Scottish Law Commission

DISCUSSION PAPER No. 84

DILIGENCE ON THE DEPENDENCE AND ADMIRALTY ARRESTMENTS

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

The Commission would be grateful if comments on this Discussion Paper were submitted by 30 June 1990. All correspondence should be addressed to:-

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NOTES

1. In writing a later Report on this subject with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Discussion Paper. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected, but if no request for confidentiality is made, the Commission will assume that comments on the Discussion Paper can be used in this way.

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PART I
INTRODUCTION

Preliminary

1.1. This Discussion Paper is one of a series of Papers issued in pursuance of Item No. 8 of our Second Programme of Law Reform,[1] the reform of the law of diligence.[2]

What is diligence on the dependence?

1.2 In this Discussion Paper, we are primarily concerned with the reform of the law relating to diligence on the dependence. Diligence on the dependence is diligence which may be used while an action is in dependence (or in some cases shortly before the action is raised) in order to give a litigant security for sums claimed in the action.[3] Only two types of diligence can be used on the dependence: arrestment and inhibition. Arrestments on the dependence are only competent in actions for payment of money, and inhibitions on the dependence are normally used in such actions, but are also competent in certain actions for specific implement of obligations to convey land or to create some right over land. Arrestment is a diligence attaching debts or moveable property due to the debtor by a third party (the arrestee). Inhibition is a diligence prohibiting a debtor from alienating his heritable property by voluntary deeds, or from contracting debts, after registration of the inhibition, to the prejudice of the inhibiting creditor.

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

[2] Ibid., p. 6. "Diligence" is the legal term used to denote primarily the methods of enforcing unpaid debts and other obligations due under decrees of the Scottish courts or on the dependence of actions in those courts.

[3] For a fuller description of diligence on the dependence, see paras 2.2 to 2.6 below.

The right of litigants to use diligence on the dependence

1.3 The general rule is that a litigant in the Scottish courts is entitled as of right to obtain from the court a warrant for diligence on the dependence without judicial enquiry, and to use the diligence to secure his claim while the action is in dependence.[1] Where a litigant uses a legal warrant for diligence on the dependence of an action, and the diligence is regularly executed, he is entitled to the highest degree of privilege[2] short of absolute privilege.[3] This means that, unless the litigant has used the diligence with malice and want of probable cause, he is not liable in damages to the alleged debtor if the court eventually decides that his claim is unfounded and his action is unsuccessful. Malice and want of probable cause are very rare and difficult to prove. While the debtor or another interested person may apply to the court to have the diligence recalled, or restricted to property or funds sufficient to secure the sums due, recall and in some cases restriction will generally only be granted by the court if the applicant gives security for the debt or sum attached by a bond of caution (a guarantee) by a person of substance or by consignation in court of a sum equivalent to the debt or sum attached.

The need to retain a system of diligence on the dependence

1.4 This system, at least in its essential features, has existed in Scotland for centuries. We have no doubt that provisional and

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1 See para.2.14 below.

2 ie. immunity from actions of damages.

3 Notman v. Commercial Bank of Scotland 1938 S.C. 522 at p. 532 per Lord Justice Clerk Aitchison. See para 2.27 ff.

protective measures designed to protect litigants while actions are in dependence, are in principle a necessary and just feature of Scots law. Many other legal systems, including systems of the Contracting States of the E.E.C., make available to litigants, while court actions are in dependence, provisional and protective measures designed to prevent debtors from avoiding payment of their just and lawful debts by dissipating their assets, disposing of property to third parties or burdening property with securities in favour of third parties, removing funds or other moveables from the jurisdiction, or otherwise making their property unavailable to creditors or untraceable, pending the outcome of court proceedings.[1] Until relatively recently, English law had no such system of provisional and protective measures, but since 1975 the English courts have developed the so-called "Mareva" injunction[2]. This is designed to restrain defendants frrom disposing of or removing assets pending the outcome of a court action and broadly speaking performs the same role for England as diligence on the dependence in Scotland, except that (unlike such diligence) it does not give the litigant a security or preference in insolvency or ranking processes.

Criticisms and reforms of diligence on the dependence (Part II)

1.5 While the need for a system of diligence on the dependence is undoubted, and indeed has never been questioned by any official advisory body which has examined the Scots law of

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[1] See para 2.47 ff.

[2] Which takes its name from one of the two leading cases which first established the principle underlying the injunction, namely, Mareva Compania Naviera SA v. International Bulk Carriers SA [1975] 2 Lloyd's Rep 509; also reported in [1980] 1 All E.R. 213(C.A.); see also Nippon Yusen Kaisha v. Karageorgis [1975] 1 WLR 1093 (C.A.). For further information on Mareva injunctions, see paras 2.48 - 2.50 below.

diligence, some of its features have long been criticised by judges and writers as having an unduly harsh impact on defenders or debtors, especially defenders who are eventually successful in defending a depending action. A statute in 1966,[1] following a recommendation by the McKechnie Report,[2] got rid of the worst feature of the system, namely arrestments of the defender's earnings and pensions on the dependence. But other defects remain. The unrestricted use of diligence on the dependence, and the wide-ranging scope of the property affected which may greatly exceed in value the amount of the alleged debt, may for example make it difficult or impossible for the alleged debtor to carry on his business, may damage his credit, perhaps irretrievably, and can have harsh social and economic effects in other respects, all in circumstances where the debt may eventually be found not to be due.

1.6 The main issues addressed in this Paper concern what legal limits and judicial controls should be placed on the present unrestricted use and wide-ranging scope of diligence on the dependence. We advance proposals that limits fixed by legal rules should be imposed on the amount of sums attached by arrestments on the dependence.[3] More importantly, we seek views on whether warrants for diligence on the dependence should cease to be available to litigants as of right, but should in future be granted by the court in the exercise of discretionary powers, including powers to limit and control the assets affected by the diligence and to impose conditions, and also powers to refuse to grant the warrant in appropriate cases.[4]

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[1] Law Reform (Miscellaneous Provisions)(Scotland) Act 1966, s.1.

[2] Recommendation 5 (para 52).

[3] Paras 2.140 - 2.163 below.

[4] See paras 2.13 to 2.101. The main proposals are at Propositions 2 (para 2.69); 3 (para 2.79); 4 (para 2.90); 5 (para 2.92); and 6(para 2.101).

1.7 If diligence on the dependence is to remain an effective remedy for creditors, it is necessary to preserve the elements of speed and surprise in appropriate cases. The element of surprise may be preserved by our proposed requirement that an application to the court for warrant for diligence on the dependence should be ex parte, except where the court orders intimation to the defender.[1] But an application to the court may entail some delay which may be critical in some cases. We therefore seek views on whether creditors should retain the right to use diligence on the dependence under a warrant obtained in the ordinary course of process as an alternative procedure, with the proviso that the use of such a warrant would attract strict liability in damages for wrongful diligence if eventually the depending action turned out to be unsuccessful.[2]

1.8 In addition to suggesting the foregoing principal reforms, we examine diligence on the dependence in some detail in Part II and suggest a number of mainly minor and technical reforms, which are summarised in Part V.

Admiralty arrestments and jurisdiction (Part III)

1.9 In Part III we consider the attachment by Admiralty arrestments of ships and other vessels and their cargo. Under the present law, an Admiralty arrestment, rather than poinding, is the proper diligence for arrestment of a ship, though the ship is in the defender's possession. An Admiralty arrestment of a ship may only be used on the dependence of an Admiralty action in personam. An Admiralty arrestment in rem is used in an

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[1] Proposition 3(2), 3(3)(d) (para 2.79).

[2] Proposition 2(3) (para 2.69).

Admiralty action in rem to enforce a special kind of non-possessory security called a maritime lien. There is also a special form of Admiralty arrestment of ships in rem under the Administration of Justice Act 1956, s. 47(3)(b) which secures a non-pecuniary claim by a species of quasi-lien.[1]

1.10 In Part III we suggest that warrants to arrest in rem to enforce a maritime lien should be available as of right since a maritime lien is a security right.[2] We also suggest that the rules on the discretionary grant of warrants for arrestment on the dependence proposed in Part II should apply to arrestments on the dependence in Admiralty actions in personam.[3] We take the opportunity of advancing proposals on among other things related questions of Admiralty jurisdiction and procedure including a new definition of Admiralty causes,[4] removal of inappropriate restrictions on the sheriff's jurisdiction in salvage actions[5] and the enactment of procedural rules for sheriff court Admiralty actions,[6] the revision and clarification of the rules for arresting cargo on board ship,[7] and the clarification of the territorial limits on the competence of Admiralty arrestments, especially on the landward side.[8]

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1 See paras 3.49 to 3.54.

2 Proposition 30 (para 3.48).

3 Proposition 33 (para 3.70).

4 Proposition 26 (para 3.15)

5 Proposition 27 (para 3.20).

6 Proposition 28 (para 3.22).

7 Proposition 35 (para 3.96).

8 Proposition 40 (para 3.168).

Interim attachment on the dependence of corporeal moveables in the defender's possession (Part IV)

1.11 There is a gap in the existing system of diligence on the dependence insofar as Scots law makes no provision for attaching corporeal moveables in the defender's possession on the dependence of an action for payment except in the case of Admiralty arrestments of ships and cargo. In Part IV we seek views on whether or how this gap should be filled. We provisionally conclude that there is a need for reform and, after considering various options, advance proposals for enabling the court, in its discretion, to grant warrant for the attachment of specified moveable goods in the defender's possession. This would have effect for a prescribed period after extract of the decree for payment to allow time for the pursuer to poind the goods on an expired charge. Goods in dwelling houses would be excluded. We would emphasise that our proposals are only tentative and that we are not committed to the introduction of provisional measures on the dependence against moveable goods in the defender's possession.

Other proposals

1.12 In this Discussion Paper, we assume for convenience that certain proposals to be made in a future discussion paper on inhibitions will be implemented at the same time as the proposals in this Discussion Paper. The most important of these proposals is that power to grant warrants for inhibition on the dependence should be conferred on the sheriff, though the Court of Session would retain its power to grant such warrants. We also intend to issue as soon as possible a Discussion Paper on recompense for arrestees for operating arrestments which have been served on them.

Acknowledgments

1.13 We have pleasure in expressing our gratitude to a number of people who helped us in the preparation of this Discussion Paper. Mr George L Gretton WS, of the Department of Scots Law in the University of Edinburgh, prepared for us a valuable preliminary research paper on diligence on the dependence. Others who gave most helpful advice or information on various topics include Mr Ian G Inglis WS and Mr Robert Knox WS; Mr V E Ricks, Admiralty Marshal and Chief Clerk of the Admiralty Registry of the High Courts of Justice in England and Wales; Mr M G Bonar, Deputy Principal Clerk of Session; and Mr John Anderson, Secretary of the Court of Session Rules Review Group. Herr Hans O Bartels of the Ministry of Justice of the Federal Republic of Germany and Ms Lena Moore of the Ministry of Justice of the Kingdom of Sweden assisted us with advice on the German law (see para. 2.51) and the Swedish law (see para. 2.54) respectively and Mr D B Walters, Head of the Department of Civil Law at the University of Edinburgh, advised us on the French law (see para. 2.52). None of these persons, however, bears any responsibility for any errors or omissions in this Discussion Paper or for any of the views expressed therein.

PART II
DILIGENCE ON THE DEPENDENCE

Preliminary: nature of diligence on the dependence

2.1 In this Part, we set out provisional proposals for reform of the law of diligence on the dependence. As regards the attachment by an Admiralty arrestment on the dependence of ships and other maritime property, the grant of such warrants is considered along with Admiralty arrestments in rem in Part III, but many other aspects of the law on arrestment on the dependence of ships, such as recall or loosing, being so closely bound up with the general law on arrestment, are considered in this Part. As a preliminary step, it may be helpful to describe briefly the nature and effect of the two forms of diligence on the dependence, arrestment and inhibition, which may be used under the present law.

2.2 Arrestment on the dependence. An arrestment on the dependence is a form of diligence by which the pursuer in an action for payment of money may prevent a third party holding moveable property belonging to the debtor, or money due to the debtor, from parting with it pending the disposal of the action so that the pursuer's debt may eventually be satisfied in whole or in part from the attached property or funds.[1] The arrestment has the effect of prohibiting the defender (the common debtor) from alienating the arrested subjects, and the third party (the arrestee) from parting with it, and imposes what is called a "nexus" or preferable right over the subjects which the law will recognise and enforce in insolvency proceedings and other processes of ranking. If the pursuer is successful in the action and obtains and extracts decree for payment, the arrestment on the dependence becomes

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

automatically equivalent to an arrestment in execution,[1] but, in processes of ranking, the arrester's preferable right in principle dates from the execution of the arrestment, not the date of extract of the decree.

2.3 Both an arrestment on the dependence, and arrestment in execution of a decree, are inchoate or incomplete diligences. In order to transfer arrested funds to the creditor or to enable arrested goods or shares to be sold for his benefit or transferred to him in default of sale, the creditor must obtain decree in an action of furthcoming, which can only be raised after the arrestment on the dependence has become equivalent to an arrestment in execution.[2] In practice, an action of furthcoming is rarely necessary because the debtor, to avoid incurring liability for the expense of such an action, normally either pays the debt directly or gives a mandate to the arrestee to release the arrested funds to the creditor.

2.4 Inhibition on the dependence. "Inhibition is a preventive diligence whereby a debtor is prohibited from burdening, alienating directly or indirectly, or otherwise affecting, his lands or other heritable property to the prejudice of the creditor inhibiting."[3] An inhibition renders the whole of the inhibited debtor's heritable estate "litigious" for a period of 5 years as from the date when the inhibition or a prior notice of inhibition is registered in the Register of Inhibitions and Adjudications (the personal register).

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

[2] Creswell v Colquhoun & Co 1987 SLT 329.

[3] Graham Stewart,p 526. Though called a "preventive" diligence, an inhibition does not prevent a disposal or security violating the inhibition but rather renders it reducible: see para 2.5.

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

2.6 In order to acquire a real right in the nature of a security right, a creditor has to use the diligence of adjudication, but warrant to adjudge on the dependence is not competent. The inhibition only strikes at future "voluntary" acts of the debtor. It does not prevent the debtor from conveying property in implement of a contract concluded before the date of registration of the inhibition. By preventing future voluntary sales or security rights over heritable property, it gives the inhibiting creditor a powerful weapon. He can normally obtain payment as a condition of discharging the inhibition and allowing it to be cleared off the personal register. Inhibition may be used on the dependence of actions in the Court of Session and sheriff court, but warrants to

inhibit may only be granted on application to the Court of Session: the sheriff has no jurisdiction to grant such warrants.[1]

(1) Proceedings in which diligence on the dependence competent

2.7 Actions for payment of a principal sum. Under the Debtors (Scotland) Act 1838, s. 16,[2] and at common law[3], arrestment on the dependence is only competent where the action concludes for or craves payment of money other than expenses. The pecuniary conclusion or crave may be alternative or subsidiary to a non-pecuniary conclusion or crave,such as declarator, reduction, or accounting. Though the Court of Session Act 1868, s. 18[4] did not expressly limit the availability of warrants of inhibition on the dependence to actions of any particular kind, it was generally accepted that the competence of the diligence is governed by the common law, which inter alia allows inhibition on the dependence of an action containing pecuniary conclusions or craves other than expenses.[5] The availability of diligence on the dependence is not to be extended further than is permitted by law and usage.[6] There is no doubt that diligence on the dependence

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1 See eg Macphail p 365; McKechnie Report paras 190-191. In a forthcoming Discussion Paper on Inhibitions, we intend to propose that jurisdiction to grant warrants of inhibition should be conferred on the sheriff, and our proposals in this Discussion Paper assume that such a proposal will be implemented.

2 Which enables warrants for arrestment to be inserted in summonses concluding for payment of money.

3 Graham Stewart, p 19; Weir v Otto (1870) 8 M 1070.

4 Which enabled warrants for inhibition to be inserted in summonses. Now repealed by the Court of Sesssion Act 1988, s 52(2) and Sch 2, Pt I.

5 Weir v Otto,supra. This remains the position under RC 74, under which alone warrants are now granted. Graham Stewart, p 531.

6 Stafford v McLaurin (1875) 3 R 148 at p 150.

is competent in actions for random sums, such as damages,[1] or count, reckoning and payment.[2] It is competent to use diligence on the dependence of an action founded on an agreement containing an arbitration clause referring disputes to arbitration, even arbitration outside Scotland under foreign law.[3]

2.8 In a number of sheriff court cases earlier this century, criticisms were made by Sheriff Fyfe of arrestments on the dependence of actions for random sums, such as damages or count, reckoning and payment,[4] on the ground that while these may be technically "pecuniary conclusions", they are not in the same category as a crave for payment of a liquid debt.[5] It was observed that it "is open to anybody to state a claim of damages against another person, and to lay his damages at a ridiculous figure, and then to proceed to plant arrestments all round".[6] The possible cures for this mischief are discussed later and subject to these we think that diligence should remain competent on the dependence of actions for random sums. We suggest that the foregoing rules are generally satisfactory and do not consider that diligence on the dependence should be available where the only pecuniary conclusion or crave is for expenses.

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[1] eg. Svenska Petroleum AB v. H O R Ltd 1982 SLT 343.

[2] Eg. Fisher v Weir 1964 SLT (Notes) 99.

[3] Motordrift A/S v Trachem Co Ltd 1982 SLT 127; Svenska Petroleum A B v H O R Ltd 1986 SLT 513 at p 518; Mendok BV v Cumberland Maritime Corporation 1989 SLT 192.

[4] Dick and Parker v Langloan Iron and Chemical Co (1905) 21 Sh Ct Rep 139; Gebruder van Uden v Burrell 1914, 1SLT 411; Pett v Kopke (1918) 34 Sh Ct Rep 261; Conzemius Ltd v Findlay (1925) 41 Sh Ct Rep 337.

[5] Van Uden v Burrell, supra, at p 412.

[6] Dick and Parker v Langloan Iron and Chemical Co supra at p 140.

2.9 Actions for specific implement: inhibitions.[1] Inhibition is competent on the dependence of an action to enforce an obligation to convey land, so as to prevent its disposal to a third party[2]; or in an action for implement of an obligation to grant a lease, to prevent sale of the land to the pursuer's prejudice[3]; or in an action by a truster against his trustee for reconveyance of the reversion of the trust estate, to prevent the trustee conveying it to his own creditors or alienating it.[4] Inhibition of this kind is competent to secure property transfer orders in divorce and nullity actions,[5] and in such a case the court has a power to restrict the inhibition to the property concerned at the stage of granting the warrant.[6] However, in other actions for specific implement of an obligation ad factum praestandum relating to heritable property, the inhibition affects the whole of the defender's heritable property, and not merely the property to which the obligation relates, at least unless and until it is restricted by the court. This has been rightly criticised as odd,[7] and it is indeed unjust. We propose that a warrant for inhibition securing an obligation ad factum praestandum should be limited expressly, by a proper conveyancing description, to the particular heritable property to which the obligation relates. A warrant for inhibition not so limited should be treated not merely as ineffectual but as inherently defective, so that any inhibition used thereunder would be wrongful and sound in damages.

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1 See Graham Stewart pp 528, 532.

2 Barstow v Menzies (1840) 2 D 611.

3 Seaforth's Trs v Macaulay (1844) 7 D 180.

4 Pedie v Stewart (1830) 8 S 710.

5 Family Law (Scotland) Act 1985, ss 8 and 19.

6 Ibid, s 19.

7 Gretton, Inhibition and Adjudication p 15.

2.10 Foreign proceedings. At common law, warrant for diligence on the dependence is competent only in respect of actions before the Scottish courts. The Civil Jurisdiction and Judgments Act 1982, s. 27, however, confers on the Court of Session a new power to grant warrant for arrestment of assets in Scotland, or warrant for inhibition over any property situated in Scotland, on the dependence of proceedings in another Contracting State or in England and Wales or Northern Ireland, if the subject matter of the proceedings is within the European Judgments Convention and the warrant could competently have been granted in equivalent proceedings before a Scottish court. We are not aware of any difficulties raised by this provision but invite comments.

2.11 Scottish proceedings other than actions for payment. In the Court of Session, the Rules of Court provide for warrants for diligence on the dependence to be granted only in actions[1], though it appears that very occasionally decree may be granted on petition for payment of sums other than expenses[2].Pecuniary obligations are rarely the subject matter of Court of Session petitions, so that diligence on the dependence of petitions will rarely be competent, but where it is competent, it seems undesirable to require the petitioner to apply for letters of inhibition or arrestment on the dependence. We invite views on this question which may be relatively unimportant in practice. In the sheriff court, summary applications are treated as actions for some purposes,[3] and are commenced by initial writ which may

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[1] eg RC 74; see para 2.16 ff.

[2] eg. in petitions for custody of children containing a prayer for an award of aliment. See Encyclopaedia of Scottish Legal Styles vol 2, p 395.

[3] Sheriff Courts (Scotland) Act 1907, s 3; Macphail, p 871 ff.

contain a warrant for arrestment on the dependence[1]. Among the wide variety of miscellaneous common law and statutory summary applications in the sheriff court, it is not clear in what forms of application diligence on the dependence is competent.

2.12 We propose:

(1) **Warrants for diligence on the dependence should continue to be available in actions for payment of a principal sum of money, including actions concluding for a random sum (such as damages or count, reckoning and payment) and should not be available in actions in which the only pecuniary conclusion or crave is for expenses.**

(2) **Warrants for inhibition on the dependence should continue to be available in actions for specific implement of obligations ad factum praestandum relating to heritable property, so far as competent under the present law. The warrant for inhibition should, however, be limited expressly by a proper conveyancing description to the particular heritable property to which the obligation relates.**

(3) **Is there any need for warrants for diligence on the dependence to be available in Court of Session petitions containing a prayer for a decree for payment of a sum of money other than expenses?**

(Proposition 1).

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[1] OCR, Form B2.

(2) Warrants for diligence on the dependence: a legal right or a discretionary judicial remedy?

2.13 In this Section we are concerned with the grant of warrants for diligence on the dependence to secure debts alleged to be already due. We deal below[1] with warrants for securing future and contingent debts, including aliment, and financial provision on divorce or nullity of marriage. In considering whether the law on the grant of warrants should be reformed, it is necessary to consider not only the existing law on that topic but also the existing law on the recall or restriction of the diligence on the ground of its excessive and oppressive use; on caution or consignation as a condition of the defender obtaining recall, or the pursuer retaining the diligence; and on liability for wrongful diligence on the dependence.[2]

(a) The present law on the grant of warrants for diligence on the dependence

2.14 It is well established that diligence on the dependence of an action for a debt alleged to be already due is, as a general rule, a legal remedy to which the pursuer is entitled as of right.[3] There are two main qualifications of the near absolute nature of this right. First, once the diligence has been used the court may recall or restrict it with or without caution or consignation, on the application of interested persons. Second, a litigant using diligence on the dependence may be liable in damages for wrongful use of the diligence in limited circumstances, namely where the diligence is executed (1) with a

[1] See paras 2.106 to 2.118.

[2] See paras 2.14 to 2.29.

[3] See eg Royal Bank of Scotland v Bank of Scotland (1729) 1 Paton 14, revg (1728) Mor 875; Brodie v Young (1851) 13D 737; Volthekker v Northern Agricultural Co. (1862) 1 M 211; Roy v Turner (1891) 18R 717 at p 719; Clan Line Steamers Ltd v Earl of Douglas Steamship Co Ltd 1913 SC 967 at p 972; Grant v Magistrates of Airdrie 1939 SC 738 at p 759; Bruce v Hutton (1934) 50 Sh Ct Rep 272 at pp 273-4; Mowat v Kerr 1977 SLT (Sh Ct) 62 at p 63; Ward v Kelvin Tank Services Ltd 1984 SLT (Sh Ct) 39 at p 41.

defective warrant or without warrant, or (2) in an irregular manner or (3) with malice and want of probable cause. The last two tests of wrongful use of diligence are only applied after the diligence has been used and we revert to them later.

2.15 Subject to one qualification noted at para. 2.17 below, applicable in a narrow class of case, warrants for diligence on the dependence in respect of debts alleged to be presently due, are generally granted automatically without judicial enquiry in consonance with the theory that the diligence is a legal remedy to which the creditor is entitled as of right.

2.16 Court of Session warrants granted ex parte. Thus in the Court of Session, warrant to arrest and to inhibit on the dependence may be obtained by one of several methods involving the administrative act of a clerk of court granting an ex parte application. The most common method is that the pursuer inserts in the printed form of summons, presented to the General Department of the Office of the Court of Session for signeting, a short form of warrant for arrestment on the dependence, or inhibition on the dependence, or most commonly both.[1] As soon as it is signeted, the warrant has the same legal effect as letters of arrestment and inhibition on the dependence. Warrant for diligence on the dependence is also granted automatically in the procedures by which a pursuer calls in an additional or substitute defender,[2] or a defender includes a counter-claim in his defences or at adjustment of the closed record,[3] or a defender serves a third party notice, or a pursuer serves a like notice in respect of

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[1] RC 74, Form 1; superseding Debtors (Scotland) Act 1838, s. 16 (arrestments); Court of Session Act 1868, s. 18 (inhibitions) now repealed by the Court of Session Act 1988, s 52(2) and Sch 2, Pt I.

[2] RC 74(f) as read with RC 92(c).

[3] RC 84(c).

a counter-claim.[1] An arrestment on the dependence[2], and a notice of inhibition on the dependence,[3] may be used even before the service of the summons to preserve the element of surprise. It may be observed that, to avoid undue repetition, we use the word "pursuer" to mean (except where the contrary intention appears) any litigant, including a defender, obtaining warrant for diligence on the dependence, and references to the "defender" should be construed accordingly.

2.17 Court of Session warrants granted by judge on intimated application. In the foregoing cases, warrant is granted without judicial enquiry, usually as an administrative act by a clerk of court, on the ex parte application of the litigant. In one somewhat anomalous class of case, the procedure is different. Where the pursuer has omitted to obtain warrant for diligence on the dependence at the stage of the signeting of the summons, he may apply under RC 74(d) for such a warrant at any stage of the proceedings by motion to the Lord Ordinary. In practice, some at least of the motions for the grant of a warrant under RC 74(d) are intimated to the defender as required by RC 93(b). It is not entirely clear whether an order under RC 74(d) granting warrant for diligence on the dependence may properly be characterised as

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[1] RC 85(1)(b). In this case the warrant for diligence on the dependence is inserted in the order granting leave to serve the third party notice, but is so inserted without judicial enquiry.

[2] Debtors (Scotland) Act 1838, s 17.

[3] Titles to Land Consolidation (Scotland) Act 1868, s 155; RC 74(e).

an interim order within the meaning of RC 79(2).[1] Where a motion is made for an interim order before the case calls, then in terms of RC 79(2), the procedure for interim orders in interdict petitions applies, and under that procedure the court may make an

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[1] The meaning of "interim order" in a similar context was considered in the Outer House case of Kelly v Monklands D C 1986 SLT 165, in which Lord Ross held that an order for production of documents is not an interim order within the meaning of RC 260 B(11) (which provides that the first order in a petition for judicial review may specify any interim order). Lord Ross observed (at p 167) that the order to produce documents was not expressed as being ad interim and approved the statement in Maxwell, Practice of the Court of Session p 220 that interim orders relate mostly to the merits of the cause in which they are sought. An order granting warrant for diligence on the dependence under RC 74(d), though not material in the above-mentioned list (which is not necessarily exhaustive) and though not directly relating to the merits of the cause, does grant warrant "on the dependence" of the action and arguably has effect ad interim since it ceases to have effect if the pursuer fails in the action and is thus contingent on his success on the merits of the cause.

interim order without prior intimation in terms of RC 236(a).[1] In short in some (but perhaps not all) cases of the late grant of a warrant for diligence on the dependence, the motion is intimated to the defender who may oppose the motion. If the motion is granted, a certified copy interlocuter is issued authorising execution of the diligence.

2.18 There is Outer House authority that, at least where the motion is opposed, the court has a discretionary power to grant or refuse the warrant, with or without conditions as to caution or consignation. Thus in Fisher v. Weir,[2] in refusing a motion for warrant for diligence on the dependence of an action of count, reckoning and payment, and in attaching to the refusal a condition of consignation, Lord Kilbrandon remarked:

> "The pursuer's attitude is that, since a warrant to arrest could have been inserted in the summons, she must be entitled to have one granted some four months later. That may be literally so, but it is now known that the warrant is to be opposed, and it would be a very absurd situation if I were to hold myself bound to grant today a warrant which I could see good reasons for recalling tomorrow. Arrestments granted ex parte by administrative action are always subject, on the motion of the arrestee (sic), to the control of the court".

The logic of this approach is that, in an opposed motion for the grant of warrant, the court has the same power of control, and applies the same principles, as in an application for recall or

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[1] Under RC 79(3), a caveat may be lodged against a motion for an interim order, though generally a caveat against the grant of a warrant for diligence on the dependence is not competent: see para. 2.119 below.

[2] 1964 SLT (Notes) 99.

restriction. This approach receives further support from Pow v. Pow[1] in which the court, in granting (in an opposed motion) a warrant to inhibit on the dependence, restricted the warrant by excluding specified heritable property from its ambit. Pow v. Pow concerned a future and contingent debt but Fisher v. Weir (supra) suggests that the power to restrict exists also where the debt is alleged to be presently due. If these cases were rightly decided, it follows that the question whether diligence on the dependence is available as of right, or only on an exercise of the court's discretion, can depend on a mere accident of procedure.

2.19 An application to the Court of Session for warrant for diligence on the dependence of foreign proceedings under the Civil Jurisdiction and Judgments Act 1982,[2] and the European Judgments Convention[3] is made by petition to the Outer House.[4] It is competent to grant the warrant ex parte,[5] but the court may presumably order intimation before granting the warrant if so advised.

2.20 Sheriff court warrants for arrestment. The warrants for arrestment on the dependence are generally granted in the sheriff court by the sheriff clerk or his depute ex parte as a routine administrative act. The pursuer inserts a form of warrant in the

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[1] 1987 SLT 127; 1987 SCLR 290 . This action of divorce was raised on 17 February 1986 before the coming into force of the Family Law (Scotland) Act 1985, s. 19, and the power was thus assumed at common law. See also Wilson v Wilson 1981 SLT 101.

[2] Section 27.

[3] Article 24, as set out in Schedules 1 and 4 to the 1982 Act.

[4] RC 189(a)(xxvii).

[5] Eg Clipper Shipping Co Ltd v San Vincente Partners 1989 SLT 204.

initial writ or summary cause summons which he presents to the sheriff clerk when applying for warrant to cite the defender.[1] The Ordinary Cause Rules provide that warrants for citation or for arrestment on the dependence may be signed by the sheriff or the sheriff clerk.[2] In practice, the sheriff clerk normally signs the warrant for arrestment on the dependence along with the warrant for citation of the defender unless the diligence is prima facie not competent.[3] In such cases, the sheriff will decide whether to grant the warrant. It has been claimed in a sheriff court case that the sheriff has a discretion whether or not to grant warrant to arrest on the dependence,[4] but this may be doubted. The certified copy initial writ with the warrant thereon is sufficient warrant to arrest on the dependence if it is otherwise competent to do so. The grant of warrant is also routine in the Ordinary Cause procedure for calling in additional or substitute defenders,[5] counter-claims[6] and third party notices.[7] In summary causes, there is a counter-claim procedure,[8] and in certain proceedings a third party procedure,[9] but these do not make provision for arrestment on the dependence. Where a pursuer omits to obtain the warrant at the commencement of an Ordinary Cause action, he may obtain one later but the application is to

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[1] OCR, r 5; Forms B, B1 and B2; SCR, r 1; Forms A, B G,H and I; r 3(2).

[2] OCR, r 8(1). If for any reason the sheriff clerk refuses to sign a warrant, the writ may be presented to the sheriff for his consideration and signature if appropriate: r 8(3).

[3] Macphail, pp 353; 816.

[4] Gebruder van Uden v Burrell 1914, 1 SLT 411 at p. 412 per Sheriff Fyfe.

[5] OCR, r 64(1)(c).

[6] OCR, r 53(1).

[7] OCR, r 50(7).

[8] SCR, r 21.

