SCOTTISH LAW COMMISSION

(Scot Law Com No 183)

Report on Diligence

Laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965

May 2001

SE/2001/107

EDINBURGH: The Stationery Office

£20.70

0 10 888031 1

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965[1] for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

The Honourable Lord Gill, *Chairman*
Patrick S Hodge, QC
Professor Gerard Maher
Professor Kenneth G C Reid
Professor Joseph M Thomson

The Secretary of the Commission is Miss Jane L McLeod. Its offices are at 140 Causewayside, Edinburgh EH9 1PR

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[1] Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (S.I. 1999/1820).

SCOTTISH LAW COMMISSION

Item No 7 of our Sixth Programme of Law Reform

Diligence

To: Jim Wallace Esq QC MSP, Deputy First Minister and Minister for Justice.

We have the honour to submit to the Scottish Ministers our Report on Diligence.

(Signed) BRIAN GILL, *Chairman*

PATRICK S HODGE

GERARD MAHER

KENNETH G C REID

JOSEPH M THOMSON

JANE L MCLEOD, *Secretary*

23 April 2001

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ABBREVIATIONS

1970 Act
Conveyancing and Feudal Reform (Scotland) Act 1970

1979 Act
Land Registration (Scotland) Act 1979

1985 Act
Bankruptcy (Scotland) Act 1985

1987 Act
Debtors (Scotland) Act 1987

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Scot Law Com DP No 79
Scottish Law Commission, Discussion Paper No 79 on *Equalisation of Diligences* (1988)

Scot Law Com DP No 107
Scottish Law Commission, Discussion Paper No 107 on *Diligence against Land* (1998)

Scot Law Com DP No 108
Scottish Law Commission, Discussion Paper No 108 on *Attachment Orders and Money Attachment* (1998)

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Scottish Law Commission, Discussion Paper No 110 on *Poinding and Sale: Effective Enforcement and Debtor Protection* (1999)

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Part 1 Introduction

1.1 This is the final report to be submitted on the reform of the law of diligence.[1] We have previously reported on a wide range of topics on diligence.[2] In this Report we make recommendations for reform of matters considered in our Discussion Papers No 78 on *Adjudication for Debt and Related Matters* (1988), No 79 on *Equalisation of Diligences* (1988),[3] No 107 on *Diligence Against Land* (1998) and No 108 on *Attachment Orders and Money Attachment* (1998).[4] We propose the removal of various parts of the existing law of diligence, namely the diligence of adjudication for debt and the law relating to equalisation of heritable diligences. We also propose the introduction of new diligences. In place of adjudication for debt we recommend two new diligences, land attachment and attachment orders. We also recommend that a diligence should be introduced to attach money in the hands of a debtor. Furthermore we recommend various reforms of the existing diligence of inhibition. A short account of the main characteristics of each of these recommendations follows.

1.2 In this Report we depart from our normal practice of including a draft bill which gives expression to our detailed recommendations. We remain firmly of the view that as far as possible our reports should include a draft bill. Our approach to law reform is not only to identify the appropriate general principles on the relevant area of law but also to work through the application of those principles to detailed legal rules. However we have thought it right to present this report without a draft bill. The Scottish Executive is currently conducting a wide-ranging review of all aspects of the diligence system.[5] Our understanding is that the Executive will conduct a public consultation on all issues covered by the review, which will include the topics dealt with in this Report. For these reasons we consider that the drafting of a bill on those topics should await the outcome of the review process. Nonetheless we have attempted as far as possible to present our recommendations in sufficient detail to indicate the likely statutory form which our proposals would take.

Outline of our proposals

1.3 In Part 2 we set out our reasons for our recommendation that the diligence of adjudication for debt should be abolished. Much of the law on adjudication for debt is uncertain and obscure. Its operation in practice presents few advantages for creditors but it also contains little by way of protection of the interests of debtors. The law on adjudication does not reflect principles which are appropriate for the contemporary law of diligence. We do not believe that the current law can simply be re-cast and we consider that it should not

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[1] "Diligence" is the legal term used primarily to denote the methods for enforcing unpaid debts due under court decrees.

[2] Our earlier reports were *Report on Diligence and Debtor Protection* Scot Law Com 95 (1985), which was largely implemented by the Debtors (Scotland) Act 1987; *Report on Statutory Fees for Arrestees* Scot Law Com No 133 (1992), which remains unimplemented; *Report on Diligence on the Dependence and Admiralty Arrestments* Scot Law Com No 164 (1998), which remains unimplemented; *Report on Poinding and Warrant Sale* Scot Law Com No 177 (2000), implemented in part by the Debtors (Scotland) Act 1987 Amendment Regulations 2000 (SSI 2000/189).

[3] Both issued under Item 8 of our *Second Programme of Law Reform* Scot Law Com No 8 (1968). Our *Sixth Programme of Law Reform* Scot Law Com No 176 (2000) consolidated and superseded all previous programmes.

[4] Both issued under Item 7 of our *Sixth Programme of Law Reform*.

[5] Statement by the Minister of Justice (Scottish Parliament Official Report, vol 7, no 2, col 106 (8 June 2000)).

remain as part of our law. Adjudication for debt has two distinct roles as a diligence. First it is a diligence used against heritable property. Secondly it is also a residual diligence, that is it is used against property which is not exempt from diligence in general but does not fall within the scope of any specific diligence. As a consequence of our recommendation that adjudication for debt should be abolished we go on to consider whether there should be replacements for it in respect of both of its existing roles.

1.4 In Part 3 we consider whether there should be a replacement diligence against heritable property and we conclude that there should be. The new diligence of land attachment would have two distinct phases. First a creditor on the basis of an extract decree or its equivalent would be able to register in the property registers a notice of land attachment. Registration would have the effect of creating a real right in security over the land specified in the notice, for payment of the debt owing to the creditor. The second stage involves the creditor applying to the court for authority to sell the attached land. Where authority to sell is granted detailed provision is made for the conduct of the sale and disbursement of the proceeds. We have given careful consideration to the issue whether land attachment should apply to dwellinghouses. We have reached the conclusion that dwellinghouses should be subject to the first stage of the diligence (attachment and creation of a security). This stage confers considerable protection to the interests of the creditor but does not by itself unduly interfere with the rights of the debtor (including his right to continue to occupy the land). However different considerations apply at the sale stage of the diligence. Here we have identified two options. The first is to exempt dwellinghouses from sale. A second option is to allow the sale of dwellinghouses but to provide special measures of debtor protection to prevent or minimise the homelessness of the debtor and other occupiers of the dwelling. We do not express any preference between the two options as we believe that the choice between them reflects considerations of general social policy rather than legal principle. We also recommend that a variety of measures should be introduced to protect the interests of debtors. The provisions of the Debtors (Scotland) Act 1987 on time to pay debts should apply to the new diligence of land attachment. Also a creditor would not be entitled to apply for sale of the attached land unless the debt exceeded a certain amount (£1,500). Furthermore the court could not grant authority to sell unless satisfied that the proceeds of sale would be likely to reduce part of the principal debt owed by the debtor.[6] The court could also refuse to allow a sale or could delay a sale if a sale would be unduly harsh in the circumstances. If dwellinghouses are to be within the scope of the sale stage of land attachment, we recommend that authority for sale would be granted only if the court was satisfied of various matters relating to the debtor and occupiers of the house. We have modelled these particular recommendations on the provisions of the Mortgage Rights (Scotland) Bill, which confers on debtors a right to apply for suspension of the enforcement of a standard security. We also make recommendations to protect the interests of parties engaged in transactions involving land which becomes subject to land attachment and of co-owners of land which is caught by the diligence.

1.5 In Part 4 we propose that adjudication for debt should also be replaced with a new diligence in respect of its role as a residual diligence. The new diligence is to be called an attachment order. We recommend that attachment orders should be made available over property which, though not exempt from diligence as such, is nonetheless not covered by any of the existing specific diligences. It is not possible to give an exhaustive list of the types of property which would fall within the scope of attachment orders but the new diligence

[6] We refer to this form of debtor protection as the "not worth it" test.

would be used against many forms of intellectual property and various rights in land which are not caught by land attachment. The diligence would require the creditor to apply to the court for an attachment order. The effect of the order would depend on whether the property to be attached was registrable in a public register or not. Where the property was registrable (eg patents, trademarks) the order itself would be registered and would take effect as a real right or preference in accordance with the law relating to the type of property in question. Where the property is not registrable the order would act as a real right or preference as from the date it was served on the debtor. Provision would be made to protect a party who transacted in good faith in respect of attached property. To complete the diligence the creditor would have to make a further application to the court for an order authorising an appropriate procedure (such as sale or diversion of income) for satisfying the debt out of the attached property. In deciding what type of order to grant the court would consider its impact on the debtor and would balance the interests of the parties. We also recommend that the time to pay provisions of the 1987 Act should apply to attachment orders.

1.6 In Part 5 we consider whether there should be a specific diligence against money in the hands of the debtor. Under the present law money is part of the debtor's estate which vests in a trustee in sequestration. However, although the point is not entirely clear, money cannot be poinded nor is it subject to any other diligence (except possibly adjudication as a residual diligence). On balance we favour the introduction of a diligence to attach money in the hands of the debtor. However we do not think it appropriate that the diligence should be used against money situated in a dwellinghouse, as the procedure involved would be too intrusive. Moreover we do not think that there should be any diligence against money in the debtor's possession if corporeal moveable property in the debtor's possession is to be exempt from diligence. That issue is currently being considered by a Working Group set up by the Scottish Ministers to identify an alternative diligence to poinding and sale, which will cease to be a competent diligence once the Abolition of Poindings and Warrant Sales Act 2001 comes into effect.[7] If there is to be a diligence against money we recommend that the time to pay provisions of the 1987 Act are applicable in respect of it. We envisage that the procedure to be used in executing any diligence of money attachment should in general terms be similar to that to be devised for attaching corporeal moveables. An attachment would be incompetent if the total estimated value of the money to be attached did not exceed the likely total expenses of the diligence. A creditor would have to apply to the court for an order that the attached money is paid over to him. We also set out the procedure to be used to realise the attached money where it is not sterling currency (eg foreign currency, cheques, bills of exchange).

1.7 In Part 6 we examine the diligence of inhibition. Much of the criticism of inhibition focuses on its use as a diligence on the dependence, and in particular on the procedure for obtaining warrant to inhibit. We have discussed those issues in our *Report on Diligence on the Dependence and Admiralty Arrestments*.[8] In the present Report we propose that the diligence of inhibition should be retained subject to various reforms which we set out. In particular we accept that inhibition should continue to have the effect of rendering reducible future voluntary deeds by the inhibited person. However we propose that inhibition should no longer confer a preference on the inhibiting creditor in respect of post-inhibition debts

[7] The 2001 Act comes into effect on 31 December 2002 or such earlier date as is prescribed by the Scottish Ministers (s 4(1)).
[8] Scot Law Com No 164, Parts 2, 3 & 5.

incurred by the debtor. We also make proposals to clarify the remedies of the inhibiting creditor where there has been a breach of inhibition and the rules of prescription which apply to the exercise of those remedies. We further make recommendations to resolve problems which arise in conveyancing transactions where an inhibition has not been discovered at the date of settlement. In those recommendations we seek to give effect to the general principle that protection should be given to a third party who transacts in good faith with an inhibitee.

1.8 Our final set of proposals, in Part 7, concerns equalisation of adjudications. The law on this topic, which dates from the 17th century, deals with equalisation of diligence outwith the context of bankruptcy. We doubt whether equalisation is appropriate where the debtor is not subject to an insolvency process. We have previously recommended the abolition of broadly similar provisions in respect of equalisation of arrestments and poindings outside formal insolvency proceedings,[9] and we can identify no convincing reason for retaining equalisation of adjudications.

1.9 A full list of our recommendations is set out in Part 8.

Summary warrants

1.10 In this paper we make recommendations for the introduction of three new diligences, land attachment, attachment orders, and money attachment. We also propose reforms of the diligence of inhibition. One issue on which we have refrained from making recommendations is whether these diligences should be authorised by summary warrants, which are available to local authorities and the tax authorities to recover arrears of a variety of taxes and rates. We are aware that the use of summary warrant procedure is the subject of some controversy. In our *Report on Poinding and Warrant Sale*, we discussed some of the problems concerning summary warrants, and we made various recommendations for reform.[10] However we do not consider that we should make any recommendations in relation to summary warrants in the context of the present Report. In our Discussion Paper No 78, issued in 1988, we argued "since summary warrants dispense with the need for court actions, it seems desirable not to widen the methods of enforcement which they authorise more than is strictly necessary."[11] We proposed in that Discussion Paper that summary warrants should not authorise any new diligence against land which would replace adjudication for debt. This proposal was supported by all consultees who commented on this issue. In our Discussion Paper on *Diligence against Land* we proposed that summary warrants should authorise inhibition on the basis that the diligence was less intrusive than the diligences which are already authorised by summary warrants.[12] This proposal drew a mixed response on consultation, with a slight majority of consultees supporting it, and several of that majority on the basis of the particular reason we had identified. We did not make any specific proposals in our consultation on whether attachment orders and money attachment should be authorised by summary warrants. We have reached the conclusion that the issue of the range of diligences which summary warrants should authorise is a

[9] Scot Law Com No 164, paras 9.25-9.53.
[10] Scot Law Com No 177, Part 4.
[11] Scot Law Com DP No 78, para 5.209.
[12] Scot Law Com DP No 107, para 3.50. At present summary warrants authorise the execution of arrestment, earnings arrestment, and poinding and sale.

matter requiring further consultation and we make no recommendations on that issue in this Report.

Legislative competence

1.11 The subject matter of the recommendations in this Report is the law of diligence. In general terms reform of the law of diligence does not relate to any matter reserved to the Westminster Parliament and is within the subject-matter legislative competence of the Scottish Parliament.[13] In this Report we refer to the topics of consumer credit, corporate insolvency, intellectual property, and currency, all of which are reserved matters.[14] As a consequence the question arises whether our recommendations on these topics are within the legislative competence of the Scottish Parliament. We deal later with this issue in the context of the specific recommendations.

European Convention on Human Rights

1.12 A further aspect of the legislative competence of the Scottish Parliament is that an Act of the Parliament must be compatible with the rights set out in the European Convention on Human Rights.[15] Insofar as any of our recommendations require implementation by an Act of the United Kingdom Parliament, the question of compatibility with the Convention is also relevant for the legislative process of that Parliament.[16]

1.13 In the context of the law of diligence the most relevant Convention rights to consider are article 1 of the First Protocol (the right to peaceful enjoyment of possessions), article 6 (the right to a fair hearing before an independent tribunal), and article 8 (the right to respect for private and family life and the home). The European Court of Human Rights has held that the right to peaceful enjoyment of possessions is not necessarily infringed by procedures for the payment of debts. In *Gasus Dosier-und Fördertechnik GMBH v The Netherlands*,[17] the Court considered Dutch legislation which enabled the tax authorities in certain circumstances to seize and sell a third party's assets to satisfy a tax-payer's debts, for which the third party was not liable. The Court held that a system of recovery of tax arrears which involved the power to seize and sell a third party's assets was not incompatible *per se* with the requirement of article 1 of the First Protocol.

1.14 In *K v Sweden*,[18] the European Commission of Human Rights upheld a Swedish law which allowed forcible entry to the applicant's house and the search for and seizure of her goods to recover arrears of government taxes and other debts owed to a private creditor by the applicant's former husband. The Commission considered that the case disclosed a prima facie interference with the right to respect for private life and the home within the meaning of paragraph 1 of article 8. However this provision is subject to qualifications set out in paragraph 2 of that article. First interference can be justified if made "in accordance with the law". Secondly interference must be in the pursuit of one or more of enumerated "legitimate

[13] Diligence is specifically mentioned as part of Scots private law which by statutory implication is not reserved to the Westminster Parliament (Scotland Act 1998, ss 29 (2), (4); 126(4)).
[14] Scotland Act 1998, Sch 5 Part II, Head C, section C7 (consumer credit); Head C, section C2 (corporate insolvency); Head C, section C4 (intellectual property); and Head A, section A2 (currency).
[15] Scotland Act 1998, ss 29(2)(d), 126(1); Human Rights Act 1998, s 1(1).
[16] Human Rights Act 1998, s 19.
[17] (1995) 20 EHRR 403
[18] Application No 13800/88 (European Commission of Human Rights, sitting on 1 July 1991).

aims." These aims include the economic well-being of the country, and the protection of the rights and freedoms of others. Thirdly the interference must be "necessary in a democratic society" for those aims. This qualification requires that the interference is proportionate to the aim being pursued, though a margin of appreciation is left to Contracting States. In this case the Commission decided, first, that the measures were in accordance with Swedish law whose "quality" was "compatible with the rule of law". The enforcement legislation was formulated in a precise manner though giving discretion as to prior notice of entry, and the seizure was subject to review by the Swedish courts. Second, the protection of creditors' rights was a legitimate aim in terms of the protection of the rights of others. Third, the enforcement was "necessary in a democratic society" in the interest of creditors.

1.15 In our view enactment of the recommendations made in this Report would not infringe Convention rights. We have sought to frame our recommendations in clear terms and have avoided leaving issues to be determined by the open-ended discretion of a court. We have sought to achieve a proportionate balance of the interests of the creditors and other parties, especially debtors. We propose that debtors would be able to apply to the courts for time to pay measures which would halt the further operation of diligence. We propose a variety of further measures for debtor protection, which are set out in detail in the Report. For example, the "not worth it" test would prevent debtors being subject to sale of attached land or money attachment unless the outcome would be to reduce his debt. We also propose that money attachment cannot be carried out in the debtor's home. While we have left open the issue whether dwellinghouses should be included in the sale stage of land attachment, in the event that dwellings are included we have made recommendations for protecting debtors and other occupiers. A crucial aspect of the new diligences of land attachment, attachment orders and money attachment is that at various stages in the respective diligences a creditor requires the authority of a court to proceed, and that the debtor is entitled to participate fully in the court proceedings.

Acknowledgements

1.16 A list of persons who submitted comments on our discussion papers is set out in Appendix B. We are grateful to all of those persons for their views. We also gratefully acknowledge the assistance of others whom we consulted on specific aspects of our work, including the Law Society of Scotland in respect of conveyancing aspects of land attachment and inhibition, the Keeper of the Registers of Scotland as regards the Registers and inhibition, an official from one of the Scottish clearing banks on the workings of money attachment, and to various specialist practitioners in the field of intellectual property. None of those who assisted us bears any responsibility for the recommendations in our Report or for any errors in it.

Part 2 Abolition of Adjudication for Debt

2.1 In this Part we explain our reasons for recommending that the existing diligence of adjudication for debt should be abolished. Later in the Report we discuss the diligences which we believe should replace adjudication for debt, namely land attachment and attachment orders.[1]

Outline of existing procedure

2.2 The effect of an adjudication for debt is to vest in the adjudging creditor a redeemable security over the adjudged property of the debtor, convertible by a court decree into an absolute right of ownership on the expiry of a period defined by statute. The diligence is primarily, but not exclusively, available against the heritable property of the debtor. A creditor cannot proceed to the diligence of adjudication simply on the basis of an extract decree or its equivalent. Instead he must raise an action of adjudication in the Court of Session, specifying the property which he wishes to adjudge. Once the decree of adjudication has been granted and extracted, the creditor will normally complete title by registration of the extract decree in the property registers.[2] The effect of such registration is that the creditor obtains a right in the nature of a judicial heritable security over the adjudged property. This security is enforceable against the debtor but also gives the creditor a priority over third parties, such as subsequent purchasers, adjudgers or heritable creditors, whose rights are registered later. The adjudication also enables the adjudger to take possession, by action of removing if necessary, and to grant leases, or, if the land is already let, to receive the rents in pursuance of decree in a court action, called an action of maills and duties. But the security does not entitle the creditor to sell the property. If the debt is paid, whether by receipt of the rents or otherwise, the security is discharged. If after ten years (a period known as 'the legal period of redemption', or in short 'the legal') any of the debt is still outstanding, the creditor may raise another action, also in the Court of Session, called an action of declarator of expiry of the legal. Decree in such an action will have the effect of making the creditor the owner of the property. He can then sell it if he wishes to do so.

Defects of the diligence

2.3 Adjudications for debt were introduced by the Adjudications Act 1672. The diligence now known as adjudication for debt was originally called a general adjudication and was conceived of as being penal in character.[3] It was an alternative to a special adjudication

[1] See Parts 3 and 4 below.

[2] In Scotland there are two public registers relating to rights in land. The first is the Register of Sasines, set up in 1617, in which the deeds creating or transferring real rights in land are recorded or registered. The Register of Sasines is being replaced by the Land Register of Scotland set up under the Land Registration (Scotland) Act 1979. Whereas the Register of Sasines is a register of title deeds, the Land Register is a register of title. The Land Register is a computer-based register and the entries are updated to give effect to deeds presented to the Keeper. The deeds themselves do not enter the register. In this Report we refer to the Land Register of Scotland and the Register of Sasines collectively as the "property registers" and use the term "registered" and cognate expressions for both registers. Although the term "registered" may give the wrong impression as regards the Land Register, it is a convenient shorthand term which is indeed used throughout the 1979 Act itself (see 1979 Act, s 1(3)).

[3] Graham Stewart, pp 577-578.

which was designed to attach heritable property proportionate in value to the amount of the debt and had a legal of only five years. A special adjudication required the co-operation of the debtor but since debtors preferred the longer legal of 10 years, they invariably did not co-operate so that from the outset it appears that special adjudications were never used. They have been incompetent for many years.[4] It is a not very creditable fact that, apart from the abolition of special adjudications and some minor statutory changes of a technical character, adjudications for debt have remained unreformed by statute since 1672. So archaic is the procedure that although heritable property is a very valuable asset, creditors very rarely use adjudications in modern practice, preferring to rely on the preventive diligence of inhibition or to attach land by sequestration. We have no doubt that radical reform is long overdue for the reasons summarised in the following paragraphs.

2.4 **Unduly long legal period for redemption.** The legal period of redemption of 10 years is far too long. The creditor has to wait for that period before completing the diligence. It may be that this period was devised with large landed estates in mind so that the debt could often be satisfied from the rents received by the creditor during the legal. In modern conditions, however, it is likely that the reformed diligence for attaching heritable property would not normally be directed against landed estates but rather against property used for commercial and domestic purposes.[5] The lengthy duration of the legal may also have arisen from the desire of the Scottish Parliament of the 1670s to prevent landed estates from being involuntarily alienated for debt. It is extremely doubtful whether such an objective reflects any acceptable legal or social policy today.

2.5 **No provision for judicial sale.** It is an archaic feature of the diligence of adjudication that there is no provision for holding a compulsory sale under authority of the court as an alternative to transfer of ownership to the creditor at the end of the legal. By contrast, diligences over moveable property (arrestments and poindings) take the form of an attachment followed by the relatively speedy realisation of the property to satisfy the debt out of the proceeds of sale. Ownership of poinded goods is transferred to the creditor only if a sale at the appraised value proves impossible. We believe that the transfer of ownership, being an indirect method of satisfying debt, is not always satisfactory. What the creditor wants, and what by law he is entitled to, is the payment of money, and accordingly payment of money should normally be the ultimate object of the diligence. Transfer of ownership should be merely a subsidiary alternative occurring only in default of sale.

2.6 **Apparent absence of obligation on creditor to account to debtor for value of property on foreclosure.** While the present law is over-protective to debtors in allowing far too long a redemption period, it is unduly harsh on debtors in other respects. A striking example, or apparent example, occurs on foreclosure. In an action of declarator of expiry of the legal, the adjudger calls on the debtor to exercise his right of redemption. If the debtor fails to do so, the court declares his right of redemption to be foreclosed which has the effect that ownership is transferred to the adjudger. Where the adjudger has entered into possession, he must account to the debtor for his intromissions, if any (eg with the rents). But there appears to be no rule requiring the adjudger to account to the debtor for the value of the property. The absence of such a rule is remarkable. The outcome is that foreclosure does not diminish the debt, and in effect the diligence gives the property to the adjudger for

[4] Special adjudications, long obsolete, were eventually abolished by the Statute Law Revision (Scotland) Act 1906.
[5] In Part 3 we consider whether the new diligence of land attachment should be used against dwellinghouses (paras 3.21 – 3.28).

nothing. It is difficult to accept that the law can really be so inequitable and we have traced no modern authority on the point. The law on this matter is at best very uncertain and at worst harsh to the debtor almost beyond belief.

2.7 **Disproportion between value of adjudged subjects and amount of debt.** The emergence of general adjudication as the only competent form of adjudication means that the original object of the Diligence Act 1672, namely to restrict adjudications to property of a value broadly proportionate to the amount of the debt, has not been attained. The result is that a very large estate can be adjudged for a disproportionately small debt. While it may be argued that the greater the disproportion, the less excuse for non-payment, diligence should not operate in such an exorbitant and oppressive manner.

2.8 **No provision for protecting interim possession or home of debtor or his family.** Another way in which the present law on adjudications is unduly harsh on debtors is that it allows the adjudger, immediately after obtaining his decree of adjudication, to proceed (by action if necessary) to eject the debtor from the adjudged property. If the debtor is an individual with dependants, they too will be ejected. There is no minimum sum: a debtor may be immediately ejected for a trifling debt. Nor is there any period of grace: the creditor may raise his action of removing or ejection as soon as he has obtained his decree of adjudication. All this is unacceptable in modern conditions.

2.9 **Unnecessarily cumbersome and expensive procedure.** Apart from the over-long period of the legal, the procedure involved is unnecessarily cumbersome in other respects. In particular:

(1) an action of adjudication can be raised only in the Court of Session.

(2) where the adjudged property is leased, the adjudger can enter into 'civil possession' and receive the rents, but for this purpose must raise an action of maills and duties either in the Court of Session or sheriff court.

(3) at the end of the long period of the legal, the creditor cannot obtain the full benefit of his diligence without raising yet another action in the Court of Session (an action of declarator of expiry of the legal).

The requirement that the diligence should proceed by way of a Court of Session action stems from the Adjudications Act 1672 and thus derives from a period when all actions relating to heritable property were treated as falling within the exclusive jurisdiction of the Court of Session. Such a view has long been out-of-date.[6] The Grant Report of 1967[7] recommended that the sheriff court should have concurrent jurisdiction with the Court of Session in actions of adjudication. The McKechnie Report in 1958 recommended a procedure whereby a creditor holding a decree for payment could adjudge without resort to the courts at all.[8] These recommendations were never implemented. We fully accept that a diligence against heritable property will involve complexity, and that the courts will necessarily be involved at some stage. However these complications arise from the need to provide adequate debtor protection or to consider the interests of various parties other than the creditor and debtor

[6] See Sheriff Courts (Scotland) Act 1907, s 6(d).
[7] *Report of the Committee on the Sheriff Court* (Chairman, The Rt Hon Lord Grant) Cmnd 3248 (1967), para 123.
[8] *Report of the Committee on Diligence* (Chairman, Sheriff H McKechnie) Cmnd 456 (1958), para 184.

(such as occupiers of the land or co-owners). By contrast the complications of the present law serve no useful purpose. We also believe that diligence against heritable property is better supervised by the sheriff court of the place where the land is situated.

2.10 **Obscurity of the law.** The diligence of adjudication is obscure and uncertain in several important areas. We have already mentioned the apparent rule that foreclosure does not diminish the debt. Another example is the rule on prescription. It is well established that after the expiry of the legal the adjudger may acquire a full right of ownership by means of prescription. It is, however, very unclear whether the relevant prescription is the long negative prescription of 20 years or the positive prescription of 10 years.[9]

2.11 **Summary of main criticisms**. To sum up, adjudication is an archaic and cumbersome diligence which can be unjust to both creditors and debtors. In particular:

(1) the adjudged property cannot be made fully available to the adjudging creditor for the unduly long period of 10 years;

(2) the absence of provision for a judicial sale means that the diligence yields payment indirectly, except to the extent that rents are received by the creditor during the legal;

(3) the absence, or apparent absence, of any rule requiring a foreclosing adjudger to account to the debtor for the value of the property on foreclosure has the effect that foreclosure does not diminish the debt and gives the adjudger the property for nothing;

(4) a large estate can be adjudged for a disproportionately small debt even though the estate is divisible;

(5) immediately after adjudication, the debtor and his family may be ejected from the adjudged property without the chance to obtain alternative accommodation;

(6) the full procedure normally involves two Court of Session actions and is thus unnecessarily cumbersome and expensive; and

(7) the law on adjudications is obscure in material respects.

2.12 **Consultation**. In response to our Discussion Papers Nos 78 and 107, there was universal agreement that the diligence of adjudication for debt should be abolished. It was variously described by consultees as "antiquated and outdated", "far too clumsy", and "an unattractive diligence for pursuers". It was confirmed that it was rarely used in modern practice and that reform was "long overdue and necessary." One solicitor recalled sequestrating a number of people simply to enable a property to be sold - a remedy which appeared to him to be unduly dramatic.

2.13 Most consultees assumed that adjudication for debt should be replaced by the new diligences of land attachment and attachment orders which we consider later in this Report. Some however expressed serious concern that new diligences, especially against the debtor's

[9] See Scot Law Com DP No 78, paras 5.174-5.177.

land, might impose undue hardship on debtors, and argued for abolition of adjudication for debt without any replacement. However that is a separate issue which does not detract from the fact that no consultee wished to retain adjudication for debt.

2.14 We recommend that:

1. The diligence of adjudication for debt should be abolished.

Re-naming the Register of Inhibitions and Adjudications

2.15 The Register of Inhibitions and Adjudications was created in 1924 by the amalgamation of the General Register of Inhibitions and Interdictions and the Register of Adjudications.[10] With the abolition of adjudications for debt, this name will cease to be suitable. Since it is likely that inhibitions will continue to be the dominant document registered in that register, we consider that it should be re-named simply the Register of Inhibitions.[11]

2.16 We recommend that:

2. The Register of Inhibitions and Adjudications should be re-named the "Register of Inhibitions."

[10] Conveyancing (Scotland) Act 1924, s 44.
[11] In this Report we will usually refer to it by its unofficial name, the 'personal register'.

Part 3 Introduction of Land Attachment and Related Issues

A. PRELIMINARY

(1) Overview

3.1 In this Part, we make recommendations for introducing a new diligence to replace adjudication for debt of heritable property. We call this new diligence land attachment and sale (or land attachment, for short). In summary, land attachment would involve two distinct stages. A creditor on the basis of an extract decree or equivalent would register a notice of land attachment in the property registers. The effect of registration would be to confer on the creditor a real right over the land specified in the notice in security for the debt owing by the debtor. However a creditor would not be able to sell the attached land without first obtaining authority to do so from a sheriff. An application for authority to sell could not be made until at least six months from the date of registration of the notice. In considering whether to grant authority to sell the sheriff would have to be satisfied that the diligence was competent and appropriate in respect of various matters designed to protect the interests of the debtor. Arrangements for the sale of attached property would be made by an independent person appointed by the sheriff.

