Scottish Law Commission

DISCUSSION PAPER No. 87

STATUTORY FEES FOR ARRESTEES

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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 31 August 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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DILIGENCE

DISCUSSION PAPER NO. 87

STATUTORY FEES FOR ARRESTEES

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TABLE OF ABBREVIATIONS

Graham Stewart

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

Maclaren *Expenses*

J A Maclaren *Expenses in the Supreme and Sheriff Courts of Scotland* (Edinburgh 1912)

Macphail *Sheriff Court Practice*

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

Maher and Cusine

G Maher and D J Cusine *The Law and Practice of Diligence* (Edinburgh, 1990)

Wallace and McNeil

Wallace and McNeil's Banking Law (ed. D B Caskie) (9th edn.) (Edinburgh, 1986)

Wilson *Debt*

W A Wilson *The Law of Scotland Relating to Debt* (Edinburgh, 1982).

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

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]

Scope and arrangement of Discussion Paper

1.2 In this Discussion Paper, we seek views on provisional proposals to introduce a system of statutory fees for persons in whose hands arrestments have been laid (who are called "arrestees") to recompense them for the administrative and clerical expenses incurred by them in complying with the arrestment. The Paper is concerned with arrestments of property and funds other than arrestments of earnings since statutory provision is already made for the payment of fees to employers complying with earnings arrestments.[3]

1.3 Representations by Scottish Committee of Clearing Bankers. The Paper is in part a response to representations made to us in 1989 by the Scottish Committee of Clearing Bankers who gave us information on the large and increasing volume of arrestments served on member banks and the increased burden of work which this involves, especially in tracing whether any funds have been attached by an arrestment. For this work the arrestees

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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] Debtors (Scotland) Act 1987, s.71.

receive no recompense whatsoever. In the course of consultation we hope to obtain information on the scale of arrestments used in the hands of other types of arrestee, including for example such financial institutions as building societies and insurance companies.

1.4 In Part II we examine the existing law and its defects and outline the scale of use of arrestments used against banks so far as known to us.[1] We also describe the system in England and Wales where creditors obtaining Mareva injunctions freezing debts due to a defendant in the hands of a third party (equivalent to arrestment on the dependence) and garnishee orders attaching debts due to a judgment debtor in the hands of a third party (equivalent to arrestment in execution) are required to recompense to some extent the third party for expenses incurred in complying with the injunction or garnishee order.[2]

1.5 Statutory fees for deposit-taking institutions (Part III, Section A). In Part III we provisionally propose the introduction of a sliding scale of fees for arrestees broadly proportionate to the number of offices (head office and branch offices) which an arrestee is compelled to include in a search to trace arrested funds.[3] This system would apply to institutions which are deposit-taking institutions within the meaning of the Banking Act 1987.

1.6 Recovery by creditor from common debtor of expenses of abortive arrestment. One problem which we have identified in the course of our research is not confined to statutory fees for arrestees. That is the problem which arises when an arrestment attaches nothing (as is usual in the case of arrestments served on

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[1] Paras 2.1 to 2.32.

[2] Para 2.33 ff.

[3] See Part III, Section A, paras 3.2 to 3.68.

banks) and the creditor wishes to recover the expenses of the abortive arrestment from his debtor. The general view is that such expenses are not recoverable where the abortive arrestment was used to enforce an ordinary debt, but under recent statutes there are uncommented-on provisions which may be construed as allowing recovery from a defaulter of the expenses of an abortive arrestment served in pursuance of a summary warrant for the recovery of arrears of taxes, rates, community charges and associated civil penalties. We seek views on whether the expenses of abortive arrestments in respect of these fiscal debts should indeed be recoverable from the defaulter.[1]

1.7 Disclosure and confidentiality. One provisional proposal would apply to all arrestees (not merely deposit-taking institutions), namely our proposal that an arrestee may disclose to the arrester the existence and extent of any funds or property arrested in execution (as distinct from on the dependence) notwithstanding any duty of confidentiality owed by the arrestee to the common debtor.[2]

1.8 Reimbursement of expenses or statutory fees for arrestees other than deposit-taking institutions for complying with arrestments of non-maritime subjects (Part III, Section B). Our proposals for statutory fees for arrestees spring from the view that the law should not impose a pecuniary burden on an "innocent" third party (who is ex hypothesi not concerned with the litigation or debt) simply because his duties arise from the need to comply with an arrestment. This policy should in our view apply to arrestees other than deposit-taking institutions (eg garage

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[1] See paras 3.54 to 3.59.

[2] See paras 3.69 to 3.72; cf paras 2.6 and 2.7 for the background law.

proprietors or warehousemen) as well as to those institutions. We propose therefore that such arrestees should generally be entitled to a small, fixed rate statutory fee and, more importantly, entitled also to claim statutory recompense for any expenditure, in excess of the amount of that fee, actually incurred in complying with the arrestment.[1]

1.9 Reimbursement of expenses of third parties arising from arrestments of ships and of cargo on board ship (Part III, Section C). In the case of an arrestment of a ship or cargo on board ship, expense may be incurred by an innocent third party in discharging the cargo from the ship. If a ship is arrested for the owner's debt, the cargo-owner or charterer may discharge the cargo and the charterer may incur expense arising from the detention of the ship. If cargo is arrested for the cargo-owner's debt, the ship-owner or charterer may discharge the cargo. In these cases, we think that the third party should be entitled to claim his expenses from the arrester broadly on the same principle as an arrestee could claim under the proposals already mentioned.[2]

Extra-territorial effect of arrestments and double jeopardy of arrestee

1.10 Under the Scottish rules of private international law, an arrestment of a debt is treated as valid and effectual to attach inter alia debts "located" outside Scotland (eg credit balances in accounts kept in the English branch of a Scottish bank). It is doubtful if this extra-territorial effect would win international recognition given that the location of the debt is outside Scotland. This question will be considered in a separate Discussion Paper

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[1] See Part III, Section B, paras 3.73 to 3.82.

[2] See Part III, Section C, paras 3.83 to 3.101.

where we consider proposals which inter alia would limit the territorial effect of arrestments of debts, including funds in bank accounts, to debts "located" in Scotland. One effect of this proposal would be to relieve arrestees of the need to search their branch networks outside Scotland in pursuance of an arrestment, and thereby reduce the amount of the scale fee in the case of arrestees with large branch networks outside Scotland.[1] It would also protect such arrestees from the risk of double jeopardy (ie. of having to pay the debt twice over) in a case where (1) the English or foreign court refused to recognise the extra-territorial effect of arrestments and enforced payment of the debt, or damages for non-payment, in an action at the instance of the common debtor[2] against the arrestee and (2) the Scottish courts granted decree of furthcoming ordaining the arrestee to pay the debt to the arrester.

Consultation and final report

1.11 Although this Discussion Paper is one of a series forming the second phase of the reform of the law of diligence,[3] we think that the topics with which it deals are severable from the subject matter of the other Discussion Papers in the series, except the forthcoming Discussion Paper on the extra-territorial effect of arrestments mentioned in para. 1.10 above. We have therefore decided to prepare a report on statutory fees for arrestees which,

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1 See para 3.42, Table C, and para 3.44, Table D.

2 The "common debtor" is the technical legal name given to the arrester's debtor. The name originated from processes of ranking of competing arrestments on property of a debtor, whose position as debtor was thus common to all the arrestments. The name has long been used outside processes of ranking as a convenient label to distinguish the arrester's debtor from the arrestee, who is the debtor of the arrester's debtor.

3 Discussion Papers already issued in this series include Discussion Paper No 78 on Adjudication for Debt and Related Matters (1988); Discussion Paper No 79 on Equalisation of Diligences (1988); and Discussion Paper No 84 on Diligence on the Dependence and Admiralty Arrestments (1989). Further Discussion Papers in preparation include a Discussion Paper on Inhibitions to be issued in due course.

we hope, would be associated with or incorporate a report on the extra-territorial effect of arrestments but which would be submitted in advance of the main report on the other topics in the series. We invite comments on this Discussion Paper by 31 August 1990.

PART II
THE EXISTING LAW AND ITS DEFECTS

(1) Preliminary: the background law on arrestments

2.1 The main features of arrestments. An arrestment is "the diligence appropriate to attach obligations to account to the debtor by a third party and corporeal moveables belonging to the debtor which are in the hands of a third party".[1] The creditor using the arrestment is called "the arrester", the third party in whose hands the schedule of arrestment is laid is known as "the arrestee", and the arrester's debtor whose funds or other moveables are attached is called "the common debtor". An arrestment is the first, inchoate step in the diligence of arrestment and action of furthcoming. The arrestment imposes a nexus on moveable property (other than pecuniary debts) attached, interpels the arrestee from paying the arrested funds, or delivering the arrested moveables, to the common debtor and creates a preference for the arrester in competition with other diligences and rights. An arrestment may be used on the dependence of an action for payment of a principal sum, or in execution of a decree for payment of a principal sum or judicial expenses, or in execution of an extract document of debt registered in the Books of Council and Session or sheriff court books, or a document of debt enforceable as if so registered, or in pursuance of a summary warrant for the recovery of arrears of rates, taxes or community charge. In order to complete the diligence, the arrester must raise an action of furthcoming calling the arrestee and common debtor as defenders.[2] In an action of furthcoming, the arrester obtains a decree requiring the arrestee to pay to the arrester the sum arrested so far as necessary to satisfy the arrested debt, or as the case may be, for sale of so much of the moveable property belonging to the common debtor, which were in the arrestee's

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[1] Wilson Debt p 216; see generally Maher and Cusine, Chapter 5.

[2] Graham Stewart, p 225 ff; Maher and Cusine, para 5.45 ff.

hands at the time of the execution of the arrestment, as are necessary to satisfy the arrester's debt.

2.2 The diligence of arrestment and furthcoming does not apply to the attachment of earnings or pensions which are now attachable by new statutory forms of diligence (called earnings arrestments, current maintenance arrestments, and conjoined arrestment orders).[1] We are not concerned in this Discussion Paper with diligence against earnings and pensions which make new statutory provision for recompense for arrestees operating such arrestments.[2]

2.3 Arrestment of ships and their cargo. There is a special kind of arrestment applicable to ships and their cargo, which have distinctive characteristics, one of which is that the arrestment may be used against the ship or cargo while it is in the hands of the defender or debtor.[3] In the case of ships, the arrestment is executed against the ship herself by affixing the arrestment schedule to the mast or other prominent part of the ship.[4] There is thus strictly speaking no arrestee.[5] In the case of cargo on board ship, a copy of the arrestment is served on the ship master or other person in charge of the cargo.[6]

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[1] Debtors (Scotland) Act 1987, Part III (ss 46 to 73).

[2] Ibid, s 71.

[3] Bankton Institute IV, 41, 9; Graham Stewart, p 105. The law and practice of arrestments of ships and cargo are discussed in our Discussion Paper No 84 on Diligence on the Dependence and Admiralty Arrestments (1989), Part III.

[4] Graham Stewart, p 41; RC 140(a).

[5] Barclay, Curle & Co Ltd v Sir James Laing & Sons Ltd 1908 SC 82 at p 89 per Lord McLaren.

[6] RC 140(b); Svenska Petroleum AB v HOR Ltd 1986 SLT 513.

2.4 Extent of property attached by arrestment. An arrestment is executed by the service of a schedule of arrestment on the arrestee, the form of which is regulated by the common law and not prescribed by act of sederunt. Normally the schedule of arrestment is in general terms attaching the principal sum (or the expenses) due by the arrestee to the common debtor and "all goods, gear, debts, sums of money or any other effects whatsoever", lying in the arrestee's hands belonging to the debtor or defender. If the principal sum (or expenses) specified in the schedule of arrestment is followed by the words "more or less", the sum attached thereby is not limited to the specified sum.[1] This "more or less" formula is generally used in arrestments proceeding on Court of Session and sheriff court ordinary cause arrestments, though for historical reasons arrestments proceeding on sheriff court summary cause warrants often arrest a maximum sum, omitting the words "more or less". In our Discussion Paper No 84, we advance proposals that there should be a limit to the amount of funds attached by an arrestment defined by reference to the principal sum plus further sums to cover interest and expenses.[2]

2.5 There is in general no requirement that the schedule of arrestment should specify particular funds or property arrested.[3] Where the arrestee is a large institution with a network of branches, such as a clearing bank or a building society, the arrestment will normally attach all funds and moveable goods in the possession of the arrestee held at the head office and all the branches of the institution. There is no requirement that the

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[1] Ritchie v McLachlan (1870) 8 M 815.

[2] Discussion Paper No 84 on Diligence on the Dependence and Admiralty Arrestments (1989) Proposition 13 (para 2.163).

[3] Even in the case of arrestments of ships on the dependence of an Admiralty action in personam, the warrant for arrestment need not specify a particular ship.

schedule of arrestment must specify the particular branches of the arrestee's business and undertaking at which funds or moveable property of the defender or debtor are situated. The arrester will often not know, and have no means of knowing, whether the arrestee holds funds or goods belonging to the debtor, or at what branch of the arrestee's business any such funds or goods are held.

2.6 Disclosure by arrestee to arrester of existence of funds and property arrested. There is text-book authority that an arrestee is not under any legal duty to disclose to the arrester that he (the arrestee) does not hold any funds or goods belonging to the debtor.[1] This is supported by sheriff court authority to the effect that an arrestee's refusal to disclose the failure of an arrestment in execution to attach funds or property will not render the arrestee liable for expenses in a subsequent action of furthcoming.[2]

2.7 Where the arrestee (such as a bank)[3] owes the common debtor a duty to maintain confidentiality concerning the existence or extent of funds or property held by the arrestee on the debtor's behalf, it may be that in certain circumstances the arrestee cannot disclose to the arrester whether an arrestment has attached anything, without breaching that duty of confidentiality. It is understood that in practice the Scottish banks will not disclose whether anything has been attached by an arrestment on

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[1] Graham Stewart, p 229.

[2] Veitch v Finlay and Wilson (1893) 10 Sh Ct Rep 13. In this case (in which the arrestee was a firm of solicitors) the sheriff observed (at p 14): "In many cases it may be very reasonable for the arrestee to inform the arrester before the action of furthcoming has been raised that he has no funds belonging to the common debtor,...". But questions of confidentiality were not in issue or at least were not canvassed in the judgment.

[3] Tournier v National Provincial and Union Bank of England [1924] 1 KB 461.

the dependence,[1] but will disclose what sum has been attached by an arrestment in execution, or its equivalent an arrestment on the dependence which has been converted by decree for payment into an arrestment in execution.[2] A creditor holding an arrestment in execution can enforce payment by the arrestee by an action of furthcoming whereas a creditor arresting on the dependence does not, or not yet, have that right. According to a standard text-book on banking law in Scotland:[3]

> "It is the duty of a bank if it has any funds in its hands belonging or owing to the common debtor to disclose the amount of these to the arrester to enable a proper action of furthcoming to be raised. It should be noted that the bank's duty of confidentiality prevents it from disclosing details of its customer's affairs where the arrestment is on the dependence of an action since the customer's liability to the arrester has not been judicially determined."

No authority is cited for these propositions. The proposition that a bank complying with an arrestment in execution has a legal duty to disclose the amount of funds arrested is not reconcilable with the authority in the previous paragraph that an arrestee has no legal duty to disclose that nothing has been arrested. Moreover, one of the objects of an action of furthcoming is to ascertain the extent of the debt due by the arrestee to the common debtor or the goods in the arrestee's hands.[4] It is difficult therefore to base the alleged duty of a bank arrestee to disclose funds arrested in execution on the motive of enabling a proper action of furthcoming to be raised by the arrester. In the leading Tournier

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1 Wilson Debt p 160.

2 Ibid p 225.

3 Wallace and McNeil, p 209.

4 Graham Stewart, p 226. This is accepted by Wallace and McNeil, loc cit.

case[1] establishing a bank's duty of secrecy or confidentiality with respect to its customers' accounts, certain exceptions to the scope of the duty were recognised. In a passage regarded as the classic exposition of the exceptions, Bankes L J said[2] :

> "On principle I think that the qualifications can be classified under four heads: (a) Where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer".

The example given of the first category was the duty to obey an order under the Banker's Books Evidence Act 1879.[3] An analogy would be the duty of a bank arrestee to disclose the amount arrested in an action of furthcoming. Such a duty is implicit in the very objects of an action of furthcoming which include the ascertainment of the amount arrested.[4] Where an arrestment in execution is used, compulsion of disclosure by law has not yet been imposed, but it may be regarded as imminent since disclosure may be compelled in an action of furthcoming, and it may be that such imminence would suffice to bring the disclosure within the exception of compulsion by law. The matter is not, however, free from doubt. Probably the only other category of exceptions from the duty of confidentiality which might conceivably be relied on is

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[1] Tournier v National Provincial and Union Bank of England [1924] 1 KB 461. For other cases (not concerning bankers) holding that the duty of confidentiality is subject to the overriding duty to the court in the public interest, see eg Parry-Jones v Law Society [1968] 1 All E R 177; W v Egdell [1989] 2 WLR 689.

[2] Ibid at p 473.

[3] Idem. Many other examples are collated in the Report of the Review Committee on Banking Services: Law and Practice (1989) Cm 622, (chairman, Professor R B Jack CBE) para 5.07 and Appendix Q.

[4] Graham Stewart, p 226, cited above.

the third, viz where disclosure is in the interests of the bank. The example of the third class given by Bankes L J in the Tournier case[1] is where a bank issues a writ [or in Scotland raises a summons or initial writ] claiming payment of an overdraft stating on the face of the writ [or summons] the amount of the overdraft. There is, however, a dearth of other authority explaining the scope of this exception. It is true that a bank holding arrested funds has an interest in avoiding being sued in an action of furthcoming. It is also true that Tournier, being an English case, would scarcely be likely to deal with the special considerations applicable to the distinctive case of Scottish arrestments. Nevertheless it is not clear that the arrestee's interest is sufficiently substantial under the present law to entitle a bank to disclose to an arrester an amount arrested in execution. We revert to this matter at para. 3.69 below.

2.8 Procedure in service of arrestments on third party arrestees. The law on the execution of arrestments regulates inter alia four different questions.

(1) What should be the mode of service of the schedule of arrestment? There are four different modes, namely (a) personal; (b) at the dwelling-place or place of business; (c) edictal[2]; and (d) postal.[3]

(2) On whom should service be made? This arises where the arrestee is an individual but service on him cannot be

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[1] [1924] 1 KB 461 at p 473.

[2] Edictal service is only competent in the case of Court of Session arrestments.

[3] Postal service is only competent in the case of sheriff court summary cause arrestments: see Appendix A, para. 3.

effected personally or where the arrestee is a corporate body or unincorporated association.

(3) Where should service be effected? This arises where service is not effected personally and the arrestee has several places of business such as a head office and branch offices (or if an individual, two or more dwellings) to which the officer may go to effect service by hand, or to which he may send the schedule of arrestment by post in cases where postal service is competent.

(4) Who should be named and designated in the schedule of arrestment as the proper arrestee? In arrestments against funds held by banks as arrestees, practice varies in specifying the bank's head office or branch as the proper arrestee.

The mode of service of an arrestment is regulated by different enactments depending on the type of procedure in which the warrant for arrestment was granted. A summary of the existing law is set out at Appendix A.

2.9 Arrestments in hands of bodies corporate. In Campell v. Watson's Tr.[1] it was held that an arrestment in the hands of a municipal corporation could be competently effected by delivering the arrestment schedule to a servant of the corporation within the city chambers. The ground of the decision was slightly ambiguous insofar as it could be construed as requiring service by delivery to an employee of the arrestee at the arrestee's principal place of business, or domicile of citation.

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[1] (1898) 25 R 690. Graham Stewart pp 32-33 criticises the decision as allowing service on any employeee, eg an ordinary employee of the corporation in the cleansing or lighting department.

In two sheriff court cases,[1] however, involving arrestment against a railway company arrestee, it was held that an arrestment by handing the schedule to an employee of the company within one of its branch places of business was effectual. It is now well established by Court of Session decisions that an arrestment served on a corporate body as arrestee is valid and effectual if served at a place of business of the arrestee within Scotland, even though it is only a branch place of business. This rule was laid down in cases with a foreign element in which it was held that arrestments at a branch place of business of an arrestee bearing to attach all debts and moveable property due by the arrestee to the defender or common debtor were effectual to attach all such debts and moveable property, even if located outside Scotland.[2] In the face of that authority, it can scarcely be argued that such an arrestment is not effectual to attach funds and property located at other places of business within Scotland. In cases governed by the sheriff court rules, service of a postal copy to the arrestee's "principal place of business" under OCR, rule 111, is necessary to complete an effectual service effected at a corporate body's branch place of business, but that extra requirement does not apply to arrestments under Court of Session warrants or extract registered documents of debt which are still governed by the old Citation Acts. Postal service of a copy of the schedule of arrestment under a Court of Session warrant on the arrestee's principal office or registered office outside Scotland is of no avail if the schedule of arrestment itself is not duly served on a branch

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[1] Robertson v N B Railway Co (1893) 9 Sh Ct Rep 72; Macintyre v Caledonian Railway Co (1909) 25 Sh Ct Rep 329.

[2] See eg McNairn v McNairn 1959 SLT (Notes) 35 (an arrestment in the hands of the Glasgow branch of the Abbey National Building Society held effectual to attach money in the defender's deposit account operated at the Head Office in London for a defender resident in Harrogate); O'Brien v A Davies & Son Ltd 1961 SLT 85. (the parties were agreed that the test whether an arrestment was valid was whether the arrestee was carrying on business, and had a place of business, at the premises where the arrestment was served; the arrestee was an English company whose registered office was in England).

place of business within Scotland.[1] Provision is made by the Companies Act 1985[2] for service on a company at its registered office, and by the Local Government (Scotland) Act 1973[3] for service of legal proceedings and statutory notices on a local authority or its proper officer at the offices of the local authority. These are permissive rather than mandatory.

2.10 Banks. In the case of bank accounts, (or more strictly debts due by banks), some doubts appear to have arisen as to the strict law and the proper practice in serving arrestments. Graham Stewart observed that in the case of banking companies registered under the Companies Acts (eg. now the Royal Bank of Scotland plc, the Clydesdale Bank plc and the Trustee Savings Bank, Scotland, plc):

> "service should be made at the registered office not at a branch. Where the money which it is desired to attach is lying at a branch office, notice should also be sent to its branch to prevent its being paid away in ignorance of the arrestment; and this notice may well be made by serving another schedule of arrestment there".[4]

Wallace and McNeil state in effect that service of an arrestment at the "Head Office" of the bank is an alternative to service on the registered office (which may not be the same as the Head Office). Thus they remark:

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[1] O'Brien v A Davies and Son Ltd 1961 SLT 85 following Laidlaw v Provident Plate Glass Insurance Co Ltd (1890) 17 R 544.

[2] S 287: "A company shall at all times have a registered office to which all comunications and notices may be addressed". S 725(1): "A document may be served on a company by leaving it at, or sending it by post to, the company's registered office".

[3] S 190.

[4] Graham Stewart, p 22.

