure. In order to protect potential purchasers in good faith transacting with the creditor on the faith of the registers, it should be provided that the creditor's title should not be challengeable on the ground of any irregularity in the foreclosure procedure or prior procedure in the diligence. But this immunity would not protect the creditor from an action of damages based on such an irregularity. Similar provision is made in the case of foreclosure under standard securities (1970 Act, s.28(8)) and is proposed above (Proposition 5.15 at para. 5.65) in relation to the title of a purchaser in a sale of adjudged subjects.

5.114 **Views are invited as to the proposals on foreclosure in default of sale in pursuance of an adjudication outlined at paras. 5.101 to 5.113 above.**
(Proposition 5.22).

(c) **Powers of entry into possession**

5.115 Present law. Under the present law, it is entirely in the discretion of the adjudger whether he will enter into possession or allow the debtor to remain in possession.[1] A decree of adjudication or infeftment thereon does not by itself give a warrant to enter into possession. For this a further judicial warrant is necessary. If the debtor is the landlord of the adjudged property, the adjudger's remedy is to obtain a decree of maills and duties which clothes him with powers to uplift rents, powers (and duties) to grant leases (keeping up the value of the

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[1] Graham Stewart, p. 622.

rent-roll), to remove tenants and, subject to certain statutory restrictions, to grant leases.[1] If the debtor or his nominee is in personal occupation, the adjudger may eject him as if he were an occupant without title.[2]

(i) Entry into actual possession

5.116 Three cases. There are three categories of case where the adjudger might take actual possesion. First where the debtor or his nominee is in personal occupation, we suggested in volume 1 that he should be entitled to retain possession for so long as the debtor has a right to redeem the adjudged subjects.[3] In special circumstances, where the debtor defaults in obligations eg. as to maintenance, we suggest that the sheriff in the adjudger's application should have powers to have the debtor or nominee ejected and to enter and possess the subjects for limited purposes.[4] The other two categories of case involve squatters or vacant property.

5.117 Squatters. Where the adjudged subjects are occupied by third parties without the permission of the debtor, eg. squatters, we think that the adjudger should have a title to raise an action for their ejection as occupants without title.

5.118 Unoccupied property. Where the adjudged subjects appear to be unoccupied, eg. because of the debtor's abscondence,

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[1] Ibid. pp. 520, 621-624.

[2] Ibid. pp. 521, 624; Heritable Securities (Scotland) Act 1894, s. 5.

[3] Proposition 3.9 (para. 3.69).

[4] Proposition 5.24(2) and (3) (para. 5.130).

we suggest that the sheriff, on the adjudger's application, should be empowered, after such intimation, advertisement and enquiry as he thinks fit, to grant warrant to the adjudger to enter into possession of the subjects for the limited purposes of inspection, of showing the property to prospective purchasers, and of making the premises lockfast if necessary for their safety. The sheriff should also have power to grant warrant to sheriff officers to open shut and lockfast places for the purposes of enabling the adjudger to gain entry.

5.119 It is for consideration whether the adjudger should be entitled to apply for the sheriff's authority to undertake works of maintenance or repair to prevent deterioration in the market value of the property, at his own expense or, if the sheriff so orders, the debtor's expense.

(ii) Entry into civil possesion: abolition of adjudger's remedy of uplifting rents

5.120 Where the debtor is landlord of the adjudged property, we provisionally conclude that the adjudger should not be entitled to enter into civil possession and uplift the rents. The case for retaining the adjudger's remedy of uplifting the rents seems much less strong under the new diligence of adjudication and sale where the creditor can sell the property within a short period than under the existing diligence of adjudication with its "legal" of ten years. Even in the period when adjudications were used relatively frequently, often against large estates yielding high rents, it appears (somewhat surprisingly) that, if there was no competition with other adjudgers, the adjudger was generally satisfied with his real security and, provided he received interest on his debt,

permitted the debtor to retain possession and uplift the rents.[1]

5.121 If there were a general rule that an arrestment or a poinding of moveable property attached the fruits of that property, there would be an argument based on consistency of principle for retaining the adjudger's right to claim the rents. But the existence of such a rule is doubtful. The opinion has been expressed that an arrestment of a partner's share in a partnership will carry the partner's share, after deduction of debts, on the dissolution of the partnership, including apparently profits earned after the date of the execution of the arrestment,[2] but there is also an opinion that it only attaches profits accrued prior to that date.[3] There is a surprising dearth of authority on whether, for example, a poinding of a pregnant animal attaches its offspring, or whether an arrestment of shares in a registered company attaches subsequent dividends, or of a "with-profits" life assurance endowment policy attaches subsequent bonuses, or of money on a deposit receipt,[4] or in an interest-bearing bank account, attaches future interest.

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[1] Graham Stewart, p. 622; Parker on Adjudications p.54.

[2] Cassells v. Stewart (1879) 6R. 936 at p. 956 per Lord Gifford; Bennett Miller, The Law of Partnership in Scotland (1973) p. 397.

[3] Rae v. Neilson (1742) Mor. 716: "Hence it may be inferred that an arrestment of a partner's stock will not carry the benefit of any new adventure begun after the date of the arrestment".

[4] In Union Bank of Scotland v. Mills (1926) 42 Sh. Ct. Reps. 141 at p. 143 Sheriff Fyfe assumed that an arrester of money on deposit receipt would be entitled to claim future interest but cited no authority.

5.122 In these circumstances the question has to be decided on grounds of policy rather than by reference to established legal principle. It seems clear that a remedy of uplifting rents would cause considerable complications in the procedure for the adjudger, the debtor and most importantly for the tenants who are not parties to the debtor-creditor relationship. Even a new and simpler statutory remedy than an action of maills and duties would be relatively complicated. Provision would have to be made for assigning the debtor's rights to the rents, for intimation of the statutory assignation to tenants, for allocating bygone rents in arrears, current rents and future rents as between the adjudger and debtor, for clothing the adjudger with the landlord's powers to recover rents, and for regulating the transmission to the adjudger of the landlord's powers and obligations under the lease eg. as to repairs and maintenance. To impose on the debtor liability for the adjudger's expenses in using the remedy might seem somewhat unfair, and on the other hand to make the adjudger bear the expense seems contrary to principle and might deter adjudgers from resort to the remedy.

5.123 It is not easy to see, as a matter of policy, why an adjudication of the property itself, coupled with a power of sale, should carry with it an additional power to draw the rents. Moreover, a special rule would be needed to regulate a competition between an adjudger's attachment of the rents and an arrestment of rents laid by a third party creditor. The present rules on such competitions are somewhat complicated[1] but it should be noted that a decree of adjudication gives the adjudger who subsequently takes civil possession a preference over a creditor arresting before the decree in respect of future rents ie, which are neither due nor current at the date of the decree, and

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[1] See Graham Stewart, pp. 161-163.

that infeftment on the adjudication before the term day of the current rent gives the adjudger a preference over an arrestment laid prior to the date of the decree of adjudication and a fortiori an arrestment laid after that date.[1] Even if these rules are reformed so as to give the adjudger a preference only if his intimation to the tenant of the statutory assignation preceded the execution of the arrestment, it is difficult to see why the adjudger should be able to attach future rents by a single intimation so as to have a preference over later arrestments of the rents. Yet it would be illogical to allow the adjudger's attachment to be trumped by a later arrestment and confusing if the attachment were good against the debtor but not against an arrester. We therefore conclude that the adjudger's powers to uplift the rents should be abolished.

(iii) Proposals

5.124 We propose:

(1) **The following proposals relate to an adjudger's powers to enter into possession of adjudged subjects not occupied by the debtor or by other persons with his permission (as to which cases see Proposition 3.9 at para. 3.69 and Proposition 5.24(2) and (3) at para. 5.130).**

(2) **Where the adjudged subjects are occupied by persons without permission by the debtor, the adjudger should be entitled to obtain decree for their ejection.**

(3) **Where the adjudged property is unoccupied, the sheriff, on the adjudger's application, should be empowered, after such**

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[1] Idem.

intimation, advertisement and enquiry as he thinks fit, to grant warrant to the adjudger to enter into posssession of the property for the purposes of inspection, showing the property to prospective purchasers, and making the property lockfast if necessary for its safety. Should the sheriff have power to authorise the adjudger to carry out works of repair and maintenance if necessary to maintain the market value of the property, and to order that the expense should be chargeable against the debtor?

(4) Where the adjudged subjects are held by a tenant on lease from the debtor as landlord, the adjudger should not have a remedy of entering into civil possession and uplifting the rents.

(Proposition 5.23).

(d) Debtor's obligations and adjudger's default powers and limited powers of entry in relation to adjudged property

5.125 We have proposed that the debtor or a person occupying the adjudged property with the debtor's permission should be entitled to retain possession until the debtor's right of redemption is cut off.[1] It is a corollary of this privilege of retaining possession that the debtor or occupant must give access to the adjudger or his nominee from time to time to enable the adjudger or nominee to show the adjudged property to prospective purchasers. We propose therefore that the adjudger should have a right of entry for that purpose on giving not less than 48 hours' prior written notice. The sheriff should have powers designed to make the right of access effective if access is obstructed.

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[1] See volume 1, Proposition 3.9 (para. 3.69).

5.126 Where an adjudger has not entered into possession, the law imposes no obligations on the debtor with respect to the adjudged property and no restrictions on his rights as owner to deal with the property. By contrast, in the case of a standard security, the 1970 Act, Schedule 3, sets out certain standard conditions which the debtor must observe designed to protect the creditor's security interest. On the debtor's default in compliance with these conditions, the creditor may generally enter into possession and himself secure that the conditions are fulfilled, any expenses thereof being chargeable to the debtor and recoverable from the proceeds of sale. It is for consideration whether similar provisions should apply in the case of adjudications. These might cover for example maintenance and repair, observance of conditions in title, planning notices, and restrictions on letting. Some modification of the statutory conditions would be necessary in our view since the statutory conditions are in some respects too onerous, and were framed primarily with a solvent borrower in mind, whereas in an adjudication the debtor will almost always be insolvent.