3.2 We are of the view that such a two-staged model of land attachment represents a proportionate balancing of the interests of debtors and creditors. The first stage acts to provide the creditor with a form of security over the debtor's land but does not by itself unduly interfere with the debtor's own rights. The debtor can continue to use and occupy his land. Different considerations apply to the second stage. One effect of an enforced sale would be to require the debtor to remove from the land. We believe that the diligence should not proceed to this stage unless the court is satisfied that the debtor's interests have been considered. One particular issue, which was mentioned by many of our consultees, requires to be noted at this point. This is whether the new diligence of land attachment should apply to the debtor's dwellinghouse. We conclude that dwellinghouses should be subject to the attachment stage, which is not unduly intrusive on the debtor's position. However the sale of an attached dwellinghouse might lead to the homelessness of the debtor and his family. We can see that good grounds can be made for exempting the debtor's house from the sale stage of the diligence. We have reached the conclusion that this question rests ultimately not on any issue of legal principle but is rather a matter of choice based on political and social policy. Accordingly we have left open the issue of the scope of the sale stage in respect of dwellinghouses. Our recommendations on this point contain alternative models, one including dwellinghouses, and the other excluding them from this part of land attachment.

(2) Introduction of land attachment.

3.3 Our proposal in Discussion Paper No 107 to replace adjudication for debt with land attachment met with a mixed reaction. While none of our consultees argued for the

retention of adjudication for debt, some suggested that adjudications should be abolished but should not be replaced by any diligence for the attachment of heritable property. We fully accept that arguments for abolishing adjudication for debt do not necessarily compel the introduction of a replacement diligence. Nonetheless we are of the view that there should be a new diligence against land. We now set out our reasons for this conclusion.

Arguments against the introduction of land attachment

3.4 The main arguments against the introduction of land attachment put to us on consultation are as follows:

(a) Land attachment would operate oppressively against debtors, who would be rendered homeless by eviction and a compulsory sale of their home in order to satisfy a creditor's debt, possibly of disproportionately small amount.

(b) The relatively high expenses involved in executing land attachment would increase the debt unduly without benefiting the creditor.

(c) Creditors already have sufficient diligences available to them under the existing law so that the introduction of land attachment is unnecessary.

(d) Land attachment could prejudice other creditors unfairly. Widespread use of land attachment might induce competing creditors to petition for the sequestration of the debtor under the Bankruptcy (Scotland) Act 1985 thereby increasing the use of sequestration.

(e) If land attachment were to prevail over concluded missives under which the debtor contracts to sell his land, ordinary conveyancing transactions would be prejudiced as purchasers lose the benefit of their bargain.

(f) Land attachment would result in an increase in homelessness with a huge impact in social and other costs.

3.5 **Causing debtors undue economic hardship and personal distress**. Most consultees accepted that one likely effect of introducing a new diligence against heritable property is that the diligence would be used more frequently that the existing diligence of adjudication. As a consequence, it was argued, the new diligence would lead to debtors experiencing hardship and distress. Debtors (and their families) would be removed from their dwellinghouses. The availability of the diligence would also lead to creditors attempting to concuss debtors to make payment under threat of selling their dwellinghouse or business premises.

3.6 In a closely argued and well-informed submission, the Glasgow Anti-Poverty Project (GAPP) represented to us that the diligence of adjudication should be abolished and not replaced by land attachment. Creditors wishing to attach heritable property (it was said) should apply for sequestration or liquidation. They observed that from the point of view of multiple debt clients, the introduction of land attachment could turn a bad situation into a disastrous one. On top of the usual diligences which can be done by unsecured creditors,[1]

[1] *Viz* bank arrestments, earnings arrestments, inhibitions, and poindings and warrant sales.

debtors would now face the prospect of the forced sale of their home. Land attachment in effect would turn unpaid unsecured debts into secured debts. GAPP pointed out that many of their owner-occupier debt clients bought their council houses in the 1980s and then ran into difficulties due to loss of overtime, ill-health, low wages, insecure employment and the over-commitment resulting from too easily available credit. If their debts are unsecured, advisers (whether Citizens Advice Bureaux, money advice centres or other agencies) can deal with their creditors and usually obtain settlements which keep the clients in their family homes. Usually the main worry and concern of debtors is that they may lose their home.

3.7 We agree that the likely effect of introducing a diligence of land attachment is that it will be used much more frequently than adjudication. Reform of the law of adjudication would be pointless if the new diligence were just as cumbersome and difficult to use as the old one. However we do not accept that making the diligence easier to use necessarily results in its use being oppressive against debtors. We consider the issue of a possible increase in homelessness in more detail later.[2]

3.8 **Expenses of land attachment increase debt unduly.** GAPP also argued that land attachments would unduly increase their clients' indebtedness since the relatively high cost of the diligence would be added to the debt. The problem would be greater in the case of multiple debtors. Theoretically, they observed, with an average of ten creditors, debtors could be dragged through this procedure ten times. As well as the severe stress that this would cause the persons concerned, the legal expenses would dramatically increase their indebtedness.

3.9 We fully accept that where diligence has been used against a debtor the effect should not be to increase the debtor's indebtedness. However we do not consider that the solution to this potential problem is to have no diligence against land at all. Instead provision can be made that authority for a creditor to sell attached land will not be granted unless it is likely that the amount of the debt will be reduced and we make recommendations to this effect.[3]

3.10 **Land attachments unnecessary.** Some of our consultees argued that creditors already have sufficient diligences available to them under the existing law so that the introduction of land attachment is unnecessary. The Scottish Sheriff Court Users Group observed that "the current powers available to unsecured creditors, through inhibition and sequestration for example, are sufficient."

3.11 We do not agree with this argument. The only diligence which has the effect of attaching land is adjudication and to remove this diligence without replacing it would mean that there would be no diligence against land. In Part 6 below we discuss reform of the law on inhibitions. It is important to appreciate that inhibition is not by itself a complete diligence against heritable property. The effect of inhibition is to impose a personal prohibition on the debtor from dealing with his heritable property to the prejudice of the creditor. However a diligence which attaches the debtor's heritable property is required to make the inhibition effective. At the very least it is needed in cases where the debtor disposes of his property in violation of the inhibition. In such a case the remedy of the creditor is a special form of reduction of the deed violating the inhibition (reduction on the

[2] Para 3.16.

[3] Paras 3.96-3.99.

ground of inhibition) which does not restore the property to the inhibitee's estate for all purposes but only for the purpose of rendering the property liable to be attached by an adjudication for debt. If land attachment were not competent after a reduction on the ground of inhibition, the reduction would be pointless. Moreover, an inhibition is purely a freeze diligence. Another form of diligence is required to enable the creditor to satisfy his debt out of the proceeds of sale. Traditionally that is the role of the archaic diligence of adjudication for debt which we believe should be replaced by the modern diligence of land attachment.

3.12 Nor do we consider that insolvency processes such as sequestration and liquidation should be used as forms of diligences against land. In our view this argument does not correctly identify the different roles of diligence and insolvency processes. The law of diligence is concerned with the situation involving two parties, a creditor and a debtor. Where a person has defaulted on payment of a debt the law of diligence provides the creditor with mechanisms for attaching the debtor's assets with a view ultimately to realising the attached assets in order to pay off the debt. By contrast sequestration presupposes that the debtor is insolvent, that is he has insufficient assets to pay all of his debts. Insolvency processes provide a procedure for the orderly realisation of the debtor's assets with a view to a fair sharing among all of the creditors. Accordingly we take the view that if the purpose of a legal process against land is to enforce a debt where the debtor is not insolvent, it is appropriate to have a diligence against land rather than to use sequestration and liquidation.

3.13 **Unintended consequence of increasing use of sequestrations.** Another argument for not introducing land attachment is that if land attachment were to be used very frequently, other unsecured creditors would not be prepared to see a principal asset disappear to the land attacher. The widespread use of land attachment might induce the competing creditors to petition for the sequestration of the debtor (or liquidation of a debtor company) thereby unduly increasing the use of sequestration (or liquidation). One answer to this argument would be to retain and to modernise the law on the fair sharing among creditors of the fruits of diligences of heritable property outside sequestration and liquidation. In Part 7 below, however, we reject this solution partly because of its complications and partly because in our view fair sharing is best achieved within the contexts of sequestration and liquidation.[4] We recommend below[5] that land attachments registered within six months before the date of the debtor's sequestration would be rendered, by the award of sequestration, ineffectual in a question with the trustee in sequestration. We agree therefore that there is a risk that creditors competing with the land attacher might resort to a petition for sequestration in some cases.

3.14 On the other hand, there will be cases where creditors can use land attachment and thereby avoid the need to resort to the more draconian and drastic remedy of sequestration. If there were no diligence of land attachment, then the only way in which an unsecured creditor could compel a sale of his debtor's heritable property to satisfy his debt would be by way of sequestration or liquidation. So it is difficult to accept that the introduction of land

[4] Another remedy for multiple indebtedness – debt arrangement schemes – was recommended in Scot Law Com No 95, ch 4 and more recently in Scot Law Com No 177, paras 5.52-5.61. No action has yet been taken on these recommendations.
[5] Para 7.10.

attachment will necessarily increase the incidence of sequestration. It might well have the opposite result. As one experienced practitioner observed on consultation:

> "I agree that there is a considerable need for a method of enforcing debt against heritable property of a debtor. With very little thought I can bring to mind a number of sequestrations over the past few years (and one or two liquidations) in which the sole purpose of the exercise was to allow the sale of heritable property owned by the debtor or debtor company. It seems inappropriate (perhaps particularly in the debtor's interest) that such a radical step should take place for such a limited purpose. In addition why should a creditor require to take steps which bring in other creditors purely to seize a particular asset?"

We find these observations convincing.

3.15 **Deleterious impact on conveyancing practice.** Another objection to land attachment was put to us by the Joint Committee of the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers. The Joint Committee pointed out that under the proposals contained in our Discussion Paper the situation could easily arise where a third party had concluded missives for the purchase of the debtor's land. If land attachment were to be used prior to registration of a subsequent disposition, the effect would be that the land attachment would trump the rights of the parties under the missives. As a consequence, ordinary conveyancing transactions would be prejudiced because purchasers would lose the benefit of their bargain. We accept that this objection is a forceful one but we do not regard it as a good ground for not introducing a new diligence of land attachment. Instead we believe that by modifying our original proposals we can meet this objection. What we now propose is a delay of six months between the registration of a notice of attachment and the application for warrant to sell and the actual sale under the warrant. A purchaser under missives can search the property registers for a notice of attachment registered in the previous six months. If the purchaser finds a notice of land attachment he can contact the creditor and make informal arrangements to complete the transaction. A purchaser can also lodge a caveat in the court with jurisdiction over the attached land. This step will prevent the creditor from being granted warrant to sell the land without giving the purchaser an opportunity to apply to the sheriff dealing with the diligence to be allowed to complete the transaction. The sheriff would then allow the sale to the purchaser to proceed if the price was paid to the attaching creditor.

3.16 **Increasing homelessness.** Many of those who did not favour the introduction of a new diligence against land argued that land attachment would be likely to increase homelessness. We take this concern seriously. Nevertheless it is our view that any arguments concerning homelessness are not arguments against a diligence of land attachment as such. Concerns about homelessness are out of place where the property to be attached is not a dwellinghouse, for example land or buildings used for commercial purposes. Furthermore the new diligence which we propose has two distinct parts, an attachment stage and a sale stage. Allowing dwellinghouses to be subject to the attachment stage would have the effect that a form of security would be created over the dwelling. By itself this stage would not deprive the debtor of the right to continue to reside in the dwellinghouse. It may be that those who use an argument about homelessness as a general one against a new diligence of land attachment are concerned that it would be difficult or practically impossible to define the type of dwellings which would be exempt from the diligence or from the sale stage. However we do not accept this view. In our view it is

possible to mark out dwellings either for purposes of exempting this type of property from the sale stage of the diligence or to provide for further measures of debtor protection if dwellings are to be included within the full scope of the diligence. In short, proper concern about the impact of land attachment on homelessness is not by itself a good argument for having no diligence against land at all.

The arguments in favour of introducing land attachment

3.17 On consultation the great majority of consultees supported the introduction of land attachment. One consultee for example said that such a measure is "long overdue and necessary". Another consultee said that an objective of law reform is "the simplification and rationalisation of the law", and that it was better to have "a complete overhaul of the law, with a simpler and clearer system."

Principle of universal attachability

3.18 The main, and in our view convincing, argument in favour of a new diligence against heritable property is based on what we refer to as the principle of universal attachability. As a matter of principle all the debtor's property, regardless of its form or character, should be subject to legal processes to satisfy debts owed by the debtor. This principle does not mean that no item of a debtor's property can ever be exempt from diligence, for clearly exemption operates as an important measure of debtor protection. Rather the principle of universal attachability argues that a legal system should provide an adequate mechanism for debt enforcement which is appropriate for each and every specific type of property but that each diligence will provide its own particular range of debtor protection measures. The general principle of universal attachability has been recognised in a variety of contexts. For example the Royal Commission on Legal Services in Scotland maintained that:[6]

> "where the debtor has some resources at his disposal it is obviously important that our system of justice provides a reasonably efficient means for the creditor to gain possession of whatever proportion of them is needed to extinguish the debt."

A similar principle is recognised in other legal systems. For example in Norway the Creditors Recovery Act of 1984 provides:[7]

> "<u>2.2 Main Rule Concerning the Attachment</u>
> Except as otherwise provided by statute or other valid provision, the creditors have the right to seek satisfaction in any property which belongs to the debtor at the time of attachment, and which can be sold, leased or otherwise converted into money."

Furthermore in a wide-ranging study of procedures for the enforcement of debt, the Alberta Law Reform Institute identified the following general principle:[8]

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[6] Report of the Royal Commission on *Legal Services in Scotland* (1980) Cmnd 7846 (Chairman: the Rt Hon Lord Hughes), para 12.2.

[7] Attachment and sale of goods in Norway are regulated by the Act of Enforcement 1992 and the Creditors Recovery Act 1984.

[8] Alberta Law Reform Institute, Report No 61 on *The Enforcement of Money Judgments* (1991) vol 1, Recommendation 1 (p 25). The Law Reform Institute also referred to a principle of just exemptions which it formulated as follows: "The deliberately exempted property should be sufficient to permit debtors to maintain themselves and their dependents at a reasonable standard and to have reasonable security that they will be able to continue to do so in the future" (*ibid*).

> "All the property of a judgment debtor should be subject to enforcement regardless of its form or character, excepting only property that has been excluded deliberately from enforcement. No property should be 'exempt' from enforcement for lack of an enforcement procedure."

3.19 A similar principle is adopted in the law of bankruptcy. In sequestration the "whole estate" of the debtor vests in the permanent trustee for the benefit of the creditors.[9] Anomalies would follow if the law of diligence did not have a similar approach. Insolvency processes are not designed as systems of debt enforcement. Rather they are concerned with the orderly realisation and distribution of a debtor's estate among the whole body of creditors. If heritable property were subject to sequestration or liquidation but not subject to any diligence, the consequence would be that a creditor would be forced to use the inappropriate (and possibly more expensive) process of sequestration or liquidation in order to enforce a debt from the debtor's land.

3.20 We have already examined in detail the arguments advanced against introducing land attachment. In our view most of these arguments are advanced under the principle of exemption from diligence rather than as a counter to the idea of universal attachability. In particular these arguments spring wholly or mainly from an understandable desire to protect debtors from the economic hardship and personal distress that would ensue if their family home or principal dwelling were subjected to land attachment. This consideration is not a good argument against modernising diligence against land as such. It is not, for example, an argument against attaching land used for recreational purposes, such as a holiday cottage. Still less is it an argument against attaching land used for non-residential purposes such as a profession, trade or business. It is rather an argument for exempting or otherwise protecting the debtor's family home or principal dwelling from certain aspects of land attachment. To block the reform of diligence against land in order to achieve that more limited purpose seems to us to be too undiscriminating a solution. We propose below a range of measures designed to protect debtors from undue hardship caused by the use of land attachment.[10] These protections apply whether or not the attached property is a dwellinghouse. We also consider fully the question whether a debtor's dwelling should indeed be exempt from the sale stage of land attachment but we do not offer a concluded view on that issue. However we do explore the special measures of debtor protection which should apply if it is decided that dwellings should be capable of being sold as part of the new diligence.

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[9] 1985 Act, s 31(1).

[10] Namely (a) the availability of time to pay directions and orders under the 1987 Act, Part I; (b) a lower limit on the amount of debt before warrant to sell can be granted; (c) a requirement that attached land cannot be sold unless the likely consequence is to reduce the amount of the debt; (d) the power of the sheriff to refuse warrant of sale or to defer sale, if sale of the property would be unduly harsh in the circumstances; (e) the expenses of land attachment being recoverable from that diligence only and not by a separate process. In addition, we recommend that where the attached land to be sold is the debtor's principal dwellinghouse, the sheriff is under a duty to consider the circumstances concerning the unpaid debt and the ability of the debtor and other occupiers to find alternative accommodation. See paras 3.75-3.124.

Application of land attachment to dwellings

3.21 As already noted, a key issue which was mentioned by many consultees was whether the new diligence of land attachment should apply to the debtor's dwellinghouse. We recognise that there are powerful arguments for and against including dwellings in the scope of land attachment. In assessing this issue it is important to bear in mind that the new diligence of land attachment will have two stages. The first stage has the effect of creating for the creditor a subordinate real right over the attached land. This stage gives considerable protection to the creditor's interests for in any subsequent sale of the land he would be entitled to rank on the proceeds in respect of the amount secured by the attachment. What the attachment of the land does is in effect to give the creditor a form of security over the land for his debt. However this stage does not by itself interfere with the rights of the debtor to occupy his land. A comparison can be made with the effect of an inhibition against the proprietor of land. Inhibition is merely a prohibitive diligence, that is it prevents the debtor from dealing in certain ways with his property. A 'bare' attachment under the new diligence of land attachment would have no greater intrusive effect on the debtor's rights than arises under an inhibition. Indeed a debtor whose land was attached would still be able to transact concerning his land, which would however be subject to the creditor's subordinate real right over it. Inhibition has never been the subject of criticism that its effect as a diligence on the debtor is unfair or harsh, and we doubt whether it could be said that by itself attachment of land would be open to the objection that it was radically unfair to the debtor.[11] Different considerations come into play at the second stage of land attachment, the sale of the land. Where a creditor is given authority to sell attached land then clearly the debtor would be faced with the prospect of being removed from his land and if that land were a dwellinghouse, the outcome could be the homelessness of the debtor and his family. Accordingly we have reached the conclusion that arguments about the effect of land attachment in creating homelessness have no application in respect of the first stage of the new diligence nor can we identify any other issue of legal principle or social policy which would justify exempting dwellinghouses from the attachment stage.

3.22 The key issue is whether dwellinghouses should come within the sale stage of land attachment. A preliminary point is whether it makes sense to permit a creditor to create a subordinate real right over a debtor's land but not grant him any power to sell it. It may seem odd that a creditor would be able to start a diligence but not complete it. However a similar position applies to inhibition, which confers no real right on the creditor who must follow up inhibition with another diligence such as adjudication or arrestment in order to get the full benefit of his rights under the inhibition. Indeed a creditor who has attached land is in a stronger position than one who has used an inhibition, for the attachment confers a subordinate real right. A creditor who has attached land might not be interested in going to the expense of applying for a warrant of sale and carrying out an enforced sale. He might well be prepared to wait until the land is sold, either by another creditor or by the debtor himself. In any case what we are considering is the possibility of exempting dwellinghouses, but not all land, from the sale stage of land attachment while including them at the attachment stage. In short we see no objection as a matter of legal technique to the option of exempting dwellinghouses from the sale stage of land attachment.

[11] The strongest criticism against inhibition has been in respect of its use as a diligence on the dependence and especially in relation to the ability of a pursuer to obtain warrant to inhibit without having to show any need to use the diligence or the likely prospects of success in the action. We have recommended reform of diligence on the dependence in Scot Law Com No 164, Parts 2 and 3.

3.23 The next question is identifying the range of options in giving effect to such an exemption. In our Discussion Paper No 78 we considered the possibility of adapting the homestead exemptions found in many North American legal systems but were not at that time inclined to introduce them into Scots law.[12] Many of the States of the USA and certain Canadian provinces have homestead legislation.[13] But it is crucial to note that these homestead Acts vary considerably in how they operate.

(i) In some (but not all) homestead Acts in the USA there are no upper limits on the exemption and the whole dwelling is exempt.

(ii) A more frequently used approach is to place an upper financial limit on the value of the dwelling. There is some variation on how this upper limit has effect. In some jurisdictions (eg Michigan), the rule is that a home valued below the upper limit cannot be subject to execution at all. In other states (eg California) a homestead may be sold but the debtor is entitled to retain the amount of the upper limit from the proceeds of sale. In other states the upper limit which the debtor is entitled to keep applies to the so-called "equity" in the land. In other words the exemption is applied to the value of the debtor's interest after deducting prior securities and not to the value of the dwelling which may be much greater.[14] The rationale of this approach appears to be that if the debtor were ultimately to be evicted from his dwellinghouse he should be left with resources sufficient to obtain replacement accommodation. In some states homes may be subject to execution if above the amount of the upper limit. If the property can be divided, only the part above the upper limit is sold. If the property cannot be easily divided, the whole property is sold with the debtor receiving the amount of the exemption.

(iii) In other jurisdictions (eg Quebec) a threshold limit is placed on the amount of the claim for enforcement rather than on the value of the debtor's interest in his dwellinghouse.

(iv) In some states in the USA the homestead exemption does not apply in respect of certain types of debt, usually property taxes and assessments, although some states disapply homestead exemption for other forms of debt.[15]

(v) A final feature worth noting is that most of the legal systems in North America which have homestead exemption laws have a requirement that a property is registered as a qualifying homestead for purposes of the legislation.

3.24 There is a more general point about the North American laws on homesteads. The policies underlying these exemption laws vary. Some early Acts were passed to attract

[12] Paras 3.90–3.93.
[13] See Milner, "A Homestead Act for England?" (1959) 22 MLR 458; Vukowich "Debtors' Exemption Rights" (1974) 62 Georgetown Law Journal 779; Uniform Exemptions Act (Uniform Laws Annotated, vol 13, 1979) (USA).
[14] This is the position in several Canadian provinces. In 1998, in Alberta the value of the exemption on the debtor's principal residence was $40,000; in British Columbia $9,000 (but $12,000 in Vancouver or Victoria); $2,500 in Manitoba; $10,000 in Newfoundland; and $32,000 in Saskatchewan. There is no similar protection in the other Provinces.
[15] Such as debts for common repairs in a condominium (see Illinois Code of Civil Procedure, S 12-903 and Condominium Property Act 1963).

settlers; others were a response to periods of economic depression. It is open to question whether statutes introduced with these goals in mind are appropriate for dealing with problems of homelessness in present-day Scotland.

3.25 In the light of representations made to us on the issue of homelessness we have reconsidered the homestead exemptions. But we still do not think that they provide a suitable model for dealing with the specific issue of including dwellinghouses within the sale stage of land attachment. We are not in favour of introducing a homestead exemption subject to an upper monetary limit. We recognise that this approach may appear to solve the problem of giving the same protection to debtors who own homes of quite different values. However there are major practical difficulties in applying this approach. There are problems in fixing a limit which would treat debtors equally. A modest property in one part of Scotland may be worth as much as a large, luxury property elsewhere. Furthermore fluctuations in property values would create difficulties in ensuring that any limit remained fair after it was set.

3.26 Nor do we favour introducing a homestead exemption but disapplying it in the case of revenue or other types of debt. Such an approach confers an advantage on one class of unsecured creditor which is not enjoyed by others. We have previously argued that in the law of diligence creditors should be treated alike and we would apply that principle to land attachment.[16] On the other hand we see merit in introducing a lower limit on the amount of debt for which a land attachment would be competent. However we consider the arguments for a lower limit to have general application and are not restricted to the use of the diligence against dwellinghouses.

3.27 We do not favour introducing into Scots law a model based on the homestead legislation of North America. We can identify no strong objection to including dwellings in the attachment stage of the diligence. As regards the sale stage in our view the options remain between:

(1) excluding dwellinghouses from the sale stage of land attachment. The exclusion would not apply to every property which was a dwellinghouse but only to the debtor's or other occupier's principal dwelling; or

(2) including dwellings in the sale stage but providing special measures of debtor protection where a dwellinghouse is to be both attached and sold.

3.28 We have found the issue of including dwellinghouses within the sale stage of land attachment a difficult one to resolve. We have reached the conclusion that this question is not one which can be determined by consideration of purely legal principle but ultimately depends upon social and political policy. Accordingly we make no recommendation on this point. In this Part of our Report we will make recommendations on the detailed provisions of the new diligence both as it would apply to the sale of attached dwellinghouses and as it would operate by exempting dwellings from sale.

[16] Scot Law Com No 68, para 15.5; Scot Law Com No 95, paras 7.93-7.106.

Alternative proposal for forced assignation of debt to approved lender and compelled standard security

3.29 In their response to our Discussion Paper No 107, the Sheriffs Principal suggested that where the sum due under the court decree for payment is demonstrably less than the value of the heritable property or the debtor's reversionary interest in it, and there are no indications that the debtor is absolutely insolvent, the debt could be satisfied by the debtor being compelled to grant an approved lender a standard security of an amount to cover the sum decerned, interest and expenses. This procedure would be in lieu of a sale under warrant or foreclosure.

3.30 This proposal is interesting but we think that it should be rejected for the following reasons. (i) There seems little point in arranging a new loan to a debtor to be made by a new (approved) lender in substitution for the creditor. Such a measure would not solve the problems of enforcement but simply effect a change of creditor. It seems unlikely that the advantages claimed for the procedure would emerge in practice. The debtor remains owner until sale under land attachment. When the time comes to advertise the property for sale, it will be just as necessary for the proposed new lender, as it would be for the diligence creditor, to eject the debtor and his family in order to effect a sale at the best price. So these difficulties are not solved by the new procedure. (ii) As the Sheriffs Principal acknowledge, there is doubt whether the competent authorities could find approved lenders willing to lend in these circumstances. The difficulty would be compounded where the property attached is a share *pro indiviso* of common property. (iii) If the debtor were to refuse to co-operate in granting a standard security, there would be no realistic alternative to the sanction for contempt of court (including imprisonment). A land attachment is designed to operate without this heavy sanction. (iv) In most cases the debtor will already have used his property as a fund of secured credit and it will already be subject to a standard security. In such cases it is difficult to see what advantages the proposed new procedure would have. (v) While the land attachment procedure would involve a degree of complexity it may well be less complicated than the suggested alternative. The law on land attachment could easily adapt, with any necessary modifications, the parts of the legislation on standard securities which ought to apply. That seems to us to be a simpler approach. (vi) The procedure for application for warrant to sell attached land is designed to operate as a safeguard for debtors. Under the existing law there are no comparable safeguards in enforcing standard securities and our recommendations for debtor protection in land attachment are more extensive than any that would be appropriate for standard securities.[17]

Our recommendation

3.31 The new diligence of land attachment and sale (or land attachment, for brevity) would apply to property registrable in the Land Register or Register of Sasines. A land attachment would be constituted as a real right by registration of a notice of land attachment in the property registers. Registration would impose a *nexus* encumbering the attached property. As such it would be an inchoate diligence having effect for ranking purposes but

[17] The Mortgage Rights (Scotland) Bill (a Member's Bill introduced on 30 June 2000) seeks to provide measures of debtor protection where the subjects under a standard security are a dwellinghouse. We have adapted the provisions of the Bill in our own recommendations on applications for warrant to sell attached dwellings (paras 3.115-3.124). The point we would emphasise here is that we also recommend a variety of debtor protection measures which apply to all types of attached property.

requiring to be completed by sale or by foreclosure in default of sale. The creditor would require to apply for warrant to sell the attached property but no application could be made until after the expiry of six months from the registration of the notice of land attachment. Before a sheriff could grant warrant to sell he would have to be satisfied that the creditor is owed a debt in excess of a specified amount. The sheriff must also be satisfied that the likely proceeds of the sale will result in a reduction in the amount of the debt. In granting warrant the sheriff appoints a suitable independent person to conduct the sale of the attached property. The diligence would be completed by a sale under the sheriff's warrant or by decree of foreclosure. The debtor's dwellinghouse would be subject to the attachment stage of the diligence but we leave open the issue whether it should be sold under a sheriff's warrant.

3.32 We recommend that:

3. (1) There should be a new diligence, to be known as land attachment, which takes effect by registration by the creditor in the property registers of a notice of land attachment.

(2) The effect of completing the registration of a notice of land attachment is to confer on the creditor a subordinate real right in security for payment of the debt.

(3) After a period of six months the creditor would be entitled to apply to the sheriff for (i) warrant of sale of the attached land to extinguish or reduce the debt, or (ii) in default of sale, for decree of foreclosure of the attached land in favour of the creditor.

(4) The creditor would be entitled to register a notice of land attachment against the debtor's principal dwellinghouse. We make no recommendation on whether a warrant of sale or decree of foreclosure could be granted in respect of the debtor's attached principal dwellinghouse.

B. MAIN FEATURES OF NEW DILIGENCE OF LAND ATTACHMENT

(1) Outline of main steps in land attachment

3.33 The main steps in the new diligence of land attachment, which are set out in the diagram on page 26, may be explained shortly.

(1) Warrant for the diligence of land attachment would be included in an extract decree for payment and certain other documents of debt.

(2) A charge to pay would be served by an officer of court (messenger-at-arms or sheriff officer) on the debtor.

(3) On the expiry of the days of charge (14 or 28 days) without payment, it would be competent for the creditor to register in the property registers a notice of land attachment.

(4) The effect of the registration of the notice of land attachment would be:

(a) to render the land specified in the notice litigious for a period of 14 days commencing on the date of registration of the notice; and

(b) to confer on the creditor, as from the date on which that period expires, a subordinate real right over that land in security for payment of (i) the sum charged for and interest accruing after service of the charge and before the attachment ceases to have effect; and (ii) the taxed expenses for which the debtor is liable by virtue of the attachment.

(5) A period of six months after the date of registration must elapse before the creditor could apply for warrant of sale.

(6) The debtor may obtain a time to pay order to prevent the diligence commencing or from proceeding further.

(7) The creditor may make an application to the sheriff (having jurisdiction where any part of the attached land is situated) for warrant of sale. The creditor would intimate the application to the debtor, a holder of a prior security, a purchaser under prior missives and any co-owner of the land.

(8) At the hearing the sheriff must be satisfied that the land is capable of being attached and sold, that the debt owing to the creditor exceeds a prescribed amount, and that the net proceeds of sale of the attached land are likely to exceed the expenses of the diligence and a portion of the debt. Where the land to be attached is a principal dwellinghouse the sheriff must also consider various factors concerning the debt and the circumstances of the debtor and other occupiers.

(9) At the hearing the sheriff must also consider any representations made (i) by the debtor that the exercise of the diligence will be unduly harsh (ii) by a holder of a prior security that he should be allowed to exercise his power to sell the land (iii) by a purchaser under prior missives that sale of the land under missives should proceed and (iv) a co-owner of the land to be attached.

