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ADJUDICATIONS FOR DEBT AND RELATED MATTERS

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PART VI

COMPETITIONS BETWEEN ADJUDICATIONS AND OTHER RIGHTS AND RELATED MATTERS

6.1 Preliminary. In this Part we consider competitions between adjudications and other rights, and related matters such as the provisions deeming bankruptcy sequestrations and liquidations of debtor companies to be equivalent to adjudications for debt. We deal in a separate Discussion Paper with the rules on the equalisation (ie. the pari passu ranking) of adjudications inter se.[1] We may revert in a future Discussion Paper on inhibitions to aspects of competitions between adjudications and inhibitions so far as not dealt with in Part V above.[2]

(1) Computation of amount of adjudger's debt under common law rules of ranking

6.2 The orthodox view is that, in a competition between an adjudger and other creditors, the adjudger is entitled at common law to rank on the estate adjudged proportionately to the amount of his debt as fixed at the date when it became secured by the adjudication so, however, that he does not draw more than 100p in the pound. This is generally said to be the result of the two leading cases of the Earl of Loudon[3] and Auchinbreck's Creditors[4] in which an adjudger, who had received partial payment from funds not covered by the adjudication, was nevertheless found entitled, in a competition with adjudgers, to rank for the full

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[1] See Discussion Paper No.79 on Equalisation of Diligences issued along with the present Discussion Paper.

[2] We consider above the protection of the title of a purchaser of adjudged property from reduction by an inhibitor (para. 5.80 ff.); the ranking of inhibitions on the proceeds of sale of adjudged property (para. 5.84 ff.); and the title of an inhibitor to demand payment in a ranking on adjudged property (para. 5.93).

[3] Earl of Loudon v. Lord Ross (1734) Mor 14114; 5 B.S. 143.

[4] Auchinbreck's Creditors v. Lockwood (1758) Mor. 14129.

amount of the debt originally secured so as to recover the unpaid balance. As Erskine[1] remarked: "The security acquired by the adjudger ... is as broad for the last shilling as for the whole sum, because it is the nature of the security which entitles him to the preference, and not the amount of the sum which is secured". Bell and Graham Stewart attribute this rule to the old theory that an adjudication is a sale under reversion,[2] and state that when it came to be established that an adjudication was in the nature of a heritable security,[3] this different character ascribed to the diligence was held not to affect the already established rule.[4]

6.3 This rule for ranking adjudications (if indeed it still represents the law) contrasts with the rule for ranking voluntary heritable securities in processes of ranking governed by the common law where the debtor is insolvent. Under this latter rule, the secured creditor ranks for the full amount of his debt as at the time when the process of ranking was commenced, to the effect of recovering the deficiency. The creditor need not deduct the value of his security for this purpose. The rationale is that the rule "gives effect to what is, in its exact terms, the contract between the debtor and creditor, viz. that the debtor is to have the debtor's personal obligation for the whole debt, and that the real security is to be something additional to the personal obligation".[5] Under this rule the tempus inspiciendum is the date when the process of ranking commenced,[6] and not the date when the debt was originally secured. There is some doubt whether this second rule has superseded the rule relating to adjudications

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[1] Institute II, 12, 67.

[2] Bell, Commentaries, vol. 2, pp. 425-426; Graham Stewart, p. 629.

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

[4] Dalrymple's Trs. v. Cuthbertson (1825) 4 S. 16.

[5] Goudy, p. 506.

[6] Kirkaldy v. Middleton (1841) 4 D. 202 at p. 208; cf. Molleson v. Leck (1884) 11 R. 415 at p. 417: "the time when the competition arises".

because in the leading case of Kirkaldy v. Middleton[1], Lord Fullerton explained that the Earl of Loudon and Auchinbreck's Creditors were examples of this second rule.

6.4 Yet another rule applies by statute to the ranking of securities (including adjudications and other diligences as well as voluntary securities)[2] in a sequestration, liquidation or a trust deed for creditors (unless the trust deed provides otherwise[3]). In these insolvency processes, the adjudger or other secured creditor is required to deduct partial payments to account made before the date of sequestration[4], or commencement of the winding-up,[5] or granting of the trust deed,[6] as the case may be, and to deduct the value or net realisation of his security or preference before ranking as an ordinary creditor.[7]

6.5 It follows that the common law rules of ranking only apply in other processes of ranking such as multiple-poindings, trust deeds for creditors disapplying the statutory ranking rules,

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[1] (1841) 4 D 202 at pp. 208-209.

[2] The Bankruptcy (Scotland) Act 1985, s. 73(1) defines "security" to mean "any security, heritable or moveable, or any right of lien, retention or preference" and since this includes inhibitions and arrestments (Goudy, p. 187) it must also include adjudications. The word is defined in similar terms by the Insolvency Act 1986, s. 248(b).

[3] Bankruptcy (Scotland) Act 1985, Sch. 5, para. 4.

[4] Bankruptcy (Scotland) Act 1985, Sch. 1, para. 1(1).

[5] Idem. applied to liquidations by the Insolvency (Scotland) Rules 1986 (SI 1986/1915), rule 4.16.

[6] Idem. (as read with Sch. 5, para. 4(a)).

[7] Bankruptcy (Scotland) Act 1985, Sch. 1, para. 5(1) and (3); Insolvency (Scotland) Rules, rule 4.16; 1985 Act, Sch. 5 para. 4(a).

composition contracts, and extra-judicial rankings by heritable creditors on the proceeds of sale of the security subjects. They may also apply in receiverships.

6.6 We suggest that in processes of ranking not governed by the statutory rule for computing debts for ranking purposes, the rule of ranking applicable to debts secured by a voluntary security should apply to debts secured by an adjudication.

6.7 We propose:

> **In any process of ranking on adjudged property, or on the debtor's general estate other than a process to which the Bankruptcy (Scotland) Act 1985, Sch. 1, para. 1, applies, the amount of the debt which the adjudger may claim for ranking purposes should be the amount outstanding at the date when the process of ranking was commenced.**

(Proposition 6.1).

(2) Competitions with other adjudications for debt

6.8 The present law on the ranking of adjudications led outwith the statutory period for the pari passu ranking of adjudications (considered in a separate Discussion Paper[1]) is unduly complicated, depending in different circumstances on different criteria of preference, namely, infeftment by registration in the property registers, or registration of the abbreviate of adjudication in the personal registers, or the grant of the decree of adjudication.[2] The reason for these complicated rules is purely

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[1] See Discussion Paper No.79 on Equalisation of Diligences issued along with the present Paper.

[2] See Graham Stewart pp. 615,632, 643.

historical since they stem from the time when completion of title was a lengthy and complicated process and accordingly competitions involving uninfeft adjudgers had to be regulated. These rules have been anachronistic since the conveyancing reforms of the 19th century which introduced completion of title by direct recording of the decree of adjudication in the property registers. We have proposed that the adjudger's title would be both created and completed by registration in the property registers,[1] and it follows that registration in the property registers would be the sole criterion of preference in competitions between adjudgers for debt. Decrees and abbreviates of adjudication for debt would be abolished and the law greatly simplified.

(3) Competitions with adjudications in implement

6.9 The provisions of the conveyancing statutes governing completion of title on decrees of adjudication for debt apply also to decrees of adjudication in implement.[2] Accordingly in a competition betwen a notice of adjudication for debt such as we propose and a decree of adjudication in implement whether of a right of property or a security right, priority would depend on priority of registration in the property registers.[3] The position might however be different if the adjudication in implement were based on an obligation struck at by a plea of litigiosity.[4]

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[1] See Proposition 5.4 (para. 5.25).

[2] Titles to Land Consolidation (Scotland) Act 1868, s.62 subst. by Conveyancing (Scotland) Act 1874, s.62; Conveyancing (Scotland) Act 1924 , ss.4-5.

[3] See Graham Stewart, p.633; Encyclopaedia, s.v. "Adjudication" vol. 1, pp.145-146.

[4] Graham Stewart, p.633.

(4) Competition with voluntary rights granted by debtor

6.10 We have proposed that after service of the charge and notice of entitlement to adjudge, the creditor would be required to register a notice of litigiosity.[1] This would have a similar effect to a registered notice of summons of adjudication under the existing law in giving the adjudger priority over any voluntary assignation or conveyance, of a property or security right, granted after registration of the notice. We are therefore concerned here with assignations or conveyances not affected by litigiosity.

6.11 Where the property adjudged is feudal and can only be transmitted by sasine (or registration in the Sasines or Land Registers as its modern equivalent) the preference depends on priority of registration in the property registers.[2] We deal elsewhere with competitions between adjudgers and the debtor's tenants.[3]

6.12 Restriction of prior heritable securities. Under section 13(1) of the Conveyancing and Feudal Reform (Scotland) Act 1970, where the creditor in a duly registered standard security has received notice of the creation of a subsequently registered security over all or part of the security subjects, or a registered assignation or conveyance of that interest, the creditor's preference in ranking is restricted to (i) present advances; (ii) future advances if he is required to make them under the

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[1] Proposition 3.5; para. 3.43.

[2] Erskine Institute II, 12, 23; Bell, Commentaries, vol. 1, pp.743, 755; Mitchells v. Ferguson (1781) Mor. 10296; Gordon v. Rae (1822) 2 S. 78; Boyes v. Laurie (1854) 16 D. 860; Graham Stewart, p.635.

[3] See para. 5.211 ff.

principal obligation; (iii) interest, present and future; and (iv) expenses or outlays, plus interest, reasonably incurred in exercising his powers. Under section 13(2)(b) "any assignation, conveyance or vesting in favour of or in any other person of the interest of the debtor in the security subjects ... resulting from any judicial decree" constitutes sufficient notice. Section 13(2)(b) is presumably designed to cover inter alia decrees of adjudication which on registration would restrict a prior security without actual notice to the prior heritable creditor.

6.13 The proposed new notice of adjudication, not being a judicial decree, would have to be actually notified to the prior heritable creditor in order to operate restriction under s. 13(1). We think that this result is acceptable, especially since subsequent voluntary securities require to be notified in order to operate restriction.

6.14 We propose:

> **A notice of adjudication should have the effect of restricting a prior heritable security for future advances under section 13 of the Conveyancing and Feudal Reform (Scotland) Act 1970 only if actual notice of the registration of the adjudication is given to the creditor in the heritable security.**

(Proposition 6.2).

(5) Sequestration

6.15 Our concern with sequestration as a bankruptcy process focusses mainly on the following topics.

First, bankruptcy legislation gives a sequestration the same effect as a decree of adjudication for the purpose of the pari passu ranking of creditors under the legislation on equalisation of adjudications. We deal with this in Discussion Paper No.79 in which we propose that equalisation of adjudications should be abolished. In its place, we propose that sequestration should have the effect of rendering ineffectual any adjudication registered within 60 days prior to the date of sequestration, but saving the adjudger's right to claim the expenses of the adjudication in the sequestration.

Second, for the purposes of the vesting of the debtor's estate in the permanent trustee, bankruptcy legislation deems the trustee's act and warrant to be equivalent to inter alia a decree of adjudication for debt and in security. The abolition of such decrees necessitates an amendment of that provision.

Third, bankruptcy legislation also prevents a creditor from raising or insisting in an adjudication after the date of sequestration, and this provision requires adaptation to the new procedure for adjudications.

6.16 We are concerned in this Discussion Paper only with adjudications for debt of subjects capable of registration in the property registers, including feudal property and registrable long leases but excluding debts secured by heritable securities. We consider only the effect of sequestration in attaching property of that type. We shall consider in a later Discussion Paper the effect of sequestration in attaching other adjudgeable subjects, ie.

non-feudal heritable property and debts secured by heritable securities.

6.17 Vesting of estate in permanent trustee. The Bankruptcy (Scotland) Act 1985 section 31(1) provides for vesting of the debtor's estate in the permanent trustee in the following terms:

> "31.--(1) Subject to section 33 of this Act, the whole estate of the debtor shall vest as at the date of sequestration in the permanent trustee for the benefit of the creditors; and--
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> (a) the estate shall so vest by virtue of the act and warrant issued on confirmation of the permanent trustee's appointment; and
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> (b) the act and warrant shall, in respect of the heritable estate in Scotland of the debtor, have the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the permanent trustee."

In a debtor's petition, sequestration is awarded forthwith[1] and the date of sequestration is the date on which sequestration is awarded.[2] In a petition by a creditor or trustee in a trust deed for creditors, the date of sequestration is the date on which the court grants warrant citing the debtor to appear.[3] The act and warrant on confirmation of the permanent trustee's appointment is issued at a later date after sundry procedure (statutory meeting of creditors at which permanent trustee elected; confirmation of permanent trustee by sheriff; lodging of bond of caution).[4]

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[1] Bankruptcy (Scotland) Act 1985, s. 12(1).

[2] Ibid, s. 12 (4)(a).

[3] Ibid, s.12(4)(b).

[4] Ibid, s.25.

6.18 Between 1772 (when sequestration as a bankruptcy process was introduced) and 1839, the act and warrant or decree confirming the trustee's appointment did not itself transfer the bankrupt's estate. The decree of confirmation originally contained an order on the bankrupt to convey and an adjudication of his lands and moveables if he failed. The concept of a statutory transfer was introduced by the Bankruptcy Act 1839 and has been embodied in all subsequent Scots Bankrutpcy Acts.

6.19 The drafting has however been recently modified. The Bankruptcy (Scotland) Act 1913 s.97(2) provided for vesting of the heritable estate in Scotland "to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee, and recorded at the date of sequestration, ...". It is generally accepted that the words underlined had reference to recording in the personal register, not the property registers, because, as Goudy remarks, section 97(2) of the 1913 Act "is a re-enactment of section 102 of the 1856 Act, and the recording of decrees of adjudication in the Register of Sasines for the purpose of infeftment and making up title was unknown in 1856."[1] These words therefore do not apply to subjects registrable in the property registers. The result was stated by Bell[2] as follows: "The effect of this provision as to such heritage as requires sasine, is to make the trustee run a race of diligences for the obtaining of sasine with creditors holding an inchoated security, the first completed right being preferable". The omission of the words underlined from s.31(1) of the 1985 Act may have changed the law on the effect of sequestration on non-registrable

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1 Goudy, p.256.

2 Bell, Commentaries on the Recent Statutes relative to Diligence etc. (1840) p. 168; see also Goudy, p. 256.

adjudgeable property but has not changed its effect in relation to registrable adjudgeable property which remains as stated by Bell.

6.20 Clearly the abolition of decrees of adjudication will require a consequential amendment of section 31(1)(b) of the 1985 Act. The fact that the trustee acquires merely a personal right to the sequestrated heritable property requiring sasine is a deliberate policy designed to ensure that the holders of conveyances or securities from a bankrupt should be in no worse position in relation to the trustee than in relation to any single creditor entering into competition with them.[1] It would be out-of-place to suggest any change to that policy in this Discussion Paper and we assume it should continue. This means that section 31(1)(b) can no longer be made equivalent to an adjudication for debt, since (a) to make it equivalent to a registered notice of adjudication would eliminate the race to the register which s.31(1)(b) is designed to preserve, and (b) to make it equivalent to an unregistered notice of adjudication would be meaningless having regard to our proposal that a notice of adjudication should have no effect till registration.

6.21 We suggest that s.31(1)(b) be amended to secure that, for the purposes of vesting in, and completing title to, heritable property requiring sasine, the act and warrant should not have effect as an adjudication for debt or in security. It would be legislatively possible to provide that the act and warrant should continue to have effect as if it were a decree of adjudication in implement of sale. Such a decree has effect as a conveyance in ordinary form of the lands therein contained granted by the seller, although in nonage or of unsound mind, in favour of the purchaser

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[1] Bell, Commentaries, vol. 2, p.338.

and the purchaser may complete title by direct registration in the property registers or by using the decree as an assignation of an unrecorded conveyance for the purpose of completing title by the usual means of notarial instrument, notice of title or clause of deduction of title.[1] Whether the legislation should refer to the analogy of a decree of adjudication in implement of sale, or expressly define the effect of the act and warrant in broadly the same terms, is a question of statutory drafting which need not be resolved here. If the analogy of such a decree, or of a conveyance, is used, two further provisions would be necessary.

6.22 First, it would be necessary to ensure that the principle in Rodger (Builders) Ltd. v. Fawdry[2] would not apply so as to defeat the vesting of the heritable property in the trustee. Under that principle, where a purchaser of heritable property is aware of a prior contract for the sale of the property, he is bound to inquire into the nature and result of that contract, and he is not entitled to rely on the seller's assurance that the prior contract is no longer in existence. His failure to make the necessary inquiries is sufficient per se to deprive him of the character of a bona fide purchaser and to render his registered disposition reducible at the instance of the prior purchaser. At present an adjudger for debt, and a trustee in a sequestration as a deemed adjudger for debt, may obtain a good title over the bankrupt's heritage by infeftment even though the debtor has conveyed the property to a third party by a delivered disposition (if not registered prior to the date of the adjudger's infeftment).[3] There has never been any suggestion that the Fawdry principle applies, or should apply, to adjudgers for debt or to trustees in sequestration. It would, however, apply to an adjudication in implement of sale since that is simply a judicial

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[1] Titles to Land Consolidation (Scotland) Act 1868, s. 62; Conveyancing (Scotland) Act 1924, ss. 3 to 6.

[2] 1950 S.C. 483.

[3] Mitchells v. Ferguson (1781) Mor. 10296; Wylie v. Duncan (1803) Mor. 10269; Heritable Reversionary Co. v. Millar (1891) 19 R. (H.L.) 43 at p.48; Gibson v. Hunter Home Designs Ltd. 1976 S.C. 23 at pp.29-30; Graham Stewart, pp.620-621; Goudy, p.251.

means of supplying the want of a voluntary conveyance in favour of the purchaser. The Fawdry principle must therefore be excluded if it is enacted that sequestration is to have effect as an adjudication in implement of sale.

6.23 Second, it seems that the historical and legal source of the principle of tantum et tale in sequestrations (viz. that the trustee in sequestration takes the property as it is vested in the debtor's person, subject to all the conditions and qualifications attaching to it, being real conditions affecting the subject itself or conditions affecting the constitution of the debtor's right therein) is that the sequestration is a deemed adjudication for debt which attracts that principle.[1] The amendment we propose is not intended to affect the tantum et tale principle and, if necessary, that principle should be expressly preserved.

6.24 We propose:

(1) **As under the present law, in the case of a sequestration affecting feudal property and registrable long leases, the act and warrant issued on confirmation of the permanent trustee's appointment should confer on the trustee a personal right convertible into a real right on registration in the property registers. Section 31(1)(b) of the Bankruptcy (Scotland) Act 1985 should be amended to secure that for the purpose of vesting in and completion of title to, the debtor's feudal property and registrable long leases, the act and warrant would no longer have effect as an adjudication for debt or in security, but subject to the proposals in para. (2),would continue to have**

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[1] Graham Stewart pp.620-621; and see para. 5.36 above.

effect as a decree of adjudication in implement of sale (whether the legislation expressly refers to such a decree or defines the effect of the act and warrant in similar terms).

(2) The present rules should continue whereby:

(a) the property vests in the permanent trustee tantum et tale; and

(b) the trustee's title is not affected by personal obligations granted by the debtor.

(Proposition 6.3).

6.25 Stoppage of adjudication by sequestration, vesting in the trustee and preferences of adjudgers. Under the present law, the rule that adjudged property vests in the trustee on the date of sequestration[1] is complemented by a rule that it is incompetent for a creditor to raise or insist in an adjudication on or after the date of sequestration.[2] Although bankruptcy legislation defines "securities" in such a way as to include (except where the context otherwise requires) unsecured creditors' diligences as well as voluntary securities, the case law construing that legislation makes it clear that diligences and voluntary securities are not always treated in exactly the same way.[3]

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

[2] Ibid., s.37(7). This rule was originally limited to an adjudication of the estate of a deceased debtor (Bankruptcy (Scotland) Act 1856, s. 30; Bankruptcy (Scotland) Act 1913 , s.29) but Graham Stewart p. 636, fn. 4 stated that the principle was equally applicable to the estate of a living debtor.

[3] See next paragraph.

6.26 The vesting provision in section 31(1) of the 1985 Act is expressly made subject to section 33(3) which provides that section 31 is "without prejudice to the right of any secured creditor which is preferable to the rights of the permanent trustee" and "security" is widely defined[1] to include diligences,[2] and must include adjudications. The effect of this saving for "preferable securities" is,however, merely to preserve the right of the creditor executing diligence to claim a preference in the sequestration and not to exclude the attached property from vesting in the trustee, or his right to take possession and dispose of it.[3] This interpretation is consistent with the provision that an adjudger cannot insist in his adjudication.[4]

6.27 By contrast, creditors in voluntary heritable securities have always been entitled to realise the security subjects and rank for any deficiency, subject to the right of the trustee in certain circumstances to take over the security subjects at the valuation specified by the creditor if he lodges a claim before realisation.[5] Under a new provision in section 39(4) of the 1985 Act, the secured creditor may sell the security subjects only if he intimates to the trustee his intention to sell before the trustee intimates to the secured creditor his intention to sell. These provisions clearly do not apply to adjudgers (who under the present

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[1] 1985 Act, s.73(1): "security" means "any security, heritable or moveable, or any right of lien, retention or preference". The definition is the same, so far as material, as that in the Bankruptcy Acts of 1839, s.3; 1856, s.4; and 1913, s.2.

[2] Goudy, p. 187.

[3] Graham Stewart, p. 186; Goudy, p. 254; Lord Advocate v. Royal Bank of Scotland 1977 S.C. 155 at p. 171.

[4] 1985 Act, s. 37(7).

[5] Goudy pp. 319-320; 505-506. See now 1985 Act, Sch. 1, para. 5(2).

law have no power of sale) and we propose that generally an adjudger who has not concluded missives of sale of the adjudged subjects, nor obtained decree of foreclosure before the date of sequestration, should not be entitled to proceed with the adjudication.

6.28 Conversely where the adjudger has concluded missives of sale of the adjudged subjects, but the debtor has not yet been divested of the subjects by the purchaser's infeftment, a personal right to the subjects should be vested in the trustee (in case the sale transaction is not completed) and the trustee should be bound to concur in or to ratify the disposition implementing the sale. Normally the adjudger should be bound to account for and pay to the trustee the free proceeds of sale after deducting his debt, any prior or pari passu debt, and his diligence expenses. Where the adjudication was registered within 60 days before the date of sequestration, the adjudication will be ineffectual to secure a preference in a question with the trustee under proposals made in our Discussion Paper No. 79 on Equalisation of Diligences. It will be unusual for an adjudication to be both registered and followed by missives of sale within the 60 days but if such a case occurred, the adjudger should pay the whole proceeds of sale, under deduction of diligence expenses, to the trustee. If for any reason the contract of sale is terminated (eg. by rescission or repudiation) before the delivery of the disposition at settlement, the trustee should have power to sell the property with the adjudger's consent or, in default of such consent, the authority of the court. Where the adjudger has obtained decree of foreclosure before the date of sequestration, the adjudged subjects should not vest in the trustee whether or not the decree of foreclosure has been registered in the property registers.

6.29 Whether an adjudger can claim a preference in a sequestration depends under the existing law on whether his adjudication is equalised with the claims of the general body of creditors by virtue of the sequestration being dated within a year and a day after the first effectual adjudication.[1] We propose in a companion Discussion Paper that equalisation of adjudications should be abolished[2] and that an adjudication should be ineffectual in a question with a trustee in a sequestration if the adjudication was registered within 60 days prior to the date of sequestration.[3]

6.30 We propose:

(1) On or after the date of sequestration of a debtor's estate, it should not be competent for a creditor:

(a) to commence a diligence of adjudication and sale; or

(b) to proceed with an adjudication and sale already begun unless a contract of sale of the subjects has been concluded in exercise of the adjudger's power of sale or unless decree of foreclosure has been granted.