[9] Act of Sederunt (Consumer Credit Act 1974) 1985 (SI 1985/705).

the sheriff clerk for a precept of arrestment, [1] and there is no intimated application to the court equivalent to the motion procedure under RC 74(d) in the Court of Session. There is provision for service of arrestment prior to the service of the initial writ.[2]

2.21 Letters of inhibition on the dependence. The grant of letters of arrestment on the dependence is unknown in modern practice (at any rate to secure debts already due), but letters of inhibition on the dependence of sheriff court actions are very frequent. Application is made to the General Department of the Court of Session.[3] The applicant presents a bill (a form of application) and letters of inhibition[4] for signeting together with evidence of the depending action.[5] The clerk of court checks that the documents are in order, eg. that the ground of debt stated in the letters is the same as in the bill and grants the application by endorsing a "fiat" on the bill. If the fiat is refused, the application may be placed before a Lord Ordinary,[6] but the grant of the application is a routine administrative act. In a forthcoming Discussion Paper on Inhibitions we intend to propose that the sheriff court should have power to grant warrants of inhibition,and accordingly bills for letters of inhibition on the dependence would become unnecessary.

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[1] OCR, r 42(2). There is no equivalent summary cause procedure.

[2] OCR, r 112.

[3] Practice Note,February 21, 1986.

[4] See McBryde and Dowie, Petition Procedure in the Court of Session (1st edition; 1980) pp 45-47; Macphail, pp 365 - 366.

[5] See the form in the Titles to Land Consolidation (Scotland) Act 1868, s 156, Sch QQ.

[6] RC 189(b).

(b) The existing law on recall or restriction of diligence on the dependence as excessive or oppressive

2.22 The court's power to recall or restrict arrestments and inhibitions on the dependence, is discretionary deriving historically from the nobile officium of the Court of Session.[1] Generally the court exercises its powers in accordance with certain recognised principles, but having regard to the discretionary nature of the powers, it may be that new grounds may come to be recognised by the courts on analogy with principles applied in earlier cases. The main grounds are:

(i) that the court may recall or restrict diligence on the dependence where it appears that the effect of the diligence is nimious (ie. excessive) or oppressive;

(ii) that the court may in certain cases recall diligence on the dependence where it appears prima facie to have been incompetently or irregularly exercised; and

(iii) possibly that the court may recall or restrict diligence on the dependence where it is ineffective.

For present purposes, we are concerned only with the first of these grounds. We revert to the other grounds later.[2]

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[1] See eg Mackay, Practice of Court of Session, vol 1, p 218; Maclaren, Court of Session Practice p 96; Greigs, Petitioners (1866) 4 M 1103.

[2] See para 2.202 ff.

2.23 An inhibition or arrestment on the dependence may be recalled or restricted on the ground that it is nimious (ie. excessive) or oppressive.[1] In practice, nimiety and oppression are generally treated as one test. Lord President Dunedin observed that a nimious and oppressive diligence may be recalled "in some cases simpliciter but much more generally on caution".[2] The court has a discretion in deciding whether to recall or restrict the diligence and whether to impose on the applicant a condition of caution or consignation. No fixed rules can be stated and the following are some examples.

(1) Where the diligence which is the subject matter of the application is excessive, or where it is excessive when taken along with other diligence or caution. Here the diligence may be restricted, or may be recalled as regards some subjects but not others.[3]

(2) Where the pursuer's debt is already secured by a voluntary security.[4]

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

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

3 See eg Noble v Noble 1921, 1SLT57; Tweedie v Tweedie 1966 SLT (Notes) 89 (arrestment); McInally v Kildonan Homes Ltd 1979 SLT (Notes) 89 (inhibition).

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

(3) Where the debtor has consigned the debt.[1]

(4) Where the conclusions or craves in the action are extravagant or the sum sued for is disproportionate to the pursuer's interest.[2] The court may have regard to the nature of the action and especially where it concludes for a random sum, (eg. damages, or count, reckoning and payment with an alternative pecuniary conclusion for damages) may, if it considers that the sum is excessive, substantially restrict the property affected by the diligence or fix caution substantially below that sum[3]. But practice seems to vary and even in damages actions the critical amount fixed for restriction or caution may often be the sum sued for plus a reasonable amount for expenses.[4]

(5) There is authority that where the defender has ample funds to meet the pursuer's claim, and there is no prospect of the claim being defeated by other creditors, the court may recall the diligence as oppressive without caution.[5] But, it seems that, in modern practice, generally if the defender's financial standing is good, he will be required to give caution or consignation as a condition of

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[1] Graham Stewart, p. 569.

[2] Graham Stewart, p 198; Levy v. Gardiner 1964 S.L.T. (Notes) 68.

[3] Eg Fisher v Weir 1964 SLT (Notes) 99; Arch Joinery Contracts Ltd (in liquidation) v Arcade Building Services Ltd. 1988 GWD 29-1258.

[4] Eg McPhedron and Currie v McCallum (1888) 16 R 45; Ellis v. Menzies & Co Ltd (1901) 9 SLT 243; Bruce v. Hutton (1934) 50 Sh Ct Rep 272: See W J D, "Arrestment on the Dependence" 1934 SLT (News) 49 at p. 49.

[5] Graham Stewart, p 199; Magistrates of Dundee v Taylor (1863) 1 M 701.

recall.[1] The practice is not invariable, however, and in a recent case an arrestment of the cargo of a ship was recalled on the ground that the defender was the titular head of a foreign government department and that it was realistic to assume that any decree in favour of the pursuers would be obtempered.[2] Practice in relation to ships or their cargo may be somewhat special and it is thought that this was an unusual case. In some cases, the defender's omission to offer caution may be regarded by the court as grounds for doubting his ability to meet the pursuer's claim,[3] or, if the defender has substantial assets, as a ground for rejecting an argument that the arrestment is nimious and oppressive.[4]

(6) Where it appears that the purpose of an arrestment on the dependence is not to protect the legitimate interests of the pursuer but to embarrass the defender, it may be recalled without caution.[5]

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[1] Cf Graham Stewart p 202, commenting on Bell, Commentaries vol 2, p 66.

[2] West Cumberland Farmers v Director of Agriculture of Sri Lanka 1988 SLT 296; see also Lindsay v K-Shield Double Glazing Ltd 1989 G W D 6-260 where an inhibition securing a counter-claim was recalled, two factors being the circumstances of the pursuer (defending the counter-claim) and the comparatively small amount of the counter-claim.

[3] Svenska Petroleum A B v H O R Ltd 1982 SLT 343 at p 344 (OH) per Lord Kincraig. See also David McAlpine Properties Ltd v Jack Jarvis (Kirkcaldy) Ltd 1987 G W D 16-620.

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

[5] Levy v Gardiner 1964 SLT (Notes) 68 (OH); distinguished Svenska Petroleum AB v H O R Ltd 1986 SLT 513 at p 518.

(7) Possibly where the pursuer has delayed unduly in prosecuting his action, the diligence may be recalled.[1]

(8) Where the pursuer's arrestment on the dependence prevented the implementation of his arrangement with the defender to wind up their partnership, the diligence was recalled without caution.[2]

(9) At least where the thing arrested on the dependence is a ship or its cargo, and probably in all cases of diligence on the dependence, the court may recall the diligence without caution if it is not satisfied that the averments in the summons or initial writ disclose "some intelligible and discernible cause of action" and "the existence of a colourable case".[3] The averments however are not "examined with anything approaching the standard of scrutiny as would occur in a procedure roll debate. Recognition has to be made that on occasions there is great urgency in instituting proceedings particularly when it is apprehended that a vessel is about to sail beyond the jurisdiction of the court".[4] It is probably true to say that in current practice generally the court will not recall an arrestment on the dependence, except on full caution or consignation, even in cases where the pursuer's pleadings and quantification of his claim are very rough or insubstantial and lacking in specification.

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

[2] Lapsley v Lapsley (1915) 31 Sh Ct Rep 330.

[3] West Cumberland Farmers Ltd v Ellon Hinengo Ltd 1988 SLT 294 at pp 294-5 per Lord Weir; applied in Clipper Shipping Co Ltd v San Vincente Parnters 1989 SLT 204 where Lord Coulsfield held that, in an application for arrestment on the dependence of foreign proceedings, an affidavit by a responsible foreign lawyer to the effect that the legal ground of the foreign depending action is recognised by the applicable foreign law suffices to satisfy the test of a colourable case, in the absence of any contrary evidence as to the foreign law.

[4] Ibid at p 295.

2.24 In some cases it is not entirely clear whether the ground of recall without caution is, or ought to be, invalidity or nimiety and oppression. Thus, where an arrestment on the dependence has been used in bad faith, as where the property has been wrongly detained in order to create the opportunity to lay the arrestment, the arrestment has sometimes been treated as invalid[1] and sometimes as oppressive.[2] To this indeterminate category perhaps belong also cases where arrestments are used by trust beneficiaries against a trustee in order to prevent him ingathering the estate or to secure a preference over other beneficiaries.[3]

(c) The existing law on caution and consignation

2.25 Caution or consignation by applicant for recall or restriction. Since the purpose of diligence on the dependence is to provide a creditor with security for his claim, the defender or alleged debtor (or other applicant for recall) is entitled to obtain recall of the diligence if he consigns the sum sued for or finds caution for it to the satisfaction of the court.[4] In the case of arrestment, caution may be found for the arrested fund or property or its value, but more commonly caution for the whole debt is required[5], thereby enabling the court to recall all the arrestments already used, and to prohibit the use of further

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[1] Azcarate v Iturrizga 1938 S C 573.

[2] See Rintoul Alexander & Co v Bannatyne (1862) 1M 137; classified by Graham Stewart p 198 under the head of nimious: see also Svenska Petroleum AB v HOR Ltd 1986 SLT 513 at p 518.

[3] Graham Stewart p 199.

[4] This is recognised in the usual form of arrestment on the dependence which states that the subjects are arrested until sufficient caution be found.

[5] Macphail, p. 361.

arrestments under the same warrant.[1] In the case of inhibition on the dependence, caution will normally be found for the debt. If anything less than full caution or consignation is offered, the amount required is fixed by the court in its discretion. "No general rule can be laid down except that the amount depends on the circumstances of each case".[2] In particular, where the pursuer sues for a random sum, eg. damages or count, reckoning and payment with an alternative conclusion for damages, the court may modify the amount of caution having regard to the nature of the action, the extent of the subjects arrested or affected by the inhibition and the circumstances of the common debtor.[3] Often the court will fix caution at a sum substantially below the random sum.[4] The court is the judge of the status of the cautioner but in general caution may be furnished by a private individual. Where the cautioner's solvency becomes doubtful while the action is still in dependence, the pursuer should move for new caution to be found.[5] The court may order consignation of an appropriate sum in lieu of caution.[6]

2.26 Caution by arrester or inhibitor on the dependence. Where an arrestment or inhibition has been used on the dependence, there is old authority that the court hearing an application for recall or restriction may require the arrester or

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1 See para 2.219 below.

2 Graham Stewart, pp 202; also p 571.

3 Graham Stewart, pp 203, 571; Macphail p 361.

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

5 Cf RC 238 (f).

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

inhibitor to find caution for the damage which may be caused by allowing the diligence to remain.[1] This is rarely resorted to, and Graham Stewart[2] observes that it is used only when it is apparent that the pursuer has little prospect of success. No case has been traced in which caution has been required as a condition of obtaining the warrant. A requirement of caution by a pursuer is difficult to reconcile with the pursuer's entitlement to obtain a warrant for diligence on the dependence as of right, and with the rule that he is not liable for damages merely because the action in question turns out to be unsuccessful.[3] The caution could only be required to secure against damages for diligence which is wrongful in the sense of formally irregular or executed with malice and want of probable cause, and not against nimious and oppressive use of the diligence. This distinguishes diligence on the dependence from interim interdict where the court sometimes imposes a condition that the complainer find caution to secure the respondent for damages and expenses in the event of interdict being ultimately held to be wrongous, ie, if the action ultimately fails.[4]

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

[2] p 570 citing Seton v Hawkins (1842) 5 D 396.

[3] See para 2.28 below.

[4] Burn-Murdoch, Interdict, p 141 ff; but see as to modern practice Wright v Thomson 1974 SLT (Notes) 15 where Lord Maxwell observed that while no fixed rule could be laid down, caution would not normally be required except where the pursuer was insolvent or it appeared that the defender would have a substantial claim for damages in the event of interim interdict proving wrongous.

(d) The existing law on liability for wrongful diligence on the dependence

2.27 One aspect of the present law which may well encourage the unrestricted use of diligence on the dependence, is that a litigant using such diligence in the ordinary course of process is generally not liable for loss which has been caused if his claim should eventually prove to be unfounded. A fortiori, he is not required to find caution for such damage.

2.28 Thus the general rule is that the "right of a litigant to use arrestment and inhibition in security of his claim is in the same position as his right to take action therefor. He has an absolute right to use these diligences without obtaining a special warrant from the Court, and is not liable in damages if he has proceeded regularly, although it should ultimately turn out that his claim is unfounded".[1] As a general proposition, a litigant using diligence on the dependence under a warrant obtained as a routine administrative act is only liable in damages for loss which it causes if (1) there is an inherent defect in the warrant; or (2) the diligence is not regularly executed; or (3) though the diligence is formally regular, it was executed with malice and want of probable cause.[2] Both malice (in the sense of improper motive) and want of probable cause are requirements of liability , are very difficult to prove, and are rarely established. Diligence on the dependence may be excessive or oppressive, within the meaning of the test for recall, though used in good faith. The test of whether diligence on the dependence is excessive or oppressive is an objective test which has reference primarily to the impact of the diligence on the defender. By contrast, the test of delictual liability - malice and want of probable cause - or

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[1] Graham Stewart, p 773, approved in Grant v Magistrates of Airdrie 1939 S C 738 at p 759 per Lord President Normand.

[2] Graham Stewart, p 762; Walker, Delict, pp 863-865; Grant v Magistrates of Airdrie, supra, at pp 758-9.

at least the first part of that test, has reference primarily to the pursuer's spiteful or improper motive. It is this emphasis on subjective motive, together with the fact that creditors rarely use diligence vindictively being concerned simply to recover their debts, which makes the test of delictual liability difficult to satisfy.

2.29 The reason given by the courts for the rule which makes malice and want of probable cause a requirement of liability for wrongful use of diligence on the dependence is that a person using a legal process acts in the exercise of his legal right and is entitled to the highest degree of privilege short of absolute privilege.[1] In the leading Wolthekker case,[2] Lord Justice-Clerk Inglis observed:

> "It would be most unreasonable and inconsistent, to give the pursuer of an action the right to use inhibition and arrestment on the dependence, and, at the same time, to make him answerable in damages, merely because he fails in obtaining a judgment against the defender, though he has used his legal right moderately and in good faith. I think it would be quite as reasonable to make him answerable for damages arising from his having raised an action in which he has not succeeded. His right to raise the action, and to state in his summons everything pertinent, though injurious to the defender, is not more unqualifiedly secured to him as a litigant, than his right to use diligence on the dependence.[3]

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[1] Notman v Commercial Bank of Scotland 1938 S C 522 at p 532 per Lord Justice-Clerk Aitchison (delivering the Opinion of a Court of seven judges).

[2] Wolthekker v Northern Agricultural Co (1862) 1 M 211.

[3] Ibid. at pp 212-213.

An ill-founded action is just as competent as a well-founded action[1] and the same is true of diligence on the dependence. The principle underlying the decisions[2] is that it is in the public interest that persons should not be deterred from using the machinery of the law to take advantage of their legal remedies.[3]

(e) Some criticisms of existing law in legal sources

2.30 The unrestricted availability and use of diligence on the dependence has long been criticised by writer and judge, sometimes in trenchant terms. In 1822, for example, Walter Ross[4] observed that inhibition on the dependence:

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

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

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

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

4 Lectures on Conveyancing and Legal Diligence (2nd edn) vol 1, p 468.

A standard work on sheriff court pleading[1] remarks of arrestment on the dependence:

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

Another highly respected writer on sheriff court practice, Sheriff W Jardine Dobie, observed, with reference to arrestment on the dependence:-

> "... a disinterested enquirer, unacquainted with our forms of procedure, might well express surprise, if not amazement, at a process which enables any random pursuer to impound his opponent's funds while he drags through the Courts a claim which may be not only ill-founded, but preposterous."[2]

Judicial dicta include the following:

> "The use of inhibition and arrestment may be productive of the most serious injury to the mercantile credit and interests of the party against whom they are used: and it might frequently happen that reparation for such injury could not be obtained".[3]

> "It must be borne in mind that a warrant of arrestment is granted as a matter of course on the mere application of an alleged creditor who desires security for his debt, - a state of the law which has often been the subject of complaint in reference to vessels of large burden with valuable cargoes suddenly detained, when on the point of sailing, in security of claims which have ultimately proved to be unfounded".[4]

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[1] Lees, Handbook of Written and Oral Pleading in the Sheriff Court (1st edn; 1888) p 40.

[2] W J D, "Arrestments on the Dependence", 1934 SLT (News) 49 at p 49.

[3] Beattie & Son v Pratt (1880) 7R 1171 at p 1173 per Lord Ormidale.

[4] Carlberg v Borjesson (1877) 5R 188 at p 195 per Lord Shand.

"The evil done by the diligence is the same, whether the arrestment has been successful or not. That evil is the creation in the minds of arrestees of doubt as to the stability of the common debtor. The average man who receives an arrestment schedule does not stop to discriminate whether that imports an arrestment in execution, or merely an arrestment on the dependence. Most probably he does not know the difference between the two. Even if he does, the impression conveyed to his mind is that the defender is wrongously refusing to pay a claim made against him, and is being sued in court to compel payment; and to the mind of the commercial man in the street I fear an action in court infers resistance to a just claim. If the process of arrestment is repeated, it is not difficult to see how easily the reputation of a commercial firm might be injured in the eye of the commercial community...".[1]

"The reckless use of arrestment on the dependence is, I fear, becoming a crying evil... It should be borne in mind that a warrant to arrest is necessarily granted upon a pursuer's ex parte statement, and in nine cases out of ten such general illiquid claims[2] do not turn out to have been the kind of pecuniary conclusions upon which a warrant to arrest on the dependence should have been granted at all".[3]

2.31 We ourselves have received some representations on the topic. The Society of Messengers-at-Arms and Sheriff Officers observed to us that warrants to arrest on the dependence are too easily obtained at the present time. They suggested that warrants to arrest on the dependence should only be granted by the court on an ex parte application by the pursuer who should be required to make out a case for it being granted. And a local society of solicitors observed that diligence on the dependence is difficult to defend when the defender's liability has not been established.

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1 Dick and Parker v. Langloan Iron and Chemical Co Ltd (1904) 21 Sh Ct Rep 139 at p 140 per Sheriff Fyfe.

2 ie. actions for random sums such as damages, or count, reckoning and payment.

3 Gebruder van Uden v Burrell (1914) 1 SLT 411 at p 412 per Sheriff Fyfe.

defender who is unable to pay their weekly wages because his bank account is arrested; and the purchaser of property from an inhibited seller. Arrestment and inhibitions are bound to cause some degree of harm to third parties, but where the claim is unfounded and the diligence therefore unjustifiable, the third parties have no redress against the arrester or inhibitor.

2.35 Excessive diligence on the dependence. One of the most important criticisms of the present law is that the subjects affected by an inhibition on the dependence, or attached by arrestments on the dependence, may be disproportionately great relative to the amount of the debt claimed or likely to be found due.

2.36 It seems likely that in a significant number of cases of inhibition on the dependence, this criticism is justified. An inhibition on the dependence renders litigious the whole of the heritable property of the defender or alleged debtor. It is clear from our survey of inhibitions that inhibitions on the dependence are sometimes used to secure sums which are relatively small, and certainly significantly less than the capital value of the property affected by the inhibition. Thus, in 1985, of 2,731 inhibitions used on the dependence of debt actions, 81(3%) secured debts under £100; 270(10%) secured debts under £1,000; 1,393 (51%) secured debts under £5,000; and 1,929 (71%) secured debts under £10,000.[1] It is true that the inhibition does not necessarily secure for the inhibitor the whole value of the property affected by the inhibition because there may be securities, real diligences and pre-inhibition debts having priority. Moreover, in very many cases the debtor will have only one heritable property, and so restriction of the inhibition may not be practicable or reasonable.

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[1] The percentages do not add up to 100% because each successive percentage includes the previous quantities.

2.37 On the other hand, to freeze a valuable asset for a debt of trifling amount, which could be secured by an arrestment on the dependence, may often be unreasonable. Although the inhibition may be recalled on caution of ex hypothesi a trifling amount, the mere registration of an inhibition can cause a transaction to fail before the inhibition is recalled.

2.38 Especially vulnerable are defenders with many conveyancing transactions in hand at any one time, such as development companies feuing or leasing land; property companies buying and selling land as their stock-in-trade; and local authorities selling council houses. There is a risk that where the debt is small, the delay and expense involved in an application for restriction or recall may induce the defender to pay the debt claimed though it may not be legally due. Diligence on the dependence should not be used to put pressure on defenders to settle alleged debts.

2.39 A warrant for arrestment on the dependence may be used as often as the creditor wishes, and each arrestment attaches the whole amount due by the arrestee to the common debtor. It quite frequently happens that arrestments on the dependence attach amounts far in excess of the debt claimed.

2.40 We provisionally propose later[1] that an arrestment on the dependence should only secure a specified sum fixed by reference to the debt claimed plus a reasonable estimate of the expenses. This, however, would not of itself prevent the pursuer from using several arrestments on the dependence, each of which attaches funds or property to the extent of the debt and expenses,

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[1] See para 2.140 ff.

so that the aggregate of the arrested sums may greatly exceed the amount of the debt claimed. Moreover, in actions for a random sum, such as damages or count, reckoning and payment, where normally the sum claimed is considerably in excess of the sum eventually found due, the sum attached by even one arrestment on the dependence will generally be excessive.

2.41 Unnecessary or oppressive use of diligence on the dependence. Even where diligence on the dependence does not affect assets of a greater value than the sum sued for, it may be used in circumstances where there is no real or substantial risk that enforcement of the pursuer's decree (assuming his action is successful) will be frustrated by the alleged debtor's insolvency, or by a race of diligences by competing creditors against his property, or by the defender dealing with his property to defeat the pursuer's claim. We have seen that, in applications for recall of diligence on the dependence, generally if the defender's financial standing is good, he will nevertheless still be required to give caution or consignation as a condition of recall.[1] The fact that the defender is good for any decree which may be pronounced against him in the action is not generally regarded as a factor making diligence on the dependence oppressive. It seems likely that in a significant proportion of cases where diligence on the dependence is used, the defender is solvent and does not wish to dissipate his assets to avoid payment. In such cases, diligence on the dependence may be used primarily to pressurise the defender into settling the pursuer's claim.

2.42 Scale of problem: arrestments on dependence. There are no comprehensive, reliable and up-to-date official statistics on the scale of use of arrestments on the dependence. The most recent information we have consists of statistics of the numbers of arrestments used against the four Scottish clearing banks provided to us by the Committee of Scottish Clearing Bankers. These valuable statistics include arrestments in execution as well as on the dependence. They show that in the calendar year 1988, almost 26,000 arrestments were executed in the hands of the four

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[1] Graham Stewart, p 202; see para 2.23, head (5).

Scottish clearing banks [1] A very substantial proportion of these, probably well over half, are likely to have been arrestments on the dependence. Probably in very many cases the creditor serves an arrestment on all four clearing banks. The numbers of arrestments against banks have been increasing greatly in recent years. Thus the Royal Bank of Scotland plc have informed us that in the sixteen years from 1973 to 1988 inclusive the annual number of arrestments have increased almost ten-fold, from 745 in 1973 to as many as 7,374 in 1988. These statistics throw considerable doubt on the results of a survey which suggested that in Scotland in 1978, only about 900 arrestments were executed against funds and property other than earnings.[2] The Royal Bank of Scotland plc informed us that in that year, 1,530 arrestments were served in their hands alone.

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[1] In 1988, the Bank of Scotland received 5,242 arrestments; the Royal Bank of Scotland plc, 7,110; the Clydesdale Bank plc, 6,588. In the year 3.12.87 to 2.12.88 the TSB, Scotland plc received an estimated 7,000 arrestments: the actual figure for the half-year 3.6.88 to 2.12.88 was 3,447.

[2] B Doig, The Nature and Scale of Diligence, Central Research Unit, Scottish Office (1980) para 3.6. The evidence of this study was to some extent corroborated by a survey of defenders in debt actions in 1978. Of the sample of 1,223 debtors interviewed, only 23 (2%) experienced an arrestment and in all cases the arrestments were arrestments in execution of earnings. No cases were reported of arrestments of money (other than earnings) or other property: see Gregory and Monk, Survey of Defenders in Debt Actions in Scotland, Social Survey Division, Office of Population Censuses and Surveys, HMSO (1981); p 39 and pp 41-42.

2.43 Scale of problem: inhibitions on dependence. A survey conducted by us of inhibitions registered in the personal register in 1985 showed that 2,731 inhibitions on the dependence of actions for a principal sum (ie. excluding actions for divorce or aliment) were registered in that year. Of these, 853 (31%) were on the dependence of Court of Session actions; 1628 (60%) on the dependence of sheriff court ordinary causes; and 250 (9%) on the dependence of sheriff court summary causes. The numbers of inhibition documents registered have been increasing in recent years.[1]

2.44 Irrecoverable expenses as a restraint on use of diligence on the dependence. In the result, while we have statistics for inhibition on the dependence, we do not know the number of cases in which arrestment is used on the dependence. Although it is a significant and growing number of cases, it is probably still in only a relatively small percentage of all actions of payment. The Civil Judicial Statistics do not disclose the precise number of actions of payment raised in any year in which diligence on the dependence is competent but it must be at least 110,000 actions, excluding divorce and aliment actions.[2] We would expect that the number of actions, in which arrestment on the dependence is used, is unlikely to exceed greatly the numbers in which arrestments are used against banks, and are therefore unlikely to exceed about 10,000 or 15,000 annually, since in very many cases the pursuer lays arrestment in the hands of 2, 3 or all 4 clearing banks. Given that a pursuer has an undoubted right to use diligence on

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[1] According to the Civil Judicial Statistics, Scotland, 1984, Table 5.9,(the last published annual civil judicial statistics), the number of documents registered in the personal register (including notices of inhibition as well as inhibitions) rose from 2, 606 in 1974 to 9,798 in 1984.

[2] See Civil Judicial Statistics, Scotland, 1984, Tables 2.3; 2.4; 2.5; 3.4; 3.6; 3.7. In 1984, for example, 123,805 summary cause actions were initiated in 1984 (Table 3.6) of which perhaps about 80% (almost 100,000) were actions for debt (para. 3.13 at Table 3.7). In the sheriff's ordinary court, almost 19,000 (18,973) actions were initiated (Table 3.4) of which probably about 60% (over 11,000) were for debt. In the Court of Session 3,278 debt, personal injury and damages actions were initiated in the Outer House.

the dependence of an action, and is not liable in damages for wrongful use of diligence merely because his action is unsuccessful, the question arises of why diligence on the dependence is apparently used in only a relatively small percentage of the total number of actions initiated. One reason may be that actions for payment normally elicit payment without the need for diligence but there are at least two other possible reasons, namely,first, that arrestment of earnings on the dependence is incompetent[1] , and second that the expenses of using diligence on the dependence are not recoverable as part of the expenses of process and indeed there is some doubt whether they are recoverable at all.[2] This rule applies even if the action is successful, and the diligence on the dependence is in effect converted, by the extract of the decree for payment, into a diligence in execution. It does not seem to us that this result is altogether satisfactory since it penalises the pursuer whose claim is well founded along with the pursuer whose claim is unfounded. We revert to this later.[3] We note here that if the expenses of diligence on the dependence are to be recoverable by a pursuer whose claim is well founded, then, since most actions for payment (about 95%) are undefended, such a change on the law might result in a considerable increase in the use of diligence on the dependence, unless a judicial or legal restraint is placed on the availability or use of warrants for diligence on the dependence.

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[1] Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, s 1.

[2] Graham Stewart, pp 133, 554; see para 2.123 ff.

[3] See para.2.123 ff.

(g) The analogy of interim interdict and interim and provisional remedies in other legal systems

2.45 The analogy of the law and procedure in interim interdict and interim and provisional remedies in other legal systems also suggests that a pursuer's virtually absolute right to use diligence on the dependence is exorbitant and requires reform.

2.46 The analogy of interim interdict. Diligence on the dependence closely resembles interim interdict, which though a prohibitory remedy enforceable by petition and complaint for contempt of court, and not a true diligence creating a nexus or preference, has been described as "in the nature of a diligence in security". [1] Both are interim remedies. Both are designed to secure that a pursuer's rights are not defeated by the defender during the dependence of an action. Both are generally granted on an ex parte application by the pursuer. Broadly speaking, both are provisional and become final or absolute in the event of the pursuer being successful in his action. There is however this difference that interim interdict is a discretionary remedy granted by the court only on cause shown by the pursuer. The onus is on the applicant for interim interdict to show why he should have an interim remedy pending disposal of the merits of the action. Further, the pursuer may be required to find caution as a condition of obtaining interim interdict.[2] By contrast, diligence on the dependence is generally available to a pursuer as of right; he need not show a prima facie case for obtaining the interim remedy; and the onus lies on the defender to show cause why the diligence should be recalled or restricted, and to find caution. We note later that the analogy of interim interdict should not be pressed too far. Nevertheless, it is difficult to see why two

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[1] Graham Stewart, p 780.

[2] Wright v Thomson 1974 SLT (Notes) 15: see para 2.26 above.

remedies so similar in their essential roles and functions should have such different procedures and prerequisites.

2.47 Interim and provisional remedies in other legal systems. Our limited research on interim remedies in other legal systems suggests that Scots law may be unusual in treating diligence on the dependence as a matter of legal right available without an ex parte judicial enquiry. In the Denilauler case,[1] the Court of Justice of the European Communities appears to have assumed that a judicial enquiry would precede the ex parte judicial authorisation of provisional and protective measures.[2]

2.48 England and Wales. In English law, the nearest equivalent to diligence on the dependence is (apart from the special Admiralty process of arrest of ships) the so-called Mareva injunction, which takes its name from one of the two cases in which it was first granted.[3] A Mareva injunction is an injunction restraining a defendant from disposing of, removing or concealing assets to defeat the claim of a plaintiff in an action in the courts in England and Wales. Unlike diligence on the dependence, it does not create a preference for the plaintiff in a competition with

[1] Denilauler v SNC Couchet Freres. [1981] 1 CMLR 62; [1980] ECR 1553; 1984 SLT (European Court Case Notes) 24.

[2] See [1981] 1 CMLR 62 at p 81: "The courts of the place or, in any event, of the contracting State, where the assets subject to the measures sought are located, are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to the laying down the procedures which the plaintiff must observe in order to guarantee the provisional and protective character of the measures ordered". (emphasis added).

[3] Mareva Compania Naviera SA v. International Bulk Carriers SA [1975] 2 Lloyds Rep 509 (CA) also reported at [1980] 1 All ER 213. The other case was Nippon Yuren Kaisha v. Karageorgis [1975] 1 WLR 1093 (CA).

other creditors.[1] It is a discretionary remedy deriving from the discretionary power of the High Court to grant interlocutory injunctions in all cases where it appears just and convenient.[2] The application is initially ex parte and in chambers, and the supporting documents include the originating writ in the action, an affidavit or affidavits and a draft of the injunction sought. The injunction is at common law purely ancillary to an action in the English courts.

2.49 The plaintiff must show (a) that he has a good arguable case[3], (which appears to mean that there is a serious question to be tried though not necessarily one which the judge believes, on the basis of affidavit evidence not tested by oral cross-examination, to have more than a 50 per cent chance of success[4]). (b) The plaintiff must show that there is a real risk of disposal, removal or concealment of assets done during the dependence of an action with a view to avoiding execution after judgment. (c) At one time, the plaintiff had to produce prima facie evidence from which it might be inferred that the defendant had assets within the jurisdiction. In a series of recent Court of Appeal cases, however, (the most recent at the time of writing being Derby & Co Ltd v. Weldon (Nos 3 and 4)),[5] it has been held that, although a Mareva injunction should normally be confined to assets within the jurisdiction, in an appropriate case the court has power to make an order concerning foreign assets, subject to ordinary principles of international law, in order to prevent the defendant from taking action designed to frustrate subsequent

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[1] Iraqi Ministry of Defence v. Arcepey Shipping Co. SA [1981] QB65 at pp. 71-72.

[2] Now contained in the Supreme Courts Act 1981, s 37(1). The county court may also grant a Mareva injunction.

[3] Rasu Maritima SA v Perusahaan [1978] 1QB 644 at p 661 (CA); Ninemia Corporation v Trave GmbH [1983] 1 WLR1412 at p 1417.

[4] American Cyanamid v Ethicon Ltd [1975] AC 396.