(10) If the sheriff grants warrant of sale he would also appoint a suitable person who would be responsible for the arrangements of the sale.

(11) On the granting of warrant to sell the creditor would be able to serve on the debtor a notice which terminates the debtor's rights of occupation and transfers the debtor's rights and obligations as proprietor to the creditor pending the sale.

(12) The sale would be effected by public auction or private bargain, and as one unit or in lots.

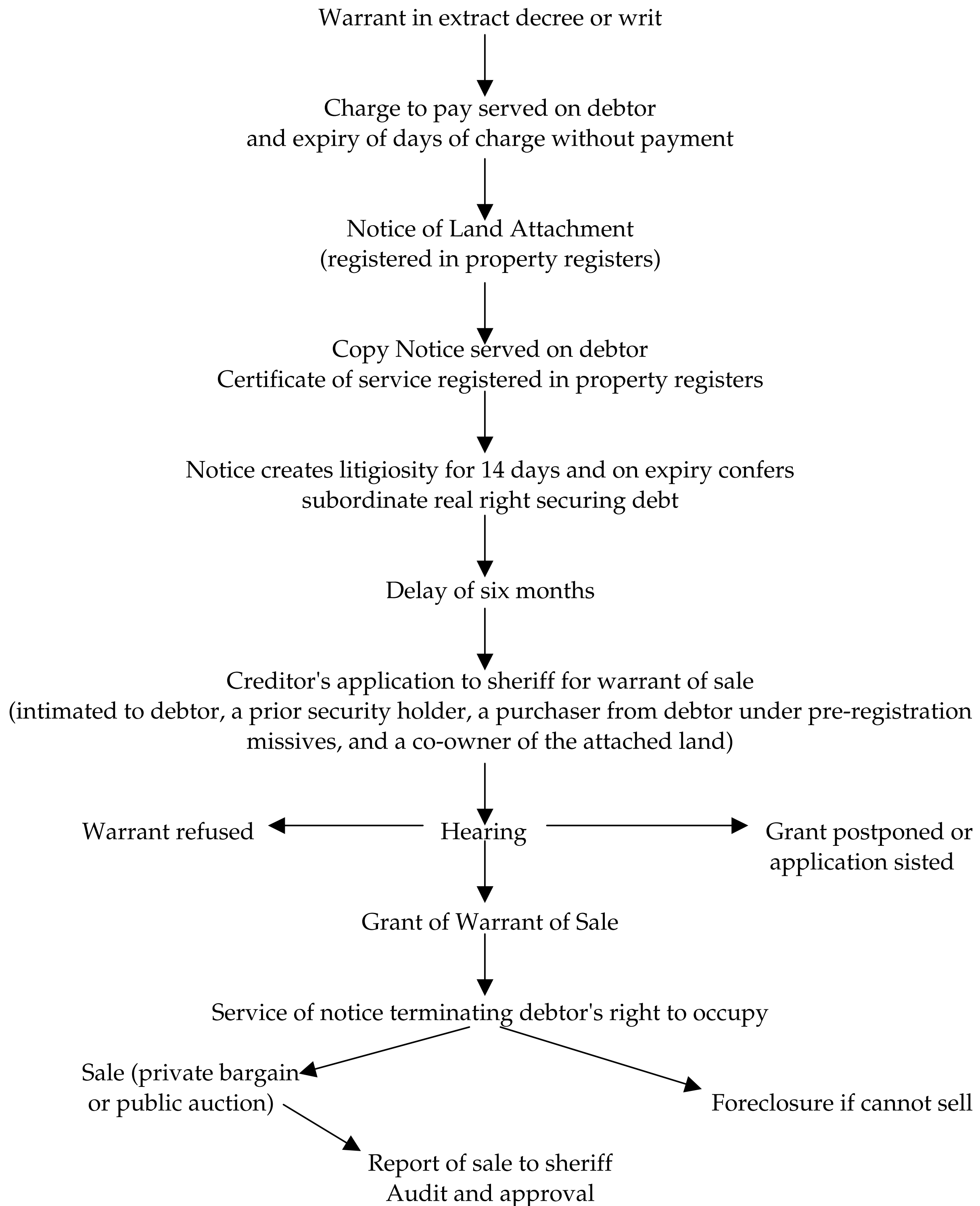
(13) The creditor would grant and deliver a disposition in exchange for the price and on registration of the disposition the land would be freed and disburdened of the land attachment.

(14) After any sale, the appointed person would disburse the proceeds of sale to the creditor, and any prior, *pari passu* or postponed creditors, in accordance with their respective rights and preferences and make a report of the sale to the sheriff.

(15) If the land could not be sold, the creditor would apply to the sheriff for decree of foreclosure which would adjudge the land to belong to the creditor at the last reserve price.

(16) Where the attached land consists of or includes the debtor's *pro indiviso* share of land held in common property, the sheriff would follow procedures adapted from actions of division and sale.

DIAGRAM OF MAIN STEPS IN LAND ATTACHMENT



(2) Warrant for land attachment

3.34 We propose that a warrant for diligence in an extract decree for payment should, without any further application to the court, authorise the creditor to take the initial stages of the diligence. On obtaining an extract of the decree, the creditor would be authorised to charge the debtor to pay the debt. If the debt is not paid within the days of charge, the creditor would then be entitled to register in the appropriate property register a notice of land attachment of any land specified in the notice. For purposes of using land attachment a 'decree' includes decrees for payment granted by the Court of Session and the sheriff court but also extends to other decrees or their equivalents. An example would be an extract writ registered in the Books of Council and Session or sheriff court books for execution. The writ may be a deed[18] containing a clause of consent to registration for preservation and execution, or it may be a notarial instrument of dishonour[19] registered for execution.[20] To protect consumers, regulated consumer credit agreements are not enforceable by summary diligence.[21] In consonance with the existing rule,[22] an extract of a sheriff court decree should authorise attachment of land situated in any sheriffdom in Scotland.

3.35 Land attachment should be available in executing orders of other courts or tribunals which are enforceable by virtue of various enactments as if they were decrees or registered writs.[23] Likewise orders for payment of fines, penalties and sums due under compensation orders in criminal proceedings[24] and a liability order for arrears of child maintenance[25] should authorise land attachment as well as the other diligences presently authorised.

3.36 We believe that the service of a charge to pay should be a prerequisite of a registration of a notice of land attachment. The charge to pay would be a general one so that the creditor could proceed to poind and arrest earnings as well as or instead of applying for a land attachment. The charge, which would be in a form prescribed by rules of court, would be served on the debtor by an officer of court (messenger-at-arms or sheriff officer) in accordance with the existing rules for service of charges.[26] The days of charge are 14 or 28 depending on the debtor's whereabouts.[27] Poinding and arrestment of earnings are not competent more than two years after the service of a charge.[28] This rule should extend to land attachment. The charge should be served on the debtor in accordance with the normal rules for service. [29]

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[18] Such as a personal bond, lease or heritable security.

[19] Proceeding on a bill of exchange (other than a cheque) or promissory note which has been dishonoured and protested.

[20] Bills of Exchange Act 1681; Inland Bills Act 1696; Bank Notes (Scotland) Act 1765; Bills of Exchange (Scotland) Act 1772; all saved by Bills of Exchange Act 1882, s 98.

[21] Consumer Credit Act 1974, s 93A (as inserted by the 1987 Act, Sch 6, para 16).

[22] 1987 Act, s 91 (certain warrants of sheriff for diligence enforceable anywhere in Scotland).

[23] Eg Scottish Land Court Act 1993, Sch 1, para 16 (Scottish Land Court); Lands Tribunal Act 1949, s 3(12) (as amended by the Land Tenure Reform (Scotland) Act 1974, s 19 (Lands Tribunal for Scotland); Solicitors (Scotland) Act 1980, Sch 4, paras 20-21 (Scottish Solicitors' Discipline Tribunal).

[24] Criminal Procedure (Scotland) Act 1995, s 221.

[25] Cf Child Support Act 1991, s 38, providing that the Secretary of State may adjudge on the basis of a liability order.

[26] Amendments will be required to the 1987 Act, s 87 and the Sheriff Courts (Scotland) Extracts Act 1892, s 7 which set out the effect of a warrant for execution.

[27] See 1987 Act, s 90(3).

[28] *Ibid*, s 90(5). The creditor may reconstitute his right to execute diligence by the service of a further charge.

[29] RCS, rule 16; OCR 1993, rule 5.

3.37 A creditor, if so advised, should be entitled to enforce more than one debt due to him in the same capacity by the same debtor against the same land by means of a single notice of land attachment. One charge may be served for one debt or two or more debts. The notice of land attachment should itemise all the debts being enforced thereby.

No land attachment on the dependence or in security

3.38 In our *Report on Diligence on the Dependence and Admiralty Arrestments*[30] we recommended that adjudication on the dependence should not be introduced. We also recommended that the diligence of adjudication in security of future or contingent debts should be abolished. Consistently with those recommendations, we do not recommend that land attachment should be available on the dependence or in security. Land attachment is a relatively cumbersome and expensive diligence and it seems best to restrict diligence on the dependence or in security to the more streamlined and cheaper diligences of inhibition and arrestment. Inhibition on the dependence or in security would be available and should suffice. We recommend that land attachment should be preceded by a charge to pay within the days of charge, and a charge to pay cannot be used on the dependence of an action since liability for the debt is not yet constituted. We also recommend below[31] that there should be a lower limit on the amount (including litigation expenses) enforceable by land attachment. It would be difficult to apply this limit to land attachment on the dependence since the litigation expenses would often not be known until a late stage in the action. In any case we are not aware of any demand for the introduction of land attachment on the dependence. On the contrary it might well be opposed by those who fear that land attachments could disrupt conveyancing transactions and by bodies representing debtors. We concede that (as the Scottish Clearing Bankers represented to us) there is a risk of a potential race to the register between competing creditors which might have an effect on creditors' behaviour in litigation. On balance, the disadvantages outweigh the advantages and accordingly we adhere to our view that land attachment should not be available on the dependence or in security.

3.39 We recommend that:

4. (1) A warrant for diligence in an extract of a decree or a decree equivalent should have the effect of authorising the creditor, among other things:

(a) to charge the debtor to pay the debt, interest and expenses within the days of charge on pain of attachment of land;

(b) after expiry of the days of charge without payment, to register in the property registers a notice of land attachment over land specified in the notice.

[30] Scot Law Com No 164, Recommendation 48 (para 6.58).
[31] Paras 3.85-3.95.

(2) For this purpose a decree or decree equivalent should include:

(a) a decree for the payment of money of the ordinary courts of law (Court of Session, High Court of Justiciary, Court of Teinds or a sheriff court);

(b) a civil judgment granted outwith Scotland by a court, tribunal or arbiter and, by virtue of any enactment or rule of law, enforceable in Scotland;

(c) a document of debt registered for execution in the Books of Council and Session or sheriff court books;

(d) a bill protested for non-payment by a notary public;

(e) a document or settlement which, by virtue of an Order in Council made under section 13 of the Civil Jurisdiction and Judgments Act 1982, is enforceable in Scotland;

(f) an order of a criminal court imposing a fine or other financial penalty or making a compensation order containing a warrant for diligence;

(g) a liability order within the meaning of section 32(2) of the Child Support Act 1991; and

(h) an order or determination which by virtue of any enactment is enforceable as if it were an extract registered decree arbitral bearing a warrant for execution granted by the sheriff.

(3) A notice of land attachment may not be registered after the lapse of two years from the date of service of the charge on the debtor but a creditor may reconstitute his right to register a notice by the service of a further charge in terms of section 90 of the Debtors (Scotland) Act 1987.

(4) Land attachment should not be competent on the dependence of an action or in security of future or contingent debts.

(3) Land attachable

3.40 As its name implies land attachment is a diligence which is used against the debtor's land. However for purposes of diligence "land" is not restricted to what is meant by land in everyday language.[32] As is the case with adjudication for debt, the new diligence will apply not only to land in which the debtor holds the primary real right of ownership but also to subordinate real rights (in a third party's land) to which the debtor is entitled. While the common case will be land owned by the debtor, subordinate real rights such as debts

[32] A further point about land which can be attached by land attachment is that it must be situated in Scotland. This qualification derives from general principle and is not further discussed.

secured over land by standard securities, or long leases registered in the property registers,[33] would also be attachable.

3.41 In defining what "land" is to be attachable by land attachment, it seems desirable to use terminology which coheres with the Abolition of Feudal Tenure etc. (Scotland) Act 2000[34] in order to promote proper and consistent usage. The Act amends provisions in the Conveyancing and Feudal Reform (Scotland) Act 1970 (introducing the standard security) which are in some ways analogous to the recommendations in our present report. Section 9(2) of the 1970 Act, as amended by the 2000 Act,[35] provides that it "shall be competent to grant and record in the Register of Sasines a standard security over any land or real right in land…". For this purpose the expression "real right in land" is defined to mean "any such right, other than ownership, which is capable of being held separately and to which a title may be recorded in the Register of Sasines."[36] In this definition, the expression "capable of being held separately" excludes for example a servitude or real burden. Following this precedent we have framed our recommendations in this report by describing the subjects attachable by land attachment as "land" and we define "land" so as to include a subordinate real right in land that is to say any such right, other than ownership, which is capable of being held separately and the title to which may be registered in the property registers.

3.42 In our discussion paper we provisionally proposed that a land attachment should be competent for use against land of a debtor whose title is at the date of registration of the notice of land attachment either registered in the property registers or capable of being so registered.[37] This proposal was generally approved on consultation and we adhere to it subject to the following explanation. First, at the date of registration of the notice of land attachment, a title to the land (ie the subjects sought to be attached by land attachment) must already have been registered in the property registers. So for example if a deed (such as a lease or a standard security) creates a new registrable right and that right has not yet been registered in the property registers, the right is not to be attachable by land attachment until it has been registered. In other words, either the debtor or his predecessors in title must at some stage have registered a title to the land in the Land Register or recorded a deed in the Register of Sasines. The land must have entered the registers. It is not enough that a title of the debtor or his predecessor in title is registrable if it has not yet been registered. Without registration there is no real right to attach. Secondly, the debtor must himself hold a registered or registrable title to the land. In this context "a registrable title" means an unregistered conveyance or other midcouple or link in title (connecting the debtor with the person having the last registered title) on which the debtor could complete title by registration. Thirdly, it follows that it is not enough if the debtor has merely a personal right to demand the grant and delivery of a conveyance, eg from an executor or trustee or from a seller under missives. Such a personal right may be attachable by the new diligence of attachment order[38] but it is not to be attachable by land attachment.

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[33] Under the Registration of Leases (Scotland) Act 1857 or the Land Registration (Scotland) Act 1979.

[34] The 2000 Act implements our *Report on Abolition of the Feudal System* Scot Law Com No 168 (1999). On terminology see Report, paras 9.2-9.6 and especially para 9.5 concerning the term "interest in land".

[35] Abolition of Feudal Tenure etc. (Scotland) Act 2000, Sch 12, para 30(6).

[36] See 1970 Act, s 9(8) as read with s 2(6) as amended by the Abolition of Feudal Tenure etc. (Scotland) Act 2000, Sch 12, para 30(3)(c) and (6).

[37] Scot Law Com DP No 107, Part 2, s B, Proposition 1(1).

[38] See para 4.38.

3.43 Where title to the land has been registered by the debtor's predecessor in title but the debtor's title itself is not registered (ie depends on an unregistered midcouple or link in title), it is essential that links in title connecting the debtor with the last registered title be produced. On consultation the Keeper pointed out that in the Land Register production of unregistered links in title would be necessary to give the Keeper sufficient information to discharge his statutory function of deciding whether the application was "frivolous or vexatious" in the statutory sense.[39]

3.44 We do not consider that the validity of the diligence would or should be adversely affected if the debtor does not subsequently register his title in the Land Register or record his title deed in the Sasines Register. It is competent for a proprietor whose title to land has not yet been registered to grant a standard security over the land using a clause of deduction of title[40] and in principle a land attachment is no different. It is common for links in title (eg wills and docketed confirmations of executors) to be registered for preservation in the Books of Council and Session or sheriff court books which are public registers. In such a case the creditor could obtain an extract for use as a link in title.

3.45 The Keeper suggested that difficulties concerning links in title would be obviated if attachment could only be used when the debtor's title actually appeared in the register. We have not accepted this suggestion since it would mean that a registrable but unregistered right would not be attachable by any attaching diligence. To avoid raising well-nigh intractable problems, such a right should not be attachable by the proposed new diligence of attachment order recommended in Part 4 below.[41]

3.46 We considered whether the court should have power to compel debtors to exhibit to the creditor, and to deliver on loan, any links in title required to connect the debtor with the person having the last registered title. Such a provision would require to be backed by sanctions for contempt of court which would seem socially unacceptable, as tending to bring back imprisonment for debt by the back door.[42]

3.47 Particular issues arise in respect of the attachment of leases. In terms of general principle only a registered lease would be capable of being attached. However under the existing law there are qualifications on the adjudgeability of certain types of lease. First a lease which cannot be assigned is not adjudgeable, and the same principle should apply to land attachment.[43] Secondly there are doubts as to the adjudgeability of a lease which is assignable with the consent of a landlord but that consent must not be unreasonably

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[39] 1979 Act, s 4(2)(c).
[40] 1970 Act, s 12(1).
[41] The complications arising if it were so attachable are easy to see. What if registrable but unregistered land already attached by attachment order were registered? How could an attachment order, which is already in force, be adapted so as to apply to registered land in such a way as to protect the faith of the registers? Should there be two different types of attachment for registered land? Should the attachment order cease to have effect or be transformed into a land attachment? What provisions would be needed to effect the transformation? These complications are best avoided. A non-registrable real right in land (eg a short lease) does not raise the same problems and should be attachable by attachment orders such as recommended in Part 4.
[42] It may be that the creditor could use a common law action of exhibition but these are virtually unknown in modern practice: see Macphail, *Sheriff Court Practice* (2nd edn) paras 2.86; 24.01. We doubt whether an order under the Administration of Justice (Scotland) Act 1972 s 1 (extended powers of court to order inspection of documents or other property etc) would be competent to obtain the production of links in title. It is not the practice of the Scottish courts to assist creditors to obtain information needed for the execution of diligence.
[43] Graham Stewart, p 601.

withheld.[44] We believe that this doubt should be removed, and that such leases should be subject to the diligence of creditors, including land attachment.[45]

3.48 The proposed new residual diligence of attachment orders which we discuss in detail in Part 4 could apply to non-registrable rights such as a non-registrable lease.

3.49 A basic principle of the law of property is that real rights in heritable property are defined in terms of registration in the property registers, and we have used the term ownership to reflect that basic principle. However the decision of the House of Lords in *Sharp v Thomson*[46] has thrown this generally accepted principle into some doubt and has suggested that there may be contexts in which registration is not the defining moment for acquiring and divesting ownership of land and other real rights in land. The decision in that case has given rise to various doubts and difficulties. We have received a reference from the Scottish Ministers to consider the implications of *Sharp v Thomson* and to make recommendations as to possible reform of the law.[47] We shall consider the full ramifications of the decision in our work on that reference. In this Report we shall continue to use the traditional principles of the law of property when discussing the "land" and "real rights" of the debtor.

3.50 We recommend that:

5. (1) The diligence of land attachment should apply to land of a debtor whose title is, at the date of registration of the notice of land attachment, registered in the property registers or capable of being so registered.

(2) "Land" for this purpose should include land itself and a subordinate real right in land being a right which:

(a) is capable of being held separately;

(b) is not a right of ownership; and

(c) is registered in the property registers.

(3) It should not be competent to use land attachment to attach a lease :

(a) which is not assignable; or

(b) which excludes assignation except with the landlord's consent.

But a lease of the latter type which provides that the landlord's consent shall not be unreasonably withheld should be attachable.

[44] Gretton, pp 73-74.
[45] We make a similar recommendation in respect of the use of attachment orders against unregistrable leases. See para 4.11.
[46] 1997 SC (HL) 66, reversing 1995 SC 455 (First Division).
[47] See our *Thirty-Fifth Annual Report*, Scot Law Com No 182 (2000), paras 3.33-3.35. We intend to produce a discussion paper on this reference by the end of 2001 and a report as soon as possible thereafter.

(4) Notice of land attachment

3.51 After the days of charge have expired without payment, the next step is for the creditor to register a notice of land attachment in the property registers.

3.52 **Content of notice of land attachment**. A statutory form for the notice of land attachment would be provided. We envisage that the notice should set out the names and designations of the creditor and debtor and specify the decree or other document constituting the debt and containing (or deemed by law to contain) the warrant for the diligence. It should also specify the amount of the debt whose payment is to be secured by the land attachment. This sum consists of or includes the principal sum specified in the decree (including litigation expenses, interest to date, the expenses of its registration and of executing the prior charge, less payments to account). Finally the notice should describe the land to be attached by the diligence.

3.53 Where the debtor's title is unregistered, the notice of land attachment registered in the Sasine Register should specify the links in title connecting the debtor to the last registered proprietor. The Keeper would be entitled[48] to refuse to enter the attachment in the Land Register unless satisfied by documents or other evidence that the debtor owned registrable rights in relation to the land, or might exclude indemnity in relation to the validity of the links. Creditors who were unable to find out about, or to specify, these links would not be able to use land attachment. They would have to use some other diligence, such as inhibition, or to sequestrate. If the debtor's title was incomplete in that some steps had to be taken in order to obtain a link in title, the creditor should not be entitled to take the required steps in place of the debtor.

3.54 **Rights conferred on a creditor by registration of a notice of land attachment.** The main effects of the registration of the notice of land attachment would be two-fold. First, it would render the land specified in the notice litigious, for the benefit of the creditor, for a period of 14 days commencing on the date of registration of the notice. Secondly, it would confer on the creditor, as from the expiry of the period of litigiosity, a subordinate real right over that land in security for payment of his debt that is the total of (i) the sum charged for and interest accruing after service of the charge and before the attachment ceases to have effect; and (ii) the taxed expenses for which the debtor is liable by virtue of the attachment.

3.55 **(a) mandatory period of litigiosity**. We propose that in rendering the land litigious, the notice of land attachment should have the same effect as if it were an inhibition restricted to the land described in the land attachment, subject to the reforms of inhibitions proposed in Part 6 of this Report. Accordingly the mandatory 14 days period of litigiosity acts to protect the creditor against deeds voluntarily granted by the debtor during the period between registration of the notice and the attachment having effect as a subordinate real right. Moreover the period of litigiosity acts to protect purchasers of the subsequently attached land, transacting with the debtor on the faith of the registers, from suffering a double loss. That double loss is (1) loss of the price paid on the date of settlement and (2) loss of the property purchased which would occur if the land attachment were to win a race to the register against the debtor's disposition to the purchaser. A period of litigiosity between the registration of the notice of land attachment and the vesting of a real right in the creditor on the expiry of the 14 days would enable a purchaser or lender on security

[48] 1979 Act, s 4(1).

transacting with the debtor, to whom a conveyance had been delivered on the date of such registration, to complete title by registering the conveyance in the property registers.[49] The effect would be that if the purchaser or secured lender were to obtain an interim report on search, showing clear records up to a time shortly before settlement, and in particular disclosing no notice of land attachment in the property registers, he will know that if he completes title within 14 days after the end of the period of the interim search, his title could not be defeated by any land attachment subsequently registered by a creditor of his author.

3.56 A novel feature of the notice of land attachment is that it would be a document rendering land litigious by registration in the property registers rather than by registration in the personal register. The personal register has hitherto been the only competent register for registering inhibitions and other documents creating litigiosity. There are two reasons for this innovation. First, normally documents registrable in the personal register (inhibitions and other notices of litigiosity) do not describe the land affected by the litigiosity. Since it is intended that only the land to be attached (and not the debtor's whole heritable property) should be rendered litigious, any notice of litigiosity would require to describe the land to which it relates. Since it would contain such a description, it could technically be registered in the property registers. Secondly, it is easier and cheaper to provide for the registration of one notice in the property registers than to provide for two notices, one a notice of litigiosity registrable only in the personal register and the other a notice of land attachment registrable in the property registers.

3.57 The litigiosity would cease to have effect after 14 days from registration of the notice of land attachment when it would be replaced by the "attaching" effect of the diligence, that is, the constitution of a subordinate real right over the property. After the expiry of the 14 days however it would still be competent for the creditor to reduce any deed granted and delivered in violation of the litigiosity.

3.58 **(b) subordinate real right in security**. The second effect of registration of a notice of land attachment is that it would confer on the creditor, as from the expiry of the period of litigiosity, a subordinate real right[50] over the land specified in the notice in security for payment of (a) the sum charged for and interest accruing after service of the charge and before the attachment ceases to have effect and (b) the taxed expenses for which the debtor is liable by virtue of the attachment. The creation of a subordinate real right depends on two factors. A notice of land attachment will not confer a real right on the creditor where a disposition of the land has been registered during the period of litigiosity (unless the disposition was itself granted in breach of the litigiosity). Furthermore the creditor must take steps to serve the debtor with a copy of the notice of land attachment and to register a certificate of service.[51] A general effect of the constitution of a subordinate real right is that it confers on the creditor a priority over any conveyance of the land granted by the debtor after the date of constitution of the real right. It also gives the creditor rights over competing processes against the attached land. The crucial factor is that the so-called "priority-point" is fixed by statute as the expiry of 14 days after the date of registration. We envisage that the rules on competition which apply to adjudications and other processes would apply *mutatis*

[49] We are considering here the situation where a disposition has been delivered but not yet registered. Later we deal with problems which may arise where missives of sale have been concluded but a notice of land attachment is registered before delivery of a disposition. See paras 3.130-3.132.

[50] See Stair Memorial Encyclopaedia vol 18, para 5.

[51] See para 3.64 below.

mutandis to land attachment but we do not recommend that these rules should be stated in statutory form.[52] It is also envisaged that as a subordinate real right in security of the debt, a land attachment would be an "effectually executed diligence" on property for the purpose of the floating charges legislation but this is ultimately a matter for the courts when interpreting the relevant statutory provisions.[53]

3.59 A notice of land attachment should be deemed to contain an assignation to the creditor of titles, searches and unregistered conveyances. There is a precedent in section 10(4) of the 1970 Act which deems a standard security to contain a provision for assignation of prior writs relating to the debtor's title.

3.60 A further consequence of this effect of registration of a notice of land attachment is that it may operate as a restriction on advances under prior heritable securities. Under section 13(1) of the Conveyancing and Feudal Reform (Scotland) Act 1970 where a creditor in a duly registered standard security has received notice of the creation of a subsequently registered security over the security subjects the security holder's preference is restricted to (i) present advances (ii) future advances if he is required to make them under the principal obligation (iii) interest, present and future and (iv) expenses and outlays. Section 13(2) provides what constitutes notice of a subsequent security for purposes of this rule and a notice of land attachment would have to be actually notified to the prior heritable creditor to bring section 13(1) into operation.

3.61 **The mechanics of registration.** In the Land Register, the creditor would apply for registration on a form to be prescribed by the Scottish Ministers.[54] The Keeper would enter details of the attachment in the charges section of the title sheet and issue the creditor with a charge certificate containing details of the attachment and any heritable securities ranking prior to it or *pari passu* with it.[55]

3.62 Certain provisions of the 1979 Act on registration of heritable securities would apply to land attachments. Registration of a land attachment, like registration of a heritable security,[56] would not induce a first registration of the debtor's land situated in an operational area. The security would be registered in the Sasine Register. Like a heritable security, a land attachment would be registered in the Land Register if the land is registered there.[57]

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[52] For discussion of the rules on competition between adjudications and other rights, see Scot Law Com DP No 78 Part 6. In Part 7 of this Report we recommend that the rules on equalisation of adjudications should be abolished. We also make proposals for new rules regulating the effect of sequestration and liquidation on prior land attachments. See paras 7.9-7.10.

[53] Companies Act 1985, s 463(1); Insolvency Act 1986, s 55(3).

[54] 1979 Act, s 27.

[55] In this Report we refer to the effect of land attachment as being postponed to "prior" securities and to its priority over subsequent securities etc in accordance with the normal rules of ranking of real rights. In theory there could be securities (including other land attachments) which rank *pari passu* with a land attachment. In Part 7 we recommend that the rules on equalisation of adjudications should be abolished and that no similar provision should be made in respect of land attachment. Accordingly *pari passu* ranking could occur only when two land attachments became effective as real rights on the same date or when a land attachment took effect as a real right on the same date as the registration of an other security over the land (1979 Act, s 7). For the sake of brevity we will generally omit reference to *pari passu* debts or securities.

[56] 1979 Act, s 2(2).

[57] 1979 Act, s 2(3).

3.63 In the Land Register, a land attachment would be entered on a title sheet in the same way as a heritable security.[58] Section 12(3)(o) of the 1979 Act excludes indemnity in respect of the amount due under a heritable security. Land attachments should be in the same position.

3.64 **Service of copy of notice of land attachment**. The debtor ought to be informed of the litigiosity and subsequent attachment of his land. A copy in a prescribed form of the notice of land attachment should therefore be served on the debtor by an officer of court (messenger-at-arms or sheriff officer) after the date of registration of the notice. The most appropriate sanction for breach of this requirement would be that the notice of land attachment should be invalid. Since however the notice would already have been registered, third parties transacting on the faith of the registers (eg parties purchasing the property from the attaching creditor) would require to be satisfied that service of a copy had been duly made. So a certificate by the officer of court of service of a copy of the notice on the debtor should be registered in the property registers within 14 days after the date of registration of the notice itself. It should be provided therefore that if such a certificate is not registered, the land attachment should thereafter be deemed to be, and always to have been, void.

3.65 We recommend that:

6. (1) The notice of land attachment should set out the names and designations of the creditor and debtor and specify:

(a) the decree or other document constituting the debt and containing (or deemed by law to contain) the warrant for the diligence;

(b) the amount of the debt secured by the land attachment (principal sum and litigation expenses, interest to date, the expenses of its registration and of executing the prior charge, less payments to account); and

(c) the land attached thereby.

(2) A notice of land attachment should:

(a) render the land litigious for a period of 14 days after registration of the notice of land attachment; and

(b) on the expiry of that period, confer on the creditor a subordinate real right in security for payment of the debt.

(3) In rendering the land litigious, the notice of land attachment should have the same effect as an inhibition restricted to the land described in the land attachment, subject to the reforms of inhibitions proposed in Part 6 of this Report.

[58] 1979 Act, ss 5 (1),(3) and 6(1)(d); the Land Registration (Scotland) Rules 1980, rule 6 set out how heritable securities are entered on a title sheet.

(4) Where a disposition of the land is registered during the period of litigiosity a notice of land attachment does not operate to confer any real right on the attaching creditor except where the disposition has been granted in breach of the litigiosity.

(5) A registered notice of land attachment should imply an assignation to the creditor of the title deeds, including searches and all unregistered conveyances affecting the attached land.

(6) Notice given to a holder of a prior standard security of a registered notice of land attachment has the effect of restricting the scope of that security in terms of section 13 of the Conveyancing and Feudal Reform (Scotland) Act 1970 (ranking of standard securities).