5.127 As regards maintenance and repairs, an adjudger who had lawfully entered into possession may execute all necessary repairs and recover the expense from the rents, if any. There are no modern authorities. Graham Stewart[1] points out that at one time it was thought advisable to establish judicially the condition of the adjudged property and to obtain a warrant authorising the repairs. It appears however that the adjudger may execute repairs without judicial warrant, though he should give intimation to the debtor or preserve evidence that the repairs were necessary or beneficial.[2] By contrast, under standard condition 1, the debtor in a standard

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1 p.624.

2 Idem.

security is obliged "to maintain the security subjects in good and sufficient repair to the reasonable satisfaction of the creditor". Under standard condition 2, the debtor is obliged "to complete, as soon as may be practicable, any unfinished buildings or works forming part of the security subjects to the reasonable satisfaction of the creditor". In addition he is obliged "not to demolish, alter or add to any buildings or works forming part of the security subjects, except in accordance with a prior written consent of the creditor and in compliance with any consent, licence or approval required by law". The creditor has a general power to perform these obligations if the debtor has failed to perform.[1] Moreover there is a specific provision enabling the creditor, on default, to effect all such repairs and make good such defects as are necessary to maintain the security subjects in good and sufficient repair, and to "effect such reconstruction, alteration or improvement on the subjects as would be expected of a prudent proprietor to maintain the market value of the subjects", with powers of entry for those purposes.[2]

5.128 These provisions, although no doubt suitable for a heritable security to which the debtor has consented, seem unduly onerous from the standpoint of a debtor in an adjudication. We suggest that the adjudger should be entitled from time to time to have the adjudged property inspected on giving seven days' notice served at or after the date of intimation of registration of the notice of adjudication. The debtor would be obliged to maintain the property in as good a state of repair as it was in at the date of the first inspection, if the adjudger by written notice (in prescribed form) specifying that date has required him to do so. This would be an objective standard as distinct from a standard

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[1] Standard condition 7.

[2] Standard condition 10(6).

set by the adjudger. If the adjudger obtains a surveyor's report, he should be liable for the surveyor's fee which should not be recoverable from the debtor as an expense of the diligence. The sheriff should have powers to enforce the adjudger's right of access for inspection; and to authorise the adjudger to execute works of maintenance and repair if the debtor defaulted. We think that the debtor should not be obliged, and the creditor should not be absolutely entitled at the debtor's expense, to complete unfinished buildings or works on the adjudged property. Instead we suggest that as from a prescribed date (say, the date of the notice requiring maintenance of the property), the debtor would not be entitled to complete unfinished buildings or works, or to demolish, add to or alter buildings or works, except with the consent of the adjudger or authority of the sheriff. Conversely, the adjudger would be entitled to do these acts but only with the consent of the debtor or authority of the sheriff. It is thought that the cost of such remedial or other works should be chargeable to the debtor but only if covered by the proceeds of sale. It is for consideration whether such costs should rank as an expense of the diligence immediately after paying any prior debts, or whether the proceeds should be ascribed first to the other sums recoverable (prior debts, plus diligence expenses, interest, judicial expenses and principal sum) and only thereafter to the cost of remedial works. The latter solution may be thought appropriate at least where remedial works are carried out without the debtor's consent, though such a solution might induce a properly advised debtor to withhold consent.

5.129 We suggest that the following standard conditions should be applied to adjudications with minimal modification:

Standard condition 3: observance of conditions in title; payment of duties, charges etc; and general compliance with requirements of law relating to security subjects;

Standard condition 4: planning notices etc (intimation to creditor, taking of steps to comply with notice or order, or to object thereto);

Standard condition 6: restriction on debtor letting or sub-letting adjudged property without creditor's consent.[1]

Standard condition 5 obliges the debtor to insure the security subjects or, at the creditor's option, to permit the creditor to insure the security subjects in the names of the creditor and debtor to the extent of the market value against the risk of fire and such other risks as the creditor may reasonably require. He must deposit any insurance policy with the creditor, pay the premiums and on request exhibit receipts to the creditor. A simpler and possibly more realistic option may be to make no provision on insurance with the effect that the adjudger and the debtor are each free to insure his own interest. We invite views.

5.130 We provisionally propose:

(1) **The adjudger or a person authorised by him should be entitled from time to time to enter the adjudged property:**

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[1] Since the tenant or sub-tenant would have notice or constructive notice of the restriction by virtue of the prior registration of the notice of adjudication, the adjudger would be entitled to reduce a lease or sub-lease infringing the restriction: Trade Development Bank Ltd. v. Warriner and Mason (Scotland) Ltd. 1980 S.L.T. 223.

(a) for the purpose of inspecting its condition on giving not less than 7 days' prior written notice at or after the date of intimation to the debtor of registration of the notice of adjudication; and

(b) for the purpose of showing the property to prospective purchasers on giving 48 hours' prior written notice at or after the date of service on the debtor of the notice of commencement of the sale procedure.

(2) The sheriff should have powers to make, on the adjudger's application, orders requiring the debtor to give access to the adjudger or his nominee for the foregoing purposes, if access had been refused, on pain of penalties for contempt of court including, if necessary, an order terminating the right of posssession of the debtor and persons deriving right from him, and giving the adjudger powers of entry.

(3) The debtor should be obliged to maintain the property in as good a state of repair as it was in at the date of the first inspection mentioned at para.(1)(a) if within 2 weeks thereafter the adjudger, by written notice (in the prescribed form) specifying that date, has required him to do so. The expense of any survey should be borne by the adjudger. The sheriff, on the adjudger's application, should have power to authorise the adjudger to enter, or to possess, the property in order to maintain it in the required state of repair.

(4) As from a prescribed date (e.g. the date of service of the above notice) the debtor should not be entitled to

complete unfinished buildings or works on the adjudged property, or to demolish, add to or alter buildings or works, except with the adjudger's consent or sheriff's authority or unless such works had been required by or under statutory authority (e.g. by a buildings authority). Conversely, the adjudger should be entitled to do these acts but only with the consent of the debtor, or the sheriff's authority which should be granted only if, in the sheriff's opinion, the works are such as would be expected of a prudent proprietor to maintain the value of the property and it is otherwise reasonable to grant such authority.

(5) The cost of such remedial works or alterations carried out by the adjudger should be recoverable from the debtor only if or to the extent that they are covered by the proceeds of sale. Views are requested on whether the proceeds of sale should be ascribed first to the other sums recoverable and thereafter to the cost of the adjudger's remedial works and alterations.

(6) Standard conditions 3, 4 and 6 in Schedule 3 to the 1970 Act and the relative default power in standard condition 7, should be applied to adjudications with any necessary modifications.

(7) The debtor should not be obliged to insure the adjudged subjects.

(Proposition 5.24).

(e) Poinding of the ground

5.131 It has long been an open question whether an adjudger has the right to bring an action of poinding of the ground, which is an action competent to heritable creditors. Early authorities took the view that such a remedy was not available,[1] but these authorities stem from a time when an adjudication was regarded as in the nature of a sale under reversion. Since at least 1794,[2] it has been settled that an adjudication is more in the nature of a heritable security, and accordingly it has been persuasively argued that until an adjudger's right becomes irredeemable, he is, like any other holder of a debitum fundi, entitled to poind the ground.[3]

5.132 In Part VIII below, however, we propose that the diligence of poinding of the ground should be abolished.[4]

(f) Exercise, suspension and revival of adjudger's remedies in cases of concurrent adjudications

5.133 Where two or more adjudications by different creditors attach the same subjects, the following questions will arise.

(i) Which co-adjudger should have a title to exercise the remedies of an adjudger as to sale, foreclosure and, where necessary, entry into possession?

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[1] Erskine, Institute IV, I, II; Ross, Lectures on Conveyancing, 2, 431; see also Henderson v. Wallace (1875) 2 R. 272 at p.276 per Lord President Inglis.

[2] Campbell v. Scotland (1794) Mor. 321.

[3] Graham Stewart, p.496.

[4] Proposition 8.1(para. 8.9).

(ii) What rules should apply as to the suspension and revival of remedies in relation to the adjudications of the other co-adjudgers?

5.134 Title to exercise remedies. Under the present law, if an adjudger does not enter into possession, he cannot prevent a later adjudger of the same subjects from entering into possession.[1] Where there are concurrent adjudications of the same subjects, which rank pari passu under the Diligence Act 1661, the equalised co-adjudgers have "an equal right to possess with the first effectual adjudger, and may either by themselves if he do not enter into possession, or along with him, enter upon the possession and management of the subjects".[2] In the nineteenth century, when adjudications were relatively common, the practice was either to appoint, by amicable arrangement between the creditors, a factor to draw and distribute the rents, or to apply for a judicial factor or sequestration.[3] This was criticised as making the diligence even more unmanageable and inconvenient.[4]

5.135 We note that the legislation on standard securities and other heritable securities does not specifically regulate the question of which heritable creditor should be entitled to exercise the remedies of sale or foreclosure. We think however that in the case of concurrent adjudications this matter should not be left unregulated. There might be undue delay while agreement was being reached on who should sell the property, and some provision seems necessary for cases where the co-adjudgers fail to agree, or where following an agreement another co-adjudger registers an adjudication.

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[1] Graham Stewart, p. 622.

[2] Ibid. p. 646.

[3] Bell Commission's Second Report (1835), p. 22.

[4] Idem.

5.136 We propose that only one co-adjudger should have a title to pursue the diligence and to exercise the remedies of a co-adjudger at any one time. The co-adjudgers should be permitted to select the appropriate co-adjudger by written agreement, which should bind any co-adjudger who registered his adjudication later and was thus not a party to the agreement. In the absence of agreement, the first co-adjudger should have the exclusive title to pursue the diligence. Other co-adjudgers would not take any steps in pursuing their diligences, whether by intimation of the registration of their adjudications or otherwise, for as long as the first or authorised co-adjudger had the exclusive title and his diligence was in effect..

5.137 Where a co-adjudger having the exclusive title to proceed with his diligence under the foregoing agreement or rules, refuses or delays without reasonable excuse to do so, we suggest that any other co-adjudger should be entitled to apply to the sheriff for an order conferring on him the exclusive title to proceed with the diligence. The sheriff should also have power to dispense with the need to repeat steps in procedure already taken by the first co-adjudger, and generally to make consequential orders as to how the diligence should proceed so as to effect a smooth transition.