> "Service of an arrestment on a bank should be made at its registered office or the schedule of arrestment should be delivered to an official at its Head Office. In all cases notice by way of another schedule should be served on the branch where the account of the common debtor is kept to prevent money being paid away in ignorance of the arrestment".[1]

Most recently, Maher and Cusine state:

> " the exact position of service on a bank is not clear, at least as a matter of strict law. Service on a particular branch of the bank certainly operates to attach the account of the defender held there but may not be effective as regard accounts held at other branches. Practice is to serve the schedule at the head office and on branches where the defender is thought to have an account but probably service on the head office alone is sufficient to attach all accounts at the bank in Scotland as the bank will circulate details of the arrestment to all its branches".[2]

In our view, however, banking corporations are in the same position as other corporations. The proper procedure to be followed in the execution of an arrestment under a sheriff court ordinary cause warrant is governed by the Ordinary Cause Rules, rules 10(1) and 111 (quoted in full at Appendix A, para. 1), and the provisions of these rules apply to banking corporations as they apply to other types of corporation. Under rule 10(1), an arrestment on a corporation may be executed by leaving the schedule of arrestment in the hands of an employee of the corporation at a place of business of the corporation. This place of business may be the registered office, or the "head office" (which is not a clearly defined technical term), or the "principal

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[1] Wallace and McNeil, p 209. No authority is cited. MacPhail Sheriff Court Practice p 209 is to a like effect.

[2] Maher and Cusine, para 4.24. No authority is cited.

place of business" (to use the terminology of OCR, rule 111), or a branch place of business. Where the arrestment schedule is not executed by service at the arrestee's principal place of business within the meaning of OCR, rule 111, then under that rule, a postal copy must be sent to the arrestee's principal place of business. Because of some drafting defects to which we refer in Appendix A, paras. 2 to 4 below, there may be some doubt about the position in relation to sheriff court summary cause arrestments, but we understand that the competent authorities are considering the removal of these defects. For present purposes, we take it that in future the rules will be the same as for ordinary cause arrestments. In the case of other arrestments (eg. Court of Session warrants and warrants in extract registered writs), the old Citation Acts and common law authorities apply to the mode of executing arrestments.[1] In these cases, it is our view that execution of the arrestment at any place of business of an arrestee will suffice, whether or not the corporation is a bank[2], since there is no enactment or rule of law which makes different provision for banking corporations. No postal copy need be served at the corporation-arrestee's principal place of business since neither the Citation Acts nor any rule of law require such service. If these requirements are satisfied, we think that a 'global' arrestment, ie one bearing to attach all debts and moveable property due by an arrestee bank to the defender or common debtor, served at a local branch office will attach all those debts and moveable property at whatever place of business (head office, principal place of business, or other local branches or places of business) the debts and property are located. We can find no authority for the view that a global arrestment served at a local branch attaches only funds and property at that branch. An arrestment is either effectual to arrest what it bears to arrest

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[1] See Graham Stewart, p 28 ff.

[2] See the authorities cited in para 2.9.

or not effectual. While for some legal purposes, a branch of a bank is treated as separate from its head or principal office, (eg. private international law rules regarding the proper law of a banking contract or the situs of a debt[1]), there is no warrant in the sources for applying that principle or rule to the scope of arrestments served at local branches.

2.11 As regards the practice of officers of court in executing arrestments on the clearing banks, we understand that there is no invariable practice that the arrestment is served on the head or principal office with another copy to the local branch. Very frequently, the officer of court will (a) serve the schedule of arrestment at a local branch of the bank, often either the branch where the defender or common debtor is known to have an account or, more frequently, the nearest branch to the officer's own office (to avoid greater mileage charges than necessary) and (b) serve a postal copy on the head or principal office of the bank (even sometimes in Court of Session arrestments where a postal copy is not stricly required by law). In the case of the National Girobank, which is operated by Girobank plc, a wholly owned subsidiary of the Post Office, accounts are held at a central office outside Scotland, and deposits are made either at a post office or by post to the Girobank Centre[2] so that the National Girobank as such does not have its own branches at which customers' accounts are held. It appears that National Girobank accounts will be treated as arrested when the arrestment is served

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[1] See eg Regina v. Grossman (1981) 73 Cr App R 302 at p 308 per Lord Denning M R; Power Curber v National Bank, Kuwait [1981] 1 WLR 1233 (CA) at p 1241 per Lord Denning M R; Libyan Arab Bank v Bankers Trust Co [1989] QB 728 at p 748 per Staughton J.

[2] Wallace and McNeil, pp 4-5.

at its office in Edinburgh.[1] It is now competent to arrest money payable by the Crown to any person on account of a deposit in the National Savings Bank (formerly the Post Office Savings Bank).[2]

2.12 Effect of arrestment and liability of arrestee for breach of arrestment. So far as relevant, the main effect of an arrestment is to prohibit the arrestee from voluntarily parting with the arrested funds or goods to the prejudice of the arrester,[3] as by paying the arrested sum or delivering the arrested goods to the common debtor or indeed anyone else.[4] In the special case of an arrestment of ships, it immobilises the ship at the anchorage where the arrestment was executed.[5] If the arrestee does voluntarily part with the arrested funds or goods, he will be liable in an action, at the instance of the arrester, of damages for breach of the arrestment.[6] The measure of damages is the amount of the actual loss sustained by the arrester as a result of the breach, being all that the creditor could have recovered by an action of furthcoming and all that he has lost by the arrestee's

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[1] Wallace and McNeil, p 5; Macphail, Sheriff Court Practice p 356: the office is Girobank plc, 93 George Street, Edinburgh EH2 3JL.

[2] Crown Proceedings Act 1947, s 46 as amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 49.

[3] Graham Stewart, p 125.

[4] High Flex (Scotland) Ltd v Kentallen Mechanical Services Co 1977 SLT (Sh Ct) 91.

[5] Alexander Ward & Company Ltd v Samyang Navigation Co Ltd. 1975 SC (HL) 26 at p 54.

[6] Walker Delict (2nd edn) p 502; Graham Stewart, p 220.

wrong,[1] plus interest thereon. The damages will therefore generally be the amount of the debt due by the arrestee to the common debtor which has been wrongfully paid away, or the value of the goods wrongfully delivered, so far as not exceeding the amount of the principal sum and expenses due by the common debtor to the arrester.[2] The old rule that the arrestee was liable for the whole debt due by the common debtor to the arrester was by the early nineteenth century no longer followed.[3] There is, however, an old case decided in 1760,[4] which might be relied on for the proposition that where the arrestee has parted with moveable goods whose value cannot be ascertained, the arrestee is liable for the whole debt due by the common debtor to the arrester. In the light of the modern principle that damages for delict are purely compensatory, it is not clear that this case is still authoritative so far it purports to sanction penal damages.

2.13 If the arrestee or a person for whom he is responsible parts with the arrested funds or goods, in good faith and in justifiable ignorance of the arrestment, the arrestee will not be liable for breach of the arrestment.[5] Ignorance alone will not suffice: it must be justifiable. Thus in Laidlaw v. Smith, Lord

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[1] McEwen v Blair and Morrison (1822) 1 S 313; Baron Hume's Lectures vol VI p 113; see also Grant v Hill (1792) Mor 786, explained in Lord Ivory's Note to Erskine Institute III, 6, 14; Graham Stewart p 221.

[2] Idem.

[3] Idem.

[4] MacArthur v Bruce (1760) Mor 803; cited Lord Ivory's Note to Erskine Institute III, 6, 14; Graham Stewart, p 221; Walker Delict (2nd edn) p 502.

[5] Laidlaw v Smith (1841) 2 Robinson App Cas 490, affg (1838) 16 S 367; applying Scott v Fluyder (1770) Mor "Arrestment" App'x No 1; Hailes 348.

Moncreiff (Ordinary) observed[1]: "that the mere fact of the [arrestee] having no personal notice or knowledge of the arrestment will not liberate him from the civil consequences of paying in the face of it, if, before he paid, he was in such circumstances that he ought to have known of it, and so must be presumed to have known it. Any other rule would certainly give occasion to pretences for evacuating the diligence of creditors". It follows that where an arrestment is served on a large institution or business with many branches, offices or departments, reasonably prompt and effective steps must be taken by the institution or business to give notice of the arrestment to all persons within the business who might pay or deliver the arrested funds or goods in ignorance of the arrestment. We have not traced direct authority on the standard of care which, however, on ordinary principles of negligence will require the arrestee to do what is reasonable in the circumstances of the particular case. The steps taken by the four Scottish clearing banks to comply with these rules of the common law are referred to below. They include for example the sending of a circular to their entire branch networks on a daily basis advising them of arrestments. So far as we are aware, no complaints are made by arresters or arrestees that the rules regulating the liability of arrestees for breach of arrestment are in themselves unfair to either party. The only defect, or possible defect, we have identified is the old rule that where the arrestee has parted in breach of arrestment with moveable goods whose value cannot be ascertained, the

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[1] Supra (1838) 16 S 367 at p 369 (emphasis in original); also reported (1841) 2 Robinson App Cas 490 at p 494. See also (1838) 16 S 367 at p 373 per Lord Medwyn: "But I have always understood that what was sufficient to make a party liable who had paid after arrestment used in his hands, was either actual knowledge of the arrestment, or his being bound to have had such knowledge" (emphasis added).

arrestee is liable for the whole debt due by the defender or common debtor to the creditor.

2.14 There is authority that breach of an arrestment is also technically a contempt of court,[1] but the penalites for contempt are very rarely invoked, since the pursuer or creditor can rely on his civil action of damages for breach of arrestment, and since failure to comply with an arrestment is normally inadvertent or negligent rather than wilful. The penalties for contempt are perhaps more likely to be invoked in cases involving the wilful removal of a ship in breach of an arrestment rather than in cases involving third party arrestees who generally have no interest to breach an arrestment wilfully.

2.15 Recompense for arrestees for complying with an arrestment? There can be little doubt that under the existing law, an arrestee is not entitled to claim from the arrester, or the common debtor, recompense for the work which he has done, or reimbursement for the outlays and expenses which he has incurred, in complying with the arrestment. We have not traced any authority directly stating that an arrestee has no such entitlement but the absence of authority must, we think, be attributable to the fact that the absence of any such entitlement has long been regarded as trite law. The authorities on arrestment and furthcoming strongly suggest that no such entitlement exists. Thus in actions of furthcoming, the arrester-pursuer concludes for

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[1] Graham Stewart, pp 222-223; cf Inglis and Bow v Smith and Aikman (1867) 5 M 320. See Meron v Umland (1896) 3 SLT 286 (defender-arrestee removing ship in breach of arrestment prevented by court from defending action except on finding caution or consignation to the extent of the sum secured by the arrestment.

payment to him of the arrested sum, but no mention is made in the conclusion of any deduction for the expenses incurred by the arrestee in complying with the arrestment.[1] Where the action of furthcoming concludes for a warrant to sell corporeal moveables and payment to the arrester-creditor of the proceeds of sale under deduction of the expenses of sale, no mention is made of deduction of the arrestee's expenses in complying with the arrestment.[2] There is no hint of a rule that an arrestee may claim fees or outlays in authoritative statements of the law on the expenses of arrestment[3] or on the defences open to an arrestee in an action of furthcoming.[4] Furthermore, in reported cases on applications by third party arrestees for the recall or loosing of arrestments of corporeal moveables[5] we have not traced any reference to the possibility that the hardship to the arrestee would be mitigated by any right to recover recompense for work done, or reimbursement of expenses incurred, in complying with the arrestment. Such a consideration would seem to be very relevant to the exercise of the power to loose or recall, yet the assumption seems to have been that the arrestee's services rendered in complying with the arrestment are gratuitous in a question with the arrester. It should be noted however that while it was the perceived absence of any right on the part of employers to recover from an arrester recompense for operating arrestments which led Parliament to introduce a statutory fee for

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

2 Encyclopaedia of Legal Styles, vol 1, p 329; RC, Appendix, Form 2(8).

3 Maclaren Expenses in the Supreme and Sheriff Courts (1916) pp 116-117 (expenses of using arrestment), p 111 (expenses of furthcoming).

4 Graham Stewart, pp 233-234.

5 eg Svenska Petroleum AB v HOR Ltd 1982 SLT 343. (arrestment of cargo on board ship on dependence of ordinary action against owners of cargo: application by arrestees - the owners or time charterers of the ship - for recall or loosing).

operating arrestments against earnings,[1] that factor is irrelevant to the present question for two reasons. First there is legislation which prevents employers from making deductions from wages,[2] and that legislation does not apply to other arrestees. Second, the assumptions made by Parliament in enacting legislation are not conclusive in interpreting the common law.

2.16 Since the law on arrestments and actions of furthcoming does not concede to an arrestee the right to claim recompense for services rendered, the question arises whether there is any other common law doctrine or principle on which an arrestee could rely. Such a doctrine or principle, if it exists, would only be found in the law of quasi-contractual obligations. Since the doctrine of negotiorum gestio clearly does not apply[3], the only other possibility seems to be a claim in recompense for the redress of unjustified enrichment. In recent formulations of the law on recompense, the courts have said that the main elements of a claim in recompense are (1) that the pursuer must have suffered loss; (2) without intention of donation; and (3) not with a view to benefit himself; (4) that the defender must have been enriched; (5) that recompense must be just and equitable in all the circumstances; and (6) that there must be special circumstances justifying an action of recompense if there was, or

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1 Debtors (Scotland) Act 1987, s 71.

2 Wages Act 1986, s 1 (general restrictions on deductions made, or payments received, by employers) replacing the Truck Acts and other legislation. Section 1(1)(a) of the 1986 Act allows deductions from wages authorised by statutes and the Debtors (Scotland) Act 1987, s 71 was therefore necessary in order to bring the employer-arrestee's fees within the exception enacted by s 1(1)(a).

3 That doctrine only applies where the person for whom the services are rendered inter alia (1) has not authorised the services and (2) is either unaware of the rendering of the services or legally incapable of managing his own affairs. The first of these requirements never applies to an arrester, and the second must rarely apply, if ever.

had been, an alternative remedy open to the pursuers.[1] There is authority by obiter dicta that the pursuer must have acted under an error of fact,[2] (a purported rule which would exclude an arrestee's claim for recompense for his services and outlays) but there is good counter-vailing authority, not all of which is obiter,

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[1] Varney (Scotland) Ltd v Lanark Town Council 1974 SC 245; Lawrence Building Co Ltd v Lanark County Council 1978 SC 30; Trade Development Bank v Warriner and Mason 1980 SC 74; Cliffplant Ltd v Kinnaird 1981 SC 9 at p 28; City of Glasgow District Council v Morrison McChlery and Co 1985 SC 52.

[2] See eg Rankin v Wither (1886) 13 R 903 at p 908 per Lord Young; Soues v Mill (1903) 11 SLT 98 at p 100 per Lord Kyllachy; Newton v Newton 1925 SC 715 at p 723 per Lord Anderson; and Gray v Johnston 1928 SC 65 at p 664 per Lord Murray.

that this alleged element is not required.[1] Some of these authorities relate to (1) cases where a defender without the requisite authority took or used a thing belonging to the pursuer, or received a thing belonging to the pursuer from a third party, rather than (2) cases where the pursuer conferred a benefit ot transferred a thing to the defender. Although the distinction has not yet been clearly made in the cases, in principle error on the pursuer's part should be relevant only to the second category of cases. This matter cannot be explored here. Suffice it to say that it is in our view unlikely that the absence of error would operate as a bar to the arrestee's claim. Nevertheless, it does not follow that such a claim would be successful.

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[1] Gray v Johnston 1928 SC 659 at p 681 per Lord Justice-Clerk Alness (obiter); Varney (Scotland) Ltd v Lanark Town Council 1974 SC 245 at pp 252; 256; 260 (all obiter); Lawrence Building Co Ltd v Lanark County Council 1978 SC 30 at p 42 and pp 53, 54 (both obiter). Recompense has been allowed in a wide variety of different types of situations without proof of the pursuer's error, eg in cases involving unauthorised interference with the pursuer's property as by using his moveable property without permission for gratuitous use (eg Mellor v William Beardmore & Co 1927 SC 597) or by occupation of his heritable property without such permission (eg Shetland Islands Council v B P Petroleum Development Co Ltd 1989 SCLR 48 at pp 62-63); or by unauthorised sale of his moveable property (eg Northwest Securities Ltd v Barrhead Coachworks Ltd 1976 SC 68, 1975 SLT (Sh Ct) 34); also in cases of recompense for discharge of a debt due by the pursuer to a third party (eg Duncan v Motherwell Bridge and Engineering Co Ltd 1952 SC 131) or recompense for aliment paid or provided (eg Horne v Horne's Executors 1963 SLT (Sh Ct) 37); or recompense for benefits given to a pupil or minor whose transactions are invalid by reason of limited capacity (eg Stair Institutions I, 8, 6; Paterson v Greig (1862) 24 D 1370); or recompense for benefits given under a contract with a negotiorum gestor acting for the defender (Fernie v Robertson (1871) 9 M 437; Dunbar v Wilson and Dunlop's Tr (1887) 15 R 210).

2.17. It has been repeatedly affirmed by the courts that the remedy of recompense is equitable and that it is not possible "to frame a definition of recompense which shall by itself in all its terms at once include all classes of case which fall within the doctrine and at the same time successfully exclude those which do not...The result is that each case must be judged of by its own circumstances".[1] Even the judicial description of the elements of the doctrine is not necessarily exhaustive: those elements can be taken as being merely "marks or notes of the situation[s] in which recompense is due",[2] which have been identified by the courts as they develop the law and which may be expanded or modified by the courts in the course of further development. Although the claim of an arrestee for recompense for services and outlays rendered in complying with the arrestment might seem, at first sight, to meet the requirements of the doctrine of recompense as set out above, there are features of the arrestee's claim which make it extremely doubtful indeed that it would succeed. Since not every conferment or transfer of benefits from one person to another ought to be remediable in recompense for the redress of unjustified enrichment, the courts have adopted a cautious, incremental approach in developing the doctrine of recompense and have recently affirmed, for example, that since the doctrine is equitable there must be special circumstances justifying an action of recompense if there was, or had been, an alternative remedy

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[1] Edinburgh and District Tramways v Courtenay 1909 SC 99 at p 105 per Lord President Dunedin, applied in eg Lawrence Building Co v Lanark C C 1978 SC 30 at pp 53 and 54 per Lord Cameron.

[2] Edinburgh and District Tramways v Courtenay 1909 SC 99 at pp 105-106 per Lord President Dunedin.

available to the pursuer.[1] In other words the remedy is in a sense a subsidiary one. Against this background, it is clear that the courts would not apply the doctrine in normal circumstances in such a way as to subvert or circumvent a long established rule of law. A possible ground on which the courts might refuse the arrestee a remedy is that although the arrestee's services have benefited the arrester, the arrester's enrichment is not unjustified. Normally where a creditor has simply obtained payment of his debt by the use of legal process, he will not be treated as enriched (lucratus) in the relevant sense.[2] If we are right in thinking that there is a long established rule of the law on arrestments that an arrestee in complying with an arrestment renders his services gratuitously to the arrestee, it seems most unlikely that the courts would reach a different result by upholding a claim by the arrestee under the doctrine of recompense. While there is scant authority on whether or in what circumstances services rendered by a pursuer under compulsion by the defender would ground a claim in recompense[3] it is possible to envisage circumstances in which such a claim would be likely to succeed. But where, as here, the compulsion imposed on the arrestee takes the form of the proper and regular use of a legal

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1 This requirement was first affirmed in Varney (Scotland) Limited v Lanark Town Council 1974 SC 245; explained in Glasgow District Council v Morrison McChlery and Co 1985 SC 52 at p 64 per Lord Justice Clerk Wheatley.

2 See eg the authorities cited at para 3.89, page 110, fn 1 .

3 See however Walker Delict (2nd edn) p 694 where the learned author states that "the quasi-contractual obligation of restitution, the equitable action of reduction and other remedies exist to prevent the party enjoying an advantage over another obtained by force". Improper compulsion is in some circumstances a ground of obtaining repayment, of sums paid but not due, by way of the remedy of repetition (analogous to recompense): see eg Jack v Fiddes (1661) Mor 2923; British Oxygen Co Ltd v SSEB 1959 SC (HL) 17 affg 1958 SC 53.

process of diligence, the analogy of other branches of law[1] strongly suggests that, on the ground that the compulsion is not an improper use of legal process, the court would refuse a remedy in recompense.

2.18 In these circumstances we have concluded that, if as a matter of policy an arrestee should indeed be given the right to claim recompense from an arrester for services rendered or outlays incurred in complying with an arrestment, the right will require to be conferred by legislation.

(2) Representations by the Committee of Scottish Clearing Bankers

2.19 The need, or possible need, for the introduction of recompense for arrestees for work done in operating arrestments was brought to our attention by the Committee of Scottish Clearing Bankers.

2.20 Scale of use of arrestments against 4 Scottish Clearing Banks. The Committee informed us that in the 10 years to December 1988, the number of arrestments served on the four clearing banks represented by the Committee (the Bank of Scotland, the Royal Bank of Scotland plc, the Clydesdale Bank plc, and the TSB Scotland plc) had increased at least six-fold and that each of these banks was by early 1989 forced to handle

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[1] For example, in the context of the law on the voidness of contracts obtained by extortion (force or fear), it is "as a general rule not extortion to threaten a legal course of action such as diligence": W W McBryde The Law of Contract in Scotland (1987) p 251.

approximately 7,000 arrestments per annum. We have been informed that the numbers of arrestments have continued to increase in 1989 as appears from the following table:

TABLE A

ARRESTMENTS SERVED ON SCOTTISH CLEARING BANKS

	Half year to 31.12.88	Half year to 30.6.89	Increase in half year to 30.6.89	Percentage increase*	Total in year to 30.6.89
Bank of Scotland	3,456	4,205	749	21.7%	7,661
Royal Bank of Scotland plc	3,725	5,022	1,297	34.8%	8,747
Clydesdale Bank plc	3,415	4,898	1,483	43.4%	8,313
TSB Scotland plc	2,006	2,698	692	34.5%	4,704
Total	12,602	16,823	4,221	33.5%	29,425

(* rounded to nearest decimal point)

SOURCE: information supplied by the Committee of Scottish Clearing Bankers.

It will be seen from the foregoing table that in the half year to 30 June 1989, the total numbers of arrestments served on the four Banks increased by as much as one third over the numbers served in the previous half-year, and in the case of one bank the increase was over 43%. Some of the increase may have been attributable to the use of arrestments to enforce payment of civil penalties connected with the new community charge, but we understand that most of it is due to a "natural" increase which was occurring anyway. For example the number of arrestments served on the Royal Bank of Scotland plc was in 1986, 4008; in 1987, 5734; and in 1988, 7374. We were informed that in early March 1989, one of the four Scottish clearing Banks had as many as 128 arrestments served on it in a single day. None of the arrestments served related to the community charge and the large number merely reflected the increasing use of arrestments generally. The Committee observed that having that number of arrestments served on any one day causes extreme administrative difficulties to the extent that in some areas the bank's normal operations are so seriously disrupted that its service to its customers is impaired. As at mid-March 1990, one bank told us it had had as many as 168 arrestments served on it in a single day, none of which related to community charge arrears or penalties.

2.21 Scale of use of arrestments against Girobank plc and Department for National Savings. The numbers of arrestments served on the four Scottish clearing banks greatly exceed the numbers of arrestments served on the Girobank plc and, in respect of deposits in the National Savings Bank, the Department of National Savings. We were informed that the number of arrestments served on Girobank plc was as low as 45. This

represents a four-fold increase since 1985.[1]

2.22 We were informed (in January 1990) that in the four years since arrestments of money on account of deposits in the National Savings Bank became competent (on 30 December 1985[2]) as few as 10 arrestments in all had been served on the Department for National Savings, all directed against deposits in the National Savings Bank[3], which has its office in Glasgow.