[5] [1989] 2 W L R 412 (CA); see also Babanaft International Co SA v Bassatne [1989] 2 W L R 232 (CA); Republic of Haiti v Duvalier [1989] 2 W L R 261 (CA); and Derby & Co Ltd v Weldon [1989] 2 W L R 276 (CA).

orders of the court. The injunction covers money, goods,[1] interests in land[2] and incorporeal property (eg goodwill[3]). In the Z Ltd. case,[4] Kerr L J observed that it was an abuse of the jurisdiction to grant a Mareva injunction:

> "in circumstances in which there may be no real danger of the defendant dissipating his assets to make himself 'judgment-proof'; where it may be invoked, almost as a matter of course, by a plaintiff in order to obtain security in advance for any judgment which he may obtain; and where its real effect[5] is to exert pressure on the defendant to settle the action".

He continued by observing that the jurisdiction:

> "would not be properly exercisable against the majority of defendants who are sued in our courts. In non-international cases, and also in many international cases, the defendants are generally persons or concerns who are established within the jurisdiction in the sense of having assets here which they could not, or would not wish to, dissipate merely in order to avoid some judgment which seems likely to be given against them; either because they have property here, such as a house or a flat on which their ordinary way of life depends, or because they have an established business or other assets which they would be unlikely to liquidate simply in order to avoid a judgment... the great value of this jurisdiction must not be debased by allowing it to become something which is invoked simply to obtain security for a judgment in advance, and still less as a means of pressurising defendants into settlements".[6]

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1 Allen v Jambo Holdings Ltd [1980] 1 WLR 1252.

2 Stockler v Fourways Estates Ltd [1984] 1 WLR 25.

3 Darashah v UFAC (UL) Ltd (1982) 79 LSG 678.

4 Z Ltd v A-Z [1982] QB 558.

5 Ibid at p 585.

6 Ibid at p 585-586.

Consistently with these remarks, Lord Donaldson of Lymington MR observed[1]:

> "The fundamental principle underlying this jurisdiction is that, within the limits of its powers, no court should permit a defendant to take action designed to ensure that subsequent orders of the court are rendered less effective than would otherwise be the case. On the other hand, it is not its purpose to prevent a defendant carrying on business in the ordinary way or, if an individual, living his life normally pending the determination of the dispute, nor to impede him in any way in defending himself against the claim. Nor is it its purpose to place the plaintiff in the position of a secured creditor. In a word, whilst one of the hazards facing a plaintiff in litigation is that, come the day of judgment, it may not be possible for him to obtain satisfaction of that judgment fully or at all, the court should not permit the defendant artificially to create such a situation". (emphasis added).

2.50 The plaintiff must give an undertaking to pay damages flowing from the injunction, if his claim should be unsuccessful, and may be required to support the undertaking by a bond or security.[2] The plaintiff must make a full and frank disclosure of all matters in his knowledge which are material for the judge to know, including a fair statement of points against his claim which have been or are likely to be made by the defendant.[3] If the plaintiff breaches this duty of frankness, the injunction will be discharged.[4]

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[1] Derby & Co Ltd v Weldon (Nos 3 & 4) 1989 2 W L R 412 (CA) at p 419.

[2] The fact that the undertaking is worthless because the plaintiff is without substance does not prevent the grant of a Mareva injunction in a proper case: see eg Allen v Jambo Holdings Ltd [1980] 1 WLR 1252 at p 1258.

[3] Third Chandris Corporation v Unimarine SA [1979] QB 645 at p 668.

[4] eg The Assios [1979] 1 Lloyds's Rep 331.

2.51 In German law, the Code of Civil Procedure[1] provides two types of interim measures to safeguard potential judgment creditors, corresponding to diligence on the dependence and interim interdict in Scots law. The equivalent of diligence on the dependence is the Arrest which is an attachment of any assets belonging to the potential judgment debtor.[2] It is available to a creditor in a claim for money or convertible into money. Anything belonging to the alleged debtor may be attached, including funds or property in the hands of a third party. To obtain an arrest the alleged creditor must inter alia show grounds for an Arrest (Arrestgrund)consisting of "facts which lead to the assumption that the debtor, before the enforcement of any judgment against him is possible, will take steps which will render enforcement of a judgment substantially more difficult or even impossible".[3] Whether acts of the debtor alone constitute an Arrestgrund or acts of third parties (eg. danger that his wife may abscond with his assets) suffice is or was at one time contested; we understand that the prevailing opinion nowadays supports the latter view. Danger of bankruptcy or enforcement by other creditors is insufficient. An Arrest freezes assets. An arrestee (Drittschuldner) has no remedy, but a fourth party, eg. one claiming ownership of the attached property, may bring proceedings against the creditor. Provision is made for the speedy disposal of applications for an arrest, which usually do not involve

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[1] Zivilprozessordnung (or ZPO for short). This paragraph is based on Cohn (ed.), Manual of German Law, vol 2 (London, 1971) p 242 ff, and on information provided by the Ministry of Justice of the Federal Republic of Germany.

[2] ZPO, ss 916-935. The equivalent of interim interdict is the einstweilige Verfugung, (ZPO, s 936 ff) with which we are not concerned.

[3] Cohen, op cit, p 244.

an oral hearing [1] and also for speedy revocation if this appears justified. The court may, and fairly often does, make an order for Arrest dependent upon security by the alleged creditor.[2] We understand that the court has an unfettered discretion to decide the type (eg. bank guarantee) and amount of security to be provided. If the court makes no decision as to the type of security, then security can be provided by way of deposit of money, or by such other form of security as is recognised by the Civil Code (B.G.B., s. 234, paras. 1 and 3). It has been observed that the condition, attached to the arrestment order, requiring the creditor to provide security "is no serious obstacle for the creditor and at the same time a valuable safeguard for the debtor and a deterrent against an abuse of the facilities".[3] The order for Arrest cannot be enforced by the creditor if the debtor gives security (such as a banker's or insurance company guarantee) for an amount specified in the order for Arrest. If the security by the defender is provided, the order for Arrest is revoked on a motion. It has been said that the order for Arrest is therefore "no real danger to a solvent and honest debtor".[4]

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[1] If the court feels doubtful about the matter it may order an oral hearing at which both parties are heard, unless there is a danger of the debtor taking steps to frustrate enforcement. At the hearing both parties submit affidavits and other documents, and the court may hear witnesses if available.

[2] Cohn, op cit, p 245.

[3] Idem.

[4] Ibid p 246.

2.52 French law[1] provides a range of interim and provisional measures, including the saisie arret[2], used to arrest claims due to debtors by third parties, and the mesure conservatoire or saisie conservatoire, regulated mainly by provisions enacted in 1955,[3] which attaches property generally[4] and may include the imposition of a temporary lien over immoveable property.[5] In the case of a mesure conservatoire, an application for authority to attach the debtor's property is made ex parte to the court.[6] The application indicates briefly why the attachment is requested and what property is to be attached.[7] Attachment may be granted only if the creditor's claim appears to be well founded and if speedy action is essential to ensure the eventual payment of the judgment debt.[8] The court may but need not order the alleged creditor to find security for possible damages and for wrongful attachment.[9] A huissier seizes the property, whether in the hands of the alleged debtor or third party and delivers it to a custodian for the court. The debtor may obtain the revocation of the attachment by application to the court or by giving security for payment of any judgment. A saisie arret may only be used by a creditor with written evidence of indebtedness and its role as an interim remedy on the dependence seems to have been superseded to some extent by saisie conservatoire.[10]

1 This paragraph is largely based on Herzog, Civil Procedure in France. (The Hague, 1967) p 198ff and p 235 ff

2 Code de Procedure Civile (CPC), articles 557-580 (anciens).

3 CPC, articles 48-57 (anciens), introduced by the Loi no 55-1745 of 12 Nov 1955; and subsequently amended.

4 Herzog, pp 198; 235; 237.

5 CPC, article 54(ancien).

6 CPC, article 48 (ancien); Herzog, p 235.

7 Herzog, p 235.

8 CPC, article 48 (ancien); Herzog, p 236.

9 Idem.

10 Herzog, p 237, fn 24; M Donnier, Recueil Dalloz 1971, Chronique, p 205.

2.53 Under Italian law,[1] the interim remedy to secure a future money decree is called a sequestro conservativo, which consists in a process for placing property in the hands of one of the parties (who give a bond of caution) or a third party and forbidding the parties to dispose of it. Any type of property may be attached. The creditor must show that he has reasonable grounds (being objective facts such as the debtor's conduct) to fear that he will be unable to obtain satisfaction of his decree unless the attachment is ordered. The order for attachment is granted ex parte and the debtor is notified of the order only after the attachment has been executed.[2] The debtor may obtain release by finding security for the creditor's claim and expenses.[3] Since the order was granted on a summary examination by the judge, usually ex parte, the creditor must apply to the court for confirmation of the order within a prescribed period.[4]

2.54 Sweden. Swedish law makes available a provisional attachment remedy designed to ensure that an anticipated money judgment can be executed.[5] The conditions which must be satisfied include, that the litigant has "probable cause" for his claim; that he furnishes security in an amount adequate to compensate for all damages that may be incurred by the adverse party; and that, in the absence of a provisional remedy, the value or "executability" of his anticipated judgment stands in jeopardy, because it can reasonably be expected that the defender will seek to evade payment by absconding, removing property or by other means.

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[1] This paragraph is based on Cappelletti and Perillo, Civil Procedure in Italy (The Hague, 1965) p 133 ff.

[2] Ibid p 135.

[3] Idem.

[4] Ibid pp 135-136.

[5] Ginsburg and Bruzelius, Civil Procedure in Sweden (1965) pp 219-222.

2.55 Summary. This brief excursion into comparative law shows that, in English law and four important Continental legal systems, interim and provisional measures safeguarding litigants pursuing actions for payment are only granted on cause shown, in an ex parte application to a judge, and that in several legal systems the judge may require caution to protect the defender from loss if the litigant's claim should turn out to be unfounded.

(h) Need and options for reform

2.56 Against this background, we have reached the provisional conclusion that the present law, under which a pursuer or other litigant has a virtually absolute right to use diligence on the dependence to secure his claim, provided it is executed in a formally regular manner, is unsatisfactory. It can have the effect of putting pressure on a defender to settle a claim which is unfounded. It can disrupt the ordinary course of a defender's business and cause damage to a defender's credit, in circumstances where the diligence is unnecessary because there is no real or substantial danger that the defender will dissipate his assets or that a competition with other creditors will arise. It seems to us that there are three main options for reform, the third being a combination of the first two. These options are:

(i) retention of the pursuer's right to use diligence on the dependence coupled with the imposition of strict liability in damages for wrongful use of diligence on the dependence where the pursuer's action is unsuccessful; or

(ii) a requirement that warrant for diligence on the dependence be granted (or refused) by a judge exercising

a discretion on cause shown, with power to restrict the warrant if he decides to grant it and to impose conditions, and with the pursuer's liability for wrongful diligence regularly executed being confined to cases where he has misled the court into granting the warrant; or

(iii) that both of the foregoing options should be available in law, and that the pursuer should be entitled to elect between using a warrant obtained in the ordinary course of process and applying to the court for a warrant.

The word "pursuer" is here used to include any litigant (including eg a defender pursuing a counter-claim) seeking a warrant for diligence on the dependence.

2.57 If it were decided that the main problem concerned inhibitions on the dependence, it would be possible to limit the reforms to warrants to inhibit on the dependence. We think, however, that reform of arrestment on the dependence is also required, and provisionally reject such a limitation. It seems to us that in principle the same rules should apply to both forms of diligence on the dependence.

First option: strict liability for loss arising from diligence on dependence in unsuccessful action

2.58 Under the first of the foregoing options, the pursuer's virtually absolute right to use diligence on the dependence would be retained in broadly its present form but he would be strictly liable to the defender in damages for loss arising from his use of the diligence if his action eventually turned out to be unsuccessful.

2.59 By an unsuccessful action we mean an action which is wholly unsuccessful. If the pursuer obtained decree for payment, albeit for less than the full amount claimed, then the use of diligence should not be treated as wrongful though it might be excessive or oppressive. The defender's remedy would be an application for recall or restriction of the diligence rather than an action for damages.

2.60 An "unsuccessful action" would require to be carefully defined by statute for this purpose. We suggest that it should mean any action in which the defender obtains decree of absolvitor or dismissal in respect of the pecuniary conclusion or crave secured by the diligence, other than a decree which is consequential on a settlement of the action. Thus an "unsuccessful action" would not necessarily be the same as an "unfounded claim". A claim may be well founded but an action to enforce it may fail for lack of evidence or some other technical reason. The concept of an "unfounded claim" is unfortunately too uncertain to be a prerequisite of strict liability.

2.61 In favour of this option, it may be observed that one of the main injustices stemming from diligence on the dependence probably arises where the pursuer's action is unsuccessful.It is also a very considerable advantage of this option that it would be very simple and quick in procedural terms, avoiding the need for a court hearing before the grant of the warrant. It also would have insignificant resource implications for the courts.

2.62 This option's disadvantages may be summarised as follows.

(1) It would not prevent excessive and oppressive diligence in cases where the court, if it had had the opportunity to consider the matter before granting warrant, would have refused to grant the warrant or restricted the scope of the warrant.

(2) This option would afford no real protection to a defender where the pursuer is a man of straw.

(3) There is also a view that "even if a pursuer is good for damages, a judicial award of damages for wrongous use of diligence is a poor remedy for the mischief done by reckless arrestment, for that can seldom be measured or compensated by mere money damages".[1]

(4) The imposition of strict liability on a deserving pursuer whose action fails for a mere technical reason, such as lack of evidence, might be regarded as unjust.

(5) In many cases the outcome of litigation is uncertain. Pursuers may well be unduly deterred from using diligence on the dependence because of the risk of incurring strict liability.

It seems to us that these disadvantages are sufficiently weighty to lead to the provisional conclusion that this option should not be adopted, or at least should not be adopted on its own as the sole solution to the problems which we have identified. We revert later[2] to the possibility of combining it with the second option, to which we now turn.

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[1] Gebruder van Uden v Burrell 1914, 1 SLT 411 (Sh Ct) at p 412 per Sheriff Fyfe.

[2] See para 2.67.

Second option: warrant for diligence on the dependence to be granted by a judge only on cause shown

2.63 Under the second option, warrant for diligence on the dependence would be granted by a judge on cause shown by the pursuer (or defender in a counter-claim) and the court would have power, when granting the warrant, to restrict it in some way to ensure, so far as practicable, that the property affected was not disproportionately great relative to the amount claimed, or prima facie likely to be found due. This solution would resemble the practice followed in those cases in which the Court of Session grants warrant for diligence on the dependence, with or without restriction, on a motion under RC 74(d),[1] except that the application would initially be ex parte. The liability of a pursuer who used diligence in a formally regular manner and on a competent warrant, but on the dependence of an unsuccessful action, would be confined to cases where the pursuer had misled the court, by some material untrue statement or failure to disclose a material fact, into granting the warrant. We discuss the details of this second option more fully below.[2]

2.64 The arguments for this particular option consist of or include the following.

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[1] See Fisher v Weir SLT 1964 (Notes) 99; Wilson v Wilson 1981 SLT 101; and Pow v Pow 1987 SLT 127, 1987 SCLR 290. See also Family Law (Scotland) Act 1985, s 19 discussed at para 2.107 ff.

[2] See para 2.70 ff.

(1) Given that the court can control, by recall or restriction, the excessive or oppressive use, and sometimes the incompetent use, of diligence on the dependence in a summary process on a prima facie presentation of the facts immediately after the diligence is used, it is arguably desirable that such control should be exercisable on a prima facie and ex parte presentation of the facts before the warrant for diligence is granted. Prevention is better than cure.

(2) Under the present law, the onus is on the defender or other applicant for recall or restriction to show cause why diligence on the dependence should be recalled or restricted, and generally recall will not be granted unless the applicant for recall finds caution, or consigns an amount equivalent to the debt or to the sum (or the value of the property) attached. Having regard to the fact that the debt may ultimately be found not to be due, and that even if due the diligence may be unnecessary to protect the debtor's claim, it seems desirable that the pursuer should be required to make out, ex parte in appropriate cases, a prima facie case for obtaining a warrant for diligence on the dependence.

(3) Pursuers suing on a bona fide claim would not be penalised for using diligence on the dependence in cases where their action is unsuccessful for technical reasons, nor would pursuers be unduly deterred by the risk of incurring strict liability depending on the possibly uncertain outcome of the action in which the diligence is used.

2.65 This option does suffer from disadvantages which are the converse of the advantages of the first option. The simplicity and speed of the present procedure would be lost and, if pursuers frequently applied for warrant for diligence on the dependence, there would be resource implications for the courts and the public purse.

2.66 We have little doubt that the advantages of this option outweigh the disadvantages, and we provisionally prefer this option as the basis for reform. The field of choice is not, however, limited to these two options, and before considering the details of our preferred option, we must make reference to a third option.

Third option: a combination of the first two options and pursuer's right to elect between them

2.67 The third option is in essence a combination of the first two options. Both of the foregoing options would be introduced by legislation, and the pursuer would be entitled to elect between them. In other words, a pursuer could obtain a warrant automatically in the ordinary course of process, but, if he did so, he would not be entitled to apply for a discretionary warrant and would be be strictly liable in damages for wrongful diligence if his action were unsuccessful. Alternatively a pursuer, who did not wish his potential liability in damages for wrongful diligence to depend on the possibly uncertain outcome of the depending action in which his diligence was used, would be able to apply to the court for a discretionary warrant for diligence on the dependence. If he obtained such a warrant and used it in a formally competent and regular manner, he would only be liable in

wrongful diligence if his action were unsuccessful and if he had misled the court into granting the warrant. This option has some attractions. A pursuer who wished to act very quickly could speedily obtain and use a warrant but would take the risk that his action would be unsuccessful. A pursuer who did not wish to take that risk could apply to the court for a warrant for diligence on the dependence. The position of defenders would be improved either by obtaining a right to claim damages if the pursuer's action was unsuccessful, or by the court's review of the question whether the grant of the warrant would be reasonable in the circumstances of the case.

2.68 On the other hand, the retention of a legal right to obtain and use a warrant for diligence on the dependence would not get rid of the disadvantage of the present system outlined in para. 2.62 above. Moreover, the co-existence of two different systems would create undesirable anomalies. Where in a special application the court in its discretion refused to grant a warrant for diligence on the dependence on the ground that it was wholly inappropriate, it seems wrong that the pursuer should nevertheless be entitled to use such diligence. We have therefore proposed that the pursuer should elect between one course or the other at the beginning of his action. However, that does not really get rid of the anomaly because a determined pursuer, who does not mind the expense, could simply abandon his action, raise a new action and obtain warrant automatically on the dependence of that action.

Main proposals

2.69 **Views are invited on the following options for reform.**

(1) A pursuer should continue to be entitled to obtain a warrant for diligence on the dependence, granted by a clerk of court automatically in the ordinary course of process, but the pursuer should be liable to the defender in damages for wrongful diligence if his action should turn out to be wholly unsuccessful. For this purpose, an unsuccessful action means an action in which decree of absolvitor or dismissal is granted, except where the decree is consequential on a settlement of the action. We do not, however, favour this option.

(2) The court should have a discretionary power, exercisable by a judge on the pursuer's application initially ex parte, to grant or refuse to grant the warrant, subject to restrictions or conditions. The pursuer's liability in damages for wrongful diligence on the dependence executed in a formally regular manner, would be confined to cases where the pursuer had misled the court.

(3) Both of the foregoing options would be introduced by legislation, and the pursuer would be entitled to elect between them.

We prefer the second option but if that is not acceptable, the third option might suffice. We reject the first option.

(Proposition 2).

(i) Specific proposals on judicial discretionary power to grant or refuse warrant for diligence on the dependence

2.70 If either of the second or third options (which both involve a judicial discretion to grant or refuse warrant for diligence on the dependence) were to be accepted, careful provision would have to be made regulating the details of the procedure in an application for such a warrant, the court's powers of disposing of the application and restricting the warrant, the grounds upon which warrant should be granted, the court's powers to impose conditions, and the related question of the pursuer's liability for wrongful diligence.

2.71 Form of ex parte application. Two points require consideration here. First, as under the present law, it should continue to be competent for the pursuer to apply ex parte for warrant for diligence on the dependence before service of the summons or initial writ, in order to preserve the element of surprise in cases where service might prompt the defender to take avoidance action. This element of surprise is all the more important having regard to modern means of communication where arrestable funds can be quickly spirited away to foreign bank accounts by electronic methods. Moreover the mere conclusion by the defender of prior missives suffices to defeat a subsequently registered inhibition, whether or not the missives are collusive in the sense of being intended to defeat a possible inhibition. We think that the application should initially be made ex parte, whether for a warrant to be inserted in the summons or initial writ, or to be granted by interlocutor in a later stage in the depending action. Second, we propose elsewhere[1] that a pursuer should be liable in damages for wrongful diligence where he had

[1] See Propositions 2(2) at para 2.69 and 6(1) at para 2.101.

misled the court by making untrue statements or failing to disclose information within his knowledge. This raises the difficulty that if the application were to be ex parte, on a simple motion, with an oral presentation of the facts supporting the application, and without any official minute of proceedings, the defender would often find it difficult or impossible to discover, or to prove, what factors had led, or misled, the court into granting the warrant. We suggest that where the application is made at the commencement of a Court of Session action or a sheriff court ordinary action, the grounds of application should be set out in an additional article in the condescendence of the summons or initial writ. Where the application is made in a sheriff court summary cause, the grounds of the application might either be stated in writing in manner prescribed by rules of court or the sheriff might endorse on the summons the grounds on which he relied in granting the warrant. Where the application is made at a later stage in the action, it should be by way of a minute stating these grounds. If material facts emerged which were not referred to in the writ supporting the application, the writ should be amended at the bar.

2.72 Powers of court. We think that the court should have wide powers to grant, or refuse to grant, the warrant, with or without restrictions or conditions, and, subject to rules of court, to determine the procedure to be adopted. The court should have power to grant a warrant for arrestment on the dependence, or inhibition on the dependence, or both such warrants, without restriction. Provided that the rules of court enable the defender and any other interested person to apply without delay to the court for recall or restriction, [1] we would expect that the court would not normally require to appoint a time for a hearing at

[1] See our proposals on applications for recall in Proposition 17(2) at para 2.188 below where we propose that an application for recall or restriction should be competent in the sheriff court before the tabling of the action on the model of Court of Session procedure.

which the defender could apply for recall or restriction. The court should also have power to grant the warrant in a restricted form as mentioned below.

2.73 The court should have power to refuse to grant the warrant simpliciter. Such cases of refusal simpliciter would probably be unusual and relate to the competency of the warrant for diligence. Questions of competency in applications for recall normally involve the irregular execution of diligence under a competent warrant , but there may be cases where it clearly appeared that the mere grant of a warrant would be incompetent, eg. where the action as laid was incompetent for want of jurisdiction in Scotland or a sheriffdom, or because the conclusions of the summons or initial writ did not support the warrant (eg. the action did not have pecuniary conclusions or, in the case of inhibitions, an appropriate conclusion or crave ad factum praestandum).

2.74 In some cases, it may appear to the court that the element of surprise is unimportant and that justice requires that the defender should have an opportunity to be heard by the court as to whether warrant should be granted, and, equally important, an opportunity to provide caution, as a condition of refusal to grant the warrant. Thus it may be clear that there is no real risk of the defender taking immediate measures to frustrate diligence following intimation of the application, as where the defender is a local authority or large public company known to be of undoubted solvency, which has ample attachable assets and ample funds to meet the pursuer's claim, and which simply delays payment because it contests liability. There may be a question of whether diligence is necessary at all in such cases[1] but even if

[1] See eg West Cumberland Farmers v Director of Agriculture of Sri Lanka 1988 SLT 296.

some security should in the court's opinion be furnished, it will often be clearly better that the defenders should have the opportunity to find caution or make consignation than that their business or credit should be harmed by premature and unnecessary diligence on the dependence securing a claim which may turn out to be unfounded. In more unusual cases, it may appear that the action is vexatious or frivolous and that warrant for diligence on the dependence is being sought to embarrass the defender rather than to protect the pursuer's legitimate interests.[1] An advantage of an opposed hearing is that, as Sheriff Dobie remarked,[2] "there seems no good reason why [the pursuer's] statements need be taken at face value when the defender may be at least equally worthy of credit... It is admittedly difficult to adjudicate upon conflicting ex parte statements,[3] but fair consideration should be given to the averments of both sides, and in suitable cases some prima facie evidence might be asked or offered".

2.75 Restriction of warrant. One of the most important powers available to the court would be the power to restrict a warrant for diligence on the dependence, especially warrants for inhibition on the dependence. It should be competent for the court to grant warrant for inhibition on the dependence limited to subjects specified in the warrant as is competent by statute[4] in the case of warrants for inhibition securing aliment or financial provision on divorce. It should also be competent for the court to grant a warrant for inhibition (which affects the defender's heritable property generally) but to except particular subjects from

[1] See eg Levy v Gardiner 1964 SLT (Notes) 68.

[2] 1934 SLT (News) 49 at p 50.

[3] ie statements not supported by evidence which is subject to cross-examination.

[4] Family Law (Scotland) Act 1985, s. 19(1); see para 2.108 below.

its ambit.[1] It would be desirable or perhaps essential that the description of the subjects specified as included or excluded should be a sufficient conveyancing description to enable the Keeper of the Registers, and users of the personal and property registers, to connect the subjects specified in the inhibition (registered in the personal register) with the title-deeds recorded in the Sasines Register or with the Title Sheet in the Land Register.

2.76 We propose later[2] that an arrestment on the dependence of money should only attach in the hands of the arrestee a sum defined by reference to the debt, together with further sums to cover the likely expenses and interest. This limit would apply to each arrestment used under a particular warrant so that where several such arrestments were used, the aggregate of the arrested funds might considerably exceed the debt claimed. It might still be useful therefore if the court had power to restrict a warrant for arrestment to particular funds or property specified in the warrant, as is competent in relation to aliment and financial provision on divorce.[3] The court should also be empowered to exclude particular funds or property from the scope of a warrant for arrestment. It might for example be clear that to arrest a defender company's bank accounts would cause undue disruption of its business, whereas other attachable assets were or might be available which could be arrested with less hardship to the defender.

2.77 The legal limit proposed below[4] on the amount secured by an arrestment or inhibition on the dependence would be the

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[1] As in Pow v Pow 1987 SLT 127; 1987 SCLR 290.

[2] See Proposition 13 at para 2.163.

[3] Family Law (Scotland) Act 1985, s 19(1); see para 2.108 below.

[4] See Proposition 13 at para 2.163.

sum claimed in the action plus an additional percentage for expenses, but such a sum would be unrealistically high in some cases, including most cases of actions for random sums, such as damages. The court should therefore have power to restrict the amount which an arrestment or inhibition on the dependence will secure to an amount less than the amount claimed and expenses. This limit would have to apply to the amount attached by an individual arrestment, and not to the aggregate of the amount attached by all arrestments, since the limit must be capable of being applied by every arrestee.

2.78 The hearing. We would expect that judges and legal practitioners would generally be content if the hearing of an application for warrant followed the existing practice in a hearing in an application for recall with the difference that the facts supporting the application would be set out in writing, which is not required in an application for recall. Thus the application for the warrant should normally be disposed of on the basis of the averments of the pursuer and, if defences have been lodged, the defender, on oral representations, and on a prima facie presentation of the facts. The court would not normally require or allow a proof, save in the same exceptional circumstances as justify an allowance of proof in applications for recall, eg. for the limited purpose of proving foreign law applicable to the ownership of a ship proposed to be arrested on the dependence.[1]

2.79 We propose:

(1) **This Proposition and Propositions 4 to 7 below are advanced on the assumption that, as suggested in Proposition 2, the courts should have a discretionary power**

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[1] See para 2.204 below.

to grant, or to refuse to grant, warrant for diligence on the dependence.

(2) (a) An application for discretionary grant of a warrant for diligence on the dependence should be competent before service of the summons or initial writ, and should initially be made ex parte (unless the pursuer chooses to intimate the application), whether the application is for a warrant to be inserted in the summons or initial writ, or to be granted at a later stage in the depending action.

(b) The grounds of the application should be set out in writing as mentioned at para. 2.71 above.

(3) In disposing of or dealing with the application, the court should have power:

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

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

(c) to refuse to grant the warrant simpliciter; or

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

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

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

(b) to limit a warrant for arrestment on the dependence to particular funds or property, or to except particular funds or property from the scope of the warrant, and

also power to restrict the amount which an arrestment will secure, or in respect of which an inhibition will have effect, to an amount less than the amount of the sums claimed in the depending action.

(5) The application for the warrant should normally be disposed of on the basis of the averments of the pursuer and (if defences have been lodged) the defender, and on a prima facie presentation of the facts, but the court should have the same restricted power to allow proof in exceptional circumstances as it possesses in applications for recall or restriction under the existing law.

(Proposition 3).

2.80 Grounds justifying warrant. We suggest that the foregoing reforms should be supplemented by a statutory test or guidelines to give the courts and others guidance on the grounds

which would normally justify the grant of a warrant for diligence on the dependence securing debts already due. In the absence of a test or guidelines, it would not initially be clear how the courts would construe and apply their new powers. If, for example, warrants continued to be granted almost as a matter of course, the object of the legislative reforms would be defeated. Moreover, a statutory test or guidelines would, or should, reduce both uncertainty and the need for the courts to evolve their own guidelines at the litigants' expense.

2.81 To elicit views, we suggest that there should be a two-stage test. The first part of the test would be based on the present law on the grounds justifying the grant of warrants securing future and contingent debts.

2.82 Risk that enforcement will be prejudiced. At common law,[1] the remedy of diligence on the dependence to secure a future or contingent debt was recognised as competent but not normally warranted.[2] The pursuer had to aver "special circumstances" justifying the grant of warrant. The traditional "special circumstances" or "grounds" were that the defender was verging on insolvency (vergens ad inopiam) or contemplating abscondence (in meditatione fugae).[3] Dicta in certain cases however suggested that special circumstances might include cases where the defender was "putting away his funds with the intention of not fulfilling his contract",[4] or where "the circumstances are such that it appears that he intends to remove his effects beyond

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[1] The position has been altered by the Family Law (Scotland) Act 1985, s 19: see para 2.107 below.

[2] Gillanders v. Gillanders 1966 S C 54 .

[3] A fortiori where the defender had already taken up residence abroad: eg Tweedie v Tweedie 1966 SLT (Notes) 89 .

[4] Burns v Burns (1879) 7 R 355 at p 357 per Lord President Inglis.

the power of his creditors".[1] In Wilson v.Wilson[2] Lord Maxwell held that "while vergens ad inopiam and in meditatione fugae are the normally and most commonly recognised special circumstances, or at least were in times gone by, special circumstances are not necessarily confined to these two states of affairs". In that case warrant to inhibit was granted on a wife-pursuer's statements that her husband was selling the matrimonial home and that she feared that he would so dispose of the proceeds of sale as to defeat her claim for a capital sum on divorce. It is therefore clear that the threat of disposal of property or putting away of funds to avoid payment also amount to special circumstances within the test.

2.83 We suggest that it should not be competent for the court to grant warrant securing debts already due unless a test on these lines has been satisfied. Thus we think one ground should be the existence of a risk that the pursuer's claim might be defeated or prejudiced by the defender's insolvency, or the diligence of other creditors (which will generally imply at least practical insolvency). It seems that verging on insolvency is not a ground for the grant of a Mareva injunction under English law. One reason for this may be that a Mareva injunction does not give the creditor a preference in insolvency proceedings,[3] and another reason may be the reluctance of English law to give one unsecured creditor enforcing debt a preference over another where the defendant is insolvent.[4] Scots law has traditionally given an arrester on the dependence the same preference in ranking as an arrester in

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[1] Tweedie v Tweedie 1966 SLT (Notes) 89 at p 90 per Lord Thomson.

[2] 1981 SLT 101 at p 102.

[3] See para 2.48 above: Iraqi Ministry of Defence v Arcepey Shipping Co SA [1981] QB65 at pp 71-72.

[4] See eg a case on charging orders on land, Roberts Petroleum Ltd v Kenny Ltd [1982] 1 WLR 301, 307, approved [1983] 2 AC 192,207.

execution, subject to the rules on equalisation of diligences,[1] and the "reduction" of diligences in insolvency proceedings[2], and we see no reason to change that approach, whether or not equalisation of diligences outside insolvency proceedings is abolished.[3]

2.84 As regards the ground of "in meditatione fugae" (contemplating abscondence), the importance of this as a separate and self-contained ground has diminished since the abolition of imprisonment for debt,[4] now competent only in aliment cases.[5] In modern law, the emphasis is or ought to be not on whether the defender will personally leave the jurisdiction but on whether he will remove attachable assets from the jurisdiction. We suggest therefore that "contemplating abscondence" should cease to be a separate ground justifying warrant.