5.138 Suspension and revival of title of other co-adjudgers to exercise remedies. Where a co-adjudger ('the authorised co-adjudger') has an exclusive title to exercise remedies, it would necessarily follow that the title of any other co-adjudger would be suspended. An 'authorised' co-adjudger's adjudication could cease to have effect in circumstances where another co-adjudger would

then require to complete his diligence. These circumstances appear to be the discharge of the authorised co-adjudger's debt; or his renunciation of his adjudication (unusual but possible); or a defect in the procedure in his adjudication making it a nullity.[1] In such circumstances, provision would be needed to enable the remaining co-adjudger to acquire a title, or (if there were more than one remaining co-adjudger) an exclusive title, to proceed with his diligence.

5.139 We suggest that the remaining co-adjudger should be entitled to apply to the sheriff for an order conferring on him the exclusive title to exercise his remedies, and making any necessary consequential orders such as are mentioned in para. 5.137 above. While we would prefer to avoid the trouble and expense of court proceedings, it is desirable that the co-adjudger's title should be clearly established by a court order, and that the court should be able to ensure so far as practicable a smooth transition between the adjudications of the co-adjudgers.

5.140 We propose:

(1) **Where two or more adjudications of all or part of the same subjects are in effect at the same time, only one of the co-adjudgers should have a title to exercise the remedies of an adjudger in accordance with the rules in this Proposition, but subject to the rules on the title of**

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[1] The authorised co-adjudger's adjudication would also cease to have effect by disburdenment on sale or foreclosure. In the case of sale, the property would be disburdened of the other adjudications. In the case of foreclosure, a new situation would arise in which any prior or pari passu co-adjudgers would have a remedy against the property acquired by the authorised co-adjudger.

heritable creditors to exercise remedies mentioned in Proposition 5.26(para. 5.147) below.

(2) Unlesss there is such an agreement as is mentioned in para. (3) below, the co-adjudger whose adjudication was registered first should have the exclusive title to proceed with the diligence and to exercise the remedies of an adjudger.

(3) The co-adjudgers should be entitled to enter into an agreement in writing as to which of them should have the exclusive title to exercise the remedies of an adjudger. Such an agreement should bind any co-adjudger whose adjudication was not registered till after the making of the agreement.

(4) Where a co-adjudger having an exclusive title to proceed with the diligence refuses or delays unreasonably in doing so, any other co-adjudger should be entitled to apply to the sheriff for an order granting him the exclusive title to proceed with the diligence.

(5) Where the adjudication of a co-adjudger having an exclusive title to proceed with the diligence ceases to have effect by virtue of any of the following events:

(a) discharge of his debt; or

(b) renunciation by him of his adjudication; or

(c) a defect in the procedure having the effect of making the adjudication a nullity,

any other co-adjudger should be entitled to apply to the sheriff for an order granting him the exclusive title to proceed with the diligence.

(6) Where the sheriff makes an order granting a co-adjudger an exclusive title to proceed with the diligence, he should have a discretionary power to make incidental and consequential orders regulating further proceedings in the diligence, including power to dispense with the need to take steps in the diligence where such steps had already been taken by the co-adjudger previously entitled to proceed.

(Proposition 5.25).

(g) Exercise, suspension and revival of remedies in cases of concurrent adjudications and heritable securities

5.141 Where there are concurrent adjudications and heritable securities (voluntary heritable securities [1] or charging orders) affecting the same subjects, some provision seems necessary to regulate the question of which creditor should be entitled to exercise the remedies of an adjudger or heritable creditor. For simplicity we put the case where there is only one adjudication and one heritable security, on the footing that the proposals would need modification to fit the case where there are two or more adjudications or securities.

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[1] These will normally be standard securities but could consist of or include a bond and disposition in security. The debtor's reversionary right to lands disponed under an ex facie absolute disposition qualified by a back bond is a personal right to land and an adjudication (registrable only in the personal register) of such a right will be considered in a later Discussion Paper.

5.142 Where the heritable security ranks prior to the adjudication,(or if there is more than one adjudication the first adjudication), we suggest that the creditor in the heritable security should have an exclusive title to sell. This seems all the more necessary since we have proposed above[1] that an adjudger exercising the remedy of sale should have the right to redeem a prior heritable security and sell the property with a title disencumbered of that security.

5.143 Adjudications and heritable securities (standard securities or charging orders) will only rank pari passu in the very rare case where the notice of adjudication and security are both registered on the same date. We suggest that the creditor in the pari passu security should have the exclusive title to sell. While the prior or pari passu heritable security was in effect, the concurrent adjudger would not be entitled to serve an intimation of the registration of his adjudication on the debtor or co-owner or take any other steps in his diligence. To cater for exceptional cases in which the heritable security does not contain an irritancy clause taking effect on constitution of the debtor's apparent insolvency[2], a heritable creditor ranking prior to or pari passu with an adjudger should by statute be empowered after registration of the adjudication, to exercise his remedies of sale or foreclosure as if the debtor had defaulted in his obligations under the security.

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[1] Proposition 5.16(para.5.79).

[2] Cf. Conveyancing and Feudal Reform (Scotland) Act 1970, Sch. 3, standard condition 9 as amended by the Bankruptcy (Scotland) Act 1985, s. 75(9).

5.144 While there are time-limits on the exercise of the remedies of sale by a heritable creditor in a standard security, (5 years from specified dates,[1] renewable on service of a further calling-up notice or default notice), these leave ample scope for the heritable creditor to delay unreasonably in exercising those remedies. We suggest that there should be a procedure whereby the adjudger should be entitled to require the heritable creditor, whether or not he had served a default notice or calling-up notice, to complete his remedies of sale or foreclosure within 2 years from the requisition, and failing sale or foreclosure in that period, the adjudger should be entitled to apply to the sheriff for an order granting him authority to pursue his diligence and to exercise remedies to the exclusion of the heritable creditor, and any necessary incidental or consequential order, eg. fixing the point in time from which time-limits in taking steps in the diligence are to be reckoned.

5.145 If the prior or pari passu heritable security were to cease to have effect otherwise than by sale or foreclosure (eg. by discharge of the secured debt or renunciation of the security), the adjudger should apply to the sheriff for an order reviving the adjudger's right to proceed with his diligence and to exercise remedies, and for any necessary incidental or consequential orders.

5.146 Cases in which a standard security ranks after an adjudication will in practice be very rare because no properly advised lender will settle a loan transaction if a prior adjudication or notice of litigiosity was disclosed by an interim search of the registers. If the postponed heritable creditor were to have the

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[1] Conveyancing and Feudal Reform (Scotland) Act 1970, s.19(11) (5 years from date of calling-up notice or date of last offer or exposure for sale); s.21(4) (5 years from date of default notice).

preferable right to exercise the remedy of sale, complications could arise in a case where the adjudger had commenced the sale procedure. Moreover, it seems just that the preferable title to exercise remedies should depend on the respective dates of infeftment. We suggest therefore that where a standard security or charging order ranks after an adjudication, the adjudger should have a preferable title to exercise the remedy of sale.

3.147 We propose:

(1) Where a heritable security (voluntary security or charging order) ranks prior to or pari passu with an adjudication, then:

(a) the heritable creditor should be entitled to exercise the remedies of sale or foreclosure and other remedies available on default or calling-up;

(b) the adjudger's title to proceed with his diligence and to to exercise remedies should be suspended while the security is in effect.

(2) Where a heritable security ranks prior to or pari passu with an adjudication, it should be provided by statute that the heritable creditor, after registration of the adjudication, has the same powers to exercise his remedies on default as if the debtor had defaulted in his obligations under the security.

(3) An adjudger should however be entitled, by serving a notice in a prescribed form on a heritable creditor, to require him to complete the exercise of his remedies of sale or foreclosure within 2 years after the date of service of the notice and if, on the expiry of the 2 years, the remedies have not been completed, the adjudger should be entitled to apply to the sheriff for an order authorising the adjudger to proceed with his diligence and prohibiting the heritable creditor from exercising his remedies.

(4) If a prior or pari passu heritable security ceases to have effect otherwise than on sale or foreclosure, the concurrent adjudger should be entitled to apply to the sheriff for an order granting him an exclusive title to proceed with his diligence.

(5) Where the sheriff makes an order granting an adjudger an exclusive title to proceed with his diligence, he should have a discretionary power to make incidental and consequential orders regulating further proceedings in the diligence.

(6) Where a heritable security is postponed in ranking to an adjudication, the adjudger should be entitled to proceed with his diligence (subject to the rules on concurrent adjudications), and the heritable creditor should not be entitled to exercise the remedies of a heritable creditor while the adjudication is in effect.

(Proposition 5.26).

(8) Assignation, transmission, restriction, extinction and redemption, prescription

(a) Assignation of adjudications

5.148 Under the present law, though an adjudger cannot dispone the lands while his right is redeemable, he may convey his adjudication, and the debt to which it is accessory, to a third party.

5.149 Form of conveyance. As a matter of conveyancing forms, if the adjudger is not infeft, a simple assignation is enough,[1] but if he is infeft, the adjudged property is conveyed by a deed containing a disposition of the lands heritably but under reversion conform to law and an assignation.[2] Professor Montgomerie Bell[3] states that the deed "will be followed by sasine or registration, in like manner, as if it contained an irredeemable conveyance". There is no direct authority on whether, in the case of registration of title, registration is in the Proprietorship Section or the Charges Section of the Title Sheet or in both. Professor Bell[4] remarks that the deed contains the clauses usual in a conveyance of lands; that the assignation of writs embraces the decree of adjudication, with grounds and warrants of it, and any writs that have followed on it; and ought also to assign the debt contained in the decree and vouchers of it.

5.150 This form of conveyance is a relic of the period when an adjudication was regarded as a conveyance of the lands under reversion. Since the modern theory is that an adjudication is a form of judicial heritable security accessory to the debt and since the form of deed appropriate for transferring a heritable security in modern law is an assignation,[5] we think that an adjudication should be transferred by a simple statutory form of assignation of the adjudication, the debt to which it is accessory, and the decree or other document of debt containing the warrant for diligence in pursuance of which the adjudication was executed. We have

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[1] Graham Stewart, p.625; Sinclair v. Sinclair (1685) Mor. 10212.

[2] Montgomerie Bell, Lectures on Conveyancing (3rd edn.) vol.2, p.1195.

[3] Idem.

[4] Idem.