Section 37(8) of the Bankruptcy (Scotland) Act 1985 should be amended accordingly.

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[1] Diligence Act 1661; Bankruptcy (Scotland) Act 1985, s. 37(1)(a).

[2] Discussion Paper No. 79 on Equalisation of Diligences Proposition 1 (para. 2.29).

[3] Ibid. Proposition 2 (para. 2.31).

(2) On the date of sequestration of a debtor's estate, property belonging to the debtor which has been adjudged should vest in the trustee unless before that date:

(a) the property has been sold by the adjudger in implement of his power of sale and the debtor has been feudally divested by the purchaser's infeftment; or

(b) decree of foreclosure has been granted in favour of the adjudger.

(3) Where the adjudger has concluded a contract of sale of adjudged subjects which thereafter vest in the trustee at the date of sequestration, then:

(a) the trustee should be bound to concur in or to ratify the adjudger's disposition implementing the sale; and

(b) the adjudger should be bound in the normal case to account for and pay to the trustee the net free proceeds of sale after satisfying his own debt and diligence expenses, and any prior or pari passu debt; or

(c) in the exceptional case where the adjudication was registered within 60 days before the date of sequestration and is thus ineffectual in a question with the trustee under proposals made in our Discussion Paper No. 79 on Equalisation of Diligences, the adjudger should be bound to pay the whole proceeds of

sale to the trustee, under deduction of his diligence expenses.

(4) If the contract of sale is terminated before the adjudger's disposition is delivered to the purchaser, the trustee should have power to sell the adjudged subjects with the adjudger's consent or, failing such consent, the authority of the court.

(Proposition 6.4)

6.31 Litigiosity. Under section 14(2) of the Bankruptcy (Scotland) Act 1985, the order of the court awarding sequestration in a debtor's petition, or for citation of the debtor in a petition by a creditor or trustee for creditors (formerly called the first deliverance), has effect from the date of sequestration of an inhibition and of a citation in an adjudication of the debtor's heritable estate. The latter will be abolished under our proposed new procedure.

6.32 We propose:

The reference in section 14(2) of the Bankruptcy (Scotland) Act 1985 to the citation in an adjudication should be repealed.

(Proposition 6.5).

(6) Liquidation of debtor company

6.33 As a general rule, the rights of competing creditors in the liquidation of a company under the Companies Acts are governed by the same rules as regulate the rights of creditors in a sequestrated estate under the Bankruptcy Acts.[1] The general object of the statutes is to preserve as far as possible all rights and interests in the position in which they stood immediately before the date of sequestration or commencement of the winding up,[2] subject inter alia to rules on the equalisation or rendering ineffectual of prior diligences[3]. Two points of difference merit attention. First, the statutes on liquidation do not make automatic provision for the vesting of the company's assets in the liquidator. Second, through an apparent oversight, the provisions of the Bankruptcy Acts on the stoppage of adjudications for debt after sequestration have not been applied to liquidations.

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[1] Bank of Scotland v. Liquidators of Hutchison, Main and Co. Ltd. 1914 S.C. (H.L.) 1 at p.3 per Lord Kinnear.

[2] Idem.

[3] Bankruptcy (Scotland) Act 1985, s. 37(1) (4) and (5); Diligence Act 1661.

6.34 Liquidation not a deemed adjudication for debt for vesting purposes. There is no enactment providing for the automatic vesting in the liquidator of the property of the company corresponding to the provisions (discussed above) on the vesting in a trustee in a sequestration in terms of section 31(1) of the Bankruptcy (Scotland) Act 1985.[1] Thus for the purpose of vesting, the winding-up order or the order appointing the liquidator does not operate as a deemed adjudication in implement of sale or as a deemed adjudication for debt or in security without reversion. This accords with the general theory that the liquidator is merely an administrator of the property which remains vested in the company.[2] Generally speaking it is the duty of the liquidator to secure control of the company's assets[3] to realise them, to discharge its liabilities and to distribute any surplus to the contributories.[4] The rights of "secured creditors" (including adjudgers) which are preferable to the rights of the liquidator are expressly preserved.[5]

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[1] For a recent debate on the vesting provisions see Gretton, "The Title of a Liquidator" (1984) 29 J.L.S.S. 357; Gretton, "Delivery of Deeds and the Race to the Register" (1984) 29 J.L.S.S. 400; McDonald, "Bankruptcy, Liquidation and Receivership and the Race to the Register" (1985) 30 J.L.S.S.20; Gretton and Reid, "Insolvency and Title: A Reply" (1985) 30 J.L.S.S. 109.

[2] Grays Trs. v. Benhar Coal Co. (1881) 9 R. 225 at p.231; Clark v. West Calder Oil Co. (1882) 9 R. 1017 at pp.1025, 1031; Bank of Scotland v. Liquidators of Hutchison, Main and Co. Ltd. 1913 S.C. 255 at pp.262-3; 1914 S.C. (H.L.) 1 at p.6; Smith v. Lord Advocate 1978 S.C. 259 at pp.271, 282.

[3] Insolvency Act 1986, ss. 143(1), 144 and 166(3)(a).

[4] Insolvency Act 1986, ss. 143(1), 165, 167, Sch. 4; Insolvency (Scotland) Rules 1986 (SI 1986/1915) rule 4.66.

[5] Insolvency (Scotland) Rules 1986, rule 4.66(6)(a); definition of "security" in Insolvency Act 1986, s. 248(b).

6.35 It seems clear that section 37(1)(a) of the Bankruptcy (Scotland) Act 1985, as applied to liquidations,[1] makes the winding-up order a deemed adjudication for debt only for the limited purpose of the equalisation of adjudications under the Diligence Act 1661, and not for vesting purposes.[2] If as we propose elsewhere,[3] equalisation of adjudications is abolished, section 37(1)(a) would be repealed.

6.36 There are, however, two rarely used provisions under which the liquidator may acquire a title to the company's property in his own name, namely by recording a notarial instrument in a statutory form in the property registers,[4] or by obtaining a vesting order of the court.[5] Neither provision deems the property to vest as if the notarial instrument or order were an adjudication for debt. We revert to these provisions below.[6]

6.37 Stoppage of adjudications for debt. Through an apparent legislative oversight, there is no provision expressly prohibiting

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[1] Insolvency Act 1986, s. 185 (1).

[2] Section 37(1)(a) replaces section 327(1)(b) of the Companies Act 1948, which was in different terms and could support an argument that the liquidation operated to vest the property in the liquidator, though that was not the generally accepted view. See Gretton "The Title of a Liquidator" (1984) 29 J.L.S.S. 357 at p. 358.

[3] Discussion Paper No. 79 on Equalisation of Diligences, Proposition 1, para. 2.29.

[4] Titles to Land Consolidation (Scotland) Act 1868, s.25.

[5] Insolvency Act 1986, s. 145(1) (winding up by court, applied to voluntary winding up by 1986 Act, s. 112(1)).

[6] See para. 6.40.

adjudications of a company's heritable property, or rendering them ineffectual, as from the commencement of the winding up of the company. Thus while the Insolvency Act 1986, s.185, applies the provisions of the Bankruptcy (Scotland) Act 1985, s.37(1) to (6) (effect of sequestration on diligence), to liquidations, it does not apply that part of section 37(8) which makes it incompetent for a creditor to raise or insist in an adjudication. Nor is there any provision for Scotland equivalent to the Insolvency Act 1986, s.128(1) which provides: "Where a company registered in England and Wales is being wound up by the court, any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up is void". This derives ultimately from the Companies Act 1862, s.163 which was in very similar terms[1] but was not expressly confined to companies registered in England and Wales, and was, despite the English legal terminology, held at one time to be applicable in Scotland.[2] Scottish companies were however excluded from the provision on its consolidation in 1908 for reasons which are now obscure.[3] Section 128(1) would seem to apply however to diligence in Scotland against a debtor company registered in England and Wales. Section 126 of the Insolvency Act 1986, which confers on the court power to stay or restrain proceedings against a company, does not apply to diligence.[4]

6.38 It should be provided by statute (on the analogy of sequestration) that on or after the date of the commencement of the winding up of the debtor company, it should not be

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[1] It applied also to winding up by the court.

[2] Allan v. Cowan (1892) 20 R. 36; Graham Stewart p.191.

[3] Companies (Consolidation) Act 1908, s.211.

[4] Allan v. Cowan (1892) 20 R. 36.

competent for a creditor to commence an adjudication and sale. Further a creditor should not be entitled to proceed with an adjudication and sale already begun before that date unless the property had been sold (in which event the creditor should be entitled to convey the adjudged subjects to the purchaser) or the creditor had obtained decree of foreclosure (in which event he should be entitled to complete title by registration in the property registers).

6.39 Where before commencement of the winding up, the adjudger had sold the adjudged subjects or obtained decree of foreclosure, we suggest the simplest solution would be that the adjudged property should not be realised under the adjudication and the liquidator should not have power to take it into his custody[1] nor to sell it, nor to complete title to it.[2] Where the adjudged property had been sold as above-mentioned, the liquidator should be bound to concur in or to ratify the adjudger's disposition implementing the sale. The proposals on accounting for the proceeds of sale to the trustee in a sequestration[3] should apply mutatis mutandis to the accounting to the liquidator.

6.40 We propose:

(1) **It should be expressly enacted that on or after the date of commencement of winding up of the debtor company, it should not be competent for a creditor:**

(a) to commence a diligence of adjudication and sale; or

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[1] Insolvency Act 1986, ss.143 and 144.

[2] See para. 6.36 above.

[3] See Proposition 6.4(3)(b) and (c), para. 6.30.

(b) to proceed with such an adjudication already begun unless a contract of sale of the adjudged subjects has been concluded in implement of the adjudger's power of sale or unless decree of foreclosure had been granted.

Section 185 of the Insolvency Act 1986 should be amended accordingly.

(2) Where prior to the date of commencement of the winding up of a debtor company, an adjudger of the company's property has sold the adjudged property in exercise of his power of sale or has obtained decree of foreclosure, then the liquidator should not have power:

(a) to take the adjudged property into his custody or to sell it; or

(b) to complete title to the adjudged property by notarial instrument under the Titles to Land Consolidation (Scotland) Act 1868, s.25, or by obtaining a vesting order under the Insolvency Act 1986, s.145(1) or under that section as read with section 112(1) or otherwise.

(3) Where the adjudger has concluded a contract of sale of the adjudged subjects before the date of commencement of the winding up, Proposition 6.4(3)(at para. 6.30) above should apply with any necessary modifications.

(4) If the contract of sale is terminated before the adjudger's disposition is delivered to the purchaser, the liquidator

should have power to sell the adjudged subjects with the adjudger's consent or, failing such consent, the authority of the court.

(Proposition 6.6).

(7) Competitions with floating charges

6.41 On the commencement of the winding up of a debtor company[1] or on the appointment of a receiver,[2] a floating charge "attaches" to the property of the company subject to the charge and this attachment "has effect as if the charge was a fixed security over the property to which it has attached." In the case of heritable property it is provided[3] that the appropriate fixed security is a heritable security in the statutory sense of "any security capable of being constituted over any interest in land by disposition or assignation of that interest in security of any debt and of being recorded in the Register of Sasines" or registered in the Land Register. A fixed security is also defined[4] as being a security (other than a floating charge) which on winding up would be treated as an effective security. This appears to mean that on attachment, there is a statutory hypothesis that a heritable security over the company's heritage has been duly recorded on the date of attachment. In the case of feudal property and registered long leases, therefore, the criteria of preference are the date of registration of the adjudication as opposed to the attachment of the floating charge and there is thus no race to the property registers by the floating charge holder.

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[1] Companies Act 1985, s.463(1) and (2).

[2] Insolvency Act 1986, ss.53(7) and 54(6).

[3] Companies Act 1985, s.486(1); Insolvency Act 1986, s.70(1); both applying the definition of "heritable security" in the Conveyancing and Feudal Reform (Scotland) Act 1970, s.9(8).

[4] Idem.

6.42 This conclusion however assumes that a duly registered adjudication for debt is an "effectually executed diligence on the property of the company" within the meaning of the legislation on floating charges. Thus section 463(1)(a) of the Companies Act 1985 provides that on commencement of the winding up the floating charge attaches subject to the rights of any person who has effectually executed diligence on the property of the company prior to such commencement. Section 55(3) of the Insolvency Act 1986 provides that a receiver's powers, e.g. to take possession of property and sell it, are likewise subject to the rights of any person who has effectually executed diligence on the property of the company prior to the appointment of the receiver. A liquidator must rank a debt secured by such an effectually executed diligence before a debt secured by a floating charge. Likewise the Insolvency Act 1986, s.60(1)(b) provides that the receiver must rank such an effectually executed diligence before a debt secured by a floating charge. The expression "effectually executed diligence ... on the property of the company" was construed by the First Division in the Lord Advocate v. Royal Bank of Scotland[1] but only with reference to diligences attaching moveable property. While that controversial case is authority for the proposition that a bare arrestment or poinding is an inchoate diligence merely operating in personam and creating litigiosity and is thus not an effectually executed diligence on the property, it seems clear that a duly registered adjudication for debt, whose preference in competition with voluntary heritable securities depends on priority of infeftment and not on litigiosity, cannot be so characterised.

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[1] 1977 S.C. 155.

6.43 On the other hand, the reasoning in the Royal Bank case makes it very doubtful whether a notice of litigiosity registered in connection with an adjudication can ever compete with a floating charge.[1] Even if it could in theory compete, the notice of litigiosity will invariably be registered after the creation of the floating charge and so would only affect future advances secured by the floating charge.

6.44 We may consider competitions betwen floating charges and adjudications for debt more fully in our work on floating charges and receivers in the light of consultation on our Consultative Memorandum No. 72. Suffice it to say here that the legislation, as construed in the Royal Bank case, creates unacceptable anomalies. Two examples will suffice. Section 60(1) of the Insolvency Act 1986 requires a receiver to rank a voluntary heritable security prior to an effectually executed adjudication irrespective of the times of infeftment and even though under the general law on ranking, the adjudication would have priority over the security. Thus the floating charges legislation distorts the ranking of heritable securities and adjudications in a competition between them though such a competition has nothing to do with floating charges. This seems unjustifiable. Second, under the ordinary law, a duly registered inhibition gives the inhibitor a preference over a subsequently registered adjudication for debt when the debt enforced by the adjudication was "contracted" after the registration of the inhibition. Since an inhibition can (on the reasoning of the Royal Bank case) never be ranked before a floating charge, but an adjudication can be so ranked, it follows that in a ranking by a receiver the adjudication will have priority over the inhibition in violation of the ordinary law.

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[1] See e.g. J.A.D.H. "Inhibitions and Company Insolvencies: a Contrary View" 1983 S.L.T. (News) 177 commenting on Gretton, "Inhibitions and Company Insolvencies" 1983 S.L.T. (News) 145.

(8) Administration orders under the Insolvency Act 1986

6.45 Under new provisions introduced in 1985[1] and re-enacted in Part II (ss.8-27) of the Insolvency Act 1986, the court may make an administration order in relation to a company where it is satisfied that the company is, or is likely to become, unable to pay its debts[2] and that the order would be likely to achieve one or more of certain specified statutory purposes,[3] such as the survival of the company, and the whole or any part of its undertaking, as a going concern. An administration order directs that during the period for which the order is in force the affairs, business and property of the company shall be managed by a person ("the administrator") appointed by the court.[4]

6.46 While a petition for an administration order is in dependence, then among other things no diligence may be carried out or continued against the company or its property except with the leave of the court and subject to such terms as the court may impose.[5] Moreover, while an administration order is in force, no diligence may be carried out or continued against the company or its property except with the consent of the administrator or the leave of the court and subject (where the court gives leave) to such terms as the court may impose.[6] Provision is needed to regulate the effect of these restrictions on the duration of a notice of litigiosity, which notice however should not have effect for a longer period than 5 years from the date when it took effect in order to avoid prolonging the period of searches in the personal register.

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1 Insolvency Act 1985, ss.27-44 (repealed).

2 Insolvency Act 1986, s.8(1).

3 Ibid, s.8(3).

4 Ibid., s.8(2).

5 Ibid., s.10(1)(c) and (5).

6 Ibid., s.11(3)(d) and 10(5)

6.47 We propose:

In computing any time limit on the duration of a notice of litigiosity registered by an adjudger, there shall be disregarded any period during which the adjudger is prevented from proceeding with the adjudication by virtue of the Insolvency Act 1986, s.10(1)(c) and 11(3)(d) (restrictions on diligence while petition for administration order in dependence or administration order is in force), except that the notice of litigiosity should not have effect, by virtue of this proposal, for a longer period than 5 years from the date when it took effect.

(Proposition 6.7).

6.48 Although outside our present terms of reference, we would observe that a similar problem arises with respect to the effect of an administration order on the time limits applying to poindings under Part II of the Debtors (Scotland) Act 1987 and the prescription of arrestments under the Debtors (Scotland) Act 1838, s.22 (arrestments to prescribe in 3 years).

(9) Repeal of obsolete statutory provisions on ranking and sale

6.49 There is still on the statute book an enactment - section 4 of the Debts Securities (Scotland) Act 1856, s.4 - providing that a decree of sale in an action of ranking and sale[1] shall be held as a general decree of adjudication (i.e. for debt) in favour of every creditor included in the decree of division and that no separate adjudication (for debt) shall be allowed to proceed during the dependence of an action of ranking and sale. This provision,

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[1] "Ranking and sale was at one time the common mode by which the heritable estates of insolvent debtors, not in trade, were realised and distributed among their creditors": Goudy, p.497.

together with other provisions[1] on actions of ranking and sale, have been rendered nugatory by the abolition in 1973 of actions of ranking and sale.[2]

6.50 We propose:

The Debts Securities (Scotland) Act 1856, ss. 2 to 4 (which relate to actions of ranking and sale) should be repealed as a consequence of the abolition of actions of ranking and sale.

(Proposition 6.8).

(10) Competitions with trust deeds for creditors

6.51 The existing law. In the case of competitions between adjudications for debt and voluntary trust deeds for creditors,[3] the legal position is somewhat complicated by conflicting authorities as to the effect of different diligences in competition with trust deeds, by uncertainty as to the effect of a trust deed for creditors in divesting the truster, and by the new statutory distinction between trust deeds for creditors which are "protected trust deeds" within the meaning of the Bankruptcy (Scotland) Act

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[1] Debts Securities (Scotland) Act 1856, ss. 2 and 3.

[2] Statute Law (Repeals) Act 1973, Sch. 1 repealing the Judicial Sale Act 1681 (c.83) (which introduced actions of ranking and sale in Scots law), the Judicial Sale Act 1690 (c.49), and the Judicial Sale Act 1695 (c.8).

[3] A trust deed for creditors "will usually take the form of a unilateral deed by the debtor containing a conveyance of his whole property to a trustee for behoof of the debtor's creditors generally. It will contain powers relating to the collection of assets, their realisation, the ranking of claims and the distribution of the estate among the creditors according to their respective rights and preferences. Trust deeds will also contain clauses relating to the practical and convenient administration of the trust, to the discharge of the debtor, and to the restoration to him of any estate that remains, after payment of his debts and the expenses of the administration ..." Bankruptcy Report, para. 24.1.

1985 and other trust deeds not so protected.[1]

6.52 The main common law principles and rules appear to be as follows.[2]

(1) A creditor acceding to a trust deed cannot competently do diligence against the estate unless a non-acceding creditor is obtaining a preference by doing diligence.[3] An "acceding creditor cannot be the first to use diligence against the debtor".[4]

(2) A non-acceding creditor can competently execute diligence against the assets of the estate until the trustee has completed title to those assets in the mode appropriate to their nature, as by infeftment or registration in the property registers in the case of feudal property and registrable long leases; by delivery in the case of corporeal moveables; and by intimated assignation in the case of incorporeal rights.[5]

(3) Difficult questions arise as to how far a non-acceding creditor can competently do diligence after the trustee in a trust deed for creditors has completed title.

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[1] See para. 6.53 below.

[2] Many of the legal issues are discussed with ability in Gretton, "Radical Rights and Radical Wrongs: A Study in the Law of Trusts, Securities and Insolvency" [1986] Juridical Review 51, to which we are indebted.

[3] Jopp v. Hay (1844) 7 D. 260; Campbell & Beck v. Macfarlane (1862) 24 D. 1097; Wilson, Debt p.295.

[4] Encyclopaedia s.v. "Trust Deed for Creditors" vol. 15, p.287, Watson v. Fede (1724) Mor. 6397.

[5] Encyclopaedia, vol. 15, p.283; Wilson, Debt p.295.

(4) As regards adjudications of the heritable estate led after the trustee's completion of title, the leading case of Campbell v. Edderline's Creditors[1] can be taken as standing for the proposition that a trust deed for creditors containing the usual clauses (power of sale of sufficient assets to pay the trustee's debts, subject to a reconveyance of the reversion to the truster), and declared irrevocable until the whole purposes of the trust are fulfilled, even though the trustees are infeft, does not completely divest the truster but operates merely as a burden on his "radical right of property", and that that right is liable to be adjudged by a non-acceding creditor of the truster in an action of adjudication for debt against him or after his death against his executors (or under the old law, as in this case, his heir-at-law).

(5) There is authority albeit inconclusive for the proposition that a non-acceding creditor of the truster may adjudge the estate by an adjudication directed against the trustees as well as an adjudication against the truster. In Campbell v. Edderline's Creditors[2] the Lord Ordinary's interlocutor stated that an adjudication by a non-acceding

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[1] 14 January 1801 F.C.; Mor. s.v. "Adjudication" App'x No. 1; 1 Ross's Leading Cases 458; approved McMillan v. Campbell (1834) 7 W. & S. 441 affg. (1831) 9 S. 551; 1 Ross's Leading Cases 466; (Held a trust deed for creditors on which trustee infeft does not so divest the truster as to prevent him from granting a procuratory of resignation and deed of entail); followed Lindsay v. Giles (1844) 6 D. 771; 1 Ross's Leading Cases 479; Gilmour v. Gilmours (1873) 11 M. 853; Marquess of Huntly v. Earl of Fife (1887) 14 R. 1091; Kinmond Luke & Co. v. James Finlay & Co. (1904) 6 F. 564. For earlier cases, see e.g. Snee & Co. v. Anderson's Trs. (1734) Mor. 1206; Forbes-Leith v. Livingston (1759) Mor. 1212.

[2] Supra.

creditor led against the trustees is an "inhabile diligence, the trustees not being the real proprietors of the lands adjudged, nor the proper debtors in the debts adjudged for." It was however observed in the same case by Lord President Campbell[1] that the estate might be adjudged from the trustees and that if the adjudication had been within a year and a day of the adjudication against the heir-at-law, the adjudications would have ranked pari passu. (The point was not argued by counsel because the adjudications against the trustees were too late to rank pari passu.) This proposition is difficult to reconcile with ordinary principles and rules of feudal conveyancing. Thus in McMillan v. Campbell,[2] Lord Advocate Jeffrey argued, "The appellants are not aware upon what grounds of law it can be maintained, that adjudications of the same property can be led at the same time against different parties with equal effect; or in other words, how it can be held that the entire right of property subsists in two different persons at one and the same time. In the Court of Session the Judges did not attempt to supply the defects or to explain the apparent difficulties of the case of Campbell of Edderline". (The House of Lords observed that the point had been settled by Campbell v. Edderline's Creditors.) Menzies on Trustees[3] seeks to solve this problem by remarking: "In the case of heritage, there is in the trustees a title complementary to the radical title in the truster, and exclusive of the truster's complete feudal title to the extent to which the trustees have become bound to convey the heritage in execution of their trust". The concept of a "complementary fee" is unusual and anomalous. It differs from a trust in its normal and pure form where the

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[1] 1 Ross's Leading Cases 458 at pp. 463-464.