(7) A copy in a prescribed form of the notice of land attachment should be served on the debtor by an officer of court (messenger-at-arms or sheriff officer) after the date of registration of the notice.

(8) If a certificate by the officer of court of service of a copy of the notice of land attachment on the debtor has not been registered in the property registers within 14 days after the date of registration of the notice, the diligence should thereafter be deemed to be, and always to have been, void.

(5) Incidental effects of land attachment

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

3.66 Under the present law, a decree of adjudication has the effect of accumulating the debt due to the adjudger - principal, accrued interest and expenses - into a single sum on which interest runs though the decree does not mention interest. As a general rule, other modes of diligence do not have that effect in modern practice and though registration of an expired charge in the Register of Hornings does have that effect under an old statute,[59] the Debtors (Scotland) Act 1987, section 90(8) abolished registration of expired charges which was never used in modern practice. This rule is not consistent with the rules on accrued interest under heritable securities or the diligences of arrestment and poinding.[60] We can see no reason why land attachment should have the special privilege of accumulation given to adjudication.

3.67 We recommend that:

7. The rule that registration of an adjudication has the effect of accumulating the principal sum, interest and expenses into a capital sum bearing interest thereafter should not apply to the new diligence of land attachment, and accordingly land attachment should secure interest accrued and continuing to accrue until sale or foreclosure but not interest on accrued interest.

[59] Debtors (Scotland) Act 1838, ss 5 and 10 (now repealed).
[60] See 1987 Act, s 45 (poindings); *McDonald and Halket v Wingate* (1825) 3 S 494 (arrestment).

(b) Apparent insolvency

3.68 Under the Bankruptcy (Scotland) Act 1985, section 7(1)(c)(iv), a decree of adjudication has the effect of creating apparent insolvency within the meaning of that Act unless it is shown that when the decree was granted the debtor was willing and able to pay his debts as they become due. An expired charge has a similar effect.[61] Since in the new procedure which we propose, an expired charge will precede every land attachment and since apparent insolvency thus constituted continues until the debtor becomes able to pay his debts and pays them as they become due,[62] there would seem to be little practical point in providing that the registration of a notice of land attachment would reconstitute apparent insolvency of new.

3.69 We recommend that:

> 8. **If as we recommend above an expired charge becomes an essential prelude to registering a notice of land attachment, then such registration should not constitute or reconstitute apparent insolvency in the statutory sense.**

(c) Vesting *tantum et tale*

3.70 The real right over the adjudged property which vests in an adjudging creditor on the date of registration of an adjudication, by virtue of the duly registered extract decree of adjudication, is subject to certain exclusions which are normally described by reference to the general common law principle (applicable to arrestments and poindings as well as adjudications)[63] that the creditor takes the property "*tantum et tale*" as it stood in the hands of the debtor, and subject to certain conditions and qualifications attaching to it. Thus the adjudging creditor is bound by a prior latent trust over the adjudged subjects created in favour of a third party beneficiary.[64] The *tantum et tale* principle, however, only applies to real rights affecting the property[65] and to conditions which affect the constitution of the real right in the debtor.[66] It does not apply to personal obligations under which the debtor has come with respect to the property. Thus if the debtor is under a contractual obligation to convey property to a third party, even for onerous cause, this has no effect on an adjudging creditor.[67]

3.71 The *tantum et tale* principle applies also to sequestrations.[68] The bankrupt's estate for example vests in the permanent trustee by virtue of the act and warrant which has the same effect with respect to heritable property as *inter alia* "a decree of adjudication for payment and in security of debt, subject to no legal reversion" in the trustee's favour.[69] In our *Report on*

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[61] 1985 Act, s 7(1)(c)(iii).
[62] *Ibid*, s 7(2)(b).
[63] Graham Stewart, pp 68, 128-129, 620-621.
[64] *Heritable Reversionary Co v Millar* (1892) 19 R (HL) 43 at p 48 per Lord Watson; *Thomson v Douglas Heron and Co* (1786) Mor 10229.
[65] *Gibson v Hunter Home Designs Ltd* 1976 SC 23 at pp 29-30 per Lord Cameron; Graham Stewart, p 620.
[66] *Mansfield v Walker's Trs* (1833) 11 S 813 at p 822 per Lord Corehouse, affd 1 S & McL 203; Graham Stewart, p 620.
[67] *Mitchells v Ferguson* (1781) Mor 10296; *Heritable Reversionary Co v Miller* (1892) 19 R (HL) 43 at pp 47-48 per Lord Watson; *Gibson v Hunter Home Designs Ltd* 1976 SC 23.
[68] Goudy, p 249; *Gibson v Hunter Home Designs Ltd* 1976 SC 23; 1985 Act, s 31(1)(b).
[69] 1985 Act, s 31(1)(b); see further paras 3.204-3.207.

Bankruptcy and Related Aspects of Insolvency and Liquidation[70] we concluded that it would be unwise to put the adaptability of the *tantum et tale* principle at risk by attempting to make it the subject of express statutory statement. That conclusion applies with equal force to land attachments. The *tantum et tale* principle should be as applicable to the new diligence of land attachment as to the existing diligence of adjudication. However we do not consider that the Act introducing land attachment should attempt to set out the detail of the application of the general principle to land attachment. This is a matter better left to development by the courts.

3.72 We recommend that:

> **9. It should be made clear by statute that the common law principle known as vesting *tantum et tale* (under which the right which an adjudger acquires over the adjudged property, by registration of a decree of adjudication in the property registers, is subject to certain conditions and qualifications affecting the debtor's title to the property as it stood at the date of that registration) should apply in relation to the registration of a notice of land attachment. The content of that common law principle should not, however, be defined by statute but should be left to be developed by the courts.**

(d) Character of debt as heritable or moveable

3.73 In Discussion Paper No 78 we examined the common law rule that an adjudication used to enforce a moveable debt has the effect of changing the character of the debt from moveable to heritable.[71] As we noted there, this rule has various ramifications especially in relation to the interaction of adjudication and the law of succession. This is an area of law which is subject to considerable uncertainty. We take the view that the common law rule has no place in the modern law of succession or diligence and we recommend that it should not apply to the new diligence of land attachment.

3.74 We recommend that:

> **10. In the new diligence of land attachment, the registration of a notice of land attachment to enforce a moveable debt should not have the effect of changing the character of the debt from moveable to heritable.**

(6) Debtor protection and protection of occupiers against homelessness

3.75 **Overview**. Every form of diligence should strike the right balance between the need for an efficient system of debt enforcement and the need to protect debtors from undue economic hardship and personal distress. We discussed earlier[72] the issue of the extent to which the debtor's principal or sole dwellinghouse should be subject to the diligence of land attachment. We believe that concern over this particular issue was the driving force behind many of the representations made to us on consultation that the safeguards for debtors

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[70] Scot Law Com No 68, para 11.22.
[71] Paras 5.42-5.44.
[72] See paras 3.21-3.28.

proposed in our discussion paper[73] were inadequate. We are now of the view that whatever decision is made about including dwellinghouses in the scope of land attachment, measures of debtor protection are required. Clearly if land attachment is to apply to the debtor's dwellinghouse, specific measures should exist to ensure that the use of the diligence does not needlessly result in homelessness. Land attachment is by its very nature a complex and cumbersome diligence and we consider that even in cases of its use against land other than dwellings, it is necessary to recognise and give weight to the debtor's interests. Earlier, we discussed our view that our proposals for the diligence of land attachment are consistent with the provisions of the European Convention on Human Rights, especially the right to respect for a person's private and family life, and the right to peaceful enjoyment of a person's possessions.[74] If the law on land attachment is to be consistent with the Convention provisions, it must be possible to show that a considered and measured balance has been struck between the interests of the creditor and the debtor and that the law is proportionate in terms of its aims.

3.76 Accordingly we propose that the following safeguards to protect debtors from undue hardship should be introduced, namely:

(a) time to pay directions and orders under the Debtors (Scotland) Act 1987, Part I;

(b) a lower limit on the size of debt for which attached land can be sold;

(c) the duty of the sheriff to refuse an application for warrant to sell attached land if the net free proceeds of sale are unlikely to pay off part of the principal debt (the "not worth it" test);

(d) the power of the sheriff to refuse warrant of sale or to postpone the sale of attached land if a sale would be unduly harsh in the circumstances;

(e) the expenses of the diligence recoverable from that diligence only; and

(f) the duty of a sheriff in an application for warrant of sale of a dwellinghouse occupied by a person as his only or principal residence:

    (i) to consider the circumstances leading to the debt, the ability of the debtor to pay the debt within an extended period, and the ability of persons occupying the dwelling to obtain reasonable alternative accommodation;

    (ii) to refuse warrant of sale or to extend the period before a sale can take place in the light of his findings on these matters.

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[73] Summarised in Scot Law Com DP No 107, para 1.8.

[74] See paras 1.12-1.15.

Recommended safeguards for debtors

(a) Time to pay directions and orders under the Debtors (Scotland) Act 1987, Part I

3.77 We are of the view that time to pay directions and time to pay orders under Part I of the Debtors (Scotland) Act 1987 should be available to protect debtors from land attachments. These measures were introduced to give debtors who are willing but for the moment unable to pay their debts an opportunity of doing so free from the threat of diligence.[75] Time to pay directions in decrees for payment provide for payment of the debt by instalments or by a deferred lump sum and prevent the use of diligence during the period allowed for payment.[76] The directions are available in debt actions against individuals in the Court of Session and sheriff court where the sum payable under the decree does not exceed £25,000 (excluding interest and expenses). Time to pay orders convert "open" decrees (ie decrees for payment in a lump sum) into decrees having similar effects as time to pay directions in decrees.[77] Whereas time to pay directions are applied for in court actions, time to pay orders are available at the later stage when a charge to pay had been served on the open decree or where other diligence, usually an arrestment, has been used.

3.78 On consultation, some consultees argued that time to pay directions or orders would not provide adequate protection for debtors from the potentially harsh effects of the land attachment proposals. In our Discussion Paper on *Poinding and Sale* we examined research by the Scottish Office Central Research Unit on the practical operations of the time to pay provisions of the 1987 Act.[78] In the light of that research we accepted that for a variety of reasons the time to pay measures had not been completely successful in achieving their intended aims. In our subsequent Report we made a number of recommendations with a view to making the time to pay measures a greater protection for debtors and to encourage greater use of these measures. We still adhere to these recommendations.[79]

3.79 The provisions of the 1987 Act on time to pay directions allow the debtor to apply for such a direction prior to the court granting decree. While the direction is in effect various diligences cannot be used against the debtor. These provisions require amendment to ensure that the protection against diligence applies to land attachment. A time to pay direction in a decree precludes the service of a charge,[80] so precluding a subsequent registration of a notice of land attachment.[81]

3.80 After decree for payment, a debtor may apply for a time to pay order which in general terms has the same effect as a time to pay direction. A debtor may apply for an order after diligence has started up until an advanced stage of the diligence. Under the existing law a time to pay order has the effects *inter alia* of preventing the service of a charge

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[75] It is important to bear in mind that generally speaking time to pay directions and orders may be granted only where the debtor is an individual (1987 Act, s 14(1)).
[76] 1987 Act, s 1, as amended by the Debtors (Scotland) Act 1987 (Amendment) Regulations 2000 (SSI 2000/189), para 2 .
[77] 1987 Act, s 5.
[78] Scot Law Com DP No 110 (1999), paras 7.2-7.52.
[79] Scot Law Com No 177, paras 5.14-5.51. One of the recommendations (that the upper limit on debts for which time to pay directions and orders could be granted should be raised from £10,000 to £25,000) was implemented by SSI 2000/189.
[80] 1987 Act, s 2(1)(a).
[81] The reference to an adjudication for debt in the 1987 Act, s 2(1)(b)(iv) should be repealed.

and the commencement of an action of adjudication for debt.[82] Where an action of adjudication for debt has been commenced various steps in the diligence may still be taken despite the making of a time to pay order.[83] Once an application for a time to pay order has been made the sheriff grants an interim order which has a broadly similar effect to a full order on the diligence of adjudication for debt.[84] It should be noted that neither an interim nor a full time to pay order prevents a creditor from using inhibition.[85] These provisions can be adapted to take account of the characteristics of the new diligence of land attachment. A debtor should be able to apply for a time to pay order at any stage after a charge has been served and before the grant of warrant to sell the attached land. We view the attachment stage of land attachment as no more intrusive than inhibition and accordingly we recommend that a time to pay order should not prevent a creditor from proceeding with the registration of a notice of land attachment, if that stage had not already occurred, but that it would prevent any further steps in the diligence.[86] A creditor would be able to take the necessary steps to ensure that the registered land attachment created a real right in his favour by serving a copy of the notice on the debtor and registering a certificate of service. An interim order under section 8 of the 1987 Act would have a similar effect.

3.81 One particular effect of a time to pay order is that the creditor may have already incurred expenses in pursuing the diligence which is blocked or frozen by the order. This situation is governed by section 93(4) and (5) of the 1987 Act which we recommend should be amended to apply to land attachment. The effect of these provisions is that diligence expenses so far incurred which are chargeable against the debtor remain chargeable. They are added to the debt which the debtor has to pay off under the time to pay order or if the debtor has defaulted on the order the expenses are recoverable by further diligence, including land attachment.

3.82 The Insolvency Act 1986 provides[87] that while an administration order is in force no diligence or other legal process may be commenced or continued against the property of the company concerned. This provision requires no amendment for land attachment.

3.83 The relationship between diligence and time orders under section 129 of the Consumer Credit Act 1974 is not clear. The problem was mentioned in our *Report on Diligence and Debtor Protection*.[88] In that Report we considered whether a time order made after diligence had begun should have broadly the same effect as a time to pay order but no legislation followed. We now recommend a simple provision amending the 1974 Act (going

[82] 1987 Act, s 9(1), (2).
[83] These steps are the registration of a notice of litigiosity, the obtaining and extracting of a decree in the action, the registration of an abbreviate of adjudication and the completion of title to property adjudged by the decree. (*ibid*, s 9(2)(c)).
[84] 1987 Act, s 8(1)(d).
[85] In Scot Law Com No 95 (para 3.29) we argued that the new time to pay provisions should not effect inhibition on the ground that an inhibition is a merely prohibitory diligence which would not have any significant impact on the debtor's ability to pay off his debt by instalments or a deferred lump sum.
[86] However a creditor could not register a notice of land attachment unless a prior charge had been served and expired without payment. As a time to pay order (but not an interim order under section 8) prevents the service of a charge the effect is that unless a charge had already been served before the making of the time to pay order a creditor could not take any steps in land attachment.
[87] S 11(3) as read with s 10(5).
[88] Scot Law Com No 95, para 3.126.

beyond land attachment),[89] along the lines of section 11(3) of the Insolvency Act 1986 (which deals with the effect of administration orders).[90]

3.84 We recommend that:

11. (1) Where a time to pay direction under section 1 of the Debtors (Scotland) Act 1987 is in effect it should not be competent for the creditor to serve a charge or to take any steps in the diligence of land attachment.

(2) An application for a time to pay order under section 6 of the Debtors (Scotland) Act 1987 should be competent at any time after service of a charge until a warrant of sale of the attached land has been granted. While a time to pay order is in effect a creditor who has served a charge on the debtor may register a notice of land attachment but may take no further steps in the diligence other than serving a copy of the notice and registering the certificate of service. An interim order sisting diligence should allow the creditor to register a notice of land attachment, to serve a copy of the notice, and to register a certificate of service but would prevent him taking any further steps in the diligence. Expenses incurred by the creditor which are chargeable against the debtor will be recoverable according to the provisions of section 93(4) and (5) of the 1987 Act.

(3) While a time order under section 129 of the Consumer Credit Act 1974 is in effect, it should be incompetent to commence or continue any diligence (other than registering an inhibition or a notice of land attachment) against the individual concerned.

(b) Qualifying lower limit on size of debt enforceable by land attachment

3.85 We think that a debt must be above a certain figure before land attachment can be used. Such a qualifying limit was suggested by a number of consultees commenting on Discussion Paper No 107. A lower limit or monetary threshold would have several advantages. First, it would prevent the full use of the diligence, which involves the use of court resources and would result in the sale of the debtor's land, to recover very small debts.

3.86 Secondly, a fixed qualifying limit would lay down a clear rule which allows the parties to know where they stand. It would also be an effective means of providing debtor protection. One of the problems of debtor protection in diligence is that forms of protection which involve extra procedure, such as applications to the court or means inquiries, may be expensive and increase unduly the expenses falling initially on the creditor for which the debtor is ultimately liable. A fixed qualifying limit avoids that pitfall.

3.87 Thirdly, a fixed qualifying limit would be automatically applied by the creditor (because otherwise he would be liable in damages to the debtor for wrongful diligence) and by the court of its own accord. If the debt fell below the monetary threshold, the court

[89] Recommendation 11(3) below.

[90] We draw to the attention of the relevant authorities the issue whether this recommendation falls within the legislative competence of the Scottish Parliament. Consumer credit is a reserved matter in terms of the Scotland Act 1998, Sch 5, Head C, section C 7.

would be bound of its own motion to refuse warrant of sale.[91] The debtor would not need to take any initiative in order to obtain protection. This would avoid the endemic problem of the low take-up rate of court safeguards which would be a great advantage from the standpoint of debtor protection.

3.88 There is a precedent in the law of Quebec where the main residence of the debtor (if it is an immoveable) is protected against attachment if the value of the claim is below $10,000.[92] In England and Wales, where the court has a discretion whether or not to make a charging order on land,[93] it is not a proper exercise of the court's discretion to make a charging order on an asset of considerable or substantial value in respect of a relatively small debt.[94] In Northern Ireland, while a charging order is a mode of enforcing a judgment debt, it creates a security and does not itself authorise sale.[95] The Northern Ireland Enforcement of Judgments Review Committee has taken the view that while a charging order creating a security on valuable property should not be precluded by the relatively small amount of a debt, the disproportion between the property and the debt is clearly a legitimate circumstance to be taken into account in considering whether the land should be sold for the purpose only of realising that security.[96]

3.89 We concede that a fixed threshold or qualifying limit would suffer from some disadvantages. First, it may be argued that where a debtor owns heritable property of considerable value but still refuses or delays to pay a debt, the property should be subject to attachment and sale, however small the debt may be. In principle, a debtor's assets should be available for payment of his lawful debts. If the debtor's only marketable asset is heritable property, a prohibition of land attachment for a small debt could make that debt unenforceable outside sequestration. To exclude land attachment in such cases might encourage creditors to use the more drastic remedy of sequestration. Secondly, a fixed qualifying limit is necessarily arbitrary and creates anomalies. A prior creditor with a debt just below the threshold would be barred from using a land attachment while a later creditor with a debt just above the threshold would not be barred. Thirdly, a safeguard of this type is inflexible and would not allow land attachment to proceed where the creditor has no other means outside sequestration of enforcing his debt. We considered different ways of achieving the aims of a qualifying amount of debt either by giving the sheriff a complete discretion in deciding whether to grant decree by having regard to the size of debt or alternatively allowing the sheriff to disapply the qualifying amount if satisfied that no other diligence was available or reasonable. However we take the view that these approaches would result in considerable uncertainty which we think is inappropriate in this area of law.

3.90 Overall we favour having a fixed rule which sets out a minimum amount of debt before the diligence of land attachment becomes competent. We are persuaded that the advantages of such a rule outweigh the disadvantages. Use of an expensive diligence such as land attachment to enforce a small debt is an uneconomic use of resources. Moreover, as well as the debtor himself, co-owners and purchasers of the attached property may be

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[91] See paras 3.140; 3.150.
[92] Quebec Code of Civil Procedure, Article 553.2.
[93] Charging Orders Act 1979, s 1.
[94] *Robinson v Bailey* [1942] Ch 268 at p 271 per Simonds J.
[95] In Northern Ireland, the Enforcement of Judgments Office was originally barred from making a charging order in respect of a debt below £50: Judgments (Enforcement) Act (Northern Ireland) 1969, s 45(2). This restriction was later removed. See Judgments Enforcement (Northern Ireland) Order 1981 (SI 1981/226) article 45 *et seq*.
[96] Report of the Enforcement of Judgments Review Committee (Northern Ireland) (1987), para 16.20.

affected. The addition of the heavy expenses to the small amount of the debt would be unfair to debtors. If there is to be a rule on a minimum amount of debt, two questions then arise. The first is at what stage does the qualifying amount become applicable. The second is the amount of the qualifying limit.

3.91 **Stage of diligence when qualifying amount applicable**. A rule which limits land attachment to the recovery of debts of a certain amount could apply at one or both of two stages, the registration of the notice of attachment and the application for warrant to sell. The absence of any minimum level of debt at the registration stage might have the consequence that the property registers would become cluttered with notices of land attachment, which in turn could complicate many ordinary conveyancing transactions. We consider that such fears are exaggerated. A similar argument could be made about inhibition but it has never been suggested that there should be a minimum level of debt for inhibition in order to prevent an excessive number of inhibitions appearing in the personal register. In our view the expense of registration would deter many creditors from registering notices of attachment for very small debts. Furthermore, if the size of the debt were below the qualifying limit for the grant of warrant of sale, a creditor might see no advantage in attaching land for a small debt and would use another diligence instead. By contrast, we consider that a qualifying limit does play a significant role at the stage of application for warrant of sale. This is the stage of the diligence which is likely to give rise to considerable expense. In addition, sale of attached land, which might be the debtor's dwellinghouse, is an inappropriate remedy to use for a debt which is small in size in comparison with the value of the land. Accordingly we maintain that there should be no qualifying limit at the attachment stage of the diligence but that there should be such a limit at the stage of application for warrant of sale.

3.92 **The amount of the qualifying limit**. The question then arises of the amount of the qualifying limit. Some consultees suggested a lower limit of £1,500. That is currently the lower limit for petitions for sequestration[97] and the upper limit of summary causes.[98] As we have seen, it is not competent for the court to make a time to pay direction or order where the amount of debt exceeds a prescribed sum currently £25,000. We see the main rationale of a qualifying limit as preventing the use of the diligence in inappropriate cases and providing a degree of proportionality between the diligence and the debt it recovers. Initially we were inclined to suggest a figure in excess of the current sequestration level (say at the level of £5,000). However on further reflection we came to the conclusion that using a higher limit for land attachment would have the consequence that creditors would resort to sequestration to recover debts which were £1,500 or more but below the proposed level for land attachment. It is not part of this project to consider the qualifying levels for applications for sequestration and our discussion should not be interpreted as suggesting that we view the current level of £1,500 as too high or to low or otherwise in need of revision. Rather we would emphasise our pragmatic reason for using the same level as the qualifying level for applications for warrants of sale of attached land. Accordingly we recommend that the level of debt to allow grant of a warrant of sale of attached land is £1,500 (or whatever is the current level for creditors' applications for sequestration) as at the date of application for the warrant. This figure includes decerned expenses and interest

[97] 1985 Act, s 5(4).
[98] Sheriff Courts (Scotland) Act 1971, s 35(1)(a).

accrued as at the date of the application.[99] We envisage that the Scottish Ministers would have the power to alter the level of qualifying debt by regulations.

Exception to the lower limit

3.93 We have identified one exceptional type of situation where it should be competent to sell attached land to enforce a debt below the lower limit.

3.94 **Sequestration incompetent under rules of private international law.** A problem arises from a lower financial limit where the debtor has attachable heritable property in Scotland and the Scottish courts lack jurisdiction in the international sense to award sequestration. In this situation land attachment would be the only effective remedy available for use against the heritable property. Under the present law actions of adjudication for debt are competent. There have been unreported cases where a creditor has used an adjudication against a debtor because the court had no jurisdiction to award sequestration under the Bankruptcy (Scotland) Act 1985, section 9(1) (which requires that the debtor have an established place of business or habitual residence in Scotland). However a court would have jurisdiction for an application for land attachment. We recommend that in this situation a land attachment, including sale of attached land, should be competent no matter the level of debt to be recovered by it.

3.95 We recommend that:

12. (1) A creditor should be entitled to register a notice of land attachment no matter the size of debt owing by the debtor at the time of the registration.

(2) An application for warrant to sell attached land is to be incompetent unless the amount of the debt owing to the creditor at the date of application is £1,500 (or such other sum as may be prescribed) or more.

(3) However warrant to sell attached land should be competent irrespective of the level of debt where the debtor has attachable land in Scotland and, under the rules of private international law, the court lacks jurisdiction to award sequestration of his estate or, if the debtor is a company, to make an order winding up the company.

(c) Refusing warrant of sale if proceeds unlikely to exceed expenses of the diligence (the "not worth it" test)

3.96 In our Discussion Paper No 107, we sought views on proposals that in an application for warrant of sale the sheriff should have power to refuse to grant the warrant on the ground that the net free proceeds of sale receivable by the attaching creditor are unlikely to exceed the expenses of sale ("the not worth it" test).[100] On consultation, this test was criticised by some consultees as difficult or impossible to operate. It is likely that in most cases there would be a prior standard security and the value of the debtor's reversion might

[99] A consequence of including interest in the amount of qualifying debt is that if the debt is not reduced or paid off, the level of debt will sooner or later reach the qualifying limit.
[100] Scot Law Com DP No 107, Part 2, s B, Proposition 11(1).

be impossible to assess. GAPP pointed out that if (as indeed was our intention) the safeguard relates to the "equity" realisable if the property is sold, this would throw up considerable problems for sheriffs and debtors. They did not think that it would be possible to estimate accurately the value of the reversion until after the property was sold. Valuations do not always translate into actual sale prices especially on a repossessed property. We agree that there would be difficulties. The position differs from the warrant sale of poinded goods[101] where the sheriff has before him a sheriff officer's valuation and the expense of the sale can be estimated relatively accurately.

3.97 On the other hand, we think that the difficulties can be exaggerated. The existence of a security over the property can be ascertained by searching the property registers.[102] There would be no problem in ascertaining the amount of the debt owing by the debtor to the creditor, as this would be information the creditor would include in his application. The expenses of the diligence would be based on standard fees set out in tables of fees and would also be easily calculated.[103] The amount of outstanding debt due in respect of a prior heritable security or an attached floating charge can be precisely ascertained by asking the creditors or requiring them to disclose this information. We envisage that the sheriff would include as one of the preliminary orders in the application an order requiring security holders to reveal this information to the creditor.[104] We also propose that the sheriff would appoint a surveyor to report on the open market value of the land to be attached. We mentioned above that in charging orders in other parts of the United Kingdom, any disproportion between the debt and the debtor's interest in charged land is taken into account by the competent authorities in determining whether the charged interest should be realised to satisfy his debt. If the debtor co-operates in the sale so as to maintain the re-sale value of the property (and it is in his interests to do so), the fact that the sale is a forced sale need not unduly depress the price eventually obtained. Where the debtor does not co-operate the property can still be surveyed with a view to discovering its open market value. In these circumstances the court can order the debtor to allow the surveyor to inspect the land and carry out other steps necessary for producing his report. Continued opposition by the debtor would be contempt of court.

3.98 Accordingly we maintain that there are no insuperable practical difficulties in providing a not worth it test for land attachment. We also consider that there are arguments of principle in favour of the test. We think it wrong that a diligence can be used or threatened where its effect is to leave the debtor in greater indebtedness. This situation can be the result of using the present diligence of adjudication for debt and was one of the strongest reasons for our recommendation that adjudications should be abolished. The test we propose is that the sheriff should refuse to grant warrant to sell attached land unless the net proceeds of sale (after repayment of the sums owing under any prior security) are likely (a) to exceed all the diligence expenses incurred and to be incurred which are chargeable against the debtor and (b) to reduce the amount of the debt due at the time of the application. As regards the amount in question we take the view that the enforced sale of

[101] 1987 Act, ss 30(2)(a)(i); 24(3)(c); 20(4).

[102] Where the debtor is a company, a search would also be made of the register of charges in the Companies Register in respect of any charge granted over the company's property.

[103] We do not envisage that the fee paid to the independent solicitor appointed by the sheriff should be subject to regulated fees. However the amount of this fee would be a matter for estimate by the sheriff on the basis of typical fees charged for conveyancing transactions.

[104] As the disclosure is required by an order of the court, the security holder would not be able to claim any duty of confidentiality in respect of the relevant information.

land is not justified if the reduction in the size of the debt is insubstantial but we consider that this idea should be set out in a clearly ascertainable way. Accordingly we recommend that the required reduction of the debt is the lesser of £500 or 10% of the debt. We envisage that these figures and this formula may be varied by powers exercised by the Scottish Ministers.

3.99 We recommend that:

13. (1) It should not be competent to grant a warrant to sell attached land where the likely net proceeds of the sale of the attached property would not exceed the sum of (a) the expenses of the diligence which are chargeable to the debtor and (b) part of the debt owing to the creditor.

(2) "Net proceeds" means the amount of the price paid if the attached land were to be sold less any amount owing under any debt in respect of which there is a prior security over the land.

(3) The amount by which the debt must be reduced to justify granting of warrant of sale should be the lesser of £500 or 10% of the debt (or such other figures or formula as prescribed by the Scottish Ministers).

(4) On presentation of an application for warrant to sell attached land which appears in order the sheriff shall grant (*inter alia*) the following orders:

(a) an order requiring any prior security holder to disclose the amount outstanding on the security;

(b) an order appointing a surveyor or other qualified person to report on the open market value of the land and authorising the reporter to take all necessary steps (including inspecting the land) to produce such a report.

(d) Refusing or postponing warrant of sale on ground of undue harshness

3.100 In our Discussion Paper No 107,[105] we provisionally proposed that the sheriff should have power, on an objection by any interested person, to refuse to grant a warrant of sale or to postpone the grant for a specified period not exceeding 12 months on the ground that a sale of the attached land would be unduly harsh in the circumstances. In the light of the response to this proposal we consider that the sheriff should have powers to deal with cases of undue harshness. A forced sale of land is harsh so that undue harshness means something more. Possible examples of undue harshness[106] might be cases where the debtor or a family member is seriously ill[107] or where children are at a critical stage in their

[105] Part 2, s B, Proposition 11(3).
[106] See especially cases decided under the Bankruptcy (Scotland) Act 1985, s 40 (applications by trustee in sequestration to court for authority to sell bankrupt's family home).
[107] *Gourlay's Trustee v Gourlay* 1995 SLT (Sh Ct) 7 (eviction from the family home would cause considerable stress to severely ill debtor with potentially fatal results and material detriment to the health of the debtor's spouse; application for authority to sell refused; described (at p 11) as "a wholly exceptional case where the circumstances are very extreme indeed"). *Hunt's Tr v Hunt* 1995 SCLR 973 (trauma and distress caused to debtor's spouse an

schooling.[108] However we envisage that these factors would normally justify a postponement of the exercise of the warrant of sale rather than an outright refusal of the warrant.

3.101 We recommend that:

14. In dealing with an application for warrant of sale of attached land a sheriff, if satisfied on the motion of an interested person, that it would be unduly harsh to allow the diligence to proceed, should have the power:

(a) to refuse the application;

(b) to grant warrant but to extend the period before which sale can take place.

(e) Expenses of land attachment recoverable from that attachment only.