2.23 It will be seen that the problems encountered by the four Scottish clearing banks are of a quite different order of magnitude from those experienced by the Girobank plc and the Department of National Savings.

2.24 Scale of use of arrestments against other deposit-taking institutions. We have yet to obtain information on the scale of use of arrestments against other deposit-taking institutions such as

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1 We understand that Girobank plc have records of the number of arrestments served back to the date when the Scottish office of the bank was opened in August 1983 and that due to the newness of the office virtually no arrestments were served on the bank in 1983 and 1984.

2 See Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 49 (amending Crown Proceedings Act 1947, s 46 by repealing para (c) of the proviso as originally enacted which precluded arrestments of money payble on account of deposits in the National Savings Bank) and s 60(3)(d) (date of commencement of inter alia s 49).

3 The Department for National Savings which has its administrative headquarters in London also administers the Bonds and Stock Office based in Blackpool and Lytham St Annes and the Savings Certificates and SAYE Office based in Durham.

building societies, friendly societies and insurance companies. We hope to obtain information on that topic from bodies representing these institutions and possibly from a survey of arrestments to be conducted by the Scottish Office Central Research Unit on our behalf. It may be that the scale of use of arrestments on these financial institutions is of a much lower order of magnitude than their use against the four Scottish clearing banks since creditors or their advisers are likely to be more discriminatory in instructing such arrestments.

2.25 Work undertaken by 4 Scottish clearing banks in complying with arrestments. We were informed that while the four Scottish clearing banks operate computer systems which in some cases provide a central record of current account customers' names, these systems are inadequate for tracing purposes for the reasons undernoted.[1] Accordingly, in practice each of the banks is required to send circulars to all of their branches in their networks on a daily basis advising them of arrestments which have been served. Thereafter, in order to trace whether the arrestment has attached anything due or belonging to the defender or common debtor, it is necessary for every branch of the bank concerned to search (a) its current account and deposit account records; (b) its deposit receipt records; (c) its safe custody records; and (d) its security records.

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[1] The reasons given are threefold: (1) If the common debtor has a common name, eg John Smith, the computer will merely show that a John Smith has an account at a certain number of branches. (2) The banks do not have centralised computer records of deposit receipt holders nor of some other types of savings accounts. (3) The computer systems do not record items held in safe custody nor items held in security, nor details of certain other obligations such as bills of exchange accepted.

2.26 Further informal discussion with representatives of the Committee revealed that the circularising of branch networks does not exhaust the administrative work which compliance with an arrestment may entail. It is not merely debts due to the defender or common debtor arising from the deposit-taking business of the arrestee which are attached by an arrestment under the present law. The defender or common debtor may be not only a customer of the financial institution for banking services rendered by the institution; he may also for example be a supplier of goods or services to the institution and in that capacity be a creditor of the institution in respect of the price due to him for that supply. So an internal search by an arrestee in pursuance of an arrestment has to cover, for example, those departments of the institution dealing with supply contracts.

2.27 Moreover the arrestee banks may in practice be required to search their records and files to ascertain not only the existence of debts due by them to the defender or common debtor but also debts due to the arrestee institution by the defender or common debtor which may require to be set off against the arrestee's debt due to the defender or common debtor, thereby reducing or extinguishing the sum attached.[1] An obvious example is a loan to the defender or common debtor. Other examples include debts due by the defender or common debtor to the arrestee institution arising out of the provision to him of professional services such as fees for the administration of an executry, or for estate agency or insurance brokerage services.

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[1] See Wallace and McNeil p 22: "Normally, where several bank accounts are opened by one customer under various headings, with the object of keeping the sums paid into the respective accounts separate and distinct, the various accounts may be treated by the banker as one, so far as the relation of debtor and creditor between banker and customer is concerned, so that a debit balance in one account may be compensated by a credit balance in another".

2.28 Representations for introducing recompense for arrestees. As a result, the four Scottish clearing banks are required to carry out a considerable amount of work at a very substantial cost for no return whatsoever to the banks. The Committee of Scottish Clearing Bankers submitted that arrestees should in all cases be entitled to obtain adequate reimbursement for dealing with arrestments served upon them, and more particularly should be entitled to be recompensed for the cost of circularising their entire branch networks.

2.29 Abortive arrestments. The Committee of Scottish Clearing Bankers told us that on average 94% of the arrestments served on the four Scottish clearing banks attached no funds and were, as they observed, "merely carried out as speculative or 'fishing' arrestments". They further suggested that "surely the original purpose of arrestments was to attach funds in the hands of a known creditor of the debtor".

2.30 Reducing the number of abortive arrestments? In their representations, the Committee saw the main problem as one of giving adequate reimbursement to arrestees for the administrative and clerical costs incurred in complying with arrestments. Whatever the original purpose of arrestments was as a matter of history, it would now be possible, as a matter of current legislative policy, to characterise the problem as being not only one of reimbursing arrestees but also of reducing the number of abortive arrestments. The ground for such an approach would simply be that at least in the case of arrestments served on the four Scottish clearing banks there is a serious disproportion between the large amount of work involved in complying with

arrestments and the relatively small number of cases of arrestments served, currently only about 6%, in which an arrestment is wholly or partly successful.

2.31 It may be that the introduction of adequate reimbursement of arrestees would have the incidental effect of limiting the number of arrestments to those in which the arrester knows, or has reasonable grounds to believe, that the arrestment would be successful. Much would depend on the level of fees exigible by arrestees. If, however, the legislative aim is or should be regarded as one of reducing the number of abortive arrestments in order to avoid the imposition on innocent third parties of the burden of much unproductive work, then legislation directly aimed at achieving that result might be necessary. Such legislation might need to go beyond the introduction of fees for arrestees and to require limitations on the creditors' use of arrestments. We revert to this question of the aims of legislation below.

2.32 Before considering proposals on these matters, however, it may be convenient to have regard to recent developments in English law on which the Committee of Scottish Clearing Bankers to some extent relied in support of their representations.

(3) Comparison with English law

2.33 In English law, the right of a third party complying with debt enforcement measures to recompense for administrative and clerical expenses differs according as the expenses were incurred in complying with a Mareva injunction (which may be taken for present purposes as broadly equivalent to

our arrestment on the dependence)[1] or a garnishee order (broadly equivalent to our arrestments in execution).

(a) Administrative and clerical expenses of third parties complying with Mareva injunction

2.34 We understand that a Mareva injunction is normally addressed to third parties believed to hold assets of the defendant as well as to the defendant himself. Where it is addressed to the defendant's bank, it generally directs the bank to freeze his account or at least to ensure that any credit balance is not reduced below an amount specified by the injunction. Once a bank (or other third party) is given notice of a Mareva injunction affecting money or goods in its hands, it must not part with the money or goods except by authority of the court, the sanction being punishment for contempt of court. In Z Ltd. v. A-Z[2] the Court of Appeal laid down certain rules or guidelines concerning

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[1] For an explanation of Mareva injunctions, see our Discussion Paper No 84 on Diligence on the Dependence and Admiralty Arrestments (1989) para 2.48. Normally a Mareva injunction is granted on the dependence of court proceedings prior to final judgment, but it has now been held that it may be granted after final judgment and before execution: Orwell Steel (Erection and Fabrication) Ltd v Asphalt and Tarmac Ltd [1985] 3 All ER 747. A Mareva injunction is a personal order binding the defendant and third parties personally and does not create a preference for the plaintiff (unlike an arrestment).

[2] [1982] 1 Q B 558 (CA) at p 575-577 per Lord Denning M R, applying Searose Ltd v Seatrain UK Ltd [1981] 1 WLR 894.

the plaintiff's duties towards the bank or other innocent third party complying with a Mareva injunction, which included the following. (1) Insofar as the bank is required to take any action in order to comply with the Mareva injunction and is put to expense on that account, the bank is entitled to be reimbursed for its reasonable costs by the plaintiff. The plaintiff must give an undertaking to pay the bank's reasonable costs. (2) The bank should be told, with as much certainty as possible, what it is to do or not to do. The plaintiff should identify the bank account by specifying the branch and heading of the account or other assets of the defendant with as much precision as is reasonably practicable. (3) If the plaintiff cannot identify the bank account or other assets with precision, he may request the bank to conduct a search to see if the bank holds any assets of the defendant provided the plaintiff undertakes to pay the cost of the search. The search may be limited, eg to all branches in central London. The bank may not tell the plaintiff the result of the search lest it breach confidentiality but must freeze any assets.

2.35 The policy justification of these rules was described by Robert Goff J in the earlier Searose case:[1]

> "I do not think it is right that the bank should incur expense in ascertaining whether the alleged account exists, without being reimbursed by the plaintiff for any reasonable costs so incurred. Banks are not debt-collecting agencies; they are simply, in this context, citizens who are anxious not to contravene an order made by the court, an order which has been obtained on the application of, and for the benefit of, the plaintiff. Even where the particular branch of the bank is identified, some expense is likely to be incurred in ascertaining whether the defendant has an account at the branch. But where the branch is not identified, the bank will be put in a very difficult position. It is, I think, well known that Barclays Bank has

[1] Searose Ltd v Seatrain UK Ltd [1981] 1 WLR 894 at p 896.

over 3,000 branches in this country, and Lloyds Bank has over 2,000 branches. Are they to circulate all their branches? If they did so, it would involve them in great expense; moreover, such an exercise cannot, in ordinary circumstances, reasonably be expected of them".

He also referred to the possibility:[1]

> "that a practice may develop under which in ordinary circumstances, the clearing banks charge a standard fee where the branch of the bank is identified, and charge another standard fee per branch to be searched if no branch is identified. If reasonable standard fees can be established to the satisfaction of the taxing masters, a great deal of time and money may be saved thereafter on the taxation of costs".

These principles apply to all third parties holding the defendant's property to whom notice of a Mareva injunction is given, and not merely banks. We are informed that in December 1989 there was no standard fee agreed as between all the major English clearing banks but that in practice one of those banks charges £100 as a standard fee for searching its head office and branches.

(b) Administrative and clerical expenses of garnishees

2.36 Statutory fees for administrative and clerical expenses of deposit-taking institutions operating garnishee orders.[2] Under legislation passed in 1982, as subsequently amended, relating to

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[1] Idem.

[2] A garnishee order nisi made by the High Court, and a garnishee summons issued by the county court, attaches a debt due by a third party (the garnishee) to a judgment debtor, and orders the garnishee to appear and show cause why he should not pay to the judgment creditor that debt or so much of it as will satisfy the judgment debt and the costs of the garnishee proceedings. If on the hearing the garnishee does not show cause, the order may be made absolute. See generally Rules of the Supreme Court, Order 49; County Court Rules, Order 30.

High Court and county court garnishee orders,[1] where a garnishee order nisi is served on any "deposit-taking institution",[2] the institution may deduct from "the relevant debt or debts" an amount not exceeding a sum prescribed by statutory instrument "towards the administrative and clerical expenses of the institution in complying with the order". The amount of the prescribed sum is currently £30.[3] The right to deduct is exercisable from the time when the order nisi is served on the institution. The reference to "the relevant debt or debts" means the amount (at the time of service of the order) of the debt or debts of which a whole or part is expressed to be attached by the order. A deduction may be made where that amount is insufficient to cover both the deduction and the judgment debt and costs in respect of which the attachment is made, notwithstanding that the benefit of the attachment to the creditor is reduced as a result of the deduction. These statutory provisions only remunerate the garnishee if funds are attached by the garnishee order, and not for work done in unsuccessfully attempting to trace funds under a garnishee order which is ultimately found to have attached nothing.

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[1] Supreme Court Act 1981, s 40A(1), and County Courts Act 1984, s 109(1), both introduced by the Administration of Justice Act 1982, s 55 and Sch 4, Pt I; and amended inter alia by the Administration of Justice Act 1985, s 52. The relevant provisions are set out in Appendix B to this Discussion Paper.

[2] For the definition of a deposit-taking institution, see next paragraph.

[3] Attachment of Debts (Expenses) Order 1983 (SI 1983/1621). In December 1989, we were informed that there was at that time no proposal to increase the fee.

2.37 Definition of "deposit-taking institutions". A "deposit-taking institution" for this purpose means any person carrying on a business which is a deposit-taking business for the purposes of the Banking Act 1987.[1] Section 6 of that Act defines a "deposit-taking business" as one which either lends money deposited with it or finances any other activity of its business, wholly or to any material extent, out of the capital or interest of money deposited with it.[2] There are two main classes of deposit-taking institution, namely, (a) those institutions which are authorised by the Bank of England under Part I of the Banking Act 1987 to carry on a deposit-taking business and (b) the Bank of England and also those institutions which are exempt by the 1987 Act s. 4 from the need to obtain authorisation, and for that purpose are specified in a list of exempt persons in Schedule 2 to the Act, which is in the following terms:-

"SCHEDULE 2

EXEMPTED PERSONS

1. The central bank of a member State [scil. of the EEC] other than the United Kingdom.

2. The National Savings Bank.

3. A penny savings bank.

4. A municipal bank.

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[1] Supreme Court Act 1981, s 40(6) (as amended by the Banking Act 1987, s 108(1) and Sch 6, para 11) and s 40A(3); County Courts Act 1984, s 109, and s 147(1) (as amended by the 1987 Act, s 108(1), and Sch 6, para 15).

[2] These definitions may be amended by order of the Treasury: 1987 Act, s 7. The relevant provisions of the 1987 Act came into force on 1 October 1987, (see SI 1987/1664).

5. A building society incorporate (or deemed to be incorporated) under the Building Societies Act 1986.

6. (1) A friendly society within the meaning of section 7(1)(a) of the Friendly Societies Act 1974 or section 1(1)(a) of the Friendly Societies Act (Northern Ireland) 1970.

(2) This paragraph applies only to the acceptance of deposits in the course of carrying out transactions permitted by the rules of the society.

7. A society registered under either of the Acts mentioned in paragraph 6 above other than such a society as is there mentioned.

8. (1) Any institution which is for the time being authorised under section 3 or 4 of the Insurance Companies Act 1982 to carry on insurance business of a class specified in Schedule 1 or 2 to that Act.

(2) This paragraph applies only to the acceptance of deposits in the course of carrying on the authorised insurance business.

9. A loan society whose rules are certified, deposited and enrolled in accordance with the Loan Societies Act 1840.

10. A credit union within the meaning of the Credit Unions Act 1979 or the Credit Unions (Northern Ireland) Order 1985.

11. A body of persons certified as a school bank by the National Savings Bank or an authorised institution.

12. A local authority.

13. Any other body which by virtue of any enactment has power to issue a precept to a local authority in England or Wales or a requisition to a local authority in Scotland.

14. The Crown Agents for Oversea Governments and Administrations.

15. The European Atomic Energy Community.

16. The European Coal and Steel Community.

17. The European Economic Community.

18. The European Investment Bank.

19. The International Bank for Reconstruction and Development.

20. The International Finance Corporation.

21. The International Monetary Fund.

22. The African Development Bank.

23. The Asian Development Bank.

24. The Caribbean Development Bank.

25. The Inter-American Development Bank."

It has been observed that of the persons listed in Schedule 2 "[e]ssentially there are four main categories. First, those such as building societies, friendly societies, authorised insurance companies and credit unions each regulated under other enactments; secondly, those which are part of the public sector such as the National Savings Bank, local authorities, municipal banks and the Crown Agents; thirdly, those exempted by reason of their insignificant size and effect - penny savings banks, loan societies and school banks; and finally those on a list of international, supranational and inter-governmental bodies".[1]

2.38 Every annual report by the Bank of England on its activities under the Banking Act 1987 must contain a list of the financial institutions authorised under the Act at the end of the

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[1] Scottish Current Law Statutes Annotated (1987), volume 1, Banking Act 1987, annotation of section 4(1) by Mr Geoffrey Harding.

[2] Banking Act 1987, s 17(1).

financial year to which the report relates.[2] The Bank of England must make available an up-to-date list of authorised institutions on request.[1] A copy of the list of the authorised institutions as at 6 October 1989 is at Appendix C below.

2.39 Since the categories of deposit-taking institutions are not delimited primarily with the law on garnishee orders in mind, statute has conferred on the Lord Chancellor power to make an order by statutory instrument disapplying the provisions on garnishees' fees from prescribed descriptions of deposit-taking institutions.[2] We understand that the original intention was that the Lord Chancellor should be able to exlude the smallest institutions with not more than 20 branches or other outlets. No such order, however, has yet been made nor, we understand, is presently contemplated.

2.40 Statutory fees for garnishees not exigible where garnishee order abortive. As we noted above, where a garnishee order nisi is served on a deposit-taking institution, the garnishee may deduct the statutory fee from the debt or debts attached by the order but no provision is made allowing a garnishee to claim a fee from the garnishing plaintiff in a case where the garnishee order does not attach any funds.[3]

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[1] Ibid, s 17(2): the Bank may charge a reasonable fee.

[2] Supreme Court Act 1981, s 40A(4); County Courts Act 1984, s 109(4), both as amended by the Administration of Justice Act 1985, s 52.

[3] Supreme Court Act 1981, s 40A(1) and (2); County Courts Act 1984, s 109(1) and (2), as amended: see Appendix B.

2.41 Scale of use of garnishee orders. It may be however that the need for allowing fees for abortive garnishee orders in England and Wales is less great than in the case of abortive arrestments in Scotland. Thus the overall numbers of garnishee orders nisi issued by the county courts in England and Wales in 1988 was only 4,006 (4,049 in 1987).[1] This contrasts with 1,215,286 warrants for execution against goods and 49,972 attachment of earnings orders[2] securing judgment debts.[3] It appears therefore that creditors in England and Wales rely less on enforcement against debts due to the debtor (and rely more on execution against his goods) than do Scottish creditors.[4] We were informed by the Lord Chancellor's Department that there are no statistics on the numbers of county court garnishee orders nisi which were abortive and therefore not followed up by an order absolute, but that it is estimated that probably about 20% of county court garnishee orders nisi are abortive and not made absolute. In the High Court there are only statistics for the Queen's Bench Division which made 1,247 orders absolute in 1989.[5] There are no statistics on garnishee orders nisi in that Division but a further 20% might be added as a reasonable estimate. There are no statistics on garnishee orders made in the Chancery and Family Divisions. The reason for the relatively low numbers of abortive garnishee orders nisi (20% as compared with 94% of arrestments served on Scottish clearing banks) may be due in part to the affidavit procedure described in the next paragraph and in part to the charging of fees by garnishees.

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1 Lord Chancellor's Department, Judicial Statistics: Annual Report 1988 (1989) Cm 745, Table 4.16.

2 Idem.

3 Ibid, Table 4.17.

4 See our Report on Diligence and Debtor Protection (1985) Scot Law Com No 95, paras 2.29 to 2.33; also Table 2A at p 14, which illustrate this point.

5 See Cm 745 (fn 1 above) Table 3.10.

2.42 Affidavit by plaintiff applying for garnishee order. One reason for the very restricted use of garnishee orders, as compared with arrestments in Scotland, may be that in applying to the High Court or county court for a garnishee order, the creditor must present an affidavit stating inter alia that to the best of his information or belief, the garnishee is indebted to the judgment debtor.[1] In the case of a High Court application, it is expressly provided that the affidavit must state the sources of the information or the grounds for the belief.[2] In both High Court and county court applications, where the garnishee is a deposit-taking institution with more than one place of business, the affidavit must also state the name and address of the branch at which the judgment debtor's account is believed to be held and the number of that account or, if it be the case, that all or part of this information is not known to the deponent.[3] Where the affidavit names the branch, the name and address of the branch is stated in the garnishee order itself.[4]

2.43 It seems that these are only procedural rules and do not limit the power of the court to garnish all debts due by the garnishee to the judgment debtor held in all branches of the garnishee institution within the jurisdiction nor do they alter the

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[1] RSC, Order 49, rule 2(c); CCR, Order 30, rule 2(c).

[2] RSC, Order 49, rule 2(c).

[3] RSC, Order 49, rule 2(d); CCR, Order 30, rule 2(d).

[4] See County Court Practice, notes to CCR, Order 30, rule 2.

substantive law relating to the liability of the garnishee bank.[1] But their effect is presumably to deter plaintiffs from applying for garnishee orders except where they have information or grounds to believe that funds due to the judgment debtor are held by the garnishee in question, and as a result to reduce the incidence of abortive garnishee orders.

2.44 Branches affected by garnishee orders. We understand that a garnishee order will usually be drafted to attach all sums owed by the garnishee bank to the judgment debtor wherever situated within the jurisdiction.[2]

2.45 Set off. We are informed that since the garnishee order usually attaches all debts due by the garnishee to the judgment debtor, it is prudent practice for the garnishee bank to check whether it is owed money by the judgment debtor to protect its interests. If the garnishee bank finds that it is owed money and

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[1] Supreme Court Practice, 1989 (the White Book) Notes to Order 49, rr 2, 3. Cf Vinell v De Pass [1892] AC 90 (HL) at p 95 per Lord Halsbury: "The attachment is of all debts due. It is clear that within the meaning and purpose of the legislature, if there were other debts" [scil. than the debt specified in the affidavit] "out of which this execution could be satisfied due from the same person, those debts ought to be made the subject of the execution".

[2] See the prescribed forms of garnishee order. Supreme Court Practice, 1989 Part 2, Forms Nos 72 to No 74; County Court Practice, 1989 Forms N 84 and N 85.

that the sum due by it to the judgment debtor after set off cannot satisfy the garnishee order nisi, it should appear before the master on the date fixed in that order to prove the set off and to have the order either discharged or varied. It may be open to the garnishee bank and the creditor to agree that there should be a set off and for the creditor to agree that the garnishee order nisi be discharged.

2.46 Comparison with Scottish arrestments. In some respects there is a close resemblance between arrestments and garnishee orders. For example neither a garnishee order nor an arrestment is restricted in its effect to funds in particular branches of the garnishee's or arrestee's business. But there are at least three striking differences relevant to the present enquiry. First, in Scots law, warrant for arrestment in execution, and even on the dependence, can be obtained by a pursuer as of right in the ordinary course of process, and may be used against any person whether or not the pursuer or creditor has reasonable cause to believe that he holds funds or goods belonging to the defender or common debtor.[1] No preliminary application to the court supported by an affidavit is required as in English garnishee procedure. Second, in England a garnishee may charge the judgment creditor a standard flat rate prescribed fee of £30. In Scotland an arrestee cannot recover any fee from the arresting pursuer or creditor. Third, the numbers of garnishee orders nisi made in England (4,000 in the county courts in 1988) is small compared to the numbers of arrestments executed in Scotland (29,500 against the 4 clearing banks alone in the year to 30 June 1989), but a high proportion (about 80%) of garnishee orders nisi are successful in attaching some funds whereas in Scotland only about 6% of arrestments served on clearing banks attach any funds.

[1] In our Discussion Paper No 84 on Diligence on the Dependence and Admiralty Arrestments (1989) Part II we propose that warrants for arrestment on the dependence should be granted by a judge (Lord Ordinary or sheriff) on an ex parte application, but the warrant would, as under the present law, be a general warrant authorising arrestment against any person who might hold funds or goods due to the defender or common debtor.