[2] (1834) 7 W & S. 441, affg. (1831) 9 S. 551; 1 Ross's Leading Cases 466.

[3] (2nd edn.; 1913) pp. 680-681.

property is vested in the trustee and the beneficiary has merely a right of action against the trustee.[1] It has been distinguished from a "family trust" where the creditor's remedy is to sue the truster and has no direct relation with the trustee,[2] but may have some affinity since a trustee in a family trust is accountable to a creditor insofar as the creditor attaches the trust estate.[3]

(6) It seems to be the better view that what is attached by an adjudication led by a non-acceding creditor against the truster after the estate has vested in trustees under a trust deed for creditors is the reversionary interest, i.e. the surplus remaining after the creditor's rights have been satisfied in terms of the trust. The interlocutor in Campbell v. Edderline's Creditors was however ambiguous as to what precisely was attached. The reversionary interest remaining to the truster under a trust deed for creditors is a right of an unusual and anomalous character. It is not the same as the radical beneficial interest

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[1] Wilson and Duncan, p.14.

[2] i.e. a trust for the benefit of the truster or his family, where the trustee is appointed to manage property conveyed to him for the convenience of the truster and is accountable to him and not to the creditors. Wilson and Duncan, p.28.

[3] Lucas's Trs. v. Beresford's Trs. (1892) 19 R. 943 at p.945 per Lord Kinnear; cf. Rigby v. Fletcher (1833) 11 S. 256.

remaining vested in the trustee under a resulting trust.[1] The truster retains a radical proprietary title; he can convey the property under burden of the trust[2] and on fulfilment of the trust purposes no conveyance by trustees to him is necessary to effect re-investiture:[3] the burden simply flies off. There are dicta which could be construed as meaning that a non-acceding creditor can do diligence as if the trust deed for creditors were void or had not been

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[1] See Menzies, Trustees p.679; Wilson and Duncan, pp.16-17: "The doctrine of resulting trust is that where a trust has been constituted without such a declaration of purposes as disposes of the trust property in the events which happen the property is held in trust for the granter and his heirs. It is sometimes said that the truster has therefore a radical right or a radical beneficial interest in the trust estate. In some types of trust, however, a radical proprietary title remains vested in the truster. The commonest example is the trust for creditors. If the estate transferred to the trustee when the trust purposes have been fulfilled, no reconveyance from the trustee is required to vest in the granter either the title or the beneficial interest in the surplus assets. The trust is merely a burden on the granter's proprietary right ... There is little authority as to the extension of the doctrine beyond trusts for creditors."

[2] McMillan v. Campbell (1834) 7 W. & S. 441, affg. (1831) 9 S. 551.

[3] Gilmour v. Gilmours (1873) 11 M. 853; Kinmond, Luke & Co. v. James Finlay & Co. (1904) 6 F. 564.

granted,[1] in which event an adjudication for debt against the adjudger would attach the whole property and not merely the reversionary interest. But the preferable view is that it is the reversionary interest which is attached[2] and this is consonant with the view that the trust deed is a burden (akin to a heritable security) on the truster's radical proprietary interest which the truster can convey subject to that burden.

(7) There are however a number of important cases[3] dealing primarily with arrestments against trust estates (in which Edderline was not discussed) which have been taken as establishing a rule that unless a trust deed for creditors be open to challenge on the Bankruptcy Acts of 1621 or 1696 (now repealed[4]) "or otherwise contain conditions of such an exceptional nature as necessarily to vitiate it in its entirety, it will, if duly followed by possession, be effectual to exclude separate diligence of non-acceding

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[1] Gilmour v. Gilmours (1873) 11 M. 853 at p.858: "excepting insofar as creditor accede to such a trust, it is nothing ..."; Bell, Commentaries vol. 1, p.779, referring to Edderline: "in a ranking it was decided, that the radical right of a trust estate is in the truster, and may be affected by adjudication against him or against his heir, as if the trust never had been granted."

[2] Duff, Feudal Conveyancing (1838) p.436; McLaren, Wills vol.2, p. 961.

[3] Wilson v. McVicar (1762) Mor. 1214; Johnston v. Fairholm's Trs. (1770) Mor. s.v. "Bankrupt" Appx. No. 5; Nicolson v. Johnstone (1872) 11 M. 179 at p.185 per Lord Deas; Henderson v. Henderson's Trs. (1882) 10 R. 185; Lamb's Trs. v. Reid (1883) 11 R. 76 at p.84 per Lord Mure; Ogilvie v. Taylor (1887) 14 R. 399 at p.401 per Lord Young.

[4] Bankruptcy (Scotland) Act 1985, Sch. 8.

creditors".[1] In other words, a non-acceding creditor may not attach the trust estate so as to secure a preference, though he may attach the reversionary interest.[2] Graham Stewart[3] adds this gloss that "only posterior creditors can attach the reversion. In the case of prior creditors there can be no reversion till the debts are paid, and none of them can do diligence against the trust estate so as to acquire a preference. Posterior creditors on the other hand have no claim till the prior creditors are satisfied; but if there is a reversion, they may acquire a preference over it by diligence". In the Edderline case, however, the competing adjudgers were pre-trust creditors, not posterior creditors.

6.53 "Protected trust deeds for creditors". Where a trust deed for creditors satisfies certain conditions as to the qualification of the trustee, publication and notice to creditors, accession by a majority in number and two-thirds in value of creditors, and registration in the register of insolvencies,[4] it becomes a "protected trust deed"[5] with the effect inter alia that a non-acceding creditor has no higher rights to recover his debt than an acceding creditor.[6]

6.54 Our proposals. In Lamb's Tr. v. Reid,[7] commenting on cases in which a non-acceding creditor was precluded from using

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[1] Goudy, p.477.

[2] Ibid., p.484; Marianski v. Wiseman (1871) 9 M. 673.

[3] p.57, fn.1.

[4] Bankruptcy (Scotland) Act 1985, Sch. 5, para. 5.

[5] Ibid., para. 8.

[6] Ibid., para. 6(a). In addition there are restrictions on sequestration: paras. 6(b) and 7.

[7] (1883) 11 R. 76.

arrestments in the hands of a trustee in a trust deed for creditors, Lord Mure remarked:[1] "Now, these decisions proceed upon the principle that it is not expedient to allow non-acceding creditors to prevent a just and equal administration of the estate, and seem to me to decide that if non-acceding creditors do not have recourse to sequestration, all that they can demand is to be admitted to a fair division of the estate with the creditors who have all along acceded to the trust." This principle seems to us to be sound in policy terms. The law remains uncertain, however, because while this case related to the question whether a title to heritage could be challenged by a non-acceding creditor, and not to moveable estate, it does not and could not technically overrule Campbell v. Edderline's Creditors which has been approved by the House of Lords. While it would not be appropriate in this Discussion Paper to suggest amendments to the law on the general legal nature and effect of trust deeds for creditors, we think that the uncertainty as to the effect of adjudications for debt against the debtor or a trustee for his creditors requires to be removed.

6.55 We propose:

It should be expressly provided by statute that where a trust deed for creditors has been granted and the trustee has completed title to adjudgeable property comprised in the estate, then

(1) it should not be competent for a non-acceding creditor, whose debt was contracted prior to the trust deed, to attach that property by any adjudication for debt, whether directed against the debtor or the trustee, and whether for the purpose of securing a preference or attaching the reversion;

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[1] At p.84.

(2) it should however be competent for a non-acceding creditor whose debt was contracted after that date to attach the reversion of the property by an adjudication, directed against the debtor , but not to attach the property itself so as to secure a preference over prior creditors.

(Proposition 6.9).

PART VII

ADJUDICATION AFTER DEBTOR'S DEATH AND CONFIRMATION AS EXECUTOR-CREDITOR ATTACHING HERITABLE PROPERTY

(1) Preliminary

7.1 So far, we have considered reforms of adjudications when used against the estate of a living debtor. In this Part we consider reforms of adjudications used against the heritable estate of a deceased debtor or to enforce his debt against other heritable property belonging to his successors. Following on and as a result of the Succession (Scotland) Act 1964, it is coming to be accepted that the diligence of confirmation as executor-creditor, which before 1964 was only competent as a means of attaching moveable property, can now be competently used to attach the heritable estate of a deceased debtor to which an executor has not confirmed. The apparent extension of this diligence to heritable property raises certain issues which are also discussed in this Part. The effect of the debtor's death on the equalisation of adjudications is considered in our Discussion Paper No. 79 on Equalisation of Diligences, Part VI.

7.2 Before considering the remedies and diligences available against a deceased's heritable estate or heritable property belonging to his successors, it is necessary to describe briefly the rules on the transmission on the debtor's death of liability for his debts. A preliminary examination of this branch of law in the present context, and in the context of our work on the law of succession, has led us to conclude that it requires a more comprehensive review than would be possible or appropriate in either the present Discussion Paper or our forthcoming Report on Succession. We hope therefore to review the topic eventually in a

future Discussion Paper. [1] The reforms proposed in this Part are therefore confined to the minimum necessary to ensure that the law on enforcement of debt by diligence against the heritable estate of a deceased debtor is workable and to rectify certain obvious defects in the law, pending a more comprehensive review.

7.3 Passive transmission of liability on debtor's death. The general rule is that the deceased's debts transmit against his estate. The rights of creditors are not affected by the deceased's testamentary provisions, and the rights of beneficiaries of the estate do not open except to the free estate of the deceased

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[1] Such a review might cover the general topic of transmission of a deceased person's debts on his death; the doctrine of universal and limited representation; the remedies and diligences for enforcing such debts by creditors of the deceased and by creditors of the deceased's representatives and successors; the preferences of the deceased debtor's creditors over the creditors of his representatives and successors; the order in which a deceased debtor's representatives and successors may be sued by the deceased's creditors (eg. whether a creditor may sue any of these at his option or must sue them in a particular order); the ultimate incidence of liability and rights of relief as between such representatives and successors; the diligence of confirmation as executor-creditor; and the Act of Sederunt anent Executors-creditors of 28 February 1662.

after deduction of his debts.[1] Where an executor has confirmed to the estate of a deceased, the primary remedy of a creditor is to intimate a claim to him.

7.4 It should be noted, however, that liability for debts may transmit not only against property of the deceased debtor passing on his death but also against other property belonging to his representatives under the common law doctrine of passive representation. Passive representation may be one or other of two kinds, universal or limited (ad valorem).[2] Universal passive representation imports personal liability for the full amount of the deceased's debts.[3] Limited passive representation imports personal liability of the executor or successor limited to the value of the executry estate or of the succession as the case may be. Since 1874,[4] the only extant example of universal passive representation is the liability of a "vitious intromitter", ie. a person intromitting with a deceased's moveable estate without confirmation.[5] The Succession (Scotland) Act 1964 extended confirmation of executors to include a deceased's heritable property but it is unclear whether a vitious intromitter with heritable property incurs universal passive representation. We are here primarily concerned with limited passive representation, ie. liability confined to the value of the succession but in principle enforceable by diligence against property owned by the deceased's representatives. An executor incurs limited passive representation, his liability being confined to the value of the executry estate to which he has

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1 Wilson Debt, pp. 330; Wilson and Duncan, p. 453.

2 See Bell Principles, Book 3, Part II, Chapter IX, "Of Passive Representation"; McLaren Wills, vol. 1, Chapter LXIX.

3 Bell, Principles, para. 1915 et seq.

4 The Conveyancing (Scotland) Act 1874, s.12 replaced the universal passive representation of an heir-at-law with limited passive representation.

5 Bell, Principles, para. 1921.

confirmed,[1] which under the Succession (Scotland) Act 1964 includes the deceased's heritable property.

7.5 The other relevant example of limited passive representation, that of an heir of provision or disponee succeeding to heritable property of a debtor under a special destination, has become controversial. Before the Succession (Scotland) Act 1964, there was no doubt that an heir of provision or disponee incurred limited passive representation to the value of his succession.[2] The Succession (Scotland) Act 1964[3] abolished the status of heir-at-law (who formerly had succeeded to the deceased's heritable property on intestacy) and enacted new uniform rules of intestate succession applying both to heritable and moveable property. The Act did not however abolish heirs of provision or disponees succeeding on death to heritable property under a special destination but rather recognised their existence. Thus, while the Act provides that the enactments and rules of law on the administration and winding-up of the deceased's estate should apply to the whole estate, heritable as well as moveable, and that such estate vests in the executor for the purpose of administration (ie. general executry purposes including payment of debts) (section 14(1)), the Act excludes from such estate heritable property of the deceased which at the date of his death was subject to an unevacuated special destination: section 36(2)(a). Section 18(2) further provides that such property vests in the executor "for the purpose of enabling it to be conveyed to the person next entitled thereto (if such conveyance is necessary) and for that purpose only" (emphasis added). It does not allow an executor to confirm to the property for general executry purposes eg. for the purpose of realising it to pay debts. The Act made no express provision abolishing the limited passive representation of heirs of provision

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[1] Ibid.,para. 1922.

[2] Baird v. Earl of Rosebery (1766) Mor. 14019; 5 B.S. 927; Bell, Principles para. 1922; Bell, Commentaries vol. 1, p.703; McLaren, Wills vol. 2, p. 1284.

[3] Part 1.

or disponees succeeding under special destinations of heritable property.

7.6 In the controversial Outer House case of Barclay's Bank Ltd v. McGreish,[1] however, it was held in effect that a debtor's heritable property passing on his death under a special destination ceased to be attachable for his debts. This decision proceeded on the view that the statutory exclusion of the property from the executry estate for the purpose of administration (including payment of the deceased's debts) implied that the property was not available for the payment of those debts. The common law authorities affirming the limited passive representation of an heir of provision or disponee under a special destination were however neither cited to the court nor referred to in the judgement. It may be doubted therefore whether the case was correctly decided.[2] It may be reversed by a higher court. If not, in our forthcoming Report on Succession we intend to recommend the reinstatement by statute of the limited passive representation of a person succeeding under a special destination of heritable property.[3]

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[1] 1983 S.L.T. 344.

[2] The 1964 Act abolished the statutory remedy for enforcing debts against an heir of provision or disponee by repealing section 60 of the Titles to Land Consolidation (Scotland) Act 1868, but did not expressly abolish certain common law remedies. It may be possible to deduce from the repeal that the intention of the Act was to make debts unenforceable against heirs of provision or disponees, but the failure to abolish the common law remedies is inconsistent with this conclusion. See para.7.9 below. In these circumstances, we express no view on whether the case of McGreish was correctly decided.

[3] The matter is discussed in our Consultative Memorandum No. 71 on Some Miscellaneous Topics in the Law of Succession (1986) paras. 3.22-3.24. In the following paragraphs we assume that such a rule will become law in future.

(2) Diligence begun before the debtor's death

7.7 Notice of adjudication already registered before death. There are two situations to consider. First, where a creditor has already registered a notice of adjudication before the date of the debtor's death, he should be entitled to complete the diligence after that date. This is in consonance with the general rule as to the effect of the debtor's death on inchoate diligences already executed.[1]

7.8 To cater for the new situation arising on the debtor's death, the procedure would require modification on the following lines. (a) Where an executor is confirmed or a person succeeds to the adjudged property under a special destination, the executor or person would be treated as the debtor for the purposes of the procedure (ie. the right to receive intimations, and consent to sale). But the consent to sale of the deceased debtor's spouse or former spouse, and the sheriff's authority to sale in default of such consent, should still be required since such persons may require to be allowed time to obtain alternative accommodation. (b) Where no executor is confirmed within a reasonable time, and no person has succeeded to the adjudged property under a special destination, the creditor should be entitled to apply to the sheriff for an order declaring which person has the best right to the property and that person should then be treated as the debtor for the purposes of the procedure. If no such person can be identified, the sheriff should be empowered to make an order dispensing with steps in the procedure involving intimation to the debtor. Any surplus proceeds of sale remaining after the sums recoverable have been paid should be consigned in a bank in the

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[1] Graham Stewart, pp. 134, 363, 670.

name of the person having the best right thereto. (c) Where the adjudication had attached common property, and on or after the debtor's death the co-owner becomes sole owner of the property (eg. under a conveyance by the executor or a special destination not requiring such a conveyance), the special rules relating to co-owners would no longer apply. But the consent to sale of the deceased debtor's spouse or former spouse (if different from the co-owner), and the sheriff's authority to sale in default of such consent, should still be required.

7.9 Notice of adjudication not yet registered at death. The second situation would arise where the creditor has served a charge and notice of entitlement to adjudge, or registered a notice of litigiosity, before the date of the debtor's death, but has not registered a notice of adjudication before that date. Here the steps already taken in the diligence should, on the debtor's death cease to form the basis for registering a notice of adjudication. This result, while it may appear somewhat harsh to the creditor, seems inescapable because litigiosity, being personal to the debtor, ceases on the debtor's death[1], and it is in consonance with the rule that an expired charge against a debtor does not entitle the creditor to execute a poinding after the debtor's death.[2]

7.10 We propose:

(1) **Where a debtor owning adjudged property dies and a creditor has already registered a notice of adjudication before the date of the debtor's death, the creditor should be entitled to complete the diligence after that date, but**

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[1] Graham Stewart, pp. 554, 674; Gretton, Inhibition and Adjudication, p. 44.

[2] Graham Stewart, pp. 363, 670.

subject to the modifications of the procedure mentioned in para. 7.8.

(2) Where a creditor has served a charge and notice of entitlement to adjudge or registered a notice of litigiosity before the date of the debtor's death, but has not registered a notice of adjudication before that date, the steps already taken in the diligence should cease to be a valid basis for registering a notice of adjudication on or after that date.

(Proposition 7.1).

(3) Forms of diligence against deceased debtor's heritable estate or heritable property of his successors

7.11 On the assumption that the case of McGreish [1] will be reversed, and the previous law reinstated, diligence against the heritable property of a deceased debtor or his successors may take one or other of three different forms, namely:

(a) where heritable property of the deceased debtor passes under a special destination to an heir of provision or disponee, either -

(i) an adjudication of heritable property belonging to the heir of provision or disponee following decree in an action constituting the debt against him; or

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[1] Barclay's Bank Ltd. v. McGreish 1983 S.L.T. 344: see para. 7.6 above.

(ii) an adjudication against the property passing under the special destination which the heir of provision or disponee has renounced (adjudication contra haereditatem jacentem) in pursuance of a decree constituting the debt for the purpose of making the property liable to such adjudication (decree cognitionis causa tantum);

(b) where heritable property of the deceased debtor has vested in the executor of his estate, an adjudication of that property in pursuance of a decree constituting the debt against the executor; and

(c) where heritable property of the deceased debtor has neither passed under a special destination nor vested in his executor, a confirmation as executor-creditor over that property by a creditor founding on a decree for payment or liquid document of debt or in pursuance of a decree cognitionis causa tantum (ie. a decree constituting the debt for the purpose of making the property liable to the diligence of confirmation as executor-creditor).

We now turn to examine these forms of diligence.

(4) Adjudication for debt where heritable property passes under special destination

7.12 Special destinations are still of importance in modern practice because the title of many matrimonial homes is held on dispositions in favour of the married couple as owners in common coupled with a survivorship destination but other types of special

destination are still competent.[1] The law as it had developed before the case of McGreish[2] was somewhat complicated.

7.13 The development of the law. Before the Succession (Scotland) Act 1964, adjudication against heritable property which had passed under a special destination or against heritable property of the person succeeding under such a destination could take one of three different forms. Two depended on the common law, and if the case of McGreish was wrongly decided, are still available in law. One depended on statutory provisions repealed by the 1964 Act and is no longer available. In summary, the three forms of adjudication are as follows.

(a) An action of constitution of the debt (in the Court of Session or sheriff court)[3] and a separate Court of Session action of adjudication following thereon may still be competent against an heir of provision or disponee under a special destination of heritable property:

(i) who has completed title by a procedure equivalent to entry as heir under the old law, viz. by obtaining a conveyance from the executor under section 18(2) of

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[1] In our forthcoming Report on Succession, we intend to recommend the abolition in future deeds of special destinations other than survivorship destinations. See our Consultative Memorandum No. 71, Some Miscellaneous Topics in the Law of Succession (1986) paras. 3.22-3.24.

[2] See para. 7.6 above.

[3] Cf. Anderson v. Fraser (1910) 1 S.L.T. 131 (Sh. Ct.).

the 1964 Act, or semble whose title has been completed by infeftment or survivance without such a conveyance; and

(ii) who has not competently renounced the succession.

These remedies derived from the common law and were not expressly abolished by the 1964 Act.

(b) A combined action of constitution and adjudication in the Court of Session was formerly competent against an heir of provision or disponee under a special destination who had neither taken entry nor renounced the succession.[1] These remedies were originally established by the Act anent entry to lands 1540[2] which introduced the fiction that an apparent heir who had not implemented a charge to enter was deemed to have taken constructive entry. The 1540 Act was modernised by the Titles to Land Consolidation (Scotland) Act 1868, s.60 which was however repealed by the 1964 Act.[3] Accordingly these remedies are no longer available even if the case of McGreish was wrongly decided.

(c) Where the heir of provision or disponee had renounced the property passing under the special destination, an action of constitution cognitionis causa tantum (ie. "declaring or

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[1] A separate action of constitution in the sheriff court followed by an action of adjudication in the Court of Session were also competent: Anderson v. Fraser (see previous note).

[2] A.P.S. record edn. c.24; 12mo. edn. c.106.

[3] Sch. 3. The 1540 Act was repealed by the Statute Law Revision (Scotland) Act 1906.

cognoscing the extent of the debt due by the deceased, that adjudication might proceed upon it against the lands")[1] which did not imply that the heir or disponee had incurred passive representation nor authorise poinding and arrestment, and an action of adjudication contra haereditatem jacentem (attaching the renounced property) were available. Both actions were competent in the sheriff court[2] as well as the Court of Session. These remedies were introduced by the common law to fill a gap left by the 1540 Act,[3] the fiction that the heir or disponee had taken entry being inappropriate when he had renounced the property. They were not expressly abolished by the 1964 Act and may still be competent.

Most of the law was developed in relation to heirs-at-law. This partly explains the emphasis upon giving the heir an opportunity to renounce the property and so avoid the universal passive representation which an heir-at-law incurred before 1874[4] by taking entry. But all the same procedures were available in cases where the property passed to an heir of provision or disponee under a special destination,[5] even though he incurred only limited passive representation. Although the first two types of decree of constitution implied personal liability and granted warrant for poinding and arrestment, it appears that in practice diligences

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[1] Erskine, Institute II, 12, 47.

[2] Cf. Sheriff Courts (Scotland) Act 1907, s.5(4).

[3] Bell, Commentaries vol. 1, pp. 747-8.

[4] Conveyancing (Scotland) Act 1874, s.12: see para. 7.4 above.