3.102 Another safeguard mentioned below[109] is that the creditor would be entitled to recover the expenses of the land attachment only out of that particular diligence. He would not be entitled to recover the expenses from the debtor by other diligence under the same decree, still less to constitute the expenses by a second court action and recover them under a decree in that action.

(f) Application for warrant to sell the debtor's principal dwellinghouse

3.103 We have set out our recommendations on the measures to provide protection for a debtor against whom land attachment is used. We envisage that these measures would apply no matter the type of property attached by the diligence. Earlier we examined the issue whether it should be competent to grant a warrant of sale where the attached property is the debtor's principal dwellinghouse but we did not make any recommendation on that question. In this section we consider two issues (1) if there is to be an exemption of dwellinghouses from the sale stage of the diligence, what is the extent of the exemption; (2) if dwellinghouses are not exempt from sale, what further measures of debtor protection are required to deal with the issue of homelessness which arises.

3.104 **Scope of a dwellinghouse exemption.** As noted we have left open the general issue whether a debtor's dwellinghouse should be exempt from the sale stage of land attachment. If such an exemption is to be introduced it does not follow that it would apply to every item of land which can be described as a dwellinghouse. The purpose of the exemption is to provide a remedy against homelessness of the debtor or other occupiers and would be restricted to what we refer to as a "principal dwelling". The key issue is defining the scope of a dwellinghouse for purposes of the exemption. At one level the exemption could apply to any dwelling in which the occupant (who need not be the debtor or a member of his family) had a legal right to reside. This would cover cases where a person lived at a

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additional factor against authority to sell). Cf cases on "greater hardship" or "suitable alternative accommodation" in residential tenancy legislation: *Dempster v Suttie* 1947 SLT (Sh Ct) 64 (tenant and wife 77 years of age and latter almost bedridden and suffering from an illness in which mental depression might have gravest consequences: held not reasonable to grant decree of removing);

[108] Cf *Salmon's Trustee v Salmon* 1988 SCLR 647.

[109] See paras 3.174-3.176.

dwelling under a personal licence granted by the debtor. At the other end of the spectrum, the exemption could be limited to the main dwelling in which the debtor himself lived. We argue later that if dwellinghouses are to be subject to the sale stage of the diligence, the further measures to deal with the problem of homelessness should be modelled on the provisions of the Mortgage Rights (Scotland) Bill. That Bill provides for the suspension in certain circumstances of the enforcement rights of a creditor in a standard security over property used for residential purposes. The property in question is defined as security subjects (i) which are the sole or main residence of the debtor in the standard security (or of the proprietor of the subjects where the proprietor is not the debtor) or (ii) which are a matrimonial home and the sole or main residence of a non-entitled spouse of the debtor or the proprietor.[110] Where property falls within the scope of the provisions of the Bill, the effect is that the sheriff may suspend the exercise of the creditor's rights under the standard security. In considering this issue the sheriff has to take account of various factors, including the ability of the debtor, the non-entitled spouse, and those living with those parties to secure reasonable alternative accommodation. We are of the view that these provisions, modified to take account of characteristics of land attachment, should also apply as defining the scope of any exemption of dwellinghouses from the sale stage of the diligence.[111]

3.105 Dwellinghouses which are not the only or principal dwellinghouse of the occupant should be capable of being attached and sold. Thus if the debtor owns a holiday cottage and occupies it only as a secondary residence, it should be subject to sale provided it is not a matrimonial home occupied by a non-entitled spouse. Occasionally a debtor will own two or more dwellinghouses each of which is occupied to such an extent that none of them can be regarded as the main dwellinghouse. In this rare situation the creditor may apply for warrant to sell all but one of them.

3.106 A dwellinghouse may be part of a larger property also owned by the debtor. Sometimes it is reasonably feasible to separate the dwelling from the non-residential subjects. Examples are an estate consisting of a mansion house and tenanted farms or an office building with a separate owner's flat in the basement. But even if it is reasonably feasible physically to separate the residential and non-residential components it may make no economic sense to do so. The paradigm case is a farmhouse on a farm. Although it would be possible to sell the farm separately from the farmhouse the price obtained for the two separate portions might be substantially less than the sale of the farm and farmhouse together. In these situations the grant of warrant of sale should be at the discretion of the sheriff. The sheriff may refuse a warrant of sale of the whole property, grant warrant only for the non-residential part or grant warrant for the whole property. Later we make recommendations for debtor protection where there is no dwellinghouse exemption and the attachment is to be used against a principal dwellinghouse. These provisions are also to apply where there is a dwellinghouse exemption but the principal dwelling is to be attached as it is part of larger subjects and it is not easily separable or it is not economically sensible to sell the exempt and non-exempt parts separately.

[110] The terms 'matrimonial home' and 'non-entitled spouse' are defined in accordance with the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

[111] The Bill does not extend its provisions to houses occupied by a non-entitled cohabiting partner in terms of s 18 of the 1981 Act. However we are of the view that such persons should come within the scope of the provisions on land attachment.

3.107 A dwellinghouse might lose its character as a dwelling if all or part of it were used for the purposes of any trade, profession or business. Again it would be a question of degree. For example, if there were to be a dwellinghouse exemption, a dwelling where the debtor had a study from which he ran a business should not be subject to sale. At the other end of the scale would be a building which had become an office with minimal overnight accommodation for the owner. A similar continuum exists with dwellinghouses which do occasional bed and breakfast, through permanent small-scale bed and breakfast establishments to hotels and boarding houses with some accommodation for the owners. The point at which such property is to become subject to sale would be a matter for the discretion of the sheriff.

3.108 For the purpose of the exemption a dwellinghouse is a building or part of a building (a flat for example) occupied as a dwelling. It also includes any yard, garden, garage, other building and pertinents (such as an outhouse or a share in gardens) belonging to and occupied with the dwelling. These additions should have to be reasonably required for the enjoyment of the dwellinghouse as a dwelling. Thus a flat would include its allocated or *pro indiviso* share of surrounding ground and common parts and services, a semi-detached house would include its own garage and garden, while a large detached house could include various out-buildings.

3.109 We recommend that:

15. (1) Any exemption of an attached dwellinghouse from sale should apply only to a "principal dwellinghouse."

(2) For this purpose a "principal dwellinghouse" is an attached dwellinghouse which, immediately before the date of the application for warrant of sale, is occupied as an only or principal dwellinghouse by (a) the debtor; (b) a spouse of the debtor having occupancy rights under the Matrimonial Homes (Family Protection) (Scotland) Act 1981; or (c) a cohabiting partner having occupancy rights under section 18 of that Act.

(3) A dwellinghouse includes any part of a building occupied as a separate dwelling, and in particular includes a flat, and also includes any yard, garden, out-house and pertinents belonging to the house and usually enjoyed with it.

(4) A principal dwellinghouse may be subject to sale where (i) the part containing the dwelling cannot practically be separated from the rest of the land or (ii) sale of the land without the dwellinghouse would be likely to result in a price substantially less than sale of the land containing the dwellinghouse. Where a principal dwellinghouse is subject to land attachment, the provisions on protecting the debtor and other occupiers set out in Recommendation 16 are to apply.

3.110 **Measures of debtor protection for sale of an attached "principal dwelling".** In developing these extra protections we have considered other areas of law in which a debtor is compelled to leave his home as possible models to adopt in this context. In particular we have focussed on the following situations:

(i) Repossessions of dwellinghouses let under a lease, either on the debtor being in breach of the lease or otherwise;

(ii) Application by a trustee to sell the debtor's family home which is part of the debtor's sequestrated estate;

(iii) The enforcement of a standard security (or other heritable security) where the debtor is in default of the conditions of the security.

We now consider whether these provisions suggest a suitable model for land attachments.

3.111 **Repossession of leased property**. The issues which are involved in repossession of dwellinghouses leased to a tenant involve balancing the rights of the owner of the property to recover what is his with the interests of tenants in security of tenure. In certain situations a landlord can recover possession of the property even where the tenant is not in breach of the terms of the lease. Legislation on residential tenancies enables landlords to repossess their property if they can show, to the reasonable satisfaction of the sheriff, that the tenant can be provided with "suitable alternative accommodation". The criteria are broadly the same whether the tenancy is a protected private sector tenancy under the Rent (Scotland) Act 1984,[112] a secure public sector tenancy under the Housing (Scotland) Act 1987[113] or an assured private sector tenancy under the Housing (Scotland) Act 1988.[114] However the interests of the respective parties in this situation are quite different from that where a creditor attaches the debtor's house to enforce a debt. We do not think it appropriate that a creditor should have to provide alternative accommodation to a debtor or to show that such accommodation is available. The purpose of these provisions is to ensure that as far as possible the positions of the tenant and landlord are roughly similar after the repossession as before it. The aim of the debtor protection measures in land attachment is to prevent or minimise any consequent homelessness.

3.112 More commonly repossession of leased dwellings arises in the case of breach of the lease by the tenant, usually in the form of non-payment of rent. In the case of secure tenancies in public sector housing, in order to get decree for repossession the landlord must satisfy the court that rent lawfully due has not been paid and that it is reasonable to make the order for repossession.[115] The onus of establishing reasonableness rests with the landlord.[116] Apart from providing details of the tenant's rent payment record the landlord need not show any other personal circumstance of the debtor, such as the reason for non-payment.[117] Where a prima facie inference of reasonableness has been made out it is for the tenant to put circumstances before the court to show otherwise.[118]

3.113 In the case of private sector tenancies under the Housing (Scotland) Act 1988, the tenancy will usually be either an assured tenancy or a short assured tenancy. Where the landlord is seeking to recover possession of the property on the basis of non-payment of rent

[112] Rent (Scotland) Act 1984, s 11(1)(a); Sch 2, Part IV.
[113] Housing (Scotland) Act 1987, s 48(2)(b) and (c); Sch 3, Part II. See also s 51(2)(c)(ii).
[114] Housing (Scotland) Act 1988, s 18; Sch 5, Part II, Ground 9, and Part III.
[115] Housing (Scotland) Act 1987, s 48(2)(a); Sch 3, Part I, para 1.
[116] *Edinburgh District Council v Stirling* 1993 SCLR 587.
[117] *Midlothian District Council v Drummond* 1991 SLT (Sh Ct) 67.
[118] *Glasgow District Council v Erhaiganoma* 1993 SCLR 592.

he must first serve a notice on the tenant of intention to raise proceedings for that purpose. Where at the date of the service and the date of the hearing at least three months rent lawfully due from the tenant is in arrears, the sheriff must make an order for repossession. If some rent lawfully due was unpaid on the date on which proceedings were begun and was in arrears at the date of service of the notice, the sheriff must not make an order for repossession unless he considers it reasonable to do so.[119] There is little by way of case law on these provisions but it is thought that the test for reasonableness is the same as that in the case of secure tenancies in public sector housing.

3.114 **Bankruptcy.** A debtor's dwellinghouse is included in the estate which vests in a trustee in sequestration.[120] Where the dwelling is not a family home in terms of section 40 of the Bankruptcy (Scotland) Act 1985 there are no restrictions on the power of the trustee to sell the house, and for this purpose to eject the debtor. A family home is defined as one occupied immediately before the date of sequestration by the debtor and spouse, or the debtor and a child of the family, or the debtor's spouse or former spouse.[121] In order to sell a family home the trustee must obtain the consent of the debtor's spouse or, where the spouse is not resident but a child of the family lives there with the debtor, the consent of the debtor himself. If the requisite consents are not given the trustee has to seek the authority of the court to sell the house. The court has a discretion to refuse the application for the sale of a family home, postpone the granting of the application for a period not exceeding 12 months, or to grant the application subject to conditions.[122] The court is to have regard to all the circumstances of the case, including the needs, financial resources and length of residence of the debtor's spouse and any child of the family. The interests of the creditors are also to be considered. There are few reported cases and each appears to turn on its own facts. In one case the interests of creditors and the public interest in completing the sequestration were held to outweigh the needs of a spouse and a 16-year-old child.[123] But where the debtor had suffered a debilitating stroke and the spouse was suffering severe stress and in danger of a mental breakdown, it was held that in such a "wholly exceptional case where circumstances are very extreme indeed" authority to sell the house should be refused.[124] Although the 1985 Act gives the courts a wide discretion, in practice some special vulnerability must be established to overcome the creditors' interest in sale.

3.115 **Enforcing a standard security**. Where a debtor has defaulted on the conditions of a standard security, typically by non-payment of the terms of a loan, the creditor has the option of using three possible remedies. (1) Firstly he may serve a calling-up notice requiring repayment of the whole debt within two months.[125] If the two-month period passes without payment, the power to enter into possession and sell the property emerges automatically,[126] although in practice it is common for creditors to follow it up with an ordinary action for declarator that a right of sale has emerged.[127] (2) Secondly, the creditor can serve a notice of default calling upon the debtor to purge the default within one

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[119] Housing (Scotland) Act 1988, s 18(3), (4); Sch 5.
[120] 1985 Act, s 31.
[121] S 40(4).
[122] 1985 Act, s 40(2). In *McMahon's Trustee v McMahon* 1997 SLT 1090 it was held that any conditions attached should relate to the sale of the property, should be in favour of the dependent spouse or child and should be reasonable.
[123] *Salmon's Trustee v Salmon* 1989 SLT (Sh Ct) 49.
[124] *Gourlay's Trustee v Gourlay* 1995 SLT (Sh Ct) 7 at p 11.
[125] 1970 Act, s 19.
[126] 1970 Act, s 20(1), (2); Sch 3, Standard Conditions 9 and 10.
[127] G Gretton & K Reid, *Conveyancing* (2nd edn, 1999), para 20.29.

month.[128] In this case the debtor has a right to challenge the notice by making a summary application to the court within 14 days of service. The court "after hearing the parties and making such enquiry as it may think fit, may order the notice appealed against to be set aside, in whole or in part, or otherwise be varied, or to be upheld."[129] If the debtor does not object, the power to take possession and sell emerges one month after service of the notice.[130] Again, an ordinary cause action for declarator of the right to sell is common practice and an order for ejection must be sought to remove the debtor. (3) Thirdly, the creditor of a debtor in default may apply to the court for a section 24 warrant conferring the power to take possession and sell the property.[131] The creditor's certification of the nature of the default is taken as prima facie evidence of the facts certified.[132] In effect, this means that if the debtor fails to appear warrant will be granted automatically.

3.116 The first two remedies allow the power of sale to arise extra-judicially, although if the second route is taken an objection from the debtor will lead to involvement of the court. The third approach requires the intervention of the court but puts the onus on the debtor to rebut the evidence of the creditor. In none of the three remedies is there any obligation on the court to consider the circumstances of the debtor or whether it is reasonable to remove the debtor and sell the property. The court has no discretion when granting a remedy under the 1970 Act. However a Member's Bill was introduced into the Scottish Parliament on 30 June 2000 to amend the relevant provisions of the 1970 Act.[133] This Bill has the support of the Scottish Executive.[134] The Mortgage Rights (Scotland) Bill proposes to give debtors and other occupiers a right to apply to the court for an order suspending the creditor's exercise of rights under any of the three enforcement remedies under the 1970 Act. When deciding whether to make an order, the court must consider if it is reasonable in all the circumstances, having regard to:

(a) the nature of and reasons for the default;

(b) the applicant's ability to fulfil within a reasonable period the obligations under the standard security in respect of which the debtor is in default;

(c) any action taken by the creditor to assist the debtor to fulfil those obligations; and

(d) the ability of the applicant and any other person residing at the security subjects to secure reasonable alternative accommodation.[135]

3.117 The three areas of law which we have examined have strengths and weaknesses as models for debtor protection in land attachment. In cases of repossession based on rent arrears, the tenant is protected in some but not all instances by a requirement of

[128] 1970 Act, s 21.
[129] 1970 Act, s 22(2).
[130] 1970 Act, s 23(2); Sch 3, Standard Conditions 9 and 10.
[131] 1970 Act, s 24; Sch 3, Standard Conditions 9 and 10.
[132] 1970 Act, s 24(2) and Sch 7.
[133] Introduced by Cathie Craigie MSP. The Bill was discussed at First Minister's Question Time on 6 July 2000. Stage 1 of the Bill took place on 17 January 2001 (Scottish Parliament Official Report vol 10, no 3, cols 238-265). The Bill completed its Stage 2 proceedings on 21 March 2001.
[134] Scottish Parliament Official Report, vol 7, no 10, cols 1238-1240 (First Minister's Question Time, 6 July 2000); vol 10, no 3, cols 241-243 (Stage 1 proceedings, 17 January 2001).
[135] Mortgage Rights (Scotland) Bill, s 2(2) (as amended at Stage 2).

reasonableness. However this standard is open-ended and may lead to lack of certainty in application. The provisions of the Bankruptcy (Scotland) Act 1985 involve a situation similar to land attachment. However the aim of section 40 of the 1985 Act is not to deal with homelessness as such but rather to balance the needs of the debtor's dependants (but not the debtor himself) and the interests of creditors. We consider that the approach set out in the Mortgage Rights (Scotland) Bill identifies the most appropriate contemporary balancing of the interests of creditors to enforce debt and interests of the debtor (and others) to avoid homelessness. It introduces into standard security repossessions a concept of reasonableness familiar from tenancy repossessions but importantly the court is to have regard to particular issues when considering reasonableness.

3.118 Accordingly we favour a similar type of protection for the debtor and other occupiers of his dwellinghouse when a sheriff is considering an application for warrant to sell attached land. The Mortgage Rights (Scotland) Bill contains provisions that the court is to consider the nature of the debt and the debtor's ability to pay. In the context of a Bill dealing with enforcing standard securities, there are good reasons for these provisions as there will have been no prior involvement of the court. The question arises whether these matters should be included in provisions on land attachment. We have reached the view that these issues remain relevant considerations for a sheriff who is considering an application for warrant to sell attached land. Not all cases of land attachment will have been preceded by court proceedings in this country (eg extracts of registered documents or foreign judgments). But even where there has been a prior court hearing, the relevant information is unlikely to have been considered by the court. Furthermore, the debtor's circumstances may have changed in the time between earlier court proceedings and the stage of application for warrant of sale. It is important for the sheriff to have up-to-date information about the debtor and occupiers of the dwelling when dealing with an application of this kind.

3.119 The rationale of these provisions is to reduce the likelihood of homelessness arising as a consequence of the diligence. Accordingly the requirement that the sheriff is to consider the issue of reasonable alternative accommodation extends not just to the debtor but also to any other person living with him. The requirement would also apply to a spouse of the debtor with occupancy rights under the Matrimonial Homes (Family Protection) (Scotland) Act 1981, a cohabiting partner having occupancy rights under section 18 of that Act, and persons living with the spouse or partner.

3.120 We also believe that the sheriff should have regard to the personal circumstances of any occupier when dealing with an application. We have in mind situations such as that where the occupier is seriously ill or has a child at a critical stage of his schooling. The debtor himself would have the right to object on grounds of undue harshness.[136]

3.121 When the sheriff has considered these factors as well as any other that may be relevant he would have to decide in the light of all the circumstances whether it would be reasonable to grant the warrant or alternatively to refuse the application altogether or to extend the period before sale could take place. We envisage that in the vast majority of cases where the sheriff decides that these factors have weight in the circumstances of the particular case the outcome will be to extend the period of sale rather than refuse the application.

[136] See paras 3.100-3.101.

3.122 We do not favour introducing any statutory test for the criterion of reasonable alternative accommodation. In applying this test, a sheriff would no doubt avoid the extremes of holding greatly inferior slum accommodation to be reasonable on the one hand and holding anything less than the debtor's extravagantly luxurious existing dwelling to be unreasonable on the other hand. In between these extremes we would expect a test of "reasonable alternative accommodation" to be less favourable to the debtor than the test of "reasonably suitable accommodation" designed for sitting tenants who are not in arrears in payment of their rent and who have paid their lawful debts. While in residential tenancy legislation on "suitable alternative accommodation", a tenant's housing needs are to some extent determined by the character and extent of his existing accommodation and existing lifestyle, we doubt whether the test of "reasonable alternative accommodation" should depend to any significant extent, if at all, on the character and extent of the debtor's existing accommodation or existing lifestyle.

3.123 **Extension of debtor protection in bankruptcy.** The provisions which we recommend to protect the debtor and other occupiers of the debtor's principal dwellinghouse are more extensive than those of the Bankruptcy (Scotland) Act 1985 in connection with the sale of the debtor's family home.[137] These protections against use of land attachment would be defeated if a creditor were minded to use sequestration rather than land attachment as a way of attaching a debtor's home. In any case we consider that current social concern about minimising homelessness call for a strengthening of the protections for the debtor and his family in the 1985 Act. Accordingly we recommend amendment of section 40 of the Bankruptcy (Scotland) Act 1985 to reflect the factors which a sheriff has to consider when dealing with an application for land attachment against the debtor's principal dwellinghouse.

3.124 We recommend that:

16. (1) In an application for warrant of sale of an attached principal dwelling (as defined in Recommendation 15), the sheriff should refuse to grant a warrant or should extend the period of sale if it is reasonable to do so in all the circumstances. In assessing what is reasonable the sheriff should have regard in particular to the following factors:

(a) the nature of the debt and the reasons for its being incurred;

(b) the debtor's ability to pay the debt (including interest and chargeable diligence expenses) within an extended period;

(c) any action taken by the creditor to assist the debtor to fulfil those obligations;

(d) the ability of those occupying the dwellinghouse as their sole or principal residence to obtain reasonable alternative accommodation; and

(e) the personal circumstances of any such occupiers.

[137] 1985 Act, s 40.

(2) Section 40(2) of the Bankruptcy (Scotland) Act 1985 should be amended so as to include among the factors which the court has to consider: "(e) the ability of those occupying the dwellinghouse as their sole or principal residence to obtain alternative accommodation."

Other possible safeguards for debtors considered and rejected

(g) General judicial discretion to grant warrant to sell attached land

3.125 A further possible means of debtor protection would be to confer on the sheriff a general discretion to grant or refuse warrant to sell attached land in every case. This proposal was not canvassed in Discussion Paper No 107 and was provisionally rejected in Discussion Paper No 78. The main advantage of conferring a wide-ranging discretion on sheriffs is that it provides a mechanism for dealing with the variety of circumstances which different applications for warrant of sale might involve. For example in some cases allowing sale of attached land to enforce a small debt might be disproportionate (eg where the debtor has other attachable assets or his only land is a small dwelling) but in other cases (eg where no other diligence was available to a creditor) sale of land might be thought justified.

3.126 We accept that a general discretion in relation to granting a warrant of sale would bring with it the advantages of flexibility. However we believe that any advantage is heavily outweighed by disadvantages. Diligence involves the involuntary taking of one person's property by another person to exact payment of a debt. As a matter of general principle it is desirable that parties can know in advance of a determination by a court exactly when property can be taken and sold for this purpose and when it cannot.[138] The law of diligence should be governed by strict rules, or where a discretion is conferred the court should be guided by standards set in advance to govern its use of the discretion. Our approach to land attachment has been to set out rules which attempt to give a due balance to the interests of the creditor and debtor and accordingly we reject any place for an open-ended discretion in the exercise of this diligence.

(h) The "disproportion" test

3.127 In our Discussion Paper No 107, we sought views on a proposal that in an application for warrant of sale the sheriff should have power to refuse to grant the warrant (of his own accord or on an objection by any interested person) on the ground that the debt is disproportionately small in relation to the value of the attached land (by which we meant the value of the debtor's reversionary interest or equity in the attached land) ("the disproportion test").[139]

3.128 On consultation this test received little support. The disproportion test was criticised as inherently unsatisfactory. GAPP observed that the meaning of "disproportionately" is too vague to give guidance to debtors and sheriffs and too subjective: it would be a matter of individual opinion and the practice of sheriffs throughout Scotland might vary greatly.

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[138] This is also a requirement of Article 8, para 2 of, and article 1 of the First Protocol to, the European Convention on Human Rights. See *K v Sweden* (application No 13800/88, European Commission of Human Rights, sitting on 1 July 1991).
[139] Scot Law Com DP No 107, Part 2, s B, Proposition 11(1)(b).

Disproportion would be difficult for a debtor to argue. There seems to us to be substance in these criticisms. We believe that the mischief which the disproportion test is seeking to alleviate is better remedied by the "not worth it" test, which can be stated in more fixed and objective terms.

(i) Limits on expenses chargeable against the debtor

3.129 As noted earlier, one of the main criticisms of the diligence put to us on consultation was that because of the high transaction costs, it would unduly increase the debtor's indebtedness. As a possible solution to this problem we considered, but have rejected, a suggestion that the amount of the expenses of the diligence chargeable against the debtor should be limited by reference to a percentage of the amount of the debt secured by the land attachment. We consider that this approach would work at best a rough justice. In principle the expenses of diligence should be recovered by the creditor using it.[140] In our view a better approach to protecting the debtor from the danger that the use of diligence will increase the amount of indebtedness is the "not worth it test," which we considered earlier.[141]

(7) Protection of purchaser under missives from loss of bargain

3.130 In their comments on our Discussion Paper No 107, the Joint Committee of the Law Society of Scotland and the Society of Messengers-at-Arms criticised the Paper's proposals on the ground that land attachment would take precedence over prior concluded missives by which the debtor sold the subsequently attached property to a third party. The new diligence, it is said:

> "will severely prejudice current conveyancing practice as it is very common for concluded missives to contain resolutive conditions such as the obtaining of planning permission for proposed developments, payment of the price by instalments, the obtaining of licensing court consent to a transfer of a licence etc The resolving of these conditions is often a very expensive business and, if the bargain is cut down by land attachment which takes precedence, the purchaser would be very severely prejudiced. Instructing searches at the time of the missives would not assist if the land attachment was placed subsequent to the concluded missives. At best the discovery of the land attachment would prevent the purchaser throwing good money after bad".

We are grateful to the Joint Committee for drawing this point to our attention. In our initial considerations we did not propose that there should be any period of delay between the initial stage of the diligence and the sale of the attached property. Our current recommendation is that there should be a period of at least six months between the completion of registration of a notice of land attachment and an application for warrant of sale. One reason for this recommendation is to ensure that the debtor is not summarily removed from the premises. A second rationale for the six month delay is to provide a moratorium to prevent a creditor from completing the diligence so quickly that the purchaser under missives is unable to complete his transaction.[142] What we envisage is that a purchaser should for his own protection search the property registers over the previous six

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[140] This is true of all existing diligences with the exception of inhibition. In Part 6 we recommend that the expenses of executing an inhibition should be recoverable from the inhibitee. See paras 6.93-6.101.

[141] See paras 3.96-3.99.

[142] We understand that in the vast majority of cases a period of six months is sufficient to allow transactions to settle.

months to check for a notice of land attachment. In most cases where the purchaser discovers a notice of land attachment in the registers his reaction will be to contact the creditor who used the diligence. This situation is no different from that in which a standard security over the sale subjects has been registered. And in most cases it will be in the attaching creditor's interests to allow the transaction to be completed on the basis that the creditor receives payment from the proceeds of the sale to the extent of the debt owing to him by the debtor. Indeed this outcome would give the creditor the benefit of the sale of attached land without having to apply for warrant of sale, and would be of special benefit to a creditor who had attached land which was not subject to the sale stage of the diligence (which would occur if for example principal dwellinghouses were to be exempted from sale).

3.131 Difficulties would arise for a purchaser where he was unable to contact the creditor or where the creditor for whatever reason refused to make an informal arrangement with the purchaser. The remedy for the purchaser in this situation is to lodge a caveat in the court or courts in whose territory the attached land is situated. The effect is that the purchaser would receive intimation of an application for warrant of sale. He could enter the proceedings to apply to the sheriff to be allowed to complete the transaction. The sheriff could sist the application for warrant to allow the transaction to be completed and would order the purchaser to pay all or an appropriate part of the proceeds of sale to the creditor to satisfy the debt secured by the land attachment. Where warrant had been granted but sale under the warrant not yet concluded a purchaser under earlier missives could enter the process and make an application for the warrant of sale to be sisted and to complete his own transaction. In this case the sheriff would sist the operation of the warrant of sale but would have to be satisfied that no other party (such as a prospective purchaser under the sale by warrant) would be prejudiced. Arrangements would be made for the purchase price of the debtor's land to be paid by the purchaser to the attaching creditor, once any sums due to creditors holding prior securities had been paid or consigned in court to await payment.[143] In exercising these powers the sheriff would have to be satisfied that the sale of the land was not collusive or for less than the true value of the subjects. The sheriff would also have to be satisfied that the transaction could be completed within a reasonable time before making any order allowing for completion of the sale to the purchaser or sisting the application for warrant or the warrant itself.

3.132 We recommend that:

17. (1) An application for warrant of sale of attached land should not be made before the expiry of a period of six months after the date of registration of the certificate of service of a notice of land attachment.

(2) A third party who had concluded missives for the purchase of land from the debtor prior to registration of a notice of land attachment should be entitled to enter proceedings of application for warrant to sell attached land, or where warrant had been granted, to make an application to the court. He would apply for an order sisting the application for warrant of sale or an order sisting the operation of the warrant.

[143] Where an independent solicitor had already been appointed by the sheriff to conduct the sale under warrant, the proceeds of the sale under prior missives would be paid to him for disbursement to the creditor. On the role of the independent solicitor, see further paras 3.148-3.149.

(3) In considering an application by a purchaser under prior missives the sheriff should so exercise his powers as to secure, so far as reasonably practicable, the implementation of the missives and in particular that the purchaser will acquire from the debtor a title to the land free and disburdened of the land attachment if the purchaser:

(a) becomes entitled under the missives to delivery of such a title; and

(b) pays the contract price (so far as required to satisfy the sum secured by the land attachment) to or on behalf of the attaching creditor, instead of to the debtor.

(4) For this purpose the sheriff should have power:

(a) to sist an application for warrant of sale, to extend the period of sale under a warrant of sale or to sist the operation of a warrant to allow time for any outstanding terms and conditions in the missives to be satisfied and for the sale under missives to proceed;

(b) as a condition of exercising any of the above powers, to order the purchaser to pay the contract price direct to the creditor or to an already appointed independent solicitor on behalf of the creditor, in whole or partial satisfaction of his debt, instead of to the debtor; and

(c) to make such incidental or consequential orders as he thinks fit.

Such a payment would disburden the land of the land attachment.

(5) There should be two qualifications of the foregoing powers in the creditor's interest. First, the missives must not be collusive (in the sense of being designed to defeat the rights and remedies of the debtor's creditors). Second, the debtor and purchaser must proceed with the sale transaction without undue delay and otherwise act reasonably having regard to the attaching creditor's interests.

(8) Application for warrant to sell attached land

Initial stages of application

3.133 The warrant of land attachment in the decree or its equivalent should not by itself authorise sale by the creditor of attached land. A general supervisory role of the court and an opportunity for the debtor to put his case before a judge are important general principles of debtor protection. We consider that the appropriate stage for the involvement of the court is at the application by the creditor for warrant of sale. Sale by the creditor of attached

land has a much more direct impact on the debtor than the creation of a form of a security over his land by registration of a notice of land attachment, and it is at the stages of application for warrant of sale and the carrying out of sale under the warrant that the debtor's interests are most in need of consideration and protection.