PART III
PROPOSALS FOR REFORM

Preliminary: categories of arrestee

3.1 In considering the objectives, scope and content of possible reforms, it may be convenient to distinguish three categories of case, namely:

(a) where the arrestee is a deposit-taking institution within the meaning of the Banking Act 1987 (paras. 3.2 to 3.72);

(b) where the subjects arrested are a ship or cargo on board ship (para. 3.83 et seq); and

(c) all other cases of "ordinary" arrestments (ie as distinct from arrestments of earnings or pensions, which fall outside the scope of this Discussion Paper) (paras. 3.73 to 3.82).

We concentrate on deposit-taking institutions first, partly because the representations which we have received have emanated from the clearing banks, partly because deposit-taking institutions form a distinct group recognised by legislation many of which (such as building societies, friendly societies and insurance companies) may have similar problems to banks in operating arrestments, and partly because it is necessary to begin somewhere and seems convenient to devise a scheme for deposit-taking institutions and thereafter to consider whether or how far the same or similar provisions should apply to other arrestees with or without modifications.

A. Arrestments served on deposit-taking institutions

(1) Objectives of reform

3.2 Primary objective: statutory fees for arrestees. We have provisionally concluded that the main objective of reform should be the introduction of statutory fees to provide a fair measure of recompense to deposit-taking institutions for the administrative and clerical expenses incurred by them in complying with arrestments. We seek to justify this provisional conclusion at paras. 3.4 to 3.8 below.

3.3 Subsidiary objective: reduce burden of unproductive work. We also consider that, as a matter of preference if not of necessity, the reforms should reduce the number of arrestments served on deposit-taking institutions which attach nothing and thereby reduce the burden on arrestees of much unproductive work. We regard this objective, however, as subsidiary or incidental to the main objective of introducing statutory fees for arrestees. We state our reasons for this provisional conclusion at para. 3.9 below.

(2) The need for statutory fees for arrestees

3.4 The practice of arrestees giving their services without fees or other recompense is long-established in Scotland. It might be argued that if banks and other institutions providing financial services choose to take deposits of money or goods from the public, then they should accept their liability to comply with arrestments free of charge as a disadvantage which is inherent in their business. We suspect, however, that whatever may have been

the position in the past, in modern conditions it will generally be regarded as unjust to require arrestees to carry out free of charge and without benefit to themselves, costly and time-consuming work for the benefit of a pursuer arresting on the dependence (whose claim may be unfounded) or even for the benefit of a creditor who arrests in execution of a decree. We think, too, that some weight should be given to the very considerable increase in the number of arrestments served on the clearing banks. (We are seeking information on the position with respect to other types of deposit-taking institutions.) The principle that some recompense should be due has, as we have seen,[1] been accepted recently by the English courts in relation to Mareva injunctions and by Parliament in legislating for garnishee orders. Moreover, as indicated above, the same legislative principle underlies the Debtors (Scotland) Act 1987, s 71, which enables an employer to deduct at source a fee of a prescribed amount on each occasion on which he makes a payment under an earnings arrestment, or a current maintenance arrestment, or a conjoined arrestment order.

3.5 On the other hand, we think that any proposed reforms must not be such as to prejudice the system of enforcement of unsecured debts by diligence in which the system of arrestments plays an important part. Institutions providing financial services themselves rely on the system of diligence whenever they extend credit without a contractual security since the sanction of diligence as an ultimate threat underpins the whole system of unsecured credit. The need to retain an effective system of arrestments is important not least because, if its effectiveness is prejudiced, creditors might be induced to use poindings and warrant sales in lieu of arrestments, a development which most people in Scotland would be likely to regard as highly undesirable.

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[1] See para 2.34 et seq.

3.6 In our opinion, the need to retain an effective system of diligence imposes constraints on the kind of reforms which may be appropriately made in providing recompense for arrestees. In particular whatever form such recompense may take, its amount should not be set at so high a level as to deter creditors unduly from using arrestments. What is a reasonable level of recompense is discussed below.[1]

3.7 Another constraint is that the reforms should so far as possible avoid the imposition on the court system of unnecessary or unjustifiable administrative costs. Such costs might arise if the courts were to be required to adjudicate upon claims by arrestees for the expenses actually incurred by them in complying with arrestments. We also revert to this below.[2]

3.8 We invite views on the following provisional proposal:

> **Where an arrestment is served in the hands of a deposit-taking institution within the meaning of the Banking Act 1987, the arrestee should in principle be entitled to a statutory fee, payable by the arrester in the first instance, for the administrative and clerical costs incurred in complying with the arrestment, subject to the constraints imposed by the need to retain an effective system of arrestments and to avoid the imposition on the court system of unnecessary or unjustifiable administrative costs.**

(Proposition 1)

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[1] See paras 3.30 to 3.47.

[2] See para 3.26.

(3) **Reduction in the burden of abortive work imposed on arrestees**

3.9 We have seen that of all the arrestments served on the four Scottish clearing banks, (almost 29,500 in the year to 30 June 1989) only a small proportion (perhaps about 6%) attach any funds. We do not, or not yet, have statistics relating to the number of arrestments served on other financial institutions or other arrestees, nor of the proportion of these which are abortive.[1] It may be that the incidence of abortive arrestments in the hands of the four Scottish clearing banks is untypically high. There may be a practice among creditors of serving arrestments on all four clearing banks as a matter of course, and of being more discriminatory in relation to other arrestees. We would be grateful for information on this matter.

3.10 Separate legislation specifically designed to reduce number of abortive arrestments unnecessary. On the whole we think that separate legislation (distinct from statutory fees for arrestees) designed to reduce the number of abortive arrestments is unnecessary for the following reasons. First, if statutory fees for arrestees are introduced which give them a fair measure of recompense, the unproductive work would not go unremunerated. Second, since a creditor very often does not and cannot know whether a bank or other financial institution holds funds of his debtor or the extent and location of those funds, an unproductive arrestment often cannot be avoided if the creditor is to be allowed to use arrestments at all. But if the creditor is required to pay the arrestee institution for its expenses in complying with

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[1] Except in the case of the Department of National Savings (in respect of the National Savings Bank) and the Girobank plc.

an arrestment and take the risk that the arrestment will be unproductive, it seems to us that the creditor should be allowed to do so. Third, we think that the very existence of statutory fees for arrestees would make pursuers and creditors think twice before instructing arrestments and thereby incidentally tend to reduce the over-all number of arrestments, and therefore the number of unproductive arrestments, served on deposit-taking institutions.

3.11 We have nevertheless considered two legislative options which might be introduced to reduce the number of unproductive arrestments, namely:

(a) an application to the court and affidavit procedure modelled on garnishee order procedure under English law; and

(b) a requirement that an arrestment schedule served on a deposit-taking institution must specify the offices of the arrestee which would be affected by the arrestment, together with a fee per office affected.

We have rejected these options for the reasons which we now state.

3.12 First rejected option: application and affidavit modelled on garnishee order procedure. The first of these options would be to require an application by the pursuer or creditor to the court for warrant to lay an arrestment in the hands of a deposit-taking institution supported by an affidavit on the lines mutatis mutandis of that required in the English garnishee procedure,[1] (ie

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[1] See para 2.42 above.

stating that to the best of the applicant's information or belief, the arrestee is indebted to the defender or common debtor; possibly stating also the source of the information or grounds of the belief; and where the arrestee has more than one branch or place of business, stating the name and address of the branch or place of business where the defender's or common debtor's funds or goods are held and the number of the relevant account, or, if it be the case, that all or part of this information is not known to the applicant).

3.13 Applications to the court for warrants to enforce judgment debts in England and Wales are commonplace, but are not required in Scotland and, except in the special case of warrants for diligence on the dependence,[1] we do not think that they should be introduced here since they seem to us to involve unnecessary complications, trouble and expense both for the litigants and the courts. If the legislative objective were to limit the offices affected by an arrestment, this could be done by statutory provisions limiting the effect of an arrestment to funds and property held at offices of the arrestee specified in the schedule of arrestment, and such a limitation could be achieved by the messenger-at-arms or sheriff officer inserting the appropriate information in the schedule of arrestment. If the legislative intention were not to limit the scope of the arrestment to particular offices of the arrestee, we doubt whether the affidavit procedure would be worth introducing.

3.14 It is true that the effect of the affidavit procedure would be to limit the number of arrestments used to cases where the arrester has information, or grounds to believe, that the arrestee

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[1] See our Discussion Paper No 84 on Diligence on the Dependence and Admiralty Arrestments.

is indeed indebted to the defender or common debtor and thereby to reduce the number of abortive arrestments. It would however be likely also to reduce the number of successful arrestments and more importantly would place on the pursuer or creditor a burden which he could not discharge in most cases. Under the present law, the pursuer or creditor generally does not know and has no means of knowing whether the defender or common debtor has funds in the hands of a particular deposit-taking institution. There is no compulsory attachable assets enquiry prior to diligence and in our Report on Diligence and Debtor Protection[1] we recommended that no such procedure should be introduced for reasons given in considerable detail. In these circumstances we do not think that an abortive arrestment is an improper use of the diligence from the standpoint of the creditor.

3.15 The introduction of a new procedure for applications to the court would also have implications for the resources of the courts which are best avoided.

3.16 We have already suggested that an unproductive arrestment is justifiable if the arrester is willing to pay for it. If this is right, then the introduction in Scotland of the English garnishee order application procedure would not be justifiable in principle, quite apart from the extra complications and expense which it would entail.

3.17 Second rejected option: limitation of scope of arrestment to funds in offices specified in arrestment schedule together with fee per office so specified. Under the second option, where a deposit-taking institution on which an arrestment is served has more than one office, the schedule of arrestment

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[1] Scot Law Com No 95 (1985) Part II.

would specify all the office or offices which would be affected by the arrestment; the arrestment would only attach funds held at an office so specified; and a fee per office affected by the arrestment would be chargeable.

3.18 Under the present law, it is competent to arrest particular subjects defined in the schedule of arrestment, but this practice is rarely followed (except in the special case of arrestments of ships) since it is generally not in the interests of the arrester to limit the scope of the arrestment.[1] If the amount of the fee were directly proportionate to the number of offices affected, it would be likely to lead to a change in practice. Arresters would be likely to limit the scope of arrestments laid against financial institutions for example to branches within areas near the debtor's residence or place of business. We reject this option for the following reasons.

3.19 First, a provision that an arrestment be limited in the scope of its effect to funds and property held at offices specified in the arrestment schedule would place an unrealistic and unfair burden on the arrester. It would be unfair because unless he specified every office of the arrestee, which would not be realistic, he would run the risk that his arrestment would be abortive though the arrestee held funds of the debtor. Further, since it is clear that arrestees usually do not and cannot know the location of their debtor's bank accounts, it is unrealistic to require an arrester to specify the offices to be affected by the arrestment. This is the main reason why we reject this option.

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[1] Even where particular subjects are specified in the schedule of arrestment as thereby attached, it is thought that the schedule would usually add the common formula arresting all other funds and goods due by the arrestee to the common debtor.

3.20 Second, a limited arrestment would be likely to have the unintended consequence of reducing the proportion of arrestments served which are successful. This proportion (estimated at 6% or thereby in the case of the four Scottish clearing banks) is already very low and ought not to be reduced still further.

3.21 Third, a provision limiting the scope of an arrestment to funds and goods held at a particular place of business would not take account of the fact that some debts due by the arrestee to the defender or common debtor cannot be said to have a "location" (situs) or "domicile" at any particular place of business of the arrestee. It is true that in the common case of funds held in current accounts, deposit accounts and other bank accounts, the funds in these accounts are regarded for legal purposes (eg certain conflicts of law questions and the duty of the bank to pay on demand) as having a location at the branch or office where the account is administered.[1] It is thought that this attribution by a legal fiction of one location to what is essentially a debt or incorporeal obligation still applies despite changes in banking services such as computerised accounts, automatic teller machines and arrangements with other banks and institutions allowing withdrawals elsewhere than at the branch or even the

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[1] Joachimson v Swiss Bank Corporation [1921] 3 KB 110 per Atkin L J: "The [bank's] promise to repay is to repay at the branch of the bank where the account is kept..."; Wallace and McNeil Banking Law (9th edn) p 9.

institution operating the account.[1] Moreover the location of corporeal moveables on safe deposit at a branch identifies itself. There are however some debts due by an arrestee-institution which do not have a location at any particular place of business of the arrestee institution. An arrestment is as a general rule competent where the arrestee is subject to the jurisdiction of the Scottish courts[2] (and therefore the arrestment can be followed by an action of furthcoming in Scotland[3]) and so attaches obligations to account not located at a particular place of business of the arrestee. Such debts would include arrestable ordinary debts due by the arrestee financial institution eg. for the supply of goods or services to the institution.

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[1] Cf Libyan Arab Bank v Bankers Trust Co [1989] QB 728 at p 746 per Staughton J: "In the age of the computer it may not be strictly accurate to speak of the branch where the account is kept. Banks no longer have books in which they write entries; they have terminals by which they give instructions; and the computer itself with its magnetic tape, floppy disc or some other device may be physically located elsewhere. Nevertheless it should not be difficult to decide where an account is kept for this purpose, and it is not in the present case".

[2] McNairn v McNairn 1959 SLT (Notes) 35; O'Brien v A Davies and Son Ltd 1961 SLT 83; Brash v Brash 1966 SC 56.

[3] Where the contract between the arrestee and defender or common debtor provides for payment outside the jurisdiction (and therefore the debt is not recoverable by action of furthcoming within the jurisdiction) arrestment is not competent: J Verrico & Co v Australasian Mutual Provident Society 1972 SLT (Sh Ct) 57. For the view that the arrestee's liability to account must be one to account within the jurisdiction, see Anton Private International Law (1967) p 112.

3.22 Fourth, we understand that branch offices of clearing banks normally hold information on the debts due to the bank by the customer as well as debts due by the bank to the customer, such as loans or overdrawn accounts at other branches. There may however be cases where in practice limitation of the arrestment would not relieve the arrestee from searching elsewhere for other debts due by the customer to the bank (eg sums due to the bank under a credit-card scheme operated by a special department) in order to operate set off. Moreover even if branch offices of clearing banks have the information to combine credit and debit balances, other deposit-taking institutions may require to conduct more comprehensive searches to identify debts due to the arrestee for the purpose of set off. We have therefore some doubt whether limited arrestments would relieve the arrestee of the need to search other offices and departments. We seek views and information on this question.

3.23 For these reasons, especially the first, we reject a provision requiring the arrester to specify in the arrestment schedule the offices of an arrestee deposit-taking institution which would be affected by the arrestment. This provisional conclusion, however, is without prejudice to a proposal discussed below that an arrester should have the right (and not, as under the present proposal, a duty or burden) to limit the scope of the arrestment by specifying particular offices in the arrestment schedule.

3.24. We propose:

Legislation should <u>not</u> be introduced requiring that a pursuer or creditor desiring to lay an arrestment in the hands of a deposit-taking institution must either:

(a) present a special application to the court for a warrant of arrestment supported by an affidavit on the lines of the procedure in applications for garnishee orders in England and Wales; or

(b) specify in his schedule of arrestment the particular offices of the arrestee holding the funds or property which would be affected by the arrestment and to pay the arrestee a fee per office affected by the arrestment.

(Proposition 2).

(4) <u>Statutory fees for arrestments in hands of deposit-taking institutions</u>

3.25 If arrestees are not to be required by law to specify particular offices to be affected by an arrestment in the hands of a deposit-taking institution, it seems likely that in practice most arrestments would attach the whole of the arrestee's liability to account as under the existing law, unless the mode of charging fees for arrestees encouraged creditors to limit the scope of arrestments to particular offices. The critical question then arises as to how the proposed statutory fees exigible by arrestees for complying with arrestments should be regulated.

(a) Fixed fees rather than claims for work actually done

3.26 It seems clear that the recompense due to deposit-taking institutions for complying with arrestments laid in their hands should take the form of fees fixed by legal rules rather than a claim by the arrestee which would involve the court in assessing the work actually done in operating every individual arrestment. A number of factors, - including the high volume of arrestments served on some deposit-taking institutions; the relatively low amounts of clerical and administrative expenses exigible for operating a single arrestment; the difficulty of reaching a fair assessment of what expenses are attributable to one arrestment when a fluctuating number of arrestments are dealt with daily; and the difficulty of deciding what items of expenditure (eg. overheads) to include or exclude in the calculation together with the consequential wide scope for protracted disputes,- all combine to make it imperative that the recompense should take the form of fixed fees which could be easily applied in every case.

3.27 We propose

> **Recompense for deposit-taking institutions in respect of the administrative and clerical expenses incurred by them in complying with an arrestment laid in their hands should take the form of fees fixed by statute or statutory instrument rather than recompense claimed for work actually done.**

(Proposition 3)

(b) **Fees for abortive as well as successful arrestments**

3.28 In our opinion it is also clear that if the reform is to be successful it must give to deposit-taking institutions recompense for operating an abortive arrestment (ie one attaching nothing) as well as for an arrestment which is wholly or partly successful. This is a consequence of our provisional conclusion that "fishing arrestments" are justifiable provided that the arrestee receives an appropriate fee. A provision which recompensed the clearing banks for only 6% of the arrestments served on them would not be fair and reasonable. This rule would differentiate the fees for arrestees from the existing English system of fees for garnishess, where fees are only exigible in respect of successful garnishee orders, but in their case, as we have seen,[1] the volume of garnishee orders is very small in comparison to the volume of arrestments against Scottish banks (not only in relative terms per capita of population, but even absolutely) and there are procedural restraints against the use of "fishing" garnishee orders.

3.29 We propose

> **The statutory fees due to deposit-taking institutions for complying with arrestments should be chargeable in respect of arrestments which attach nothing as well as arrestments which are wholly or partly successful in attaching funds or goods.**

(Proposition 4).

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[1] See para 2.41.

(c) **Flat rate or scale fees and their level**

3.30 General We have suggested that an abortive arrestment would be justifiable in principle if the arrester were to tender an appropriate fee to the arrestee. This raises the question of what level of fee would be "appropriate". The views of consultees may differ widely according to their various interests. The suggestions which we make below are tentative and put forward only to elicit reactions from consultees. We are not at this stage committed to one view. Our main purpose is to construct a legislative framework which would form the background for consultation by Government on the details, including the precise level of fees, if and when fees have finally to be prescribed by statute or statutory instrument.

3.31 Policy factors affecting the level of fee. We suggest that in determining the level of the fee, regard should be had to the factors set out below.

(1) The amount of the fee should not be so high that creditors (and pursuers) are unduly deterred from using arrestments.

(2) The amount should, however, be sufficiently high to make creditors think twice before instructing the use of arrestments. In other words the level of fee should discourage the undiscriminating use of fishing arrestments.

(3) The fee should not be so great as to enable arrestees to make a profit out of the work of complying with arrestments.

(4) The fee should give fair recompense to arrestees for their expenses incurred in complying with the arrestment. In our provisional view, the notion of "fair recompense" in this context should not mean the full economic cost of complying with an arrestment. The execution of diligence is part of the system of administration of justice which benefits the whole community, not least financial institutions. On the analogy of witnesses' fees, which do not give recompense for the full economic cost of attending court, and fees for employers operating earnings arrestments discussed in the next paragraph, arrestees should not expect the full economic cost of complying with arrestments. We appreciate that whereas the involvement of witnesses is temporary and occasional, the involvement of some arrestees such as the clearing banks is permanent and continuous. Nevertheless it seems to us reasonable to expect financial institution arrestees to treat the difference between the smaller fee and higher costs of complying with arrestments as an expense inherent in their business.

(5) Since the amount of work involved in complying with an arrestment is the same whatever the amount of the debt which it secures , the arrestee's proposed statutory fee should not vary according to the size of the debt.

3.32 We note that the level of fees chargeable by employers for operating arrestments under the Debtors (Scotland) Act 1987, s. 71, is fixed at 50p per weekly, monthly or other periodical deduction from earnings. It seems clear that this is not adequate remuneration for employers but would cover at most only

postage and stationery costs. Different considerations may apply to repeated deductions from earnings. For example, as mentioned in the preceding paragraph, we think that the level of fee chargeable by a deposit-taking institution should be sufficiently high to make a creditor think twice before instructing an arrestment in order to alleviate the burden of unproductive or "fishing" arrestments served on such arrestees. This consideration does not apply in the case of employer-arrestees who are generally not troubled by a large number of "fishing" earnings arrestments. We also think that a higher fee for an arrestment served on a deposit-taking institution would be necessary if the fee were to be adequate recompense for the work involved. We note that the level of fees fixed in 1983 chargeable by deposit-taking institutions in England and Wales was £30, the fee being deducted at source but not applicable to abortive garnishee orders.

3.33 The verification of the costs involved in operating arrestments lies outside our expertise. We are however seeking estimates of these costs from a number of bodies representing deposit-taking institutions, and these bodies will have the opportunity to make representations in response to this Discussion Paper as to the appropriate level and mode of regulation of fees chargeable and ultimately to the Government following our final report.

3.34 Average costs incurred by 4 Scottish clearing banks. The Committee of Scottish Clearing Bankers gave us valuable information in January 1990 concerning the costs of the member Banks in complying with arrestments. The costs differed as between different banks. As regards the average administrative and clerical expenses incurred by branch offices, the highest

average was 10p per branch per arrestment and the lowest was 7p per branch per arrestment. As regards the average administrative and clerical expenses incurred by head offices of the banks, the highest average was £6 per arrestment and the lowest average was £4.50p per arrestment. We were informed that the bank which had the highest head office costs did not have the highest branch office costs and conversely the bank with the lowest branch office costs did not have the lowest head office costs. We were informed that the factors causing these variations include those undernoted.[1]

3.35 Size of branch networks of 4 Scottish clearing banks. The sizes of each of the branch networks of the four Scottish clearing banks as at 31 December 1989 is set out in the following Table.

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[1] It appears that banks with larger customer bases tend to have more records to search and also have a higher percentage of successful arrrestments used against them. In addition, depending on the different range of products offered by the different banks, the extent to which records require to be searched may vary considerably.

TABLE B

SIZE OF BRANCH NETWORKS OF THE 4 SCOTTISH CLEARING BANKS AS AT 31 DECEMBER 1989

	Scotland Branches			England Branches		Total Branches	
	Full	Sub F/T	Sub P/T	Full	Sub	Scot	Scot/Eng
Bank of Scotland	340	60	100	15	-	500	515
The Royal Bank of Scotland plc	362	118	-	323	23	480	826
Clydesdale Bank plc	282	60	-	7	-	342	349
TSB Bank Scotland plc	225	43	-	-	-	268	268
	1209	281	100	345	23	1590	1958

Notes: "Full = full branch; "sub" = sub-branch; "F/T" = full time; "P/T" = part-time. "England" includes, in relation to the Royal Bank of Scotland plc, England, Wales and the Channel Islands.

SOURCE: Information supplied by the Committee of Scottish Clearing Bankers

3.36 Flat rate fee not appropriate. We considered whether the statutory fee should take the form of a flat rate fee. The great advantage of a flat rate fee would be that the system would be easier to operate than a sliding scale fee based on the number of offices in the branch network. No calculations would be involved in determining the fee. There is a precedent in the form of the flat rate fees for garnishee orders.[1] There would be no difficulty in requiring the officer of court (messenger-at-arms or sheriff officer) to tender the fee to the arrestee at the same time as he served the schedule of arrestment. A sliding scale fee based on the number of offices in the arrestee's branch network raises the difficulty that that number would not always be within the knowledge of the officer of court. We think however that that difficulty can be surmounted by statutory orders specifying higher fees as mentioned at para. 3.53 below..