[5] Titles to Land Consolidation (Scotland) Act 1868, s.124, and Sch. GG; Conveyancing (Scotland) Act 1924, s.28, Sch. K, Form 1; (assignation of bond and disposition in security); Conveyancing and Feudal Reform (Scotland) Act 1970, s.14, Sch. 4, Forms A and E. Assignations were introduced by the Heritable Securities (Scotland) Act 1847 following a recommendation of the Bell Commission's Third Report (1838) pp. xxxvii, xlvi Proposition 38.

already proposed that the procedure for completing title to a decree (before or after extract) or extract writ registered for execution should be available to a creditor acquiring right to the decree or writ who wishes to continue an existing adjudication.[1] Before continuing with the adjudication therefore, the assignee would require to present the assignation as a link in title to the clerk of court who would then grant warrant for diligence in the name of the assignee.

5.151 Completion of title: registration. In a personal bond, the cedent is divested, and the assignee's title completed, by assignation intimated to the debtor. In the case of an assignation of an ex facie redeemable security, such as a bond and disposition in security or standard security, the cedent is not divested until the assignee has become infeft by registration in the property registers.[2] An adjudger of feudal subjects has an estate in land of the same kind as a heritable creditor and accordingly the same rule as to completion of title should apply.

5.152 Registration would be effected by recording of the assignation in the Sasines Register or by registration of the assignee's interest in the Land Register, an entry being made in the Charges Section of the Title Sheet. As in the case of the original registration of the adjudication, there would be an automatic exclusion of the assignee's entitlement to indemnity in respect of the amount due under the principal obligation secured by the adjudication.

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[1] See Proposition 5.1 (para.5.3) above.

[2] Gloag and Irvine, p.123; Anstruther v. Black (1626) Mor. 829.

5.153 Completion of title: intimation. While it is clear that registration is the criterion of preference in a question between the assignee of a heritable security on the one hand and, on the other, disponees, heritable creditors and adjudging creditors, it is not clear that registration without actual intimation completes title in a question between the assignee and the debtor. If the debtor pays to the original creditor the debt secured by a heritable security after an assignation of the debt and heritable security to a third party, but before the third party has either completed title by infeftment or intimated his assignation to the debtor, then the debt and the heritable security are both discharged and the assignation is thereafter ineffectual.[1] However no authority has been traced on the case where the debt is paid to the cedent after completion of title by registration but before intimation of the assignation to the debtor. There are cases where registration of a deed in the Register of Sasines assigning a personal right is treated as equivalent to intimation of the personal right.[2] These however are cases where a person, wrongly believing himself to be feudally vested in lands and in fact having only a personal right to demand a conveyance of the lands, has granted a heritable security to a third party in terms wide enough to assign his personal right to demand a conveyance of the lands. The registration of the heritable security in the Register of Sasines was then held to be equivalent to intimation to the party obliged to grant the conveyance in a competition between the assignee of the personal right and the cedent's trustee in bankruptcy. These cases may be regarded as somewhat special. No authority has been traced on whether registration of an assignation of an obligation to pay money (as distinct from a personal obligation to convey property) in the Sasines Register is equivalent to intimation of the assignation to the debtor in a

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[1] Macdowal v. Fullerton (1714) Mor. 576; 2 Ross's Leading Cases 709; Gloag and Irvine, pp.134-135.

[2] Paul v. Boyd's Trs. (1835) 13 S. 818; Edmond v. Gordon (1855) 18 D. 47; (1858) 3 Macq. 116.

question between the debtor and the assignee. The result of such a rule would be that no debtor in a heritable security could safely make payment, or partial payment, to the heritable creditor without first searching the property registers to ensure that an assignation of the debt to a third party had not been impliedly intimated to him by registration of the assignation. Such a rule seems so inconvenient and unjust that it is unlikely to represent the law, but the point remains unresolved by authority.

5.154 We suggest that any legislation reforming adjudications should make it clear that payment or partial payment of the debt made to the cedent before the assignation is intimated to the debtor should be good against the assignee and persons deriving title from him as well as against the cedent, and that for this purpose registration of the assignation in the property registers should not be treated as equivalent to actual intimation to the debtor of the assignation.

5.155 Implied assignation of adjudication. There is some authority that at least in some circumstances, an assignation of the debt, without an express assignation of an adjudication enforcing the debt, will carry with it an assignation of the adjudication. In the old case of Wilson v. Burrell[1] it was held that an assignation of a bond and disposition in security on which an adjudication had been used, though gratuitous and not making any specific conveyance of or reference to the adjudication, had the effect of conveying the adjudication. This case is an example of the rule that the accessory follows the principal ("accessorium sequitur principale").[2] Thus of this case Lord Kilkerran remarked: "It was strange to suppose the intention of the disponer to have

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[1] (1750) Mor. 40;41.

[2] The case is classified under this rubric in Morison's Dictionary.

been to retain the adjudication; which could no longer be of use to him after he had transferred the debt on which it was led; and it was thought a mistake to suppose a suppletory (sic) conveyance necessary".[1] The same rule applies to other diligences. Thus Bell remarks: "Assignation carries right not only to the debt, but to the diligence used upon it"[2], though of course in a poinding or arrestment, the officer of court does not act until a warrant is granted in the assignee's favour under the statutory procedure mentioned above.[3]

5.156 It would however be inconvenient and inappropriate to allow a simple assignation of the personal obligation to pay the debt to carry right to an accessory adjudication, if the assignation does not specify the lands or is not otherwise in a form which can be completed by registration in the property registers. This problem presumably did not arise in Wilson v. Burrell[4] where the principal obligation was contained in a heritable security the assignation of which would be completed by infeftment. We suggest that the only competent mode of assigning an adjudication inter vivos should be by means of the statutory form mentioned above and that if the principal obligation to pay the debt is assigned inter vivos without an assignation of the adjudication, the adjudication should cease to have effect on the date of intimation to the debtor of the assignation.

5.157 Purported assignation of adjudication without assignation of debt. In the converse case, where an adjudication is assigned

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[1] M.or. 41.

[2] Commentaries vol. 2, p.18; also Erskine, Institute III, 5, 8; Stair III, 1, 17; Graham Stewart, p.282.

[3] See para.5.2.

[4] (1750) M.or. 40;41: see previous paragraph.

but not the principal obligation of payment which it secures, it seems that the assignation is ineffectual. Thus in McCutcheon v. McWilliam[1] (which involved the assignation of a voluntary security) the Lord Ordinary (Curriehill) observed obiter that "where a debt is heritably secured and the creditor is duly infeft, the debt itself and the subjects over which it is secured are held to be so inseparably connected that in order effectually to assign the debt both it and the lands must be expressly conveyed by a deed adapted to convey heritable property". While on appeal the Lord Ordinary's decision was reversed on another point, the foregoing proposition still stands. Thus Lord Justice-Clerk Moncreiff remarked (obiter): "If the granter did not mean to assign the debt, it may be that the conveyance of the heritable subject would be nugatory ..."[2] and Lord Ormidale observed that "a disposition without a transference of the debt would place matters in a very anomalous position. The security could be worth nothing to [the disponer] if the debt merely remained with him, while the subjects forming the security were disposed ... without the debt".[3] The 1970 Act, s.14 and Sch. 4, Forms A and B, make provision for assignations of standard securities and Professor Halliday remarks[4] that where the personal obligation has been constituted in an instrument separate from the standard security, the effect of an assignation of the security in the statutory form (i.e. without an assignation of the debt) is not clear.

5.158 In view of the purely accessory nature of an adjudication, it seems clear that an assignation of an adjudication should only be competent and effectual if it is accessory to an assignation of the debt secured by it.

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[1] (1876) 3 R. 565 at p.569.

[2] Ibid., at p.571.

[3] Idem.

[4] Halliday, p. 154.

5.159 Parker on Adjudications[1] states that the price obtained from the sale of an adjudication is imputed in extinction of the original adjudger's debt. That proposition (for which no authority is cited) seems to presuppose that it is competent for the original adjudger to assign his adjudication while retaining right to the debt, but this seems wrong in law. We take the law to be that the sum paid by an assignee of an adjudication to the cedent as the price of purchasing it is a matter arising between the assignee and the cedent and has, and should have, no effect whatever on the amount of the debt.

5.160 We provisionally propose:

(1) **It should be competent to assign an adjudication and the debt which it secures in accordance with the following proposals.**

(2) **The form of conveyance should be an assignation (in a form prescribed by statute) of the adjudication, of the debt to which it is accessory, and of the decree or other document of debt in pursuance of which it was executed. It should no longer be competent to assign by a conveyance of the lands subject to the debtor's right of redemption.**

(3) **The assignee should complete title to the adjudication by:**

(a) **registering the assignation in the Sasines or Land Register; and**

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[1] p.57.

(b) intimation of the assignation to the debtor.

(4) Registration of the assignation in the property registers should not be treated as equivalent to intimation to the debtor, and accordingly payments or partial payments by the debtor to the cedent before intimation of the assignation should be good against the assignee and persons deriving title from him as well as against the cedent.

(5) It should not be competent to assign an adjudication otherwise than in the new statutory form, and in particular an assignation of an adjudication should only be competent as an accessory to an assignation of the debt secured by the adjudication.

(6) If the principal obligation to pay the debt is assigned inter vivos without an assignation of the adjudication, the adjudication should not be taken as impliedly assigned but should cease to have effect on the date of the intimation of the assignation to the debtor.

(7) Unless specifically qualified an assignation of the debt and adjudication should carry:

(a) all rights of the cedent to the writs (including the certificate of execution of the charge to pay and notice of entitlement to adjudge, the duly registered notice of litigiosity, the duly recorded notice of adjudication or the Charge Certificate referring to the adjudication, the decree for payment or other document of debt containing the warrant for diligence and any other writs following thereon);

(b) any rights of the cedent to recover from the debtor expenses incurred in executing the diligence;

(c) the full benefit of any notices given or procedures begun by the cedent so that the assignee may proceed as if they had been given or begun by him;

(d) as at common law, warrandice "debitum subesse" (i.e. that the debt subsists).

(Proposition 5.27).