2.85 The other type of "special circumstances" relates to cases where the defender is likely to put assets beyond the power of his creditors, either by removing funds or moveable property from the jurisdiction, or by disposing of, burdening, or concealing assets within the jurisdiction so as to make them unavailable or untraceable in the event of the pursuer obtaining decree. We

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[1] Bankruptcy (Scotland) Act 1985, Sch 7, para 24, which applies to an arrestment on the dependence, provided it is followed up without undue delay.

[2] Ibid, s 37(4) and (5).

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

[4] Debtors (Scotland) Act 1880.

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

think that the pursuer should not require to show that the defender will deliberately set out to dissipate his assets with the sole or main motive or intention of defeating the pursuer's claim. At one time the court's powers in divorce actions to interdict dispositions or transfers of property were exercisable only where the disposition or transfer was about to be made by the defender wholly or partly for the purpose of defeating the pursuer's claim for financial provision in whole or in part.[1] It was found that the test of motive or intention to defeat a financial claim was unsatisfactory "because there is no way of telling what the purpose of a proposed disposition or transfer is. All the courts can do is to consider whether the proposed disposition may in fact prejudice the applicant's claim".[2] Accordingly the law was changed and under the reformed law, the court in a divorce or aliment action may interdict a transfer or transaction if the court is satisfied that it "is likely to have the effect of defeating in whole or in part" the pursuer's claim.[3]

2.86 We suggest that a similar formula should be used in the present context. We would expect that normally where a defender deals with his assets in the ordinary course of his business, his transactions and operations would be unlikely to prejudice the eventual enforcement of the pursuer's claim. We would hope that the proposed formula would go far towards preventing diligence which disrupts transactions and operations in the ordinary course of the defender's business. But such transactions and operations should not be formally excluded since

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[1] Divorce (Scotland) Act 1976, s 6.

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

[3] Family Law (Scotland) Act 1985, s 18(2).

they may indeed frustrate enforcement, an obvious example being the sailing of a ship which may never return to Scottish waters.

2.87 To sum up the argument so far, the first part of the test would be that there must be a real and substantial risk that, in the event of the pursuer obtaining decree, the enforcement of the decree may be prejudiced by insolvency proceedings, or the diligence of other creditors against the defender's property, or the defender removing assets from the jurisdiction, or disposing of, burdening, concealing or otherwise dealing with his assets. No warrant should be granted unless that test is satisfied.

2.88 Reasonableness. In addition, we think that the court must also regard it as reasonable to grant the warrant, with or without restrictions or conditions, having regard to the need to avoid the excessive and oppressive use of diligence on the dependence and to all the other relevant circumstances of the case. Thus there may be cases where there is a risk of insolvency or of assets being removed from the jurisdiction, but the right course is to give the defender an opportunity to find caution as a condition of the court's refusal to grant the warrant. Or it may be that to grant warrant would be equivalent to allowing diligence in bad faith, as where property sought to be arrested has been wrongfully detained by the pursuer to facilitate the arrestment[1], or would be inconsistent with contractual arrangements between the pursuer and defender.[2] Or it may be clear that the action is vexatious or frivolous and has so little prospect of success that diligence on the dependence would not be appropriate.[3]

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[1] Rintoul, Alexander & Co v Bannatyne (1862) 1 M 137; Azcarate v Iturrizaga 1938 SC 573.

[2] Lapsley v Lapsley (1915) 31 Sh Ct Rep 330.

[3] See eg. Levy v Gardiner 1964 SLT (Notes) 68.

2.89 Thus we think that the pursuer's prospects of success in his action should be subsumed within the wider test of reasonableness and should not be a separate, distinct test into which the court must enquire before granting the warrant. We are aware that in an application for a Mareva injunction, the plaintiff is bound to show that he has a good arguable case.[1] We think however that it would usually be difficult and sometimes impossible for the courts in Scotland to assess the pursuer's prospects of success or probabilis causa litigandi in an ex parte application for warrant for diligence. It is true that in applications for interim interdict, it is the practice of the court to have regard to the pursuer's prospects of success, either as a separate matter or more probably as an element in the balance of convenience.[2] But the grounds of interim interdict, though distinct from perpetual interdict,[3] are relatively closely bound up with the merits of perpetual interdict whereas the grounds justifying warrant for diligence on the dependence would mainly relate to the risk of insolvency or of transactions defeating enforcement by diligence, both of which will usually have little or nothing to do with the merits of the action. We think that the court should be empowered to have regard to the pursuer's prospects of success, if it has the means to do so, but should not be bound to do so.

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1 See para 2.49 above.

2 See N W L Ltd v Woods [1979] 1 WLR 1294 (HL) at pp 1309-1311 per Lord Fraser of Tullybelton, explaining in an English case the practice of the Scottish courts in this matter.

3 The main issue is the cogency of the need for interim interdict: Burn-Murdoch, Interdict, p 128, approved in Deane v Lothian Regional Council 1986 SLT 22 at p 23; Reed Stenhouse (UK) Ltd. v Brodie 1986 SLT 354 at pp 357-358.

2.90 We propose:

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

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

(i) insolvency proceedings or the diligence of other creditors against the defender's property; or

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

(b) that it would be reasonable to grant the warrant, with or without restrictions or conditions, having regard to the need to avoid the excessive and oppressive use of diligence on the dependence and to all the other relevant circumstances of the case.

(Proposition 4).

2.91 Caution or consignation by defender. The court has power to impose on the defender the burden of finding caution for or consigning the debt, or sums attached, as a condition of

recall or restriction of diligence on the dependence. It should have a like power where, in an opposed application at which the defender appears, the court grants a warrant with or without restriction. Since caution or consignation is a means of providing security alternative to the security provided by arrestment or inhibition on the dependence, caution or consignation would only be required in cases where the grant of warrant for diligence on the dependence would be competent. It would therefore be unnecessary to enact a separate test or guidelines. The limit of the security provided by caution or consignation would be the same as the amounts secured by diligence on the dependence, ie. the sum claimed plus a proportionate amount to cover expenses, and a lesser amount might be required by the court in circumstances (eg actions for a random sum) in which it would have restricted a warrant for diligence.

2.92 We propose:

> **Where in an opposed application for the discretionary grant of warrant for diligence on the dependence at which the defender appears, the court decides to refuse to grant warrant, or to grant a restricted warrant, the court should have power to impose a condition making the refusal or restriction dependent on the defender finding caution for, or consigning, the sum claimed, together with a sum representing an estimate of expenses, or such lesser amount as the court thinks fit.**

(Proposition 5).

2.93 Liability of pursuer for wrongful diligence on the dependence, and caution or consignation by pursuer. We noted above[1] that a pursuer executing diligence on the dependence is not liable for wrongful diligence merely because the court eventually decides that his claim is unfounded. If he executes the diligence under a proper warrant in a formally regular manner, he is only liable if he acted with malice and want of probable cause. The basis of this high degree of privileged immunity from delictual liability is that diligence on the dependence in the ordinary course of legal process is a legal right and litigants should not be deterred from using the machinery of the law to take advantage of their legal remedies.[2]

2.94 We have proposed above that if a pursuer is to continue to be entitled to obtain warrant for diligence on the dependence in the ordinary course of process, and without a special application to the court for a discretionary grant of such a warrant, he should be strictly liable for wrongful diligence if his action turns out to be unsuccessful. Here we are concerned with the nature of the pursuer's liability where he uses a warrant for diligence on the dependence granted by the court on a special application in the procedure suggested in the second and third options, and his action turns out to be unsuccessful.

2.95 Under the existing law, there is a well established distinction between the liability of a pursuer using diligence on the dependence in the ordinary course of process and cases where the diligence is a "special diligence or remedy for which a warrant or order of the court is required and which is not obtained as a matter of course but upon a statement or

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1 See para 2.28.

2 See para 2.29.

3 Graham Stewart p 762.

representation to the court". In this type of case,[3] "the diligence is not an unquestionable right, but a remedy granted by the court on the faith of ex parte statements and is therefore granted periculo petentis "[at the applicant's risk]"... In these cases, the applicant is answerable for the truth of the statement on the faith of which he obtained the warrant and whether it was made in good or bad faith he is liable if it turns out inconsistent with fact. Want of success established by the decision of the court is conclusive as to the wrongfulness of the diligence, and a claim of damages at once arises without any proof of malice or want of probable cause". In modern practice, this class of case is generally said to include warrants for sequestration for rent under the landlord's hypothec,[1] certain warrants to carry back tenants' goods[2] and summary warrants for recovering arrears of rates, taxes or community charge.[3]

2.96 The distinction between the two classes of case, or at least the argument in the authorities supporting the distinction, is not altogether satisfactory since it is not based on procedural realities. Warrants for sequestration for rent[4] and summary

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[1] eg Watson v MacCulloch (1878) 5 R 843.

[2] eg. Jack v Black 1911 SC 691; Shearer v Nicoll 1935 SLT 313. Such a warrant is an independent and separate remedy against displenishment designed to secure the landlord's hypothec rather than a remedy which is merely incidental to sequestration for rent.

[3] Grant v Magistrates of Airdrie 1939 SC 738.

[4] OCR, r 100(1) as read with r 8(2) (ex parte grant of warrant by sheriff on an ordinary cause initial writ); SCR r 1 and Form D, (ex parte grant of warrant by the sheriff clerk on a summary cause summons); see also Paton and Cameron, Landlord and Tenant, p 216.

warrants for recovery of arrears of taxes[1] rates[2] and community charge[3] are in practice granted ex parte by a routine administrative act and are obtained as a matter of right[4] rather than on the exercise by the court of a judicial discretion. There is indeed an observation in the leading case on liability for wrongful sequestration for rent that the same rule of liability should apply to wrongful sequestration for rent as applies to wrongful diligence on the dependence,[5] though the court did not give effect to that policy in its actual decision. It also appears anomalous that unjustified diligence under a warrant to carry back tenants' goods attracts strict liability if the warrant is granted ex parte[6] (but probably not if the warrant is granted on an intimated and opposed application in which the tenant has been heard[7]) whereas liability for unjustified diligence on the dependence under an ex parte warrant requires proof of malice and want of probable cause. We do not think that these rules provide a sound basis of principle or policy for imposing on pursuers, who have obtained warrant for diligence on the dependence in a special application to the Lord Ordinary or sheriff,strict or absolute delictual liability for wrongful diligence in every case where their claim turns out to be unfounded, or their action is unsuccessful.

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[1], Taxes Management Act 1970, s 63; Car Tax Act 1983, Sch 1, para. 3(2); Value Added Tax Act 1983, Sch 7 para 6(4) (substituted by the Debtors (Scotland) Act 1987, Sch 4, paras 2, 3 and 4 respectively).

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

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

[4] See Jack v Black 1911 SC 691 at p 696 per Lord Johnston (obiter) referring to warrants for sequestration for rent.

[5] Watson v MacCulloch (1878) 5 R 843 at p. 844 per Lord Gifford.

[6] Gray v Weir (1891) 19R 25; Maclaughlan v Reilly (1892) 20R 41; Jack v Black 1911 SC 691.

[7] Jack v Black supra at p 698 per Lord President Dunedin.

2.97 Probably the main reason justifying strict liability for wrongful diligence under warrants granted in "special" applications is the need to ensure that the court is not misled into granting the warrant by the applicant's untrue statements which the alleged debtor cannot contest because the application is ex parte. We think there is much to be said for a rule imposing liability on a pursuer who persuades the court to grant warrant by making statements which he knew, or ought to have known, were untrue. Such a rule should relate not only to untrue statements but also to cases where the applicant fails to make a full disclosure of material facts within his knowledge.[1] Thus for example if the pursuer correctly informs the court that the defender is about to transfer valuable assets abroad, but fails to disclose that the defender still has ample remaining assets in Scotland attachable on the dependence, then if the pursuer knew of the remaining assets, he is clearly at fault and should be liable for wrongful diligence.

2.98 Since, however, the grounds of the application for warrant for diligence on the dependence would be for the most part quite separate and different from the subject matter of the depending action for payment, it would seem unnecessary and inappropriate to impose liability for wrongful diligence on the pursuer merely because his claim of debt is eventually held to be unfounded, still less because his action eventually fails, perhaps for a technical reason. Such a rule would in our view be

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[1] Cf Fife v Orr (1895) 23 R 8 (damages for wrongous interdict) at p 11 per Lord McLaren: "Where interdict is improperly obtained, no distinction can be taken between the cases when interdict is based on positive false statements, and when it is obtained by the suppression or non-disclosure of facts which are necessary to enable the judge to determine the expediency of granting interim interdict".

unfair and would be likely to deter litigants from using diligence on the dependence. It would also defeat one of the main objects of the proposed third policy option which is to allow pursuers, who do not wish their potential liability for wrongful diligence to rest on the uncertain outcome of their depending action, an alternative procedure which does not attract that risk.

2.99 The rule proposed in para. 2.97 above would entail rejecting the analogy of the liability of litigants who obtain interim interdict inverting possession or altering the status quo.[1] In such cases, if perpetual interdict is refused, and the interim interdict is recalled, the recall is taken to be conclusive proof of its wrongful use and liability is absolute. In one sense an arrestment or inhibition on the dependence "freezes", and does not invert, an existing state of possession, but it does affect the defender's freedom to deal with his property and thus has a close analogy with interim interdicts changing the status quo.On the other hand, the relationship between the grounds of interim interdict and the grounds of final interdict is much closer than the relationship between the proposed grounds of warrant for diligence on the dependence and the merits of the action for payment. We suggest that this justifies rejecting the analogy of absolute liability for wrongful interim interdict as a legislative model in the present context.

2.100 We referred above[2] to the old authorities under which the court hearing an application for recall or restriction of diligence on the dependence may require the arrester or inhibitor to find caution for the damage which may be caused by allowing the diligence to remain. So far as we are aware, caution or consignation by the arresting or inhibiting creditor is unknown in

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[1] Graham Stewart p 781.

[2] See para 2.26.

modern practice, but if he is to be liable for misleading the court, there may be greater scope for caution or consignation. There may even be cases where the competency of the diligence is in doubt, eg. whether a ship sought to be arrested on the dependence belongs to the defender, and warrant (if granted at all) has to be granted forthwith because speed is essential in the circumstances. In such a case, it may be useful for the court to require the arrester to find caution. We have reached no concluded view and invite comments.

2.101 We propose:

(1) A pursuer using diligence on the dependence in pursuance of a discretionary warrant should be liable in damages for wrongful diligence where the court has been misled into granting the warrant by either:

(a) a material factual statement by the pursuer which he knew, or ought to have known, was untrue; or

(b) the pursuer's failure to disclose to the court material facts within his knowledge.

(2) A pursuer using diligence on the dependence under a discretionary warrant should not however be liable in damages for wrongful diligence merely on the ground that his claim of debt is held by the court to be unfounded or that his action eventually turns out to be unsuccessful.

(3) **Views are invited on whether the court should be empowered to require the pursuer to find caution for loss arising from wrongful diligence, as a condition of obtaining a discretionary warrant for diligence on the dependence.**

(Proposition 6).

(j) Appeals

2.102 The transformation of the grant of warrant for diligence on the dependence from a routine administrative act to a discretionary judicial decision raises the question whether an appeal should lie against the decision of the court granting or refusing to grant a discretionary warrant, or indeed a decision requiring intimation of the application to the defender. An appeal against a refusal to grant warrant in an ex parte application would in many cases (eg. arrestments of ships) require to be brought and disposed of quickly, sometimes on the same day. This may present difficult practical problems.

2.103 An appeal against a decision to grant warrant should only be competent if the application had been intimated and contested. Such an appeal might require to be disposed of quickly eg. in the case of the arrestment of a ship which was on the point of commencing a voyage. If the taking effect of the warrant and hence the execution of the diligence were deferred until after an appeal against the decision had been disposed of, the defender might use the appeal procedure as a means of gaining time for putting away his property to avoid diligence. Accordingly we think that where the court grants the warrant, the warrant should not be prevented from coming into effect by reason only of an appeal against the warrant, or against any

condition affecting the warrant. Where a discretionary warrant had been granted at an uncontested hearing, the defender's remedy would be an application for recall rather than an appeal.

2.104 As regards the hierarchy of appeals and leave to appeal, we suggest that the analogy of appeals against decisions in applications for recall of diligence on the dependence should be followed with any necessary modifications.[1] In the Court of Session, a reclaiming motion should be competent from the decision of the Lord Ordinary or Vacation Judge to the Inner House without leave.[2] In the sheriff court an appeal should lie to the Inner House, or to the sheriff principal and thence to the Inner House. Following the Court of Session rule and the rule in appeals against decisions of the sheriff in petitions (competent without leave) rather than decisions in incidental motions (where leave is required),[3] it is suggested that leave to appeal from the sheriff or sheriff principal should not be required. An appeal from the Inner House to the House of Lords should be competent with leave or, if the judges differ, without leave in accordance with the normal rules.[4]

2.105

(1) **An appeal or reclaiming motion should be competent against the court's decision to grant, or to refuse to grant, the warrant or against any condition attached to the warrant.**

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[1] See paras 2.181 and 2.242 below.

[2] Cf RC 74(b).

[3] Tait v Main 1989 SCLR 106 (Sh Ct); see para 2.181 below.

[4] Court of Session Act 1988, s 40(1).

(2) It should be competent and possible to make and dispose of an appeal or reclaiming motion quickly.

(3) A warrant should not be prevented from taking effect by reason only of an appeal or reclaiming motion against the grant of the warrant, or against any condition affecting the warrant.

(4) In the Court of Session a reclaiming motion should be competent without leave from the decision of the Lord Ordinary or Vacation Judge to the Inner House. In the sheriff court, an appeal should lie to the Inner House, or to the sheriff principal and thence to the Inner House, without leave. An appeal from the Inner House to the House of Lords should be competent with the leave of the Inner House or, if there is a difference of opinion among the Inner House judges, without leave.

(Proposition 7).

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

2.106 Common law. It is competent for the pursuer to obtain warrant to arrest or inhibit on the dependence where the sum sued for is future or contingent. Nearly all the modern cases, which we have been able to trace, relating to warrants for diligence on the dependence in security of future or contingent debts, involved aliment or (since 1964) a periodical allowance or

capital sum awarded in a divorce action.[1] Aliment involves future debts insofar as, even immediately after decree, the instalments of pecuniary aliment are not yet due. Moreover, the rights to a capital sum and a periodical allowance sued for in a divorce action are contingent on success in the divorce action and the exercise of the court's discretion.[2] We have traced only one reported case of diligence on the dependence of a non-consistorial action for payment of a future or contingent debt.[3] That case is scantily reported and, while the court held the action to be competent,[4] it must be regarded as very exceptional in practice.

2.107 The Family Law (Scotland) Act 1985, s. 19 now governs the grant of warrant for diligence on the dependence in security of aliment, and of financial provision on divorce (or declarator of nullity of marriage). It follows that the older common law is only relevant to other types of action for payment of future or contingent debts, which appear to be very unusual in modern

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

[2] Brash v Brash 1966 SC 56 at p 57.

[3] See Dove v Henderson (1865) 3 M 339.

[4] Ibid per Lord President McNeill.

practice. Reference is made to the older law, as outlined at para. 2.68 above, under which the special circumstances justifying warrant are that the defender is verging on insolvency, or contemplating abscondence, or removing his property beyond the power of his creditors. In a recent case decided under the common law rather than s. 19 of the 1985 Act, the court assumed power to restrict a warrant for inhibition on the dependence by excluding specified heritable property from its ambit.[1] It has been observed that inhibition on the dependence is a more effective and suitable method of protection than interdict against disposal of property,[2] since it prevents disposal and at the same time does not involve questions of contempt of court.[3]

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

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

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1 Pow v Pow 1987 SLT 127; 1987 SCLR 290.

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

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

(2) In subsection (1) above, "the court" means the Court of Session in relation to a warrant for inhibition and the Court of Session or the sheriff, as the case may require, in relation to a warrant for arrestment on the dependence".

The section makes two changes to the pre-existing law. First, as regards the grounds on which warrant for diligence on the dependence securing aliment or financial provision (ie a capital sum or periodical allowance) may be granted, the section simply states that there must be "cause shown". The intention, as stated in our Report on Aliment and Financial Provision[1], was that it should be competent to inhibit or arrest on the dependence of a divorce or aliment action even in the absence of special circumstances, and that such diligence "should be made available as normal remedies" in such actions. It was observed that interdict to counter-act avoidance transactions is a difficult remedy to enforce in this situation and that, if inhibition and arrestment on the dependence were available, interdict should be used only as a remedy of last resort, which was desirable since inhibition and arrestment have advantages over interdict.[2]

2.109 Three further comments may be made on "showing cause". First, if the legislative intention had been to make diligence on the dependence securing aliment and financial provision a "normal remedy" in the sense that diligence on the dependence securing a debt presently due is a normal remedy, then there would have been no requirement of "showing cause". It is explained that under the old law interdict was in practice used as the normal remedy to counteract avoidance transactions, and

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[1] (1981) Scot Law Com No 67, paras. 3.152 and 3.153.

[2] See previous para, last sentence.

the object of s. 19 was that that role should be filled, so far as practicable, by diligence on the dependence. The latter form of protection does not however affect moveables in the defender's possession, and in such a case interdict would be the only remedy. Second, it is on further reflection not easy to see what "cause" will justify the grant of warrant under s. 19 other than the "special circumstances" required by the pre-existing law; ie. verging on insolvency; comtemplating abscondence; or the threat of disposal of assets, or of putting away of funds, to avoid enforcement of the pursuer's claim. In this respect, the legislation may not have made a significant difference. Third, the requirement of "showing cause" does not necessarily imply that the cause must be shown at a hearing before a judge. It may be made in averments in the summons or bill for letters of inhibition where the grant of warrant is an administrative act. We revert to procedural questions below.

2.110 Powers to restrict warrant on granting it. The second change is that section 19 confers on the Court of Session power to limit an inhibition on the dependence to any particular property and on the Court of Session and sheriff court power to limit the arrestment to any particular property or to funds not exceeding a specified value. As our Report on Aliment and Financial Provision[1] indicates, the legislative intention was that the court should be empowered to restrict an arrestment or inhibition on the dependence to specific items of property or to funds specified in the warrant . It is thought that section 19(1) achieves that intention though it has to be conceded that the object of the verb "to limit" is stated to be the inhibition or the arrestment rather than the warrant in pursuance of which the diligence is used. As regards inhibitions on the dependence, our recommendation was

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[1] Para 3.154.

made on the footing that it was not competent for the court to restrict the warrant in the first instance to particular items of property.[1] This was the commonly accepted view which was not challenged on consultation, though the recent Outer House case of Pow v. Pow[2], in which the court granted warrant for inhibition but excluded a specific item of heritable property from it, suggests that that view was mistaken. It should be noted that section 19(1) gives the court power to specify particular property to be covered by the inhibition, not as in Pow v. Pow power to grant a general warrant for inhibition with an exclusion of particular property. Where the warrant is granted by a judge, the judge may exercise the powers to limit or restrict the warrant and presumably may do so ex proprio motu. Where the warrant is granted by a clerk of court, the clerk can presumably only authorise a warrant in the terms applied for, and it seems unlikely that in practice pursuers will apply for restricted warrants in summonses or bills for letters of inhibition, when an unrestricted warrant may be obtained as a matter of course.[3] The only object of such a restriction would be to avoid the risk of being found liable, in an application for restriction or recall, in the expenses of using an exorbitant diligence. But at present such a constraint does not exist.

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[1] Idem.

[2] 1987 SLT 127; 1987 SCLR 290.

[3] There may in any event be a technical legal impediment to the exercise, by the clerks of the General Department of the Court of Session, of powers to restrict warrants to arrest or inhibit on the dependence in signeted summonses and letters of inhibition. Their powers to signet summonses and letters flow ultimately by delegation from the Keeper of the Signet (who is an Officer of State), not the Court of Session (see Maxwell, Court of Session Practice, p 53). Section 19 confers powers on the Court of Session but not on the Keeper of the Signet or his delegates. But the matter is not free from doubt.

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

(1) Warrant is granted in a summons or initial writ as a matter of course but the pursuer must, when seeking the warrant, aver the special circumstances on which he founds. This is the procedure which was approved in Noble v. Noble[1] and appears to be followed in modern practice in the great majority of cases.

(2) The pursuer should proceed by a special application intimated to the defender to enable him to oppose. This seems to have been the procedure which Lord President Inglis had in mind in Symington v. Symington[2] where he remarked: " It rather appears to me that if such diligence is to be used on the dependence of an action in security of a debt not then due, the creditor must proceed by a bill, so as to give the defender an opportunity of answering... instead of proceeding to use diligence simply by warrant obtained on the summons". It was subsequently pointed out by Graham Stewart[3] and Lord Ashmore in Noble v. Noble[4], first, that in bill procedure, a copy of the bill is not served on the defender so that he has no opportunity to object, and second, that if a copy was served on him, he would be likely to take action to frustrate the diligence. This is the procedure which is

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1 1921, 1 SLT 57 at pp 58-59 per Lord Ashmore.

2 (1875) 3 R 205 at p 206.

3 p 20, fn 11.

4 Supra at p 59.

followed where in a Court of Session action in which warrant has not been inserted in the signeted summons, warrant is subsequently applied for by intimated motion.[1] In such a case the court will examine the special circumstances even if the motion is unopposed.[2] Sheriff Macphail has argued that in a sheriff court action for enforcement of a future or contingent debt, "the court should grant warrant for citation alone, and should grant warrant for arrestment only after service of the initial writ and upon consideration of a motion which has been duly intimated to the defender".[3]

(3) Graham Stewart[4] took the view that the proper and only competent procedure was the ex parte application for a bill for letters of arrestment or inhibition on the dependence setting forth the grounds justifying the grant of the letters. This procedure may still be adopted if warrant has not been obtained in the summons or initial writ and it is desired not to intimate the application for warrant to the defender, but in practice seems to be adopted rarely if ever.

2.112 The requirement that special circumstances must be averred in the summons is enforced by clerks of court. If a clerk of court in the General Department refuses to grant a fiat on a bill for letters of inhibition or arrestment, the bill may be referred to a Lord Ordinary.[5] If the sheriff clerk refuses to

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[1] RC 74(d); Wilson v Wilson 1981 SLT 101 ; Pow v Pow 1987 SLT 127; 1987 SCLR 290.

[2] Wilson v Wilson 1981 SLT 101 .

[3] Macphail, p 354.

[4] pp 20 and 535.

[5] RC 189(b).

grant a warrant for diligence on the dependence in an initial writ or summary cause summons, or a precept of arrestment, the pursuer may apply to the sheriff.[1] We understand that under a long-established practice, where a clerk of court in the General Department refuses to signet a summons because of some technical defect which he has identified and the solicitor involved is unwilling to amend, the matter is put before a judge for a ruling.

2.113 In our Report on Aliment and Financial Provision[2] we recommended that rules of court should lay down the procedure for obtaining warrants for inhibition or arrestment on the dependence, the suggested procedure being by motion intimated to the other party. We suggested that obtaining warrant as a matter of course might not be suitable in relation to financial provision on divorce when there was no existing debt, any liability being contingent on the court's decree, though we recognised that intimation of a motion might enable the other party to take rapid steps to frustrate the arrestment or inhibition.[3] We understand, however, that the rules of court governing Court of Session and sheriff court procedure in divorce, nullity and aliment actions or in letters of inhibition or arrestment, have not changed the normal routine methods of obtaining warrants to arrest and inhibit on the dependence.

2.114 Our proposals. We suggest that our specific proposals on the discretionary grant of warrants for diligence on the dependence securing debts already due (the second option) should

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[1] OCR, r 8(3); SCR, r 3(1)(b).

[2] Recommendation 42(b) (para 3.155), and para 3.153.

[3] Para 3.153.

apply to cases involving diligence on the dependence securing future or contingent debts, including aliment and financial provision on divorce. Since the debt is future or contingent, the pursuer should not be entitled to obtain the warrant as a matter of course.

2.115 So far as procedure is concerned, it seems unsatisfactory that, under the present law, the pursuer is required to "show cause" in aliment, divorce and nullity actions, or to aver "special circumstances" in other actions for payment of future or contingent debts, yet (except in applications under RC 74(d)) the court does not scrutinise the "cause" or averments unless and until an application for recall or restriction is made.

2.116 The proposed statutory test or guidelines on the grounds justifying warrant for diligence on the dependence[1], being based largely on the common law grounds applicable in cases involving future and contingent debts,[2] (modified by the addition of a reasonableness test[3]) are particularly apt for such cases. The main formal difference would be that the "cause shown" formula in the Family Law (Scotland) Act 1985, s. 19, would be repealed, but that might make small difference in practice since "cause shown" is likely to have related to the debtor's insolvency or his dealings with assets. It seems unlikely that pursuers in aliment, divorce or nullity actions will apply for interdict under s. 18 of the 1985 Act rather than use inhibition or arrestment on the dependence, but, if we are wrong in this, it could be provided that such interdicts should not be granted where inhibition or arrestment on the dependence would be an adequate interim and provisional remedy. We invite views.

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[1] See Proposition 4 (para 2.90).

[2] See para 2.82.

[3] See para 2.88 ff.

2.117 Again the court's power to restrict warrants for diligence on the dependence correspond closely to the powers conferred by the 1985 Act, s. 19(1) and assumed at common law[1] in relation to future and contingent debts, and are therefore apt for such cases.

2.118 We propose:

(1) **The proposals on warrants for diligence on the dependence securing debts already due, liability for wrongful diligence, and related matters, set out in Propositions 3 to 6[2] above, should extend to diligence on the dependence securing future or contingent debts, including aliment and financial provision on divorce or nullity of marriage, and should replace the Family Law (Scotland) Act 1985, s. 19.**

(2) **Should it be provided that the grant of an interdict under the Family Law (Scotland) Act 1985, s. 18 (which interdict prohibits transfers or transactions likely to defeat claims for aliment or financial provision) should only be competent if it appears to the court that inhibition or arrestment on the dependence would not be an adequate remedy?**

(Proposition 8).

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[1] Pow v Pow 1987 SLT 127; 1987 SCLR 290.

[2] See respectively paras. 2.79, 2.90, 2.92 and 2.101.

(4) Procedure for preventing diligence on the dependence

2.119 Caveats. It has been held in the sheriff court[1] that it is incompetent for a person to lodge in that court a caveat against the grant of a warrant for arrestment on the dependence.[2] The decision proceeded partly on the absence of any authority sanctioning a caveat procedure and partly on the ground that a caveat would deny the pursuer "a right conferred by law to arrest without notice being given"[3] It appears that there is also no caveat procedure applying to diligence on the dependence in the Court of Session.[4]

2.120 More recently, commentators[5] have suggested that a caveat against diligence on the dependence may indeed be competent since a kind of caveat procedure against arrestment and inhibition on the dependence was sanctioned by the Court of Session in the old case of Royal Bank of Scotland v. Bank of Scotland (1729).[6] It is thought however that that case does not support the competence of a caveat procedure. First, the decision of the House of Lords (reversing the Court of Session) in that case is generally taken as an affirmation of a pursuer's virtually absolute right to use diligence on the dependence, and such a right is somewhat inconsistent with a caveat procedure.

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1 Ward v Kelvin Tank Services Ltd 1984 SLT (Sh Ct) 39.

2 A caveat is a request to the court that notice be given, to the person lodging the caveat (the caveater), of the commencement of proceedings for interdict or some other remedy and that before the court decides to make any interim order, the caveater has an opportunity to object to the making of the order.

3 Ward v Kelvin Tank Services Ltd 1984 SLT (Sh Ct) 39 at p 41.

4 Ibid at p 40.

5 McBryde and Dowie, 2nd edn, p 7; Gretton, Inhibition and Adjudication p 33.

6 I Paton 14.

Second, the decision also antedates the statutory provisions allowing service of an arrestment[1] and registration of a notice of inhibition[2] before service of the summons or letters of inhibition and these provisions are consistent with the pursuer's virtually absolute right to use diligence on the dependence. It is thought the better view is that caveats against diligence on the dependence are not competent either in the Court of Session or sheriff court.

2.121 Interdict. A defender may obtain interdict against the threatened use of arrestment and inhibition on the dependence where (a) it can be instantly verified that the use of the diligence would be wrongful,[3] or (b) he has consigned the principal sum sued for in the action.[4] In general, the application for interdict must be made to the Court of Session, not the sheriff.[5] It has however been observed that while the safest course is to apply to the Court of Session, it may be that a sheriff could competently interdict the use of arrestment on the dependence in his own court.[6] It is incompetent to interdict the registration of an

1 Debtors (Scotland) Act 1838, s 17.

2 Titles to Land Consolidation (Scotland) Act 1868, s 155.

3 Beattie and Son v Pratt (1880) 7 R 1171. By "wrongful" is meant executed without warrant, or irregularly, or with malice and want of probable cause: see para 2.28. Burn-Murdoch Interdict p 187 states that inhibition can be interdicted if shown to be nimious or oppressive but this is a ground of recall not of damages and interdict appears to be of doubtful competence in such a case.