3.37 It is clear from paras 3.34 and 3.35 above that the costs of the arrestee deposit-taking institutions can vary considerably according to the number of branches in the branch network. It seems to us that it would not be right to enable an arrestee such as a merchant bank, with only one office, or small insurance company or building society with a handful of offices or outlets, to charge the same level of fee as one of the Scottish clearing banks with several hundred branches. Even as between the four Scottish clearing banks, the branch networks range from 268 to either 826 or, if one has regard only to Scotland, 500.[2] We do not regard the precedent of the flat rate fees for garnishees as decisive since the numbers of garnishee orders are so much fewer than Scottish arrestments. On the whole therefore, albeit with considerable regret in view of the simplicity of the proposal, we provisionally reject flat rate fees.

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[1] See para 2.36 above.

[2] See para 3.35 above, Table B. . We shall discuss in a forthcoming Discussion Paper whether an arrestment should be treated under Scots law as attaching funds held by the arrestee in branches outside Scotland.

3.38 Sliding scale fee. Having rejected claims based on work actually done and flat rate statutory fees, we provisionally propose a system of sliding scale fees. In our view, a fair system of charging fees should discriminate as between institutions with differing sizes of branch networks upon the view that the costs should be roughly proportionate to the size of the branch networks.

3.39 The formulation of the sliding scale and the level of fees within it is no easy task having regard to the different sizes of financial institution to which the scale would apply ranging from a merchant bank with one office to a clearing bank with several hundred offices. The scale is bound to be arbitrary to some extent. We suggest however that there should be a basic fee applying to an arrestee with one office or a small number of offices not exceeding (say) 20 offices. For simplicity, the basic fee would be both the only fee chargeable by an arrestee with 20 or fewer offices and also the first band in the sliding scale applicable to arrestees with more than 20 offices. The basic fee would be higher than the fee for each additional band of 20 offices. If possible it should be at a level which fairly recompenses (1) the clearing banks for their head office costs and the costs of about 20 branches and (2) an arrestee with between one and 20 offices.

3.40 We have seen[1] that the average cost per arrestment incurred by the head office of a clearing bank is within the range of £4.50p to £6 and that the average cost per arrestment of a branch office of a clearing bank is within the range of 7p to 10p, or £1.40p to £2 for 20 branch offices. On the basis of economic

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[1] See para 3.34 above.

cost, the first band of the sliding scale might be within the range of £5.90p to £8. This might however be regarded as too low for a small arrestee unused to receiving arrestments. We suggest therefore that the basic fee might be about £10. The clearing banks' overall fee would not be excessive since we suggest that the fee for additional branches would be below the economic cost.

3.41 As regards the additional bands of 20 branches, we suggest that the fee should be fixed at about 5p per branch office or £1 for 20 branches. This is lower than the lowest average cost per arrestment incurred by the clearing bank branches. It would seem to us however to be fair to the clearing banks having regard to the considerations mentioned in para. 3.31.

3.42 On the basis that the sliding scale should provide a basic fee of £10 for the first band of 20 branches, and an additional one pound for each additional band of 20 branches or part thereof, the fees which would be chargeable by the four clearing banks are shown in Table C, on the assumption that an arrestment would attach credit balances and moveable property in offices furth of Scotland as well as within Scotland.

TABLE C

EXAMPLE OF POSSIBLE SLIDING SCALE FEES FOR ARRESTEES AS APPLIED TO THE FOUR SCOTTISH CLEARING BANKS (INCLUDING BRANCHES FURTH OF SCOTLAND)

	(1) Basic fee (for first 20 offices offices)	(2) No of offices	(3) No of reckonable offices after first 20 offices	(4) Additional fee (£1 per 20 reckon-able offices)*	(5) Total fee [(1) plus (4)]
Bank of Scotland	£10	515	480	£24	£34
Clydesdale Bank plc	£10	342	320	£ 16	£26
Royal Bank of Scotland plc	£10	826	800	£ 40	£50
TSB Scotland plc	£10	268	240	£ 12	£22
		1,951	1,840		£132

*Note: ie. excluding the last group of offices where that group has less than 20 offices.

At page 75, in line 5, the reference to £10 (as the average arrestment fee) has been rendered out-of-date by the Act of Sederunt (Fees of Sheriff Officers) 1990 (SI 1990/381) and the Act of Sederunt (Fees of Messengers-at-Arms) 1990 (SI 1990/379) which came into force on 2.4.1990. The average fee is likely now to be significantly higher.

It will be seen that the aggregate of arrestees' fees for "global" arrestments served on all four clearing banks affecting all branches, including those furth of Scotland, would be £132. We understand that the average amount of a fee for a sheriff officer serving an arrestment is about £10. In addition the instructing fee of the solicitor has to be added. The effect is likely to be to make pursuers and creditors or their agents think twice before instructing arrestments against all four clearing banks.

3.43 Sliding scale fee excluding funds located furth of Scotland. As we shall be discussing in a forthcoming Discussion Paper, the weight of authority in the present law favours the view that, as a general rule, an arrestment served at an arrestee's place of business within Scotland effectually attaches debts and moveable goods due to the defender or common debtor which are located furth of Scotland.[1] Although for some purposes of private international law, such as the determination of the proper law of the banking contract,[2] a credit balance in a current or deposit account with a bank is located at the branch which holds and administers the account and where the balance is primarily payable, nevertheless an arrestment can attach funds which are located outside Scotland for these purposes. The result is that those Scottish clearing banks having branches outside Scotland include those branches in a search for attached funds pursuant to an arrestment. In principle other arrestees should do the same even if the arrestee has only one place of business in Scotland and a large network outside Scotland. In a forthcoming Discussion Paper we shall seek views on a provisional proposal that an arrestment should not in future attach debts and moveable goods located outside Scotland.

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[1] See eg Graham Stewart, p 34; Skardon (John Dunn's Executor) v Canada Investment and Agency Co Ltd (unreported; February 1898) (noted Wallace and McNeil, p 205 fn 3); McNairn v McNairn 1959 SLT (Notes) 35; O'Brien v A Davies & Son Ltd 1961 SLT 85.

[2] eg Libyan Arab Foreign Bank v Bankers Trust Co [1989] QB 728 at p 746 per Staughton J.

3.44 Such a change in the law would have the incidental effect of reducing the number of branches of the four Scottish clearing banks covered by a search for arrested funds from 1,951 branches to 1,590 branches and as a consequence reduce the aggregate of the scale fees (at the levels suggested above) from £132 to £115. This emerges from a comparison of Table C above with Table D below, which excludes branches outside Scotland from the calculations. We think nevertheless that aggregate fees of £115 would still suffice to make pursuers and creditors think twice before instructing arrestments in the hands of all four Scottish clearing banks.

TABLE D

EXAMPLE OF POSSIBLE SLIDING SCALE FEES FOR ARRESTEES AS APPLIED TO THE FOUR SCOTTISH CLEARING BANKS (EXCLUDING BRANCHES FURTH OF SCOTLAND)

	(1) Basic fee (for first 20 offices)	(2) No of offices	(3) No of reckonable offices after first 20 offices offices	(4) Additional fee (£1 per 20 reckon-able offices)*	(5) Total fee [(1) plus (4)]
Bank of Scotland plc	£10	500	480	£24	£34
Clydesdale Bank plc	£10	342	320	£ 16	£26
Royal Bank of Scotland plc	£10	480	460	£ 23	£33
TSB Scotland plc	£10	268	240	£ 12	£22
		1,590	1,500		£115

*Note: ie excluding the last group of offices where that group has less than 20 offices

3.45 Statutory fees for arrestments limited in effect to specified branches. So far we have been considering fees for "global" or "blanket" arrestments attaching funds and property throughout the branch networks of the arrestee institution. We think however that if a creditor limits the scope of an arrestment to funds and property held at particular offices of the arrestee institution which are specifically identified in the arrestment schedule, then the fee chargeable by the arrestee should be determined by applying the basic fee and sliding scale only to the offices so specified. We invite views on this proposal.

3.46 We would emphasise again that at this stage we are primarily concerned to devise legislation enabling the competent authorities to prescribe fees of appropriate amounts. It would however be helpful to us in preparing our report with draft legislation (and may ultimately be helpful to Government in considering that draft legislation) to obtain views on what the appropriate level of fees should be as well as on the mode of regulating such fees.

Our proposals

3.47 We propose:

(1) **The statutory fee chargeable by deposit-taking institutions for complying with arrestments should take the form of a sliding scale fee rather than a flat rate fee.**

(2) **Where the arrestment attaches the whole debts and goods due by the arrestee to the defender or common debtor, the sliding scale fee should take the form of**

(a) a fee of £10 chargeable by an arrestee having not more than 20 offices; and

(b) in any other case, a basic fee of £10 for the first 20 offices together with an additional fee of £1 for every additional whole number of 20 offices.

In this and the next paragraph, an "office" means a place of business of the arrestee institution at which deposit-taking services are rendered.

(3) Where the arrestment is limited in its effect to the attachment of credit balances in accounts and goods held or administered at offices specified in the schedule of arrestment, the fees mentioned in the preceding paragraph should apply in relation only to the offices so specified.

(Proposition 5).

(d) Amendment of scale fees by statutory instrument

3.48 We think that the Lord Advocate, (as the Government Minister having responsibility for oversight of the law of diligence) should have power to vary the scale fees fixed by statute. It may be that the fees would be required to be raised from time to time to keep pace with inflation.

3.49 On the other hand, technological changes in banking practices might enable the clearing banks and other financial institutions to trace accounts much more rapidly than they do at present with the effect that the prescribed fees might become too high viewed as a recompense for work done. We suggest that the

statutory power to vary the scale fees should take account of this possibility.

3.50 We propose

(1) **The Lord Advocate should have power to make an order by statutory instrument varying the level of the statutory fees for arrestees from time to time.**

(2) **In exercising this power, the Lord Advocate should be required to have regard not only to the effect of inflation on the level of fees, but also to any downward changes in the level of expenses actually incurred by arrestees in complying with arrestments, as a result for example of improvements in computer technology facilitating the tracing of customers' accounts.**

(Proposition 6).

(e) Specification of higher scale fees by statutory order; tender of fee

3.51 To protect arrestees, we think that the tendering of an appropriate fee should be a pre-condition of a valid and effectual arrestment. It would be unrealistic and unfair simply to give arrestees a right to raise an action to recover unpaid fees: the general rule should be "no fee, no arrestment". Where the arrestment schedule specified the offices which would be affected by the arrestment, it would be possible and easy for the officer of court (messenger-at-arms or sheriff officer) to tender the correct amount of the fee when executing the arrestment. In the

case of a scale fee system, however, difficulty could arise in requiring an officer of court serving a global or unlimited arrestment to tender the correct amount of any additional scale fee because he would not necessarily know the number of offices in the branch network of the arrestee institution, and would have to rely on information furnished by an employee of that institution. This would have the effect of making the provisions on tender of fees complicated and difficult to operate in some cases. Thus it would be necessary to enact rules on the following lines:-

(1) If the officer of court (messenger-at-arms or sheriff officer) is reasonably satisfied that he has accurate information as to the number of offices of the arrestee institution which would be affected by the unlimited arrestment, he must tender the scale fee appropriate to that number on or before executing the unlimited arrestment.

(2) If the officer of court is not so satisfied, he must, before executing the unlimited arrestment, request a responsible employee or representative of the arrestee institution to give him information as to the number of offices which would be affected by the unlimited arrestment.

(3) If that information is given, and is accepted by the officer of court, he must, on or before executing the arrestment, tender the scale fee appropriate to the number of offices which, according to that information, is appropriate.

(4) If that information either:

(a) is not given; or

(b) is given but the officer of court has reasonable cause to dispute the accuracy of the information,

the officer of court may execute an arrestment only if he tenders or has tendered the basis fee in the sliding scale on or before the time of execution. The officer of court should record in his certificate of execution of the arrestment the reason why he had not tendered more than the basic fee.

(5) If in accordance with sub-para (4) above, the officer of court tenders only the basic fee, the arrestee should be entitled to claim from the arrester and the officer of court payment of any unpaid balance of the fee which he believes is due to him.

(6) An arrestment served on a deposit-taking institution should be treated as valid and effective only if:

(a) in the case of an unlimited arrestment, the officer of court tenders the arrestee's fee in accordance with the foregoing rules;

(b) in the case of an arrestment limited in its effect to funds and property held or administered at particular offices specified in the arrestment schedule, the officer of court tenders the arrestee's fee appropriate to the number of offices so specified.

3.52 We reject rules on the foregoing lines because they would be too complicated and difficult to operate. In computing the appropriate fee, an officer of court should not be required to rely on information supplied by an employee of the arrestee as to the number of the arrestee's offices. Accordingly we think that provision should be made by statute (variable by statutory instrument) fixing a flat rate fee applicable to deposit-taking institutions coupled with a provision enabling the Lord Advocate as the Minister responsible for oversight of diligence (or possibly the Court of Session as the rule-making authority empowered to fix the level of judicial expenses) to make an order by statutory instrument fixing a higher level of fee for each deposit-taking institution, having more than 20 offices, which applies to the Lord Advocate (or Court of Session) to have a higher fee fixed. The higher fee would be fixed by reference to the sliding scale. Deposit-taking institutions should be given an opportunity to apply for the fixing of a higher fee. The statutory order would be subject to variation, and deposit-taking institutions would be entitled to apply for inclusion in the order, or for variation of the fee, depending on changes in the number of offices in their branch network. Since the scale fees would depend on bands of 20 branch offices, it seems unlikely that variations of the order would be required very often.

3.53 We propose:

(1) **The Lord Advocate should have power to make an order by statutory instrument fixing higher fees to be chargeable by arrestees specified in the order, (being arrestees having more than 20 offices which would be affected by an**

unlimited arrestment), in accordance with the statutory sliding scale referred to in Proposition 5(2) above.

(2) Before making such an order, the Lord Advocate should give deposit-taking institutions an opportunity to apply to him for the fixing of a higher fee.

(3) The Lord Advocate should have power to vary any fee fixed by the order mentioned in para. (1) above either:

(a) of his own accord after giving a deposit-taking institution affected by the variation an opportunity to make representations; or

(b) on the application of a deposit-taking institution for variation of the fee.

(4) A deposit-taking institution not specified in the order should be entitled to apply to the Lord Advocate for variation of the order by way of specifying a higher fee for that institution.

(5) A deposit-taking institution whose fee is fixed by the order should be under a duty to inform the Lord Advocate of any change in the number of its offices which, having regard to the statutory sliding scale of fees, would have the effect of entitling the institution to a lower fee than that specified in the order. Views are invited on what sanction should be provided for wilful breach of this duty.

(6) An officer of court would be bound to tender the appropriate fee on or before executing an arrestment.

(Proposition 7).

(f) Recovery of arrestee's fee and other arrestment expenses by creditor from common debtor

3.54 The arrestee's fee should be treated as part of the expenses of executing the diligence. It should therefore in principle be recoverable by the arrester from the debtor in accordance with the normal rules on the recovery of diligence expenses. Although it is only incidentally relevant to the main subject matter of this Discussion Paper, it is necessary to set out the law in some detail since it is in some respects not free from doubt.

3.55 We deal first with the expenses of arrestments in pursuance of warrants for diligence on the dependence and for diligence in execution. First, under the present law it is clear that the expenses of an arrestment on the dependence of an action cannot be decerned for as part of the expenses of process in that action.[1] Second, there is a view that the expenses of an arrestment on the dependence are not recoverable at all by the creditor from the debtor[2] but it is thought that the cases cited do not support that view.[3] In our Discussion Paper No 84, we have provisionally proposed that the court should have a discretionary power to award the expenses of an arrestment on

[1] Graham Stewart p 133; Maclaren Expenses p 116.

[2] Graham Stewart p 133.

[3] See our Discussion Paper No 84 on Diligence on the Dependence and Admiralty Arrestments (December 1989) para 2.124.

the dependence.[1] Third, 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. (Previously there was doubt in some cases whether an arrestment secured the expenses of the arrestment). Fourth, the creditor is entitled at common law to recover the expenses of an arrestment in execution.[2] Fifth, previously there was doubt whether the expenses of an arrestment in execution were secured by an arrestment. This doubt has been removed by the provisions of the Debtors (Scotland) Act 1987, s 93(2) referred to above.

3.56 Sixth, it is probably the accepted view that the expenses of an arrestment which attaches nothing are not recoverable from the debtor.[3] So far as we are aware, despite the large number of abortive arrestments served, in practice the arrester never attempts to recover the expenses of service. We have not, however, traced any direct authority which clearly states (or contradicts) such a rule, and it may be that there is some doubt about this.[4] We think that any doubt should be removed by a statutory provision to the effect that the expenses of an arrestment attaching nothing are not recoverable from the common debtor. Such a provision goes somewhat beyond the topic of statutory fees for arrestees. We think, however, that it would not be politic to provide by statute that only the statutory fee chargeable by arrestees is not recoverable by the creditor from the debtor in the case of an abortive arrestment, lest the

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1 Ibid, Proposition 10(1) at para 2.130.

2 Graham Stewart, p 133.

3 In our Discussion Paper No 84, para 2.125, we assumed that this view correctly represented the law.

4 The Wages Arrestment Limitation (Scotland) Act 1870, s 2, (now repealed) provided that the expenses of executing an arrestment of wages are not chargeable against the debtor unless the arrestment recovers a sum larger than those expenses. This, however, is not decisive as to the common law rule partly because statutes are not aids to the interpretation of the common law and partly because the mischief struck at by the 1870 Act, s 2, might have been cases where wages were attached but less than the amount of the arrestment expenses.

implication is raised that the other expenses connected with the service of an arrestment are so recoverable.

3.57 As regards arrestments executed in pursuance of summary warrants for the recovery of rates, taxes and community charges (and certain associated penalties[1]) it is expressly provided by statute that:

> "the sheriff officer's fees, together with the outlays necessarily incurred by him, in connection with the execution of a summary warrant shall be chargeable against the debtor".[2]

Clearly, the proposed statutory fee chargeable by an arrestee to the creditor would be an outlay incurred by the sheriff officer. No exception is made from the foregoing provision for the case of arrestments served in pursuance of a summary warrant which have not attached any funds or property belonging to the debtor. There is no doubt that where the sheriff officer uses an arrestment on the instructions of the creditor public authority, the sheriff officer's fees will be chargeable against that authority. The foregoing provision could possibly, but in our view erroneously,

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[1] See Abolition of Domestic Rates Etc (Scotland) Act 1987, s 17(10) and (11)(civil penalties for failure to provide information, or for giving false information to a community charge registration officer). Civil penalties incurred in connection with taxes (see eg Taxes Management Act 1970, ss 93, 95 and 98; Finance Act 1985, ss 13 and 15) are not recoverable by way of summary warrant diligence.

[2] Local Government (Scotland) Act 1947, s 247A(1) (inserted by the Debtors (Scotland) Act 1987, Sch 4, para 1) (recovery of rates); Taxes Management Act 1970, s 63A(1) (inserted by the 1987 Act, Sch 4 para 2) (Inland Revenue taxes); Car Tax Act 1983 Sch 1, para 3(5) (inserted by the 1987 Act, Sch 4, para 3); Value Added Tax Act 1983 Sch 7, para 6(7) (inserted by 1987 Act, Sch 4, para 4); Abolition of Domestic Rates Etc (Scotland) Act 1987, Sch 2, para 8(1).

be construed as making it competent for the creditor authority to recover from the defaulter the fees and outlays, not only in respect of arrestments which attach some funds or goods but also for arrestments which attach nothing. It might on the other hand be argued that where an arrestment is competently laid, but attaches nothing, the summary warrant is not "executed" within the meaning of the statutory provision: if it attaches nothing, it is ineffectual, imposing no nexus and having no legal effects (other than entitling the arrestee to his new statutory fee) and in that sense arguably the warrant is not "executed". The matter is not however entirely free from doubt.

3.58 Whatever the true meaning and effect of that provision, we doubt whether as a matter of legal and social policy, it would be right for a public authority creditor recovering arrears of fiscal debts or associated penalties, which had laid "fishing arrestments" in the hands of a large number of arrestees, to be entitled to recover from the defaulter the sheriff officer's fees and outlays incurred in executing those arrestments which attached nothing. Such an entitlement would be inconsistent with the practice which is followed in the case of arrestments laid in pursuance of warrants for diligence securing ordinary private law debts, and would confer on such public authorities a privilege which appears exorbitant. The provision has its origins in provisions in a draft Bill prepared by us,[1] which was used as a precedent for the community charge provisions. As a matter of public record, we may observe that in framing these provisions, we did not intend that they should confer on public authorities a privilege of the kind just described, and there is no evidence apparent to us that the Government (or Parliament) in adopting (or enacting) our suggested provisions, had any different intention. The problem

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[1] Report on Diligence and Debtor Protection Scot Law Com No 95 (1985), vol 2, Appendix A, draft Debtors (Scotland) Bill, Sch 5, paras 1 to 7.

having now been identified, we seek views on whether it should be made clear by statute that where in pursuance of a summary warrant a public authority executes arrestments which attach nothing, the sheriff officer's fees exigible, and outlays incurred, in connection with such an arrestment should not be recoverable by the creditor from the defaulter. It would not suffice to limit such a provision to the proposed statutory fees for arrestees since that would raise the implication that fees and other outlays of sheriff officers incurred in executing wholly abortive arrestments were intended to be recoverable from defaulters.

3.59

(1) To clarify the common law, should it be provided by statute that the expenses of an arrestment executed in pursuance of a warrant for diligence in common form which attaches nothing are not recoverable by the arresting creditor from the common debtor?

(2) To clarify the enactments relating to the recovery by a public authority from a tax, rates or community charge defaulter of the sheriff officer's fees and outlays incurred in executing a summary warrant, should those enactments be amended to ensure that they do not apply to the expenses of an arrestment which attaches nothing?

(Proposition 8).

(g) Exemptions from charging of fees?

3.60 It is for consideration whether any classes of arrestment should be exempted from the proposed rules on arrestee's fees.

3.61 Small debts? One possibility might be to exclude arrestments securing debts of a small or very small amount. We suggested above,[1] however, that since the amount of work involved in complying with an arrestment does not vary with the size of the debt which the arrestment secures, the arrestee's fee should be the same whether the debt were small or great. It would be inconsistent with this view to exclude any debts on account of their small amount.

3.62 Arrestees with few offices ? Another possibility would be to exclude deposit-taking institutions which have only one office or less than a prescribed number (say 10 or 20) offices on the ground that the amount of work involved does not justify the charging of a fee. It seems clear however that a deposit-taking institution with one office or few offices would incur some administrative and clerical expenses in complying with an arrestment. In such a case, these institutions may not have a well-used standing procedure for dealing with arrestments received and the disruption to the work of a relatively small staff by the unfamiliar task of complying with a single arrestment may be relatively greater than in the case of a larger institution with permanent administrative arrangements geared for that purpose. The prescribed number of offices forming the threshold for the charging of fees would necessarily be arbitrary and we think that arbitrary rules should be kept to a minimum. In our provisional

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[1] Para 3.30.

view, the small number of offices should be relevant only to the scale of fees chargeable by the arrestee-institution but should not be a ground for excluding such an institution from the right to charge a fee.