3.134 We believe that the appropriate court for considering applications for warrant to sell attached land and for supervising the diligence is the sheriff court. In the present day there is little justification for the rule applying to adjudications that the Court of Session has exclusive jurisdiction. The sheriff court already plays a significant role in granting warrants and orders in respect of diligence, and we do not consider the fact that the new diligence relates to land is a good reason for denying jurisdiction to the sheriff court. The appropriate court to consider an application to sell attached land is the sheriff court of the place where the land to be attached is situated. Where the attached land is situated in two or more sheriffdoms, the application should be made to a sheriff having jurisdiction in any one of them. The sheriff should be empowered to include in the warrant of sale attached land situated in another sheriffdom. Such a provision would prevent unnecessary procedure and expense, and ensure unity of the sheriff's supervisory control, by enabling all parcels of land attached by a single attachment to be dealt with in a single application for warrant to sell.

3.135 In his application the creditor will need to aver that:

(a) he has registered a notice of land attachment in the appropriate property register;

(b) the outstanding debt owed to the creditor exceeds £1,500 (or other specified amount) or falls within the exception to that limit; and

(c) (if a principal dwellinghouse or other items of land are exempt from the sale stage) the debtor's land specified in the application is capable of being sold.

Furthermore the hearing which deals with the application is to be intimated not only to the debtor but also to other parties who have an interest in the land. The application should therefore be accompanied by the results of searches in the property registers showing all those with a registered interest in the attached land and carried down to not less than three clear days prior to the lodging of the application. The creditor will therefore have to carry out such a search just before lodging the application. Where the attached land is a principal dwellinghouse, intimation is also to be made to occupiers of the house and where known to the creditor the name of the occupiers should be included in the application.[144] If the whereabouts of the debtor are not known, intimation should be made to the Extractor of the Court of Session.[145] Where the application is made in respect of land which the debtor owns in common with others, it should also be intimated to all the other co-owners. Where a purchaser under prior missives has lodged a caveat with the court, intimation will also be made to that party. The intimation of the creditor's application should be accompanied by a notice in prescribed form, explaining the import of the application and what steps the debtor or other party may take. In the case of the debtor these steps include opposing the application and applying for a time to pay order.

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[144] 'Occupiers' in this context are the persons who are entitled to the special protection afforded to those who occupy a principal dwellinghouse as defined in Recommendation 15, para 3.109.

[145] A similar provision applies to notices calling up standard securities: 1970 Act, s 19(6).

3.136 In addition the creditor will have to put forward the name of an independent solicitor who is to be appointed by the sheriff as the party who will make the arrangements for sale, and a note of that solicitor's willingness to act should also be lodged. The sheriff is not bound to appoint the suggested person and can appoint any other solicitor.

3.137 The creditor in his application will crave various preliminary orders from the sheriff. If the sheriff is satisfied that the application is in order he would grant the following orders and warrants as of right:

(a) an order fixing a date for the hearing;

(b) warrant to intimate the application together with a note of the hearing date to the debtor, others with an interest in the attached land and, in the case of a principal dwellinghouse, its occupiers;

(c) an order appointing a surveyor or other qualified person to report on the open market value of the land and authorising the reporter to take all necessary steps (including inspecting the land) to produce the report;

(d) an order requiring any holder of any security over the land to disclose the amount outstanding on that security.

3.138 We recommend that:

18. (1) An application for a warrant to sell attached land must be made to a sheriff of the place where any part of the attached land is situated.

(2) The sheriff if satisfied that the application is in order shall grant:

(a) orders fixing a date for the hearing of the application and orders for intimation of the hearing to appropriate parties;

(b) an order for a report on the value of the attached land; and

(c) an order requiring holders of prior securities over the land to disclose the amount of outstanding debt.

The hearing of the application for warrant of sale

3.139 At least seven days prior to the hearing, the creditor must lodge a note detailing the amount outstanding on any securities over the land The creditor should also lodge a continuation of the previous search in the property registers up to three clear days before the hearing. The purpose of the continuation is to reassure the sheriff that no other transactions have been registered in the interval. If a transaction has been registered the sheriff should order intimation of the application to the persons concerned. Prior to the hearing the appointed surveyor must also have lodged a report on the valuation of the land.

3.140 At the hearing the sheriff may grant warrant of sale only if satisfied that:

(a) the net proceeds of sale are likely to exceed all the diligence expenses incurred and to be incurred chargeable against the debtor plus the lesser of £500 or 10% of the amount then due by the debtor (or other prescribed figures);

(b) the attached land can be sold under warrant; and

(c) the amount of the debt then outstanding exceeds £1,500 or such other sum as may be prescribed or falls into the excepted category.

3.141 One of the main reasons for the requirement of a court hearing for warrant to sell attached land is that it allows the sheriff to consider the interests of parties other than the creditor. There are five categories of other parties who may have an interest in a creditor's application for warrant to sell attached land: (i) the debtor (ii) where the attached land is a principal dwellinghouse, occupiers of the land (iii) holders of prior securities over the land; (iv) parties involved in transactions relating to the land, and (v) co-owners of the land.

3.142 **(i) the debtor.** The debtor may raise any issue of the competence of the diligence which the sheriff has in any case to consider of his own accord, that is the size of outstanding debt, the nature of the land to be sold, and the 'not worth it' test. The debtor may also raise the defence that it would be unduly harsh to grant the creditor's application.[146]

3.143 **(ii) occupiers of a principal dwellinghouse**. Where the land which is the subject of the application is a principal dwellinghouse, occupiers (including the debtor) may in addition apply for refusal of the application or extension of the period before sale can take place on the ground that it is reasonable to do so in all the circumstances. The factors which the sheriff is to consider in dealing with such an application are set out in Recommendation 16.

3.144 **(iii) holders of prior securities**. As a land attachment takes effect from the date of registration of a notice of attachment, it has no effect against prior securities over the land (including previously registered notices of land attachment). Accordingly at a hearing of an application for warrant to sell attached land the holder of any prior security (including a prior attaching creditor) may apply to have the application refused or sisted to allow that security holder to exercise his power of sale of the land under the security.

3.145 **(iv) purchasers under existing missives for sale of the land**. A land attachment should not have the effect of depriving a purchaser under existing missives of sale of the land of his bargain. We have already discussed this issue in more detail.[147] At a hearing for an application for warrant of sale, a purchaser may apply to be allowed to proceed with the implementation of the missives under conditions which protect the interests of the attaching creditor.

3.146 **(v) co-owners.** Where the land to be attached is owned by the debtor in common with another person or persons, the application for warrant of sale will have to protect the position of the co-owner or co-owners. We propose that in this situation the procedure in

[146] A debtor may also apply for a time to pay order if entitled to do so.
[147] See paras 3.130-3.132.

the application should be modelled on that used in an action of division and sale. We discuss this issue in more detail later.[148]

Orders granted by sheriff

3.147 Where the sheriff decides that the creditor is entitled to a warrant to sell attached land he will grant a warrant and may also grant various other related orders. The warrant will specify a period in which the sale should take place but this period may be extended on application by or on behalf of the creditor or by another interested party. Where a residential property has a large amount of land surrounding it or where a property has separable business and residential aspects, the sheriff may grant warrant in respect of only a specified portion of the land. The sheriff must be satisfied that allowing only part to be sold will not unduly prejudice the debtor, for example by reducing substantially the value of the remaining part of the land. The sheriff may also make other appropriate ancillary orders in connection with the sale (eg sale of the land in lots[149]).

3.148 From the perspective of the debtor the stage of sale of attached land is much more intrusive than the previous stages of the diligence. We do not think it appropriate that the arrangements for the sale and disposal of proceeds of sale should be left to the creditor. The general principle of civil diligence is that the execution of the different steps in any diligence is the responsibility of an officer of court, not the creditor.[150] In this respect diligence differs from processes such as the enforcement of a standard security where the granter of the security has consented to the enforcement process at the hand of the creditor. The question arises as to the most appropriate party to conduct the sale under the warrant of sale. We consider that in the process of sale of land, the most suitable person is a solicitor who has the necessary skills and experience in the marketing and conveyancing of land. Accordingly the sheriff, on granting warrant of sale, will appoint a suitably independent solicitor (SIS) to market and sell the land on behalf of the creditor. The SIS may be replaced by another solicitor later under the sheriff's power to make any appropriate ancillary order relating to the sale. The requirement that the appointed person is to be independent would preclude the agent for the creditor, debtor or any of the other parties to the application being appointed. The SIS's functions are to market and sell the land in an appropriate way. He or she would advertise the land, deal with enquiries and note the interests of potential purchasers, conclude missives on behalf of the creditor, and prepare or revise all the necessary conveyancing documents. A SIS could appoint people to carry out specialist tasks, for example a surveyor to carry out a pre-sale survey to fix an upset price, or a specialist firm of estate agents to market an agricultural estate. The SIS would be entitled to reasonable remuneration and outlays reasonably incurred. These would be payable by the creditor in the first instance but would be chargeable against the debtor and recoverable by the diligence, subject to being taxed by the auditor of court. We do not consider that the use of a person such as the SIS will unduly increase the expenses of the diligence as the

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[148] See paras 3.198-3.202.

[149] Cf Conveyancing (Scotland) Act 1924 Act, s 40. Under the present law a heritable creditor selling the land in lots is entitled to create rights, and to impose duties and conditions, so far as required for the proper management, maintenance and use of land held in common by the owners of the lots and for that purpose to execute and register a deed of declaration of conditions. See *ibid*, s 40(2), (3) as read with Conveyancing (Scotland) Act 1874, s 32.

[150] "While to have one's household goods seized and sold up by an officer of the law may be regarded as Kismet, to have them seized and sold by an employee of the creditor may perhaps be regarded as tyranny" (*Stewart v Reid* 1934 SC 69, at p 75 per Lord Sands).

functions he performs are all necessary parts of any process of selling land and disposal of the proceeds of sale. The important point about the SIS is the element of independence from the creditor and his duties to the court supervising the diligence.

3.149 The SIS would be obliged to carry out the functions in accordance with the statutory provisions on land attachment and any directions or orders made by the sheriff. The SIS would owe a duty of care to the creditor, debtor and other secured creditors and would be liable if they suffered loss due to any fault on his or her part. He or she would be required to lodge a bond of caution. Unlike a normal agent acting for a client, the SIS would not take instructions from the creditor, except in relation to starting the process of sale and the acceptability of any offer to purchase. The SIS would consult the creditor as to the mode of sale and may consult about other matters. However the SIS is an officer of the court and owes a duty to it to carry out the functions properly. The SIS should be entitled to apply to the sheriff for an order or direction if difficulties arise during the sale process. When the sale process is going to start the SIS would no doubt get in touch with the debtor. This does not need to be formalised in legislation.

3.150 We recommend that:

19. (1) Prior to the hearing of an application for warrant to sell attached land, the creditor must lodge a note of the outstanding debts on any securities on the land and a report by a surveyor on the value of the land. The creditor must also lodge an updated search of the property registers.

(2) A sheriff cannot grant warrant to sell attached land unless satisfied that (i) the amount of debt owing to the creditor is £1,500 or more or the application falls into the exception to that limit (ii) the land may properly be sold as part of the diligence and (iii) the proceeds of sale are likely to exceed the sum of all the diligence expenses chargeable against the debtor plus the lesser of 10% of the debt or £500.

(3) A sheriff must consider representations by any party on whom intimation of the hearing has been made, including the debtor, where the land to be attached is a principal dwellinghouse any occupier of the land, a holder of any prior security, and purchasers under existing missives for sale of the land.

(4) If satisfied that the debtor's interests would not be prejudiced, the sheriff should have power to restrict the warrant of sale to part of the attached property.

(5) The warrant must specify a period within which any sale can take place. The period may be extended on application by or on behalf of the creditor or any other party with an interest. The sheriff may authorise sale of the attached land in lots. The sheriff may also make any ancillary order as he considers appropriate in connection with the sale of the attached land.

(6) On granting warrant of sale the sheriff should appoint a suitably independent solicitor (SIS) to market and sell the attached land.

(7) Where the warrant of sale authorises the sale of the land in lots the SIS acting on behalf of the creditor shall have power to create such rights and impose such duties and conditions as he considers may be reasonably required for the proper management, maintenance and use of the land.

(9) Possession and maintenance of attached land

3.151 Sale of the attached land can take place only after the creditor has instructed the SIS to proceed with the sale. Thereafter, the debtor and persons deriving right from him should have no right to occupy the attached land. The SIS would be entitled to serve on the debtor and other occupiers a notice that with effect from seven days (or longer) the person receiving the notice has no right to occupy the land unless his right of occupation would prevail over the debtor's singular successors (for example a person with a real right of possession under a tenancy protected by the Leases Act 1449). On expiry of the period of notice the SIS would be entitled to apply to the sheriff for warrant to eject the debtor or other occupier. These provisions are necessary in order to enable the SIS to sell with vacant possession and to facilitate the sale to obtain the best price possible in the interests of the debtor as well as the creditor. We received representations that any other solution is likely to be unworkable in practice. The SIS may on the creditor's instructions permit the debtor (or others) to remain in occupation, but the permission could normally be withdrawn at any time.

3.152 From the date when the notice takes effect, there should be deemed to be transferred to the attaching creditor the debtor's rights and obligations as proprietor.[151] The idea is that the attaching creditor would, and the debtor would not, have these rights and obligations in the period between the date of service and the date on which the land attachment ceases to have effect. That might be called "the creditor's statutory period of possession", (possession being civil or actual). The rights and obligations would include the right to receive rent and other rights and obligations in relation to leases We think however that the creditor should not have power to grant new leases and that he is to be entitled to receive rent only after intimation of the notice to the tenants.

3.153 The rights and obligations would also include obligations of an owner to maintain under the title deeds, eg for common repairs. Under the existing law an obligation of an owner to maintain his land carries with it the obligation to pay for the work but when the obligation to pay a particular sum thus arises, that constitutes a debt due by the owner who was so at the time when the debt arose and will not transmit against singular successors or heritable creditors subsequently taking possession.[152] The same rule would no doubt be applied by the courts to preclude transmission of a particular debt already incurred to an attaching creditor. In relation to an obligation to do work on the land imposed by a statutory notice[153] it is thought that if the notice is served during the creditor's statutory

[151] Cf 1970 Act, s 20(5): "deemed to be assigned".
[152] *David Watson Property Management v Woolwich Equitable Building Society* 1992 SLT 430 (HL) at p 434I-K per Lord Mackay of Clashfern.
[153] Eg Building (Scotland) Act 1959, s 11 (on "owner"); Civic Government (Scotland) Act 1982, s 87 (on "owner"); Housing (Scotland) Act 1987, s 108 (on "person having control").

period of possession, he would be liable. Expenses and outlays incurred in implementing the owner's obligations should form part of the expenses of the land attachment process and be chargeable against the debtor. The effect will be that the creditor cannot raise an action to recover those expenses but that is a risk he must take.

3.154 A court order should not be needed for routine powers of maintenance and management but should be required for works of reconstruction, alteration or improvement at the debtor's expense.

3.155 By virtue of the statutory transfer of the debtor's rights to the creditor, the creditor should have the same title as the debtor had before the transfer to raise an action of removing, intrusion or ejection against a third party in respect of the attached land.

3.156 We recommend that:

20. (1) Where the creditor has instructed the SIS to proceed with the sale of the attached land the SIS may by notice served on the debtor or any other person entitled to occupy the land, terminate any right of the debtor (or such other person) to continue to occupy the land, with effect from a day not less than seven days from the date of service.

(2) Any right of a person (other than the debtor) to occupy the land which before a notice of land attachment relating to the land was registered would have been binding on a singular successor of the debtor should not be affected by any such notice to remove from the land.

(3) From the date on which the notice takes effect until the land attachment ceases to have effect the creditor (in place of the debtor) should have the debtor's rights and obligations as proprietor of the land, including (a) any right of the debtor to receive rent from any tenant (but only as regards rent payable on or after the date on which the SIS intimates in writing to the tenant that notice has been given) and (b) any lease and any permission or right of occupancy granted in respect of the land but not including the power to grant a lease.

(4) After the notice takes effect, the SIS

(a) may apply to the sheriff for an order (i) authorising him to effect works of reconstruction, alteration or improvement if they are works reasonably required to maintain the market value of the land and (ii) to recover from the debtor any expenses reasonably incurred in so doing;

(b) may bring an action of ejection against the debtor; and

(c) shall have title to bring any action of removing, intrusion or ejection which the debtor might competently have brought in respect of the land.

(10) The sale

3.157 Unless the sheriff otherwise directs, the SIS should be entitled to sell the attached property by private bargain or public auction after due advertisement. The SIS should be under a general duty to take all reasonable steps to ensure that the sale price is the best that can reasonably be obtained.[154] What amounts to due advertisement would depend on the situation and nature of the land. In order to protect the debtor from unnecessary publication of his indebtedness, the advertisement should neither reveal the name of the debtor nor disclose that it is a sale by an attaching creditor. There may also be a risk that such a revelation might depress the price.

3.158 An attachment and sale should be treated as valid even though the debtor and any other person to whom an intimation is made is not of full age or legal capacity.[155] In terms of section 16 of the 1979 Act, a deed conveying an interest in land is deemed to include an assignation of writs. This statutory assignation would be imported into the disposition granted by the creditor to the purchaser.

3.159 A disposition by the creditor (or by the SIS on behalf on the creditor) to a purchaser at the warrant sale should not be challengeable on the ground of any latent error or irregularity in the diligence, if the warrant of sale and evidence of due advertisement were produced and were apparently in order. Immediately prior to settlement the SIS is to give the purchaser a certificate that the diligence has been regularly executed. This certificate will protect the purchaser unless he knew of any irregularity or knew that the land attachment had ceased to have effect prior to settlement or could have known from an inspection of the property registers. If in fact there had been an irregularity or the land attachment had ceased to have effect, the SIS's certificate will still protect a purchaser in good faith but it will not prevent a claim for wrongful diligence.[156] A SIS who knowingly issues a false certificate would commit an offence under the Statutory Declarations Act 1835.

3.160 We recommend that:

21. (1) A SIS should be entitled, unless the sheriff otherwise directs, to sell the attached land by private bargain or public auction after due advertisement. The SIS should be under a general duty to take all reasonable steps to ensure that the sale price is the best that can reasonably be obtained.

(2) An attachment and sale should be valid notwithstanding that the debtor and any other person to whom intimation has to be made is in nonage or under legal disability.

(3) The SIS should have authority, by virtue of the sheriff's warrant, to grant a disposition on behalf of the creditor in favour of the purchaser in implement of the contract of sale. The disposition should be deemed to include an assignation by the debtor to the purchaser of all obligations of warrandice owed to the debtor and an obligation by the creditor of

[154] A similar duty applies in a sale by a creditor under a standard security (1970 Act, s 25).
[155] Cf Conveyancing (Scotland) Act 1924, s 41(1).
[156] *Ibid* s 41(2) (as amended).

warrandice from his own facts and deeds. The creditor's right to the writs proposed in Recommendation 6 would be assigned automatically under the Land Registration (Scotland) Act 1979, section 16.

(4) Prior to settlement the SIS must issue to the purchaser a certificate that the diligence has been regularly executed and continues to have effect. This certificate will protect a purchaser in good faith even if there had been an irregularity in the execution of the diligence or the diligence had ceased to have effect.

(11) Disburdenment of purchaser's title and ranking on proceeds of sale

3.161 The SIS should be bound to discharge all prior attachments and diligences and should be entitled to redeem any prior security, even if the debtor was not so entitled. Any net surplus proceeds of sale arising after satisfying creditors' claims should be paid to the debtor. The debtor should remain personally liable for any balance of the debt still due to the creditor after completion of the sale process.

3.162 If the SIS is unable to obtain a discharge for any of the above sums, the sum should be consigned in the sheriff court which granted the warrant of sale. The sheriff clerk's receipt should be equivalent to a discharge. Where the consigned sum relates to a prior security or attachment which the creditor is redeeming, the SIS should register a notice in prescribed form in the property registers which would have the effect of disburdening the land sold of that prior security or attachment.

3.163 A land attachment should be regarded as a security for the purposes of section 27 of the 1970 Act (application of proceeds of sale carried out by a standard security holder).

3.164 We recommend that:

22. (1) Registration of the purchaser's disposition in the property registers should have the effect of disburdening the land disponed of the selling creditor's land attachment and all other diligences and heritable securities ranking *pari passu* with or postponed to that attachment, but not of any real right or preference ranking prior to it.

(2) The proceeds of sale should be applied by the SIS to meet the following debts in the following order:

(a) the creditor's expenses in connection with the sale and any attempted sale incurred after the granting of the warrant of sale;

(b) the sums due to the creditors holding prior securities, attachments or diligences, except the amount due under a prior security which is not redeemed;

(c) the amount due to the attaching creditor (less the expenses in (a)), or where there are *pari passu* attachments, diligences and

securities the sums due to the attaching creditor and the others in their due proportions; and

(d) the sums due to creditors with attachments, diligences or securities postponed to that of the attaching creditor, in accordance with their rankings.

(12) The report of sale

3.165 The diligence of land attachment requires a considerable degree of judicial supervision. As a safeguard for the debtor and any creditors claiming to rank on the proceeds of sale of the attached land, there should be judicial scrutiny of the sale procedure and an auditing of any payments made to other creditors and of the diligence expenses. There is no judicial supervision of a sale carried out by a standard security holder, but in a standard security the debtor consents to the procedure when granting the security. There is a precedent in the provisions on the report of a warrant sale of poinded goods.[157] The report of sale should be made by the SIS and should include the following information:

(a) any land sold and the amounts for which it has been sold;

(b) any land remaining unsold and the price at which it was last exposed for sale;

(c) the expenses chargeable against the debtor incurred in executing the diligence;

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

(e) any surplus paid to the debtor; and

(f) any balance of the proceeds of sale due to the debtor or any balance of the debt due by the debtor to the creditor.

3.166 The auditor would tax the expenses chargeable against the debtor and would set out the balance due to or by him. The auditor would also draw to the attention of the sheriff any matter which seemed to call for further investigation. No fee should be chargeable for lodging a report of sale and the cost of the auditor of court's audit should be met out of public funds. Requiring the debtor to pay would increase the expenses of the diligence. The report of sale and auditor's report should be available for inspection by the public for a prescribed period on payment of a prescribed fee.

3.167 The sheriff should have power to deal with the situation where the SIS delays or fails to lodge a report. The sheriff should be enabled to order the forfeiture of the SIS's fees and he may also report the SIS to the Law Society of Scotland for investigation and possible disciplinary proceedings under Part III of the Solicitors (Scotland) Act 1980.[158]

3.168 On examining the report the sheriff may discover that there has been some substantial irregularity in the diligence, in which case he would have the power to declare

[157] 1987 Act, s 39.
[158] Cf *ibid* s 39(3).

the diligence null.[159] A declarator by the sheriff that the diligence was void should not affect the title of a purchaser which is protected in terms of Recommendation 21 above.

3.169 We recommend that:

23. (1) The SIS should be required to submit to the sheriff a report of sale and diligence expenses in prescribed form within 28 days of the date of settlement of the sale.

(2) Where a report of sale is made late without reasonable excuse or where the SIS refuses to make a report, the sheriff should have power to make an order forfeiting in whole or in part the SIS's entitlement to a fee and the reimbursement of any expenses and outlays incurred in carrying out his functions.

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

(a) tax the expenses chargeable against the debtor;

(b) certify the balance due to or by the debtor; and

(c) report to the sheriff,

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

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

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

(b) if satisfied that there has been a substantial irregularity in the diligence to declare the diligence to be void and make consequential orders.

(13) Foreclosure

3.170 Where the SIS is unable to sell the attached heritable property for enough to discharge the debt and prior and *pari passu* incumbrances, he should be entitled to apply to the sheriff for a decree of foreclosure. The principal effect of foreclosure is to transfer ownership of the attached land from the debtor to the creditor broadly as if it had been sold to the creditor at the upset price at which the land was last auctioned. The remedy of foreclosure has long been available to creditors in voluntary heritable securities. Our recommendation is modelled on the provisions for standard securities.[160] Land is a readily marketable commodity so that in practice foreclosure by standard security holders is very

[159] Cf *ibid* s 39(5), (9).
[160] 1970 Act, s 28.

uncommon. It seems unlikely to be more common in land attachments. Before applying for decree of foreclosure, the SIS must have attempted to sell the land, or the remainder of the land (having sold part by private bargain), by public auction for at least the upset price mentioned above.

3.171 Rules of court should provide that the SIS's application should be intimated to the debtor, other creditors holding securities or attachments on the land and other persons with an interest. The application should state the amount due to the various creditors and if part of the land had been sold a report of the sale should be submitted.

3.172 The sheriff should have power to appoint a valuer to value the unsold land if the land is to be re-exposed for sale at a reserve price. The decree of foreclosure should be in prescribed form and contain a sufficient conveyancing description of the unsold land. The creditor should have the right to redeem prior and *pari passu* securities, even if the debtor had no such right. The debtor would remain liable for the balance due to the creditor and sums due under postponed securities and attachments, which would be discharged. The creditor's title should not be challengeable on the ground of any irregularity in the diligence or foreclosure proceedings, without prejudice to the debtor's right to claim damages for wrongful diligence.

3.173 We recommend that:

24. (1) Where the SIS fails to sell the attached property by public auction, or parts by private bargain and the rest by public auction, for sufficient to pay off the debt and prior and *pari passu* creditors' securities and diligences, he should be entitled to apply to the sheriff court which granted the warrant of sale for a decree of foreclosure.

(2) The sheriff, after ordering such intimation and enquiry as seems fit and giving the debtor and other creditors an opportunity to be heard, should have power:

(a) to sist the application for up to three months;

(b) to order the unsold property to be auctioned with a reserve price, or to be re-advertised for sale at that fixed price and if still unsold auctioned at that reserve price. The creditor should be entitled to bid and buy at the auction; and

(c) to grant decree of foreclosure, either immediately or in the event that the property remains unsold.

(3) Registration of the decree in the property registers should:

(a) extinguish the debtor's right to bring the attachment to an end by paying the debt;

(b) vest the creditor in the heritable property described at the upset price at which it was last auctioned; and

> **(c) disburden the property of the creditor's attachment and all postponed securities and diligences.**

(14) Payments to account and diligence expenses

3.174 At present an adjudging creditor is not entitled to charge the debtor with any of the expenses of adjudication, except that the debtor is liable for any extra expenses occasioned by unsuccessful opposition. However the rule for adjudications has to be viewed against the background that if the debt remains unpaid the adjudger will eventually become owner of the land, however valuable it is in relation to the debt.

3.175 By contrast, the new diligence of land attachment operates as an "attach and sell" diligence. Accordingly our recommendations on the expenses of land attachment are modelled on the provisions dealing with the expenses of diligence against moveables, especially those relating to poinding.[161] The creditor's expenses of executing the diligence of land attachment should be chargeable against the debtor and recoverable from the proceeds of the attachment. In general, no expenses (apart from those of the charge) should be recoverable by other legal process. A different rule would have the effect that diligence could always be followed by other diligence. Exceptionally, where the land attachment is overtaken by a supervening insolvency process or other process of ranking creditors' claims on the attached land (eg a sale under a standard security or floating charge), the expenses could be claimed in that process. Any expenses not recovered while the land attachment is in effect should cease to be chargeable against the debtor. Each party should bear his own expenses in relation to incidental court applications. As an application for warrant to sell attached land is a necessary step in the diligence the creditor would normally be entitled to the expenses of the application. However, if an application for warrant to sell attached land, for authority to bring an action of division and sale, or for decree of foreclosure is made or objected to by any party on frivolous grounds the sheriff may award expenses (not exceeding a prescribed sum) against such a party.

3.176 We recommend that:

25. (1) The expenses properly incurred by a creditor in executing the diligence of land attachment should be chargeable against the debtor. The expenses should, unless paid by the debtor, be recoverable from the proceeds of the attachment concerned but (apart from the expenses of the charge) not by any other legal process except supervening insolvency processes or processes of ranking creditors' claims on the attached land.

(2) Any expenses not recovered by the time when the diligence is completed or ceases to have effect should cease to be chargeable against the debtor, except as mentioned in (1).

(3) Each party should bear his own expenses in relation to incidental court applications but where any party makes or objects to an application for warrant to sell attached land, or authority to bring an action of division and sale, or for decree of foreclosure, on frivolous grounds the court should

[161] 1987 Act, ss 92-95.

be empowered to award expenses not exceeding a prescribed sum against that party.

Ascription of payments to account during land attachment

3.177 Sums paid while a land attachment is in effect and the proceeds of an attachment should be ascribed first to expenses, secondly to interest accrued to the date of registration of the notice of land attachment and lastly to the principal sum together with any further interest. This proposition is modelled on section 94 of the Debtors (Scotland) Act 1987 which makes similar provision for poindings and arrestments.

3.178 We recommend that:

26. Sums paid while a land attachment is in effect and the proceeds of an attachment should be ascribed first to expenses, secondly to interest accrued to the date of registration of the notice of land attachment and lastly to the principal sum together with any further interest.

(15) Transmission and termination of land attachments

Assignation of debt

3.179 At common law, the assignation of the right to a debt automatically carries with it, by operation of law, any diligence securing the debt.[162] If the cedent had not already registered a notice of land attachment the assignee would have to apply to the sheriff clerk[163] for a warrant to register a notice of land attachment in his own name. The warrant would also authorise arrestment, earnings arrestment and poinding by the assignee to enforce the debt assigned. Where the cedent had already registered a notice of land attachment the assignee would acquire the benefit of steps already taken by the cedent and be entitled to complete the diligence. The assignee should be entitled to register a notice in the property registers, so as to show the assignee as the new creditor.

3.180 We recommend that:

27. An assignation of the debt should carry with it the benefit of steps in the diligence of land attachment already taken by the cedent in relation to that debt.

Acquisition by creditor's assignee or successor of creditor's right to use land attachment

3.181 As part of the modernisation of the law of diligence, the Debtors (Scotland) Act 1987, section 88 introduced a new procedure whereby an executor or assignee of the creditor[164] in a decree or other document containing a warrant for diligence can obtain a warrant authorising him to do diligence under the extract in his own name. A minute is endorsed on the extract which is produced to a clerk of court along with the relevant link in title (eg the confirmation of the executor or the intimated assignation). This procedure should be

[162] Bell, *Commentaries* ii, 19.
[163] Under the 1987 Act, s 88.
[164] Or other person acquiring right from the creditor directly, or indirectly through a third party.

available to a creditor wishing to serve a charge to pay or to register a notice of land attachment.

3.182 Where however the original creditor has already registered a notice of land attachment in the property registers, application to the clerk of court is unnecessary. Instead the person (executor or assignee) acquiring right to the extract decree or document of debt and the diligence should be entitled to register a notice in a prescribed form in the property registers deducing his title to the extract and diligence from the original creditor through the links in title.

3.183 We recommend that:

28. (1) An assignee, executor or other person acquiring from the original creditor, directly or through a third party, the right to an extract decree or document of debt bearing a warrant for diligence, should be entitled to apply to the clerk of court for a supplementary warrant under section 88 of the Debtors (Scotland) Act 1987 authorising him to execute a charge to pay and to register a notice of land attachment in his own name under the extract.