4 Duff v Wood (1858) 20 D 1231.

5 Beattie and Son v Pratt supra at pp 1173-4; Graham Stewart, pp 195; 573; 754; Burn-Murdoch, Interdict, pp 186 - 7.

6 Macphail, p. 360.

7 Craig v Anderson (1776) 5 B S 482; Graham Stewart p 571; Burn-Murdoch, Interdict p 187.

inhibition[7] the proper procedure being application for recall.[1] We do not propose any change in these rules.

2.122 Proposals We propose:

(1) **It should remain incompetent to register a caveat against diligence on the dependence.**

(2) **No change should be made in the existing law on interdict against diligence on the dependence.**

(Proposition 9).

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

The existing law

2.123 The law on the incidence of liability for the expenses of using diligence on the dependence is confused and uncertain. The question (1) whether the expenses are chargeable against the debtor (ie. recoverable by the creditor from the debtor) has to be distinguished from (2) the question whether an arrestment attaches the expenses of arrestment (as well as the principal sum, interest and judicial expenses) or gives the inhibitor a preference for his expenses; and (3) the question whether the expenses of arrestment and inhibition on the dependence of an action may be decerned for, in that action, as part of the expenses of process. Graham Stewart[2] observes that "As arrestment in security is taken for the interim protection of the pursuer he cannot, although successful in his action, recover the expense of using it from the

[1] Dove v Henderson (1865) 3 M 339.

[2] p 133. See also Maclaren, Expenses, p 116.

defender,[1] nor is the expense of arresting a ship on the dependence and dismantling her recoverable by the pursuer".[2]

2.124 The cases cited, however, only support the proposition that the expenses of diligence on the dependence of an action cannot be decerned for as part of the expenses of process in that action.[3] The decisions were based on the principle that the using of arrestment on the dependence, however necessary it may be to make a pursuer's decree effectual when obtained, has nothing to do with obtaining that decree, which is the sole object of the action. But the court left open the question whether the expenses of arrestment on the dependence of an action are a debt due by the defender,[4] and as such recoverable in a separate action[5] such as an action of furthcoming[6] or an action of payment. The expenses of an arrestment in execution are recoverable at common law in a separate action for payment,[7] as were the expenses of poinding and warrant sale[8] until the Debtors (Scotland) Act 1987 made them recoverable out of the diligence itself but as a general rule not otherwise.[1]

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1 Citing Taylor v Taylors 25 January 1820 F C; Symington v Symington (1874) 1 R 1006; Roy v Turner (1871) 18 R 717.

2 Black v Jehangeer Framjee & Co (1887) 14R 678.

3 See eg Maclaren Expenses p 116.

4 Symington v Symington (1874) 1R 1006 at p 1009 per Lord Ardmillan.

5 Ibid at p 1009 per Lord Deas; Roy v Turner (1891) 18 R 717 at p 718 per Lord McLaren.

6 Roy v Turner supra at p 718 per Lord Adam.

7 Graham Stewart p 555.

8 Cf Inglis v McIntyre (1862) 24D 541 at p 544; Harvie v Luxram Electric Ltd (1952) 68 Sh Ct Reps 181 at pp 182-183.

9 Section 93(1) and (5): previously it was competent to poind sufficient goods to cover the expenses of the charge, poinding and warrant sale (McNeill v McMurchy Ralston & Co (1841) 3 D 554), but a tender of the debt not covering diligence expenses terminated the diligence.

2.125 On policy grounds, Graham Stewart's explanation seems unsatisfactory. All inchoate diligences, such as arrestments in execution and poindings, are for the protection of the creditor, and it is difficult to see why the interim character of arrestment on the dependence should mean that the creditor is not to have his expenses. If the expenses of an arrestment on the dependence are a debt chargeable against the defender, then under the Debtors (Scotland) Act 1987, s. 93(2), they are recoverable from the debtor out of the arrested property and the court will grant decree in the action of furthcoming for the payment of the balance of any expenses not so recovered. Alternatively the expenses may be recovered by a subsequent action of payment and diligence thereon. Another explanation of the supposed non-recoverability of the expenses of diligence on the dependence was given by Lord Sands (obiter) in Hatton v. A/S Durban Hansen[1] (which held that the expenses of an arrestment in rem of a ship were recoverable) where he remarked:[2]

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

This explanation is not in our view wholly persuasive. First, it is not easy to see why the recovery of the expenses of diligence should be made to hinge on the absence of any legal presumption that the defender was unwilling to meet his obligations. Such an approach views the matter wholly from the defender's standpoint and ignores those cases where the pursuer was not only successful

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[1] 1919 SC 154.

[2] Ibid at p 155.

on the merits of his action but also had good reason to use diligence on the dependence. Moreover, it is always open to a defender, by formal tender of the sum which he thinks is due, to protect himself against further unnecessary expense. Second, ex hypothesi the defender cannot be completely unable to pay because, for arrestment expenses to be recoverable at all, the arrestment must have attached some assets. In principle, the debtor should use his assets to pay his debts.

2.126 Graham Stewart[1] states a similar rule as to the expenses of an inhibition as he states for arrestments on the dependence, on the basis of the same authorities dealing with decree for the expenses of process of the action in which diligence on the dependence was used. In the case of inhibitions, however, there is this difference that there is no authority holding that the expenses of an inhibition used in execution of a decree are chargeable against the debtor, and indeed there is sheriff court authority[2] that the expenses of such inhibitions are not so chargeable. The reason for the decision was that "Inhibition is in its nature merely prohibitory, - a diligence of precaution or protection, - and, unlike arrestment, which may also be described as prohibitory, can never be carried so far as to become a direct step in enforcing payment".

Possible reforms

2.127 It is necessary to deal with arrestment on the dependence separately from inhibition on the dependence, since the existing law and policy considerations differ as between these two forms of diligence.

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[1] pp 554-555.

[2] Clark v. Scott (1878) I Guthrie's Select Sheriff Court Cases 204.

2.128 Arrestment on the dependence. Two categories of expenses require to be considered, namely first the expenses of using the diligence, and second the expenses of obtaining the warrant under the new procedure. As regards the expenses of using the diligence, we suspect that if there were no judicial discretion to refuse warrant and no strict liability for wrongful diligence and if the expenses were recoverable in a subsequent furthcoming (as indeed, contrary to the previous view, they may be, as a result of the 1987 Act, s. 93(2)[1]) arrestments on the dependence may come to be more commonly used. While we are reluctant to advance proposals which might significantly increase the use of arrestments on the dependence, we think that in principle the expenses of arrestment on the dependence of a successful action should be recoverable from the defender in a subsequent action of furthcoming. We note that the McKechnie Report[2] recommended that the court should have a discretion to award the pursuer the expenses of an arrestment on the dependence if he obtains decree (even if only for expenses) or can show good reason why the arrestment was used. The McKechnie Committee's reasoning was that it may well be that the arrestment is not necessary to ensure that the pursuer is able to recover his debt. We suggest that this solution should be adopted but subject to modifications. First, we suggest that if the pursuer's action is unsuccessful (ie the court grants decree of absolvitor or dismissal and the action has not been settled), the pursuer should have no right to recover his expenses. Second, even if the pursuer is successful in his action he should be entitled to recover his expenses only if he can show good reason why the arrestment was used. Even in a successful action diligence on the dependence may be unnecessary as where the

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[1] See para 2.125 above.

[2] Recommendation 58 (para. 181).

pursuer has already used arrestments which he knows already adequately secure his claim. It may be that where the pursuer has obtained a discretionary warrant, ie has already justified the need for diligence to the court, the onus should be reversed so that he would be presumed to be entitled to his expenses unless the defender showed that the pursuer had no good reason for using some (or all) of the diligences.

2.129 The proposed requirement that a pursuer should make a special application for warrant for arrestment on the dependence is designed to be a measure of debtor protection and it might be regarded as paradoxical if the debtor had to bear the expense of the application, especially as the pursuer could have obtained the warrant in the ordinary course of process. There are a number of possible options including: (1) that the pursuer should always be liable for his own expenses; (2) that the pursuer should be liable for his own expenses unless he is successful in the action, when the expenses would become recoverable from the debtor; (3) that the defender should only be liable for any extra expenses of the pursuer caused by the defender's opposition to the application in a case where the pursuer is successful in his action; and (4) that the court should have a discretion to award the pursuer the expenses of the application if he obtains a decree (even if only for expenses).[1] A pursuer should be liable to a defender for the defender's expenses in opposing an application for arrestment on the dependence if the pursuer's claim is held to be unfounded.

2.130 We propose:

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[1] Cf the McKechnie Report's recommendation as to the expenses of arrestment on the dependence itself.

(1) The court should have a discretionary power to award the pursuer the expenses of arrestment on the dependence where the pursuer:

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

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

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

(2) Views are invited on what criteria should determine liability for the pursuer's expenses in applying for a discretionary warrant for arrestment on the dependence.

(3) If the pursuer is unsuccessful in his action,he should be liable to the defender for the defender's expenses in opposing the application.

(Proposition 10).

2.131 Inhibition on the dependence. Inhibition expenses are special because the expenses of all inhibitions, even an inhibition in execution, are generally thought to be irrecoverable from the inhibited debtor.[1] We shall seek views on the incidence of

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[1] See para 2.126.

liability for expenses of using inhibitions in execution in our forthcoming discussion paper on inhibitions. If such expenses are to be recoverable, then the expenses of inhibition on the dependence should be recoverable in the same way as the expenses of arrestments on the dependence.[1] We think that it would be convenient if the same rule were to apply to the expenses of an application for warrant for inhibition on the dependence as is ultimately chosen for applications for warrant for arrestment on the dependence.

2.132

(1) **In a forthcoming Discussion Paper on Inhibitions we intend to invite views on the incidence of liability for the expenses of using inhibitions in execution. It is suggested that if the expenses of using inhibitions in execution are to be recoverable, then the expenses of inhibition on the dependence should be governed by the rules for the expenses of arrestment on the dependence in Proposition 10(1) above.**

(2) **Whatever rules are ultimately adopted as regards the matters dealt with in Proposition 10(2) and (3) above should apply in relation to expenses in an application for warrant for inhibition on the dependence.**

(Proposition 11).

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[1] The McKechnie Report, recommendation 58 (para 181), recommended that it should be within the discretion of the court to award the pursuer the expenses of an inhibition (on the dependence?) if he obtains decree (even if only for expenses) or can show good reason why the inhibition was used, ie the same recommendation as for arrestment on the dependence.

(6) Service of arrestment and registration of notice of inhibition before service of summons or initial writ

2.133 Service of arrestment before service of summons. An action can be said to be in dependence only when it has been commenced by service on the defender of the summons (or initial writ) and accordingly at common law the schedules of arrestment on the dependence could only be competently served on the defender after service of the summons.[1] Since service of the summons gave defenders notice of the pursuer's intention to use arrestment on the dependence, defenders sometimes put away their funds to render the arrestments useless.[2] Accordingly a series of statutory provisions[3] culminating in the Debtors (Scotland) Act 1838, s. 17, enabled a pursuer in a Court of Session action to lay an arrestment in pursuance of the warrant in his summons. Section 17 further provides that:

> "Such arrestment shall be effectual provided the warrant of citation" [ie. in the signeted summons] "shall be executed against the defender within 20 days after the date of the execution of the arrestment, and the summons called in court within 20 days after the diet of compearance, or where the expiry of the said period of 20 days after the diet of compearance falls within the vacation, or previous to the first calling day in the session next ensuing, provided the summons be called on the first calling day next thereafter; and if the warrant of citation shall not be executed and the summons called in the manner above directed, the arrestment shall be null...".

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[1] Elphinston v Creditors of Strichen (1706) Mor 8144; Hamilton v Dunlop (1711) Mor 8145; Neil v Brown (1773) Mor sv "Arrestment", App'x 3.

[2] Baron Hume's Lectures, vol VI, p 93; Graham Stewart, p 17.

[3] Bankruptcy Act 1793, s 2; Bankruptcy Act 1814, s 3.

In Brash v. Brash,[1] Lord Kissen observed that there is no equivalent of the "diet of compearance" in the present day practice of the Court of Session; refused to accept counsel's submission that its equivalent is the first day on which the summons can be lawfully called; and refused to hold an arrestment null on the ground that it did not comply with the provisions of section 17 relating to the diet of compearance. On this approach, it is enough if the summons is served within 20 days after service of the arrestment. There is no obligation on the pursuer to report to the Court of Session execution of an arrestment before service such as applies in sheriff court procedure.[2]

2.134 In the sheriff court, an arrestment used before service must also satisfy certain conditions. In ordinary cause actions, the arrestment falls unless the initial writ is served within 20 days from the date of arrestment.[3] In the case of defended causes, it must be tabled within 20 days after the first ordinary court day occurring after expiry of the period of notice (the induciae).[4] In the case of undefended causes, decree in absence must be taken within 20 days of the expiry of the induciae.[5] In a sheriff court summary cause, an arrestment on the dependence executed prior to service of the summons falls if the summons is not served within 42 days after the date of execution of the arrestment.[6]

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[1] 1966 SLT 157 at p 158 (omitted from the report in 1966 SC 56).

[2] See para 2.137 below.

[3] OCR, r 112(1).

[4] Idem.

[5] Idem.

[6] SCR, r 48.

2.135 We propose retention of the rule that an arrestment used prior to service falls if the summons or initial writ is not executed within a specified period thereafter. The whole point of the diligence is to secure a claim in a depending action, and accordingly the action should be commenced shortly after execution of the arrestment.

2.136 On the other hand, it is not easy to justify the other resolutive condition that the action must call or table within a certain period. That requirement only applies to arrestments executed before the date of service of the summons or initial writ, and not to arrestments executed after that date. The reason for this distinction is obscure.[1] If there is to be a condition as to tabling or calling, it should apply to arrestments used after service of the summons as well as arrestments used before such service. We think however that a simpler and better solution is to abolish the requirement. This would mean that the remedy of the defender against a dilatory pursuer - namely an application for recall of the diligence on grounds of undue delay - would be the same at whatever stage of the court action the arrestment on the dependence happened to be served.

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[1] The provision stems from the Bell Commission's Second Report (1835) which, in suggesting (at p 24) the extension to the Court of Session of the sheriff court practice of inserting warrants for arrestment on the dependence in summonses rather than signeted letters of arrestment, added the qualification "that the action shall be proceeded in within a certain time, otherwise the arrestment to lose its force". This seems unexceptionable. But the detailed recommendation at p 33 proposed that the arrestment should fall unless the summons was executed within 20 days or the case called within 20 days after the diet of compearance, and this formula was closely followed in s 17 of the 1838 Act.

2.137 Reporting arrestment used prior to service. An arrestment on the dependence executed prior to the service of a sheriff court ordinary cause initial writ or summary cause summons must be reported "forthwith" by the arrester or his solicitor to the sheriff clerk.[1] The reason for this provision is said to be that the execution should be in the sheriff clerk's hands as the defender might at any moment apply to the sheriff to have the arrestment recalled or loosed on caution[2] or might apply at once to have rectified anything which he may have to complain of in regard to its use.[3] There are conflicting sheriff court decisions on whether failure to observe this requirement renders the arrestment inept.[4] It has been argued that failure to report in time renders the arrestment null, "unless perhaps where the court is satisfied that the delay may be excused on the ground of some special cause".[5] There is no equivalent requirement to report to the Court of Session arrestments used prior to service of a Court of Session summons.

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[1] OCR, r 112(2); SCR, r 47, deriving ultimately from the Act of Sederunt of 10 July 1839, s 18.

[2] Johnson v. Johnson (1910) 26 Sh Ct Rep 134 at p 138; citing McGlashan Sheriff Court Practice (4th edn) s 1013 (the clerk would have to prepare a bond of caution).

[3] Dove Wilson, Sheriff Court Practice (4th edn) p 212; Wallace, Practice of the Sheriff Court (1909) p 209.

[4] So held in Johnson v Johnson (1910) 26 Sh Ct Rep 134; contra AB v CD (1911) 26 Sh Ct Rep 172; opinion reserved in Macintyre v Caledonian Railway Co (1909) 25 Sh Ct Rep 329 at p 332 where Sheriff McClure stated: "It is not, I think, clear whether the prescription of rule 127 is directory or imperative,...".

[5] Macphail, p 357.

2.138 We have not found any satisfactory explanation for the difference between the Court of Session and sheriff court rules on reporting of pre-service arrestments. So far as we are aware, applications for recall of arrestments under RC 74(g) are not prejudiced by the absence of a requirement to report the arrestment. Moreover the reasons adduced for reporting, namely that the sheriff clerk needs to have the arrestment in case there should be an application relating to the arrestment, eg. for recall on caution or rectification of a complaint, are reasons which seem to apply equally strongly to arrestments on the dependence used after service of the initial writ or summons. If reporting is not needed in post-service arrestment cases, we do not see why it should be needed in pre-service arrestment cases. There may however be something which we have missed and we invite views. Certainly abolition of the requirement would simplify the law and dispense with the need for further legislation to clarify the question whether the requirement is mandatory or directory.

2.139 We propose:

(1) **Where an arrestment on the dependence is executed prior to the service of the summons or initial writ, the existing rules should be retained under which the arrestment falls unless the summons or initial writ is served within a prescribed period after the date of execution of the arrestment.**

(2) **However the requirement that the action must call or be tabled within a prescribed period should be abolished.**

(3) The requirement that a sheriff court arrestment on the dependence used prior to the service of the initial writ or summons must be reported to the sheriff clerk, should be abolished.

(Proposition 12).

(7) Limits on amounts of money attached by arrestment on the dependence or in execution

(a) The existing law and practice

2.140 Arrestment on the dependence. Where a pecuniary debt due by the arrestee to the defender is arrested on the dependence of a Court of Session action or sheriff court ordinary cause, the schedule of arrestment normally states that it arrests in the hands of the arrestee a specified sum of money, qualified by the words "more or less", due by the arrestee to the defender, together with other goods, debts, effects and sums of money in the arrestee's hands belonging to the defender. The specified sum is usually computed by aggregating the principal sum sued for and an estimated amount for judicial expenses. It may be that as a result of the coming into force of the Debtors (Scotland) Act 1987, s. 93(2), in practice the expenses of the arrestment on the dependence will also be included in the specified sum.

2.141 In Ritchie v. McLachlan,[1] it was established that where the schedule of an arrestment on the dependence defines the arrested sum as being a particular amount "more or less", the arrestment in fact attaches all sums due by the arrestee to the defender.

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[1] (1870) 8 M 815.

2.142 In the case of a sheriff court summary cause arrestment on the dependence, we understand that the schedule of arrestment (the form of which is not prescribed by any enactment) usually states that it arrests in the hands of the arrestee all sums of money owing to the defender and all goods and effects in the arrestee's custody belonging to the defender, "and that to an amount or extent not exceeding the value of £X sterling". The words "more or less" are omitted. This style seems to be modelled on the style of schedule of arrestment on the dependence prescribed for the old small debt action under the (now repealed) Small Debt (Scotland) Act 1837, Sch. C. In the latter style, the sum specified was the statutory upper limit of the small debt court's jurisdiction. Whether the sum now in practice inserted in the summary cause schedule of arrestment is the upper jurisdictional limit of the summary cause procedure (currently £1,500 of principal sum exclusive of interest and expenses), or a sum computed in the same way as in other schedules of arrestment, may vary according to the practice of sheriff officer firms. It is difficult to see why the repealed 1837 Act style should still be followed.

2.143 Arrestments in execution. The case of Ritchie v. McLachlan[1] involved an arrestment on the dependence. We have not traced any reported case which considers whether the same rule applies to arrestments in execution. The secondary authorities do not expressly discuss that question, and so far as

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[1] Supra.

they give any guidance, point different ways.[1] In practice a schedule of arrestment in execution[2] is in very similar terms to a schedule of arrestment on the dependence, the main difference being that expenses chargeable against the debtor are normally specified. A schedule of arrestment in execution of a summary cause decree is normally in similar terms to other schedules of arrestment in execution, inter alia because the statutory style in the 1837 Act, Sch. C, did not apply to arrestments in execution of small debt decrees, and was therefore not followed on the introduction of the summary cause procedure. A schedule of arrestment in execution normally states that it arrests in the hands of the arrestee a specified sum or sums of money due by the arrestee to the common debtor, together with other goods, debts, effects, and sums of money in the arrestee's hands belonging to the common debtor.[3] Normally the schedule of arrestment in execution will specify a sum computed by aggregating, and will specify separately, the principal sum decerned for, the judicial expenses of process, the dues of extract, possibly the interest accrued to the date of arrestment if claimed, and the expenses of the diligence (ie. the prescribed fees of the messenger-at-arms or sheriff officer and the solicitor's instruction fee).

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[1] Graham Stewart, pp 37 and 134, states the rule in Ritchie v McLachlan when discussing arrestments generally, and gives the impression that he considered that it applies to arrestments in execution. Wilson, Debt, p 160 gives the effect of the case only in the context of arrestment on the dependence. The McKechnie Committee's Report paras 42-46 discusses the rule in the context only of arrestment on the dependence.

[2] The form of which is not prescribed by any enactment.

[3] See Campbell on Citation (1862) p 167 ff.

2.144 It seems to be the better view that even an arrestment in execution attaches more than the specified sums if the words "more or less" qualify those sums. Thus the prescribed form of conclusion in an action of furthcoming[1] concludes for payment by the arrestee to the arresting pursuer:

> "of £X [the sum specified in the arrestment schedule] or of such sum as may be owing by the arrestee to (the common debtor) and arrested in his hands by the pursuer, or at least of so much thereof as shall satisfy the pursuer in (1) the payment of the expenses of and incidental to the sale and (2) the principal sum of £Y with interest thereon at the rate of £Z per centum per annum from the date of citation until payment as shall satisfy the pursuer in the principal sum of £Y".

This conclusion presupposes that the pursuer will be entitled to payment of interest from the arrested property or money, being interest accrued up to the date of payment of the principal sum. And the formula "so much thereof as shall satisfy the pursuer" shows that arrested subjects may exceed the specified sums.

(b) The McKechnie Report's recommendations

2.145 The McKechnie Committee[2] said that they had received from the Law Society of Scotland and Society of Writers to the Signet representations:

> "as to the excessive and sometimes oppressive use of this form of diligence where it is used without limitation of effect. The Committee of Scottish Bank General Managers told us of the embarrassment that may be caused to a customer in carrying on his business where the whole of his funds in a bank are attached by an unrestricted

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[1] See RC, Appendix, Form 2(8); Encyclopaedia of Scottish Legal Styles, vol 1, p 325.

[2] McKechnie Report, para 43.

arrestment. They suggested that any arrestment on the dependence should be effective only to the extent of the creditor's claim and a reasonable sum for the expenses of the action. The same suggestion was made to us by the two legal societies".

The Committee accepted that view remarking that "the arrestee and the debtor should know the extent of, and liability under, an arrestment on the dependence".[1] The Committee recommended:[2]

> "that an arrestment on the dependence should arrest "£X or such less sum as may be owed by you to the debtor", the specified sum being reached by reference to the amount of the creditor's claim with the addition of a reasonable sum - normally not more than twenty per cent of the claim - in respect of expenses, including the expenses of an action of furthcoming if required. It would of course always be open to the creditor to lodge a further arrestment in respect of expenses if the proceedings were unexpectedly protracted or if the sum sued for was increased".

The Committee further observed[3] that their recommendation:

> "would not prevent a creditor from lodging several arrestments on the dependence in respect of all the bank accounts, company holdings, etc, known to belong to his debtor. As, however, a creditor does not always know the extent of the funds held by an arrestee for the debtor, he cannot judge whether that arrestment will give him sufficient cover. Where several arrestments are lodged the debtor's remedy is to move the court to recall or restrict one or more of them. An application for the recall or restriction of an arrestment is seldom taken, however, because normally the creditor is ready to withdraw an arrestment when it is shown to him that sufficient to cover his claim is caught by another of his arrestments".

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1 Ibid, para 44.

2 Idem

3 Ibid, para 45.

(c) Our proposals

2.146 Limit on amount arrested. We provisionally accept this unimplemented proposal of the McKechnie Committee.[1] Any reform should apply to arrestments in execution as well as arrestments on the dependence. The legislation however would have to be rather more complicated than that Committee appears to have recognised. Judicial expenses are one variable mentioned by the Committee, but in addition special provision will be needed as respects any interest running on the debt at a contractual or legal rate before or after decree. Moreover, since in future an arrestment on the dependence as well as an arrestment in execution may secure the expenses of that arrestment,[2] (and possibly the expenses of obtaining the warrant[3]) these must be aggregated with the other sums in determining the limit of the sums arrested.

2.147 It might be argued that there would be no need for a statutory limit imposed by law on the sum attached by an arrestment on the dependence if, as we proposed above,[4] the court possesses power to limit or restrict ab initio a warrant to arrest on the dependence. It seems to us, however, that the court may find it difficult in an ex parte application, and in the absence of any enquiry into the defender's attachable assets, to use that power in some cases. Limits which apply by operation of law would probably still be very useful.

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1 The recommendation was also supported by the Grant Report, para 645.

2 Debtors (Scotland) Act 1987, s 93(2): Proposition 10(1) (para 2.130).

3 See Proposition 10(2)(para 2.130).

4 Proposition 3 (para 2.79).

2.148 To elicit comments, we suggest that an arrestment on the dependence of money due by the arrestee to the defender should attach an amount equivalent to (a) the aggregate of the sums in the following list or (b) the debt due by the arrestee to the defender, whichever is the lesser of (a) and (b).

(1) The principal sum concluded for or craved.

(2) A sum to cover judicial expenses. This might be a percentage of the principal sum, - the McKechnie Committee suggested not more than 20%. It is for consideration whether this should be a flat rate percentage, or a sliding scale percentage. For the sake of simplicity, we provisionally suggest a flat rate percentage of (say) 20%. If that seemed excessive in a particular case, the defender could apply to the court for restriction.

(3) The expenses of executing the arrestment might be separately specified, together possibly with the expenses of applying for a discretionary warrant if these are to be chargeable against the defender.

(4) Interest on the principal sum at the appropriate contractual or legal rate accrued up to a date specified in the schedule of arrestment, being a date occurring not later than the date of execution of the arrestment, together with (say) one year's future interest at the foregoing rate to cover the possibility of delay in payment.

2.149 The same solution should apply to an arrestment in execution of an extract decree, with the modification that the sums to be aggregated would be slightly different to reflect the different stage which the debt recovery process had reached. The list of sums to be aggregated would be as follows.

(1) The principal sum decerned for in the extract decree.

(2) The judicial expenses decerned for in the extract decree.

(3) The expenses of executing the arrestment.

(4) A sum to be prescribed by statute or statutory instrument to cover the expenses of a possible action of furthcoming.

(5) Interest at the appropriate rate (or rates) accrued up to a date specified in the schedule of arrestment, being a date occurring not later than the date of execution of the arrestment, together with (say) one year's future interest at the rate specified in the extract decree, to cover the possibility of further delay in payment or recovery by furthcoming.

In the case of an arrestment enforcing an extract registered document of debt, the sums aggregated would be the same, except that judicial expenses would not be exigible.

2.150 There is a risk that if a limit is imposed on the sums attached by an arrestment on the dependence, the amount eventually decerned for might exceed that amount very considerably. For example, if the arrestment can only attach 20%

of the principal sum in the name of judicial expenses, and the action is a summary cause appealed all the way up to the House of Lords, the judicial expenses will almost certainly greatly exceed the principal sum. Again, in a complicated case, the action, and appeals arising out of it, may be in dependence for several years during which interest is running against the defender but unsecured by arrestment. It may be therefore that if the pursuer is successful in obtaining decree at first instance and the defender appeals, the pursuer should be entitled to apply to the judge of first instance for a warrant to arrest the unattached balance of the funds. We invite views.

2.151 Moveable property other than money. We think that the proposed statutory limit should be confined to arrestments of sums of money due by the arrestee to the defender and should not apply to other forms of moveable property, corporeal or incorporeal, belonging to the defender in the hands of the arrestee. It is a feature, and in many respects a great advantage, of an arrestment that (in contrast to a poinding) arrested corporeal or incorporeal moveable property is not valued in money terms at the time when the arrestment is laid.[1] Without such a valuation, the statutory limit could not be applied to such property. In such cases, the defender's remedy should be an application for recall or restriction.

2.152 Where the arrestee (a) is liable in a money debt to the defender or common debtor, and (b) has possession of moveable

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[1] A valuation is only necessary at the stage when, following a decree of furthcoming, moveable property is exposed for sale and remains unsold and it then becomes necessary for ownership to be transferred at valuation to the arresting creditor of so much of the arrested property as will satisfy the sums due to him.

property belonging to the defender or common debtor, if the sum arrested is not less than the money debt, that debt should be deemed to be arrested and the moveable property should be deemed not to be arrested. If the sum arrested is less than the money debt due by the defender or common debtor to the pursuer, then the arrestment should be treated as attaching the whole moveable property as well as the money debt.

2.153 Foreign currency. Two problems involving foreign currency require consideration. The first is the case where the pecuniary conclusion, or as the case may be the extract decree, provides for payment in a foreign currency. The second is the case where the sums attached payable by the arrestee to the defender or common debtor are in a foreign currency.

2.154 Where the currency of account of the debt due by defender or common debtor to pursuer is a foreign currency. Where a contractual obligation to pay a debt refers to a currency, the reference may be to "the money of account" or "the money of payment" which have to be distinguished. "The money of account is the currency in which an obligation is measured. It tells the debtor how much he has to pay. The money of payment is the currency in which an obligation is to be discharged. It tells the debtor by what means he is to pay".[1] Since the judgment of the Full Court in Commerzbank Aktiengesellschaft v Large,[2] in 1977, where the money of account in an obligation is a foreign currency, it has been competent for the pursuer in an action for payment in the Scottish courts to conclude for or crave, and to obtain an extract decree for, payment of the principal sum and interest in the foreign currency or the sterling equivalent as at the date of payment or the date of extract, whichever is earlier.

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[1] Woodhouse Ltd v Nigerian Produce Ltd [1971] 2 QB 23 at 54 per Lord Denning MR.

[2] 1977 S C 375. The Court was influenced inter alia by the English case of Miliangos v George Frank (Textiles) Ltd [1976] A C 443 (HL).

A defender in Scotland has the right to pay the debt in its sterling equivalent. Because of fluctuating exchange rates, the date of conversion into the sterling equivalent is of great practical significance. Thus if and for so long as sterling is depreciating in value as against the foreign currency, the foreign sum concluded or decerned for will be worth more pounds sterling if the date of conversion is deferred.

2.155 In the (English) Miliangos case, Lord Fraser of Tullybelton observed[1]:

> "I think that a party suing for recovery of a debt in a foreign currency should be entitled to claim payment of, and to get judgment for, the amount of the debt expressed in the foreign currency.
>
> But there must be some provision for converting the foreign currency into sterling so that it can be enforced in this country. The question is what the conversion date should be. Theoretically, it should, in my opinion, be the actual date of payment of the debt. That would give exactly the cost in sterling of buying the foreign currency. But theory must yield to practical necessity to this extent that, if the judgment has to be enforced in this country, it must be converted before enforcement".

He concluded that in English procedure, conversion should be at the date when the court authorises enforcement of the judgment in sterling. In the Commerzbank case, Lord President Emslie remarked[2]:

> "...for the purposes of enforcement in Scotland it is, however, necessary to provide in any decree for the conversion of the foreign currency into sterling and ideally the conversion date should be the date when the debt is actually paid. If, of course, the debt is not paid voluntarily when decree is taken, the search must be for

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[1] [1976] AC 443 at p 501.

[2] 1977 S C 375 at p 383 (delivering the Opinion of the Court).

> the latest practicable date for conversion in order to reduce to a minimum the risk that the foreign creditor, who has to enforce his decree will suffer by reason of an adverse fluctuation of the value of sterling as against the currency of account. For the purposes of this case the pursuers had deliberately chosen to fix the conversion date as the date of payment, or at the date when the decree is taken whichever is the earlier, and we can see no procedural obstacle in the way of pronouncing the decree now sought or in enforcing payment under the decree if the defender does not voluntarily satisfy the judgment either in the currency of account or in the sterling equivalent at the time of payment. The option must always be his".