(b) Title of adjudger's assignee and singular successors

5.161 Several authorities emphasise the insecure nature of the right of an assignee who purchases a debt secured by an adjudication because his rights cannot be determined by the faith of the registers.[1] Thus, (1) the adjudication may be extinguished by the adjudger's renunciation or discharge which need not be registered to be effectual. (2) It may also be extinguished by payment of the debt, or by the adjudger's satisfaction of the debt by intromission with the rents, neither of which can be registered. (3) Under the rules on equalisation of adjudications outside sequestration, the registration of an adjudication may create a kind of common right to support other adjudications subsequently led within a year and a day of the first effectual adjudication. This last disadvantage would, however, disappear if equalisation of adjudications were to be abolished.[2]

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[1] Stair III, 1, 21; III, 2, 39; Erskine Institute II, 12, 36-38; Baron Hume's Lectures, vol. IV, pp.474-6; Graham Stewart, pp. 625-626.

[2] See Discussion Paper No. 79 on Equalisation of Diligences.

5.162 The law can be stated in three rules. (1) Personal obligations granted by the original adjudger while he was uninfeft, such as declarations of trust communicating the benefit of the adjudication to other creditors, or backbonds restricting the creditor's right to part of the lands adjudged in a competition with another creditor, are effectual against a singular successor of the adjudger during the legal though not disclosed on the registers, even though the singular successor is infeft, or the adjudger thereafter becomes infeft.[1] (2) On the other hand, personal obligations created after the adjudger is infeft are not effectual against singular successors even before expiry of the legal.[2] (3) Where the adjudger is infeft, the legal expires, and the debtor's right of redemption is foreclosed, the adjudger's right is treated as a full right of property and personal obligations which would not be effectual against purchasers of lands will not be effectual against a purchaser from the adjudger.[3]

5.163 The policy underlying the first rule is fully explained in the books.

(1) "The commerce of debts and diligences is not (and indeed it ought not to be) so much the object of the law's encouragement as that of rights of property. Within the legal, these diligences are calculated for security only of the claim of debt to the creditor and his heirs; and if they fully answer this end, the law is nowise anxious about

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[1] Stair III, 1, 21; Kennedy v. Cunningham (1670) Mor. 10205-6; Earl of Southesk v. Marquis of Huntly (1666) Mor. 10203.

[2] Sinclair v. Sinclair (1685) Mor. 10212; Burnet v. Nasmith (1693) Mor. 3040.

[3] Stair, III, 1, 21.

adapting them with the greatest convenience to the market."[1]

(2) Because (as indicated above) a right to an adjudication may be restricted or extinguished by acts which need not or cannot enter the registers, an assignee of an adjudication necessarily purchases the diligence at his own risk and purely on the credit of his author. It is a logical extension of this risk to make the assignor's prior deeds qualifying the diligence effectual against the assignee.

(3) In the period before sequestration had been introduced in Scots law, it was convenient to enable a creditor to adjudge as a trustee on behalf of other creditors who had assigned their debts to him in return for backbonds communicating part of the benefit of the diligence to them. If such a trust were not effectual against assignees, creditors for small debts might each adjudge separately on their own behalf for possibly small amounts which was regarded as highly inconvenient, expensive and unjust to debtors.[2]

5.164 It seems however to have been regarded as going too far to allow an adjudger's personal obligations created after infeftment to be effectual against assignees during the legal. Moreover, since dispositions by adjudgers after the date of expiry of the legal were the foundation of the title to many great estates, it was thought wrong to allow personal obligations to be effctual against singular successors after that date.[3]

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[1] Baron Hume's Lectures, vol. IV, p.475.

[2] Kennedy v. Cunningham (1670) Mor. 10205 at p.10207.

[3] Stair, III, 1, 21.

5.165 We think that the existing rules are generally applicable mutatis mutandis to modern conditions and the proposed new procedure of adjudication. First, in the case of a combined assignation of the debt and the adjudication securing the debt, it is inescapable that the assignee cannot transact on the faith of the registers but must rely on the personal credit and good faith of his author. In these circumstances we see no reason to change the rule under which latent personal obligations and trusts are effectual against the adjudger's assignees if created before the time of the adjudger's completion of title by infeftment but not if created after that time.

5.166 Second, the position should be different where an adjudger sells in exercise of his proposed new power of sale, or where in default of sale he obtains decree of foreclosure such as we have proposed and sells the property thereafter. There can be no room for qualifying a bona fide purchaser's title by latent personal obligations or trusts granted by the adjudger and not appearing on the registers. The integrity of judicial sales as well as the faith of the registers suggests that the analogy of sales after expiry of the legal should be followed.

5.167 We propose:

(1) **Where an adjudication is assigned by an assignation of the debt and adjudication as mentioned in the last Proposition, the existing common law rule should apply whereby latent personal obligations and trusts not appearing on the property registers are effectual against the adjudger's assignees if created before the time of the adjudger's infeftment but not if created after that time.**

(2) Where however an adjudger sells the adjudged property under his proposed new power of sale, or obtains decree of foreclosure and sells or burdens the property thereafter, latent personal obligations and trusts (whenever created) not appearing on the registers should not be effectual in a question with a bona fide purchaser or lender taking without notice of the latent obligation or trust.

(Proposition 5.28).

(c) Further proposals on transmission of adjudication and entitlement to adjudge

5.168 We have made certain proposals relating to the transmission of the diligence which it may be helpful to summarise.

(1) A creditor acquiring right to a decree for payment or extract registered writ inter vivos or mortis causa must obtain a warrant for diligence in his own name from a clerk of court by the relevant statutory procedure before commencing or continuing an adjudication. (Proposition 5.1; para. 5.3).

(2) A notice of adjudication should have no legal effect until registered in the property registers. It should not have effect as an unrecorded conveyance and so could not be used as a link in title for the purposes of completion of title by notice of title or notarial instrument in the name of an assignee, executor or other successor of the adjudger. (Proposition 5.4(3); para. 5.25).

(3) Where the debt and diligence are assigned inter vivos after registration of the notice of adjudication, it would be competent for the assignee to complete title to the adjudication by direct registration of the assignation. (Proposition 5.27; para. 5.160).

Two further provisions seem necessary.

5.169 First, where the debt transmits to an assignee, executor or other successor of the creditor after service of the notice of entitlement to adjudge but before the notice of adjudication has been registered, the creditor's successor should be entitled to continue the diligence after obtaining a warrant for diligence in his own name by the statutory procedure. On such a transmission, it should be competent for the successor to apply, at his own expense, to the sheriff for an extension of the period for registration of the notice of adjudication, and the related period of litigiosity. Once the successor had obtained a warrant for inter alia continuing the diligence in his own name, he would register a notice of adjudication in his own name deducing his right from the original creditor as the party who had served the notice of entitlement to adjudge.

5.170 Second, where a notice of adjudication has been registered, it should be competent for an assignee, executor or other successor of the adjudger, after obtaining a warrant for diligence in his own name by the statutory procedure, to complete title as adjudger by registering a notarial instrument or notice of title deducing title through the relevant link in title. It seems to us that the provisions of the conveyancing statutes relating to the completion of title to heritable securities by successors of

heritable creditors[1] already apply to the transmission of a decree of adjudication for debt to the adjudger's successors by reason of the fact that the definition of "heritable security" in the conveyancing statutes extends to such decrees.[2] We suggest that these provisions should be applicable to notices of adjudication.

5.171 We propose:

(1)(a) **Where the debt transmits to an assignee, executor or other successor of the creditor after service of the notice of entitlement to adjudge, and the successor has obtained a warrant for diligence in his own name, (which would have the effect of entitling him to proceed with a diligence already begun) the successor would be entitled to register a notice of adjudication in his own name deducing title from the original creditor.**

(b) **On such a transmission the sheriff should have power, on the successor's application, to extend the period for registration of the notice of adjudication and the related period of litigiosity. The expense of such an application should not be chargeable against the debtor.**

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[1] Titles to Land Consolidation (Scotland) Act 1868, ss.126 and 127; Conveyancing (Scotland) Act 1874, ss.51 and 53; Conveyancing (Scotland) Act 1924 ss. 4 to 6.

[2] Titles to Land Consolidation (Scotland) Act 1868, s.3 (definitions of "heritable security", "deed" and "conveyance") applied by Conveyancing (Scotland) Act 1874, s.3 and Conveyancing (Scotland) Act 1924, s.2.

(2) **Where the debt transmits to an assignee, executor or other successor of an adjudger after registration of the notice of adjudication, and the successor has obtained a warrant for diligence in his own name, the successor should be entitled to complete title by registering a notarial instrument or notice of title under the provisions of the conveyancing statutes relating to completion of title to heritable securities.**

(Proposition 5.29).

(d) **Transmission of debtor's personal obligation to successors and disponees**

5.172 Section 47 of the 1874 Act provides that a "heritable security", and the relative personal obligation of payment, transmits against any person taking the burdened estate (a) by succession, gift or bequest or (b) by conveyance, when an agreement to that effect appears in gremio of the conveyance. It is not clear whether this provision applies to adjudications as being heritable securities within the meaning of the conveyancing statutes. The background to this provision is explained in the authority cited.[1] On the whole, we see no reason why it should not apply.

5.173 We propose:

Section 47 of the Conveyancing (Scotland) Act 1874 (which regulates the transmission of a personal obligation secured by a heritable security against the debtor's successor taking by succession, gift, bequest or conveyance) should apply in relation to obligations secured by adjudications.

(Proposition 5.30).

[1] Menzies, Lectures on Conveyancing (rev. Sturrock, 1900) p.868.

(e) Abolition of doctrine of adjudger's acquisition of ownership by prescription

5.174 Under the present law, even after the expiry of the legal, the debtor may still redeem the adjudication by payment of the debt until the adjudger has obtained decree of declarator of expiry of the legal which has the effect of conferring on the adjudger an irredeemable title as full owner. It is settled that where the adjudger does not obtain such a decree, then he can acquire a title as full and absolute owner of the adjudged subjects by prescription. As has recently been pointed out, however, by Mr G L Gretton in a learned article,[1] there are divergent views as to whether the relevant type of prescription is the negative prescription of the debtor's right of redemption through non-exercise for 20 years,[2] or the positive prescription of the adjudger's right based on possession for 10 years,[3] and there is even a view that both types of prescription operate,[4] which was easier to entertain when the periods of the negative and positive prescriptions were both 40 years than it is now. A major difficulty concerning the operation of the negative prescription is that by statute (affirming the old common law) a real right of ownership in land cannot be extinguished by the operation of the negative

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[1] Gretton, "Prescription and the Foreclosure of Adjudications", [1983] Juridical Review 177.