[5] On actions of constitution against heirs of provision, see Parker Adjudications, pp. 67-68. On the application of the 1540 Act to heirs of provision see Bruce-Henderson v. Henderson (1790) Mor. 4215; Baron Hume's Lectures vol. IV pp. 449-450; cf. Earl of Selkirk v. Dalrymple (1756) Mor. s.v. "Adjudication", App'x., No. 1. Since the 1540 Act applied to heirs of provision and disponees under special destinations, the 1868 Act s.60 must have so applied since it merely simplified the 1540 Act.

other than adjudication were never used.[1]

7.14 Formerly an apparent heir (ie. an heir who had not taken entry) had a year and a day after the deceased debtor's death (called the annus deliberandi) in which to consider whether he would enter or renounce.[2] Charges to enter could be given and the summons of constitution could be served before the year and a day had expired, but could not be "insisted in" till after it had expired.[3] The period was at one time necessary for heirs-at-law who before 1874, by entry as heirs, incurred universal passive representation. But the annus deliberandi seems also to have applied to heirs of provision and disponees succeeding under a special destination, [4] though such heirs and disponees were only liable to the value of their succession. The period was reduced to 6 months by the Titles to Land Consolidation (Scotland) Act 1868, s.61. This section was then repealed by the Succession (Scotland) Act 1964[5] presumably on the mistaken view that it had applied only to heirs-at-law. There is a question of statutory interpretation whether the effect of the repeal is to revive the common law annus deliberandi. The better view is probably that

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[1] Parker Adjudication p. 67 observes: "though personal execution is competent upon the decree, yet in practice none ever follows, unless for the sole purpose of accumulating principal and arrears of interest into capital" (ie. by registering a charge under the Debtors (Scotland) Act 1838 ss. 5 and 10, repealed by the Debtors (Scotland) Act 1937, Sch. 8).

[2] Graham Stewart, p. 585; Bell, Commentaries, vol. 1, pp. 747-748.

[3] Graham Stewart, p. 585.

[4] Parker on Adjudications, p. 66.

[5] Sch. 3.

the common law has not been revived[1] and that the remedies of action of constitution and adjudication (assuming they are still competent) can be insisted in as soon as may be after the debtor's death against a person succeeding under a special destination or against the property itself if he has renounced it.

7.15 Forthcoming proposals for reform. We propose to advance recommendations for reform of the passive representation of a person succeeding under a special destination in our forthcoming Report on Succession. We intend to recommend there that the remedy of a creditor of the deceased should be a decree of constitution of the debt against the person succeeding under the special destination, which decree would authorise all the usual modes of diligence against moveables, and which could also be followed by an action of adjudication of heritable property. Since the person succeeding under the special destination would incur only limited representation (ie. restricted to the value of the specially destined property), the decree of constitution would include a declarator either (a) that the value of that property exceeded the amount of the debt or (b) if it did not exceed the amount of the debt, what the value was . The value would normally be assessed as at the date of the deceased debtor's death but if, by the time when the decree of constitution was granted, the value had declined below the amount of the debt, the court would be empowered to fix the lower value as the limit of

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[1] Interpretation Act 1889, s.38(1)(c) consolidated in Interpretation Act 1978, s. 6(a).

the successor's liability.[1] Many of the complications in the decrees of constitution and adjudication against a person succeeding under a special destination flow from the fact that different forms of decrees are needed depending on whether the deceased's heir of provision or disponee had renounced the succession, or taken entry as heir,[2] or neither renounced nor taken entry. We propose to consider also the question of renunciation and possible simplification of decrees of constitution in our forthcoming Report on Succession.

7.16 Our proposals. If the law were reformed along these lines, then under the main proposals made in this Discussion Paper, one of the diligences which the decree of constitution would authorise would be the new diligence of adjudication and sale. Where in order to complete title an heir of provision or disponee under a special destination requires to obtain, and has obtained, a conveyance under section 18(2) of the Succession

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[1] An alternative option would be that the deceased's creditor should normally seek to adjudge first the specially destined property and only if that were impossible should he do diligence against other estate of the person succeeding under the special destination. However, because of the expense and relative harshness of adjudications at least in the case of small debts, it seems better to allow the deceased's creditor freedom to use any of the competent modes of diligence.

[2] The modern equivalent of service as heir is a conveyance by the executor under section 18(2) of the Succession (Scotland) Act 1964. See next paragraph.

(Scotland) Act 1964 (equivalent to entry as heir under the law before 1964), [1] or where he has otherwise a title equivalent to such entry (eg. as a nominate constructive conditional institute,[2] or what is very frequent indeed, a survivor under a survivorship destination[3]), the property will be adjudgeable at the instance of the creditor of the deceased debtor and no problem arises. Where, however, the heir of provision requires to obtain, but has not obtained, a conveyance under section 18(2), it is doubtful whether the creditor can adjudge the property itself or, as seems possible, merely the right to demand such a conveyance from the executor.[4] The latter solution seems undesirable. We suggest that the property itself should be adjudgeable and for that purpose, the creditor should apply to the court, in the action of constitution of the debt, or subsequently in a separate application to the sheriff, for an order authorising adjudication as if the executor had granted such a conveyance. The order would be referred to in the notice of adjudication for the purpose of linking the title of the heir of provision or disponee with the title of the person last infeft in the subjects to be adjudged. Such cases are likely to be

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[1] Eg. in the case of a special destination in an inter vivos disposition to A whom failing to B where A completes title as disponee. If the succession opens to B on A's death, B must complete title as substitute and heir of provision by obtaining a conveyance under s.18(2) of 1964 Act and registering his title: Encyclopaedia s.v. "Completion of Title", vol. 4, p. 222.

[2] In a mortis causa disposition to A whom failing B, B is a contructive conditional institute and if A predeceases the granter of the disposition, B becomes the institute. B may record the disposition with warrant of registration in his own favour: Encyclopaedia vol. 4, pp. 221-222; Hutchison v. Hutchison (1872) II M. 229.

[3] In a disposition to two (or more) persons as owners in common with a survivorship destination (eg. to A and B and the survivor), if both were infeft, the survivor does not require to make up a further title. If neither was infeft before the death of one of them, the survivor can complete title without obtaining a conveyance under s.18(2) of the 1964 Act. See Encyclopaedia vol. 4, p. 222; Bisset v. Walker (1799) Mor. s.v. "Deathbed", App'x. No. 2.

[4] Cf. Watson v. Wilson (1868) 6 M. 258.

unusual.[1]

7.17 We propose:

(1) The proposition in para. (2) below is advanced on the assumption that (as we intend to recommend in our forthcoming Report on Succession) the law will be amended to make it clear that the liability of a deceased debtor transmits against an heir of provision or disponee succeeeding under a special destination, and that the creditor's remedy will be a decree constituting the debt against the heir of provision or disponee, subject to provisions limiting that liability to the value of the succession.

(2) Where a creditor of a deceased debtor wishes to adjudge heritable estate of the deceased passing under a special destination to an heir of provision or disponee, and in order to complete title in the person of the heir of provision or disponee, a conveyance by the executor of the deceased to the heir of provision or disponee is required under section 18(2) of the Succession (Scotland) Act 1964,

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[1] In the context of our Report on Succession, we intend to consider the abolition of special destinations of heritable property other than survivorship destinations, but there could in theory be transitional cases of special destinations requiring a conveyance under section 18(2) of the 1964 Act.

then the creditor should be entitled to apply to the court entertaining an action to constitute the debt, or to the sheriff if decree of constitution has already been obtained, for an order authorising adjudication as if the estate had been so conveyed under section 18(2). The notice of adjudication would refer to the order for the purpose of connecting the title of the heir of provision or disponee with that of the person last infeft in the estate to be adjudged.

(Proposition 7.2)

(5) Adjudications against deceased debtor's executry estate and against heritable property owned by executor

7.18 Adjudication against executry estate. Since the heritable estate of a deceased vests for general executry purposes (including payment of debts) in the executor at the date of confirmation (unless it passes under an unevacuated special destination), adjudication by a creditor of the deceased against executry estate is competent under the present law and would be competent if the new diligence of adjudication and sale were introduced. The Act of Sederunt anent Executors-creditors of 28 February 1662 has been construed as having the effect of precluding diligence against executry estate during that period.[1] We take this view to be correct though there is an alternative theory that such diligence can be used but anyone else using it within that period acquires a pari passu preference.[2] As originally enacted, the Act of Sederunt did not apply to diligence against heritable property, and there is some doubt whether the Succession (Scotland) Act 1964, s.14(1) has the effect of extending it so as to preclude diligence against executry estate within the six months.

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[1] Graham Stewart, pp. 65, 670 and 671.

[2] See eg. Globe Insurance Co. v. Scott's Trs. (1849) IID. 618 at p. 638 per Lord Fullerton; McPherson v. Cameron (1941) 57 Sh. Ct. Reps. 64 at p. 67.

In these circumstances we suggest that the position should be clarified by statute. We suggest that a creditor of the deceased, having constituted his debt against the executor, should be entitled within the 6 months period to commence the diligence by serving a notice of entitlement to adjudge and registering the notice of litigiosity, but a charge to pay the debt within that period should be neither necessary nor competent since the executor is not bound to pay debts of the deceased until after the period has expired. Since the proposed mandatory period of litigiosity required before the registration of an adjudication would be at least 6 months, no adjudication and a fortiori no sale could be executed within the 6 months after the debtor's death.

7.19 We propose:

> **It should be competent for a creditor of a deceased debtor who has constituted his debt against the debtor's executor to commence diligence against heritable property forming part of the executry estate within the 6 months after the debtor's death specified in the Act of Sederunt of 28 February 1662 by serving a notice of entitlement to adjudge and registering a notice of litigiosity. But the execution of a charge against the executor within that period should be neither necessary not competent as a prelude to adjudication.**

(Proposition 7.3).

7.20 Adjudication against heritable property owned by executor to enforce debt due by deceased. We have seen [1] that under the old common law doctrine of passive representation

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[1] See para. 7.4 above.

which is still in force, an executor confirming to the estate of a deceased debtor incurs limited passive representation. His liability is limited to the value of the executry estate but it appears to be a form of personal liability in the sense that if he refuses to pay a debt due by the deceased, diligence can be done against estate belonging to him though it has never been comprised in the executry estate. In such a case, he will no doubt have a right of relief against the executry estate. Where the executor acts improperly in the administration of the executry estate, he may be personally liable in a different sense, his right of relief against the executry estate being at best uncertain and at worst non-existent. Thus if the executor pays ordinary debts without first providing for privileged debts (eg. funeral expenses), or pays the beneficiaries without providing for debts, he is personally liable.[1] Again if the executor pays particular creditors or beneficiaries while he knows, or should know, that the estate is insolvent, he is in breach of duty[2] and will be personally liable.

7.21 In principle we think that, except where an executor has prejudiced his ability to pay the debt by acting improperly, his liability should be confined to the assets comprised in the executry estate. In the case of moveables, such a principle might lead to difficulties in cases where the executry estate has been mingled with the executor's own moveable funds or goods. Such practical difficulties should not arise in the case of heritable property, since it should always be possible to distinguish executry heritable estate from heritable property belonging to the executor. While therefore the application of the principle to moveables

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[1] Lamond's Trs. v. Croom (1871) 9M. 662; Heritable Securities Investment Association Ltd. v. Miller's Trs. (1893) 20R. 675.

[2] Laird v. Hamilton 1911, 1 S.L.T 27 at p. 29 per Lord President Dunedin.

should be deferred to a future Discussion Paper on transmission of debts on death and is in any event outside the scope of the present Discussion Paper, we think that it should be made clear by statute that the principle applies to heritable property.

7.22 Accordingly we propose:

The obligation to pay debts due by a deceased which is incurred by an executor by virtue of his confirmation should not be enforceable by adjudication or other legal process against heritable property belonging to him as an individual unless:

(a) the executor has prejudiced his ability to pay the debt by:

(i) improperly paying funds or conveying property to a beneficiary or postponed creditor from the executry estate without providing for payment of the debt, or at a time when he knew, or ought to have known, that the executry estate was insolvent; or

(ii) otherwise acting improperly in the administration of the executry estate; and

(b) the creditor has obtained decree for payment of the debt against the executor in his capacity as an individual.

(Proposition 7.4).

(6) Diligence against unconfirmed heritable estate not passing under special destination

7.23 It is coming to be accepted that one effect, or side-effect, of section 14(1) of the Succession (Scotland) Act 1964 is that confirmation as executor-creditor is competent in relation to heritable estate to which an executor has not confirmed and which does not pass under a special destination. This view has been advanced in text-books[1] and followed in at least one sheriff court.[2] This view is supported by the fact that the 1964 Act[3] amends enactments relating to the confirmation of executors (which must presumably include the Confirmation Act 1695, which enables creditors of a deceased's next of kin to confirm as executor-creditor) so that references therein to moveable estate are to be construed as including a reference to the whole estate.[4] Section 14(1) however is not altogether aptly expressed for extending confirmation as executor-creditor to heritable property. This process, although in form a confirmation, is in its true legal character and effect a diligence creating a nexus or security over the estate which is left 'in haereditate jacente' of the deceased.[5] Thus the executor-creditor is vested in a security over the property primarily for payment of his own debt and pari passu debts of creditors citing him, (although he must account for any surplus). It is therefore only in a special and somewhat strained sense that the property vests in him 'for the purposes of administration'. Moreover, a confirmation as executor-creditor

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1 Wilson and Duncan, p. 463; Wilson, Debt p. 334.

2 Confirmation as executor-creditor of heritable estate was granted in Armour, Petitioner (unreported, 31 March 1937) Edinburgh Sheriff Court. Decree appointing an executor-creditor and granting warrant to the Commissary Clerk to issue confirmation of heritable estate was granted in Scottish and Newcastle Breweries PLC (unreported, 3 April 1987), Edinburgh Sheriff Court.

3 Sch. 2, para. 3.

4 See para. 7.38 below.

5 Graham Stewart, p. 441; Smith Trustees v. Grant (1862) 24 D 1142 at p. 1169 per Lord Curriehill.

may be, and usually is, deliberately limited to particular assets[1] which is incompetent in all other types of confirmation. Section 14(1) speaks of 'all the estate' vesting in the executor, which appears rather inapt in the case of an ex facie partial confirmation. It is however possible to construe this as meaning all the estate to which the executor-creditor has confirmed. Given that no other form of diligence is competent, it seems likely that the courts will continue to construe section 14(1) as extending the diligence to heritable property.

Proposals for reform

7.24 We consider that it should be made clear by statute that confirmation as executor-creditor rather than adjudication should be the appropriate form of diligence to enforce debts of a deceased debtor against estate which is not vested in his executor and has not passed under a special destination. We regard the advantages as being that (1) it would make the least change from what appears to be the present law; and (2) diligence could be done against heritable and moveable estate in one diligence process. The diligence suffers from a number of defects, however, which require to be removed by legislation.

7.25 Criteria of preference in competitions with adjudications. In competitions with arrestments and poindings begun during the deceased debtor's life, the criterion of preference is the date of confirmation as executor-creditor as opposed to the date of the competing creditor's decree of furthcoming or the date of the competing creditor's sale of the poinded goods.[2] In competitions with assignations, the criterion of preference is the date of confirmation as opposed to the date of

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[1] Confirmation of Executors (Scotland) Act 1823, s. 4.

[2] Graham Stewart, p. 451-452.

intimation of the assignation.[1] It has long been recognised that these rules can create strange anomalies and a circle of priorities.[2] If on the analogy of these rules, a decree of confirmation as executor-creditor were to have priority over a bare adjudication registered during the deceased debtor's life (ie one registered but not followed by sale or foreclosure), a circle of priorities would arise where a duly registered adjudication was followed by a duly registered heritable security which after the debtor's death was followed by a decree of confirmation. The adjudication would have priority over the heritable security which would have priority over the confirmation which would have priority over the adjudication. This anomaly appears unacceptable and it would therefore be necessary to provide that an adjudication, though only an inchoate diligence, should nevertheless have priority over a decree of confirmation in accordance with the general rule that registration of an adjudication governs priority in ranking.[3]

7.26 Infeftment of executor-creditor as criterion of preference. Another defect is that in competitions the present rule (which was evolved when confirmation as executor-creditor attached only moveable property) is that the criterion of preference is the date of the grant of the decree of confirmation.[4] But the faith of the registers requires that that criterion should be the date of the registration of the executor-

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[1] Ibid., p. 452.

[2] See Lord Ivory's Note to Erskine Institute III, 6, 11. Where a bare arrestment is followed by intimation of an assignation which is followed by decree of confirmation as executor-creditor, the arrestment has priority over the assignation which has priority over the decree of confirmation which has priority over the arrestment.

[3] See Part VI above.

[4] Graham Stewart, p. 449.

creditor's title in the property registers not the prior grant of confirmation.

7.27 We suggest that where the deceased debtor had been infeft, the executor-creditor should register in the property registers a notice, in a form prescribed by statute, of the decree of confirmation and a conveyancing description of the heritable property attached by the confirmation as set out in the executor-creditor's inventory of the confirmed estate. Where the deceased debtor had been uninfeft, the form of notice would narrate that the deceased debtor's title is deducible from that of the person last infeft by means of the unregistered conveyances. Persons having custody of the unregistered conveyances would be bound on demand to deliver or exhibit them, and it would be necessary to prescribe a procedure whereby the sheriff, on the creditor's application, could enforce the obligation of delivery or exhibition.[1]

7.28 Under the Act of Sederunt anent Executors-creditors of 28 February 1662, a creditor who cites an executor-creditor within 6 months of the debtor's death ranks pari passu with the executor-creditor on the property attached. It seems to be the better view that where the value of the attached property exceeds the amount of the sum recoverable by the executor-creditor, the extent of the nexus or burden created by the confirmation is not increased to secure the pari passu creditor's debt.[2] On that view, it seems unnecessary to provide that the title of the pari passu creditor should be registered in the property registers.

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[1] See para. 5.19 and Proposition 5(5) (para. 5.25) above.

[2] It is a general rule that the nexus is limited by the amount of the creditor's debts: Smith's Trs. v. Grant (1862) 24D. 1142.

7.29 No mandatory period of litigiosity. A confirmation as executor-creditor is competent against estate to which no executor or successor of the deceased has a title, and thus in circumstances where no person has incurred liability to pay the debt out of the property attached by the confirmation. It is a diligence against property, not against a debtor, and there is thus no debtor against whom a notice of litigiosity could be registered. It is however doubtful whether such a notice would serve any useful purpose in protecting conveyancing transactions from disruption.

7.30 Safeguard for home of debtor's family. It would be necessary to impose restrictions on the executor-creditor's entry into possession or sale of the home of the debtor's family along the lines of the safeguards proposed for adjudications for debt. [1]

7.31 Restriction by court of exorbitant confirmation as executor-creditor. It has been held that the nexus or security created by the diligence of confirmation as executor-creditor is limited by the amount of the debt and the valuation of the subjects attached specified in the inventory of those subjects on which the confirmation as executor-creditor proceeds.[2] This decision had reference to the attachment of a fund. Where the property attached is a physical asset, which the executor-creditor requires to sell in order to satisfy his debt, it is thought that the nexus will extend to that asset, but the executor-creditor must account to the executor or other creditors entitled to rank on the proceeds of sale for the surplus proceeds over and above his own debt and expenses.[3] Where the property attached is heritable property which is divisible, we suggest that the court should be

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[1] See volume 1, Proposition 3.8 (para. 3.65).

[2] Smith's Trs. v. Grant (1862) 24D. 1142, especially at p. 1169 per Lord Curriehill.

[3] Graham Stewart, p. 447.

empowered to restrict the nexus to property proportionate in value to the amount of the debt and expenses of the executor-creditor, and of any other creditor entitled to rank on the proceeds of sale by virtue of another confirmation as executor-creditor, on the analogy of our proposals relating to restrictions of exorbitant adjudications.[1]

7.32 Full inventory. Though a confirmation as executor-creditor may be partial, it seems that the inventory must include a full and complete inventory of the estate,[2] though one authority adds the gloss 'so far as known'.[3] This requirement seems troublesome and unnecessary.

7.33 Common property. In volume 1, we made a number of proposals governing the adjudication of common property in which the debtor has a pro indiviso share. These proposals covered such matters as the creditor's right to adjudge and sell the whole property as distinct from merely the debtor's pro indiviso share; the right of a co-owner to purchase the debtor's share of the common property at valuation or to apply to the sheriff for an order for restriction of the adjudication to the debtor's share; restriction of an exorbitant adjudication; and safeguards for the home of the co-owner and his family as well as the debtor and his family.[4] We consider that these proposals should apply mutatis mutandis to confirmations as executor-creditor attaching heritable property.

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[1] See volume 1, Proposition 3.7 (para. 3.55).

[2] Currie Confirmation, p. 147. The Encyclopaedia s.v. 'Executor' vol. 6, pp. 502-503 states that this is required for the purpose of stamp duties.

[3] Graham Stewart, p. 446.

[4] Proposition 3.15 (para. 3.116).

7.34 Proposals. We propose:

(1) It should be made clear by statute that the appropriate mode of diligence whereby a creditor of a deceased person may enforce a debt against the deceased's unconfirmed heritable estate not passing under a special destination is confirmation as executor-creditor rather than adjudication and sale.

(2) In a creditor's action for a decree cognitionis causa tantum constituting a debt against the vacant succession, the deceased's intestate and testate successors (rather than his next-of-kin) should be called as defenders.

(3) An adjudication of a debtor's property duly registered during the debtor's life should have priority in ranking over a decree of confirmation as executor-creditor attaching that property after the debtor's death.

(4) In a competition between a confirmation as executor-creditor attaching heritable property and an adjudication of that property, or any other competing right, the criterion of preference should be registration in the property registers of the executor-creditor's title rather than the grant of decree of confirmation.

(5) An executor-creditor's title to heritable property should be prescribed by statute and take the form of a notice referring to the decree of confirmation, and containing a conveyancing description of the attached heritable property

as set out in the inventory of the estate to which the executor-creditor has confirmed, and, where the deceased debtor had been uninfeft, a reference to unregistered conveyances linking the debtor's title to that of the person last infeft.

(6) There should be a procedure whereby the creditor can obtain exhibition or delivery of unrecorded links in title.

(7) A notice of litigiosity should not be required as a mandatory prelude to a confirmation as executor-creditor attaching heritable property.

(8) Restrictions should be imposed on sale and entry into possession by the executor-creditor of the home of the debtor's family along the lines of the safeguards proposed for adjudication and sale at Proposition 3.7 (para. 3.55 in volume 1).

(9) The court which granted decree of confirmation as executor-creditor should have powers, exercisable on the application of the executor-nominate or executor-dative (if any) or any other person interested in the deceased's estate, to restrict an exorbitant nexus over divisible heritable property attached by the confirmation as executor-creditor, or to allow part of the property to be sold and to sist further procedure in the remaining part, on the model of the powers proposed for exorbitant adjudications at Proposition 3.6 (para. 3.29 in volume 1).

(10) The proposals on adjudication of common property in Proposition 3.17 (para. 3.122) should apply mutatis mutandis to confirmation as executor-creditor attaching common property.

(11) An executor-creditor confirming to heritable estate of a deceased debtor should not be required to submit a full inventory of the whole heritable and moveable estate but only an inventory of the heritable and moveable estate which the executor-creditor wishes to attach.

(Proposition 7.5)

(7) Adjudications and confirmations as executor-creditor attaching heritable property, at instance of creditors of deceased's successors and representatives

7.35 In the previous paragraphs of this Part, we have been concerned with adjudications and confirmations as executor-creditor attaching heritable property at the instance of creditors of the deceased. We now turn to consider such diligences at the instance of creditors of the deceased's successors.