The Court expressly left open the possibility, (which had not been argued in that case) of a later date of conversion, for enforcement purposes, than the date of extract. The Lord President said that conversion at the date of extract "may well be the latest date to which conversion can be left for reasons of practical necessity but it may be for consideration in subsequent cases, after full discussion, whether any later date would be procedurally acceptable"[1] The Extractor endorses on the extract a docquet to the effect that in terms of that certificate the sterling equivalent of the principal sum and interest is £X.[2] The Extracts Department Regulations[3] now provide that "in actions for payment in a foreign currency there must be lodged along with the Note to the Extractor a certified statement of the rate of exchange prevailing at the date of the extract sought and of the sterling equivalent, at that rate, of the principal sum and interest". An equivalent procedure is prescribed in at least some sheriffdoms by an act of court made by the sheriff principal.[4] Presumably interest accruing after the date of extract is convertible at the exchange rate specified in the docquet endorsed on the extract decree.

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1 Idem.

2 Idem.

3 Practice Note 9 July 1980, reg 5A.

4 [1978] CLY 3704; 1978 SLT (News) 123; Macphail p 300.

2.156 The Lord President's dictum that the search must be for the latest practical date for conversion was confined to the circumstances of that case, in which sterling was depreciating so that the creditor would be prejudiced if there was a considerable time lag between the date of conversion,and the date of payment or of recovery by diligence. The Court, following the suggestion of the Lord Ordinary (Lord Maxwell), reserved its opinion on a number of questions, including the question whether, if sterling should appreciate as against the currency of account, a defender should be entitled to insist on the right to make payment in the currency of account.[1]

2.157 The Lord Ordinary (Maxwell) reserved his opinion on whether in addition to endorsing the conversion rate and sterling equivalent on the extract, further provision would be necessary for arrestment and inhibitions on the dependence.[2] Such further provision has so far been unnecessary because an inhibition renders litigious all the defender's heritable property without reference to the amount of the debt. Moreover, an arrestment on the dependence normally arrested the whole liability to account of the arrestee to the defender without reference to the amount of the debt, and it is only in cases where the formula "more or less" is omitted that problems could arise under the present law. Presumably summary cause arrestments on the dependence, which as a matter of practice omit that formula, rarely secure craves for sums expressed in foreign currency.

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[1] 1977 S C 375 at p 380 (report by Lord Maxwell); and at pp 383-384. In 1985, 15 inhibitions were registered to enforce claims expressed in foreign currency all of which were inhibitions on the dependence: (unpublished research on inhibitions conducted by this Commission).

[2] 1977 S C at p 380.

2.158 As a consequence, however, of the proposed new statutory rule, under which the extent of an arrestment of money on the dependence would be limited by sums specified in the arrestment schedule (the principal sum and interest thereon), new provision will in our view be needed to ensure that that sum is expressed in sterling. We suggest that the principal sum and interest should be converted to sterling at the rate of exchange obtaining on the day immediately preceding the date of execution of the arrestment. The rate of exchange might have to be defined, perhaps by act of sederunt, to regulate such details as the buying or selling rate; the middle market price or closing price; and the last day on which the markets are open.

2.159 We suggest that the foregoing conversion of the principal sum and interest to sterling should operate for the purpose only of the rules defining the amount of money attached by the arrestment on the dependence and by necessary implication for the purpose of the conclusion or crave in a later action of furthcoming. It should be open to the pursuer to conclude for or crave conversion of the foreign currency of account to the sterling currency of payment at a different date for all other purposes. If sterling is depreciating as against the foreign currency of account, the sterling equivalent of the principal sum eventually decerned for in the depending action may considerably exceed the sterling sum previously attached by the arrestment on the dependence. The pursuer could however recover the balance by other diligence, and if the arrestee still has unarrested funds of the debtor, such further diligence could include a further arrestment in the hands of that arrestee.

2.160 In the usual case of an arrestment in execution of an extract decree in foreign currency the conversion rate will have been fixed by the decree, normally at the conversion rate obtaining at the date of extract. In the case of extract registered documents of debt expressed in foreign currency, we suggest that the conversion rate should be the rate obtaining on the day immediately preceding the date of execution of the arrestment.

2.161 Where the currency of account of the debt due by the arrestee to defender or common debtor is a foreign currency. It is possible that the currency of account of the pecuniary obligation owed by the arrestee to the defender or common debtor may itself be a foreign currency, as for example where the arrestee is a bank holding a sum in foreign currency in a deposit account. In the English case of Choice Investments Ltd v. Jeromnimon[1], the Court of Appeal held that a bank account held by a judgment debtor in a foreign currency was capable of being attached by a garnishee order (equivalent to our arrestment in execution) as a "debt" within the meaning of the English legislation on garnishee orders. The Court further held that the garnishee order for the attachment of the foreign currency should direct the garnishee bank (equivalent to an arrestee), as soon as reasonably practicable after the service of the "garnishee order nisi" to put a "stop order"[2] on the requisite amount of United States dollars as would, at the buying rate of sterling at the time of the stop order, realise the amount of the sterling judgment. When the garnishee order was made absolute, the bank should exchange that stopped amount from dollars into sterling so far as was necessary to meet the sterling judgment debt and pay that amount to the judgment creditor or into court.

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[1] [1981] 1 QB 149 (CA).

[2] The meaning of these terms is explained in the judgment of Lord Denning, M R.

2.162 We consider that a similar solution should be adopted in Scotland mutatis mutandis. We suggest that where an arrestment (whether on the dependence or in execution) attaches a debt, whose currency of account is a foreign currency, due by the arrestee to the defender or common debtor, the arrestment should have the effect of attaching such an amount of the foreign currency in the arrestee's hands as would, at the buying rate of sterling at the date of execution of the arrestment, realise the amount in sterling specified in the schedule of arrestment as being thereby arrested. That would then be the sum which the arrestee would be bound to make furthcoming to the pursuer if decree is, or has been, granted in the pursuer's favour.

2.163 We propose:

(1) An arrestment on the dependence of a pecuniary debt due by an arrestee to the defender should attach an amount equivalent to (a) the aggregate of the amounts referred to in the list set out below, or (b) the amount of the debt, whichever is the lesser. The list referred to is as follows:

(i) the principal sum concluded for or craved;

(ii) a flat rate percentage prescribed by statute (say 20%) of the principal sum to cover judicial expenses;

(iii) the expenses of executing the arrestment, if specified in the schedule of arrestment, (together possibly with the expenses of applying for any discretionary warrant authorising the arrestment if so specified); and

(iv) the cumulo interest on the principal sum accrued up to a date specified in the arrestment schedule (being a date occurring not later than the date of arrestment) together with a sum so specified equivalent to one year's future interest at that rate.

(2) The same solution should apply to an arrestment in execution of an extract decree, with the modification that the list of sums to be aggregated should be as follows:

(i) the principal sum decerned for;

(ii) the judicial expenses decerned for in the extract decree;

(iii) the expenses of executing the arrestment;

(iv) a sum to be prescribed by statute (updated by statutory instrument) to cover the expenses of a possible action of furthcoming;

(v) the cumulo interest on the principal sum accrued up to a date specified in the arrestment schedule, (being a date occurring not later than the date of execution of the arrestment) together with a sum so specified equivalent to one year's interest at the rate authorised by the extract decree (to cover the possibility of further delay in payment or recovery by furthcoming).

An arrestment enforcing an extract registered document of debt would be in the same terms but excluding item (ii).

(3) The statutory limit should not apply to arrested moveable property (corporeal or incorporeal) other than a pecuniary debt.

(4) In any case where the arrestee is liable in a pecuniary debt to the defender or common debtor and also possesses other moveable property belonging to the defender or common debtor, then if, and only if, the arrestee's pecuniary debt is less than the sums specified in the arrestment schedule as thereby arrested, the arrestment should have the effect of attaching the other moveable property.

(5) Where an arrestment on the dependence secures a claim of debt whose currency of account is a foreign currency, the principal sum and interest specified in the schedule of arrestment should be the amount of sterling required to purchase the amount of the principal sum and interest expressed in foreign currency, at the buying rate of the foreign currency on the date (or last business day) immediately preceding the date of execution of the arrestment.

(6) The foregoing conversion rate should be applicable only for the purpose of determining the amount of money attached by the arrestment.

(7) A schedule of arrestment in execution of an extract decree, in specifying the amount of principal sum and interest thereby arrested, should give effect to the conversion rate provided for by the decree.

(8) In the case of an extract registered document of debt expressed in foreign currency, the conversion to sterling should be at the rate obtaining on the date (or last business day) immediately preceding the date of execution of the arrestment.

(9) Where an arrestment (whether on the dependence or in execution) attaches a pecuniary debt due by the arrestee to the defender or common debtor, and the currency of account of that debt is a foreign currency, the arrestment should have the effect of attaching in the arrestee's hands such an amount of the foreign currency as would, at the buying rate of sterling at the date of execution of the arrestment, realise the amount in sterling specified in the schedule of arrestment as being thereby arrested.

(Proposition 13).

(8) Ranking of diligence on the dependence in other processes

2.164 Arrestment on the dependence. Difficulties can arise where a fund must be distributed upon which there is an arrestment on the dependence. Though the decree in the depending action has the effect of converting the arrestment on the dependence into an arrestment in execution, a competition involving an arrestment on the dependence can arise before decree. The competition may be an action of multiple-poinding or an insolvency process such as a sequestration, liquidation or trust-deed for creditors. The main difficulty is of course that until decree is granted in the action on the dependence of which the arrestment was used,a scheme of division cannot be finalised.

2.165 What course of action should be adopted in the ranking process? Where the ranking process is a multiple-poinding, it was held in the only relevant authority we have traced, Baynes v. Graham[1] that the fund should remain in medio until the arrester's action is ended. This was an equitable decision on the facts of that case because the Court of Session had found in favour of the arrester and the action continued in dependence only because the defender had appealed to the House of Lords. But this solution would not necessarily be equitable in all cases. A frivolous action for a small sum might hold up distribution of the fund in medio for an indefinite or unduly long period. The arrester's competitors are not assisted by the law on prescription of arrestments, because prescription runs from the date of the decree not the date of the arrestment.[2]

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[1] 16 February 1796 F C; Mor 2904.

[2] Debtors (Scotland) Act 1838, s 22; Graham Stewart p 223.

2.166 In a sequestration under bankruptcy legislation, provision is made allowing the trustee before paying a dividend to set aside funds which may be required to satisfy contingent claims.[1] It may be that in practice the trustee will set aside funds to meet the preference created by an arrestment on the dependence. We would be grateful for information on the practice of trustees.

2.167 Taking the case of a multiple-poinding, there seem to us to be at least five options:

(1) to delay the distribution until the arrester's action for payment is finally disposed of, (the course adopted in Baynes v. Graham[2]);

(2) to allow distribution if the court is satisfied that the arrester has unduly delayed in pursuing his action;[3]

(3) as in (1) above, with this difference that the court seized of the multiple-poinding should give the arrester a period within which to obtain decree, failing which the arrestment will cease to have effect;

(4) to set aside sufficient to meet the arrester's provisional claim (principal, interest and expenses) and to make an interim distribution to the other competing creditors;

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[1] Bankruptcy (Scotland) Act 1985, s 52(3) which requires the trustee to make "allowance for future contingencies" before paying a dividend in respect of an accounting period.

[2] 16 February 1796 F C; Mor 2904.

[3] Cf Bankruptcy (Scotland) Act 1985, Sch 7, para 24(2): see para 2.172 below.

(5) to distribute the fund to the other creditors in disregard of the arrestment, but reserving the arrester's right to recover from the other creditors in the event of his obtaining decree for payment, perhaps requiring the other creditors to find caution. This fifth option was the one favoured by the Lord Ordinary in Baynes v. Graham.[1]

2.168 We invite comments on this issue and the options set out above. Our provisional view is that the court entertaining the multiple-poinding should have a discretionary power to choose any of these options. The introduction of a judicial discretion seems justifiable having regard to the provisional and interim nature of diligence on the dependence and the need to strike a balance between the interests of the arrester on the dependence and other creditors. If this solution is adopted for multiple-poindings, it is for consideration whether the same solution should be adopted with any necessary modifications in insolvency proceedings (sequestrations, liquidations and trust deeds for creditors) and any other processes of ranking of arrestments.

2.169 We propose:

(1) Where a creditor arresting on the dependence claims a ranking in an action of multiple-poinding, the court entertaining the multiple-poinding should have power to make any of the following orders, namely:

(a) an order delaying distribution of the fund in medio until the creditor's action for payment is finally disposed of;

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[1] Supra.

(b) an order allowing distribution in disregard of the arrestment on the dependence, if the court is satisfied that the creditor has unduly delayed in pursuing his action;

(c) an order as at (a) above coupled with an order recalling the arrestment on the dependence and taking effect on the expiry of a specified period unless the creditor obtains decree for payment within that period;

(d) an order requiring consignation of sufficient funds to meet the amount or likely amount of the creditor's claim and authorising an interim distribution to the other competing creditors; and

(e) an order authorising distribution of the fund in disregard of the creditor's arrestment on the dependence reserving the creditor's right of recovery from the other creditors and requiring the other creditors to find caution to secure that right.

(2) Views are invited on whether similar provision is necessary or desirable in insolvency proceedings.

(Proposition 14).

2.170 Inhibitions on the dependence. It seems possible that similar problems may arise in relation to inhibitions on the dependence as where an inhibitor on the dependence claims a ranking in a multiple-poinding or on the proceeds of sale of subjects under heritable security.

2.171

Should Proposition 14 above apply to inhibitions on the dependence?

(Proposition 15).

2.172 Equalisation of diligences. The Bankruptcy (Scotland) Act 1985, Sch. 7, para. 24(1) provides that all arrestments and poindings executed within a statutory period created by the constitution of apparent insolvency rank pari passu as if they had all been executed on the same date. Para. 24(2) of that Schedule provides that "Any such arrestment which is executed on the dependence of an action shall be followed up without undue delay". In our Discussion Paper No. 79 on Equalisation of Diligences we propose that these provisions should be repealed, and equalisation of arrestments and poindings outside insolvency proceedings abolished. We also proposed certain reforms on the hypothesis that our primary proposal was rejected. On the same hypothesis, we think that, if Proposition 14 above is implemented, sub-para. (2) of para. 24 should be repealed as no longer necessary.

(9) The negative prescription of diligence on the dependence

2.173 The statutory provisions on the negative prescription of arrestments on the dependence are unsatisfactory and do not vouch sufficiently well the orthodox and generally accepted view that the three year negative prescription of an arrestment on the dependence runs from the date of the decree. The Prescription Act 1669,[1] as originally enacted, provided:

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[1] 1669 c 14 record edn; c 9 12mo edn.

> "That all arrestments to be used hereafter upon decrees, registered bonds, dispositions or contracts not pursued and insisted on within five years after the laying on thereof shall after that time prescribe;... And that all arrestments used or to be used upon dependence of actions shall likewise prescribe within five years after sentences obtained in the said actions, if the said arrestments be not pursued or insisted on within that time". (modernised spelling and punctuation).

Implementing a recommendation of the Bell Commission's Second Report of 1835,[1] the Debtors (Scotland) Act 1838, s. 22, enacted that:

> "All arrestments shall hereafter prescribe in three years instead of five; and arrestments which shall be used upon a future or contingent debt shall prescribe in three years from the time when the debt shall become due and the contingency be purified".

This provision reduced the prescriptive period from five to three years and made specific provision on the commencement of the negative prescription of arrestments enforcing future or contingent debts.

2.174 There is no doubt that the 1838 Act s. 22 amended, but did not supersede, the 1669 Act,[2] and that the tempus inspiciendum for the commencement of the negative prescription of an arrestment on the dependence was governed by the 1669 Act, and not by the 1838 Act, s. 22 except in a case where the

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[1] page 33, Propositions as to Arrestments, Proposition 2: "That the period of prescription of arrestments shall be limited to three years, instead of five, to be reckoned from the date of the execution of arrestment when used on a liquid ground of debt; from the date of the decree, when used on a depending action; and from the period of the debt becoming due, when used on a future or contingent debt". See also p 24.

[2] See Jameson v. Sharp (1887) 14 R 643 at p 647 per Lord President Inglis: "The Statute of 1669, though it is old, is still in viridi observatione, for not only has effect been given to it in modern times, but its policy has been recognised in comparatively recent legislation by the Act 1 and 2 Vict c 114". (ie. the Debtors (Scotland) Act 1838).

arrestment on the dependence enforced a future or contingent debt. In this last category of case, there was a risk of conflict between the 1669 Act, and the 1838 Act, s. 22. In the event of such a conflict, the 1838 Act s.22 as the later enactment would rule and this seems right on policy grounds.

2.175 The next step was, however, that the provisions of the 1669 Act quoted at para. 2.181 above were repealed by the Statute Law Revision (Scotland) Act 1906,[1] quite incorrectly in our opinion since these provisions were, in the words of Lord President Inglis, "in viridi observatione" and, as we have seen, had been amended but not impliedly repealed by the 1838 Act. Curiously this fact does not seem to have been identified by recent commentators who still opine that in arrestments on the dependence, prescription begins to run from the date of decree in the action. We think that the old law should be set out in a modern statute, and that the period of negative prescription should commence on the date when the decree in the creditor's favour is extracted.[2]

2.176 Furthermore, the opportunity should be taken of clarifying the provisions of the 1838 Act, s.22. Of these provisions, Professor W. A. Wilson[3] remarks:

> "The Debtors (Scotland) Act 1838, s. 22, provides that arrestments upon a "future or contingent debt" will

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[1] The remaining provisions were repealed by the Prescription and Limitation (Scotland) Act 1973, s 16(2) and Sch 5, Part I.

[2] It is only after extract that an action of furthcoming may be raised. Any arrestment used prior to extract (eg. during an appeal or the appeal days) is treated as being an arrestment on the dependence and not as an arrestment in execution.

[3] Wilson, Debt p 13.

prescribe in three years "from the time when the debt shall become due and the contingency be purified". In Jameson v. Sharp[1] the arrestment of a vested interest in a trust was held to be prescribed and it does not seem to have been suggested that the 1838 Act had any application. Perhaps the "or" is exegetical and "future" is used to mean "contingent"; that would explain the "and" between "due" and "the contingency".

The results we wish to achieve are set out at para. 2.178 below.

2.177 The period of the negative prescription of inhibitions is 5 years. Inhibitions on the dependence prescribe in 5 years from the date when they take effect,[2] like inhibitions in execution, but unlike arrestments on the dependence. There seems to be a good reason for this difference. The period of prescription of inhibitions determines the length of searches in the personal register and from the standpoint of conveyancing practice, it is essential that that period should be standardised at a fixed and universally known duration.

2.178 We propose:

(1) **The Debtors (Scotland) Act 1838, s. 22, should be replaced by a new statutory provision setting out clearly the law on the negative prescription of arrestments on the dependence and other arrestments, on the following lines.**

(2) **An arrestment on the dependence of an action should (if not insisted in) prescribe on the expiry of 3 years after the date when the decree for payment was extracted, unless the debt is future or contingent and the time for**

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[1] (1887) 14 R 643.

[2] Conveyancing (Scotland) Act 1924, s 44(3)(a).

payment does not arrive till after that date, in which event paragraph (4) below should apply.

(3) An arrestment in execution of an extract decree for payment of a debt presently due, or other extract registered document relating to such a debt, should (if not insisted in) prescribe on the expiry of 3 years from the date of execution of the arrestment.

(4) An arrestment enforcing a future debt or a contingent debt should (if not insisted in) prescribe on the expiry of 3 years after the date when the debt becomes payable.

(Proposition 16).

(10) Recall and restriction of diligence on the dependence

(a) Jurisdiction and procedure in applications for recall or restriction

Court of Session actions

2.179 Formerly applications for recall or restriction of arrestments or inhibitions on the dependence were presented by petition to the Inner House of the Court of Session.[1] Since 1838 in the case of arrestments,[2] and 1868 in the case of inhibitions,[3] the application may be made by petition to the Lord Ordinary

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1 Maclaren, Court of Session Practice pp 900 and 902.

2 Debtors (Scotland) Act 1838, s 20.

3 Titles to Land Consolidation (Scotland) Act 1868, s 158.

before whom the depending action is enrolled.[1] The next development was that in practice the application for recall or restriction came to be made by a simple motion to the Lord Ordinary,[2] and it has been held that petition procedure is only appropriate "in very exceptional circumstances".[3] An example is a case where there are two or more actions between the same parties and a petition is presented for recall of several arrestments used on the dependence of different actions.[4]

2.180 An application for recall or restriction made before the action calls is by letter to the deputy principal clerk, intimated to the pursuer, which is heard by a Lord Ordinary in chambers.[5] An application for recall or restriction made after the case calls is by motion to the Outer House or Vacation Judge, or Inner House if the case is depending there.[6] The motion is intimated to the pursuer.[7] It may be that it is still competent to present a petition to the Inner House, as an alternative to these procedures,[8] but nowadays such a practice seems unknown. Where however a warrant to arrest or inhibit on the dependence has been granted on a summons, or other writ in an action, and the process has been finally extracted, the petition for recall or restriction

[1] The statutory provisions refer to a warrant in a summons or in letters of arrestment or inhibition on the dependence of the action. But these should presumably now be construed as applying also to warrants in counter-claims, third party notices etc.

[2] Barbour's Trs v Davidsons (1878) 15 SL Rep 438; Maclaren, Court of Session Practice, p 903.

[3] Stuart v Stuart 1926 SLT 31 per Lord Morison: and see Smith v Smith 1932 SLT 45 .

[4] Blade Securities Ltd,Petitioners 1989 SLT 246.

[5] RC 74(g).

[6] RC 74(h).

[7] RC 93.

[8] Graham Stewart, p 208; Maclaren, Court of Session Practice p 900.

must be presented to the Inner House.[1]

2.181 Sheriff court: ordinary cause arrestments. The sheriff has no power at common law to recall or restrict arrestments.[2] Section 21 of the Debtors (Scotland) Act 1838 however provides that the sheriff may recall or restrict arrestments on caution or without caution, the procedure laid down being by way of petition and answers. In modern practice in ordinary causes the procedure is normally by motion (after the cause has been tabled) intimated to the pursuer and if thought fit the arrestee.[3] There is a view that written answers are necessary only if the pursuer moves for them[4] but it has been argued that, where the procedure is by motion, written answers are not appropriate.[5] An initial writ is still sometimes used in modern practice[6] and is required where there is no pending process and also where it is desired to apply for recall or restriction after service of the initial writ and before tabling. In a petition under section 21, an appeal without leave to the sheriff principal is competent though section 21 only

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[1] Such a petition invokes the nobile officium (see para 2.22 above) and as such is still reserved to the Inner House under RC 190 (vi). It is only petitions for recall of arrestments and inhibitions granted on a bill or a bill for letters which are presented to the Outer House in terms of RC 189(a)(xv).

[2] Graham Stewart p 209; Stewart v Macbeth and Gray (1882) 10 R 382, in which the sheriff-substitute held that he had no power to recall or loose arrestments except under the Debtors (Scotland) Act 1838, s. 21. But as regards loosing, this seems to have been wrong: see para. 2.248, head (1) below.

[3] Macphail pp 362 - 363; and see Tait v Main 1989 SCLR 106 (Sh Ct).

[4] Mowat v Kerr 1977 SLT (Sh Ct) 62.

[5] Macphail p 363.

[6] cf Kennedy v Kennedy (1910) 27 Sh Ct Rep 71; Swan v Kirk 1932 SLT (Sh Ct) 9; Gatoil International Inc. v Arkwright - Boston Manufacturers Mutual Insurance Co. 1985 SLT 68.

mentions review by the Court of Session.[1] In an incidental motion for recall, however, it appears the better view that an appeal to the sheriff principal is competent only with leave of the sheriff.[2] When warrants of concurrence were competent and necessary for arrestment on arrestees outside the jurisdiction of the sheriff court granting the warrant, it was held that the sheriff granting the concurrence had jurisdiction in applications for recall.[3] With the virtual abolition of warrants of concurrence,[4] the application for recall of such a warrant must be made to the sheriff court which granted the warrant (unless application is made to the Inner House).

2.182 Sheriff court: summary cause arrestments. The Summary Cause Rules provide that a party may have any arrestment on the dependence "loosed" on paying into court, or finding caution to the satisfaction of the sheriff clerk, of the whole sum claimed plus £10 for expenses.[5] An alternative procedure, by minute and answers, for recall or restriction with or without caution is also available.[6]

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[1] Macphail p 363.

[2] Sheriff Courts (Scotland) Act 1907, s 27 (f); Tait v Main 1989 SCLR 106 (Sh Ct) per Sheriff Principal Ireland; dictum of Sheriff Principal Reid in Mowat v Kerr 1977 SLT (Sh Ct) 62 at p 63 not followed.

[3] Comrie v Gow & Sons (1931) 47 Sh Ct Rep 159; cf Irvine v Gow & Sons (1910) 26 Sh Ct Rep 174.

[4] Debtors (Scotland) Act 1987, s 91(1)(d) (which applies to arrestments on the dependence); see also OCR, rule 16 and SCR, rule 11.

[5] SCR 48.

[6] Idem. A certificate by the sheriff clerk operates as a warrant for release of the arrested sum or subjects.

2.183 Letters of inhibition. An application for recall or restriction of letters of inhibition (and in theory letters of arrestment) on the dependence, which will almost always be on the dependence of sheriff court actions, are presented by way of petition to the Outer House.[1] The petition is lodged, with productions[2] which may include a surveyor's report on the value of the property. An interlocutor is granted allowing intimation and service on the creditor. The induciae may be shortened on the debtor's motion eg. where the debtor is about to conclude missives for disposal of the property. If the petition is unopposed, the debtor may obtain a certified copy interlocutor containing the restriction or recall for registration in the personal register. If answers are lodged, the petition proceeds as an opposed petition.

2.184 Interim recall of inhibition. A recent text-book refers to a practice which "has arisen recently, in a small number of cases, in which a motion for interim recall of an inhibition has been enrolled and granted, in one instance before intimation and service of the petition".[3] The authors, rightly in our opinion, doubt the competence and appropriateness of the procedure.

> "There must be a recall or not and once recall is granted property may be sold. It is thought that the Register of Inhibitions and Adjudications cannot show some form of temporary lifting of the inhibition. In any event it is a very drastic measure to recall an inhibition on an ex parte statement made without any opportunity given to the inhibiter to oppose the motion".[4]

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[1] RC 189 (a) (xv). For the procedure see McBryde and Dowie (2nd edn 1988) pp 85-86.

[2] Including eg a certified copy initial writ, letters of inhibition, a search in the personal register, and certified copy of any relevant sheriff court interlocutor.

[3] McBryde and Dowie (2nd edn) p 85.

[4] Idem.

We think that it can be safely left to the courts to stamp out this practice.

2.185 Possible reforms. So far as we are aware, the procedure in applications for recall to the Court of Session operates satisfactorily. There is however a residual class of case in which an application for restriction or recall must be taken to the Inner House, namely where the diligence is used on the dependence and the application is made after decree in the action has been finally extracted, or where the application is for recall of a diligence in execution.[1] We think that all applications for recall or restriction should be made to the Outer House in the first instance, unless the case is before the Inner House on a reclaiming motion.

2.186 As regards sheriff court ordinary cause procedure,[2] it seems to us that to require an application for recall or restriction to be made by petition procedure commenced by a separate initial writ before the action tables is unduly cumbersome, and we suggest that application by letter to the sheriff clerk should be introduced similar to the Court of Session procedure applicable before the action calls.[3] The existing practice whereby applications made after tabling are by intimated motion should continue and the law should be brought into line with this practice by an amendment of the Ordinary Cause Rules and the repeal of the provisions on petition procedure in the Debtors (Scotland) Act 1838, s. 21. It is also not clear to us why the procedure in summary cause actions is by minute and answers, which appears more cumbersome than the Court of Session procedure by motion for recall which can be opposed without written answers.

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[1] See para 2.180 above.

[2] See para 2.181 above.

[3] RC 74(g); see para 2.180 above.

2.187 If the sheriff is given power to grant warrant for and to recall or restrict inhibitions on application, we suggest that the procedure in such an application should be the same as in the procedure for recall of arrestments on the dependence.

2.188 We propose:

(1) All applications for recall or restriction of arrestments and inhibitions under Court of Session warrants (in particular warrants made after final extract) should be made in the first instance to the Outer House, unless the action is already before the Inner House on a reclaiming motion.

(2) In a sheriff court ordinary cause it should be competent to make an application for recall or restriction of diligence on the dependence:

(a) before tabling by letter to the sheriff clerk on the model of the corresponding Court of Session procedure under RC 74(g); and

(b) after tabling by intimated motion.

The provisions of section 21 of the Debtors (Scotland) Act 1838 should be repealed so far as inconsistent with this proposal.

(3) Views are invited on whether in sheriff court summary causes the procedure in applications for recall or restriction of diligence on the dependence should be simplified.

(Proposition 17).

(b) Title to apply for recall

Arrestments on the dependence

2.189 Most of the problems as to title to apply for recall arise where the diligence used is an arrestment, rather than an inhibition, on the dependence. The general rule is that "any one who has an interest in having the arrestment taken off and who can produce the requisite caution may apply".[1] Thus arrestees (in the case or corporeal moveables[2] or shares[3]) or third parties claiming ownership[4] or entitled to the use of the arrested subjects,[5] or cautioners of the common debtor,[6] or a person claiming that his funds have been arrested on a warrant not relating to him,[7] or in the case of arrested ships, the charterers[8] or mortgagees in possession[9] or having power of sale[10] may apply, and in the case of arrested cargo, the charterers and owners of

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1 Graham Stewart, p 210.

2 Barclay, Curle & Co Ltd v Sir William Laing & Co Ltd 1908 S C 82.

3 Blade Securities Ltd,Petitioners 1989 SLT 246.

4 Duffus v Mackay (1857) 19 D 430; Bildstein v Bock & Co (1872) 9 SLR 512.

5 Stewart v Macbeth (1882) 10 R 382.

6 Drummond v Boyd (1834) 12 S 454.

7 Murdoch v Bennet (1894) 11 Sh Ct Rep 67.

8 Thorburn v Starr De Wolf (1847) 10 D 310.

9 Stewart v Macbeth (1882) 10 R 382.

10 McMillan, p 73.

the ship may apply.[1]

2.190 There are however three kinds of limitations, or possible limitations, on title to apply for recall (or restriction) which require consideration, namely:

(1) limitations on the title of persons other than the pursuer or defender to make an incidental application for recall in the depending action;

(2) limitations on the title of an arrestee to apply for recall where the thing arrested is a debt;

(3) limitations on the title of a third party claiming ownership of an arrested vessel or of a fourth party claiming ownership of other types of arrested property.[2]

In cases (2) and (3), our proposals relate to arrestment in execution as well as arrestment on the dependence.

2.191 Title to apply in the depending action. Since the power to recall was originally vested only in the Inner House, the powers of Outer House judges and sheriffs to recall are based on specific statutes or rules of court. Under the Debtors (Scotland) Act 1838, ss 20 and 21, where application is made to the Lord Ordinary, or Vacation Judge (formerly the Lord Ordinary on the

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[1] Svenska Petroleum AB v V H O R Ltd 1982 S L T 343; West Cumberland Farmers Ltd v Director of Agriculture of Sri Lanka 1988 S L T 296.

[2] For the meaning of "third party" and "fourth party" in this context, see para. 2.196, fn 2.

bills), or the sheriff, the only party who has a title to apply is the debtor or defender. In the case of the Court of Session, however, RC 74(g) and (h) now govern applications for recall by the Lord Ordinary in a depending action and do not specify that the application must be made by the defender or common debtor. In two recent Outer House cases,[1] it has been held that where an arrestment of a ship's cargo is used on the dependence of an action against the cargo-owner, the owner of the ship (and in one of the cases, the time-charterer[2] also) may apply for recall by incidental application in the depending action to a Lord Ordinary.[3]

2.192 The 1838 Act, s. 21, still governs the power of the sheriff to recall arrestments on the dependence in ordinary causes, and it appears that since the sheriff had no power at common law to recall arrestments, only the defender or debtor may apply to the sheriff.[4] In summary causes, the power to recall is conferred by SCR, r. 48 giving title to apply to "a party". Since in principle the exclusive jurisdiction of the Court of Session cannot be restricted except by a plain enactment, probably only the defender or debtor may apply to the sheriff. In these cases, the

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[1] Svenska Petroleum AB v HOR Ltd 1982 SLT 343 applied in West Cumberland Farmers Ltd v Director of Agriculture of Sri Lanka 1988 SLT 296 (OH).

[2] Svenska Petroleum AB v HOR Ltd, supra.

[3] In the West Cumberland Farmers case, the issue was presented as being whether the shipowner's intervention should be countenanced, whereas arguably the true issue was whether the shipowner's proper course was to apply by petition to the Inner House rather than by incidental application in the depending action to a Lord Ordinary. However, the extra inconvenience and expense involved in an Inner House petition make it unlikely that the court would uphold the need for such a petition unless required to do so by RC 74(g) and (h).