[2] E.g. Napier, Commentaries on the Law of Prescription in Scotland (1839) p.136; Millar, Handbook of Prescription (1893) p.21 (but cf. p.152); Bell, Lectures on Conveyancing (3rd edn.) p.1194; Walker, Prescription and Limitation of Actions in Scotland (3rd edn.) p.17.

[3] Bell, Commentaries (7th edn.) pp.745-6 semble; Duff, Treatise on Leeds (1838) p.177.

[4] Hinton v. Connell's Trs. (1883) 10 R. 1110 at p.1112 per Lord Lee.

prescription.[1] A major difficulty concerning the operation of the positive prescription is that the role of prescription is generally understood to be the fortification of a title which is ex facie valid but suffers from extrinsic and latent defects whereas in the present context the theory seems to be that positive prescription has the quite different and unusual role of changing the nature of the adjudger's right from a redeemable right under a judicial heritable security to an irredeemable right of ownership.[2] It may be that the adjudger's right under a decree of adjudication is sui generis having two aspects, namely, (1) a judicial heritable nexus or security during the legal and (2) after the expiry of the legal having the capacity to become an irredeemable right of ownership by declarator of expiry or by positive prescription, though even this theory is difficult to reconcile with all the authorities.[3]

5.175 It is however unnecessary for us to reach a concluded view on the present law since we propose that the doctrine of an adjudger's acquisition by prescription of an irredeemable title of ownership should be abolished. An adjudger would only acquire a title as owner of the adjudged property if, in default of sale, he obtained decree of foreclosure.[4]

5.176 The debate concerning the nature of the prescription is, however, relevant to the interpretation of section 1 of the Prescription and Limitation (Scotland) Act 1973. In summary,

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[1] Prescription and Limitation (Scotland) Act 1973, Sch. 3, para. (a).

[2] See Gretton, loc cit, at p.180.

[3] E.g. Hinton v. Connell's Trs. (1883) 10 R. 1110.

[4] See paras. 5.101 to 5.114 above.

section 1(1) provides that if an interest in land has been possessed for 10 years openly, peaceably and without judicial interruption, and the possession is founded and follows on the registration of a deed conferring a title to the interest in the Sasines Register, or registration of the interest in the Land Register subject to an exclusion of indemnity by the Keeper, then on the expiry of the 10 years the validity of the title is exempt from challenge. Section 1(3) provides that in the computation of the prescriptive period for the purposes of this section (i.e. the positive prescription) in a case where the deed in question is a decree of adjudication for debt, any period before expiry of the legal shall be disregarded. Section 1(3) was probably based on the view that an adjudger acquires an irredeemable title as owner by the running of the positive prescription as from the expiry of the legal. On the other hand, the section says nothing about the effect of positive prescription in conversion of an adjudger's security right to a right of ownership. An alternative view is that section 1(3) is concerned not with conversion by positive prescription of an adjudger's right but with fortification by positive prescription of his title by exempting it from challenges based on extrinsic defects. The difficulty with this view, however, is that there is no reason why prescription fortifying the title should begin to run on the expiry of the legal instead of on the registration of the decree of adjudication.[1] Whatever the true effect of section 1(3) of the 1970 Act as the law presently stands, we think that all difficulties would be removed by its repeal consequential on the abolition of positive prescription as a means of converting an adjudger's security right to a right of ownership. The effect would be that positive prescription in its usual role would operate so that a challenge of an adjudger's title based on extrinsic defects affecting the notice of adjudication would cease to be competent on the expiry of 10 years from the date of its registration.

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[1] Gretton, loc cit, at p.184.

5.177 We propose:

(1) **The present rule under which an adjudger can acquire an irredeemable title as owner by prescription should be abolished.**

(2) **Section 1(3) of the Prescription and Limitation (Scotland) Act 1973 (which provides in effect that where the foundation writ of the positive prescription is a decree of adjudication for debt, the prescriptive period begins to run on expiry of the legal) should be repealed.**

(3) **The foregoing proposals are without prejudice to the role of the positive prescription as a means of fortifying the adjudger's title.**

(Proposition 5.31).

(f) Extinction of adjudication

5.178 Under the present law[1] an adjudication may be extinguished by discharge of the debt, whether by intromission with rents, payment by or on behalf of the debtor, or otherwise, in much the same way as a heritable security may be extinguished. In that event the debtor, or his successor as proprietor of the reversionary interest, may obtain decree in an action of declarator of extinction of the adjudication, or an action of reduction and declarator of extinction, or of declarator of redemption. The action may be combined with an action for count and reckoning. It is also available to postponed adjudgers. Under the old law, on the debtor's death, his heir could exercise the right of redemption and that right is now presumably possessed by the debtor's

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[1] See Graham Stewart, pp.660-664.

executor. It is also competent for the adjudger to grant a formal renunciation of the adjudication in which he discharges the debt and the decree and declares the lands to be redeemed and disburdened.[1] If he has been in possession he will render an account and obtain a ratification and discharge of his intromissions before granting a renunciation of the adjudication.[2] Since a decree of adjudication even if registered in the property registers does not divest the debtor of his right of ownership, but creates a separate judicial security interest burdening the debtor's proprietary right, it is unnecessary to register the extract decree or the creditor's deed in order to make the extinction effectual.[3] Where the adjudger was infeft, however, in order to clear the registers of the burden on the owner's title, it is good conveyancing practice to register the deed or extract decree in the property registers and also normally in the Register of Inhibitions and Adjudications.[4]

5.179 We consider that the present law should be retained with minor technical modifications. The adjudication would be extinguished by discharge of the debt (i.e. all sums secured by the adjudication), whether by payment or otherwise, or by a tender which is not accepted within a reasonable time. Under the present law, payment may be made or tendered in the creditor's action of declarator of expiry of the legal. Under the proposed new procedure, payment or tender would be effectual at any time before the conclusion of the contract for sale of the property by private bargain or public auction or, as the case may be, the

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[1] Encyclopaedia of Scottish Legal Styles vol.1, pp.107-8.

[2] Ibid., p.108.

[3] Graham Stewart, pp.663-664.

[4] Graham Stewart, p.664; A.M. Bell Lectures on Conveyancing (3rd edn.) vol. 2, p.1195.

granting of decree of foreclosure of the debtor's right of redemption.[1]

5.180 We have not traced any authority on the extinction of an adjudication by "confusion" (or merger) of the adjudger's "estate" with the proprietor's "estate". There are authorities on the extinction of heritable securities by "confusion" which we think would be held applicable to adjudications, and while there is some doubt about the circumstances in which the extinction of a heritable security will take place,[2] we think that this matter should be developed by the common law. The doctrine of confusion could be important in competitions with heritable creditors or other adjudgers. Thus a debtor cannot pay a prior debt affecting his lands, take an assignation to it and the accessory security and set it up in his own interest in priority to a postponed bondholder or adjudger.

5.181 It should be competent for anyone having an interest (e.g. the debtor, or his successor as owner of the adjudged property, or a postponed adjudger or heritable creditor) to apply to the sheriff for a declarator that the adjudication has been extinguished by satisfaction of the debt or otherwise. In the case of a discharge of the debt after service of the notice of entitlement to adjudge but before registration of the notice of adjudication, the declarator would relate to the extinction of the creditor's entitlement to adjudge.

5.182 It should also be competent for the adjudger to grant a formal deed renouncing and discharging the adjudication and

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[1] As to tender, see Proposition 3.16(5) (para. 3.107).

[2] Gloag and Irvine, pp.137 et seq.

disburdening the subjects of it. We suggest that statute might precribe a style as in the case of discharges of standard securities.[1]

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[1] Conveyancing and Feudal Reform (Scotland) Act 1970, s.17; Sch. 4, Form F.

5.183 We have already proposed that the right conferred on a creditor by registration of a notice of adjudication would be a right to a nexus or attachment burdening the debtor's proprietary interest. Since this right would be purely accessory to the principal obligation to pay the debt, it must cease to have effect when the debt is discharged. Further, since the debtor was never divested of his right as owner, he would not require to be reinvested in that right after extinction of the adjudication. Nevertheless it should be competent as under the existing law to register an extract decree of declarator of extinction or a deed of discharge in the property registers in order to clear those registers.

5.184 We propose:

(1) An adjudication should be extinguished by:

(a) discharge or tender of the debt prior to conclusion of the contract of sale under the power of sale or to the grant of decree of foreclosure;

(b) "confusion" or merger of the legal estates if the adjudger became proprietor of the adjudged property;

(c) the operation of insolvency processes as mentioned in Part VI;

(d) the creditor's formal deed discharging the debt and decree, or renouncing the adjudication, or both such a discharge and renunciation;

(e) an intimated assignation of the debt without an assignation of the adjudication as mentioned at Proposition 5.27(para. 5.160) above;

(f) a procedural defect rendering the adjudication null.

(2) The sheriff should have power, on application by the debtor or other person having an interest, to grant a declarator of extinction of the adjudication.

(3) It should be competent to register an extract declarator of extinction or a deed of discharge or renunciation in the property registers in order to clear the registers but an infeft debtor should not require following discharge to be reinvested in a proprietary title.

(Proposition 5.32).

(9) Solicitors' functions and fees

5.185 Provision will be necessary for determining who is authorised to execute warrants of adjudication and sale, on the regulation of fees for executing such warrants and related matters.

5.186 Authority of solicitors to execute warrants of adjudication and sale. At the present time, warrants for diligence in extract court decrees and documents of debt only operate against moveable property and are executed by messengers-at-arms and sheriff officers. Only solicitors however have the necessary expertise in all the various skills required for executing the main steps in the new diligence of adjudication and sale (eg. in heritable conveyancing), and we propose that solicitors should have

the exclusive authority to execute that form of diligence. Exceptionally messengers-at-arms or sheriff officers could alone execute certain steps, such as 'hand service' of writs, and warrants of ejection or warrants to open shut and lockfast places; and public auctions of adjudged subjects should be conducted by professional auctioneers.