7.36 Background: adjudications by creditors of heir-at-law before 1964. Under the law before the Succession (Scotland) Act 1964, the creditors of the heir-at-law could adjudge the heritable estate to which he succeeded. The grounds of debt were different from the grounds of adjudications by the ancestor's creditors. In place of a decree of constitution imposing on the heir representation for the ancestor's debts, the grounds of debt were

a decree against the heir-at-law who had not taken entry to require him to do so by raising and executing letters of special charge (where the ancestor had been infeft) or general special charge (where he had been uninfeft) in terms of the Comprisings Act 1621 (which extended the 1540 Act to diligence at the instance of the heir's creditors).[1] These letters were then followed by an action of adjudication. The need for these letters was dispensed with by the Titles to Land Consolidation (Scotland) Act 1868, s.60 under which citation in the action of adjudication had the same effect as letters of special charge or general special charge.[2] The heir-at-law was entitled to the annus deliberandi, reduced to 6 months by the 1868 Act, s.61, in a question with his own creditors. (These provisions of the 1868 Act were repealed by the 1964 Act). Though the heir-at-law was entitled to the 6 months period under the 1868 Act, s.61, the Institutional writers state that an heir-at-law could not renounce the succession so as to avoid adjudication by his own creditors.[3] It seems however

[1] See Erskine Institute II, 12, 11 and 14.

[2] It should be noted that Graham Stewart p.674 observed in 1893 that the action by a creditor of the heir-at-law "is a simple adjudication. As a personal right to land now vests by survivance, there is no difference, except as regards the mode in which the adjudger's title is completed, whether the heir has or has not completed title". The summons in the action of adjudication concluded for adjudication of the property to the pursuer from the defender "as heir of the deceased ..... and held as duly charged to enter himself as heir of line in special or in general special to the said [deceased] and from all others having or pretending right to the heritable property of the said [deceased] which pertained heritably or otherwise to the said [deceased] and to which the defender might establish a right in his person were he served heir to the said [deceased] of the said heritable property.....".Encyclopaedia of Scottish Legal Styles vol. 1(1935) p. 103, Form No. 121.

[3] Stair III, 2, 51; Bell, Commentaries, vol. 1 pp. 748-749; Parker Adjudications, p. 78.

that there was some doubt about this rule.[1]

7.37 Adjudication of heritable property passing under special destination. It would seem that the foregoing enactments and rules applied to adjudications by creditors of heirs of provision or disponees succeeding under special destinations (as well as heirs-at-law) before the Succession (Scotland) Act 1964 came into force. As regards the existing law, where an heir of provision or disponee has obtained a conveyance under s.18(2) of the 1964 Act (equivalent to entry as heir under the old law) or has otherwise a completed title equivalent to such entry,[2] it seems that the heritable property passing under the special destination is adjudgeable at the instance of the creditors of the heir of provision or disponee. Where on the other hand the heir of provison or disponee requires and has not obtained a conveyance under s.18(2) of the 1964 Act in order to complete title, it is clear that service of a summons of adjudication does not have the effect of a charge on the heir or disponee to obtain such a conveyance under certification that the property will be adjudgeable if he fails to do so, because the 1868 Act, s.60 has been repealed and not replaced by any corresponding new provision. It is unclear therefore how a creditor of the heir can use adjudication under the existing law against the property itself. The heir's or disponee's right to demand a conveyance from the

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[1] In Laird of Carse v. His Brother (1627) 1B. S. 45 the Court allowed an heir-at-law, who had been charged in special to enter as heir under the 1621 Act, to renounce the succession. But since the process seemed to be collusive between the two brothers, the Court declared that the case should not 'prejudge' any other case.

[2] See para. 7.16 above.

executor under s.18(2) may possibly be adjudgeable[1] but the matter is not free from doubt.

7.38 Clearly heritable property passing to an heir of provision or disponee under a special destination should be attachable at the instance of his creditors by the new diligence of adjudication and sale. Where a conveyance under section 18(2) of the 1964 Act is required to enable the heir of provision or disponee to complete title, the heritable property itself, as distinct from a right to demand a conveyance of it from the executor, should be adjudgeable. For this purpose, an order authorising adjudication as if such a conveyance had been made should be competent as in the case of adjudications by the creditors of the deceased.[2]

7.39 We propose:

Where a creditor of an heir of provision or disponee succeeding to heritable property under a special destination wishes to adjudge the property, and the heir of provision or disponee requires and has not obtained a conveyance under section 18(2) of the Succession (Scotland) Act 1964 in order to complete title, the creditor should have the same right as a creditor of the deceased to apply to the court for an order authorising adjudication as is proposed in Proposition 7.2 above.

(Proposition 7.6).

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[1] Cf. Watson v. Wilson (1868) 6 M.258

[2] See Proposition 7.2 (para. 7.17).

7.43 Heritable property forming part of executry estate. Where the creditor of a successor to a deceased person holds a decree against the successor as an individual, in principle the successor's creditor should be entitled to arrest the executor's liability to account to the successor, and possibly to adjudge the successor's right to demand from the executor a conveyance of heritable property[1]. He should not, however, be entitled to adjudge or poind executry estate or to arrest debts due to the executor, in order to enforce the successor's debt. In principle, it should make no difference that the successor has confirmed as executor, since a claim against the successor in his capacity as an individual should not warrant diligence against the successor in his capacity as an executor. There are however old cases accepted as authoritative which throw doubt on the validity or universality of these principles. For example, in one old case in 1661,[2] a debt was owed to a person who died and whose son confirmed to his estate. A creditor of the son arrested the debt and thereafter a creditor of the deceased arrested the debt. It was held that the arrestment by the creditor of the deceased, though later, should be preferred because creditors of an ancestor have a preference over creditors of the ancestor's executor. The significance of the case for present purposes is that the validity of the arrestment by the executor's creditor was not challenged. There are other old cases to a like effect.[3] On the basis of such cases Graham Stewart,[4] speaking of diligence by creditors of the deceased's next of kin, observed: "If the next of kin are entitled to be confirmed executors and have confirmed, the creditor proceeds by action and diligence as against any other debtor". This seems to us to be contrary to principle. If a creditor of the next of kin who has confirmed as executor can do diligence against the executry estate, there seems no reason in principle why the creditor of any

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1. Cf. Watson v. Wilson (1868) 6 M. 258.

2 Town of Edinburgh v. Ley (1661) Mor. 3123.

3 See eg. Tait v. Kay (1779) Mor. 3142.

4 p.673.

other beneficiary of the executry estate (eg. a legatee) should not also be entitled to do diligence against the estate. But such a result would be absurd. The old cases seem to be an insecure foundation for the rule stated by Graham Stewart and require reconsideration in the context of a review of the transmission of debts on death. Meanwhile we think that it should be made clear by legislation that executry estate cannot be adjudged for debts due either by the executor as an individual or by a beneficiary of the estate.

7.41 We propose:

> **It should be made clear by statute that a decree for payment of debt against an executor as an individual, or against a beneficiary of an executry estate, should not be treated as authorising an adjudication of heritable property forming part of the executry estate.**

(Proposition 7.7)

7.42 Unconfirmed heritable estate not passing under special destination. Where no executor has confirmed to heritable estate of a deceased and the estate has not devolved under a special destination, then, upon the assumption that confirmation as executor-creditor is competent with respect to such estate, by virtue of section 14(1) of the Succession (Scotland) Act 1964, it seems that the Confirmation Act 1695[1] applies. This inter alia enables creditors of the deceased's nearest of kin to obtain confirmation as executor-creditor of the deceased's moveable estate and, apparently (by virtue of s.14(1)) his heritable estate, where no 'universal' executor has confirmed to it. Thus the 1695 Act as originally enacted provided:-

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[1] A.P.S. record edn. c.72; 12mo. edn. c.41.

"in the case of a moveable estate left by a defunct and falling to his nearest of kin who lies out and doth not confirm, the creditors of the said nearest of kin may either require the procurator fiscal to confirm and assign to them under the peril and pain of his being liable for the debt if he refuse or they may obtain themselves decerned executors dative to the defunct as if they were creditors to him".[1]

The reference to moveable estate has since 1964 to be construed as a reference to the whole estate.[2] In a recent unreported sheriff court case, a creditor of the brother of the full blood of a deceased person (or rather a trustee on the sequestrated estate of the brother)[3] was confirmed as executor-creditor to heritable property belonging to the deceased person's estate.[4]

7.43 The Confirmation Act 1695 seems to require reform. For example, the Act speaks only of the nearest of kin. A leading text-book[5] observes that there is no authority for extending the Act to other intestate representatives[6] or to testate

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[1] The Act has an important proviso to effect that the creditors of the deceased doing diligence to affect the moveable estate within a year and a day of the debtor's death shall always be preferred to the diligence of the nearest of kin. We consider this provision in our Discussion Paper No. 79 on Equalisation of Diligences.

[2] Succession (Scotland) Act 1964, Sch. 2, para. 3.

[3] The trustee on the sequestrated estate of the next-of-kin is regarded as being in the same position as a creditor of the next-of-kin for this purpose: see Currie Confirmation pp. 148-149, citing Macdonald, July 9, 1857; Davidson, April 19, 1866 (both Edinburgh Commissary Court).

[4] Armour, Petitioner, 26 May 1987, Edinburgh Sheriff Court.

[5] Currie on Confirmation p. 149.

[6] Eg. a surviving spouse entitled to succeed under s.2(1)(e) of the 1964 Act.

representatives. The 1695 Act however applies to moveable as well as heritable property and its reform lies outwith the scope of the present Discussion Paper. We intend to review the Act in due course in the context of a comprehensive review of the enforcement of debts against the estate of a deceased person.

(8) Preferences of creditors of deceased debtor over creditors of his successors.

7.44 The policy and principles underlying the law on the preferences of the creditors of a deceased over the creditors of his successors were well expressed by Bell [1] as follows:

> "The estate of which a man is possessed, and which he has an uncontrolled power to alienate to his creditors, or to make the subject of securities to them, naturally becomes a source of credit on which he may obtain money or goods. Such credit is readily given by dealers and money-lenders, without taking specific security over the estate or effects, and trusting only to that right of attaching the property which they know can at any time be exercised for their payment. This right of attachment ought not at once to cease on the death of the debtor. If his heir is unwilling to undertake the debts, he ought to leave the property untouched for the creditors; if he takes up the succession, he should reckon on being liable for the debt which belongs to it. And the creditors of the heir can in justice take no better right than he himself has, that is to say, the reversion of the ancestor's estate, after his debts are paid. This is so natural a consequence of the credit acquired in reliance on the uncontrolled power of a proprietor, that it has found admission into every system of jurisprudence, where no peculiar territorial policy has interfered with it.....
>
> But the heir, in his turn, acquires credit in reliance on the lands and effects to which he succeeds, whether his titles and possession be completed, or he be seen as apparent heir to possess for a course of time in

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[1] Commentaries, vol. 1. pp. 764-765.

undisturbed tranquillity. It is just, therefore, to his creditors, that the preference should not be continued in point of time to the creditors of the ancestor without limitation".

These general principles seem still to be valid. It follows that the creditors of a deceased debtor should have a preference over the creditors of the debtor's executors or successors, but only for a reasonable and limited period.

7.45 The Succession (Scotland) Act 1964 has changed the law on the preference of creditors of a deceased debtor over the creditors of his representatives and successors. Before that Act, the law on this topic made separate provision for heritable and moveable property.[1] As regards heritable property, the Act anent apparent heirs of 1661[2] enacted that the creditors of the deceased should be preferred to the creditors of the apparent heir provided the creditors of the deceased did diligence against the estate of the deceased within 3 years after the deceased's death. The 1661 Act applied not only to heirs possessing on a title of apparency but also to heirs of provision and disponees succeeding under special destinations.[3] The 1661 Act was repealed by the 1964 Act.[4] It seems now to be the law [5] however, that the preference which the creditors of a deceased have over moveable estate in competition with the creditors of the representatives or successors at common law, as modified by the Confirmation Act 1695,[6] extends to heritable estate. The basis for this view is that the common law rules and the Confirmation Act 1695 relate to the "winding up" of the deceased's estate within the meaning of section 14(1) of the 1964 Act and are thus extended to heritable estate by that section.

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[1] Bell, Commentaries, vol. 1, pp. 764-772; vol. 2 pp. 85-86; McLaren on Wills vol. 2, pp. 865, 1294-1299; Wilson on Debt pp. 333-334.

[2] A.P.S. 1661 c.88 record edn.; c.24 12mo. edn..

[3] McLaren on Wills vol. 1, p. 195; Graham Stewart, p. 675.

[4] Sch. 3.

[5] Wilson and Duncan p.456; Wilson on Debt pp. 333-334.

[6] A.P.S. record edn. c.72; 12mo. edn. c.41.

7.46 There are three categories of case to be considered. First, where the executor has confirmed to the deceased's estate, the creditors of the deceased executing diligence against that estate have a preference over the creditors of his executor or successors though the latter have used diligence first.[1] This preference was evolved at common law in relation to moveable property and extended to heritable property by section 14(1) of the Succession (Scotland) Act 1964. The preference subsists for so long as the estate can be identified,[2] subject to the extinction of the preference by the long negative prescription, or by personal bar or acquiescence.[3] We have proposed above[4] that an adjudication by a creditor of a successor of the deceased should not be competent against executry estate while vested in the executor. But in certain circumstances a creditor of the deceased may do diligence against property conveyed by the executor to a successor of the deceased.[5] The result of the common law preference in such a case would therefore be that, for so long as the property conveyed to the successor is owned by him, an adjudication of the property by the deceased's creditor would always have a preference over a prior adjudication of that property by the successor's creditor. Such a long duration of the preference appears inconsistent with the principles underlying the preference as stated by Bell.[6] It contrasts with the 3-year limit on the preference of creditors of an heir-at-law imposed by the now repealed Act anent apparent heirs of 1661, and with the one-year duration of the preference where an executor-creditor confirms imposed by the Confirmation Act 1695. We suggest that where the executor has conveyed heritable estate to a successor, an adjudication registered within one year after the deceased's death by a creditor of the deceased should have a preference over

[1] Stair III, 8, 71; Erskine, III, 9, 42; Bell Commentaries vol. 2, pp. 85-86; McLaren on Wills vol. 2, pp. 866, 1299; Graham Stewart, p. 681; Wilson and Duncan, p. 456; Menzies v. Poutz 1916 S.C.143.

[2] Idem.

[3] Traill's Trs. v. Free Church of Scotland 1915 S.C. 655.

[4] Proposition 7.6 (para. 7.41).

[5] See eg. Wilson Debt p.334; Wilson and Duncan, p. 456.

[6] See para. 7.44 above.

an adjudication registered at whatever date by a creditor of the deceased's successor, but in any other case the competing adjudications should rank by priority of the times of registration.

7.47 The second category of case arises where adjudications are used against property passing under a special destination. By an accident of statutory drafting, it appears that the common law preference over moveables was not extended to heritable property of this type by section 14(1) of the 1964 Act.[1] On the analogy of the rule on preferences proposed above, we suggest that an adjudication of the property subject to the special destination by a creditor of the deceased registered within one year after the debtor's death should have a preference over an adjudication (whenever registered) of that property by a creditor of the heir of provision or disponee.

7.48 The third category of case arises where no executor has confirmed and the property has not passed under a special destination. It seems that the Succession (Scotland) Act 1964, has the effect of extending the Confirmation Act 1695[2] to unconfirmed heritable estate.[3] As we have seen, this latter Act enables the creditors of the nearest of kin of the deceased to obtain confirmation as executor-creditor of the deceased's moveable estate, and by virtue of the 1964 Act his heritable estate, but with the proviso that the creditors of the deceased doing diligence within a year and a day of his death are preferred to the nearest of kin. We do not propose any change to this Act at the present time.

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[1] See s.36(2) of the 1964 Act defining "estate" within the meaning of s.14(1) so as to exclude heritable property passing under a special destination.

[2] A.P.S. record edn. c.72; 12mo. edn. c. 41.

[3] See the 1964 Act s. 14(1). See also Sch. 2, para. 3 providing that in any enactment relating to the confirmation of executors or the administration of the moveable estate of deceased persons, references to the moveable estate of the deceased person are to be construed as references to his whole estate. This general amendment appears to apply to the Confirmation Act 1695.

7.49 We propose:

(1) Where an executor has conveyed heritable property comprised in the executry estate to a successor of the deceased, an adjudication of the property by a creditor of the deceased registered before the expiry of one year after the deceased's death should have a preference over an adjudication of that property, whenever registered, by a creditor of the deceased's successor.

(2) Where heritable estate of a debtor passes on his death under a special destination to an heir of provision or disponee, an adjudication by a creditor of the deceased of property belonging to the heir of provision or disponee registered before the expiry of one year after the debtor's death should have a preference over an adjudication of that property, whenever registered, by a creditor of the heir of provision or disponee.

(Proposition 7.8).

(9) "Universal" executor's right of retention as constructive diligence affecting confirmed heritable estate

7.50 Where a "universal" executor (ie an executor-nominate, or executor-dative qua next of kin or surviving spouse) is himself a creditor of the deceased, his confirmation in that character "gives him the same preference for the debt due to himself as if he had confirmed executor-creditor".[1] In effect he is given a right to pay the debt due to himself by retention of the confirmed

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[1] Graham Stewart, p. 444.

estate. There are two situations to consider. First, where the executor confirms within the 6 months after the debtor's death specified by the Act of Sederunt of 28 February 1662, his right of retention becomes fully operative on the expiry of the 6 months so as to enable him to rank pari passu with all creditors who have used citations and diligences within the 6 months, and preferably to those who have not, all as if he had confirmed as executor-creditor.[1] We have proposed[2] that adjudications of the confirmed heritable estate within the 6 months should not be competent, but there could be a question of pari passu ranking under the Act of Sederunt where a confirmation as executor- creditor had been used against unconfirmed estate within the 6 months: i.e. it would seem that the claims of the executor and of the executor-creditor would rank pari passu under the Act of Sederunt. Second, competitions between diligences executed after the 6 months are regulated as if the Act of Sederunt had not been enacted. Accordingly, where the universal executor confirms after the 6 months, his right to pay his debt by retention gives him a preference in competition with diligences of the confirmed estate executed after his confirmation.[3]

7.51 The policy underlying the foregoing rules is that it would be absurd to require an executor to raise in his capacity as an individual creditor, an action against himself in his capacity as an executor, in order to do diligence against the confirmed estate.[4] This policy seems at first sight to be sensible. The executor's right to pay his debt by retention is however a somewhat unusual

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[1] Bell, Commentaries, vol. 2, pp. 80-81; Napier v. Menzies (1740) Mor. 3936; Erskine, Institute III, 9,45 Note (a).

[2] Proposition 7.3 (para. 7.19).

[3] Idem.; McDowal's Creditors v. McDowal (1744) Mor. 100077; McLeod v. Wilson (1832) 15 S. 1043.

[4] Bell, Commentaries, vol. 2, p. 80.

right which does not fall neatly into any of the categories of rights of retention known to Scots law.[1] Its nature and incidents may require review in the Discussion Paper to which we referred above.[2] In these circumstances we think that any reforms should be kept to a minimum.

7.52 We note that the executor's "right of retention" was developed at a time when a confirmation did not encompass heritable property. In principle, the faith of the registers requires that real rights of security or diligence affecting heritable property should depend on registration of the creditor's title in the property registers. For this reason, we proposed above,[3] that in a competition between a confirmation as executor-creditor attaching heritable property and an adjudication of that property or any other competing right, the criterion of preference should be registration in the property registers of the executor's title rather than the grant of decree of confirmation. Since the rule is that confirmation of a "universal" executor gives him the same preference for a debt due to him as confirmation as executor-creditor, it would seem right in principle that if the executor's right of retention is to apply in future to heritable property, the executor's title to the right should only become complete if it is registered in a prescribed statutory form in the property registers. Provision would also be needed for restriction, discharge and perhaps assignation of that title. The alternative would be to provide that the executor's right of retention does not apply to heritable estate.

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[1] See Encyclopaedia, vol. 13, s.v. "Retention", para. 1.

[2] See para. 7.2.

[3] Proposition 7.5 (4) and (5) (para. 7.34).

7.53 We seek views on the following:

(1) Should the common law rule under which an executor-nominate or executor-dative qua next-of-kin or surviving spouse acquires by confirmation a right of retention of the estate for payment of a debt due to himself as an individual apply, or continue to apply, to heritable property or should it be limited to moveable property?

(2) If the executor's right of retention is to apply to heritable property, it should have effect in a competition with adjudications of the heritable estate or with other competing rights of creditors secured over the estate only if the title to the right of retention is registered, in a form prescribed by statute, in the property registers. The criterion of the executor's preference should be the registration of his title rather than the confirmation in his favour.

(3) The prescribed form of notice of the executor's title should specify the debt due to the executor and include a description of the heritable estate affected by the executor's right of retention. Forms of discharge, restriction and possibly assignation should also be prescribed by statute.

(Proposition 7.9).

PART VIII

REAL DILIGENCES ENFORCING DEBITA FUNDI AND RELATED MATTERS

(1) Introductory

8.1 In this Part, we consider two rarely used forms of real diligence for the enforcement of what are called debita fundi, namely:

(a) adjudication on a debitum fundi, which differs in material respects from an ordinary adjudication for debt; and

(b) poinding of the ground, which differs in material respects from an ordinary or "personal" poinding.

A debitum fundi has been defined as "a real debt or lien over land, which attaches to the land itself, into whose hands soever it may come".[1] The category of debita fundi consists of the following types of debt:

(a) debts secured over land by a voluntary heritable security, now restricted to standard securities;[2]

(b) feuduties due to superiors;

(c) ground annuals due to the creditor in the ground annual;

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[1] Bell's Dictionary (7th edn.) s.v. "debitum fundi".

[2] A debt secured by an assignation of a lease, even a registered long lease, is not a debitum fundi: Luke v. Wallace (1896) 23 R. 634. This rule does not appear to be affected by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s.3 (creation of real conditions in assignations of certain long leases).

(d) real burdens for the payment of money imposed in a disposition of land granted by the creditor in the burden in favour of the original debtor; and

(e) a charging order made by a public authority in favour of itself or another person under a specific enactment, which order has the effect of charging and burdening the land with a debt payable to the authority or person.

We revert to charging orders in Part IX below.

(2) The present law

8.2 Adjudication on a debitum fundi. An adjudication on a debitum fundi differs from an ordinary adjudication for debt in the following respects.

(1) It is available even where the property has ceased to be owned by the debtor, as where the debtor has conveyed the property to a third party under burden of the debitum fundi.[1]

(2) An adjudication on a debitum fundi is excepted from the system of equalisation of diligences introduced by the Diligence Act 1661.[2]

(3) The preference of an adjudger on a debitum fundi depends not on the date of the decree of adjudication or

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[1] Graham Stewart, p.593.