(2) Where a notice of land attachment has already been registered at the time when the person acquires the right to the warrant and diligence, the person acquiring the right should be entitled:

(a) to continue with the diligence without a supplementary warrant; and

(b) to register a notice in the prescribed form in the property registers deducing his title from the original creditor by means of links in title.

Duration and extension of land attachment

3.184 A notice of land attachment should cease to have effect five years after the date of its registration. The creditor should be entitled to extend the period for a further five years by registering a notice of extension. The application for registering an extension in the Land Register and the notice of extension of a registered land attachment in the Sasine Register should be in a prescribed form. More than one extension should be competent. The creditor should be entitled to extend the attachment period provided that the debt remains enforceable. The fact that the period of attachment is "extended" (as distinct from "renewed") means that the creditor continues to rank as from the date of registration of the original notice.

3.185 We recommend that:

29. (1) A notice of land attachment should cease to have effect on the expiry of a period of five years after the date of its registration.

(2) The creditor should be entitled to extend the period for a further five years by registering, within the last two months of this period, a

document in a prescribed form to be known as a notice of extension. More than one extension should be competent.

Termination of attachment by payment

3.186 The general rule is that attached property is disburdened of any attaching diligence as soon as the debt secured by it is paid. Once the SIS has entered into a contract of sale, however, the effect is that the creditor becomes legally bound to give the purchaser a good title. It would be unfair and unreasonable if the debtor was able to bring the attachment to an end thereafter with the result that the creditor would be unable to give the purchaser a good title and might be liable to him in damages for breach of contract. The debtor should be entitled to bring a land attachment to an end by paying or tendering the full amount (including expenses chargeable against the debtor) due to the creditor but only if he does so before the conclusion of the contract of sale or the registration of a decree of foreclosure. This same rule applies in poindings and arrestments.[165] Recommendation 25 details the expenses chargeable against the debtor.

3.187 We recommend that:

30. The debtor should be entitled, at any time up to the conclusion of the contract of sale or the registration of a decree of foreclosure, to bring a land attachment to an end by paying or tendering the full amount (including expenses chargeable against the debtor) due to the creditor.

Discharge, recall and restriction

3.188 If the debt is satisfied otherwise than by sale of all of the attached land (eg by payment, or sale of part of the land, or other diligence), the creditor should be under a duty to grant a discharge of the land attachment. The debtor should be liable for the whole expenses of preparing and registering any discharge or restriction granted by the creditor. The debtor or any other person having an interest should be entitled to apply to the sheriff for a land attachment to be recalled or restricted. The debtor may wish to do this if the creditor refuses to grant a discharge when obliged to do so. The expenses should be left to the sheriff's discretion. The discharge, recall or restriction should be in a prescribed form and be registrable in the property registers.

3.189 We recommend that:

31. (1) A land attachment may be discharged or restricted by the creditor.

(2) A land attachment may be recalled or restricted by the sheriff on the ground that:

(a) the warrant is invalid in whole or in part;

(b) the execution of the diligence is irregular or incompetent; or

(c) the diligence has ceased to have effect.

[165] 1987 Act, s 95.

(16) Debtor's death

Debtor's death before registration and service of land attachment

3.190 Where the debtor has died before service on him of the notice of land attachment, the outcome is that the diligence cannot proceed. The steps to be taken by the creditor differ in each of the three categories of case, namely:

(1) where an executor is confirmed to the estate of the deceased debtor;

(2) where the succession is vacant, (ie no executor has confirmed to his estate and either no person has succeeded to the deceased's heritable property by virtue of a special destination or such a person has renounced his succession); and

(3) where a person succeeds to heritable property of the deceased under a special destination in a disposition or assignation of a lease (such a person being traditionally called an "heir of provision").

3.191 In the first case, which is the most common, an executor confirms to the deceased's estate. In this situation the creditor claims payment of the debt by the executor from the estate. If the executor refuses to pay, the creditor's remedy is to raise an action to constitute the debt against the executor. No change to the existing law is recommended except that a decree against the executry estate would authorise land attachment as recommended above.[166]

3.192 The next category of case concerns a vacant succession, that is, where no executor has confirmed to the estate of a deceased debtor. It should cease to be competent for the deceased's creditor to use the diligence of confirmation as executor-creditor in order to attach the deceased debtor's heritable property. Instead, land attachment (or where appropriate an attachment order discussed in Part 4) should be competent as mentioned in the following paragraphs. Confirmation as executor-creditor was at one time only applicable to moveable property but was extended to heritable property by the Succession (Scotland) Act 1964.[167] It would be simpler to allow for use of land attachment (or attachment orders) than to adapt confirmation as executor-creditor to heritable property by adding safeguards and new procedures.

3.193 In place of confirmation as executor-creditor, we propose that vacant succession cases should be dealt with by a new statutory version of the combined common law actions of constitution *cognitionis causa tantum* and adjudication for debt *contra haereditatem jacentem* (ie against the vacant succession). These were available before 1964 in the sheriff court as well as the Court of Session and may possibly still be competent though that is not clear.[168] In the former action the court granted a decree "declaring or cognoscing the extent of the debt due by the deceased, that adjudication might proceed upon it against the lands"[169] but not implying personal liability on the part of any one nor itself granting warrant for

[166] Recommendation 4, para 3.39.
[167] Scot Law Com DP No 78, para 7.23.
[168] See Scot Law Com DP No 78, para 7.13.
[169] Erskine, *Institute* II,12,47.

diligence. Instead of adjudication for debt *contra haereditatem jacentem*, however, we propose that the court will grant warrant for land attachment or for an attachment order against heritable property in the vacant succession. Since a vacant succession means by definition that there is no identifiable surviving debtor, the procedure in land attachment or the attachment order should be adapted by rules of court and the sheriff's orders for use against a vacant succession.

3.194 In the third category, property passes to an "heir of provision" under a special destination in a disposition. In our Discussion Paper on *Adjudications for Debt* we noted that the generally accepted principle is that a person who succeeds to property by virtue of a special destination is personally liable for the debts of the previous owner unless the person renounces the succession.[170] The liability is limited to the value of the property at the date of the previous owner's death. However that principle was thrown into some doubt by the Outer House decision in *Barclays Bank Ltd v McGreish*.[171] In our *Report on Succession* we made recommendations designed to reverse that decision.[172] Since that report the decision in *McGriesh* has been overruled by the Inner House in *Fleming's Tr v Fleming*.[173] Accordingly we now take the view that this situation should be governed by the rule that creditors of a deceased debtor should sue any heir of provision for debts of the deceased due to them and do diligence (including land attachment) on the basis of the decree they obtain in that action.

3.195 We recommend that:

32. (1) Where a copy of a notice of land attachment has not been served prior to the debtor's death, the land attachment should be ineffectual.

(2) Where an executor has confirmed to the estate of a deceased debtor, a creditor of the deceased should constitute his debt by decree for payment against the executor as under the present law and be entitled to do diligence under the decree against the executry estate in the normal way.

(3) Where no executor has confirmed to the estate of a deceased debtor, it should cease to be competent to confirm as executor-creditor to the deceased debtor's heritable property, and land attachment (or where appropriate an attachment order) should be competent.

(4) Where on the expiry of six months after a debtor's death, the succession to his estate is vacant (ie no executor has confirmed to his estate and either no person has succeeded to the deceased's heritable property by virtue of a special destination or such a person has renounced his succession), a creditor of the deceased should be entitled to raise an action in the sheriff court of constitution of the debt and declarator of the extent of the debt due by the deceased to the pursuer (traditionally known as an action of constitution *cognitionis causa tantum*). Decree in the action should authorise land attachment (or an attachment order) in place of an action of adjudication for debt *contra haereditatem jacentem* which should

[170] Scot Law Com DP No 78, paras 7.12-7.16.
[171] 1983 SLT 344.
[172] Scot Law Com No 124, paras 6.15-6.17.
[173] 2000 SLT 406.

cease to be competent. Provision should be made by rules of court adapting the statutory procedure in land attachment to the case of a vacant succession, including provision conferring powers on the sheriff to make ancillary orders dispensing with or modifying steps in that procedure.

(5) Where property has passed under a special destination a creditor of the deceased should raise an action of declarator of the value of the property passing under the destination and constitute his debt by decree for payment against the person succeeding under the special destination and be entitled to do diligence (including land attachment) under the decree against that person's property in the normal way.

Debtor's death after registration and service of land attachment

3.196 Where the debtor dies after service of a notice of land attachment, we propose that the land attachment should continue in effect. This is consistent with the theory underlying the diligence that a registered land attachment is a subordinate real right in the attached property. It therefore binds the debtor's singular successors and his universal successors. Provision should be made by rules of court adapting the statutory procedure in the diligence to that case, including provision conferring powers on the sheriff to make ancillary orders dispensing with or modifying steps in that procedure. Rules of court might provide that the deceased debtor's executor or heir of provision (if any) would stand in place of the deceased debtor with regard to receiving intimations, making or opposing applications and the like. If the succession is vacant, provision might be made for intimation to the Lord Advocate, as in notices calling up a standard security.[174]

3.197 We recommend that:

33. A real right constituted by a registered notice of land attachment will transmit against the debtor's universal successors or heir of provision on his death and accordingly the creditor should be entitled to proceed with the diligence. Provision should be made by rules of court adapting the statutory procedure in the diligence to that case, including provision conferring powers on the sheriff to make ancillary orders dispensing with or modifying steps in that procedure.

(17) Land attachment of *pro indiviso* share of common property

3.198 In some cases the debtor may own a *pro indiviso* share of land in common with one or more co-owners. A leading feature of common ownership is that each co-owner has a *pro indiviso* (ie undivided) share in every part of the property. Ownership of different parts of the property is not allocated to different co-owners.[175] Common ownership of dwellings and other heritable property is quite frequently found. A family home for example may be co-owned by a husband and wife[176] or by an unmarried couple cohabiting there. Outside family

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[174] 1970 Act, s 19.

[175] Stair Memorial Encyclopaedia, vol 18, paras 17-21.

[176] There are no recent statistics. A survey in 1979 found that of matrimonial homes in ownership, 57% were owned by husband and wife in common ownership, 37% by the husband alone, 5% by the wife alone, and 1% in some other way. See A J Manners and I Rauta, *Family Property in Scotland* (1981) Table 2.4 (Office of Population Censuses and Surveys). The trend was towards co-ownership by spouses: *idem*.

relationships, common property is relatively unusual. It is an unstable form of concurrent ownership since any co-owner has an absolute right to terminate the common ownership by raising an action of division and sale.[177] Common property has to be distinguished from joint property which is the form of ownership appropriate to trusts and unincorporated associations.

3.199 One possible model for dealing with this situation is the law on the poinding of articles of moveable property in the common ownership of the debtor and a third party. There the creditor poinds all the shares of all the co-owners but the third party co-owner has a right to obtain the release of the goods by paying the value of the debtor's share or, as the case may be, a right to be credited with his own proportion of the proceeds of sale if the article is sold by warrant sale.[178] This approach is apt for poinded articles of moveable property which are very often of small value. However the general rule in diligence is that a creditor cannot attach the property of A for B's debt. There is no good reason why effect should not be given to that principle in land attachment.[179] Adjudication of a *pro indiviso* share of common property is competent.[180] A standard security, which has similarities to land attachment, may also be granted over a *pro indiviso* share of common property.[181]

3.200 At the attachment stage of land attachment, the subordinate real right would apply only in respect of the debtor's *pro indiviso* share of the land. Where all the co-owners (including the debtor) wished to sell the land, they would have to make an arrangement with the creditor for the discharge of the attachment in order for the sale to proceed. Where only some of the co-owners wished to sell the land, the remedy would be to apply for division or for division and sale of the land. If the land were divided the land attachment would continue to apply to the debtor's part of the land. If the land were subject to division and sale, the situation would again be that for the sale to proceed, an arrangement would have to be made with the attaching creditor.

3.201 Matters are more complex where the attaching creditor wishes to sell the attached land. In our view the sheriff should have the power to deal with an application by the creditor for sale on the model of an action of division and sale of the land. In an application for warrant to sell attached land held in common, the sheriff would approach the commonly held land in the same manner as with any other action of division and sale, that is he would grant either a decree of division or, more likely, a decree of sale of the land. If he granted a decree of division he would restrict the warrant of sale to that part belonging to the debtor. Where the sheriff granted a decree of sale of the common property, he would also grant a warrant for sale of the whole property. The warrant would make provision requiring the SIS to make payment to the other co-owner or co-owners of the part of the price due to them.

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[177] In the case of a matrimonial home commonly owned by spouses this right is subject to Matrimonial Homes (Family Protection) (Scotland) Act 1981, s 19.
[178] 1987 Act, s 41.
[179] The same principle applies in maritime law where an Admiralty arrestment *in personam* attaches one or more of the 64 shares in a ship in common ownership rather than the ship itself (Stair Memorial Encyclopaedia vol 8, para 322; RCS r 46.5 (2),(3),(7)–(11)). See also Scot Law Com No 164, para 7.22.
[180] Bell, *Principles*, para 1073; Gretton, pp 216-217.
[181] *McLeod v Cedar Holdings Ltd* 1989 SLT 620.

3.202 We recommend that:

34. (1) Land which is subject to the diligence of land attachment includes land which the debtor owns in common with another person or persons.

(2) Where an application is made for warrant of sale of attached land held by the debtor in common with another person, the sheriff should have the same powers in respect of the land as are available to him in an action of division and sale of the land.

(3) In any such application, the same protections for the debtor and third parties should be available as are recommended for an application for decree of attachment of land owned by the debtor absolutely.

(4) Where in respect of the commonly owned land the sheriff grants a decree of division (ie partition of the land with each co-owner becoming exclusive owner of a part of the land), the decree should in the normal way declare specified parts of the land to pertain and belong to the debtor and other owners respectively and their respective successors, heritably and irredeemably, as their own separate and absolute properties. The warrant of sale would apply only to the part of the land belonging to the debtor.

(5) Where in respect of the commonly owned land the sheriff grants a decree of sale, the warrant of sale has effect against all of the land. The warrant of sale shall direct the SIS to pay to the non-debtor co-owner or co-owners the part of the price due to them.

(18) Effect of sequestration and liquidation on land attachment

3.203 Our discussion of the relationship between land attachment and the insolvency process of sequestration and liquidation focuses on three issues.

(1) First, legislation on sequestration and liquidation has the effect of cutting down certain diligences executed prior to the insolvency processes. We deal with this issue in Part 7 of this Report.

(2) Second, in respect of sequestration (but not liquidation) for the purposes of the vesting of the debtor's estate in the permanent trustee, the trustee's act and warrant is deemed to be equivalent to *inter alia* a decree of adjudication for debt and in security. The abolition of adjudication for debt and in security would require amendment of that provision.[182]

(3) Third, legislation also prevents a creditor from raising or insisting in an adjudication after the date of sequestration, and this provision requires adaptation to the new diligence of land attachment. However at present there is no equivalent rule in respect of liquidations.

[182] We recommend abolition of adjudication for debt in Part 2 of this Report. We recommended the abolition of adjudication in security in Scot Law Com No 164, paras 6.55-6.58.

Vesting of estate

3.204 **Vesting of estate in permanent trustee.** The Bankruptcy (Scotland) Act 1985, section 31(1) provides that the whole of the debtor's estate shall vest in the permanent trustee by virtue of the act warrant and further that:

> "(b) the act and warrant shall, in respect of the heritable estate in Scotland of the debtor, have the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the permanent trustee."

3.205 In our Discussion Paper on *Adjudications for Debt* we analysed the effect of this provision.[183] The key point is that the Act does not give the trustee a real right to the sequestrated heritable property but merely a personal right. Like any other person holding a personal right the trustee is required to run a race to the registers to complete title. This limitation on the effect of the trustee's act and warrant reflects a policy designed to ensure that the holders of conveyances or securities from a bankrupt should be in no worse position in relation to the trustee than in relation to any single creditor entering into competition with them.[184] We are of the view that there should be no change to that policy. However there are difficulties in adapting the provisions of section 31(1)(b) to the new diligence of land attachment. To make the act and warrant equivalent to a registered notice of land attachment would eliminate the race to the register which section 31(1)(b) is designed to preserve. On the other hand to make it equivalent to an unregistered notice of land attachment would be meaningless because a notice of land attachment would have no effect until registration.

3.206 We suggest that section 31(1)(b) should be amended to provide that the debtor's heritable property in Scotland shall vest in the trustee for purposes of the sequestration. This provision would not by itself give the trustee a real right of ownership, and it would still be necessary to register the act and warrant in the Land Register (or in the case of the Sasine Register to use the act and warrant as a midcouple for the purpose of completing title). An important qualification concerns the principle of *tantum et tale.* In our Discussion Paper No 78 we argued that this principle applied in sequestrations because the sequestration is treated as a deemed adjudication for debt.[185] The amendment we propose is not intended to affect the *tantum et tale* principle and, if necessary, that principle should be expressly preserved.

3.207 We recommend that:

> **35. (1) In a sequestration, the permanent trustee's act and warrant should convey to the trustee the debtor's heritable estate in Scotland, ownership being acquired on registration in the property registers. Accordingly, section 31(1)(b) of the Bankruptcy (Scotland) Act 1985 should be amended to provide that subject to the qualification set out in paragraph (2), the act and warrant would vest the debtor's heritable property in the trustee for purposes of the sequestration.**

[183] Scot Law Com DP No 78, paras 6.17-6.21.
[184] Bell, *Commentaries* ii p 338.
[185] Scot Law Com DP No 78, paras 5.36-5.38.

(2) The present rule should continue whereby the property vests in the permanent trustee *tantum et tale*.

3.208 **Liquidation not a deemed adjudication for debt for vesting purposes.** There is no enactment providing for the automatic vesting in the liquidator of the property of the company corresponding to the provisions on the vesting in a trustee in a sequestration in terms of section 31(1) of the Bankruptcy (Scotland) Act 1985. Thus for the purpose of vesting, the winding-up order or the order appointing the liquidator does not operate as a deemed adjudication in implement of sale or as a deemed adjudication for debt or in security without reversion. This accords with the general theory that the liquidator is merely an administrator of the property which remains vested in the company.[186]

3.209 There are two rarely-used provisions under which the liquidator may acquire a title to the company's property in his own name, namely by recording a notarial instrument in a statutory form in the property registers,[187] or by obtaining a vesting order of the court.[188] However neither provision deems the property to vest as if the notarial instrument or order were an adjudication for debt and no change is required.

3.210 It seems clear that section 37(1)(a) of the Bankruptcy (Scotland) Act 1985, as applied to liquidations,[189] makes the winding-up order a deemed adjudication for debt only for the limited purpose of the equalisation of adjudications under the Diligence Act 1661, and not for vesting purposes. If as we recommend later,[190] equalisation of adjudications is abolished, section 37(1)(a) should be repealed. Note may also be made of section 37(1) of the Bankruptcy (Scotland) Act 1985, as applied to liquidations by section 185(1) of the Insolvency Act 1986. This provision makes a winding-up order a deemed adjudication but this is only for the limited purpose of the equalisation of adjudications under the Diligence Act 1661, and not for vesting purposes.

Prohibition of further diligence

3.211 **Stoppage of land attachment by sequestration, vesting in the trustee and preferences of attaching creditors.** A further effect of sequestration on the diligence of adjudication is that it is incompetent for a creditor to raise or insist in an adjudication on or after the date of sequestration.[191] A similar rule should apply to prevent the commencement of land attachment on or after the date of the debtor's sequestration.

3.212 A more difficult question is devising a rule which prohibits the creditor from 'insisting' in a diligence already started but not completed before the sequestration. To appreciate the issues involved it is necessary to understand how sequestration affects the operation of prior securities and diligences. Although the 1985 Act defines "securities" in such a way as to include unsecured creditors' diligences as well as voluntary securities, the

[186] *Gray's Trs v Benhar Coal Co* (1881) 9 R 225 at p 231; *Clark v West Calder Oil Co* (1882) 9 R 1017 at pp 1025, 1031; *Bank of Scotland v Liquidators of Hutchison, Main and Co Ltd* 1913 SC 255 at pp 262-3, 1914 SC (HL) 1 at p 6; *Smith v Lord Advocate* 1978 SC 259 at pp 271, 282.
[187] Titles to Land Consolidation (Scotland) Act 1868, s 25.
[188] Insolvency Act 1986, s 145(1) (winding up by court, applied to voluntary winding up by 1986 Act, s 112(1)).
[189] Insolvency Act 1986, s 185(1).
[190] See Part 7.
[191] 1985 Act, s 37(8).

case-law construing the legislation makes it clear that diligences and voluntary securities are not always treated in exactly the same way.

3.213 The vesting provision in section 31(1) of the 1985 Act is expressly made subject to section 33(3) which provides that section 31 is "without prejudice to the right of any secured creditor which is preferable to the rights of the permanent trustee." "Security" is widely defined[192] to include diligences,[193] and would therefore include adjudications. The effect of this saving for "preferable securities" is, however, merely to preserve the right of the creditor executing diligence to claim a preference in the sequestration and not to exclude the attached property from vesting in the trustee, or his right to take possession and dispose of it.[194] This interpretation is consistent with the provision that an adjudger cannot insist in his adjudication.[195] It should be borne in mind that an attaching creditor will not be able to claim this sort of preference in a sequestration where his diligence has been struck down by the sequestration. We examine this issue later.[196]

3.214 By contrast, creditors in voluntary heritable securities have always been entitled to realise the security subjects and rank for any deficiency, subject to the right of the trustee in certain circumstances to take over the security subjects at the valuation specified by the creditor if he lodges a claim before realisation.[197] Under section 39(4) of the 1985 Act, the secured creditor may sell the security subjects only if he intimates to the trustee his intention to sell before the trustee intimates to the secured creditor his intention to sell. These provisions clearly do not apply to adjudgers (who under the present law have no power of sale) and we propose that generally a creditor who uses land attachment but who has not before the date of sequestration concluded missives of sale of the attached property subjects nor obtained decree of foreclosure, should not be entitled to proceed with the diligence.

3.215 Conversely where there have been concluded missives of sale of the attached property, but no disposition has been registered in the property registers, the effect is that the debtor has not yet been divested of the property. As a consequence, the debtor's right is vested in the trustee but the trustee should be bound to concur in or to ratify the disposition implementing the sale. The attaching creditor would be bound to account for and pay to the trustee the free proceeds of sale after deducting the sum secured by the attachment and any prior or *pari passu* debt. If for any reason the contract of sale is terminated (eg by rescission or repudiation) before the delivery of the disposition at settlement, the trustee should have power to sell the property with the consent of the attaching creditor or, in default of such consent, the authority of the court which granted the warrant of sale. Where the attaching creditor has obtained decree of foreclosure before the date of sequestration, the attached subjects should not vest in the trustee whether or not the decree of foreclosure has been registered in the property registers.

[192] 1985 Act, s 73(1): "security" means "any security, heritable or moveable, or any right of lien, retention or preference."
[193] Goudy, p 187.
[194] Graham Stewart, p 186; Goudy, p 254; *Lord Advocate v Royal Bank of Scotland* 1977 SC 155 at p 171.
[195] 1985 Act, s 37(7).
[196] Part 7.
[197] 1985 Act, Sch 1, para 5(2); Goudy, pp 319-320; 505-506.

3.216 We recommend that:

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

(a) to commence a diligence of land attachment; or

(b) to proceed with a land attachment already begun unless a contract of sale of the attached property had been concluded under the warrant of sale or unless decree of foreclosure has been granted.

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

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

(a) the property has been sold under warrant of sale and the disposition in implement of sale had been registered in the property register; or

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

(3) Where missives have been concluded for the sale of the attached land under a warrant of sale and the land thereafter vests in the trustee at the date of sequestration, then:

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

(b) the attaching creditor should be bound to account for and pay to the trustee the net free proceeds of sale after satisfying the debt secured by the attachment, and any prior or *pari passu* debt.

(4) If the sale does not proceed or is subsequently set aside, the trustee should have power to sell the attached subjects with the creditor's consent or, failing such consent, the authority of the court which granted the warrant of sale.

3.217 **Stoppage of land attachment by winding up.** Through an apparent legislative oversight, there is no provision expressly prohibiting adjudications of a company's heritable property, or rendering them ineffectual, as from the commencement of the winding up of the company. Thus while the Insolvency Act 1986, section 185, applies the provisions of the Bankruptcy (Scotland) Act 1985, section 37(1) to (6) (effect of sequestration on diligence), to liquidations, it does not apply that part of section 37(8) which makes it incompetent for a

creditor to raise or insist in an adjudication. Nor is there any provision for Scotland equivalent to the Insolvency Act 1986, section 128(1) which provides: "Where a company registered in England and Wales is being wound up by the court, any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up is void."[198]

3.218 It should be provided by statute (on the analogy of sequestration) that on or after the date of the commencement of the winding up of the debtor company, it should not be competent for a creditor to commence a land attachment. Further a creditor should not be entitled to proceed with a land attachment already begun before that date unless the property had been sold under warrant (in which event the creditor should be entitled to convey the attached property to the purchaser) or the creditor had obtained decree of foreclosure (in which event he should be entitled to complete title by registration in the property registers).

3.219 Where before commencement of the winding up, the attached property had been sold under warrant or where decree of foreclosure had been pronounced, we suggest the simplest solution would be that the attached property should not be realised under the liquidation and the liquidator should not have power to take it into his control[199] nor to sell it, nor to complete title to it.[200] Where the attached property had been sold as above-mentioned, the liquidator should be bound to concur in or to ratify the disposition implementing the sale. The proposals on accounting for the proceeds of sale to the trustee in a sequestration should apply *mutatis mutandis* to the accounting to the liquidator.[201]

3.220 We recommend that:

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

(a) to commence a diligence of land attachment; or

(b) to proceed with a land attachment already begun unless a contract of sale of the attached property had been concluded under the warrant of sale or unless decree of foreclosure has been granted.

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

(2) Where prior to the date of the winding up of a debtor company, a creditor has attached the company's property and the property has been

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[198] S 128(1) would seem to apply however to diligence in Scotland against a debtor company registered in England and Wales. S 126 of the 1986 Act, which confers on the court power to stay or restrain proceedings against a company, does not apply to diligence (*Allan v Cowan* (1892) 20 R 36).

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

[200] See paras 3.212-3.215.

[201] We would point that our recommendations on these matters may not fall within the legislative competence of the Scottish Parliament. Insolvency of business associations is in general terms a reserved matter but an exception to this rule applies in respect of the effect of winding up on diligence (Scotland Act 1998, Sch 5, Head C, section C2).

sold under warrant of sale or decree of foreclosure has been granted in favour of the attaching creditor, then the liquidator should not have the power:

> **(a) to take the attached property into his custody or to sell it; or**
>
> **(b) to complete title to the attached property by notarial instrument under the Titles to Land Consolidation (Scotland) Act 1868, section 25, or by obtaining a vesting order under the Insolvency Act 1986, section 145(1) or under that section as read with section 112(1), or otherwise.**

(3) Where the attached land has been sold under a warrant of sale before the date of commencement of the winding up, Recommendation 36(3) should apply with any necessary modifications.

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

Part 4 Attachment Orders

A. INTRODUCTION

Replacement of adjudication as a residual diligence

4.1 In this Part we recommend the introduction of a new diligence which we call an attachment order. Attachment orders would act as a residual diligence to attach property of the debtor for which no other diligence is competent. It would take the form of an application to the court for an attachment order after a charge to pay had expired without payment, service of a schedule of attachment on the debtor and others with an interest in the attached property, an application to the court for an order authorising the creditor to satisfy the debt out of the attached property, implementation of that order and finally a report to the court and an accounting between creditor and debtor. At present adjudication for debt is not only the competent diligence for attaching registered or registrable heritable property but also functions as a residual diligence in the sense that it can be used to attach every other kind of property (whether heritable or moveable) which is not attachable by any other diligence. In Part 3 we make recommendations for a new diligence, called land attachment, to replace adjudication for debt in relation to registered and registrable heritable property.

4.2 Assets which are presently adjudgeable and could be attachable by a new residual diligence include patents and other intellectual property rights, liferents and annuities, unregistered leases, heritable rights under trusts and licences. In Discussion Paper No 108, we put forward three options in relation to adjudication and a replacement residual diligence. The first option was to retain adjudication as the residual diligence. In adjudication there is a period of at least 10 years between the initial attachment and the creditor becoming the owner of the property during which time the debtor may discharge the attachment by payment of the debt. Such a lengthy redemption period is inappropriate for a residual diligence because many assets such as patents and leases have a limited lifetime. There was no support for this option on consultation. The Faculty of Advocates commented that few people realise that adjudication is available for items other than heritable property. The law relating to adjudication is not well known and this is particularly true in relation to its use against such items. Retention of adjudication for debt as a residual diligence would mean retaining much obscure law, which, because of its unfamiliarity, would not be used by creditors. We do not recommend this option.

4.3 The second option we put forward was that adjudication for debt should be abolished without any replacement. The result would be that unless property could be arrested, poinded or attached by land attachment it could not be attached outside insolvency proceedings. There would be no residual diligence at all. We considered that this would be a retrograde step and it found no favour on consultation. Moreover, this would have unfortunate repercussions for breach of inhibition. Currently, inhibition affects all heritable rights capable of being adjudged. Where the right is registered or registrable the creditor's remedy would be reduction of the breaching deed followed by land attachment of the property concerned. Without a replacement for adjudication as a residual diligence,

creditors would be left with no remedy against a breach of inhibition where non-registrable heritable rights were concerned.

4.4 Our third option was to replace adjudication as a residual diligence by a new diligence. The existence of a residual diligence affirms the principle of "universal attachability" *viz* that diligence should be available against all the debtor's property, subject to certain limited exceptions designed to prevent undue hardship.[1] We consider that this principle should be preserved. Decrees for payment of money may be worthless and unenforceable if execution against all the debtor's assets cannot follow on them.

4.5 This option is consistent with the rule in sequestration under which "the whole estate" of the debtor vests in the permanent trustee for the benefit of the creditors.[2] If the law on creditors' remedies is to be coherent, the same approach must be adopted for diligence, unless there are good reasons for limiting the scope of diligence. We can see no such reasons. It might be argued that a residual diligence is unnecessary because creditors could use sequestration or liquidation to reach property not subject to diligence. Such a solution would be unsatisfactory. First, sequestration may not be competent because of the threshold of indebtedness. Sequestration cannot be granted on a creditor's petition unless the creditor is owed at least £1,500, or if more than one creditor applies their debts are in aggregate at least that sum.[3] Secondly, sequestration may also be unavailable through the court's lack of jurisdiction. The Scottish courts have jurisdiction in a petition for sequestration only if the debtor has an established place of business, or is habitually resident, in Scotland at any time in the year immediately preceding the presentation of the petition.[4] Thirdly, a creditor should not be forced to use the expensive and drastic remedy of sequestration simply because of gaps in the law of diligence.