5.187 Obligation to act when instructed? Solicitors are generally not obliged to act when instructed, but in diligence, messengers-at-arms and sheriff officers are so obliged. The rationale is often said to be that decrees of court ought not be rendered unenforceable by the refusal or reluctance of an officer to execute the warrant, eg. in a difficult case attracting adverse publicity. This rationale has greater force in relation to messengers-at-arms and sheriff officers who are very few in number compared to practising solicitors, and it may be in practice that such a rule would be unnecessary. Some solicitors specialising in other work might be unfairly prejudiced by a duty to act. Accordingly, if there were to be such a duty, it would be for consideration whether a list should be drawn up by the Law Society of Scotland of solicitors who had volunteered to act, and who by virtue of being listed had the duty to act when instructed. Perhaps solicitors not so listed should not enjoy the authority of acting. We seek views.

5.188 Discipline and indemnity. There seems no reason why the normal provisions on complaints and disciplinary proceedings against solicitors should not apply to their conduct in executing the diligence of adjudication and sale.[1] Similarly such conduct could presumably be underwritten by the Scottish Solicitors Guarantee Fund[2] and by the rules requiring indemnity insurance

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[1] Solicitors (Scotland) Act 1980, ss. 49-56.

[2] Ibid, s. 43.

against professional liability.[1] These provisions would be the counterpart of the provisions on the discipline of messengers-at-arms and sheriff officers by the court,[2] and their provision of bonds of caution.[3]

5.189 Adjudication void where solicitor executing it has direct or indirect interest in debt. It is a rule of the common law that an officer of court (ie. a messenger-at-arms or sheriff officer) cannot competently execute diligence to enforce a debt due to himself,[4] or to a company of which he is a director.[5] The effect of the prohibition is to render the diligence void. These rules have been placed on a statutory basis, clarified and extended by the Debtors (Scotland) Act 1987, s. 83. This renders void a diligence executed by an officer of court to enforce a debt which is due to himself, or to a company or firm of which he is a director or partner, or to a debt purchase company or firm in which he has a pecuniary interest, or to a business associate or member of his family (all as defined). It seems clear that solicitors executing the new diligence of adjudication and sale should be under a similar restriction.

5.190 Regulation of fees for executing adjudication and sale. The fees charged by solicitors are regulated by act of sederunt in

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[1] Ibid., s. 44.

[2] Debtors (Scotland) Act, ss. 78-81.

[3] Ibid, s. 75 (1) (e).

[4] Dalgliesh v. Scott (1822) 1 S. 506; see also R.C. 50.

[5] John Temple Ltd v. Logan 1973 SLT (Sh. Ct.) 41; Lawrence Jack Collections v. Hamilton 1976 SLT (Sh.Ct.) 18; Lawrence Jack Collections v. Dallas 1976 SLT (Sh.Ct.) 21; British Relay Ltd. v. Keay 1976 S.L.T. (Sh.Ct.) 23; Lewis, Petitioner (3 February 1978, Sheriffdom of North Strathclyde at Paisley).

the case of court proceedings[1] and by the Table of Fees for Conveyancing and General Business approved by the Council of the Law Society of Scotland (which covers for example the procedure in calling up standard securities). The fees charged by messengers-at-arms and sheriff officers for executing citation and diligence are regulated by act of sederunt.[2] It is thought that fees for diligence should be regulated by act of sederunt rather than by the Table of Fees for Conveyancing and General Business, and that this should be made clear in any legislation authorising solicitors to execute the new diligence of adjudication and sale.

5.191 We propose:

(1) **The exclusive authority to execute the new diligence of adjudication and sale should be conferred only on solicitors, except that:**

(a) **where service of writs otherwise than by post or warrants of ejection or warrants to open shut and lockfast places require to be executed, they should be executed by messengers-at-arms or sheriff officers; and**

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[1] Administration of Justice (Scotland) Act 1933, s. 16(g); R.C. 347; Sheriff Courts (Scotland) Act 1907, s. 40; Act of Sederunt Anent Fees of Solicitors and Others in the Sheriff Courts 1935; Act of Sederunt (Fees of Solicitors in the Sheriff Court) 1986.

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

(b) a public auction of adjudged subjects should be conducted by a professional auctioneer.

(2) Should a solicitor be legally obliged to execute a warrant for adjudication and sale when required by the creditor to do so?

(3) If so, should this duty apply to all solicitors, or should the Law Society of Scotland be required to draw up a list of solicitors willing to act, who would have both the exclusive privilege of acting, and the duty to act when instructed?

(4) Complaints and disciplinary proceedings against solicitors executing warrants of adjudication and sale should be dealt with by the Law Society of Scotland by its usual procedures, and acts and defaults of solicitors in such execution should be underwritten by the Scottish Solicitors Guarantee Fund and under the rules on indemnity insurance rather than by special bonds of caution.

(5) Provision should be made by statute rendering void an adjudication and sale executed by a solicitor to enforce a debt due to himself or to a company or firm of which he is a director or partner, or to a debt purchase company in which he has a pecuniary interest, or to a business associate or member of his family, along the lines of the provisions of section 83 of the Debtors (Scotland) Act 1987 (which makes similar provision for diligence executed by a messenger-at-arms or sheriff officer).

(6) **Legislation authorising solicitors to execute the new diligence of adjudication and sale should make it clear that the fees chargeable to solicitors for executing the diligence will be prescribed by act of sederunt.**

(Proposition 5.33).

(10) Report on sale and diligence expenses

5.192 Since an adjudication and sale will be a diligence under a warrant of the court, rather than a voluntary heritable security, we think that provision should be made requiring the solicitor executing an adjudication to report to the sheriff on the sale (if any) and the disposal of its proceeds, the expenses of the diligence chargeable against the debtor, and the balance due to or by the debtor. This should be submitted either after all the subjects have been sold, or in default of sale of all the subjects, along with the adjudger's application for decree of foreclosure. The report would enable the auditor of court to tax the diligence expenses and provide an important safeguard for debtors. The proposals made below are based on the Debtors (Scotland) Act 1987, s.39, which enacts revised provisions on the reports of sale of poinded goods.

5.193 In cases where the adjudger does not sell the adjudged subjects, but claims a ranking on the proceeds of sale of the subjects by a co-adjudger or heritable creditor, the adjudger should be bound to submit a report to the sheriff court on his diligence expenses for taxation if required to do so by interested persons or, in a judicial ranking, by the court. Similar provision might be made for taxation of expenses where a prior or pari passu

adjudger claims to rank for those expenses in a question with a foreclosing adjudger.

5.194 We propose:

(1) A solicitor executing a diligence of adjudication and sale should be required to submit to the sheriff a report on sale and diligence expenses in accordance with the following paragraphs.

(2) The report should specify:

(a) any subjects sold and the amounts for which they have been sold;

(b) any subjects remaining unsold and the price at which they were last exposed for sale;

(c) the expenses chargeable against the debtor incurred in executing the diligence of adjudication and sale;

(d) the amounts of any prior, pari passu or postponed debts ranking on the proceeds of sale;

(e) any surplus paid to the debtor; and

(f) any balance of the proceeds of sale due to the debtor and any balance of the debt due by the debtor to the adjudger.

(3) Where all the subjects have been sold in pursuance of the diligence, the report should be submitted within a period prescribed by act of sederunt following the date of conclusion of the contract of sale or, where the subjects have been sold in lots on different dates, the date of conclusion of the last contract of sale.

(4) Where all or part of the subjects have not been sold in pursuance of the diligence, and the adjudger applies for decree of foreclosure with respect to the unsold subjects, the report should be submitted along with the application for decree of foreclosure.

(5) Where the solicitor makes a report of sale late without reasonable excuse, or wilfully refuses or delays to make a report of sale after the time for submission of the report has elapsed, the sheriff should be empowered to make an order that the solicitor should be liable for the expenses chargeable against the debtor in whole or in part.

(6) The report of sale should be remitted by the sheriff to the auditor of court who should:

(a) tax the expenses chargeable against the debtor;

(b) certify the balance due to or by the debtor as mentioned at para. (2)(f) above; and

(c) report to the sheriff,

after giving interested persons an opportunity to make representations on any alteration of the expenses or balance.

(7) On receiving the auditor's report, the sheriff, after giving interested persons an opportunity to be heard, should have power:

(a) to declare the above-mentioned balance to be due to or by the debtor, with or without modifications; or

(b) if the sheriff is satisfied that there has been a substantial irregularity in the diligence (other than in the making of the report of sale), declare the diligence to be void, (which declarator should not however affect the title of a purchaser in good faith and for value or his singular successors).

(8) The auditor of court's fee should be payable by the Exchequer.

(9) The report of sale and auditor's report should be available for inspection by the public for a prescribed period on payment of a prescribed fee.

(10) Where -

(a) there are concurrent adjudications, or concurrent adjudications and heritable securities, affecting the same subjects, which are then sold by an adjudger or heritable creditor; and

(b) an adjudger who has not exercised his remedy of sale claims the expenses of his adjudication in any judicial or extra-judicial process of ranking on the proceeds of sale,

the solicitor of the last-mentioned adjudger should be bound to submit a report on those expenses to the sheriff court for taxation by the auditor of court if he is required to do so by the debtor, or by a pari passu or postponed adjudger or heritable creditor claiming a ranking on those proceeds, or by the court in the case of a judicial ranking.

(11) Similar provision should be made for taxation of diligence expenses where a prior or pari passu adjudger claims to rank for his diligence expenses in a question with a foreclosing adjudger.

(Proposition 5.34).

(11) Miscellaneous

(a) Effect of adjudication of the debtor's property right on leases granted by the debtor or his authors

5.195 It is convenient to consider together certain questions relating to the effect of an adjudication or notice of litigiosity on leases of the adjudged or litigious subjects granted by the debtor or his authors.

5.196 Leases granted before litigiosity or adjudication. The question whether a lease confers on the tenant a real right enforceable against the adjudger is governed by the Leases Act

1449, as liberally construed by the courts. Under that Act a lease granted by an owner confers on the tenant a real right enforceable against the owner's singular successors if the tenant has taken possession of the leased subjects prior to the singular successor's infeftment. In the case of a registrable long lease, registration of the lease in the property registers is by statute equivalent to possession.[1] Singular successors include among others adjudging creditors,[2] and there is no doubt that a creditor using the new diligence of adjudication and sale would also be treated as a singular successor for this purpose. Accordingly a lease granted by a debtor or his authors before the adjudger's infeftment and not struck at by the adjudger's notice of litigiosity will only be enforceable against the adjudger and persons deriving right from him if the tenant has taken possession, or registered the lease, prior to the adjudger's infeftment.