[2] See Discussion Paper No.79 on Equalisation of Diligences published of even date with the present Paper.

completion of title on the adjudication but on the date of infeftment creating the prior real right.[1]

(4) Completion of title by registration of an adjudication on a debitum fundi accumulates prior interest and transforms it into a principal sum bearing interest, but the adjudger's preference by virtue of his debitum fundi over other adjudgers does not extend to interest which is treated as a personal debt for this purpose. In order to obtain a preference for interest on the accumulated sum, the creditor in the debitum fundi may have resort to a complicated procedure which involves obtaining decree in an action of poinding of the ground, and then raising an action of adjudication proceeding on the debt as the ground and the decree of poinding of the ground as the warrant. The decree of adjudication accumulates the arrears of interest and transforms them into a real debt having a preference over ordinary adjudications.[2]

(5) Under the Debtors (Scotland) Act 1937, a time to pay direction in a decree, or a time to pay order, such as are introduced by that Act, will preclude or affect an ordinary adjudication for debt but not an adjudication on a debitum fundi.[3]

8.3 Adjudications enforcing ground annuals under section 23(5) of the Conveyancing (Scotland) Act 1924. Under this provision, where a ground-annual falls into arrears for two years together, the creditor holding a duly registered title thereto is entitled to

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[1] Graham Stewart pp.593-594

[2] Graham Stewart, p.593; Encyclopaedia, vol. 1, p.143.

[3] Section 15(1).

raise an action of adjudication against the proprietor of the land out of which the ground-annual is payable, and against postponed creditors. The effect of non-payment for two years is that the proprietor forfeits his rights to the lands and accordingly the decree of adjudication, unlike an ordinary adjudication for debt, declares that the land, and unpaid rents, belong to the adjudging creditor absolutely. On registration of the decree in the property registers, the lands are disencumbered of rights and burdens postponed to the ground annual. The effect is similar to a decree of declarator of irritancy of a feu for non-payment of feuduty. Such an adjudication therefore differs from a redeemable adjudication enforcing a debitum fundi and is excluded from our present proposals. Ground annuals will eventually wither away in any event.[1] On the other hand, a redeemable adjudication enforcing arrears of ground annual (of less than two years) would be covered by our proposals.

8.4 Poinding of the ground. Poinding of the ground "is that diligence by which a creditor in a debitum fundi can attach the moveables on the ground in so far as these belong to or are available to his debtor or his successor in the lands, but that only so long as they remain thereon and have not been transferred to a bona fide purchaser or carried off under complete diligence".[2] The diligence takes the form of a court action which may be brought in the Court of Session or the sheriff court.[3] The diligence proceeds on the document creating the prior real right. The summons specifies the creditor's title, describes the lands and cites the proprietor and any tenants as defenders. The diligence

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1 As a result of the Land Tenure Reform (Scotland) Act 1974, no new ground annuals may be created (s.2) and existing ground annuals are gradually being redeemed (ss.4 to 6).

2 Graham Stewart, p.493.

3 Maxwell, Court of Session Practice pp. 365-6; Dobie, Sheriff Court Practice pp.521-522.

attaches all the moveables of the proprietor on the ground, and also any tenant's moveables on the ground to the extent of his rents past due and current. The goods of third parties are not otherwise attachable.[1] The conclusion or crave is for warrant to search for, poind and distrain the moveable goods on the ground, for payment of the debitum fundi and meantime for warrant to inventory and secure. It is the service of the summons or initial writ which imposes the nexus on the moveables on the ground.[2] In the sheriff court the warrant to inventory is included in the first deliverance ordaining service and is executed by an officer of court (messenger-at-arms or sheriff officer). In the Court of Session, a warrant to inventory at the outset of the action can be obtained from the Lord Ordinary in Chambers on a note signed by the solicitor.[3] Decree in the Court of Session was originally a warrant for letters of poinding under the Signet though the Debtors (Scotland) Act 1987, which abolishes letters of poinding,[4] provides that the decree itself authorises poinding of the ground.[5]

8.5 A poinding of the ground differs from a personal poinding in the following respects.[6]

(1) Poinding on the ground proceeds on an infeftment or real right burdening the land, whereas personal poinding proceeds on a personal obligation to pay a debt.

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[1] Thomson v. Scoular (1882) 9 R. 430; Kelly's Trs. v. Moncrieff's Tr. 1920 S.C. 461.

[2] Lyons v. Anderson (1880) 8 R. 24.

[3] Maxwell, Court of Session Practice p.366.

[4] Section 89.

[5] Section 87(5).

[6] See Graham Stewart, p.493.

(2) Poinding of the ground only affects moveables on the ground whereas personal poinding may affect moveables of the debtor anywhere.

(3) A personal poinding requires a decree (of court or of registration) against the debtor, a charge to pay the debt and is confined to the debtor's moveables whereas a poinding of the ground proceeds on a decree against the land; it does not require a charge, and can affect a tenant's moveables though the tenant is not personally liable for the debt.

(4) Personal poindings rank inter se by priority of completion whereas poindings of the ground rank inter se according to the priority of the infeftment on which they proceed.

(5) In a sequestration[1] or a liquidation,[2] a poinding of the ground executed within 60 days before the date of sequestration or the commencement of winding up, or (it seems) on or after that date, gives a preference for 1½ years' interest, whereas a personal poinding executed within that period or on or after that date gives no such preference.[3]

(6) By the Debtors (Scotland) Act 1987, a time to pay direction in a decree, or a time to pay order, under that Act will preclude or affect a personal poinding but not a poinding of the ground.[4]

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1 Bankruptcy (Scotland) Act 1985, s.37(6).

2 1985 Act, s.37(6); Insolvency Act 1986, s.185(1)(a).

3 1985 Act, s.37(4); 1986 Act, s.185(1)(a).

4 Section 15(1).

(3) Our proposals summarised

8.6 Our approach to reform may be summarised as follows.

(a) A preliminary question arises which goes beyond the reform of diligence enforcing debita fundi. We take the opportunity of proposing the abolition of one obsolete category of debita fundi, namely the right to create in future pecuniary real burdens constituted by reservation in conveyances of land. (Paras. 8.7 to 8.9).

(b) We propose that actions of poinding of the ground should be abolished. (Paras. 8.10 and 8.11).

(c) Since a debitum fundi is in the nature of a heritably secured debt, we consider that its enforcement should be by way of a remedy of sale, or foreclosure in default of sale, rather than by the old diligence of adjudication or the new diligence of adjudication and sale. (Paras. 8.12 to 8.17).

(d) Given that in some forms of debita fundi, (ie. voluntary heritable securities created by grant rather than reservation, feu-duties and ground annuals), the creditor has methods of enforcing his debt other than adjudication on a debitum fundi, we seek views on whether the new remedy of sale or foreclosure should be available to those creditors. (Paras. 8.18 to 8.23).

(4)Abolition of pecuniary real burdens

3.7 It is no longer competent to create, by reservation in a conveyance of land, a pecuniary real burden securing a debt payable by way of a periodical payment.[1] It appears to be generally accepted, however, that it is still competent to create by such reservation a pecuniary real burden securing a debt payable as a lump sum. Thus while section 9(3) of the Conveyancing and Feudal Reform (Scotland) Act 1970 prohibits the grant of any right over an interest in land for the purpose of securing any debt by way of a heritable security otherwise than in the form of a standard security, the section did not prohibit the creation of a pecuniary real burden by reservation.[2] Nevertheless, it is thought that pecuniary real burdens securing lump sums are never, or almost never, created in modern practice.[3]

3.8 In these circumstances, we suggest that pecuniary real burdens should be abolished. Their existence appears to us to complicate the law unnecessarily. Where the seller and purchaser of land agree that part of the price should be paid at a future date and heritably secured over the property sold in the meantime, they should in our view use a standard security rather than a reservation of a real burden in order to secure the debt.

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[1] Land Tenure Reform (Scotland) Act 1974, ss. 1 and 2.

[2] See K.G.C. Reid, "What is a Real Burden?" (1984) 29 J.L.S.S. 9 at pp. 12-13; Halliday, Conveyancing Law and Practice, vol. 2 (1986), p. 254, fn. 39a. Section 9(3) does appear to prohibit the constitution of a pecuniary real burden in favour of a third party in the dispositive clause of a conveyance of land.

[3] In Wells v. New House Purchasers Ltd. 1964 S.L.T. (Sh.Ct.) 2 Sheriff Allan Walker observed (at p. 4) that the practice of constituting pecuniary real burdens "is thought now to be obsolete".

8.9 We propose:

It should no longer be competent for the granter of a conveyance of land to create, by reservation in the conveyance, a real burden for the payment of money secured on the land.

(Proposition 8.1).

(5) Abolition of poinding of the ground

8.10 We suggest that the diligence and action of poinding of the ground should be abolished. In modern conditions, it does not seem to be necessary or justifiable to retain a rule which concedes to a creditor in a debt secured over land the further advantage that the security attaches the moveables on the land. This rule seems to us to be a relic of a bygone age when rights over land were conceded special privileges by the law. If there is a case for giving security without possession over moveables, it does not seem to us one which can be confined to heritable creditors.

8.11 We propose:

The diligence of poinding of the ground should be abolished.

(Proposition 8.2).

(6) New remedies of sale or foreclosure enforcing debita fundi, and interim possession

8.12 We do not think that a creditor seeking to enforce a debitum fundi on default should be required to use the new diligence of adjudication and sale. It should not, for example, be necessary for him to register a notice of litigiosity in the personal register, or a notice of adjudication in the property registers, because his security right has already been constituted and published by the registration in the property registers of the deed or charging order creating the debitum fundi. On the other hand, the procedure for enforcing standard securities[1] is not readily applicable to charging orders or pecuniary real burdens without modification. These orders and deeds creating such burdens do not contain standard conditions which are the basis of, and regulate to some extent, the procedure for enforcing standard securities. Moreover, a calling-up notice[2] is not, for example, appropriate for enforcement of an annuity charging order.[3]

8.13 It seems to us that separate statutory provisions are needed enabling the creditor to use the remedy of sale or foreclosure on the debtor's default. The procedure for enforcement should indeed be modelled on the procedure for enforcing standard securities commenced by default notice, and set out in sections 21 to 23 and 25 to 29 of the Conveyancing and Feudal Reform (Scotland) Act 1970.

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1 Conveyancing and Feudal Reform (Scotland) Act 1970, Part II.

2 Ibid., ss. 19 and 20.

3 For such orders, see Part IX below.

8.14 Thus where the debtor defaulted in payment eg. of an instalment of an annuity secured by a statutory charging order, or of a sum payable on demand at a term day under a real burden, the creditor would serve a default notice specifying the default.[1] The debtor or owner of the burdened land (if different), would have an opportunity to object to the default notice by summary application to the sheriff.[2] If the notice was upheld or no objections were made, the creditor would be entitled to sell the subjects.[3] But the debtor or owner would be entitled to redeem the property by paying the debt until sale or decree of foreclosure.[4] The provisions as to the manner of sale, disburdenment of the subjects sold, application of the proceeds of sale and foreclosure would be broadly as set out in sections 25 to 28 of the 1970 Act or the corresponding provisions on adjudication and sale.

8.15 Since however a charging order, like an adjudication, is not based on a prior voluntary deed (such as a standard security) granted by the debtor, the procedure would require to include provisions modelled on aspects of the procedure in the new diligence of adjudication and sale which have no counterpart in the legislation on standard securities. Thus the creditor would have power to require exhibition or delivery of unregistered writs,[5] and should be empowered to assign to a purchaser obligations of warrandice owed to the debtor or owner by his

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[1] Cf. 1970 Act, s. 21.

[2] Ibid. s.22.

[3] Ibid., s. 23(1) and (2).

[4] Ibid., s. 23(3).

[5] Proposition 5.4(5) (Para. 5.25); Proposition 5.9 (para. 5.41). It is thought that section 16 of the Land Registration (Scotland) Act 1979 does not apply to charging orders.

predecessors in title.[1]

8.16 As regards interim possession, maintenance and repairs, and the power to grant leases, pending sale or foreclosure, we think that unless the deed creating the debitum fundi expressly or by legal implication confers power on the creditor to take possession[2] or grant leases, the provisions proposed for adjudications should apply.[3] In other words, the debtor would be entitled to retain interim possession but should not have power to grant leases without the creditor's consent. The creditor should not be entitled to grant leases, and should only have limited rights to take entry.

8.17 We propose:

(1) **It should not be competent to enforce a debitum fundi either by the existing diligence of action of adjudication or by the proposed new diligence of adjudication and sale.**

(2) **A special procedure for sale or foreclosure, and entry into possession, should be available for enforcing debita fundi on the lines of the proposals in paras. 8.13 to 8.16 above.**

(Proposition 8.3).

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[1] Proposition 5.14(2) (para. 5.61).

[2] A disposition creating a pecuniary real burden and conferring a power of sale carries with it power to take possession: see Gloag and Irvine, p. 173.

[3] See paras. 3.66 to 3.69 in volume 1, and paras. 5.115 to 5.130 above.

(7) What debita fundi should be enforceable by the new remedies of sale or foreclosure?

8.18 We think that the new remedies of sale or foreclosure should be available to enforce those categories of statutory charging order securing an annuity which are at present enforceable by adjudication. Indeed we think that these remedies should be the typical ones for enforcing those charging orders. We describe these charging orders in Part IX below,[1] where we also consider what other remedies should be available to enforce such charging orders.[2] Recent statutes have enacted that two new forms of statutory charging orders securing a lump sum are enforceable as if the order was a standard security, and we also revert to these in Part IX.[3]

8.19 Moreover the new remedies should be available to enforce those pecuniary real burdens which are not enforceable by a conventional power of sale. Where there is such a power, we suggest that the creditor should be entitled to invoke that power or the new statutory remedies.

8.20 A voluntary heritable security, such as a standard security or bond and disposition in security, though at present in theory enforceable by adjudication on a debitum fundi, should not be enforeable by the new remedies since such securities have their own remedies of sale or foreclosure.

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[1] See para. 8.6 ff.

[2] See paras. 9.22 to 9.25.

[3] See para. 9.30 ff.

8.21 A superior has a wide range of remedies enabling him to enforce his right to feuduty. If we leave aside poinding of the ground (see above), these remedies consist of (1) a personal right to raise an action and use ordinary diligence against the vassal for the time being in respect of feuduties arising after infeftment until notice of change of ownership following a subsequent transmission of the feu; (2) the superior's hypothec over moveables on the ground; (3) adjudication on a debitum fundi which carries with it an active title to obtain decree of maills and duties; and (4) where the feuduty is 5 years in arrears, a right to annul the feu rights and all real rights derived from the vassal by obtaining decree of declarator of irritancy of the feu.[1] At present, an adjudication is seldom used since inter alia a declarator of irritancy gives an immediate irredeemable title. We think that these remedies, together with a reformed ordinary adjudication (as distinct from an adjudication on a debitum fundi) would adequately protect a superior. We invite views.

8.22 The remedies of a creditor in a ground annual[2] consist of (1) an action of poinding of the ground (the abolition of which is proposed above); (2) an adjudication on a debitum fundi which gives an active title to obtain civil possession by decree of maills and duties and draw the rents; (3) in a modern contract of ground annual assigning rents, a simplified process of maills and duties;[3] (4) a conventional irritancy (where the ground annual is in arrears for 2 years) or its statutory equivalent, an action for an irredeemable decree of adjudication under section 23(5) of the

[1] See Halliday, Conveyancing Law and Practice (1936) vol. 2, pp. 127-132; Feu-duty Act 1597 as amended by the Land Tenure Reform (Scotland) Act 1974, s.15.

[2] See Encyclopaedia, s.v. "Ground Annual", vol. 7, pp. 516-517.

[3] Conveyancing (Scotland) Act 1924, s. 23(4); Heritable Securities (Scotland) Act 1894.

1924 Act;[1] (5) an action and diligence on the personal obligation by the original disponee and his executors if that is still possible. Unlike the superior's position with respect to feuduty, the creditor in a ground annual has no personal right of action against a singular successor of the original disponee. We do not propose any change in statutory irredeemable adjudications under section 23(5) of the 1924 Act.[2] In the light of this, and despite the possible absence of any right to enforce the personal obligation, it is arguable that a creditor in a ground annual is adequately protected by the remedies other than adjudication on a debitum fundi and poinding of the ground. We invite views.

8.23 We propose:

(1) **The new remedies of sale or foreclosure mentioned at Proposition 8.3 (para. 8.17) above should be available to a creditor in those types of statutory charging order which are at present enforceable by adjudication.**

(2) **The new remedies should be available to a creditor in a pecuniary real burden created in a disposition for so long as such real burdens are extant. Where the disposition confers a conventional power of sale, the creditor should be entitled to invoke either the conventional power or the new remedies.**

(3) **Views are invited on whether the new remedies should be available to:**

(a) a superior enforcing feuduty; or

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[1] See para. 8.3 above.

[2] Idem.

(b) a creditor in a ground annual.

(Proposition 3.4).

PART IX

STATUTORY CHARGING ORDERS ON HERITABLE PROPERTY

(1) Introductory

9.1 The name "charging order" is applied by several enabling enactments to a special form of involuntary security established and regulated by the enactments concerned whereby a debt of a type specified in the enactment may be secured over land. All types of charging order which we have traced can only be made by a public authority (such as a local authority,[1] or government department,[2] or statutory board[3]). Normally the charging order secures a debt due to the public authority arising out of an advance of public money by the public authority, or expenditure incurred by it, under the enactment. Occasionally, the public authority is empowered to make a charging order in favour of a private person eg. to secure a debt arising from expenses incurred by that person in pursuance of a statutory notice[4] or to secure a tenant's right to compensation or a landlord's right to repayment of compensation in respect of agricultural holdings.[5] The name "charging order" is an English legal term of art which has apparently entered Scots law through the practice of copying or

[1] eg. Building (Scotland) Act 1959, Sch. 6; Sewerage (Scotland) Act 1968, s. 47; Housing (Scotland) Act 1987, Sch. 9; Water (Scotland) Act 1980, s. 65; Civic Government (Scotland) Act 1982, s. 103; Health and Social Services and Social Security Adjudications Act 1983, s. 23.

[2] eg. Secretary of State for Scotland: see Agricultural Holdings (Scotland) Act 1949, ss. 70 and 82; Agriculture Act 1967, Sch. 3, para. 7.

[3] eg. Scottish Legal Aid Board: see Civil Legal Aid (Scotland) Regulations 1987 (S.I. 1987/381) reg. 40.

[4] See eg. Water (Scotland) Act 1980, s. 65(1); see also Housing (Scotland) Act 1966, s. 30(1) as originally enacted; Cochrane Law of Housing in Scotland (1976) p. 42.

[5] Agricultural Holdings (Scotland) Act 1949, ss. 70 and 82.

extending to Scotland legislation for England and Wales.[1] In England, the name may also refer to an order made by a court imposing a charge (analogous to a pecuniary real burden) to secure a private law judgment debt,[2] but judicial charging orders are virtually unknown in Scotland.[3]

9.2 The law on charging orders in Scotland has not previously been reviewed as an autonomous topic by any official advisory body. In attempting such a review, we have two main objectives. The first is to make proposals on the enforcement of such orders having regard to our proposals in Part VIII that they should not be enforceable as an adjudication on a debitum fundi but by special remedies of sale or foreclosure. The second objective is to seek views on whether or how far the specific enabling enactments, which have developed piecemeal, should be harmonised or replaced by a uniform code with a view to eliminating anomalies and simplifying and modernising the law.

9.3 We have not researched charging orders under local Acts and there may be charging orders under public general Acts which we have not, or not yet, identified. We should be glad to be referred to any such local or public general Act.

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[1] See eg. Housing Act 1957, ss. 14 and 15 (E & W).

[2] See the Charging Orders Act 1979 (E & W) implementing the Law Commission's Report on Charging Orders (Law Com. No. 74; Cmnd. 6412).

[3] See however Improvement of Land Act 1864, s. 57; see also Solicitors (Scotland) Act 1980, s. 62 (court may declare solicitor entitled to a "charge" for expenses over property preserved or recovered for client in proceedings). Charges under this section are not registrable in the property registers and are not considereed in this Discussion Paper.

9.4 Similar statutory burdens still extant? There was at one time a legislative practice of making certain public expenses or rates assessments into real burdens normally for a limited period of years and valid against bona fide purchasers and lenders of the burdened lands even without registration in the property registers.[1] Clearly provisions of this type were objectionable as breaching the faith of the registers and we are not aware that any are still in force. Another device similar to a charging order was that of rendering a public debt a real burden which affected purchasers, lenders and others only if a notice of the burden[2] or a decree declaring it[3] had been registered in the property registers. We should be glad to be referred to any such provision which is still in force.

9.5 Improvement of Land Act 1864. The old Scots Entail Acts enabled heirs of entail to "charge" the entailed estate with the cost of improvements but this seems to have been effected by

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[1] Eg. Edinburgh and Leith Sewerage Act 1864, s. 73, (unpaid assessments to be real burdens on lands for 3 years): considered in Macknight v. Oman's Tr. (1872) 11 M. 154; Greenock Police Act 1877, s. 408 (expense of streets and sewers recoverable from proprietor to be real burden and charge preferable to all subsequent incumbrances and charges): considered Greenock Board of Police v. Liquidator of Greenock Property Investment Society (1885) 12 R. 832; Burgh Police (Scotland) Act 1892, s. 366 (special sewer rates real burden for 7 years).

[2] Eg. Glasgow Streets, Sewers and Buildings Consolidation Order Confirmation Act 1937, s. 236(1), considered in Pickard v. Glasgow Corporation 1970 S.L.T. (Sh. Ct.) 63.

[3] Eg. Burgh Police (Scotland) Act 1903, s. 71 (compensation for ground taken to form hollow square to be a charge on properties of other owners of square, and to be a real burden on registration of sheriff court declarator of charge in property registers).

bonds or court decrees, not charging orders. The Improvement of Land Act 1864,[1] a Great Britain Act which is still in force, enabled a limited owner (such as an heir of entail) assessed with the cost of drainage or other public improvement works, to apply to (now) the Secretary of State for an absolute order charging the assessed money on the inheritance (the entailed estate) by means of a "rent-charge" (an English type of annuity payable out of land). This Act was probably the model for modern Scots charging orders.[2] Since the Act would be difficult to modernise, is now rarely if ever used in Scotland, and differs in many details from modern enactments on charging orders, we exclude it from this Discussion Paper.

(2) Categories of charging order

9.6 Until recently, the enactments on charging orders generally constituted the debt into an annuity enforceable as if it were a feuduty. Under the two most recent enactments, however, the debt remains due as a lump sum but is enforceable as if the charging order were a standard security granted by the debtor in favour of the public authority creditor. These two types of charging order may respectively be called "annuity charging

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[1] Ss. 57 to 72. The Act is briefly considered in Rankine, Landownership (4th edn.) p. 1137: see also Halsbury, Laws of England, vol. 1, para. 1203 et seq.

[2] It is still applied in part by the Water (Scotland) Act 1980, s. 65(7): see para. 9.23 below.

[3] Building (Scotland) Act 1959, Sch. 6; applied in part by Agriculture Act 1967, Sch. 3, paras. 7(1) and 11; Housing (Scotland) Act 1987, ss. 109(5), 131, 164(4) and Sch. 11, para. 11(3), Sch. 9, applied in part with modifications by Civic Government (Scotland) Act 1982, s. 103; Water (Scotland) Act 1980, s. 65; applied with modifications by the Agricultural Holdings (Scotland) Act 1949, ss. 70 and 82 and by the Sewerage (Scotland) Act 1968, s. 47.

orders"[3] and "lump sum charging orders".[1] Within each group there is substantial similarity (though not identity) but as between the two groups there are considerable differences.

(3) Annuity charging orders

9.7 In this Discussion Paper, we assume that annuity charging orders should be retained. We observe that the orders generally provide for a low and slow rate of recovery and it may be that they are nowadays not frequently used. We hope to obtain information on that matter in due course. We suggest, however, that if they are to be retained, the opportunity should be taken to modernise and harmonise or codify the relevant legislation.