3.63 Fiscal debts? In some respects, fiscal debts (such as arrears of taxes, rates and community charges, and civil penalties connected with such fiscal debts enforceable in the same manner, ie penalties for failure to provide information to a community charge registration officer[1]) have certain privileges in the domain of enforcement of debt by diligence. It is for example not competent for the courts to make time to pay directions or time to pay orders in respect of such fiscal debts and penalties (ie orders giving tax, rates or community charge defaulters an extension of time to pay in a lump sum or by instalments free of the immediate threat of diligence).[2] Again the Inland Revenue still have a preference for payment of certain taxes out of other people's diligences,[3] and some fiscal debts have preferences in bankruptcy sequestrations and liquidations.[4] Moreover the public authorities recovering arrears of rates, taxes and community charges may obtain summary warrants (authorising inter alia arrestment) on the basis of a certificate of arrears without the

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[1] Abolition of Domestic Rates Etc (Scotland) Act 1987, s 17(10) and (11): s 17(11) provides that the civil penalty "shall be a debt due to the regional or islands authority, recoverable by them as such as if it were arrears of community charges...".

[2] See Debtors (Scotland) Act 1987, ss 1(5)(d) to (f) and 5(4)(c) to (f) both as amended by the Abolition of Domestic Rates Etc (Scotland) Act 1987, s 33.

[3] Taxes Management Act 1970, s 64 as amended by the Finance Act 1989, s 155: see Scot Law Com No 95 (1985) Recommendation 7.19 (para 7.106) recommending aboliton of this provision as originally enacted. Our recommendation for aboliton of the comparable provision for rates was implemented by the Debtors (Scotland) Act 1987, s 74(4) and Sch 8. See generally Maher and Cusine, para 8.17.

[4] Bankruptcy (Scotland) Act 1985, s 51 (1) and (2) and Sch 3; Insolvency Act 1986, s 386 and Sch 6.

need for a court action.[1]

3.64 On the other hand, the recent legislative trend has been towards restricting the extent of privileges for fiscal debts.[2] Moreover the arguments favouring such privileges,[3] such as that the public authorities recovering arrears of fiscal debts do not choose their debtors, do not seem to us to warrant a rule conferring on arrestments securing fiscal debts immunity from the charging of fees by arrestees. We note that no such immunity applies either to fees for garnishees complying with garnishee orders securing fiscal judgment debts in England and Wales[4] or fees for employers complying with earnings arrestments securing fiscal debts in Scotland.[5]

3.65 Arrestments rendered ineffectual by bankruptcy proceedings? Under the legislation in England and Wales providing for fees for garnishees, it is provided that the statutory fee may

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[1] See the enactments referred to at para 3.57, fn 2 above.

[2] The local authorities' preferences for unpaid rates and the Inland Revenue's preferences for unpaid income tax, corporation tax and capital gains tax have been abolished by exclusion from the provisions referred to at para 3.60 fn 4 above. The remaining preferences relate to those fiscal debts where the debtor may be regarded as a collector on behalf of the state, eg VAT, car tax and gaming duties and certain social security contributions.

[3] These are canvassed and criticised in our Report on Bankruptcy and Related Aspects of Insolvency and Liquidation Scot Law Com No 68 (1982) para 15.3 ff and in the Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558, Chapter 32, (chairman, Sir Kenneth Cork).

[4] See enactments in Appendix A.

[5] Debtors (Scotland) Act 1987, s 71.

not be deducted or retained by the garnishee if by reason of certain provisions of the Insolvency Act 1986[1], the creditor is not entitled to retain the benefit of the attachment.[2] Under the Insolvency Act provisions, where a creditor has attached debts due to a debtor individual or company, and subsequently the individual is adjudged bankrupt or the company is wound up, the creditor is not entitled to retain the benefit of the attachment against the official receiver or trustee of the bankrupt's estate or the liquidator of the company, unless the creditor has completed the attachment before the commencement of the bankruptcy or winding up.[3]

3.66 Under the corresponding Scottish provisions, however, which render arrestments ineffectual to create a preference for the arrester where sequestration in bankruptcy or winding up of a company occurs within 60 days after the execution of the arrestment,[4] the arrester is entitled to claim the expenses of executing his arrestment out of the arrested estate,[5] notwithstanding that his arrestment has been rendered ineffectual. Since the fees chargeable by the arrestee would be part of the expenses of the arrestment, it follows that in principle the arrester should be entitled to claim them along with other arrestment expenses in subsequent sequestration or liquidation proceedings against the common debtor. We do not see why the fees of the arrestee should not be chargeable by reason only of the fact that the arrestment is subsequently rendered ineffectual in a question with the trustee in bankruptcy or liquidator. The

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[1] Insolvency Act 1986, s 183 (companies) and 346 (individual bankrupts).

[2] Supreme Court Act 1981, s 40A(2); County Courts Act 1984 s 109. See Appendix A.

[3] Idem.

[4] Bankruptcy (Scotland) Act 1985, s 37(4); Insolvency Act 1986, s 185.

[5] Bankruptcy (Scotland) Act 1985, s 37(5); Insolvency Act 1986, s 185.

purpose of the statutory rules is to preserve equality among the general body of creditors, including those whose arrestments are "cut down" by subsequent insolvency proceedings, and there seems to be no good reason to provide an exception to the ordinary rules on expenses in order to penalise an arrestee for the benefit of the general body of creditors.

3.67 Statutory instruments excluding institutions?. We have already noted[1] that in England and Wales the Lord Chancellor is empowered to make an order by statutory instrument excluding institutions described in the order from the power to charge fees for complying with garnishee orders[2] but that the power has never been exercised. We do not think that a corresponding power is necessary in Scotland.

3.68 We propose

(1) **No exemptions from the statutory fees for deposit-taking institutions complying with arrestments should be provided in respect of small debts, or of the small number of the institution's places of business affected by the arrestment, or of fiscal debts or of cases where an arrestment is rendered ineffectual by subsequent insolvency proceedings against the common debtor.**

(2) **No provision should be made for subordinate legislation excluding specified classes of deposit-taking institution from the power to charge fees for complying with arrestments.**

(Proposition 9).

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[1] See para 2.39 above

[2] Supreme Court Act 1981, s 40A(4)(c); County Courts Act 1984 s 109(4)(c).

(5) Disclosure and confidentiality

3.69 As we indicated above,[1] it is the practice of the Scottish clearing banks to preserve confidentiality as to whether an arrestment on the dependence laid in their hands has attached any funds and, if so, what amount, but to disclose that information if the arrestment is in execution or its equivalent, an arrestment on the dependence converted by decree for payment into an arrestment in execution. We also pointed out that there are conflicting views and doubts whether a disclosure following an arrestment in execution is a breach of confidentiality, and indeed whether the banks are under a duty to disclose.

3.70 Whatever the true effect of the common law may be, we think that the present practice is sensible and practical. Presumably in most cases the common debtor would authorise the arrestee bank to disclose the funds arrested or himself disclose that information, and indeed give a mandate for paying those funds without furthcoming or himself pay the funds, all to prevent him incurring further liability for the expenses of an action of furthcoming. Where, however, the common debtor refuses or delays in authorising disclosure or payment, the arrestee as well as the common debtor may be sued in an action of furthcoming and therefore the arrestee has an interest to disclose the existence (if any) and amount of the funds and property arrested. Since the arrester can compel disclosure in an action of furthcoming, there is no good reason why the arrestee should not

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[1] See paras 2.6 and 2.7 above.

be entitled to make the disclosure to the arrester before such an action is raised. It would, in our view, be absurd to require an arrester to raise an action of furthcoming for the sole purpose of discovering that no funds or property had been attached by the arrestment.

3.71 We suggest that that interest should be treated by law as sufficient to override any duty of confidentiality which a bank or other arrestee may owe to the common debtor. The legislation should not be confined to deposit-taking institutions but should extend to any arrestee, such as a firm of solicitors, in whose hands an arrestment in execution has been laid. We note that the Report of the Review Committee on Banking Services: Law and Practice[1] recommended a statutory codification and consolidation of the law on the banker's duty of confidentiality based on the Tournier exceptions and, that in the proposed legislation the third Tournier exception ("where the interests of the bank require disclosure"), would include inter alia cases of "disclosure to a court in the event of legal action to which the bank is a party".[2] This does not seem wide enough to cover arrestments in execution prior to the raising of an action of furthcoming. Moreover we think that it should suffice that the arrestee would have a right (or immunity from damages for breach of confidence) to disclose to the arrester the existence (or non-existence) and extent of any funds and property attached, rather than a duty owed to the court or arrester. The alternative would be to impose on the arrestee a duty of disclosure to the arrester which would presumably be backed by the sanction of damages. We invite views on this matter.

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[1] (1989) Cm 622, para 5.29 ff, especially paras 5.38 to 5.43.

[2] Ibid para 5.42.

3.72 We propose:

(1) It should be expressly provided by statute that where:

(a) an arrestment in execution or its equivalent (including an arrestment on the dependence of an action in which decree for payment has been granted and extracted) has been laid; and

(b) the arrestee discloses to the arrester whether or not funds and property have been attached by the arrestment, and the amount of those funds and the nature, value and extent of the property, or any of that information,

the disclosure should not be treated as a breach of any duty of confidentiality which the arrestee may owe to the common debtor with respect to those funds or that property.

(2) The foregoing proposals should apply to all arrestees owing a duty of confidentiality to a common debtor whether or not the arrestee is a deposit-taking institution.

(Proposition 10).

B. Reimbursement of expenses or statutory fees for arrestees other than deposit-taking institutions for complying with arrestments of non-maritime subjects

(1) The need for reform

3.73 If banks and other deposit-taking institutions who are arrestees are to be recompensed for expenses incurred in complying with an arrestment, it seems to us that in principle other arrestees should likewise be entitled to a measure of recompense for such expenses from the arrester, who should then be entitled to recover the expenses from the debtor as an element in the expenses of the arrestment.[1] Where, for example, an arrestment of the debtor's car is laid in the hands of a garage proprietor who has the vehicle for repair, or an arrestment attaches commercial goods of the debtor in a warehouse belonging to the arrestee, it does not seem right that the arrestee should be bound to keep the car or commercial goods free of charge in safe custody until the time comes when it is made furthcoming or the arrestment otherwise ceases to have effect. If the available space is limited, the arrestee might be put to considerable trouble and expense. In our view, the law should not impose a pecuniary burden on an "innocent" third party not concerned with the litigation or debt, simply because his duties arise from the need to comply with an arrestment.

3.74 It seems likely that the impact of an arrestment on an arrestee in possession of corporeal moveables belonging to the defender or common debtor will usually be different in practical terms from the impact on a bank or other deposit-taking institution. Normally the arrestment will not be a "fishing" arrestment, and the arrestee will generally not be concerned to trace whether he does in fact have goods in his possession

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[1] We are not here concerned with arrestments of ships and their cargo which are considered below.

belonging to the defender or common debtor. He will normally not have to cope with a large number of abortive arrestments. Nevertheless the arrestee may be put to considerable expense, as where valuable warehousing space occupied by the arrested goods is needed for the purposes of the arrestee's business, and alternative arrangements have to be made for the warehousing of other customers' goods which would otherwise have occupied the space taken up by the arrested goods.

3.75 While therefore the nature of the arrestee's duties in the case of arrestments of corporeal moveables will normally differ in practical terms from the duties of banks and other deposit-taking institutions, that does not seem to us to affect the principle that an arrestee should be entitled to claim recompense from the arrester for necessary expenses incurred in complying with an arrestment. We invite views on this provisional conclusion.

(2) Proposals for reform

3.76 Arrested pecuniary debts and incorporeal moveables. Where the thing arrested is a pecuniary debt due by the arrestee to the defender or common debtor, the arrestment will generally not cause the arrestee much inconvenience or expense.[1] The funds arrested simply continue to be held by the arrestee as part of his general funds which are not under any embargo. The arrestee is not liable to pay interest on the sum arrested to the defender or common debtor by reason only of the arrestment.[2] This suggests that recompense should take the form of a statutory fee rather than a claim for work actually done. If as we have proposed a sliding-scale fee were to be introduced for deposit-taking institutions consisting of a basic fee (of £10) plus additional fees related to the size of their branch network, then we suggest

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[1] See the remarks of Lord President Dunedin in Barclay Curle & Co Ltd v Sir James Laing & Co Ltd 1908 SC 82 at p 807.

[2] Glen Music Ltd v Glasgow D C 1983 SLT (Sh Ct) 26.

that the basic fee should be exigible by an arrestee who is not a deposit-taking institution. Incorporeal moveable property, such as arrested shares of incorporated companies, should be treated in the same way.

3.77 Arrested corporeal moveables. Where the thing arrested is a corporeal moveable, a fixed statutory fee would not appear appropriate at least as the sole measure of recompense. The necessary expenses incurred by arrestees would differ greatly according to the circumstances of the particular case. We suggest that the arrestee should be entitled (a) to receive the basic fee mentioned in the previous paragraph, and (b) if his actual necessary expenses exceeded that fee, to claim the excess of those expenses.

3.78 Abortive arrestment. We have considered whether in the case of arrestees who are not deposit-taking institutions, the statutory fee or excess claim should only be exigible by the arrestee if the arrestment has attached something in his hands. It may be that such an arrestee will rarely be concerned with tracing funds, unlike banks and other deposit-taking institutions. On the other hand, there is much to be said for a simple rule requiring the officer to tender a flat rate fee in order to cover possible minor expenses and preserve consistency with deposit-taking institutions.

3.79 Procedure in claim for expenses or tender of fee If as we suggest a statutory fee is to be exigible by the arrestee even in the case of abortive arrestments, the officer of court should tender the fee on or before laying the arrestment.

3.80 If the arrestment attached corporeal moveables and thereby caused expense to the arrestee, in the case of arrested corporeal moveables, the arrestee would claim any excess expenses above the statutory fee at or after the time when he relinquishes possession of the moveables which would be either (a) when the arrestment ceases to have effect (eg. on decree in the defender's favour extinguishing an arrestment on the dependence, or on payment of the debt secured by the arrestment, or on judicial recall or the arrester's abandonment of the diligence) or (b) when the goods are uplifted for sale in pursuance of a decree for sale in an action of furthcoming. The arrester should pay the claim unless he or the defender or common debtor (who should bear the ultimate liability, except where the arrestment is abortive) disputes the claim in which event the claim should be referred to the auditor of court for determination subject to an appeal to a judge (sheriff or Lord Ordinary).

3.81 Recovery of expenses by arrester from common debtor. The expenses of the arrestee should be treated as part of the expenses of the arrestment, payable by the arrester in the first instance but recoverable from the common debtor. If however a statutory fee were to be payable by the arrester to the arrestee even in the case of an arrestment attaching nothing, then that fee should not in principle be recoverable from the debtor. In other words the same solution should be adopted as for deposit-taking institutions.[1]

3.82 We seek views on the following.

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[1] See paras 3.54 to 3.59 above.

(1) Where an arrestment of a debt or property other than a maritime subject (a ship or cargo on board ship or some other maritime res) is laid in the hands of a person who is not a deposit-taking institution, the arrestee should in principle be entitled to recompense for necessary expenses incurred in complying with the arrestment.

(2) Where the thing arrested is a pecuniary debt or incorporeal moveable property (eg. shares), a fixed statutory fee should be exigible which it is suggested should be the same as the basic fee in the sliding scale for deposit-taking institutions.

(3) Where the thing arrested is a corporeal moveable or moveables, the arrestee should be entitled to payment of:

(a) the fixed statutory fee mentioned in the previous paragraph; and

(b) where appropriate, recompense for necessary expenses actually incurred so far as in excess of that statutory fee.

(4) The statutory fee should be exigible even if the arrestment does not attach anything

(5) Views are invited on the procedure for payment of the statutory fee and any excess claim set out in paras. 3.79 and 3.80 above.

(6) **As in the case of deposit-taking institutions, the statutory fee and excess claim should be recoverable by the arrester from the debtor, but any fee payable by the arrester for an arrestment attaching nothing (if exigible from the arrestee as proposed in para. (4) above) should not be recoverable from the debtor.**

(Proposition 11).

C. Reimbursement of expenses of third parties arising from arrestments of ships or of cargo on board ship

3.83 Types of arrestment of ships. Arrestments of ships present distinctive problems because of the distinctive rules on arrestments of ships. An arrestment of a ship is either:

(a) an arrestment in rem of the ship in an Admiralty action in rem to enforce a maritime lien; or

(b) an arrestment on the dependence of an Admiralty action in personam, or an arrestment in execution of decree in a personal action against the owner of the ship.

3.84 Exclusion of arrestments in rem from Discussion Paper. Arrestments in rem of ships and of other maritime subjects (eg cargo and freight) are excluded from this Discussion Paper because we are here concerned with recompense or fees for expenses incurred by a third party arrestee in complying with an arrestment, being an "innocent" third party who happens to hold funds or property of the defender or common debtor. In an arrestment in rem and an action in rem, there is no defender or common debtor and no third party arrestee properly so called.

The arrestment in rem and action in rem are special Admiralty processes directed against the ship herself, irrespective of her ownership, and enforcing a lien arising out of damage done to the ship or services (eg. salvage) rendered to the ship. The type of situation with which we are concerned in this Discussion Paper does not therefore arise.

3.85 Arrestments of ships securing personal debts. Arrestments of ships securing personal obligations of payment owed by the owner of the ship to the arrester more closely resemble ordinary arrestments of non-maritime subjects. There is, however, an important difference. An arrestment of a ship securing a personal debt of the owner of the ship is a "real diligence" in a procedural sense being directed against the ship herself and may be executed against the ship although she is in the possession of her owner (the defender in the personal action or debtor in a decree granted in such an action). By contrast, ordinary arrestments of non-maritime subjects are laid in the hands of a third party arrestee who is not concerned as a party to the action on the dependence of which the arrestment is laid or, as the case may be, as a debtor in the decree in the personal action on which the arrestment in execution proceeds. We are not concerned in this Discussion Paper with arrestments of ships in the possession of the defender or debtor since they do not involve "innocent" third parties.

3.86 "Innocent" third parties incurring expenses arising from the arrestment of a ship or her cargo securing personal debt. Nevertheless "innocent" third parties may incur expense arising from the arrestment of a ship. For example:-

(a) Where a ship belonging to the defender or debtor carrying the cargo of a third party is arrested and the third party incurs expense in discharging the cargo.

(b) Where a ship belonging to the defender or debtor is chartered to a third party and the ship is arrested for her owner's debt. The third party charterer may incur expenses involved in the detention of the ship and discharge of her cargo.

Where the thing arrested is the cargo on board the ship and not the ship herself, the arrestment is laid in the hands of the ship-master as representing the owner or charterer of the ship having possession of the cargo, and the expenses are incurred by the ship-owner in his capacity as arrestee who is not entitled to move the ship out of the jurisdiction with the cargo on board. Accordingly a third situation has to be considered.

(c) Where cargo on board ship is arrested for the debt of the cargo-owner, the ship-owner or charterer who is the arrestee may incur the expenses involved in the restriction of the movement of the ship and in the discharge of the cargo to allow the ship to sail.[1]

If banks and other deposit-taking institutions who are arrestees, and arrestees holding non-maritime subjects belonging to the defender or debtor, are to be recompensed for expenses incurred in complying with an arrestment, the question arises whether in principle the above-mentioned "innocent" third parties should not likewise be recompensed for such expenses, though technically they are not all arrestees?

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[1] Cf Svenska Petroleum AB v HOR Ltd 1982 SLT (Notes) 343.

3.87 Third party cargo-owner's expenses in discharging cargo from arrested ship. We have not traced any direct Scottish authority showing that a third party cargo-owner may claim expenses (eg for discharging cargo) from the arrester of the ship in which the third party's cargo was being carried at the time of the arrestment. In an English case, The Jogoo[1], an unsuccessful claim was made by a cargo-owner to have his expenses of discharging cargo on board an arrested ship treated as a prior claim analogous to the expenses of the Admiralty Marshal in the appraisement and sale of the ship. The cargo-owners intervened in an Admiralty action after the arrest of the ship and the court made an order allowing the discharge of the cargo prior to judgment and for appraisement and sale of the ship. The cargo-owners submitted that when a vessel has been arrested by proceedings in rem which confers a benefit on the res by enhancing its value, the cargo-owners should be reimbursed out of the proceeds of sale as a first charge on those proceeds.[2] Sheen J rejected this submission and held that the cargo-owners must pay for removal of their own cargo in the event of the contract of carriage not being completed by the shipowners.[3] He further observed that the cargo-owner's remedy was to make a claim for breach of contract against the shipowners for the damage which they suffered. He accepted counsel's submission[4] that the shipowners had repudiated the contract of carriage by failing to pay their creditors or to put up security in order to obtain the release from arrest of their vessel. The result was that the expenses of the cargo-owner had the same priority on the proceeds of sale as a substantive claim of damages for breach of

[1] [1981] 1 Lloyd's Rep 513.
[2] Ibid at p 515.
[3] Ibid at p 517.
[4] Idem.

the contract of carriage.[1]

3.88 The judgment in The Jogoo[2] provides persuasive authority in Scots law that where a ship is arrested, the cargo-owners in certain circumstances would have an action of damages against the ship-owners on the ground of their repudiation, or deemed repudiation, of the contract by failing to pay the debt claimed by the arrester or failing to have the arrestment timeously recalled on caution or consignation. The damages would include the cost of discharging the cargo. But in the case of an arrestment on the dependence (as distinct from an arrestment in execution) such a remedy would presumably only be available if the arrester's claim was ultimately upheld by the court. If the arrestment was laid on the dependence to secure a debt which eventually turned out not to be due, it is difficult to see on what grounds of legal principle the ship-owner defender could be deemed to have repudiated the contract of carriage entered into with the cargo-owner. In these circumstances, however, it might be held that the contract of carriage had been frustrated by the supervening arrestment.[3] In such a case, under Scots law (differing in this respect from English law) the cargo-owner would be entitled to recover from the ship-owner defender freight which had been paid in advance on the principle causa data causa non

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[1] D G Jackson Enforcement of Maritime Claims (1985) p 178.

[2] [1981] 1 Lloyd's Rep 513.

[3] Where the defender ship-owner did owe the debt secured by the arrestment, he could probably not invoke the doctrine of frustration since the event (the arrestment) making performance impossible would be treated as "self-induced", ie due to his own conduct or fault in failing to pay his debts or obtain recall of the arrestment. See however W W McBryde The Law of Contract in Scotland (1987) pp 352-354 on the uncertainty surrounding the law on self-induced frustration.

secuta.[1] Since he could not claim damages from the ship-owner defender, however, he would not be entitled to claim the expenses of discharging the cargo as an element in those damages.

3.89 Another possibility we have considered is whether the cargo-owners might have a claim in recompense for the redress of unjustified enrichment either against the arrester or against the owners of the ship. Since the cargo-owner is not an arrestee, the allowance of a claim in recompense for these expenses would not infringe any rule of the law on arrestment expenses to the effect that arrestees' expenses are not recoverable from the arrester. In The Jogoo[2] a claim in restitution (the corresponding branch of

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[1] Watson and Co v Shankland (1871) 10 M 142. In English law, freight and other payments in advance were not recoverable at common law if frustration of the contract supervened: Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] A C 32. The law was changed by the Law Reform (Frustrated Contracts) Act 1943 generally but in terms of s.2(5)(a), that Act does not apply "to any charter-party except a time charter-party or charter-party by way of demise, or to any contract (other than a charter-party) for the carriage of goods by sea".