5.197 Leases granted after litigiosity while adjudication is in effect. For so long as an apprising or adjudication was regarded as a sale under reversion, the debtor did not have power to grant leases while the apprising or adjudication was in effect. One of the results of the transformation of the diligence into a kind of judicial heritable security was that the debtor could grant leases after the adjudger's infeftment, just as if he had granted a heritable bond.[3] The rule derived from the Leases Act 1449[4] however means that such a lease is not enforceable against the adjudger because the tenant ex hypothesi cannot take possession

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[1] Registration of Leases (Scotland) Act 1857, s.16.

[2] Wallace v. Harvey (1627) Mor. 67; Graham Stewart, p. 635; Rankine, Leases (3rd edn.) p. 168.

[3] Baron Hume's Lectures, vol. IV, p. 456.

[4] Wallace v. Harvey (1627) Mor. 67; see previous paragraph.

under the lease till after the adjudger's infeftment. Baron Hume[1] states a different view, but cites no authority, and it is thought that his view is mistaken.

5.198 Adjudger's powers to remove tenants having only personal rights. An adjudger who is infeft has a title to remove tenants having a personal right under the lease.[2] In the new diligence, an adjudger will be entitled to enter into possession only in limited circumstances before sale or foreclosure. Whether or not he can qualify an interest to remove tenants before he is himself entitled to take possession may be left to the common law. If however the tenant is still in possession at the date of sale, the adjudger should have the same summary powers to remove him as are proposed for the removal of the debtor.[3]

5.199 Effect of notice of litigiosity on debtor's power to grant leases. We have proposed[4] that the adjudger should be required to register a notice of litigiosity when serving a charge to pay and notice of entitlement to adjudge prior to the registration of his adjudication. This would have the same effect in creating litigiosity as a notice of summons of adjudication

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[1] Baron Hume's Lectures, vol. IV, p. 456 where it is stated that the debtor's "tacks, and other deeds of administration (provided always they are not fraudulent or malicious deeds) shall modify and have effect against the adjudger's right, though followed with infeftment before their date".

[2] Rankine, Leases (3rd edn.) p. 518; Chalmers v. Dalrymple (1701) 4 B.S. 509.

[3] See Proposition 3.9(2) (para. 3.69).

[4] Proposition 3.5(2) (para. 3.43).

under the existing law. The effect will be that the debtor may perform "acts of ordinary administration", and this is construed as including the grant of a lease "for a short period",[1] but a "long lease", or a short lease granted during the currency of an existing lease, will be reducible.[2] This effect seems to be somewhat different from the effect of the litigiosity created by an inhibition, which does not strike at a lease of "ordinary duration" for a "fair rent",[3] though the principle of not striking at acts of ordinary administration is said to apply also to inhibitions.[4]

5.200 These rules appear unsatisfactory. The concept of a "short lease" is difficult to construe. It may have meant one thing against the background of a "legal" of ten years, but ought not to have the same meaning in the context of the new diligence of adjudication and sale which may have a much shorter duration. Moreover, the concept has been rendered out-of-date and inappropriate in very many cases by the modern statutory provisions on security of tenure applicable to tenancies of private and public sector rented dwellings and under agricultural leases. Such provisions would have the effect of greatly reducing the sale value of the property rights to the prejudice of the adjudger. Nor would the problems be solved by substituting the concept of a lease of "ordinary duration" for a "fair rent".[5] For these reasons we suggest that an adjudger's notice of litigiosity should strike at all leases, of the property which is specified in the notice,

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[1] Graham Stewart p. 619; Carlyle v. Lowther (1766) Mor. 8380; Creditors of York Building Co v. Fordyce (1778) Mor. 8380; affd. 2 Paton 500.

[2] Blackburn v. Gibson (1629) Mor. 8378; Creditors of York Building Co. v. Fordyce, supra.

[3] See Craham Stewart pp. 559; Gretton, The Law of Inhibition and Adjudication (1987) p. 73.

[4] Graham Stewart, p. 562.

[5] See the remarks on that concept in Gretton, op. cit. p. 73.

voluntarily entered into during the period when the notice of litigiosity has effect.

5.201 We propose:

(1) **The protection of tenants of a debtor against adjudications by the debtor's creditors should continue to be governed by the Leases Act 1449.**

(2) **Where a tenant having a mere personal right to possession in a question with the adjudger is in possession of the adjudged subjects at the date of sale, the adjudger should have the same power to remove the tenant summarily as are proposed for the summary removal of the debtor by Proposition 3.9(2) (at para. 3.69).**

(3) **An adjudger's notice of litigiosity should render reducible all leases of the litigious subjects voluntarily entered into during the period of litigiosity, irrespective of the duration of the lease.**

(Proposition 5.35).

(b) Matrimonial Homes (Family Protection) (Scotland) Act 1981, s.12

5.202 The Matrimonial Homes (Family Protection) (Scotland) Act 1981, s.12 provides that where a matrimonial home of which there is an "entitled" and "non-entitled" spouse is adjudged, the Court of Session, on an application within 40 days of the decree of adjudication, may reduce the decree or make an order protecting

the occupancy rights of the non-entitled spouse if it is satisfied that the purpose of the diligence was wholly or mainly to defeat the occupancy rights of the non-entitled spouse. The provisions strike at collusive adjudications arranged by the debtor and creditor.

5.203 No provision is made for intimation of the adjudication to the non-entitled spouse and it seems likely that the safeguard would often be useless as a result. By contrast, section 41 of the Bankruptcy (Scotland) Act 1985 (which enables the Court of Session to reduce an adjudication or make an order protecting the occupancy rights of the non-entitled spouse of the bankrupt) provides that where the permanent trustee in the sequestration of the entitled spouse's estate is aware that the entitled spouse is married to the non-entitled spouse and knows where the non-entitled spouse is residing, he must, within 14 days of the issue of the act and warrant, inform the non-entitled spouse of the fact of the sequestration and of the rights of the non-entitled spouse to apply for reduction or protection of occupancy rights. This duty is imposed on the trustee who will not be a party to the collusion. In an adjudication there is no trustee and the most that can be done is to place a similar duty on the adjudger even though, in a collusive adjudication, the adjudger will be a party to the collusion. On the analogy of s.41 of the 1985 Act, we propose that the adjudger should intimate the registration of a notice of adjudication to a known non-entitled spouse within 14 days of the date of registration and that the application to the court for reduction should be presented within 40 days of that date.

5.204 Under section 12 of the 1981 Act (and section 41 of the 1985 Act) the relevant powers are conceded to the Court of

Session probably because that Court alone has jurisdiction to grant decrees of reduction, and not because adjudication is a Court of Session action. On this view, the Court of Session should retain this exclusive jurisdiction. Consequential provision should be made deferring time limits to allow the application to the Court to proceed.

5.205 We propose:

Section 12 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (protection of non-entitled spouse of debtor against adjudication of matrimonial home designed wholly or mainly to defeat that spouse's occupancy rights) should be amended to provide that where the adjudger is aware that the entitled spouse (the debtor) is married to the non-entitled spouse and knows where the non-entitled spouse is residing, he must within 14 days after the date of registration of the notice of adjudication inform the non-entitled spouse of his or her rights to challenge the adjudication under that section.

(c) Time orders under Consumer Credit Act 1974

5.206 Time orders under the Consumer Credit Act 1974, s.129(2)(a), have since May 1985 been available to control the enforcement of regulated consumer credit agreements and consumer hire agreements. Such a time order may provide for "the payment by the debtor or hirer or any surety [i.e. guarantor] of any sum owed under a regulated agreement or a security by such instalments, payable at such times as the court, having regard to the means of the debtor or hirer and any surety, considers reasonable". These time orders closely resemble time to pay

decrees and time to pay orders since they provide for payment by instalments and are competent in actions by the creditor to enforce the agreement and on application by the debtor inter alia after decree in such actions (1974 Act, s.129(1)).

5.207 In our Report on Diligence and Debtor Protection,[1] we suggested that consideration should be given to certain amendments of the 1974 Act, but the Debtors (Scotland) Act 1987 does not take up the suggestion. It is therefore still for consideration whether the 1974 Act should be amended to make it clear that in Scotland, where an adjudication has reached the advanced stage at which a time to pay order would not be competent (ie. the service of a notice of commencement of the sale procedure[2]), then the court should not be empowered to make a time order until the adjudication or other diligence had been completed or had ceased to have effect.

5.208

Views are invited on whether the Consumer Credit Act 1974 should be amended so that in Scotland a time order under s.129(2)(a) would not be competent where an adjudication had reached the stage at which a time to pay order would not be competent as mentioned in Proposition above.

(Proposition 5.37).

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[1] Para. 3.126.

[2] See Proposition 3.5(3) (para. 3.25) in volume 1.

(d) Summary warrants for the recovery of fiscal debts

5.209 A summary warrant for the recovery of arrears of local government rates[1] or central government taxes[2] will in future authorise poinding and sale, earnings arrestment, and arrestment and action of furthcoming. In due course, a summary warrant for the recovery of arrears of community charges will also authorise these three forms of diligence.[3] By contrast the corresponding procedures in England and Wales relate only to enforcement against moveable goods or imprisonment in the case of rates.[4] We do not think it would be desirable to widen the cross-border differences in the modes of enforcing fiscal debts. Moreover, since summary warrants dispense with the need for court actions, it seems desirable not to widen the methods of enforcement which they authorise more than is strictly necessary.

5.210 We therefore propose:

> **Summary warrants for the recovery of arrears of central government taxes or local government rates or community charges should not authorise the new diligence of adjudication and sale.**

(Proposition 5.38).

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1 Local Government (Scotland) Act 1947, s. 247, substituted by the Debtors (Scotland) Act 1987, Sch. 4, para. 1(1).

2 Taxes Management Act 1970, s. 63; Car Tax Act 1983, Sch. 1, para. 3 (3)-(7); Value Added Tax Act 1983, Sch. 7, para. 6(5)-(9), all inserted by Debtors (Scotland) Act 1987, Sch. 4, paras. 2-4.

3 Abolition of Domestic Rates Etc. (Scotland) Act 1987, Sch. 2, para. 7.

4 eg. Taxes Management Act 1970, s. 61; General Rate Act 1967, s. 96 ff.