9.8 A uniform code? We suggest that a uniform statutory code regulating the incidents and effects of annuity charging orders should be enacted. The existing legislation has developed piecemeal. Although we have identified 7 statutory codes introducing annuity charging orders, in fact only 3 codes specifically regulate the incidents and effects of a charging order. Each of these 3 codes is applied by one or two other codes: the Building Act by the Agriculture Act; the Housing Act by the Civic Government Act; and the Water Act by the Agricultural Holdings Act and the Sewerage Act.[2] It would, we suggest, be more satisfactory if there were a single set of general clauses which could be applied by other existing and future statutes. (To distinguish these other statutes from the general clauses, we refer to them as the "special acts".) This would reduce the number of

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[1] Health and Social Services and Social Security Adjudications Act 1983, s. 23; Civil Legal Aid (Scotland) Regulations 1987 (S.I. 1987/381), reg. 40.

[2] See para 9.6, fn. 3.

separate and repetitive enactments, eliminate unnecessary and anomalous differences, and make it easier to keep the law up-to-date.

9.9 We propose:

The separate enactments regulating the incidents and effects of annuity charging orders should be replaced by a uniform statutory code.

(Proposition 9.1)

9.10 Appeals against charging orders. In the case of Building Act and Agriculture Act charging orders,[1] it is competent to appeal to the sheriff against the making of the order. Such an appeal is not competent in the case of other charging orders. The grounds of the appeal are not specified.

9.11

(1) Should a uniform code on charging orders provide for an appeal to the sheriff against the making of the order?

(2) Alternatively should the availability of such an appeal be left to be regulated by the special act?

(Proposition 9.2).

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[1] Building (Scotland) Act 1959, s. 16(1)(g); Agriculture Act 1967, Sch. 3, paras. 7(1) and 11. The order does not become operative until the appeal days have elapsed or an appeal has been determined or abandoned: 1959 Act, s.16(4) and Sch. 6, para. 3.

9.12 The annuity. The charging order provides and declares that the building or land concerned is thereby charged and burdened with an annuity to pay the amount of the debt in question. Of the provisions defining the annuity, the Housing Act is typical:

> "The annuity charged shall be such sum, not exceeding such sum as may be prescribed, as the local authority may determine for every £100 of the said amount and so in proportion for any less sum, and shall commence from the date of the order and be payable for a term of 30 years to the local authority".[1]

The power to prescribe by statutory instrument the maximum annuity in Housing Act charging orders has not been exercised. The corresponding power has been exercised in the case of the Water Act.[2] The Building Act itself fixes the annuity at £6 for every £100.[3] These differences of detail appear unnecessary. All of these Acts specify a term of 30 years.[4]

9.13 We propose:

> **The amount of the annuity fixed by a charging order should be determined by the creditor subject to such maximum as may be prescribed by statutory instrument**

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[1] Housing (Scotland) Act 1987, Sch. 9, para. 2.

[2] Water Charging Orders (Annuity) (Scotland) Regulations 1949 (S.I. 1949/1214) fixing a maximum of £5 for every £100 of the debt.

[3] Building (Scotland) Act 1959, Sch. 6, para. 2.

[4] In the case of the Water (Scotland) Act 1980, s. 65, the 30 years begin on the date when the local authority were satisfied as to the due execution of the work.

and the annuity should be for a term of 30 years from the date of the charging order.

(Proposition 9.3).

9.14 Form of charging order. The Housing Act [1] and the Water Act [2] provide that the charging order shall be in a form prescribed by statutory instrument. The Building Act [3] simply provides that the land burdened by the order shall be specified in the order.

9.15 We propose:

The form of a charging order should be prescribed by statutory instrument.

(Proposition 9.4).

9.16 Registration in property registers and preferences in ranking. The enabling statute directs that the charging order shall be registered in the property registers [4] or provides that it has no effect until so registered. [5] The Building and Housing Acts declare expressly that on registration, the annuity is to be a charge on

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[1] Housing (Scotland) Act 1987, Sch. 9, para. 3; see the Housing (Forms) (Scotland) Regulations 1974 (S.I. 1974/1932), Schedule, Form 18.

[2] Water (Scotland) Act 1980, s. 65(10); Water (Form of Charging Orders) (Scotland) Regulations 1949 (S.I. 1949/1215).

[3] Building (Scotland) Act 1959, Sch. 6, para. 1.

[4] Building (Scotland) Act 1959, Sch. 6, para. 4; Housing Act 1987, Sch. 9, para. 3.

[5] Water (Scotland) Act 1980, s. 65(4).

the land or premises concerned,[1] while the Water Act refers to an "annuity constituted a charge by a charging order". Though the concept of a "charge" is not a Scots legal term of art, it is construed to mean a pecuniary real burden running with the lands. The provisions on lump sum charging orders direct the creditor to intimate to the debtor in writing that they have made and registered the charging order and inform him of its effect.[2] This should apply also to annuity charging orders.

9.17 The Building, Housing and Water Acts have provisions on preferences in ranking which are similar in outline but differ in detail. The fullest provision is that in the Housing Act as modified by the Civic Government (Scotland) Act 1982 s. 108 (but only in relation to charging orders under that Act), which provides that an annuity constituted a charge by a duly registered charging order:

> "... shall have priority over--
>
> (a) all future burdens and incumbrances on the same premises, and
>
> (b) all existing burdens and incumbrances thereon except--
>
> (i) feuduties, teinds, ground annuals, stipends and standard charges in lieu of stipends or any sum secured by virtue of section 5(5) to (8) of the Land Tenure Reform (Scotland) Act 1974;[3]

[1] Building (Scotland) Act 1959, Sch. 6, para. 4; Housing (Scotland) Act 1987, Sch. 9, para. 4.

[2] eg. Health and Social Services and Social Security Adjudications Act 1983, s. 23(3).

[3] These provisions make money due to the superior for redemption of feu duty into a pecuniary real burden enforceable by the superior by the same remedies as feuduty.

(ii) any charges created or arising under any provision of the Public Health (Scotland) Act 1897[1] or any Act amending that Act, or any local Act authorising a charge for recovery of expenses incurred by a local authority, or under this Schedule or under the Building (Scotland) Act 1959;

(iii) any charge created under any Act authorising advances of public money".

(modifications by 1932 Act underlined).

It will be seen that para. (b)(ii) even as modified by the 1932 Act does not cover all types of charging order.[2] Similar criticisms may be made of the Building Act provisions which are in similar terms. The Water Act provision[3] gives priority over "all existing and future estates, interests and incumbrances" with exceptions which inter alia include feuduties and teinds but not ground annuals, stipend, standard charges or the superior's redemption money, and which include prior and future charging orders under the Housing Acts but not other Acts. The Water Act[4] further provides that annuities under that Act rank inter se by priority of date of registration but does not make similar provision as to ranking in competition with other annuity charging orders under other Acts.

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[1] Repealed by the Civic Government (Scotland) Act 1932.

[2] Eg. those under the Water (Scotland) Act 1980, s. 65, the Sewerage (Scotland) Act 1968, s. 47 or the Agriculture Act 1967, Sch. 3, paras. 7 and 11.

[3] Water (Scotland) Act 1980, s. 65(5).

[4] Idem.

9.18 We suggest that a uniform code should eliminate these anomalous differences. Some further points merit consideration. First, the general effect of the provisions on preferences is that a charging order has priority over all existing and future voluntary heritable securities, adjudications for debt and inhibitions. While we note that by contrast the new lump sum charging orders take priority in ranking by the dates of registration in the property registers,[1] we can see there may be a policy justification for the absolute preference accorded to annuity charging orders. We seek views on this matter. Second, under the Building, Housing and Water Acts, the charging order does not have priority over certain other specified charging orders, nor over "any charge created under any Act authorising advances of public money". Literally construed, this latter provision seems to cover any Act authorising an advance of public money whether or not the charge secures repayment of the advance, but the provision is somewhat ambiguous. We suggest that it should be expressly confined to cases where the charge secures repayment of the advance. We seek views however on whether any such statute is still in force. Third, where the sum secured is an advance of money,[2] the debt is voluntarily incurred by the debtor and may infringe an inhibition. On the other hand, the charging order itself is not a deed voluntarily granted by the debtor, and so, under the rules on inhibitions, will not be rendered reducible by a previously registered inhibition. This presumably explains why the enactments on charging orders do not expressly provide that such orders will have priority over inhibitions. Such a provision would be unnecessary. We see no reason to change this result. Fourth, the Agricultural Holdings (Scotland) Act 1949, s. 82(2) (power of landlord to obtain charge on holding in respect of compensation paid by him) provides that an annuity constituted a charge by a

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[1] See para. 9.32 below.

[2] Eg. Agriculture Act 1957, Sch. 3, para. 7.

charging order "shall rank after all prior charges heritably secured thereon".[1] It would be possible for the "special act" to vary the uniform general clauses on the ranking of an annuity charging order, and it may be that these clauses are not properly applicable to the tenant's interest in an agricultural holding. Fifth, reference is made to the question raised in volume 1 as to whether a mandatory notice of litigiosity and period of delay should be required as a prelude to the registration of a charging order whose priority in ranking depends on priority in time of registration in the property registers.[2]

9.19 We propose:

(1) **Uniform provision on the registration and ranking of annuity charging orders should be made on the following lines.**

(2) **An annuity charging order should have no effect until a charge or real right to the annuity is constituted by registration of the order in the property registers, following the registration of a notice of litigiosity and the expiry of a mandatory period of delay as mentioned in Proposition 3.5(5) (para. 3.43).**

(3) **The person registering the charging order should intimate its registration to the debtor, and inform him of its effect, in writing.**

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[1] The 1949 Act s. 82 applies the provisions of the Water (Scotland) Act 1980 s. 65 relating to charging orders in favour of a private person, but does not apply the ranking provisions in subsection (5) of that section. Compare the 1949 Act, s. 70.

[2] See Proposition 3.5(5) (para. 3.43).

(4) Subject to paragraph (6) below, in an annuity secured by a charging order should have priority in ranking over all real burdens and incumbrances affecting the property registered in the property registers (whether before or after the date of registration of the charging order) other than those mentioned in the next paragraph.

(5) Subject to paragraph (6) below, in a competition between an annuity secured by a charging order and any of the following burdens or incumbrances affecting the property -

(a) feuduties, ground annuals or redemption money secured under section 5(5) to (8) of the Land Tenure Reform (Scotland) Act 1974;

(b) teinds, stipends or standard charges in lieu of stipends;

(c) any annuity or lump sum constituted as a charge or real right -

(i) by any charging order made under any of the public general statutes relating to charging orders; or

(ii) by or under any local Act authorising the charge for the recovery of expenses incurred by a local authority; or

(iii) (possibly) by or under any other Act authorising the charge for the recovery of an advance of public money,

the priority in ranking should be determined in accordance with the priority in time of the registration of the first-mentioned charging order and the constitution of the competing burden or incumbrance as a real right.

(6) A charging order made under the Agricultural Holdings (Scotland) Act 1949, s. 82(2) (power of landlord to obtain charge on holding in respect of compensation paid by him) should continue to rank in competition with other real burdens and incumbrances by priority of the respective dates of registration in the property registers.

(7) Since a charging order is not a deed voluntarily granted by the debtor, such an order should continue to have priority over an inhibition, whenever registered, affecting the property charged, under the common law rules on the ranking of inhibitions.

(Proposition 9.5).

9.20 Conclusive evidence of due creation of charge etc. The Building and Housing Acts provide that a charging order duly recorded is conclusive evidence that the charge has been duly created in respect of the land or premises specified in the order.[1] The Water Act[2] makes more elaborate provision as follows:

> "A charging order recorded in the appropriate Register of Sasines shall be conclusive evidence that all notices, acts and proceedings by this Part of this Act required in

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[1] Building (Scotland) Act 1959, Sch. 6, para. 5; Housing (Scotland) Act 1987, Sch. 9, para. 5.

[2] Water (Scotland) Act 1980, s. 65(6).

connection with the execution of the work or with reference to or consequent on obtaining or making such an order have been duly served, done and taken, and that the charge has been duly created and is a valid charge on the house and land declared to be subject thereto".

No equivalent provision is made with respect to the lump sum charging orders discussed below. "Ouster clauses" excluding judicial review of a public authority's acts are no longer regarded with favour by the courts or Parliament and are frequently circumvented by the courts.[1] We think that insofar as such a provision is intended to protect the public authority or holder of the charging order, it should be repealed and not re-enacted in any uniform code. Where, however, the public authority or other holder of the charging order exercises a remedy of sale in an adjudication enforcing a charging order, a bona fide purchaser should be entitled to rely on the charging order without prejudice to the right of any person challenging the order to claim damages from the public authority or holder of the order.

9.21 We propose:

(1) **A charging order duly registered in the property registers should continue to be treated by statute as conclusive evidence that:**

(a) **the charge has been duly created in respect of the property specified in the order; and**

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[1] Moss' Empires Ltd. v. Glasgow Assessor 1917 S.C. (H.L.) 1; Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147; McDaid v. Clydebank District Council 1984 S.L.T. 162.

(b) that prior acts of the authority which made the order or the person in whose favour the order was made, being acts on which the validity of the order depends, have been duly performed,

in any question between a party challenging the order and a bona fide purchaser of the property from the holder of the charging order who has exercised his remedy of adjudication and sale.

(2) It should be expressly enacted however that the foregoing rule is without prejudice to any right of the party challenging the order to claim damages from the public authority or person in whose favour the order was made for loss arising from any act or omission of that authority or person.

(3) A duly registered charging order should no longer be conclusive evidence of the matters referred to in para. (1) above in any question between a party challenging the order and the public authority which made the order or person in whose favour the order was made.

(Proposition 9.6).

9.22 Remedies of holder of charging order. The Building and Housing Acts provide that "every annuity charged by a charging order may be recovered by the person for the time being entitled to it by the same means and in the like manner as if it were feuduty".[1] The Water Act has a similar provision but in place of

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[1] Building (Scotland) Act 1959, Sch. 6, para. 6; Housing (Scotland) Act 1987, Sch. 9, para. 6.

the reference to feuduty, it refers to "a rent charge secured on the subjects by absolute order made under and in terms of the Improvement of Land Act 1864".[1] The last-mentioned Act provides that a rent charge under that Act may be recovered "as to lands in Scotland by the same means, and in the like manner in all respects, as any feu duties or rent or annual rent or other payment out of the same lands would be recoverable".[2] Though a superior has a personal action for feuduty against the vassal for the time being, the House of Lords have held,[3] on the construction of identical words in a private Act, that such a provision does not impose on a landowner a personal obligation so as to render him liable in an action of payment and this decision may be taken as applying to the 1864 Act. The Building and Housing Act provisions are more favourable to a personal action, since inter alia they do not refer to "a payment out of the lands". Nevertheless, the case cited suggests that even in their case a personal action is not competent. Thus Lord Watson observed:[4]

> "... it is necessary to keep in view the fact that a personal action is not an action for the recovery of a charge upon land. It is a misnomer, a contradiction in terms, to say that a creditor is recovering a charge on land when he brings a personal action of debt for the purpose of obtaining a decree under which he can recover payment out of any part of the debtor's estate...".

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1 Water (Scotland) Act 1980, s. 65(7).

2 Improvement of Land Act 1864, s. 63. See para. 9.5 above.

3 Scottish Drainage and Improvement Co. v. Campbell (1889) 16 R. (H.L.) 16; affg. (1887) 15 R. 103. See Halsbury, Laws of England, vol. 1, p. 649, fn. 5 which states that the decision would seem to be applicable to all charges whether created under the 1864 Act or the private Act of an improvement company.

4 (1889) 16 R. (H.L.) 16 at p. 20.

And in the Inner House Lord President Inglis remarked:[1]

> "... where a security is constituted in a form created by an Act of Parliament which in itself creates no personal obligation against anyone, it would require very clear language in other portions of the statute to extend the nature of the obligation, so as to give a right to enforce it against the possessor of the lands. One would expect to find the personal obligation expressed in the document itself".

On this approach, the remedy which the Building and Housing Act (as well as the Water Act) provisions give to the holder of the charge is the remedy applicable to a feuduty insofar as it is a charge upon land and not insofar as it is a matter of personal contract.[2]

9.23 It is unclear whether a charging order is enforceable by an action of declarator of irritancy where the annuity is two years in arrears on the analogy of the feudal superior's irritancy.[3] Such a drastic remedy goes far beyond the normal remedies for enforcing real burdens and we suggest that it should be made clear by statute that the remedy is not available to the holder of a charging order.

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[1] (1887) 15 R. 108 at p. 112.

[2] Cf. 16 R. (H.L.) at p. 20 per Lord Watson. See also Mackintosh v. Mackintosh (1870) 8 M. 627 (construing similar rent-charge provisions in the Public Money Drainage Act 1846) in which it was held that those provisions did not create a personal obligation of payment: "... the real debtor to the Government under these clauses is the land itself, and not the proprietor of the land", per Lord President Inglis at p. 633.

[3] As to such an irritancy, see para. 8.12 above.

9.24 There is no doubt that the holder of a charging order may enforce his debt by an adjudication on a debitum fundi or poinding of the ground. We have proposed above the abolition of poinding of the ground[1] and that charging orders should be enforceable by new remedies of sale or foreclosure in place of an adjudication on a debitum fundi[2] which would no longer be competent. We now propose that the new remedies should be the only ones available for enforcing statutory charging orders, unless the special act otherwise provides. It is thought that under the present law, the adjudication recovers the amount of the debt and not merely the arrears of the annuity and this should be made clear by statute.

9.25 We propose:

(1) **If as proposed at Proposition 8.4 (para. 8.23) a statutory charging order presently enforceable by adjudication on a debitum fundi is in future to be enforceable by new remedies of sale or foreclosure adapted to the enforcement of debita fundi, then those remedies should be the only ones available for enforcing such charging orders. In particular, the order should not be enforceable by irritancy of the feu or personal action for payment.**

(2) **It should be made clear by statute that the new remedies enforce the unpaid balance of the debt and not merely the unpaid arrears of the annuity.**

(Proposition 9.7).

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[1] Proposition 8.2 (para. 8.11).

[2] Proposition 8.4 (para. 8.23).

9.26 Assignation of charging order. The legislation normally provides that the charging order may be from time to time transferred in like manner as a bond and disposition in security and sums payable thereunder,[1] or as a standard security or rent charge.[2] Presumably charging orders in favour of public authorities are not assigned, except by statutory transmission on transfer of functions, but provision is necessary where the holder of the charging order is a private person.[3] We suggest that a form of assignation adapted to charging orders should be prescribed by statutory instrument.

9.27 We propose:

> **Charging orders should in principle be assignable where the holder of the order is a private person and the form of assignation should be prescribed by statutory instrument.**

(Proposition 9.8).

9.28 Redemption of annuity and discharge of order and annuity. The Building, Housing and Water Acts provide that the owner of or other person having an interest in the property charged by the charging order should be entitled to redeem the

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[1] Building (Scotland) Act 1959, Sch. 6, para. 7; Housing Act 1987, Sch. 9, para. 7.

[2] Water (Scotland) Act 1980, s. 65(8): for assignation of rent charges, see Improvement of Land Act 1864, s. 65 and Sch. C.

[3] Eg. Water (Scotland) Act 1980, s. 65(1); Agricultural Holdings (Scotland) Act 1949, ss. 72 and 80.

annuity on payment to the person entitled to the annuity of such sum as may be agreed, or in default of agreement, determined by the Secretary of State.[1] We see no need to change this provision but invite views. We suggest that the form of discharge of the debt or annuity and of the order should be prescribed by statutory instrument.[2]

9.29 We propose:

(1) Provision should be made for redemption of an annuity charged by a charging order on the lines of the existing provisions.

(2) The form of discharge of the annuity and charging order should be prescribed by statutory instrument and should be registrable in the property registers.

(Proposition 9.9).

(4) Lump sum charging orders

9.30 The present law. Two recent enactments enable a public authority to make a charging order under which a debt due to the authority is enforceable as a lump sum rather than by way of an annuity. Thus section 23 of the Health and Social Services and Social Security Adjudications Act 1983 (the 1983 Act) provides that where a person who avails himself of accommodation provided

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[1] Building (Scotland) Act 1959, Sch. 6, para. 8; Housing (Scotland) Act 1937, Sch. 9, para. 8; Water (Scotland) Act 1980, s. 65(9).

[2] Compare Health and Social Services and Social Security Adjudications Act 1983, s. 23(5); Civil Legal Aid (Scotland) Regulations 1987 (S.I. 1987/381), Form 2.

by a local authority in Scotland, England or Wales under certain Acts[1] fails to pay any sum assessed as due to be paid by him for the accommodation, and has an interest in land as defined, the local authority may make a charging order in their own favour and register it in the property registers. This section of the 1983 Act is not yet in force. The Civil Legal Aid (Scotland) Regulations 1987, [2] reg. 40, provides that where an assisted person owes contributions or other sums to the Legal Aid Fund, and property recovered or preserved in proceedings comprise an interest in land (as defined), the Scottish Legal Aid Board may make a charging order in its own favour and register the order in the property registers. On registration, the charging order creates a right which is deemed to be granted by the debtor in favour of the public authority creditor over the debtor's interest for the purpose of securing the debt and interest.[3] In the case of the 1983 Act, the debt secured apparently includes sums to become due in the future in respect of the provision of accommodation.[4]

9.31 It is provided that a charging order over an interest in land in which the debtor is uninfeft is as valid as if the debtor was infeft.[5] The forms of charging order and of discharge are prescribed.[6] The enactments both provide that the provisions on the enforcement of standard securities in the Conveyancing and Feudal Reform (Scotland) Act 1970 Part II will apply to such

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[1] Social Work (Scotland) Act 1968 and ss. 21 to 26 of the National Assistance Act 1948 (E. & W.).

[2] S.I. 1987/331 made under Legal Aid (Scotland) Act 1986, s. 36(2)(g).

[3] 1983 Act, s. 23(3); 1987 Regs., reg. 40(2).

[4] 1983 Act, s.23(3).

[5] 1983 Act, s. 23(4); 1987 Regs., reg. 40(3).

[6] 1983 Act, s. 23(5) (power not yet exercised); 1987 Regs., reg. 40(4) and Sch. 4, Forms 1 and 2.

charging orders,[1] subject to modifications by statutory instrument which have been made in the case of the 1987 regulations[2] and which have yet to be made in the case of the 1983 Act. The main substantive modification effected by the 1987 Regs. is that the charging order is not assignable.[3]

9.32 It appears that a lump sum charging order ranks in competition with diligences, securities and conveyances by priority of registration and does not have the special priority of annuity charging orders.

9.33 New remedies for enforcing lump sum charging orders. We have proposed in Part VIII[4] the enactment of a new procedure, modelled in part on Part II of the 1970 Act, for enforcing charging orders and other debita fundi by the new remedies of sale or foreclosure, and regulating interim possession. If this proposal is accepted, we suggest that it should apply to lump sum charging orders.

9.34 We propose:

> **If as proposed in Proposition 8.3 above, a special procedure for sale or foreclosure, and entry into possession, is made available by statute for enforcing debita fundi, that procedure should also be available for enforcing lump sum charging orders in place of the remedies for enforcing standard securities.**

(Proposition 9.10).

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[1] 1983 Act, s. 23(3); 1987 Regs., reg. 40(5).

[2] 1987 Regs., reg. 40(5).

[3] Idem., disapplying s. 14 of the 1970 Act.

[4] Proposition 8.3(2) (para. 8.17).