[4] Graham Stewart, p 209; Macphail, p 362; Tait v Main 1989 SCLR 106 (Sh Ct).

arrestee or third party must apply to the Inner House.[1]

2.193 We think it should be made clear by statute that a third party having a title and interest to apply for recall or restriction of a diligence used on the dependence of a sheriff court ordinary cause or summary cause action should be entitled to apply to the sheriff in whose court the action depends rather than to the Inner House of the Court of Session.

2.194 Arrested debts: arrestee has no title. It has been held that when the subject arrested is a debt or claim of money allegedly due by the arrestee to the common debtor, the arrestee has no title to apply for recall but must await a furthcoming.[2] The reasons were explained by Lord President Dunedin as being:

> "... that in a furthcoming the arrestee can appear and make good his right, and in the meantime no prejudice is created. The arrestee could not be made to pay the alleged debt till the furthcoming, and in the meantime his general funds are laid under no embargo.... There is no reason why a question of whether a sum is due or not due" [by the arrestee to the common debtor] "should be taken up in the inconvenient form of a petition for the recall of arrestment, and for the very simple reason that the arrestee is not hurt or damnified by waiting until a furthcoming is raised. An arrestment in the hands of A of all moneys due by him to B does not put a nexus upon any particular money in A's hands, it does not prevent A from going on with his business, and using any money that he has got; it only attaches such sum as A is due to B, and it leaves A perfectly free in the furthcoming that is directed against him to say that he is due no sum to B".[3]

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[1] Graham Stewart, p 209; Macphail p 362; RC 190(vi).

[2] Barclay Curle & Co Ltd v Sir James Laing & Co Ltd 1908 S C 82 at p 87.

[3] Idem.

On the other hand, where the thing arrested is a corporeal moveable, the Lord President held that the arrestee does have a title to apply for recall. The reason given was that:

> "if a corporeal moveable is arrested, and the arrestee wishes to say that it is his own, the arrestee has no power of either starting himself or getting others to start a furthcoming; and, accordingly, if he had not some other way of getting rid of the arrestment, he would be in this uncomfortable position that a nexus would be upon the subject which would put him in danger to deal with it, and at the same time he would have no possible means of starting a furthcoming in which he could appear to vindicate his right".[1]

2.195 We entertain some doubt as to whether, where the thing arrested is a sum of money allegedly due by the arrestee to the defender, the arrestee is never prejudiced by being required to await a furthcoming. The arrestee may be a tenant who is uncertain whether the rents are properly due to the defender or someone else. Or the arrestee may be a bank which is uncertain as to whether the true owner of funds in a current or deposit account is the defender or someone else. Or a bank or building society may be uncertain as to the question whether an arrestment in its hands attaches funds in a bank account in its network of branches in England and Wales. It is difficult to see why the arrestee should be required to await a furthcoming over the timing of which he has no control.

2.196 Whether third parties claiming ownership of arrested vessels, or fourth parties claiming ownership of other types of arrested subjects, have title?[2] In Brand v. Kent,[3] rents allegedly due to the common debtor were arrested on the dependence and a fourth party petitioned for recall on the ground that the rents

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[1] Ibid at p 87 per Lord President Dunedin.

[2] In this context " a third party" refers to a party other than the pursuer and defender, and "a fourth party" refers to a party other than the pursuer, defender and arrestee.

[3] (1892) 20 R 29.

belonged to him. The petition was refused inter alia on the ground that if the arrested rents were due to the fourth party, the arrestment could not affect him since the schedule of arrestment in its terms only attached rents due to the common debtor. Therefore the fourth party had no title or interest to apply for their recall. It is difficult to attack the logic of this ground of the decision. On the other hand, there is no general rule that if an arrestment can be ignored as ineffective, nobody has a title or interest to apply for its recall. For example if an arrestment is null because executed without warrant, the arrested fund can be disposed of without recall but an application for recall is competent[1] and indeed Graham Stewart[2] observes that that is the safest course. It is difficult to see why a fourth party should not have a title to apply to have particular rents due to him excluded from an arrestment, even though the order restricting the arrestment would be declaratory rather than executive in its effect.

2.197 There is no doubt that a third party claiming ownership of an arrested ship has a title to apply for recall[3] and it seems to be the better view that a fourth party claiming ownership of other types of arrested subjects also has such a title. As Graham Stewart observes[4] if the question or right is disputed, it will not normally be tried in the application for recall unless instantly verifiable, or unless there are special circumstances, and recall

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1 Macfarlane v Sanderson (1868) 40 Sc Jur 189.

2 p 200.

3 Duffus v Mackay (1857) 19 D 430; Bildstein v. Bock & Co (1872) 9 SLRep 512; compare, however, Tait v Main 1989 SCLR 106 at p 110.

4 p 210 fn 4.

will only be granted on caution.[1] It is thought that this conclusion is not inconsistent with Nordsoen v. Mackie Koth & Co.[2] in which Brand v. Kent was applied.[3] The law, however, is uncertain and perhaps ought to be clarified by statute.

2.198 We propose:

(1) **A person other than a defender who has a title to apply for the recall or restriction of an arrestment on the dependence of a sheriff court ordinary or summary cause action should have a title to make the application to the sheriff, by incidental proceedings in the depending action. It should no longer be necessary, and should cease to be**

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[1] See Vincent v Chalmers & Co's Tr (1877) 5 R 43 at p 44 per Lord President Inglis: "In an application of this kind we must be able to say that arrestments should never have been used at all, or else to say that they should be recalled on caution being found. We cannot allow a proof". (emphasis added).

[2] 1911 S C 172. In that case, a fourth party petitioned for recall of an arrestment on the dependence on the ground that the arrested funds belonged to him. The petition was dismissed as incompetent partly because it raised a question of ownership requiring proof and partly because the question of ownership would only be appropriately determined in a process in which all interested parties could be convened. Neither the defender nor the arrestee were convened in that process. The petition however was for recall without caution, and it is thought that it would have been competent if caution had been offered.

[3] The status of Brand v Kent is in some doubt and may only be authority for its own facts: see Lord Ruthven v Drummond 1908 S C 1154 at p 1158.

competent, to make the application to the Inner House of the Court of Session.

(2) Where the thing arrested is a sum of money, should the arrestee have a title to apply for recall?

(3) Should it be made clear by statute that a third party claiming ownership of an arrested vessel and a fourth party claiming ownership of other types of arrested subjects, have a title to apply for recall or restriction of the arrestment, without prejudice to the court's power to dismiss or refuse the application on the ground that a proof is required and would be inappropriate, or that all interested parties have not been convened in the process?

(Proposition 18).

2.199 Inhibitions on the dependence. In principle, a third party qualifying an interest may apply for recall or restriction of an inhibition. An example of recall would be a case where a singular successor of the inhibited debtor, having paid the debt, is unable to obtain a discharge from the inhibiting creditor.[1] An example of restriction might be a case where an inhibition has been competently registered but is ineffectual to strike at subjects conveyed to a third party, and the third party seeks to have the subjects excluded from the scope of the inhibition.[2]

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[1] Gretton, Inhibition and Adjudication p 37.

[2] Ibid pp 37-38: see para 2.179 above.

2.200 At common law applications for recall were by way of petition to the Inner House.[1] The Titles to Land Consolidation (Scotland) Act 1868, s 158 enabled the Lord Ordinary in the Court of Session, before whom any summons containing warrant for inhibition is enrolled, or before whom any action on the dependence whereof letters of inhibition have been executed, to recall or restrict the inhibition "on the application of the defender or debtor", in accordance with a procedure by petition and answers. The procedure is now governed by RC 74(g) and (h) discussed above,[2] which do not specify the persons having a title to apply. The cases[3] on the title of persons other than the defender or debtor to apply under RC 74(g) for recall or restriction of an arrestment on the dependence suggest that third parties may apply for recall or restriction of an inhibition under that rule by incidental application in the process, to the Lord Ordinary.[4] Clearly the same rules should apply to inhibitions as to arrestments.

2.201

It should be made clear by statute that a person other than the debtor or defender having a title and interest to apply for recall or restriction of an inhibition on the dependence may make an incidental application in the depending action in the Court of Session or, if warrants

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1 Graham Stewart, p 571.

2 See para 2.191.

3 Idem.

4 Even a pursuer or a creditor has a title to apply for recall which he may wish to exercise in special circumstances where for some reason extra-judicial recall would be of doubtful competence or legal effectiveness: see Graham Stewart p 572.

for inhibition are in future to be granted in the sheriff court, in that court, as the case may be.

(Proposition 19).

(c) Grounds and scope of recall and restriction

(i) The existing law

2.202 We described above[1] the court's power to recall or restrict diligence on the dependence where it appears that the effect of the diligence is excessive or oppressive. In addition to those grounds -

(a) the court may in certain cases recall diligence on the dependence where it appears prima facie to have been incompetently or irregularly exercised; and

(b) there is some authority supporting the view that the court may recall or restrict diligence on the dependence where it is ineffective.

(ia) Recall of diligence on the dependence as incompetent

2.203 It is the well established practice of the court to dispose of questions relating to the recall of arrestments and inhibitions without proof and upon a prima facie presentation of the facts.[2] As a general rule, a proof will be allowed only of a limited kind and in special circumstances.[3] The reason is that an application for recall is a summary procedure and the question of the validity of the diligence should only be conclusively determined in other proceedings such as an action of furthcoming following an arrestment, or an action of reduction, in which a proof can be

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[1] Para. 2.22 ff.

[2] Azcarate v Iturrizaga 1938 SC 573 at p 581 per Lord President Normand.

[3] See para 2.204 below.

held. A dictum of Lord Kinnear in Brand v. Kent[1] seemed to indicate that the court could never reach a decision on the validity of an arrestment in an application for recall. It is however well settled that the court may reach a prima facie view of the validity of the diligence, and may recall it if its incompetence is instantly verifiable without a proof, or in the case of an arrestment if the pursuer fails to make out a prima facie case that the defender owns the arrested subjects.[2] In two cases, the courts have refused an application for recall, partly on the ground that a proof of ownership of arrested subjects was required and partly on the ground that not all parties having an interest had been convened as parties to the application.[3] These cases have been construed as meaning that the court may decide the question of the validity of the diligence in an application for recall if it can be determined without a proof and if the decision will be res judicata against all parties having an interest.[4] Since, however, the court proceeds on a prima facie view of the facts, it may be doubted whether the grounds for recall are, or ought to be, regarded as res judicata in any other proceedings as to the ownership of arrested subjects. There is no doubt that a decision refusing to recall an arrestment on the dependence is not

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[1] (1892) 20R 27 at p 31: "A petition for recall of arrestments always assumes that they have been well laid on... and the Court are asked to interfere as a Court of equity to prevent an oppressive use being made of the arrestments. And the notion of using the process... as a means of determining any question of right is quite out of the question".

[2] See para 2.205 below.

[3] Brand v Kent (1892) 20 R 29; "Nordsoen" v Mackie Koth and Co 1911 S C 172.

[4] McMorran v Glover (1937) 53 Sh Ct Rep 87 at p 88.

conclusive as to ownership,[1] and it is difficult to see why a decision to recall made without a proof on a prima facie view of the facts should be binding in other proceedings as to questions of ownership.

2.204 Disputed ownership of arrested corporeal moveables. Where the thing arrested is a corporeal moveable, an arrestment on the dependence (or in execution) will be recalled without caution if it is instantly verifiable, and verified, that the defender had no right of property in the subjects arrested at the time of the arrestment, and proof will only be allowed in special circumstances[2] eg. a remit for an opinion by a foreign lawyer regarding the transfer of ships under foreign law.[3] Many of the cases have involved ships[4] in which it was claimed that the defender had transferred ownership to the arrestee prior to the execution of the arrestment and the ownership could be verified by reference to the certificate of registration from the relevant register of ships.

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[1] See eg Svenska Petroleum AB v H O R Ltd 1986 SLT 513 at p 517.

[2] William Batey (Exports) Ltd v Kent 1987 SLT 557 at p 560 per Lord President Emslie delivering the Opinion of the Court; affg. 1985 SLT 490.

[3] Schultz v Robinson and Niven (1861) 24 D 120. See also Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co 1985 SLT 68 (HL) (on application by initial writ for recall of an arrestment of a ship on the dependence) it was observed (at p 71) that the sheriff allowed a proof on the matter of ownership of the ship.

[4] eg Duffus and Lawson v Mackay (1857) 19 D 430; Grant v Grant (1867) 6M 155; Bildstein v Bock (1872) 9 SLR 512; William Batey (Exports) Ltd v Kent, supra.

2.205 In the case of non-registered or unregistered corporeal moveables, including ships not yet registered,[1] the principles applicable were laid down in the Barclay, Curle case from the standpoint of an application for recall by an arrestee.[2] If the arrestee admits the common debtor's ownership of the arrested property, but states that he has certain claims over it, eg. a repairer's lien, an application for recall without caution should be refused as the claim should be made in the furthcoming. If the arrestee does not admit the common debtor's ownership, then the latter's possession is prima facie evidence of ownership, except in certain cases eg. warehousemen. If the arrester cannot make out a prima facie case that the corporeal moveable arrested belongs to the common debtor, the arrestee may obtain recall of the arrestment.[3]

2.206 To sum up the main rules, the court will recall without caution an arrestment of a corporeal moveable on the dependence if the applicant can and does instantly verify that it was not the property of the defender at the time of arrestment or if the pursuer fails to make out a prima facie title in the defender.

2.207 Disputed ownership of arrested incorporeal moveables. In a recent case,[4] it was held that the principle in the Barclay, Curle case that an arrestee may apply for recall where he claimed ownership of corporeal moveable property applied also to company shares, and that the principle that an arrester of a moveable had to make out a prima facie case of a title in the debtor applies also to incorporeal moveable property with a written title.

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1 As in the Barclay, Curle case: see next note.

2 Barclay, Curle & Co Ltd v Sir James Laing & Co Ltd 1908 S C 82 at p 87-88.

3 Idem.

4 Blade Securities Ltd, Petitioners 1989 SLT 246: arrestment recalled since arrester unable to show that prima facie the defender was the true owner of the shares.

2.208 Disputed ownership of arrested money. No case has been traced in which an arrestment of money or a claim of debt has been recalled on the ground that the arrested money or debt was not due to the defender (the common debtor). As noted above[1] applications for recall by an arrestee[2] or a fourth party[3] have been held incompetent where the thing arrested is money. In a sheriff court case, an application for recall by the defender was held incompetent because proof was required that he held the money in trust for a third party.[4] It is thought, however, that an application is competent if caution is offered, and recall without caution may be granted if the claim of ownership could be instantly verified without proof.[5]

2.209 Other grounds of challenge of arrestments as incompetent. The courts have recalled, on the application of the defender or common debtor, arrestments on the dependence of a claim for debt where it could be established without a proof that the diligence was incompetent. Examples are where two pursuers sued for separate sums but the arrestment on the dependence wrongly gave notice to the arrestee of the attachment of a single sum to be made furthcoming to the pursuers jointly;[6] where the pursuer used an arrestment on the dependence in the hands of a bank in London, and was unable to suggest how the Scottish courts

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1 See paras 2.194 and 2.196.

2 Barclay, Curle & Co Ltd v Sir James Laing & Sons Ltd 1908 S C 82 at p 87.

3 Brand v Kent (1892) 20 R 29; "Nordsoen" v Mackie, Koth & Co 1911 S C 172.

4 McMorran v Glover (1937) 53 Sh Ct Rep 87.

5 Ibid at p 88.

6 Mactaggart v MacKillop 1938 SLT 100.

could have jurisdiction over the arrestee;[1] where the schedule of arrestment on the dependence specified wrongly the name of the common debtor;[2] and where an arrestment against a widow's private funds was executed on the dependence of an action against her as executrix.[3] Arrestments in execution of money have also been recalled, at the common debtor's instance, without caution or consignation on the ground of incompetency where the incompetency was verifiable without an allowance of proof.[4] Where an irregularity renders the arrestment null, the arrestee can dispose of the arrested property without recall of the arrestment. But it is always the safest course to apply for recall, the expense of which will fall on the creditor.[5]

2.210 In the case of arrestments of corporeal moveables, other questions of competency, besides questions of ownership of the thing arrested, may be decided in an application for recall: for example, the question whether the arrestment on the dependence of a ship is rendered incompetent by the Administration of Justice

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[1] Brash v Brash 1966 S C 56. It was observed that the position might have been very different if the pursuer could have suggested a possible ground of jurisdiction which might have been founded on in an action of furthcoming.

[2] Richards and Wallington (Earthmoving) Ltd v Whatlings Ltd 1982 SLT 66.

[3] Macfarlane v Sanderson (1868) 40 Sc Jur 189.

[4] Eg Lord Ruthven v Drummond 1908 S C 1154 (arrested fund exempt as alimentary). There was delay in raising the action of furthcoming); F J Neale (Glasgow) Ltd v Vickery 1973 SLT (Sh Ct) 88 (defenders not liable for debt in respect of which arrestments used).

[5] Graham Stewart, p 200.

Act 1956, s. 47;[1] whether the conclusions of the summons support a warrant for arrestment on the dependence;[2] and whether a second arrestment on the dependence is invalid by reason of being served while a ship was wrongfully detained in pursuance of a previous invalid arrestment.[3]

2.211 Recall of inhibitions on the dependence as incompetent. Since an inhibition generally does not specify the subjects covered by the inhibition, questions of recall on the grounds of disputed ownership have been unknown in practice, though such an application might be brought if a warrant for inhibition limited to specific subjects were granted under the Family Law (Scotland) Act 1985, s 19, or possibly at common law.[4] It is well established that "if there is any defect or irregularity in the warrant or execution of an inhibition, the effect of it may be determined by the debtor applying... for recall. Reduction is not necessary".[5]

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[1] See eg Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co 1985 SLT 68 (HL), revg 1984 SLT 462 on another point; William Batey (Exports) Ltd v Kent 1987 SLT 557 affg. 1985 SLT 490; Clipper Shipping Co Ltd v San Vincente Partners Ltd 1989 SLT 204. As to the 1956 Act, s 47, see Part III below.

[2] Azcarate v Iturrizaga 1938 S C 573 at p 574 (recall of first arrestment).

[3] Azcarate v Iturrizaga, supra.

[4] Cf Pow v Pow 1987 SLT 127; 1987 SCLR 290.

[5] Graham Stewart, p 568. As to the defects considered fatal, see ibid pp 541-546; Morton v Smith (1902) 9 SLT 396.

(ib) Recall or restriction of diligence on dependence as wholly or partly ineffective?

2.212 There is old sheriff court authority,[1] which has been accepted by text-books as authoritative,[2] that where an arrestment can attach nothing, it may be recalled. A creditor of a debtor who had granted a trust deed for creditors arrested in the hands of a trustee who petitioned for recall. No ground of challenge of the trust deed was averred. While a surplus of the trust fund might have arisen payable to the truster (the common debtor), no such surplus could arise till the debt to the pursuer and all other debts had been paid in full, and all interest to support the arrestment had ceased. The sheriff principal held that the arrestment could not be operative on any reasonable view of the circumstances and recalled it as unnecessary.

2.213 It has been suggested[3] that an inhibition which is ineffective in relation to a particular transaction (eg. because the deed concerned did not violate the inhibition but the inhibition rendered the property concerned unmarketable) may be restricted by excluding the property from the inhibition, though declarator may be the more appropriate remedy.

(ic) Other possible grounds of recall or restriction

2.214 As mentioned above, other grounds of recall or restriction may come to be recognised by the courts since their powers are

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1 Shivas' Tr v Shivas' Trs (1893) 27 Journal of Jurisprudence 556.

2 Graham Stewart, pp 57, 198; Macphail, p 362.

3 Gretton, Inhibition and Adjudication pp 37-39.

open-textured. There are grounds of recall peculiar to future or contingent debts.[1] It has been suggested,[2] on the basis of the undernoted cases,[3] that the court may recall or restrict diligence on the dependence on the ground that the pursuer's case was unlikely to succeed, or unlikely to succeed for the whole sum sued for, and that such a power may be implicit in the court's practice of allowing caution or consignation for less than the sum sued for in actions for a random sum.

(ii) Our proposals on grounds of restriction and recall

2.215 We think it would be unnecessary to specify in statute the grounds upon which the power to recall or restrict should be exercised. The court would have regard to the test or guidelines regulating the grant of warrant[4] and also the existing grounds of the recall of incompetent diligences and the other possible grounds which are best left to be developed by the courts.[5] Likewise the power to impose conditions of caution or consignation on defenders should continue to be available. Whether the court should have power to impose a requirement of caution or consignation on a pursuer as a condition of retaining a diligence would depend on the answer to the question at Proposition 6(3) above.[6]

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[1] Eg if there are no special circumstances or special cause to justify the diligence (Dove v Henderson (1865) 3 M 339; Stevens v Campbell (1873) 11 M 772) or the pursuer's averments are lacking in specification (Beton v Beton 1961 SLT (Notes) 19).

[2] Gretton, Inhibition and Adjudication pp 36-37.

[3] Turnbull's Trs. v Turnbulls (1823) 2 S 459; Hay v Morrison (1838) 16S 1273.

[4] See Proposition 4 (para 2.90).

[5] See para 2.202 - 2.214.

[6] See para 2.101.

2.216 The foregoing rules are not intended to affect the rules governing the competence of other remedies, such as suspension or interdict[1] or reduction.[2] In particular, where an arrestment or inhibition on the dependence is challenged on the ground that the messenger-at-arms or sheriff officer has executed the diligence irregularly, and the creditor produces an ex facie regular certificate of execution, reduction of the certificate is necessary under existing law[3] and this requirement would remain.

(iii) Types of order recalling diligences on the dependence and liability of cautioner

2.217 It may be necessary or desirable in some cases not only to recall or restrict diligences on the dependence which have already been used but also to prevent the use of further diligence under the warrant. The use of interdicts for this purpose has already been discussed above[4] but interlocutors recalling diligence may also have prospective effect.

2.218 Types of recall of arrestments on the dependence. Three types of recall may be distinguished, namely:-

(a) "general recall" in which the interlocutor recalls all arrestments used and to be used by the pursuer against the defender on the dependence of the action;

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1 See para 2.120 above.

2 See eg MacKillop v Mactaggart 1939 SLT 65.

3 Graham Stewart, pp 332, 753.

4 See para 2.120.

(b) "special recall" in which the interlocutor recalls specified arrestments already used in the hands of specified arrestees; and

(c) (possibly) a recall of the warrant for arrestment on the dependence itself as distinct from the recall of arrestments used or to be used in pursuance of the warrant.

The useful labels "general recall" and "special recall" are borrowed by style books[1] from the classification of letters of loosing arrestments introduced by the now almost unknown Act of Sederunt of 11 July 1826. (We propose later the abolition of letters of loosing arrestments[2]).

2.219 General recall. As we have seen, in a general recall, the court recalls all arrestments on the dependence which have been used by the pursuer against the defender in the action for payment and it also prospectively "recalls" or "prohibits and discharges" all such arrestments which may thereafter be used on the dependence of the same action.[3] This prospective recall or prohibition certainly renders future arrestments incompetent in the sense of ineffectual, and possibly also wrongful,[4] but it does not as such have effect as an interdict. We have not traced any case in which a general recall has been applied for or granted where an arrestment on the dependence had not already been used, though in principle such an application might well be a competent

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[1] See eg Lees, Sheriff Court Styles (4th edn) p 93; Dobie, Sheriff Court Styles pp 47 and 48; Enclyclopaedia of Scottish Legal Styles vol 1, pp 318 and 319. Curiously, the labels of "general" and "special" recall are applied only to sheriff court styles.

[2] See para 2.250; Proposition 23(1)(para 2.263).

[3] See eg McPhedron and Currie v McCallum (1888) 16 R 45; Cormack and Sons v Semple (1890) 7 Sh Ct Rep 100.

[4] The distinction between ineffectual and wrongful arrestments has not been much discussed but see McLaughlin v T Dixon Ltd 1924 SLT (Sh Ct) 57.

method of rendering ineffectual future arrestments on the grounds of caution or consignation. The reported cases suggest that a general recall is competent but very unusual at any rate in Court of Session practice.[1]

2.220 On the analogy of letters of general loosing,[2] the caution required as a condition of a general recall is caution for payment of the whole debt (caution judicatum solvi) including expenses,[3] as distinct from caution for payment of the amount or value of the arrested funds or property.

2.221 It frequently happens in practice that arrestments on the dependence already used are recalled on caution for payment of the whole debt (including expenses), but the interlocutor normally effects a special recall of arrestments already used and not a general recall of future arrestments. It is thought that the mere provision of caution for payment of the whole debt does not by itself render ineffectual future arrestments on the dependence. It will be for the defender to apply for recall of the future arrestments once they are executed on the ground that they are nimious and oppressive, the debt being ex hypothesi already adequately secured.

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[1] Indeed Graham Stewart pp 214 - 219, while recognising the distinction between general and special loosing, does not recognise explicitly a corresponding distinction between general and special recall, and seems to assume that recall will generally be of particular arrestments already used (ie what we have described as special recall). Thus he states that recall and special loosing have the same effect as regards the liability of the cautioner but he does not use the concept of general recall.

[2] See Graham Stewart, p 218; Macdougall's Tr v Law (1864) 3 M 68.

[3] Graham Stewart p 219.

2.222 Special recall. So far as reported cases disclose, the most common form of recall is a special recall of specified arrestments in the hands of a specified arrestee. A modification of this form of interlocutor is a recall of specified arrestments "and any other arrestments which may have been used on the dependence of the action".[1] No doubt general and special recalls may be combined in various ways, eg. a special recall of existing specified arrestments, with or without a general recall of any other existing arrestments, and a general prospective recall of future arrestments, all under the same warrant.

2.223 Liability of cautioner in general recall and special recall. In principle, on the analogy of the general and special loosing of arrestments the liability of a cautioner differs according as the recall is a general recall or a special recall. Graham Stewart observes that "there is no distinction between the liability of a cautioner in a special loosing and in a recall of arrestments", but here he is using "recall" to refer to the common case of a special recall.[2] Normally the court will fix the maximum limit of the caution required but if no limit is fixed or if the cautioner contends that the value of the subject arrested is less than the limit specified by the court, the following principles or rules apply to fix the true limit of the cautioner's liability.[3] Thus in a "special recall" as in a special loosing[4]:

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1 Pett v Kopke (1918) 34 Sh Ct Rep 261.

2 Graham Stewart p 214.

3 Idem.

4 Ibid pp 214 - 216; Potter v Bartholomew (1847) 10 D 97; Malcolm v Cook (1853) 16 D 262.

(1) the obligation of the cautioner is to make the arrested property forthcoming to the pursuer (or "to abide the result of the pursuer's diligence") in the event of him obtaining decree and demanding payment.

(2) The primary measure of the cautioner's liability is the amount or value of the arrested funds or property.

(3) If the amount of value of the arrested funds or property exceeds the amount of the debt secured by the arrestment, the cautioner is only liable to the amount of the debt.

(4) If the amount or value of the arrested funds or property cannot be ascertained, the cautioner is liable for the amount of the debt secured by the arrestment.

(5) The cautioner may get quit of liability by offering the arrested property to the arrester, provided that the property is in the same condition as at the date of the arrestment, excepting (probably) natural decay, fall of markets, the debtor's insolvency and accidents not caused by the arrestee's fault.

In general the effect is to substitute the cautioner in the place of the arrestee to the extent of the amount or value of the property arrested.[1]

2.224 The distinction between the liability of a cautioner in a special loosing (equivalent to a special recall) and a general loosing (equivalent to a general recall) was described by Lord Justice-Clerk Inglis as follows[2]:

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[1] Graham Stewart, p 217.

[2] Macdougall's Tr v Law (1864) 3 M 68 at pp. 72-73.

"The distinction between the position of a cautioner in a general loosing and the cautioner in a special loosing is clear. The obligations are entirely different in the two cases, both in nature and in effect. In a special loosing the obligation is, that a fund, attached in the hands of a particular arrestee, shall be forthcoming as soon as the arrester shall be in a position to demand payment from the common debtor. In short, the cautioner in a special loosing, can state no objection that is not equally open to an arrestee, and, of course, an arrestee could never be heard to say that the claim of the arrester against the common debtor was not well founded. Nobody has any interest to say that but the common debtor himself. But in a general loosing the rights of parties are altogether different. A general loosing applies to no particular fund, to no particular arrestment, and to no particular arrestee. Its object is to set aside all arrestments used, or which may be used, by a creditor holding a warrant of arrestment; and it is quite obvious that the caution required in such a loosing must be different from that which is required in a special loosing. In a general loosing there is no means of imposing an obligation to make a particular fund forthcoming. The obligation required is a simple obligation judicatum solvi[1], and the bond of caution is framed accordingly... It is quite impossible to distinguish between the rights and obligations of an ordinary cautioner for payment of money, and the cautioner in such a bond as the present,[2] further than that in the ordinary case a cautioner becomes bound for repayment of a loan or the like, and in the latter the cautioner becomes bound for the sum to be found due by a decree. The equities in both cases are the same".

2.225 Summary of differences between general recall and special recall. If we are right in concluding that there are differences between special recall and (the admittedly unusual) general recall which are substantially the same as the differences between special loosing and general loosing, then these differences may be summarised as follows.

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[1] ie for payment of the debt.

[2] ie a cautioner in a general loosing.

(1) In a special recall, the interlocutor recalls specified arrestments already used in the hands of specified arrestees. In a general recall, the interlocutor recalls all arrestments already used, and renders ineffectual prospectively any arrestments which may in future be used, by the pursuer against the defender on the dependence of the action without specifying the arrested property, the arrestments or the arrestees affected.[1]

(2) In a special recall, the cautioner's obligation is to make the previously arrested property forthcoming in the event that the pursuer obtains decree. In a general recall, the cautioner's obligation is a simple obligation to pay the debt.[2]

(3) In a special recall, the cautioner's liability cannot exceed the amount or value of the arrested property though either the debt due by the defender or the upper limit of the caution fixed by the court exceeds that amount or value.[3] In a general recall, the cautioner's obligation to pay the debt is not limited by reference to the amount or value of any particular fund or property.[4]

(4) In a special recall, the cautioner stands in the place of the arrestee and cannot state any objection which could be stated by the defender.[5] He cannot therefore defend the action against the defender on the merits or object to a

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[1] Macdougall's Tr v Law (1864) 3 M 68.

[2] Idem.

[3] Lord Balmerino v Lord Lochinvar (1626) Mor 788; Potter v Bartholomew (1847) 10 D 97; Bell, Commentaries vol 2, p 67.

[4] Macdougall's Tr v Law (1864) 3 M 68.

[5] Potter v Bartholomew (1847) 10 D 97; Malcolm v Cook (1853) 16 D 262.

reference to arbitration. In a general recall, the cautioner is in the position of an ordinary cautioner and thus may defend the depending action[1] and object to a reference to arbitration[2].

2.226 Is reform necessary? The distinction between general and special recall does seem to complicate the law by introducing distinctions between the liability of a cautioner in a special recall and his liability in a general recall. Special recalls are clearly necessary and we believe that the power to effect a general recall can be a useful safeguard for a defender who has furnished caution or consignation for the whole debt. It would for example be wrong if the court, when recalling an existing arrestment of a ship on the eve of its departure, had no power to prevent the immediate re-arrestment by an unreasonable pursuer of the ship before it could depart. While the law on the liability of cautioners is somewhat complex, because of the distinction between general and special recall, the distinction seems necessary and we are not aware that it causes difficulty in practice or leads to unjust results. We therefore propose that it should be retained.

2.227 Recall of invalid warrant for arrestment on the dependence? Where a warrant for arrestment on the dependence is invalid, as where it has been granted on the dependence of an action without pecuniary conclusions or craves (except for expenses), it might be thought that the warrant itself should be recalled. The practice seems, however, to be to recall any arrestments used under the warrant.[3] We suggest that it should be made clear by statute that the purported warrant itself may be recalled on the ground of its invalidity.

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[1] Macdougall's Tr v Law (1864) 3 M 68.

[2] Idem.

[3] See eg Stafford v McLaurin (1875) 3 R 148.