[2] [1981] 1 Lloyd's Rep 513.

English law) was rejected[1] but Scots law stems from different roots and is more generous to unsolicited interveners than English law.[2] The question is whether recompense might be claimed on the basis that the discharge of the cargo benefited the arrester or the debtor ship-owners because when the ship was eventually sold after the cargo-owners had removed the cargo, the price received was higher than it would have been if the cargo had still been on board. The measure of recovery would be the extent of the enrichment not the cost of removing the cargo, but the two measures might yield the same result. There is however authority in our law that improvements to security subjects do not found a claim in recompense against the creditor holding the security, since the improvements merely broaden or enhance the value of the creditor's security but do not in the relevant sense enrich the creditor who never receives more than his debt out of the

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[1] Ibid at pp 516 and 517 where Sheen J remarked: "I will assume that one result of the discharge of the cargo was that when Jogoo was subsequently sold by order of the Court, the price paid was higher than it would have been if the cargo had still been on board. Even on that assumption the interveners have no claim against the mortgagees, because there is no principle of law which requires a person to contribute to an outlay merely because he has derived a material benefit from it", citing The Ruabon Steamship Co v London Assurance [1900] AC 6.

[2] Thus for example English law has no doctrine of negotiorum gestio.

proceeds of sale of the security subjects.[1] This authority seems apposite since discharge of cargo is in this context equivalent to an improvement of the value of the security subjects. On the other hand, the debtor ship-owner would be benefited since any enhancement of the value of the security would either go to the reduction of his debt or be received by him as excess proceeds of sale. There are, however, two possible impediments to a claim by the cargo-owner in recompense against the debtor. The first is that where the debtor is liable in damages (including the cost of discharge of cargo) for a deemed repudiation of the contract of carriage, a claim in recompense might well be excluded by the general (though not invariable) rule that recompense is a subsidiary remedy to be invoked normally only where the claimant had at the relevant time no other remedy.[2] The second possible impediment to a claim in recompense is that such a claim will generally not be upheld if the defender's enrichment is an incidental benefit arising from expense incurred by the claimant for his own benefit (in suo),[3] in this case the discharge of the cargo for his own benefit.

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[1] Selby's Heirs v Jollie (1795) Mor 13438; Soues v Mill (1903) 11 SLT 98 at p 100 per Lord Kyllachy; Trade Development Bank v Warriner and Mason 1980 SC 74 at pp 85, 98, 103-104, 107; Gloag Contract (2nd edn) p 330.

[2] Varney (Scotland) Ltd v Lanark TC 1974 SC 245.

[3] Fernie v Robertson (1871) 9 M 437 at p 442 per Lord Neaves; Rankin v Wither (1886) 13 R 903; Site Preparations Ltd v Secretary of State for Scotland 1975 SLT (Notes) 41; cf Varney (Scotland) Ltd v Lanark TC 1974 SC 245 at pp 251, 255, 260; Lawrence Building Co Ltd v Lanark C C 1978 SC 30 at pp 42, 43; 53 to 55.

3.90 A claim in recompense would be most needed, and probably would only be competent, where no claim for damages lay, ie (if the foregoing analysis is correct) where the defender-owner of the ship was successful in defending his action and the arrestment was regarded as frustrating the contract of carriage of the cargo. In this type of case, it would be difficult to argue that the defender-owner of the ship has been unjustifiably enriched by the cargo-owner's discharge of the cargo. The defender-owner of the ship would be liable on the principle causa data causa non secuta to restore the advance of freight but probably not liable in recompense for the expenses of discharge of the cargo.

3.91 We suggest that it is in this type of case, ie. where the arrester has used an arrestment on the dependence of an unsuccessful action, that the cargo-owner has, from the standpoint of legal policy and equitable considerations, the strongest claim to be given a right to recover from the arrester the expense of discharging the cargo.

3.92 Where, however, the cargo-owner has a claim for damages against the debtor-owner of the ship for his deemed repudiation of the contract of carriage, there is something to be said for leaving him to pursue his common law remedy. In such a case, the moral responsibility for meeting the expenses of discharge of the cargo may be thought to lie with the debtor rather than the arrester whose action has been ex hypothesi successful or who has arrested in execution. The result would be that the cargo-owner's claim would rank as an ordinary debt on the surplus proceeds of the judicial sale of the ship after deduction of the arrester's expenses of sale and satisfaction of the arrester's debt. The alternative, (which was rejected in The

Jogoo[1]) is to treat the expenses of discharge of the cargo as part of the expenses of sale and thus having priority over the arrester's claim but recoverable by the arrester out of the proceeds of sale. We invite views on this question.

3.93 We invite views on the following proposal and question.

(1) **Where a ship belonging to the defender carrying the cargo of a third party is arrested on the dependence of an unsuccessful action, and in consequence thereof the cargo-owner discharges the cargo, the cargo-owner should have a right to claim from the arrester the reasonable expenses incurred by him in discharging the cargo.**

(2) **Where a ship belonging to the debtor carrying the cargo of a third party is arrested on the dependence of a successful action or in execution of a decree, and in consequence thereof the cargo-owner discharges the cargo, should the cargo-owner's reasonable expenses in discharging the cargo:**

(a) **be treated as an element in a claim for damages against the debtor for his deemed repudiation of the contract of carriage of goods by sea (as may already be the position at common law); or**

(b) **found a claim by the cargo-owner against the arrester and be recoverable by the arrester from the debtor ship-owner as part of the expenses of diligence and as such rank pari passu with the other expenses of the judicial sale as a prior debt on the proceeds of that sale?**

(Proposition 12)

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1 [1981] 1 Lloyd's Rep 513: see para 3.87 above.

3.94 Ship chartered to third party arrested for owner's debt: expense of charterer. Where a ship is chartered to a third party and the ship is arrested for the owner's debt, similar considerations arise. If the arrestment were on the dependence of a successful action or in execution of a decree in such an action, the failure of the debtor to pay his debts or to have the arrestment recalled timeously on caution or consignation would (by parity of reasoning with The Jogoo[1]) be treated as a deemed repudiation of the charter party. The third party charterer, on this view, would be entitled to claim from the debtor the expenses of discharging the cargo as an element in his claim for damages for breach of the charter-party.[2] If, however, the debtor-owner of the ship was successful in defending the action on the dependence of which the arrestment was laid, the charterer would probably not have a claim against him in recompense.[3] Again the third party charterer would have no claim against the arrester.[4]

3.95 Where the charterer has a claim for damages against the debtor-owner of the ship which includes damages for discharging the cargo, the question arises whether that remedy should suffice or whether his expenses in discharging the cargo should be treated as part of the expenses of sale of the ship.[5]

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1 [1981] 1 Lloyd's Rep 513: paras 3.87, 3.88 above.

2 He would probably not have a claim in recompense: see para 3.89 above.

3 See para 3.90 above.

4 See para 3.89 above, page 110, fn 1.

5 See para 3.90 above.

3.96 We invite views on the following proposal and question.

(1) **Where a ship belonging to the defender and chartered to a third party is arrested on the dependence of an unsuccessful action, and in consequence thereof the charterer discharges the cargo, the charterer should have a right to claim from the arrester the reasonable expenses incurred by him in discharging the cargo.**

(2) **Where a ship belonging to the debtor and chartered to a third party is arrested on the dependence of a successful action or in execution of a decree, and in consequence thereof the charterer discharges the cargo,should the charterer's expenses in discharging the cargo:**

(a) **be treated as an element in a claim for damages against the debtor for his deemed repudiation of the charter-party (as seems already to be the position at common law); or**

(b) **found a claim by the third party charterer against the arrester and be recoverable by the arrester from the debtor ship-owner as part of the expenses of the diligence and as such rank with the other expenses of the judicial sale as a prior debt on the proceeds of that sale?**

(Proposition 13)

3.97 Cargo arrested on board ship: expenses of ship-owner or charterer. Where cargo on board ship is arrested for the debt of the cargo owner, the ship-owner or charterer may incur expense in discharging the cargo to allow the ship to sail and other expenses arising out of the restriction against moving the ship out of the territorial jurisdiction of the court with the cargo on board.[1] The law as to expenses applicable to this class of case appears to be the same as in the case of other arrestments of corporeal moveables in the hands of a third party. In other words, the arrestee must comply with the arrestment and is not entitled to claim reimbursement of his expenses from the arrester.

3.98 If, as we have provisionally proposed, the expenses of complying with an arrestment of corporeal moveables are to be recoverable by the arrestee from the arrester, we think that that proposal should in principle apply to a ship-owner or charterer who complies with an arrestment of cargo by discharging and warehousing the cargo. We cannot see any ground on which an exception should be made from the proposed new rule. We invite views on this conclusion.

3.99 We consider that where the arrester of a ship's cargo for the debt of the cargo owner is entitled to recover the expenses of the arrestment out of the proceeds of a judicial sale of the cargo, (ie. where the arrestment is on the dependence of a successful action or in execution of a decree, against the cargo owner), the arrester should be entitled to include in those expenses the expenses of the arrestee for which the arrester is liable as proposed above.

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[1] eg Svenska Petroleum AB v HOR Ltd 1982 SLT (Notes) 343.

3.100 The ship-owner or charterer arrestee may also have a contractual remedy against the owner of the cargo on the ground of a deemed repudiation of the contract of carriage by parity of reasoning with The Jogoo[1] at least in a case where the arrestment is either on the dependence of a successful action or in execution. But if the expenses of discharging the cargo were to be claimed by the arrestee from the arrester those expenses would not also be recoverable by the arrestee as an element in his claim for damages against the debtor-owner of the cargo. They would not be an element in his patrimonial loss because they would be recovered by the arrestee from the arrester. Likewise the debtor-owner of the cargo would not suffer double jeopardy. He would be either liable to the arrester under the arrester's right to reimbursement of arrestment expenses, or liable to the arrestee under the latter's contractual remedy of damages, but not liable under both heads of liability.

3.101 We invite views on the following proposals.

(1) **Where cargo on board ship is arrested for the debt of the cargo-owner and in consequence thereof the ship-owner or charterer discharges the cargo, the ship-owner or charterer should be entitled to claim from the arrester any expenses incurred by him in discharging the cargo and keeping the cargo in safe custody.**

(2) **If the arrestment were on the dependence of a successful action or in execution, those expenses paid by the arrester to the arrestee should be recoverable by the arrester from the debtor as part of the expenses of the diligence and as**

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[1] [1981] 1 Lloyd's Rep 513: see para 3.87 above.

such rank pari passu with the other expenses of the judicial sale as a prior debt on the proceeds of that sale.

(Proposition 14).

PART IV: SUMMARY OF PROVISIONAL PROPOSALS AND QUESTIONS

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

A. Arrestments served on deposit-taking institutions

Introduction of statutory fees for arrestees

1.

Where an arrestment is served in the hands of a deposit-taking institution within the meaning of the Banking Act 1987, the arrestee should in principle be entitled to a statutory fee, payable by the arrester in the first instance, for the administrative and clerical costs incurred in complying with the arrestment, subject to the constraints imposed by the need to retain an effective system of arrestments and to avoid the imposition on the court system of unnecessary or unjustifiable administrative costs.

(Para. 3.8)

Rejection of garnishee order procedure and compulsorily limited arrestments

2.

Legislation should not be introduced requiring that a pursuer or creditor desiring to lay an arrestment in the hands of a deposit-taking institution must either:

(a) present a special application to the court for a warrant of arrestment supported by an affidavit on the lines of the procedure in applications for garnishee orders in England and Wales; or

(b) specify in his schedule of arrestment the particular offices of the arrestee holding the funds or property which would be affected by the arrestment and to pay the arrestee a fee per office affected by the arrestment.

(Para. 3.24)

Fixed fees rather than claims for work actually done

3.

Recompense for deposit-taking institutions in respect of the administrative and clerical expenses incurred by them in complying with an arrestment laid in their hands should take the form of fees fixed by statute or statutory instrument rather than recompense claimed for work actually done.

(Para. 3.27)

Fees for abortive as well as successful arrestments

4.

The statutory fees due to deposit-taking institutions for complying with arrestments should be chargeable in respect

of arrestments which attach nothing as well as arrestments which are wholly or partly successful in attaching funds or goods.

(Para. 3.29)

Sliding scale fees

5.

(1) The statutory fee chargeable by deposit-taking institutions for complying with arrestments should take the form of a sliding scale fee rather than a flat rate fee.

(2) Where the arrestment attaches the whole debts and goods due by the arrestee to the defender or common debtor, the sliding scale fee should take the form of

(a) a fee of £10 chargeable by an arrestee having not more than 20 offices; and

(b) in any other case, a basic fee of £10 for the first 20 offices together with an additional fee of £1 for every additional whole number of 20 offices.

In this and the next paragraph, an "office" means a place of business of the arrestee institution at which deposit-taking services are rendered.

(3) Where the arrestment is limited in its effect to the attachment of credit balances in accounts and goods held or administered at offices specified in the schedule of

arrestment, the fees mentioned in the preceding paragraph should apply in relation only to the offices so specified.

(Para. 3.47)

Amendment of scale fees by statutory instrument

6.

(1) The Lord Advocate should have power to make an order by statutory instrument varying the level of the statutory fees for arrestees from time to time.

(2) In exercising this power, the Lord Advocate should be required to have regard not only to the effect of inflation on the level of fees, but also to any downward changes in the level of expenses actually incurred by arrestees in complying with arrestments, as a result for example of improvements in computer technology facilitating the tracing of customers' accounts.

(Para. 3.50)

Specification of higher scale fees by statutory order: tender of fee

7.

(1) The Lord Advocate should have power to make an order by statutory instrument fixing higher fees to be chargeable by arrestees specified in the order, (being arrestees having more than 20 offices which would be affected by an

unlimited arrestment), in accordance with the statutory sliding scale referred to in Proposition 5(2) above.

(2) Before making such an order, the Lord Advocate should give deposit-taking institutions an opportunity to apply to him for the fixing of a higher fee.

(3) The Lord Advocate should have power to vary any fee fixed by the order mentioned in para. (1) above either:

(a) of his own accord after giving a deposit-taking institution affected by the variation an opportunity to make representations; or

(b) on the application of a deposit-taking institution for variation of the fee.

(4) A deposit-taking institution not specified in the order should be entitled to apply to the Lord Advocate for variation of the order by way of specifying a higher fee for that institution.

(5) A deposit-taking institution whose fee is fixed by the order should be under a duty to inform the Lord Advocate of any change in the number of its offices which, having regard to the statutory sliding scale of fees, would have the effect of entitling the institution to a lower fee than that specified in the order. Views are invited on what sanction should be provided for wilful breach of this duty.

(6) An officer of court would be bound to tender the appropriate fee on or before executing an arrestment.

(Para. 3.53).

Recovery of arrestee's fee and other arrestment expenses by creditor from common debtor

8.

(1) To clarify the common law, should it be provided by statute that the expenses of an arrestment executed in pursuance of a warrant for diligence in common form which attaches nothing are not recoverable by the arresting creditor from the common debtor?

(2) To clarify the enactments relating to the recovery by a public authority from a tax, rates or community charge defaulter of the sheriff officer's fees and outlays incurred in executing a summary warrant, should those enactments be amended to ensure that they do not apply to the expenses of an arrestment which attaches nothing?

(Para 3.59)
No exemptions from charging of fees

9.

(1) No exemptions from the statutory fees for deposit-taking institutions complying with arrestments should be provided in respect of small debts, or of the small number of the

institution's places of business affected by the arrestment, or of fiscal debts or of cases where an arrestment is rendered ineffectual by subsequent insolvency proceedings against the common debtor.

(2) No provision should be made for subordinate legislation excluding specified classes of deposit-taking institution from the power to charge fees for complying with arrestments.

(Para. 3.68)

Disclosure and confidentiality

10.

(1) It should be expressly provided by statute that where:

(a) an arrestment in execution or its equivalent (including an arrestment on the dependence of an action in which decree for payment has been granted and extracted) has been laid; and

(b) the arrestee discloses to the arrester whether or not funds and property have been attached by the arrestment, and the amount of those funds and the nature, value and extent of the property, or any of that information,

the disclosure should not be treated as a breach of any duty of confidentiality which the arrestee may owe to the common debtor with respect to those funds or that property.

(2) The foregoing proposals should apply to all arrestees owing a duty of confidentiality to a common debtor whether or not the arrestee is a deposit-taking institution.

(Para. 3.72)

B. Reimbursement of expenses or statutory fees for arrestees other than deposit-taking institutions for complying with arrestments of non-maritime subjects

11.

(1) Where an arrestment of a debt or property other than a maritime subject (a ship or cargo on board ship or some other maritime *res*) is laid in the hands of a person who is not a deposit-taking institution, the arrestee should in principle be entitled to recompense for necessary expenses incurred in complying with the arrestment.

(2) Where the thing arrested is a pecuniary debt or incorporeal moveable property (eg. shares), a fixed statutory fee should be exigible which it is suggested should be the same as the basic fee in the sliding scale for deposit-taking institutions.

(3) Where the thing arrested is a corporeal moveable or moveables, the arrestee should be entitled to payment of:

(a) the fixed statutory fee mentioned in the previous paragraph; and

(b) where appropriate, recompense for necessary expenses actually incurred so far as in excess of that statutory fee.

(4) The statutory fee should be exigible even if the arrestment does not attach anything.

(5) Views are invited on the procedure for payment of the statutory fee and any excess claim set out in paras. 3.79 and 3.80 above.

(6) As in the case of deposit-taking institutions, the statutory fee and excess claim should be recoverable by the arrester from the debtor, but any fee payable by the arrester for an arrestment attaching nothing (if exigible from the arrestee as proposed in para. (4) above) should not be recoverable from the debtor.

(Para. 3.82)

C. Reimbursement of expenses of third parties arising from arrestments of ships or cargo on board ship

Third party cargo-owner's expenses in discharging cargo from arrested ship

12.

(1) Where a ship belonging to the defender carrying the cargo of a third party is arrested on the dependence of an unsuccessful action, and in consequence thereof the cargo-owner discharges the cargo, the cargo-owner should have a

right to claim from the arrester the reasonable expenses incurred by him in discharging the cargo.

(2) Where a ship belonging to the debtor carrying the cargo of a third party is arrested on the dependence of a successful action or in execution of a decree, and in consequence thereof the cargo-owner discharges the cargo, should the cargo-owner's reasonable expenses in discharging the cargo:

(a) be treated as an element in a claim for damages against the debtor for his deemed repudiation of the contract of carriage of goods by sea (as may already be the position at common law); or

(b) found a claim by the cargo-owner against the arrester and be recoverable by the arrester from the debtor ship-owner as part of the expenses of diligence and as such rank pari passu with the other expenses of the judicial sale as a prior debt on the proceeds of that sale?

(Para. 3.93)

Ship chartered to third party arrested for owner's debt: expenses of charterer

13.

(1) Where a ship belonging to the defender and chartered to a third party is arrested on the dependence of an unsuccessful action, and in consequence thereof the charterer discharges the cargo, the charterer should have a

right to claim from the arrester the reasonable expenses incurred by him in discharging the cargo.

(2) Where a ship belonging to the debtor and chartered to a third party is arrested on the dependence of a successful action or in execution of a decree, and in consequence thereof the charterer discharges the cargo, should the charterer's expenses in discharging the cargo:

(a) be treated as an element in a claim for damages against the debtor for his deemed repudiation of the charter-party (as seems already to be the position at common law); or

(b) found a claim by the third party charterer against the arrester and be recoverable by the arrester from the debtor ship-owner as part of the expenses of the diligence and as such rank with the other expenses of the judicial sale as a prior debt on the proceeds of that sale?

(Para. 3.96)

Cargo arrested on board ship: expenses of ship-owner or charterer

14.

(1) Where cargo on board ship is arrested for the debt of the cargo-owner and in consequence thereof the ship-owner or charterer discharges the cargo, the ship-owner or charterer should be entitled to claim from the arrester any expenses

incurred by him in discharging the cargo and keeping the cargo in safe custody.

(2) If the arrestment were on the dependence of a successful action or in execution, those expenses paid by the arrester to the arrestee should be recoverable by the arrester from the debtor as part of the expenses of the diligence and as such rank pari passu with the other expenses of the judicial sale as a prior debt on the proceeds of that sale.

(Para. 3.101)

APPENDIX A

MODES OF SERVICE OF ARRESTMENT

1. Sheriff court ordinary cause arrestments. In the sheriff court, the Ordinary Cause Rules, rule 10(1) provides:

> "Any initial writ, decree, charge, warrant or other order of writ following upon such initial writ or decree may be served by an officer of court on any person:-
>
> (a) personally; or
>
> (b) by being left in the hands of an inmate or employee at the person's dwelling place or place of business".

It seems clear that this provision regulates the service of an arrestment. Rule 111 further provides:

> "If a schedule of arrestment has not been personally served upon an arrestee, the arrestment shall only have effect if a copy of the schedule is also sent in a registered or recorded delivery letter to the last known place of residence of the arrestee, or, if such place of residence is unknown, or if the arrestee is a firm or corporation, to the arrestee's principal place of business if known, or if not known, to any known place of business of the arrestee and the officer shall in his execution certify that this has been done and specify the address in question".

Compared to earlier provisions,[1] this makes it clear that where the arrestee is a firm or corporation, a copy must be sent to the arrestee's principal place of business. The sending of a postal copy is not itself an arrestment and will not validate an arrestment which is bad for want of proper execution.[2]

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[1] Sheriff Courts (Scotland) Act 1876, s 12(5) construed in Campbell v Watson's Trs (1898) 25 R 690, and Macintyre v Caledonian Railway Co (1909) 25 Sh Ct Rep 309.

[2] Corson v Macmillan 1927 SLT (Sh Ct) 13.

2. Sheriff court summary cause arrestments. The Summary Cause Rules, rule 6(1) provides:

> "Any summons, decree, charge, warrant or other order or writ following upon such summons or decree issued in a summary cause may be validly served by an officer of court,
>
> (a) by being served personally on the defender, or
>
> (b) by being left in the hands of an inmate at the defender's dwelling place or of an employee at the defender's place of business". (emphasis added).

There is no other rule providing for these modes of service in the Summary Cause Rules. The references to the defender make the provision somewhat inapt for service on arrestees. It seems that in practice the provision is liberally construed as if the references to the defender included a reference to an arrestee. It is understood that the competent authorities propose to amend the rules to remove any doubt as to their application to arrestments. If that liberal construction were not upheld by the courts, then the modes of service of summary cause arrestments are presumably regulated by the Citation Acts which are followed in the case of Court of Session arrestments.

3. Under the Execution of Diligence (Scotland) Act 1926, s. 2(1) as amended, it is competent to execute by registered or recorded delivery letter an arrestment proceeding on any warrant or decree of a sheriff in a summary cause. The letter must be sent by post to the known residence or place of business of the arrestee or to the last known address of the arrestee if it

continues to be his legal domicile or proper place of citation: 1926 Act, s. 2(2)(a). In practice this is construed as empowering the officer to post the arrestment to a branch office or branch place of business.