PART X: SUMMARY OF PROVISIONAL PROPOSALS IN VOLUME 2.

Note: Attention is drawn to the notice at the front of this volume concerning confidentiality of comments. If no request for confidentiality is made, we shall assume that comments submitted in response to this Discussion Paper may be referred to or attributed in our subsequent report.

Part V: Adjudication and sale: further proposals

(1) Creditor's title to adjudge

5.1

(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.

(Para.5.3).

(2) **Conjoining creditors?**

5.2

(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?

(Para. 5.6).

(3) **Procedure in obtaining adjudication**

5.3

(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); refer to any "interim" notice of litigiosity already registered in terms of Proposition 3.5 (para. 3.43 in volume 1); state 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 state 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?

(Para. 5.15).

(4) **Notice of adjudication**

5.4

(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.

(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.

(Para. 5.25).

(5) Intimation of registration of notice of adjudication

5.5

(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.

(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.

(Para. 5.31)

(6) Effects and incidents of adjudication

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

5.6

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.

(Para. 5.33)

(b) "Apparent insolvency"

5.7

If as we proposed above an expired charge becomes an essential 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.

(Para. 5.35).

(c) Vesting "tantum et tale"

5.8

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.

(Para. 5.38).

(d) Assignation of writs

5.9

(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.

(Para. 5.41).

(e) Character of debt as heritable or moveable

5.10

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.

(Para. 5.45).

(7) Adjudger's remedies against adjudged subjects

Power of sale

(i) Notice of commencement of sale procedure

5.11

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

(Para. 5.48).

(ii) Requirements as to mode and procedure of sale

5.12

(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.

(Para. 5.53).

(iii) Sale in lots

5.13

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.

(Para. 5.55).

(iv) Disposition on sale and warrandice

5.14

(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.

(Para. 5.61).

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

5.15

(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 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.

(Para. 5.65).

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

5.16

(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.

(Para. 5.79).

Protection of purchaser's title from reduction by an inhibitor

5.17

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.

(Para. 5.83).

Application of proceeds of sale: ranking problems

5.18

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 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.

(Para. 5.92).

Inhibitor's title to demand payment

5.19

(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.

(Para. 5.94).

Preferred debts

5.20

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.

(Para. 5.98).

Discharge on consignation

5.21

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.

(Para. 5.100).

Foreclosure in default of sale

5.22

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.

(Para. 5.114).

Powers of entry into possession

5.23

(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 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.

(Para. 5.124).

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

5.24

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

(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.

(Para. 5.130).

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

5.25

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

(2) Unless 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 his 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 exercise his remedies 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 exercise remedies.

(5) Where the adjudication of a co-adjudger having an exclusive title to exercise remedies 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 exercise remedies.

(6) Where the sheriff makes an order granting a co-adjudger an exclusive title to exercise remedies, 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 exercise remedies.

(Para. 5.140).

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

5.26

(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 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 debt 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.

(Para. 5.147).

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

(a) Assignation of adjudications

5.27

(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

(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).

(Para. 5.160).

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

5.28

(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.

(Para. 5.167).

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

5.29

(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.

(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.

(Para. 5.171).

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

5.30

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.

(Para. 5.173).

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

5.31

(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.

(Para. 5.177).

(f) Extinction of adjudication

5.32

(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; and

(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.

(Para. 5.184).

(9) Solicitors' functions and fees

5.33

(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

(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.

(Para. 5.191).

(10) Report on sale and diligence expenses

5.34

(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.

(Para. 5.194).

(11) **Miscellaneous**

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

5.35

(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 above.

(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.

(Para. 5.201).

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

5.36

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 merely 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.

(Para. 5.205).

(c) Time orders under Consumer Credit Act 1974

5.37

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.

(Para.5.208).

(d) Summary warrants for the recovery of final debts

5.38

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.

(Para. 5.210).

Part VI: Competitions between adjudications and other rights and related matters

Computation of amount of adjudger's debt under common law rules of ranking

6.1

In any process of ranking on adjudged property, or on the debtor's general estate other than a process to which the Bankruptcy (Scotland) Act 1985, Sch. 1, para. 1, applies, the amount of the debt which the adjudger may claim for ranking purposes should be the amount outstanding at the date when the process of ranking was commenced.

(Para. 6.7).

Restriction of prior heritable securities

6.2

A notice of adjudication should have the effect of restricting a prior heritable security for future advances under section 13 of the 1970 Act only if actual notice of the registration of the adjudication is given to the creditor in the heritable security.

(Para. 6.14).

Sequestration: vesting in trustee

6.3

(1) As under the present law, in the case of a sequestration affecting feudal property and registrable long leases, the act and warrant issued on confirmation of the permanent trustee's appointment should confer on the trustee a personal right convertible into a real right on registration in the property registers. Section 31(1)(b) of the Bankruptcy (Scotland) Act 1985 should be amended to secure that for the purpose of vesting in, and completion of title to, the debtor's feudal property and registrable long leases, the act and warrant would no longer have effect as an adjudication for debt or in security, but subject to the proposals in para. (2),would continue to have effect as a decree of adjudication in implement of sale (whether the legislation expressly refers to such a decree or defines the effect of the act and warrant in similar terms).

(2) The present rules should continue whereby:

(a) the property vests in the permanent trustee tantum et tale; and

(b) the trustee's title is not affected by personal obligations granted by the debtor.

(Para. 6.24).

Stoppage of adjudication: further proposals on vesting in trustee

6.4

(1) On or after the date of sequestration of a debtor's estate, it should not be competent for a creditor:

(a) to commence a diligence of adjudication and sale; or

(b) to proceed with an adjudication and sale already begun unless a contract of sale of the subjects has been concluded in exercise of the adjudger's power of sale or unless decree of foreclosure has been granted.

Section 37(8) of the Bankruptcy (Scotland) Act 1985 should be amended accordingly.

(2) On the date of sequestration of a debtor's estate, property belonging to the debtor which has been adjudged should vest in the trustee unless before that date:

(a) the property has been sold by the adjudger in implement of his power of sale and the debtor has been feudally divested by the purchaser's infeftment; or

(b) decree of foreclosure has been granted in favour of the adjudger.

(3) Where the adjudger has concluded a contract of sale of adjudged subjects which thereafter vest in the trustee at the date of sequestration, then:

(a) the trustee should be bound to concur in or to ratify the adjudger's disposition implementing the sale; and

(b) the adjudger should be bound in the normal case to account for and pay to the trustee the net free

proceeds of sale after satisfying his own debt and diligence expenses, and any prior or pari passu debt; or

(c) in the exceptional case where the adjudication was registered within 60 days before the date of sequestration and is thus ineffectual in a question with the trustee under proposals made in our Discussion Paper on Equalisation of Diligences, the adjudger should be bound to pay the whole proceeds of sale to the trustee, under deduction of his diligence expenses.

(4) If the contract of sale is terminated before the adjudger's disposition is delivered to the purchaser, the trustee should have power to sell the adjudged subjects with the adjudger's consent or, failing such consent, the authority of the court.

(Para. 6.30).

Litigiosity

6.5

The reference in section 14(2) of the Bankruptcy (Scotland) Act 1985 to the citation in an adjudication should be repealed.

(Para. 6.32).

6.6

(1) It should be expressly enacted that on or after the date of commencement of winding up of the debtor company, it should not be competent for a creditor:

(a) to commence a diligence of adjudication and sale; or

(b) to proceed with such an adjudication already begun unless a contract of sale of the adjudged subjects has been concluded in implement of the adjudger's power of sale or unless decree of foreclosure had been granted.

Section 185 of the Insolvency Act 1986 should be amended accordingly.

(2) Where prior to the date of commencement of the winding up of a debtor company, an adjudger of the company's property has sold the adjudged property in exercise of his power of sale or has obtained decree of foreclosure, then the liquidator should not have power:

(a) to take the adjudged property into his custody or to sell it; or

(b) to complete title to the adjudged property by notarial instrument under the Titles to Land Consolidation (Scotland) Act 1868, s.25, or by obtaining a vesting

order under the Insolvency Act 1986, s.145(1) or under that section as read with section 112(1) or otherwise.

(3) Where the adjudger has concluded a contract of sale of the adjudged subjects before the date of commencement of the winding up, Proposition 6.4(3)(at para. 6.30) above should apply with any necessary modifications.

(4) If the contract of sale is terminated before the adjudger's disposition is delivered to the purchaser, the liquidator should have power to sell the adjudged subjects with the adjudger's consent or, failing such consent, the authority of the court.

(Para. 6.40).

Administration orders under Insolvency Act 1986

6.7

In computing any time limit on the duration of a notice of litigiosity registered by an adjudger, there shall be disregarded any period during which the adjudger is prevented from proceeding with the adjudication by virtue of the Insolvency Act 1986, s.10(1)(c) and 11(3)(d) (restrictions on diligence while petition for administration order in dependence or administration order is in force), except that the notice of litigiosity should not have effect, by virtue of this proposal, for a longer period than 5 years from the date when it took effect.

(Para. 6.47).

Repeal of obsolete statutory provisions on ranking and sale

6.8

The Debts Securities (Scotland) Act 1856, ss. 2 to 4 (which relate to actions of ranking and sale) should be repealed as a consequence of the abolition of actions of ranking and sale.

(Para. 6.50).

Competitions with trust deeds for creditors

6.9

It should be expressly provided by statute that where a trust deed for creditors has been granted and the trustee has completed title to adjudgeable property comprised in the estate, then

(1) it should not be competent for a non-acceding creditor, whose debt was contracted prior to the trust deed, to attach that property by any adjudication for debt, whether directed against the debtor or the trustee, and whether for the purpose of securing a preference or attaching the reversion;

(2) it should however be competent for a non-acceding creditor whose debt was contracted after that date to attach the reversion of the property by an adjudication, directed against the debtor, but not to attach the property itself so as to secure a preference over prior creditors.

(Para. 6.55).

Part VII: Adjudication after debtor's death and confirmation as executor-creditor attaching heritable property

Diligence begun before debtor's death

7.1

(1) Where a debtor owning adjudged property dies and a creditor has already registered a notice of adjudication before the date of the debtor's death, the creditor should be entitled to complete the diligence after that date, but subject to the modifications of the procedure mentioned in para. 7.8.

(2) Where a creditor has served a charge and notice of entitlement to adjudge or registered a notice of litigiosity before the date of the debtor's death, but has not registered a notice of adjudication before that date, the steps already taken in the diligence should cease to be a valid basis for registering a notice of adjudication on or after that date.

(Para. 7.10)

Adjudication for debt where heritable property passes on death under special destination

7.2

(1) The proposition in para. (2) below is advanced on the assumption that (as we intend to recommend in our forthcoming Report on Succession) the law will be amended to make it clear that the liability of a deceased debtor transmits against an heir of provision or disponee succeeeding under a special destination, and that the creditor's remedy will be a decree constituting the debt against the heir of provision or disponee, subject to provisions limiting that liability to the value of the succession.

(2) Where a creditor of a deceased debtor wishes to adjudge heritable estate of the deceased passing under a special destination to an heir of provision or disponee, and in order to complete title in the person of the heir of provision or disponee, a conveyance by the executor of the deceased to the heir of provision or disponee is required under section 18(2) of the Succession (Scotland) Act 1964, then the creditor should be entitled to apply to the court entertaining an action to constitute the debt, or to the sheriff if decree of constitution has already been obtained, for an order authorising adjudication as if the estate had been so conveyed under section 18(2). The notice of adjudication would refer to the order for the purpose of connecting the title of the heir of provision or disponee with that of the person last infeft in the estate to be adjudged.

(Para. 7.17)

Adjudication against executry estate

7.3

It should be competent for a creditor of a deceased debtor who has constituted his debt against the debtor's executor to commence diligence against heritable property forming part of the executry estate within the 6 months after the debtor's death specified in the Act of Sederunt of 28 February 1662 by serving a notice of entitlement to adjudge and registering a notice of litigiosity. But the execution of a charge against the executor within that period should be neither necessary nor competent as a prelude to adjudication.

(Para. 7.19).

Adjudication against heritable property owned by executor to enforce debt due by deceased

7.4

The obligation to pay debts due by a deceased which is incurred by an executor by virtue of his confirmation should not be enforceable by adjudication or other legal process against heritable property belonging to him as an individual unless:

(a) the executor has prejudiced his ability to pay the debt by:

(i) improperly paying funds or conveying property to a beneficiary or postponed creditor from the executry

estate without providing for payment of the debt, or at a time when he knew, or ought to have known, that the executry estate was insolvent; or

(ii) otherwise acting improperly in the administration of the executry estate; and

(b) the creditor has obtained decree for payment of the debt against the executor in his capacity as an individual.

(Para. 7.22).

Confirmation as executor-creditor attaching unconfirmed heritable estate not passing under special destination

7.5

(1) It should be made clear by statute that the appropriate mode of diligence whereby a creditor of a deceased person may enforce a debt against the deceased's unconfirmed heritable estate not passing under a special destination is confirmation as executor-creditor rather than adjudication and sale.

(2) In a creditor's action for a decree cognitionis causa tantum constituting a debt against the vacant succession, the deceased's intestate and testate successors (rather than his next-of-kin) should be called as defenders.

(3) An adjudication of a debtor's property duly registered during the debtor's life should have priority in ranking over a decree of confirmation as executor-creditor attaching that property after the debtor's death.

(4) In a competition between a confirmation as executor-creditor attaching heritable property and an adjudication of that property, or any other competing right, the criterion of preference should be registration in the property registers of the executor-creditor's title rather than the grant of decree of confirmation.

(5) An executor-creditor's title to heritable property should be prescribed by statute and take the form of a notice referring to the decree of confirmation, and containing a conveyancing description of the attached heritable property as set out in the inventory of the estate to which the executor-creditor has confirmed, and, where the deceased debtor had been uninfeft, a reference to unregistered conveyances linking the debtor's title to that of the person last infeft.

(6) There should be a procedure whereby the creditor can obtain exhibition or delivery of unrecorded links in title.

(7) A notice of litigiosity should not be required as a mandatory prelude to a confirmation as executor-creditor attaching heritable property.

(8) Restrictions should be imposed on sale and entry into possession by the executor-creditor of the home of the debtor's family along the lines of the safeguards proposed for adjudication and sale at Proposition 3.7 (para. 3.55 in volume 1).

(9) The court which granted decree of confirmation as executor-creditor should have powers, exercisable on the application of the executor-nominate or executor-dative (if any) or any other person interested in the deceased's estate, to restrict an exorbitant nexus over divisible heritable property attached by the confirmation as executor-creditor, or to allow part of the property to be sold and to sist further procedure in the remaining part, on the model of the powers proposed for exorbitant adjudications at Proposition 3.6 (para. 3.29 in volume 1).

(10) The proposals on adjudication of common property in Proposition 3.17 (para. 3.122) should apply mutatis mutandis to confirmation as executor-creditor attaching common property.

(11) An executor-creditor confirming to heritable estate of a deceased debtor should not be required to submit a full inventory of the whole heritable and moveable estate but only an inventory of the heritable and moveable estate which the executor-creditor wishes to attach.

(Para. 7.34).

Adjudication of heritable property passing under special destination at instance of creditor of deceased's successor

7.6

Where a creditor of an heir of provision or disponee succeeding to heritable property under a special destination wishes to adjudge the property, and the heir of provision

or disponee requires and has not obtained a conveyance under section 18(2) of the Succession (Scotland) Act 1964 in order to complete title, the creditor should have the same right as a creditor of the deceased to apply to the court for an order authorising adjudication as is proposed in Proposition 7.2 above.

(Para. 7.39)

Heritable property forming part of executry estate

7.7

It should be made clear by statute that a decree for payment of debt against an executor as an individual, or against a beneficiary of an executry estate, should not be treated as authorising an adjudication of heritable property forming part of the executry estate.

(Para. 7.41).

Preference of creditor of deceased debtor over creditor of his successors: executry estate and property passing under special destination

7.8

(1) Where an executor has conveyed heritable property comprised in the executry estate to a successor of the deceased, an adjudication of the property by a creditor of the deceased registered before the expiry of one year after the deceased's death should have a preference over

an adjudication of that property, whenever registered, by a creditor of the deceased's successor.

(2) Where heritable estate of a debtor passes on his death under a special destination to an heir of provision or disponee, an adjudication by a creditor of the deceased of property belonging to the heir of provision or disponee registered before the expiry of one year after the debtor's death should have a preference over an adjudication of that property, whenever registered, by a creditor of the heir of provision or disponee.

(Para. 7.49)

"Universal" executor's right of retention as constructive diligence affecting confirmed heritable estate

7.9

(1) Should the common law rule under which an executor-nominate or executor-dative qua next-of-kin or surviving spouse acquires by confirmation a right of retention of the estate for payment of a debt due to himself as an individual apply, or continue to apply, to heritable property or should it be limited to moveable property?

(2) If the executor's right of retention is to apply to heritable property, it should have effect in a competition with adjudications of the heritable estate or with other competing rights of creditors secured over the estate only if the title to the right of retention is registered, in a form prescribed by statute, in the property registers. The

criterion of the executor's preference should be the registration of his title rather than the confirmation in his favour.

(3) The prescribed form of notice of the executor's title should specify the debt due to the executor and include a description of the heritable estate affected by the executor's right of retention. Forms of discharge, restriction and possibly assignation should also be prescribed by statute.

(Para. 7.53).

Part VIII: Real diligences enforcing debita fundi and related matters

Abolition of pecuniary real burdens

8.1

It should no longer be competent for the granter of a conveyance of land to create, by reservation in the conveyance, a real burden for the payment of money secured on the land.

(Para. 8.9).

Abolition of poinding of the ground

8.2

The diligence of poinding of the ground should be abolished.

(Para. 8.11)

New remedies of sale or foreclosure enforcing debita fundi

8.3

(1) It should not be competent to enforce a debitum fundi either by the existing diligence of action of adjudication or by the proposed new diligence of adjudication and sale.

(2) A special procedure for sale or foreclosure, and entry into possession, should be available for enforcing debita fundi on the lines of the proposals in paras. 8.13 to 8.16 above.

(Para.8.17)

What debita fundi to be enforceable by new remedies of sale or foreclosure?

8.4

(1) The new remedies of sale or foreclosure mentioned at Proposition 8.3 (para. 8.17) above should be available to a creditor in those types of statutory charging order which are at present enforceable by adjudication.

(2) The new remedies should be available to a creditor in a pecuniary real burden created in a disposition for so long as such real burdens are extant. Where the disposition confers a conventional power of sale, the creditor should be entitled to invoke either the conventional power or the new remedies.

(3) Views are invited on whether the new remedies should be available to:

(a) a superior enforcing feuduty; or

(b) a creditor in a ground annual.

(Para. 8.23).

Part IX: Statutory charging orders on heritable property

Annuity charging orders

A uniform code

9.1

The separate enactments regulating the incidents and effects of annuity charging orders should be replaced by a uniform statutory code.

(Para. 9.9).

Appeals against charging orders

9.2

(1) Should a uniform code on charging orders provide for an appeal to the sheriff against the making of the order?

(2) Alternatively should the availability of such an appeal be left to be regulated by the special act?

(Para. 9.11).

The annuity

9.3

The amount of the annuity fixed by a charging order should be determined by the creditor subject to such maximum as may be prescribed by statutory instrument and the annuity should be for a term of 30 years from the date of the charging order.

(Para. 9.13).

Form of charging order

9.4

The form of a charging order should be prescribed by statutory instrument.

(Para. 9.15).

Registration in property registers and preferences in ranking

9.5

(1) Uniform provision on the registration and ranking of annuity charging orders should be made on the following lines.

(2) An annuity charging order should have no effect until a charge or real right to the annuity is constituted by registration of the order in the property registers, following the registration of a notice of litigiosity and the expiry of a mandatory period of delay as mentioned in Proposition 3.5(5) (para. 3.43).

(3) The person registering the charging order should intimate its registration to the debtor, and inform him of its effect, in writing.

(4) Subject to paragraph (6) below, an annuity secured by a charging order should have priority in ranking over all real burdens and incumbrances affecting the property registered in the property registers (whether before or after the date of registration of the charging order) other than those mentioned in the next paragraph.

(5) Subject to paragraph (6) below, in a competition between an annuity secured by a charging order and any of the following burdens or incumbrances affecting the property -

(a) feuduties, ground annuals or redemption money secured under section 5(5) to (8) of the Land Tenure Reform (Scotland) Act 1974;

(b) teinds, stipends or standard charges in lieu of stipends;

(c) any annuity or lump sum constituted as a charge or real right -

(i) by any charging order made under any of the public general statutes relating to charging orders; or

(ii) by or under any local Act authorising the charge for the recovery of expenses incurred by a local authority; or

(iii) (possibly) by or under any other Act authorising the charge for the recovery of an advance of public money,

the priority in ranking should be determined in accordance with the priority in time of the registration of the first-mentioned charging order and the constitution of the competing burden or incumbrance as a real right.

(6) A charging order made under the Agricultural Holdings (Scotland) Act 1949, s. 82(2) (power of landlord to obtain charge on holding in respect of compensation paid by him) should continue to rank in competition with other real burdens and incumbrances by priority of the respective dates of registration in the property registers.

(7) Since a charging order is not a deed voluntarily granted by the debtor, such an order should continue to have priority over an inhibition, whenever registered, affecting the property charged, under the common law rules on the ranking of inhibitions.

(Para. 9.19).

Conclusive evidence of due creation of charge etc.

9.6

(1) A charging order duly registered in the property registers should continue to be treated by statute as conclusive evidence that:

(a) the charge has been duly created in respect of the property specified in the order; and

(b) that prior acts of the authority which made the order or the person in whose favour the order was made, being acts on which the validity of the order depends, have been duly performed,

in any question between a party challenging the order and a bona fide purchaser of the property from the holder of the charging order who has exercised his remedy of adjudication and sale.

(2) It should be expressly enacted however that the foregoing rule is without prejudice to any right of the party challenging the order to claim damages from the public authority or person in whose favour the order was made for loss arising from any act or omission of that authority or person.

(3) A duly registered charging order should no longer be conclusive evidence of the matters referred to in para. (1) above in any question between a party challenging the order and the public authority which made the order or person in whose favour the order was made.

(Para. 9.21).

Remedies of holder of charging order

9.7

(1) If as proposed at Proposition 8.4 (para. 8.23) a statutory charging order presently enforceable by adjudication on a debitum fundi is in future to be enforceable by new

remedies of sale or foreclosure adapted to the enforcement of debita fundi, then those remedies should be the only ones available for enforcing such charging orders. In particular, the order should not be enforceable by irritancy of the feu or personal action for payment.

(2) It should be made clear by statute that the new remedies enforce the unpaid balance of the debt and not merely the unpaid arrears of the annuity.

(Para. 9.25).

Assignation of charging order

9.8

Charging orders should in principle be assignable where the holder of the order is a private person and the form of assignation should be prescribed by statutory instrument.

(Para. 9.27).

Redemption of annuity and discharge of order and annuity

9.9

(1) Provision should be made for redemption of an annuity charged by a charging order on the lines of the existing provisions.

(2) The form of discharge of the annuity and charging order should be prescribed by statutory instrument and should be registrable in the property registers.

(Para. 9.29).

New remedies for enforcing lump sum charging order

9.10

If as proposed in Proposition 8.3 above, a special procedure for sale or foreclosure, and entry into possession, is made available by statute for enforcing debita fundi, that procedure should also be available for enforcing lump sum charging orders in place of the remedies for enforcing standard securities.

(Para. 9.34).

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