2.228 Recall and restriction of warrant for inhibition. It seems that in the case of the recall or restriction of an inhibition, it is the warrant in the signeted summons, or the signeted letters of inhibition, which are recalled or restricted and not the schedule of inhibition. This differentiates recall of inhibitions from recall of arrestments, and the reason is that a warrant for inhibition authorises one diligence completed by registration of the warrant whereas a warrant for arrestment authorises multiple arrestments each one executed by service of a separate schedule of arrestment. While in future under our proposals several inhibitions, each one restricted to particular property, will be competent in principle, nevertheless what will be recalled or further restricted will be each warrant itself. The recall or restriction of a warrant for inhibition may be effected even before it has been executed by service on the defender of the schedule of inhibition, or registered in the personal register.[1]

(iv) Proposals on powers of recall and restriction and liability of cautioner

2.229 We propose:

(1) The court should continue to possess a wide discretionary power to make any of the following orders:

(a) an order restricting or recalling specified arrestments, which have been used on the dependence, in the hands of specified arrestees (a restriction or a special recall);

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[1] Dove v Henderson (1865) 3 M 339.

(b) an order recalling all arrestments which have been used on the dependence without specifying them and also rendering ineffectual (whether in the form of a prohibition, or a prospective discharge or a prospective recall) any arrestments which may in future be used on the dependence of the same action under the same warrant (a general recall);

(c) an order effecting a restriction or a special recall of specified arrestments on the dependence already used, with or without a general recall of any other unspecified arrestments already used, and a general recall of arrestments on the dependence which may be used in future under the same warrant (a restriction or a special recall combined with a general recall);

(d) an order restricting or recalling a warrant for inhibition on the dependence, whether or not the inhibition has been registered in the personal register.

The court should also continue to possess ancillary powers to attach conditions to the grant, or the refusal to grant, any such order, or any variation or recall of any such order as is mentioned at para (4) below, including:

(i) conditions as to caution or consignation; and

(ii) conditions designed to achieve the same result as a loosing of arrestments as proposed at Proposition 23 (para.2.263) below.

(2) The foregoing powers should be exercisable by the courts having regard to the statutory principles proposed above for the grant of warrants for diligence on the dependence and, subject to those principles, having regard to the grounds for recall or restriction under the existing law, which should remain undefined by statute.

(3) The court should also possess a power to recall a purported warrant for arrestment on the dependence on the ground of its invalidity.

(4) The court should have power (exercisable with or without conditions):

(a) to vary an order restricting an arrestment on the dependence;

(b) to vary or recall an order rendering ineffectual future arrestments on the dependence;

(c) after the recall of a warrant for inhibition on the dependence, to grant a new warrant for inhibition on the dependence; and

(d) to vary or recall any ancillary conditions,

in any case where there has been a material change in circumstances since the previous order was made, or material circumstances are disclosed, which were not previously disclosed, to the court.

(5) **No change should be made in the rules regulating the liability of a cautioner in a special recall or restriction and the liability of a cautioner in a general recall.**

(6) **The foregoing proposals relating to arrestments on the dependence should apply to arrestments in rem of a ship.**

(Proposition 20).

(d) **The incidence of liability for the expenses of recall or restriction, or extra-judicial discharge, and registration**

2.230 The incidence of liability for the expenses of applications for recall or restriction, and for extra-judicial discharges, and the registration thereof in the personal register, presents a number of difficulties.[1] Generally speaking the same rules apply to arrestment and inhibition on the dependence.

2.231 Where a diligence on the dependence is recalled on the ground of its nimious (excessive) or oppressive use, or incompetence or procedural irregularity, the pursuer is liable, even though he may be successful in the action.[2]

2.232 The pursuer may come under an obligation to grant, without conditions, an extra-judicial discharge of diligence on the dependence in certain circumstances which consist of or include the following, where his action has been disposed of by decree of

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[1] See Graham Stewart, pp 212-213; 573; Maclaren, Expenses pp 117-119; Gretton, Inhibition and Adjudication pp 39-41.

[2] Clark v Loos (1855) 17 D 306; Duff v Wood (1858) 20 D 1231; Reid & Co v Langloan Iron and Chemical Co Ltd (1904) 20 Sh Ct Rep 203.

absolvitor,[1] or dismissal,[2] or has been abandoned[3] or settled by payment of the debt[4] or a composition[5] or where sufficient caution has already been found.[6] It has been suggested that the pursuer is liable for the expenses of discharge in the case of absolvitor and of dismissal; the defender is liable where payment follows decree in the pursuer's favour; and either may be liable in the case of a settlement depending on the terms of the settlement.[7] In such circumstances, if the pursuer fails to grant an extra-judicial discharge without conditions, the defender may apply for recall and the pursuer will be liable for the expenses.[8]

2.233 The case of Roy v. Turner[9] seemed to form an exception to these rules. It was there held that a pursuer who had arrested on the dependence was not obliged, on receiving payment of the debt, to withdraw the arrestment, nor liable for the expenses of an application for recall. This case is inconsistent with the other cases cited in the previous paragraph,

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[1] Livingstone v Learmonth & Co (1824) 2 S 730; White v Ballantine (1824) 2 S 770; Mackenzie v Williamson (1824) 2 S 771; Sheriff v Balmer (1842) 4 D 453.

[2] Jack v Dalrymple (1824) 7 s 219; Radford & Bright Ltd v W D M Stevenson & Co (1904) 6 F 429.

[3] cf Reid & Co v Langloan Iron and Chemical Co Ltd (1904) 20 Sh Ct Rep 203 (action abandoned and defenders obtained expenses for recall on ground that arrestments had been nimious and oppressive when laid).

[4] Milne v E & J Birrell (1902) 4 F 879.

[5] Robertson v Park, Dobson & Co (1896) 24 R 30.

[6] Blochairn Iron Co v P Flower and Co (1865) 1 SL Rep 45.

[7] Gretton, Inhibition and Adjudication p 40.

[8] See the cases in fns. 1 to 6 above.

[9] (1891) 18 R 717.

was strongly criticised by Graham Stewart,[1] was not followed in two subsequent cases,[2] and can probably be regarded as no longer authoritative.[3]

2.234 Where the pursuer is bound to grant an extra-judicial discharge, and the defender applies for recall without first requesting such a discharge, the expense of the application falls on the defender.[4] On the other hand, where the pursuer refuses to grant a discharge though bound to do so on request, and the defender applies for recall, he can refuse a later offer by the pursuer to grant a discharge, and claim expenses in his petition.[5]

2.235 Where an arrestment or inhibition on the dependence is recalled on the ground of caution or consignation, without opposition by the pursuer, and the diligence was "properly used in the circumstances", it is sometimes said that the applicant for recall bears the expenses.[6] It has however been rightly observed that "there is some basis in the case law for saying that the correct practice is to reserve the question of expenses, until decree, and then to make expenses follow the success of the

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1 pp 212 and 213.

2 Robertson v Park, Dobson and Co (1896) 24 R 30; Radford and Bright Ltd v D M Stevenson & Co (1904) 6 F 429.

3 It is ignored by Maclaren, Expenses p 117.

4 Gordon v Duncan (1827) 5 S 602.

5 Lickley, Petitioner (1871) 8 SL Rep 624.

6 Graham Stewart, pp 212, 573; Maclaren, Expenses p 117; McPhedron and Currie v McCallum (1888) 16 R 45.

action".[1] We invite views on what rule should be followed.

2.236 The need to reserve expenses until the outcome of the principal action is known was first established in petitions for recall.[2] If a reservation is not asked for and granted, the process is ended and it is not possible to allow the petitioner the expenses of recall in the principal action because it is a separate process.[3] Graham Stewart observed that if the diligence is recalled "on a minute and interlocutor in terms thereof "(ie. by incidental application in the principal action)", it is thought that the expense of recall must then be determined or reserved, otherwise it cannot afterwards be claimed".[4]

2.237 The need to reserve expenses expressly may be an unnecessary and purely formal requirement derived possibly from the analogy of a petition for recall, which analogy is inappropriate because such a petition is a separate process. We seek views on what rule should be followed.

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[1] Gretton, Inhibition and Adjudication p 39, citing Dobbie v Duncanson (1872) 10 M 810 at p 816 per Lord President Inglis: "The practice of this Division... is, in recalling diligence on caution, to reserve expenses and to allow interim extract. That does not preclude the petitioner, if he should be found right in the principal action, from coming back and asking to be found entitled to expenses".

[2] Gordon v Duncan (1827) 5 S 602; Clark v Loos (1855) 17 D 306; Dobbie v Duncanson (1872) 10 M 810.

[3] Maclaren Expenses p 118.

[4] Graham Stewart, p 213, citing the opinion of an Auditor of the Court of Session.

2.238 The expenses of an unsuccessful application for recall or restriction are borne by the applicant.[1]

2.239 As regards the incidence of liability for payment of the fee for registering the recall of an inhibition in the personal register, Graham Stewart[2] observed that the party inhibited is liable, but that proposition is not supported by the authority[3] he cites. Another approach which has been suggested[4] is "to say that the fee must be paid by the inhibitor if the inhibition is recalled on the ground of nimiety or oppression, or irregularity, or lapse, or abandonment, but otherwise by the debtor".

2.240 This is not a matter on which there should or need be any doubt and we seek views on the appropriate solution.

2.241

(1) Where an arrestment or inhibition on the dependence is recalled or restricted on caution or consignation, without opposition by the pursuer, and the diligence was properly used in the circumstances, should the rule be:

(a) that the applicant for recall or restriction should bear the expenses of the application; or

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[1] Crawford v Ritchie (1837) 16 S 107; Mowat v Kerr 1977 SLT (Sh Ct) 62.

[2] p 573.

[3] Laing v Muirhead (1868) 6 M 282.

[4] Gretton, Inhibition and Adjudication p 41.

(b) that the question of expenses should be reserved and that the right to expenses should follow success in the action?

(2) Where diligence on the dependence is recalled or restricted in an incidental application in the depending action, (as distinct from the separate process of a petition for recall or restriction), should it be necessary for the court to reserve the question of the expenses of the application expressly in order to enable expenses to be dealt with at a later stage?

(3) What rule should apply to liability for the expenses of registering the recall or restriction of an inhibition in the personal register?

(Proposition 21).

(e) Appeals

2.242 In the Court of Session, the judgment of the Lord Ordinary or Vacation Judge in an application for recall or restriction is subject to review by the Inner House, by a reclaiming motion, without leave, within seven days thereafter.[1] Section 21 of the Debtors (Scotland) Act 1838 provides that the judgment of the sheriff in a petition for recall or restriction is subject to review in the Court of Session. Leave to appeal is not required. It has however been held in a series of sheriff court cases that an appeal to the sheriff principal is also competent,[2] and it appears to be the better view that leave to appeal against such a decision is required where the decision was made on an incidental motion.[3] We suggest that, on the analogy of RC 74(h), leave to appeal should not be required. If the appeal procedure is not to be defeated, it seems clear that a recall or restriction, and perhaps also a loosing, should not take effect until after the appeal or reclaiming motion has been disposed of.[4] We are not aware of any difficulties which arise in connection with appeals but should be grateful for views.

2.243

(1) **It should be competent to appeal against a sheriff's decision in an application for recall or restriction or loosing of diligence on the dependence or in rem without the leave of the sheriff though the decision was made on an incidental motion.**

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[1] RC 74(h), superseding Debtors (Scotland) Act 1838, s. 20.

[2] See Macphail, p 363, fn 76.

[3] Tait v Main 1989 SCLR 106 (Sh Ct): see para 2.181 above.

[4] West Cumberland Farmers Ltd v Ellon Hinengo Ltd 1988 SLT 294 at p 295.

(2) **Do the provisions on appeals or reclaiming motions against judgments disposing of applications for recall, restriction or loosing of arrestments on the dependence or in rem operate satisfactorily in practice?**

(Proposition 22)

(11) Regulation by specific enactments of recall and restriction

2.244 In addition to the general power of recalling or restricting arrestments and inhibitions on the dependence or in execution, a number of specific statutes confer on the courts particular powers of recall of arrestments. These include the following[1]:

(1) a power to recall an arrestment of a ship in rem in security for the implementation of a non-pecuniary claim competent under statute: see Administration of Justice Act 1956, s. 47(5), proviso;

(2) a power, and in some circumstances a duty, to recall the arrestment of a ship or other property in security of a claim appearing to be founded on a liability to which a limit is set by the Merchant Shipping Act 1894, s. 503: see Merchant Shipping (Liability of Shipowners and Others) Act 1958, s. 6;;

(3) a duty to recall an arrestment on the dependence or in rem securing a claim for reparation for oil pollution damage where the defender is found to be entitled to

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[1] The list is not necessarily exhaustive.

limit his liability: see Merchant Shipping (Oil Pollution) Act 1971, s. 6;

(4) a power to recall or restrict an arrestment in connection with time to pay directions in decrees and time to pay orders: Debtors (Scotland) Act 1987, ss. 2(3), 3(1), 9(2)(e) and 10(1)(b).

(5) a power to recall and restrict inhibitions and arrestments of property affected by restraint orders or interdicts under section 12 of the Criminal Justice (Scotland) Act 1987 (Part I of which relates to the confiscation of the proceeds of drug trafficking) and corresponding English orders registered in Scotland for enforcement: see section 11(1)(i) and (3A) of that Act;

(6) similar powers in relation to inhibitions and arrestments of property affected by English restraint orders under the Criminal Justice Act 1988 registered in Scotland under section 90 of that Act for enforcement: see section 92(4) of that Act.

We do not think that these provisions will require amendment consequential on our proposals but invite views.

2.245 Another provision confers on the court power, on the application of a receiver, to authorise the sale or disposal of the property of a company.[1] We mention this power, which resembles a power of restriction, simply for the purpose of excluding it from consideration in this Discussion Paper. While it has been the

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[1] Insolvency Act 1986, s 61, re-enacting Companies Act 1985, s 477 (repealed), which derived from the Companies (Floating Charges and Receivers) (Scotland) Act 1972, s 21; see Armour and Mycroft, Petitioners 1983 SLT 453.

subject of some criticism,[1] especially in relation to inhibitions, any necessary reforms would be best considered in the context of floating charges and receivers.

(12) Loosing of arrestments

2.246 The meaning of "loosing". Originally the loosing of an arrestment on the dependence was very different in its procedure, incidents and effects from recall or restriction. It has always differed from restriction and still differs in some important respects from recall. The whole topic is, however, bedevilled by the lax and imprecise use of terminology, in particular the various meanings ascribed to the word "loosing". Sometimes the word "loosing" is used in its orginal, distinctive and strictly correct sense of a method (by way of signeted letters of loosing) of releasing arrested property which does not extinguish the arrestment itself and the nexus which it creates, at least until the common debtor uplifts the arrested property.[2] Sometimes "loosing" is used as a synonym for recall (which extinguishes the arrestment).[3] Sometimes the word "loosing" appears to have reference to judicial interlocutors in petitions or incidental applications having an effect similar to letters of loosing.[4] Again, while the principal authorities define "loosing" as a licence or permission given to the defender to uplift or receive the arrested property from the arrestee, it is clear that loosing must mean something different where the thing arrested is a ship since in

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1 See Gretton, Inhibition and Adjudication, pp 128 -129.

2 Bell, Commentaries, vol 2, p 67; Baron Hume's Lectures, vol 6, p 106.

3 See eg Dobbie, Petitioner (1871) 8 SLRep 523 where "loosing" is used in the judgment and "recall" in the interlocutor; Cormack & Sons v Semple (1890) 7 Sh Ct Rep 100, where the interlocutor of Sheriff Lees both "loosed" and "recalled" arrestments and presumably had effect as a recall rather than a loosing in its distinctive sense.

4 See eg Macphail, p 360.

such a case there is no arrestee.[1] Here it means a permission to move the arrested ship from the place where it was arrested.[2]

2.247 The main issues. In this Section, we are concerned with three main issues. The first, which seems uncontroversial, is the abolition of signeted letters of loosing. The second concerns the question whether in principle loosing should remain as a distinct and autonomous method of regulating and "releasing" an arrestment. The third issue concerns the technical question of whether, assuming loosing should be retained, its incidents and effects should be defined by statute and if so, what the terms of that definition should be. To understand these issues, it is necessary to describe briefly how the law has developed.

2.248 The original differences between loosing and recall. Originally there were very marked differences between loosing and recall.

(1) As regards procedure, the loosing of an arrestment on the dependence was effected in the Court of Session by signeted letters of loosing on the passing of a bill in the Bill Chamber.[3] By contrast the recall of an arrestment on the dependence was effected by an interlocutor granted on petition,[4] and after 1838 on an incidental application in the depending action.[5] There is some authority that in the sheriff court, the sheriff always had common law

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1 See para 3.5, sub-para (a) below.

2 See eg McMillan p 74.

3 Graham Stewart, p. 204 ff.

4 Ibid p 207 ff.

5 Debtors (Scotland) Act 1838, s 20.

powers of loosing,[1] though his powers of restriction and recall were and are purely statutory, being conferred by the Debtors (Scotland) Act 1838, s. 21.

(2) Signeted letters of loosing were regulated and classified by an Act of Sederunt of 11 July 1826.[2] The primary division was between:

(a) letters of special loosing for the loosing of a particular arrestment or arrestments in the hands of a specified arrestee; and

(b) letter of general loosing for the loosing of all arrestments already used, or to be used in future, under the warrant for arrestment.

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[1] McGlashan, Sheriff Court Practice (4th edn; 1868) p 368: "It is not necessary or competent to apply to the court under the statute [ie the 1838 Act, s 21] to loose arrestments on the dependence on caution, that being a common law right existing previous to the statute, and which the statute was not meant to limit, but to extend." This common law power appears to have been overlooked by the sheriff when declining jurisdiction to recall or loose arrestments in Stewart v Macbeth and Gray (1882) 10 R 382.

[2] See Graham Stewart, pp 206 - 207; Maclaren Bill Chamber Practice pp 236 - 237; Scots Style Book (1902) vol I, p 408 ff.

There was a cross-cutting classification into four categories depending on the ground on which the arrestment was laid, viz in security, on the dependence of actions for definite sums, on the dependence of actions for random sums, and on a decree. The Act of Sederunt did not apply to loosing on consignation or loosing of arrestments to found jurisdiction, nor did it apply to judicial recall, though as we have seen,[1] the labels of 'general' and 'special' recalls are used in sheriff court styles.

(3) The effect of loosing an arrestment on the dependence was, and is, not to extinguish the diligence or nexus entirely (at least until the arrested subjects are uplifted by the defender). In the case of the loosing of an arrestment of subjects other than ships, loosing is a licence or permission enabling the defender or common debtor to receive or uplift the arrested subjects from the arrestee while preserving the legal nexus.[2] Other important legal effects are:

(a) The arrestment retains its preference in a competition with other arrestments and rights (at any rate until the arrested property is uplifted).[3]

(b) The arrested property is subject to an action of furthcoming if it is still in the arrestee's possession when the arrester obtains decree of payment.[4]

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[1] See para 2.218, fn 2.

[2] Bell, Commentaries, vol 2, p 67; Baron Hume's Lectures, vol 6, p 106.

[3] Idem.

[4] Idem.

(c) If however the arrestee has released (ie parted with) the 'loosed' property to the defender by the time when the arrester obtains decree of payment, the arrester's claim is only against the cautioner.[1] In other words the uplifting of the property appears to extinguish the arrestment leaving only caution or consignation to secure the arrester's claim.

(d) If another creditor has laid a later arrestment on the "loosed" property before it has been uplifted, the loosing becomes ineffectual and the cautioner is freed of his obligation to make the loosed property furthcoming, on notifying the later arrestment to the creditor whose arrestment had been loosed.[2]

By contrast, the effect of a recall is to extinguish an arrestment entirely.

(4) Loosing was originally granted only on caution whereas recall was always granted, on cause shown, without caution.[3]

2.249 The subsequent development of the law. By the mid-19th century, some (but not all) of these differences between loosing and recall had disappeared or become blurred.

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1 Graham Stewart, p 214; Lord Balmerino v Lord Lochinvar (1626) Mor 788.

2 Bell Commentaries, vol 2, p 67.

3 Graham Stewart, p 196, fn 1; p 197, fn 4; Bell, Principles (4th edn; 1829) s 2279.

(1) The Court of Session developed the practice, in bills for letters of loosing arrestments on the dependence, of recalling (ie extinguishing) the arrestments without caution,[1] as in the famous Paisley cotton-spinners' case,[2] where arrestments of wages were recalled, by signeted letters of loosing, without caution, as being nimious and oppressive.

(2) The Court of Session began to recall arrestments on the dependence by interlocutor, in petitions and incidental applications in depending actions, on caution or consignation.[3] This latter development was given added impetus by the Debtors (Scotland) Act 1838, ss. 20 and 21, which gave the Court of Session and the sheriff an express power to grant recall on caution, as well as without caution.

(3) In the reports of cases and in practice, the word "loosing" came often to be used as a synonym for a judicial recall.[4]

In the late 19th century, signeted letters of loosing arrestments fell into disuse, being superseded in practice by judicial recall or restriction in petitions and more especially incidental applications in depending actions.[5]

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[1] Graham Stewart, p 196, fn 1.

[2] Shanks v Thomson (1838) 16 S 1353; see also Jolly v Grahame (1830) 8 S 361.

[3] Graham Stewart p 208 ff.

[4] Graham Stewart, p 197, fn 4.

[5] Scots Style Book (1902), vol 1, p 408 ff; Maclaren, Bill Chamber Practice (1915) p 236.

2.250 Abolition of letters of loosing arrestment. Since letters of loosing arrestments, whether in security, on the dependence, in execution or to found jurisdiction, have long fallen into disuse being superseded by recall or restriction, we think that their abolition is long overdue. We propose that such letters should be abolished and that, as a consequential reform, the Arrestments Act 1617[1] (which empowers the clerk of court to receive caution when accepting a bill for letters of loosing arrestments) should be repealed.

2.251 Retention, abolition or clarification of judicial loosing of arrestments of subjects other than ships and their cargo. Though signeted letters of loosing should be abolished, it does not follow that loosing as a form of judicial relief or safeguard distinct from recall or restriction should be abolished. The legal effects of loosing are described at head (3) in para. 2.224 in relation to arrestments of subjects other than ships. (We deal with arrestments of ships below). Nearly all the text-books on sheriff court practice state that judicial loosing is competent in the sheriff court.[2] We have not however found any reported sheriff court cases of judicial loosing properly so called. There is a dearth of authority on whether judicial loosing, as distinct from loosing by signeted letters, of arrestments of subjects other than ships or their cargo is competent in the Court of Session and again we have found no reported Court of Session cases of judicial loosing properly so called of such arrestments.

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1 APS record edn 1617, c 17; 12 mo edn 1617, c 17.

2 McGlashan, Sheriff Court Practice (4th edn) p 368; Dove Wilson, Sheriff Court Practice (4th edn) p 213; Wallace Sheriff Court Practice p 209; Lewis, Sheriff Court Practice (8th edn) p 101; Macphail, p 360. Dobie Sheriff Court Practice appears not to deal with loosing.

2.252 It seems to us that there are three main legislative options. The first is to leave the law in its present state. This seems to us unsatisfactory since the law is uncertain at any rate as regards the powers of the Court of Session. We think that if loosing is to remain as a distinct mode of releasing arrested property to the defender or common debtor, it should be defined by statute.

2.253 The second is to abolish loosing. This would have the merit of simplicity but may possibly be seen as narrowing the powers of the court unnecessarily. A loosing is in effect a permission granted to the defender to uplift the arrested property after satisfying any condition as to caution or consignation, coupled with a recall of the arrestment taking postponed effect when the property is uplifted. There may be circumstances where the court may wish to grant such an order, although it is not easy to envisage what these circumstances would be.

2.254 The third option is to define judicial loosing by statute as having the same effect as letters of loosing, with the refinement that insolvency proceedings should have the same effect as a later arrestment in preventing the defender from uplifting the loosed property. Whether the statute defining that effect should do so expressly or by reference would be a matter of legislative drafting which need not be resolved here, but we think that express definition would be preferable. We have reached no concluded view as to whether abolition or statutory definition would be preferable and invite views.

2.255 If loosing is retained and defined by statute, it would follow that any reference in an interlocutor or any enactment to loosing would in future be construed as importing the statutory definition. We have traced only two modern statutes containing such a reference.[1]

2.256 Loosing by sheriff clerk in summary causes. Rule 48 of the Summary Cause Rules provides:

> "A party may have any arrestment on the dependence of an action loosed on paying into court, or finding caution to the satisfaction of the sheriff clerk in respect of, the whole sum claimed together with the sum of £10 for expenses and a certificate granted by the sheriff clerk of such payment into court or finding of caution shall operate as a warrant for the release of the sum or subjects arrested".

The same rule provides for judicial restriction or recall by the sheriff on application. It is arguable that this provision (which is a simplified version of a statutory provision of 1837[2]) should be revoked and that, if loosing is retained, it should only be effected by an interlocutor of the sheriff. We would be grateful for information on whether or how this provision operates in practice and for views as to its retention or revocation.

2.257 Judicial loosing of arrestments of ships and their cargo. There seems to be a largely uncommented-on distinction between the loosing of an arrestment of a ship (or its cargo, to which similar principles may for present purposes be taken as applying[3]) and the loosing of an arrestment of other types of moveable property.

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[1] See Criminal Justice (Scotland) Act 1987, s 11 (1)(i); Criminal Justice Act 1988, s 92 (4).

[2] Small Debt (Scotland) Act 1837, s 8 and Sch C (repealed).

[3] On the question whether an arrestment of cargo on board ship immobilises the ship until discharge of the cargo or merely prevents removal of the ship with the cargo on board from the jurisdiction, see paras 3.91 to 3.95 below. For simplicity, we assume here that the ship with her cargo on board is immobilised until discharge of the cargo.

2.258 First, whereas a loosing of an arrestment of subjects other than a ship implies the giving of a permission or licence to the defender or common debtor to receive the property from the arrestee, in the case of ships the arrestment is executed against the ship[1] and there is no arrestee distinct and separate from the defender.

2.259 Second as we discuss below[2] an arrestment of a ship, unlike an arrestment of other corporeal moveables, in the hands of third parties, fixes the ship in the place where the arrestment was laid. The permission implied in loosing is a permission to move the ship from that place.

2.260 Third, whereas the uplifting of arrested property other than a ship from the hands of a third party arrestee in pursuance of a loosing seems to have the same effect as a recall of the arrestment, it seems that the moving of a ship in pursuance of a loosing does not impliedly recall the arrestment, but merely makes it "possible to postpone completion of the diligence to a more convenient date. The arrester thus retains the security of the ship herself in the event of her safe return within the jurisdiction, and acquires also the personal security of the cautioner for her value in the event of her being lost at sea or sold abroad".[3]

2.261 In most reported cases relating to ships and their cargo, recall or restriction on caution or consignation is the common mode of "releasing" the ship from arrestment but at least one recent case shows that loosing may be a useful method of

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[1] See para 3.5, head (a).

[2] See para 3.5, head (b).

[3] McMillan p 74.

obtaining a just result. Thus, in Svenska Petroleum AB v. HOR Ltd[1], for example, which was an application by the owners and time charterers of a ship lying at Hound Point in the Forth for the recall of arrestments of part of the ship's cargo on the dependence, counsel for the applicants submitted that even if the arrestments were valid "they should be loosed because of the hardship which will ensue from their being maintained until the disposal of the actions"[2](emphasis added). In that case, the court gave permission for the vessel to sail to Southampton, for bunkering purposes, on the understanding that she would be returned to the Forth thereafter. As that case discloses, it is permissible to authorise the movement of the ship outside the jurisdiction.

2.262 We have no doubt that the court should retain its power of loosing the arrestment of a ship and its cargo. If loosing is defined for other subjects, it should presumably be defined for ships and cargo. A simple definition might be a permission to move the ship, or the cargo, or both, from the place where the ship or cargo is situated for such purposes and subject to such conditions, or further order, if any, as the court thinks fit. The place where it is situated may be the place where it has been arrested, or the harbour to which it has been brought under warrant.

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[1] 1982 SLT 343.

[2] Ibid, at p 344. In Stewart v Macbeth & Gray (1882) 10 R 382, the interlocutor recalled an arrestment of a ship on consignation "to the effect of allowing the said ship to proceed on her voyage to Trinidad", but this seems to be no different from a recall simpliciter on consignation rather than a loosing.

Proposals

2.263 We propose:

(1) Letters of loosing arrestments (whether in security, on the dependence, in rem or in execution) should be abolished and the Arrestments Act 1617 (clerk of court to receive caution when receiving bill for letters of loosing) should be repealed.

(2) Views are invited on whether the courts should have power, in an application for recall, restriction or loosing of arrestments on the dependence, of subjects other than a ship or its cargo to make an order loosing an arrestment which should have the effect, subject to such conditions as the court thinks fit including conditions as to caution or consignation, of authorising the defender to uplift the subjects and requiring the arrestee, at the defender's request, to make the subjects forthcoming to the defender at the defender's expense?

(3) If loosing is retained as mentioned above, it should be provided by statute that where an order is made loosing an arrestment:

(a) the arrestment should cease to have effect if and when the arrested subjects are uplifted in pursuance of the loosing;

(b) until such uplifting, the arrestment should retain its preference (if any) in any process of ranking; and

(c) the defender's right to uplift and the obligation of a cautioner to make the subjects forthcoming should cease to have effect if, before the subjects are uplifted,(i) they are attached by another arrestment or diligence, or (ii) insolvency proceedings (a sequestration; liquidation; or attachment of a floating charge) against the defender have supervened; or (iii) the defender has granted a trust deed for creditors.

(4) Whether or not judicial loosing of arrestments of subjects other than ships is retained, the court should possess, or continue to possess, power, in an application for recall, restriction or loosing, to loose an arrestment on the dependence or an arrestment in rem of a ship or its cargo. An order loosing an arrestment of that type should be defined by statute as an order authorising the applicant or his nominee to move the ship or the cargo or both from the place where it is situated for such purposes and subject to such conditions, and to such further order, if any, as the court thinks fit, including conditions as to caution or consignation.

(5) Should the power of the sheriff clerk to loose arrestments under rule 48 of the Summary Cause Rules be abolished?

(Proposition 23).

(13) Adjudication on the dependence and in security

2.264 Under the present law, it is not competent to adjudge heritable property on the dependence of a court action.[1] It seems to us that the availability of inhibitions on the dependence make it unnecessary and undesirable to introduce adjudications on the dependence.

2.265 Adjudication is competent in security of future or contingent debts where the debtor is verging on insolvency and the debt is uncertain in amount.[2] The form and procedure in the action is much the same as in an action of adjudication in execution of debts presently due.[3] There is, however, no legal period of redemption. The adjudication is only a security and can never be converted into a full right of ownership. So far as we can ascertain this form of diligence has long been in disuse. It seems unnecessary to retain it so long as inhibitions can be used to "secure" future or contingent debts.

2.266 We propose:

(1) **Adjudications on the dependence should not be introduced in Scots law.**

(2) **The diligence of adjudication in security of future or contingent debts should be abolished.**

(Proposition 24).

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1 Debtors (Scotland) Act 1987, s 101.

2 Graham Stewart, p 665.

3 Ibid p 666.

(14) Arrestments and inhibitions in security of future or contingent debts constituted by decree or liquid documents of debt

2.267 It is in theory still competent to obtain letters of arrestment and letters of inhibition in security of future and contingent debts where there is no depending action and the debt has been constituted by decree or other liquid document of debt.[1] Such cases are very rare in modern practice, and are likely to involve cases where a person has obtained a decree for aliment or periodical allowance on divorce, or nullity of marriage, or a bond for a future debt and the debtor under the decree or bond is verging on insolvency, contemplating abscondence, or putting away his funds.

2.268 We think that arrestment and inhibition in security should continue to be competent otherwise than on the dependence, but that the procedure of application by bill for letters passing the signet, which are granted by the fiat of a clerk of court on written averments, is no longer appropriate. We suggest that signeted letters of inhibition and arrestment in security of future or contingent debts should be abolished and replaced by a warrant for inhibition or arrestment granted on a petition to the Court of Session or summary application to the sheriff. The court's powers and the main elements of the procedure would be the same as in the proposed new procedure in applications for warrant for diligence on the dependence. Under the present law, arrestment or inhibition in security appears to be competent on a document of debt (such as a bond or bill) which is liquid but not registered for execution and extracted.[2] We suggest that it should be so registered and extracted before warrant may be applied for.

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1 Graham Stewart, pp 22 - 23; 535 - 537.

2 Idem.

2.269 We propose:

(1) Letters of inhibition and letters of arrestment should be abolished.

(2) The Court of Session on petition and the sheriff on summary application should have power to grant warrant for arrestment and inhibition in security of a future or contingent debt due under a decree or extract registered document of debt on the same grounds and subject to the same conditions as under our proposals the courts may grant warrant for arrestment and inhibition on the dependence for debts already due and, in terms of Proposition 7, future and contingent debts. The proposals on warrants for diligence,liability for wrongful diligence and related matters in Propositions 3 to 6 above should apply accordingly.

(Proposition 25).