4. OCR, r. 11 (postal copy to arrestee's principal place of business where arrestment served on a firm or corporation or otherwise than personally) quoted above applies to summary cause arrestments as well as ordinary cause arrestments.[1] Where the arrestment was served by post, the Execution of Diligence (Scotland) Act 1926, 2(2)(g) provided, and still provides, that the provisions of rule 126 in Schedule 1 to the Sheriff Courts (Scotland) Act 1907 shall not apply. The reference is to rule 126 as orginally enacted, which was the precursor of OCR, r.111 and was in the same terms. The clear intention was that a postal copy of an arrestment to the arrestee's principal place of business was unnecessary where an arrestment was served by post. It is understood that the competent authorities are considering amending s.2(2)(g) by substituting, for the reference to OCR, r. 126, a reference to OCR, r. 111.

5. Arrestments on Court of Session warrants and extract registered writs. In the case of other arrestments, namely arrestments under warrants or decrees of the Court of Session, and warrants in extract documents of debt registered for execution in the Books of Council and Session or sheriff court books, (or deemed by statute to be so registered, eg. awards of industrial tribunals) the mode of service is still regulated by the old Citation Acts. It is understood that the competent authorities intend to replace the Citation Acts by new provisions in due

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[1] Act of Sederunt (Summary Cause Rules, Sheriff Court) 1976, s 3(2)

course, as has been done for example in the case of the modes of service of Court of Session summonses.[1] Service may be personal, or at the dwelling place or place of business of the arrestee, or edictal.[2]

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[1] See RC 74A. The Court of Session now has a new statutory power to make an act of sederunt regulating inter alia the modes of service of arrestments under extract registered documents of debt: see Debtors (Scotland) Act 1987, s. 102.

[2] Graham Stewart, p 28 ff.

APPENDIX B

SECTION 40A OF THE SUPREME COURT ACT 1981 AND SECTION 109 OF THE COUNTY COURTS ACT 1984

(1) Where an order nisi made in the exercise of the jurisdiction mentioned in subsection (2) of the preceding section is served on any deposit-taking institution, the institution may, subject to the provisions of this section, deduct from the relevant debt or debts an amount not exceeding the prescribed sum towards the administrative and clerical expenses of the institution in complying with the order; and the right of an institution to make a deduction under this subsection shall be exercisable as from the time the order nisi is served on it.

(1A) In subsection (1) "the relevant debt or debts", in relation to an order nisi served on any such institution as is mentioned in that subsection, means the amount, as at the time the order is served on the institution, of the debt or debts of which the whole or a part is expressed to be attached by the order.

(1B) A deduction may be made under subsection (1) in a case where the amount referred to in subsection (1A) is insufficient to cover both the amount of the deduction and the amount of the judgment debt and costs in respect of which the attachment was made, notwithstanding that the benefit of the attachment to the creditor is reduced as a result of the deduction.

(2) An amount may not in pursuance of subsection (1) be deducted or, as the case may be, retained in a case where, by virtue of section 346 of the Insolvency Act 1986 or section 183 of the Insolvency Act 1986 or otherwise, the creditor is not entitled to retain the benefit of the attachment.

(3) In this section -

"deposit-taking institution" has the meaning assigned to it by section 40(6); and

"prescribed" means prescribed by an order made by the Lord Chancellor.

(4) An order under this section -

(a) may made different provision for different cases;

(b) without prejudice to the generality of paragraph (a) of this subsection, may prescribe sums differing according to the amount due under the judgment or order to be satisfied; and

(c) may provide for this section not to apply to deposit-taking institutions of any prescribed description.

(5) Any such order shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

Notes:

1. Section first inserted by Administration of Justice Act 1982, Sch. 4, Part I.

2. Subsection (1) substituted and subsections (1A) and (1B) inserted by Administration of Justice Act 1985, s. 52.

3. Subsection (2) amended by Administration of Justice Act 1985, s. 52 and by Insolvency Act 1986, Sch. 14.

4. Paragraph (c) of subsection (4) inserted by Administration of Justice Act 1985, s. 52.

APPENDIX C

BANKING ACT 1987

AUTHORISED INSTITUTIONS

1 UK-incorporated*

ANZ Grindlays Bank plc
ANZ McCaughan Merchant Bank Ltd
Abbey National plc
Abbey National Treasury Services plc
Adam & Company plc
Afghan National Credit & Finance Ltd
Airdrie Savings Bank
Aitken Hume Ltd
Ak International Bank Ltd
Albaraka International Bank Ltd
Alexanders Discount plc
Alliance Trust (Finance) Ltd
Allied Trust Bank Ltd
Anglo-Romanian Bank Ltd
Anglo Yugoslav Bank Ltd
Henry Ansbacher & Co Ltd
Arbuthnot Latham Bank Ltd
Argonaut Securities Ltd
Assemblies of God Property Trust
Associated Japanese Bank (International) Ltd
Associates Capital Corporation Ltd
Atlanta Trust Ltd
Authority Bank Ltd
Avco Trust Ltd

BNL Investment Bank plc
Banco Hispano Americano Ltd
Bank in Liechtenstein (UK) Ltd
Bank Leumi (UK) plc
Bank of America International Ltd
Bank of Boston Ltd
Bank of Cyprus (London) Ltd
Bank of Scotland
Bank of Tokyo International Ltd
Bank of Wales plc
Bankers Trust International Ltd
Banque Belge Ltd
Banque de la Méditerranée (UK) Ltd
Banque Nationale de Paris plc
The Baptist Union Corporation Ltd
Barclays Bank plc
Barclays de Zoete Wedd Ltd
Barclays Bank Trust Company Ltd
Baring Brothers & Co Ltd
Benchmark Bank plc
Beneficial Bank plc
Birmingham Capital Trust plc
Boston Safe Deposit and Trust Company (UK) Ltd
British & Commonwealth Merchant Bank plc
The British Bank of the Middle East
British Credit Trust Ltd
The British Linen Bank Ltd
British Railways Savings Company Ltd
Brown, Shipley & Co Ltd
Bunge Finance Ltd
Burns-Anderson Trust Company Ltd
Business Mortgages Bank plc

Canadian Laurentian Bank Ltd
Cater Allen Ltd
Chancery plc
The Charities Aid Foundation Money Management Company Ltd
Chartered Trust plc
Charterhouse Bank Ltd
Chase Investment Bank Ltd
Chesterfield Street Trust Ltd
Citibank Trust Ltd
Citicorp Investment Bank Ltd
City Merchants Bank Ltd
City Trust Ltd
Clive Discount Company Ltd

Close Brothers Ltd
Clydesdale Bank plc
Clydesdale Bank Finance Corporation Ltd
Combined Capital Ltd
The Commercial Bank of the Near East plc
Confederation Bank Ltd
Consolidated Credits Bank Ltd
Co-operative Bank plc
Coutts & Co
Coutts Finance Co
Craneheath Securities Ltd
Credito Italiano International Ltd
Credit Suisse First Boston Ltd

Daiwa Europe Bank plc
Dalbeattie Finance Co Ltd
Darlington Merchant Credits Ltd
Dartington & Co Ltd
Deacon Hoare & Co Ltd
Den norske Creditbank plc
The Dorset, Somerset & Wilts Investment Society Ltd
Dryfield Finance Ltd
Duménil Ltd
Dunbar Bank plc
Duncan Lawrie Ltd

E T Trust Ltd
Eagil Trust Co Ltd
East Trust Ltd
Eccles Savings and Loans Ltd
Edington plc
Enskilda Securities-Skandinaviska Enskilda Ltd
Equatorial Bank plc
Euro-Latinamerican Bank plc
Everett Chettle Associates
Exeter Trust Ltd

FIBI Bank (UK) Ltd
Fairmount Trust Ltd
Family Finance Ltd
Federated Trust Corporation Ltd
FennoScandia Bank Ltd
Financial & General Bank plc
James Finlay Bank Ltd
First Interstate Capital Markets Ltd
First National Bank plc
First National Commercial Bank plc
The First Personal Bank plc
Robert Fleming & Co Ltd
Ford Financial Trust Ltd
Ford Motor Credit Co Ltd
Foreign & Colonial Management Ltd
Forward Trust Ltd
Robert Fraser & Partners Ltd
Frizzell Banking Services Ltd

Gartmore Money Management Ltd
Gerrard & National Ltd
Girobank plc
Goldman Sachs Ltd
Goode Durrant Bank plc
Granville Trust Ltd
Gresham Trust plc
Greyhound Bank plc
Guinness Mahon & Co Ltd
Gulf Guarantee Bank plc

HFC Bank plc
Habibsons Bank Ltd
Hambros Bank Ltd
Hampshire Trust plc
The Hardware Federation Finance Co Ltd
Harrods Bank Ltd

*including partnerships formed under the law of any part of the UK.

Harton Securities Ltd
Havana International Bank Ltd
The Heritable & General Investment Bank Ltd
Hill Samuel Bank Ltd
Hill Samuel Personal Finance Ltd
C Hoare & Co
Julian Hodge Bank Ltd
Holdenhurst Securities plc
HongkongBank London Ltd
Humberclyde Finance Group Ltd
Hungarian International Bank Ltd

3i plc
3i Group plc
IBJ International Ltd
Industrial Funding Trust Ltd
International Commercial Bank plc
International Mexican Bank Ltd
International Westminster Bank plc
Iran Overseas Investment Bank Ltd
Italian International Bank plc

Jabac Finances Ltd
Japan International Bank Ltd
Jordan International Bank plc
Leopold Joseph & Sons Ltd

King & Shaxson Ltd
Kleinwort Benson Ltd

Lazard Brothers & Co Ltd
Libra Bank plc
Little Lakes Finance Ltd
Lloyds Bank plc
Lloyds Bank (BLSA) Ltd
Lloyds Bank (France) Ltd
Lloyds Bowmaker Ltd
Lloyds Merchant Bank Ltd
Lombard Bank Ltd
Lombard & Ulster Ltd
Lombard North Central plc
London Arab Investment Bank Ltd
London & Continental Bankers Ltd
London Italian Bank Ltd
London Scottish Bank plc
Lordsvale Finance plc

MLA Bank Ltd
McDonnell Douglas Bank Ltd
McNeill Pearson Ltd
Manchester Exchange and Investment Bank Ltd
W M Mann & Co (Investments) Ltd
Manufacturers Hanover Ltd
The Mardun Investment Co Ltd
Marks and Spencer Financial Services Ltd
Mase Westpac Ltd
Matheson Bank Ltd
Meghraj Bank Ltd
Mercantile Credit Company Ltd
Mercury Provident plc
Merrill Lynch International Bank Ltd
The Methodist Chapel Aid Association Ltd
Midland Bank plc
Midland Bank Finance Corporation Ltd
Midland Bank Trust Company Ltd
Minories Finance Ltd
Minster Trust Ltd
Moneycare Ltd
Samuel Montagu & Co Ltd
Moorgate Mercantile Holdings plc
Morgan Grenfell & Co Ltd
Moscow Narodny Bank Ltd
Mount Banking Corporation Ltd
Mutual Trust and Savings Ltd
Mynshul Bank Ltd

NIIB Group Ltd
NWS Bank plc
National Guardian Mortgage Corporation Ltd
The National Home Loans Bank plc
National Westminster Bank plc
NatWest Investment Bank Ltd
The Nikko Bank (UK) plc
Noble Grossart Ltd
Nomura Bank International plc
Northern Bank Ltd
Northern Bank Executor & Trustee Company Ltd
Norwich General Trust Ltd

Omega Trust Co Ltd
Orion Royal Bank Ltd

PK English Trust Company Ltd
PaineWebber International Bank Ltd
Panmure Gordon Bankers Ltd
The People's Bank Ltd
Philadelphia National Ltd
Pointon York Ltd
Postipankki (UK) Ltd
Prestwick Investment Trust plc
Privatbanken Ltd
The Private Bank & Trust Company Ltd
Provincial Bank plc

Quin Cope Ltd

Ralli Investment Company Ltd
R Raphael & Sons plc
Rathbone Bros & Co Ltd
Rea Brothers Ltd
Reliance Bank Ltd
Riggs A P Bank Ltd
N M Rothschild & Sons Ltd
Roxburghe Guarantee Corporation Ltd
The Royal Bank of Scotland plc
Royal Trust Bank
RoyScot Trust plc

SDS Bank Ltd
SFE Bank Ltd
SP Finance Ltd
Saudi International Bank
(Al-Bank Al-Saudi Al-Alami Ltd)
Scandinavian Bank Group plc
Schroder Leasing Ltd
J Henry Schroder Wagg & Co Ltd
Scotiabank (UK) Ltd
Scottish Amicable Money Managers Ltd
Seccombe Marshall & Campion plc
Secure Homes Ltd
Security Pacific Trust Ltd
Shire Trust Ltd
Singer & Friedlander Ltd
Smith & Williamson Securities
Société Générale Merchant Bank plc
Southsea Mortgage & Investment Co Ltd
Standard Chartered Bank
Standard Chartered Bank Africa plc
Standard Chartered Merchant Bank Ltd
Standard Property Investment plc
Sterling Bank & Trust Ltd
Svenska International plc

TSB Bank plc
TSB Northern Ireland plc
TSB Scotland plc
Treloan Ltd
Trucanda Trusts Ltd
Tyndall & Co Ltd

UBAF Bank Ltd
UCB Bank plc
Ulster Bank Ltd
Ulster Bank Trust Company
Union Discount Company Ltd
The United Bank of Kuwait plc
United Dominions Trust Ltd
Unity Trust Bank plc

Wagon Finance Ltd
Wallace, Smith Trust Co Ltd
S G Warburg & Co Ltd
S G Warburg Discount Ltd
Western Trust & Savings Ltd
Whiteaway Laidlaw Bank Ltd
Wimbledon & South West Finance Co Ltd
Wintrust Securities Ltd

Yamaichi Bank (UK) plc
Yorkshire Bank plc
H F Young & Co Ltd

2 Incorporated outside the UK**

ASLK-CGER Bank
African Continental Bank Ltd
Algemene Bank Nederland NV
Allied Bank of Pakistan Ltd
Allied Banking Corporation
Allied Irish Banks plc
Allied Irish Finance Co Ltd
Allied Irish Investment Bank plc
American Express Bank Ltd
Amsterdam-Rotterdam Bank NV
Arab African International Bank
Arab Bank Ltd
Arab Banking Corporation BSC
Australia & New Zealand Banking Group Ltd

BSI-Banca della Svizzera Italiana
Banca Commerciale Italiana
Banca Nazionale dell'Agricoltura SpA
Banca Nazionale del Lavoro
Banca Popolare di Milano
Banca Serfin SNC
Banco Bilbao-Vizcaya
Banco Central, SA
Banco de la Nación Argentina
Banco de Sabadell
Banco de Santander, SA
Banco di Napoli
Banco di Roma SpA
Banco di Santo Spirito
Banco di Sicilia
Banco do Brasil SA
Banco do Estado de São Paulo SA
Banco Espirito Santo e Comercial de Lisboa
Banco Exterior - UK SA
Banco Mercantil de São Paulo SA
Banco Nacional de México SNC
Banco Português do Atlântico
Banco Real SA
Banco Totta & Açores SA
Bancomer SNC
Bangkok Bank Ltd
Bank Julius Baer & Co Ltd
Bank Bumiputra Malaysia Berhad
Bank für Gemeinwirtschaft AG
Bank Handlowy w Warszawie SA
Bank Hapoalim BM
Bank Mees & Hope NV
Bank Mellat
Bank Melli Iran
Bank Negara Indonesia 1946
Bank of America NT & SA
Bank of Baroda
The Bank of California NA
Bank of Ceylon
Bank of China
Bank of Credit and Commerce International SA
The Bank of East Asia Ltd
Bank of India
The Bank of Ireland
Bank of Montreal
Bank of New England NA
The Bank of New York
Bank of New Zealand
The Bank of Nova Scotia
Bank of Oman Ltd
Bank of Seoul
The Bank of Tokyo, Ltd
The Bank of Yokohama, Ltd
Bank Saderat Iran
Bank Sepah-Iran
Bank Tejarat
Bankers Trust Company
Banque Arabe et Internationale d'Investissement
Banque Belgo-Zairoise SA
Banque Bruxelles Lambert SA
Banque de l'Orient Arabe et d'Outre-Mer
Banque Française de l'Orient
Banque Française du Commerce Extérieur
Banque Indosuez
Banque Internationale à Luxembourg SA
Banque Internationale pour L'Afrique Occidentale SA
Banque Nationale de Paris
Banque Paribas
Banque Worms
Barbados National Bank
Bayerische Hypotheken - und Wechsel - Bank AG
Bayerische Landesbank Girozentrale
Bayerische Vereinsbank
Beirut Riyad Bank SAL
Bergen Bank A/S
Berliner Bank AG
Berliner Handels-und Frankfurter Bank
Byblos Bank SAL

CIC - Union Européenne, International et Cie
Caisse Nationale de Crédit Agricole
Canadian Imperial Bank of Commerce
Canara Bank
Cassa di Risparmio delle Provincie Lombarde
The Chase Manhattan Bank, NA
Chemical Bank
Cho Hung Bank
Christiania Bank og Kreditkasse
The Chuo Trust & Banking Co, Ltd
Citibank NA
Commercial Bank of Korea Ltd
Commerzbank AG
Commonwealth Bank of Australia
Confederacion Española de Cajas de Ahorros
Continental Bank, National Association
Copenhagen Handelsbank A/S
Crédit Commercial de France
Crédit du Nord
Crédit Lyonnais
Crédit Lyonnais Bank Nederland NV
Crédit Suisse
Creditanstalt - Bankverein
Credito Italiano
Cyprus Credit Bank Ltd
The Cyprus Popular Bank

The Dai-Ichi Kangyo Bank, Ltd
The Daiwa Bank, Ltd
Den Danske Bank af 1871 Aktieselskab
Deutsche Bank AG
Deutsche Genossenschaftsbank
The Development Bank of Singapore Ltd
Discount Bank and Trust Company
Dresdner Bank AG

Fidelity Bank NA
First Bank National Association
First Bank of Nigeria Ltd
First City, Texas-Houston, NA
First Commercial Bank
First Interstate Bank of California
The First National Bank of Boston
The First National Bank of Chicago
Fleet National Bank
French Bank of Southern Africa Ltd
The Fuji Bank, Ltd

Generale Bank
Ghana Commercial Bank
Girozentrale und Bank der österreichischen Sparkassen AG
Götabanken
Gulf International Bank BSC

Habib Bank AG Zurich
Habib Bank Ltd
Hamburgische Landesbank Girozentrale
Hanil Bank
Harris Trust and Savings Bank
Hessische Landesbank - Girozentrale
The Hokkaido Takushoku Bank, Ltd
The Hongkong and Shanghai Banking Corporation Ltd

The Industrial Bank of Japan, Ltd
The Investment Bank of Ireland Ltd
Irving Trust Company
Istituto Bancario San Paolo di Torino

**includes partnerships or other unincorporated associations formed under the law of any member State of the European community other than the UK.

Jyske Bank

Kansallis-Osake-Pankki
Keesler Federal Credit Union
Korea Exchange Bank
Korea First Bank
Kredietbank NV
The Kyowa Bank, Ltd

The Long-Term Credit Bank of Japan, Ltd

Malayan Banking Berhad
Manufacturers Hanover Trust Company
Mellon Bank, NA
Middle East Bank Ltd
The Mitsubishi Bank, Ltd
The Mitsubishi Trust and Banking Corporation
The Mitsui Bank, Ltd
The Mitsui Trust & Banking Co Ltd
Monte dei Paschi di Siena
Morgan Guaranty Trust Company of New York
Multibanco Comermex SNC

NCNB National Bank of North Carolina
NCNB Texas National Bank
National Australia Bank Ltd
National Bank of Abu Dhabi
National Bank of Canada
National Bank of Detroit
The National Bank of Dubai Ltd
National Bank of Egypt
National Bank of Greece SA
The National Bank of Kuwait SAK
The National Bank of New Zealand Ltd
National Bank of Nigeria Ltd
The National Commercial Bank
National Bank of Pakistan
Nederlandsche Middenstandsbank NV
NedPerm Bank Ltd
New Nigeria Bank Ltd
The Nippon Credit Bank, Ltd
Norddeutsche Landesbank Girozentrale
The Northern Trust Company

Osterreichische Länderbank AG
Oversea-Chinese Banking Corporation Ltd
Overseas Trust Bank Ltd
Overseas Union Bank Ltd

Philadelphia National Bank
Philippine National Bank
Provinsbanken A/S

Qatar National Bank SAQ

Rabobank Nederland
(Coöperatieve Centrale Raiffeisen-Boerenleenbank BA)
Rafidain Bank
Republic National Bank of New York
Reserve Bank of Australia
The Riggs National Bank of Washington, DC
Riyad Bank
The Royal Bank of Canada
The Rural and Industries Bank of Western Australia

The Saitama Bank, Ltd
The Sanwa Bank, Ltd
Saudi American Bank
Seattle - First National Bank
Security Pacific National Bank
Shanghai Commercial Bank Ltd
The Siam Commercial Bank, Ltd
Skandinaviska Enskilda Banken
Société Générale
Sonali Bank
State Bank of India
State Bank of New South Wales
State Bank of South Australia
State Bank of Victoria
State Street Bank and Trust Company
Südwestdeutsche Landesbank Girozentrale
The Sumitomo Bank, Ltd

The Sumitomo Trust & Banking Co Ltd
Svenska Handelsbanken
Swiss Bank Corporation
Swiss Cantobank (International)
Swiss Volksbank
Syndicate Bank

TC Ziraat Bankasi
TDB American Express Bank
The Taiyo Kobe Bank, Ltd
The Thai Farmers Bank Ltd
The Tokai Bank, Ltd
The Toronto-Dominion Bank
The Toyo Trust & Banking Company, Ltd
The Trust Bank of Africa Ltd
Turkish Bank Ltd
Türkiye İş Bankasi AŞ

Uco Bank
Ulster Investment Bank Ltd
Union Bank of Finland Ltd
Union Bank of Nigeria Ltd
Union Bank of Norway
Union Bank of Switzerland
United Bank Ltd
United Mizrahi Bank Ltd
United Overseas Bank
(Banque Unie pour les Pays d'Outre Mer)
United Overseas Bank Ltd

Volkskas Bank Ltd

Westdeutsche Landesbank Girozentrale
Westpac Banking Corporation

The Yasuda Trust & Banking Co, Ltd

Zambia National Commercial Bank Ltd
Zivnostenská Banka National Corporation

BANKING ACT 1987

The list of Authorised Institutions is amended in the following respects -

Addition

2. Incorporated outside the UK

Banque de L'Orient Arabe et d'Outre-Mer

Deletions

1. UK-incorporated

EBC Amro Bank Ltd
First Indemnity Credit Ltd
Sangster Trust Corporation

2. Incorporated outside the UK

Banque du Liban et d'Outre-Mer SAL

Name Changes

1. UK-incorporated

Allied Arab Bank Ltd to Allied Trust Bank Ltd
James Capel Bankers Ltd to HongkongBank London Ltd
Grindlays Bank plc to ANZ Grindlays Bank plc

2. Incorporated outside the UK

The Hongkong and Shanghai Banking Corporation
to The Hongkong and Shanghai Banking Corporation Ltd

Bank of England
Banking Supervision Division

BA/105
6 October 1989

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