4.6 All those who responded were in favour of the third option. Attachment orders should be a diligence only in execution of sums due under a decree or other enforceable document. They would therefore not be available on the dependence of payment actions[5] or in security of future or contingent debts[6]. We recommend that:

> **38. The diligence of adjudication for debt against items other than heritable property registered or registrable in the Land Register or the Register of Sasines should be abolished and replaced by a new diligence, to be called an attachment order, in execution of sums due under a decree or other enforceable document.**

Debtor protection

4.7 Like other diligences, attachment orders would include provisions protecting debtors from undue economic hardship and personal distress. We summarise here the protective provisions we recommend and discuss them in detail later.

[1] See paras 3.18-3.20.
[2] 1985 Act, s 31(1).
[3] 1985 Act, s 5.
[4] 1985 Act, s 9.
[5] Adjudication is not competent on the dependence either.
[6] In Scot Law Com No 164, we recommended abolition of adjudication in security (Recommendation 48, para 6.58).

(1) *Exclusion of leases of dwellinghouses*. An attachment order is to be incompetent against the tenant's interest in a lease of a dwellinghouse which is an individual's residence.[7]

(2) *Exclusion of property exempt from diligence*. Certain property is already exempted from particular diligences or all diligence and it is not to be competent to attach such property by means of an attachment order.[8]

(3) *Time to pay*. It would be incompetent to apply for an attachment order while a time to pay direction or a time to pay order under the Debtors (Scotland) Act 1987 was in effect.[9]

(4) *Refusal or postponement of satisfaction order*. The creditor must apply to the court for an order authorising some procedure (such as a sale or diversion of income) for satisfying the debt out of the attached property. In deciding whether to grant an order and if so what order to grant and whether to postpone its operation, the court should consider its impact on the debtor and other persons with an interest in the property, and give due weight to the interests of the creditor, debtor and other persons. The court should also refuse any order if the attachment was invalid or had ceased to have effect.[10]

B. SCOPE OF ATTACHMENT ORDERS

Introduction and overview

4.8 We now turn to consider what items are to be attached by attachment order. Some of the most commercially valuable assets which would be attachable by attachment order are likely to be intellectual property rights, such as patents, copyrights, industrial designs and design rights. Our general approach is that all property that is:

(a) transferable;

(b) not attachable by another diligence; and

(c) not exempt from diligence,

should be attachable by attachment order.

(a) Property transferable

4.9 **General.** In Discussion Paper No 108 we proposed that attachment orders should attach "property attachable for debt".[11] Although there were no adverse comments on consultation we now think this formula is unsatisfactory. First, it is open to the criticism that it contains an element of circularity. Secondly, the courts would have to decide whether a

[7] See paras 4.15-4.16.
[8] See para 4.18.
[9] See paras 4,42-4.44.
[10] See paras 4.80-4.82.
[11] Proposal 1(3), para 1.12.

new type of property fell within this common law category. Milk and fishing quotas, semi-conductor topography design rights and domain names are examples of types of property recently created and, no doubt, there will be many valuable new entities in the future. Thirdly, the main types of transmissible property that would be excluded by use of the concept of attachable for debt are non-vested contingent rights and interests.[12] In our discussion paper we expressed the view that such property should not be attachable by attachment order as that would extend the existing limits of attachability.[13] Non-vested contingent rights and interests form part of the sequestrated estate of a debtor on bankruptcy,[14] and we now see no reason why in principle[15] they should not be attachable by a residual diligence. One of the purposes of a residual diligence is to divert creditors from the more complex and expensive insolvency procedures.

4.10 Use of the term "property" raises the question whether licences and similar items would be attachable by attachment order. It has been held in England that a "licence properly passes no interest but only makes an action lawful which without it had been unlawful".[16] This approach has been followed in relation to licences of intellectual property. In *Northern and Shell v Condé Nast*[17] it was held that licences of trademarks are not to be considered property, even though they are marketable and have a value. On the other hand, licences have been held to be property in insolvency proceedings if they are transferable, valuable and confer an entitlement on a person who satisfies certain conditions.[18] We prefer the latter approach as it coheres with our principle of allowing creditors to attach by diligence everything which forms part of a debtor's sequestrated estate.

4.11 In the context of intellectual property, we suggested in our discussion paper that attachment orders should be competent against any property which was freely assignable or declared by statute to be transmissible by operation of law.[19] There was general agreement with this proposal. The question arises whether attachment orders should be competent when property is not freely transmissible. For example, the Faculty of Advocates pointed out that shares in private companies are arrestable even although there are restrictions on their transfer. A lease is another example of an asset where restrictions on transfer could affect the competence of attachment orders.[20] Graham Stewart[21] takes the view that an

[12] For example, the right to the fee of property which is contingent upon survivance of the liferenter.
[13] Scot Law Com DP No 108, paras 2.7-2.8.
[14] Act 1985, s 31(5).
[15] In practice they would be almost unmarketable unless the right had vested by the time the creditor sought a satisfaction order authorising him to deal with the property.
[16] *Muskett v Hill* [1839] 5 Bing NC 694, per Tindall CJ.
[17] [1995] RPC 117. Other cases in the intellectual property field to the same effect are: *Allen & Hanburys Ltd v Generics (UK) Ltd* 1986 RPC 203; *CBS United Kingdom Ltd v Charmdale Record Distributors Ltd* [1980] 2 All ER 807, and *Sports International v Inter-Footwear* [1984] 1 All ER 376, 384.
[18] *Cay's Tr Noter*, Temporary Sheriff Meston at Peterhead 1995, noted in 2000 Fam LB 47-5, (white fish pressure stock licences); *Official Receiver as Liquidator of Celtic Extractions Ltd and Bluestone Chemicals Ltd v Environmental Agency* [1999] 4 All ER 684 (waste management licences); *Swift and another v Dairywise Farms Ltd and others* (Court of Appeal, 1 February 2001, unreported)(milk quota).
[19] Scot Law Com DP No 108,Proposal 15, para 2.93.
[20] In paras 3.47-3.48 above we deal with the attachability of leases by land attachment. A lease will have to have been registered in the property registers before it can be attached by that diligence. A lease which is registrable but not registered could not be subject to land attachment or attachment order. In theory there is a gap in diligence but we do not envisage this being a practical problem. Once the Land Register is operational throughout Scotland a tenant will obtain a real right only on registration (Land Registration (Scotland) Act 1979, s 3(3)).
[21] P 601.

express prohibition against assignation prevents adjudication of a lease[22] but that a lease may be adjudged if there is only an implied prohibition against assignation and sub-letting stemming from *delectus personae*. On the other hand Professor Gretton states:[23] "Non-assignability may be as a result of an express destination to that effect, or, in the absence of a destination, by operation of law. If a lease is non-assignable it cannot be adjudged...". In our discussion paper[24] we expressed a preference for Professor Gretton's view as the parties to a lease may have relied on an exclusion of assignation implied by common law and so did not insert express provisions in the lease. Many valuable commercial leases are assignable with the consent of the landlord, which consent is not to be unreasonably withheld. We proposed[25] that such a lease should be attachable as the tenant's interest ought to be available to creditors who would be able to find a new tenant to whom the landlord could not reasonably object. There was general agreement on consultation,[26] although the Faculty of Advocates pointed out that leases of commercial premises often contain a clause entitling the landlord to irritate the lease on the tenant's apparent insolvency. We would adhere to our proposal. The creditor would obviously have to take the existence of such an irritancy clause into account in deciding whether to attach the lease after the expiry of a charge to pay.[27]

4.12 A crofter has a limited statutory power to assign the tenancy of the croft without the landlord's consent. If the landlord refuses consent to an assignation to a member of the crofter's immediate family, the Crofters Commission may give consent. Where the crofter wishes to assign to someone outwith the immediate family the Commission's consent is required, and in deciding whether to consent the Commission takes into account any representations made by the crofter and the landlord and the suitability of the proposed assignee.[28] One of the statutory conditions on which crofts are let is that the crofter must not become apparently insolvent.[29] If this condition is breached the landlord may apply to the Land Court for the crofter's removal.[30] The expiry of a charge without payment, which we have proposed should be a necessary preliminary to an attachment order, creates apparent insolvency. In our discussion paper we asked whether the interest of the tenant of a croft should be attachable.[31] Most of those who responded thought not. We think that there are too many statutory impediments to make attachment workable.

4.13 In the light of this discussion we would depart from the "freely assignable" formula proposed in our discussion paper.[32] We think that a better criterion for attachability by attachment order is that the property is capable of being transferred. It has been held that copyright in the private correspondence of a former politician was not transferred to his trustee in bankruptcy[33] as that would be a gross invasion of privacy and incompatible with

[22] A non-assignable agricultural lease may have a value for inheritance tax purposes as it must be valued on an open market basis disregarding any restriction on sale; (*Baird's Exs v Inland Revenue Commissioners* 1991 SLT (Lands Tr) 9).
[23] Gretton, p 73.
[24] Scot Law Com DP No 108, Proposal 18, para 2.119.
[25] Scot Law Com DP No 108, Proposal 18, para 2.119.
[26] A number of respondents thought that a lease of a dwellinghouse should not be attachable. We deal with this in para 4.15 below.
[27] An expired charge creates apparent insolvency (1985 Act, s 7(1)(c)(ii)).
[28] Crofters (Scotland) Act 1993, s 8.
[29] 1993 Act, s 5 and Sch 2, condition 10.
[30] 1993 Act, s 26. The vacant croft is then re-let by the landlord or the Crofters Commission, s 23.
[31] Scot Law Com DP No 108, Proposal 18.2, para 2.119.
[32] See para 4.11 above.
[33] *Haig v Aitken* [2000] 3 All ER 80.

the European Convention on Human Rights.[34] Other types of property are non-transferrable by statute and hence would not be attachable by attachment order. Examples are the moral right to be identified as the author of a work[35] and an author's or performer's right to equitable remuneration after transfer of the rental right.[36]

4.14 We recommend that:

39. (1) It should be competent, subject to the qualifications and exemptions contained in later recommendations, to attach by attachment order all property (in its widest sense) which is capable of being transferred.

(2) The tenant's interest in an unregistrable lease should be attachable by attachment order unless assignation is expressly prohibited or permitted only with the consent of the landlord or assignation is prohibited by any enactment or rule of law. A provision which permits assignation with the consent of the landlord, which consent is not to be unreasonably withheld, should not bar attachment.

(3) The interest of the debtor as tenant of a croft should not be attachable by attachment order.

4.15 **Dwellinghouses.** Leases of dwellinghouses would not be attachable by land attachment except for those pre-1974[37] residential long leases which had been registered in the property registers. We turn now to consider the attachability by attachment order of a tenant's right under a lease of a dwellinghouse. Section 23 of the Housing (Scotland) Act 1988 provides that an assured tenancy may not be assigned or sub-let without the consent of the landlord. A regulated tenancy under the Rent (Scotland) Act 1984 may be assigned only with the landlord's consent but sub-letting is permitted unless it is against the terms of the lease.[38] A secure public sector tenancy may be assigned with the consent of the landlord, which consent is not to be unreasonably withheld.[39] In Discussion Paper No 108 we proposed that any lease assignable with the consent of the landlord which was not to be unreasonably withheld should be attachable.[40] The Scottish Consumer Council, Scottish Homes and the Scottish Sheriff Court Users Group all commented that leases of dwellinghouses should be exempt from attachment. They said that there was no market in short residential tenancies (even secure tenancies) so that diligence against them would be an abuse of process in that it would put pressure on the debtor without creating any benefit for the creditor. We accept these points. Although most leases of dwellinghouses are non-assignable and hence non-attachable, some in theory would be attachable. We think there would be merit if leases of dwellinghouses were expressly excluded from the scope of attachment orders. Creditors would then be unable to threaten the use of an attachment

[34] Art 8: "Everyone has the right to respect for his private and family life, his home and his correspondence."
[35] Copyright, Designs and Patents Act 1988, s 94 (non-transferable).
[36] Copyright, Designs and Patents Act 1988, s 93B (transferable only to a collection society).
[37] In long leases granted after 1 September 1974 no part of the property may be used as a dwellinghouse (Land Tenure Reform (Scotland) Act 1974, s 8). A long lease is one that exceeds 20 years or contains an obligation to extend to more than 20 years.
[38] 1984 Act, s 19.
[39] Housing (Scotland) Act 1987, s 55(1).
[40] Scot Law Com DP No 108, Proposal 18, para 2.119; see also para 4.14 above.

order. The attachability of a lease of mixed use subjects, for example a shop with a dwellinghouse above, should be left to the discretion of the court.

4.16 We recommend that:

40. It should not be competent to attach by means of an attachment order the debtor's interest as tenant in a lease where the subjects are a dwellinghouse used as an individual's only or principal residence.

(b) Not attachable by other diligence

4.17 As an attachment order is a residual diligence, obviously the item must not be attachable by any other mode of diligence. We put forward a proposal to this effect in Discussion Paper No 108[41] and there was no dissent on consultation. Without such a rule, attachment orders would become a universal rather than a residual diligence. Moreover, it would be pointless for the law to regulate other diligences in detail if the creditor could evade these rules by applying for an attachment order. The situation as regards inhibition is different. Creditors should be able to "freeze" the debtor's unregistrable heritable property by inhibition and then follow it up with an attachment order. There is no overlap of diligences as inhibition is not an attaching diligence. It simply prohibits the debtor's voluntary disposal of heritable property and currently gives the inhibitor some preference over debts voluntarily incurred by the debtor after the inhibition comes into effect. In general, what is attachable by other diligences is fairly well established. Nevertheless, sometimes the boundary between attachment orders and arrestment will be difficult to draw. This is due to uncertainties in the scope of arrestment which can only be resolved by the courts on a case by case basis. We are not in favour of creditors having a choice between arrestment and an attachment order as this would entitle them to use attachment orders against clearly arrestable assets such as bank accounts. We examine later[42] some demarcation issues between the new attachment orders and other diligences, but meanwhile we recommend that:

41. It should not be competent to attach by attachment order any property of the debtor which is attachable by any other diligence.

(c) Exempt from diligence

4.18 The third limitation on the scope of attachment orders is that the property should not be exempt from some other diligence or from diligence generally. Examples of exempt property are social security benefits,[43] tools of trade up to a value of £1,000[44] and specified items of household furniture.[45] In our discussion paper we proposed that property which was exempt from diligence by any enactment or rule of law should not be attachable by an attachment order.[46] All those who responded agreed with our proposal. The exemptions are designed to protect debtors from undue economic hardship and personal distress. It would

[41] Scot Law Com DP No 108, Proposals 1(3) and 2(1), paras 1.12 and 2.10 respectively.
[42] Paras 4.19-4.39.
[43] Social Security Administration Act 1992, s 187.
[44] 1987 Act, s 16(1)(b),(d), as amended by the Debtors (Scotland) Act 1987 (Amendment) Regulations 2000, (SSI 2000/189).
[45] 1987 Act, s 16(2).
[46] Scot Law Com DP No 108, Proposal 2(2), para 2.10.

defeat their purpose if exempt property could nonetheless be attached and sold by an attachment order. If there is to be a replacement for poinding and warrant sale[47] and certain classes of items are exempt from that replacement diligence, then such items must also be excluded from the scope of attachment orders. We recommend that:

> **42. Any property which is, in terms of any enactment or rule of law, exempt from another diligence or from diligence generally should not be attachable by attachment order.**

C. BOUNDARIES BETWEEN ATTACHMENT ORDERS AND OTHER DILIGENCES

Introduction

4.19 Earlier we recommended that an attachment order should not be competent if the property in question was attachable by any other diligence.[48] In this section we look at some problems of the boundaries between attachment orders and other diligences and recommend minor changes to the law of arrestment to make some property presently adjudgeable subject to arrestment instead.

Land attachment and attachment orders

4.20 As a general principle, land attachment is to be competent in relation to land belonging to the debtor which is registered in the property registers or is registrable there. Land means full rights of ownership and any subordinate real right such as a heritably secured debt, a long lease and even the interest of a creditor in another land attachment.[49] Personal rights and unregistrable rights are not to be attachable by land attachment, but could be attachable by attachment order.

4.21 Timeshares are rights to occupy land such as holiday accommodation or salmon fishings for a limited period each year. It might be thought that land attachment would be the appropriate diligence, but this is not the case due to the way in which timeshares are constituted. Title to the property is usually held by an organisation such as a bank. The owners of the timeshares have only a personal right to occupy or enjoy the property for a certain part of the year.[50] Nevertheless, these timeshare rights are transferable and can be bought and sold. Another scheme, sometimes adopted for salmon fishings, is for the "timesharers" to own the fishings in common with each *pro indiviso* title containing a real burden restricting that owner's right to fish to a specified period in the year. The personal right is not registrable and the Keeper's current practice is to refuse to register such *pro indiviso* titles.[51] The appropriate diligence for such unregistrable timeshare rights would be

[47] Poinding and sale is abolished by the Abolition of Poindings and Warrant Sales Act 2001 which is to come into force on 31 December 2002 at the latest. A Working Party has been set up with the remit of finding a replacement.
[48] Recommendation 41, para 4.17 above.
[49] See paras 3.40-3.50.
[50] It has been suggested that a timeshare could be regarded as a discontinuous lease, but if granted in perpetuity it would not be good against the landlord's successors unless it was registered (Gordon, *Scottish Land Law*, (2nd edn, 1999) paras 15-08 and 19-13).
[51] *Registration of Title Practice Book*, (2nd edn, 2000) para 6.106; A G Rennie, "Timeshare Interests in Salmon Fishings" JLSS Aug 2000, p 38 and reply by M G Strang Steel on p 39.

an attachment order. Our recommendations[52] preventing or restricting the sale of dwellinghouses should not be extended to timeshares as the accommodation is not the only or principal residence of any individual.[53] Finally, where the timeshare right arises from the ownership of a share in a company owning the holiday accommodation,[54] it could be attached by arrestment of the share.

4.22 Tenancies-at-will are perpetual occupancy rights of land with a building or buildings, arising by custom and usage.[55] They are not registrable in the property registers so would not be attachable by land attachment. As they are freely transferable by assignation and intimation of the assignation to the landlord, we think that they should be attachable by attachment order. However, a tenant-at-will is entitled to purchase compulsorily the landlord's interest and become owner.[56] If the debtor of an attached tenancy-at-will converted it to ownership while the attachment order was in effect, we think that the attachment order would come to an end. While the creditor could then use a land attachment against the debtor's newly acquired property, this would involve extra expense. Moreover, it would be very difficult in the land attachment to give the creditor the benefits of steps already taken in the attachment order. To prevent conversion terminating an attachment order, we later recommend that the court should be able to grant an ancillary order prohibiting conversion while the attachment order is in force.[57]

4.23 At present the titles to baronies[58] are registered in the property registers along with the relative land. Unlike peerages and other titles of honour, they are freely saleable.[59] For this reason we think that they should be available to creditors. The appropriate diligence would be land attachment. However, in terms of section 63 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 the titular, heraldic and ceremonial privileges of a baron will become a form of, and be transmissible as, incorporeal heritable property as from the appointed day. These privileges, which are generally the valuable part of a barony, would no longer be connected with the land or transmissible only with the land. Since the barony would cease to be registrable land attachment would no longer be competent.[60] The appropriate diligence would therefore be an attachment order.

4.24 In our discussion paper we noted that by means of a grazing lease it is possible to transfer milk quota without transferring the relevant land. Nevertheless we thought that a court should not authorise the creditor to attach milk quotas separately from the land.[61] No comments were made by those consulted. However, if the relevant land was attached by

[52] Recommendation 55, para 4.86.
[53] They have been held to be dwellinghouses for rating purposes as they are occupied as residences by a succession of timesharers throughout the year (*Forest Hills Trossachs Club v Assessor for Central Region* 1992 SLT 295).
[54] Stair Memorial Encyclopaedia, vol 18, para 39.
[55] 1979 Act, s 20(8).
[56] 1979 Act, ss 20-22. In our *Report on Abolition of the Feudal System* Scot Law Com No 168, (1999), para 8.12 we did not recommend the legislative conversion of tenancies-at-will to ownership, although we expect them to wither away due to tenants using the existing provisions for purchase.
[57] Recommendation 52, para 4.76.
[58] Ie lands erected into a barony by a Crown grant of the lands to be held *in liberam baroniam* ("in free barony").
[59] The Earldom of Arran (technically a barony) with land in Arran was recently sold for around £500,000.
[60] Land attachment could still be used against the barony land itself. The creditor could use both diligences to attach the whole barony.
[61] Scot Law Com DP No 108, para 2.123.

land attachment (or attachment order[62]), we think the creditor should be entitled to attach the milk quota by attachment order so he can sell both assets as a single package.

4.25 In our discussion paper we noted that a proper liferent of heritable property would be attachable by land attachment as the liferenter has a registered or registrable title. An improper liferent of heritable property where the title to the property is held by trustees would be attachable by attachment order.[63] The debtor protection provisions in attachment orders, especially those in relation to dwellinghouses,[64] would be available for attached liferents.

Arrestment and attachment orders

4.26 Now we consider two aspects of arrestment and attachment orders. For historical reasons, certain property that would normally be considered arrestable is adjudgeable. In Discussion Paper No 108 we proposed making this property arrestable so as to enable creditors to use that diligence rather than the more complex and expensive attachment orders. The second aspect concerns types of property where regulation or clarification of the respective roles of arrestment and attachment orders seems necessary.

(a) Adjudgeable property to be arrestable

4.27 When the Bank of Scotland was set up by Act of the Parliament of Scotland in 1695, its stock was adjudgeable.[65] The only other bank in this position was the Royal Bank of Scotland,[66] but as the Royal Bank is now incorporated under the Companies Acts, its shares are arrestable as with any other company so incorporated.[67] In our discussion paper we proposed that Bank of Scotland stock be made arrestable.[68] All those responding agreed. The Bank of Scotland has stated to us that it would have no objection to the proposal.

4.28 At common law all bonds were heritable in nature.[69] The Bonds Act 1661 changed the common law and provided that all bonds containing a clause of annualrent (interest) would be moveable, except personal bonds from which executors are excluded and bonds containing an obligation to infeft the creditor, which remain heritable. But all personal bonds are still treated as heritable in relation to the Crown's rights to the estates of rebels, ie *quoad fiscum*. However the Arrestments Act 1661 made all personal bonds on which no infeftment had followed arrestable, without in any way changing the nature of the bond as being heritable or moveable. It would appear that adjudication is still available in addition to arrestment against a personal bond from which executors are excluded or containing an obligation to infeft the creditor.

[62] A short grazing lease would be unregistrable and so attachable by attachment order.
[63] See para 4.34 for trust liferents of funds.
[64] See Recommendations 54 and 55, paras 4.82 and 4.86.
[65] Bell, *Commentaries* i, 102. The Act states: "…it is hereby Declared that the sums of the aforesaid subscriptions and shares may only be conveyed and transmitted by the owners to others who shall become partners of the company in their place in manner abovementioned or by adjudication or other legal conveyance in favours of one person…".
[66] *Royal Bank of Scotland v Fairholm* (1770) Mor "Adjudication" Appendix No 3.
[67] *American Mortgage Co of Scotland Ltd v Sidway* 1908 SC 500.
[68] Scot Law Com DP No 108, para 2.132 and Proposal 20, para 2.135
[69] See *Heath v Grant's Trs* 1913 SC 78 and the authorities cited therein; Gloag & Henderson, para 36.10.

4.29 The Bonds Act also causes problems in succession. It is no longer possible to exclude executors from dealing with a personal bond because they administer both the heritable and moveable estate.[70] Nevertheless, a bond which purports to exclude executors or contains an obligation to infeft the creditor is heritable and therefore excluded from the deceased creditor's estate which is subject to legal rights.[71]

4.30 Our discussion paper proposed that all personal bonds should be attachable only by arrestment, except where the obligation is heritably secured (eg where the creditor holds a standard security registered in the property registers). Our consultees agreed with this suggestion. We now think that the opportunity should be taken to reform this area of law more generally. The problems should be dealt with on all fronts and not just in regard to diligence. The present system is both confusing and untidy. A further minor reform would not assist in making the law less complicated. Accordingly, we think that the two Acts of 1661 should be repealed. The common law position should not be resurrected because it is unrealistic to treat all personal bonds as heritage. Instead, all personal bonds should be moveable for all purposes, unless the creditor is heritably secured,[72] and the only competent diligence should be arrestment.

4.31 Our discussion paper referred back to our earlier Consultative Memorandum No 72 on *Floating Charges and Receivers*[73] where we sought views on whether all debts secured by a floating charge should be characterised as moveable (and therefore arrestable) or heritable (and adjudgeable). Our preference was for all debts, regardless of the nature of the assets secured, to be characterised as moveable. We repeated this preference in our discussion paper and proposed that all debts secured by a floating charge be arrestable.[74] All those who responded on this issue agreed, although The Faculty of Advocates said that the change would have little practical significance. We adhere to our proposal.

4.32 Summing up the foregoing section we recommend that:

43. (1) Arrestment should be the only competent diligence for attaching:

(a) Bank of Scotland shares;

(b) All sums due under a personal bond, except where the creditor is heritably secured;

(c) Debts secured by a floating charge, whatever the nature of the assets charged.

(2) The Arrestment Act 1661 and the Bonds Act 1661 should be repealed and all personal bonds should be classified as moveable in nature, except where the creditor is heritably secured.

[70] Succession (Scotland) Act 1964, s 14.
[71] M C Meston, *The Succession (Scotland) Act 1964*, (4th edn, 1993), pp 59-60.
[72] In that case the creditor's interest would be attachable by land attachment.
[73] (1986), paras 2.91 and 2.92.
[74] Proposal 20(b), para 2.135.

(b) Arrestment or attachment order?

4.33 We turn now to consider property where there is a need for regulation of the respective roles of attachment orders and arrestment. We deal first with annuities and liferents, then consider licences and contractual rights to acquire corporeal property, and finally look at a beneficiary's personal right to a conveyance of heritable property held by trustees.

4.34 **Annuities and liferents.** An arrestment attaches the instalment of an annuity due for the period in which it was served together with any arrears.[75] Where the annuity is payable in respect of the debtor's past services, it is arrestable by an earnings arrestment.[76] The effect of an earnings arrestment is that a certain amount, calculated by reference to statutory tables, is deducted from each future instalment and paid to the creditor while the earnings arrestment is in effect.[77] An annuity is also adjudgeable.[78] In Discussion Paper No 108 we considered that an attachment order should be the appropriate diligence for attaching an annuity. We expressed the opinion that arrestment, which attaches an instalment currently due, should not be extended to the annuity itself. An obligation to account exists in relation to an instalment once the period for which it is to be paid commences, but there is no obligation to account in relation to future instalments or the capital value.[79] None of those responding disagreed. We continue to think that the appropriate diligence to attach an annuity is an attachment order, except where an annuity is arrestable by an earnings arrestment. This exception would follow from our earlier recommendation that an attachment order should not be used to attach property attachable by another diligence. The position of trust liferents is somewhat similar to that of annuities. An arrestment will attach the current instalment and any arrears, but an earnings arrestment is not competent. It is thought that a trust liferent is adjudgeable, but the position is less certain than for annuities.[80] We see no reason why a trust liferent should not be attachable by an attachment order in the same way as an annuity.

4.35 Annuities and liferents that are alimentary (ie provided for the recipient's support) are to some extent protected against arrestment. The deed usually contains an express declaration of the alimentary character of the payments and will often fortify this by a prohibition against assignation or diligence. An arrestment attaches only arrears plus that portion of the instalment which is in excess of the debtor's needs, unless the arrestment is laid for an alimentary debt in which case the whole instalment may be attached. We discuss later in this Part the effect of an attachment order and how the creditor can obtain payment.[81] The general scheme would be that the court would order the payer to pay all or part of each future instalment as it fell due to the creditor instead of the debtor. The proportion payable to the creditor would be fixed by the court in the light of the debtor's needs and other resources. This debtor protection can be seen as an extension to future instalments of the existing protection for a single instalment: it justifies overriding any prohibitions against assignation or diligence, since their purpose is to protect the recipient rather than third

[75] *Smith and Kinnear v Burns* (1847) 9 D 1344.
[76] 1987 Act, s 73(2).
[77] 1987 Act, ss 47-50.
[78] Erskine, *Institute*, II, 2, 6; Bell, *Principles*, para 1480; *Lewis v Anstruther* (1852) 15 D 260; but dictum against by Lord McLaren in *Cuthbert v Cuthbert's Trs* 1908 SC 967; Graham Stewart, pp 53 and 604.
[79] Scot Law Com DP No 108, para 2.130.
[80] Bell, *Principles*, para 1480, and Graham Stewart, p 604 suggest that it is.
[81] See paras 4.63-4.68.

parties.[82] Indeed, we would go further and extend this protection to non-alimentary liferents and annuities. In Memorandum No 49, *Arrestment and Judicial Transfer of Earnings*,[83] we suggested that a form of continuing arrestment should be available against annuities and liferents. Although this received some support on consultation, we did not recommend that earnings arrestment should attach such items.[84] We thought that the automatic statutory deduction scheme in an earnings arrestment was not suitable for liferents where the instalments were payable at long intervals (eg half yearly) or for those annuities where instalments have both an income and a capital element. Moreover, since the number of liferents is small, the burden on courts to fix an individual deduction level for each case would not be too great. These considerations would not apply where the deduction level for future instalments was set by the court.

4.36 The existence of an arrestment against one instalment should not prevent an attachment order being granted against future instalments. Once an attachment order was in effect, arrestment by the same or another creditor of each instalment as it fell due should be incompetent; this would prevent the suggested debtor protection from being circumvented. We recommend that:

> **44. It should be competent to attach an annuity (except an annuity which is arrestable by an earnings arrestment) or a liferent of a trust fund by means of attachment order, notwithstanding its alimentary nature and any prohibition against assignation or the use of diligence.**

4.37 **Licences and contractual rights to acquire property.** Licences can be valuable. There is often a market in them if they are readily transferable. Examples include a white fish pressure stock licence[85] ("fishing quota") which entitles a boat to catch a certain amount of fish without incurring a penalty and a waste management licence[86] which entitles the holder to dispose of specified categories of waste on a site without committing an offence. In responding to our proposal that a licence of intellectual property should be attachable by attachment order[87] one respondent opined that licences were and should be arrestable. He argued that by analogy with shares in a limited company, which are arrestable in the hands of the company, a licence is arrestable in the hands of the owner/licensor of the intellectual property. We do not find the analogy persuasive. While an individual royalty payment would be attachable by arrestment, we consider that the licence itself should be attachable by attachment order.

4.38 In contracts of purchase and sale of heritable or moveable property the right of the seller to receive payment can be arrested. It is not clear whether any diligence is available against the purchaser's right to acquire the property on payment of the agreed price. It has been held in the Outer House that the right of a purchaser of heritage to acquire the property is not affected by inhibition.[88] Nevertheless, Professor Gretton regards as open the question

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[82] It is also analogous to the court's powers in relation to a bankrupt's income, part of which may be diverted to the permanent trustee (1985 Act, s 32).
[83] 1980, para 2.19.
[84] Scot Law Com No 95, paras 6.44-6.45.
[85] Granted under the Sea Fish (Conservation) Act 1967 as amended by the Fisheries Limits Act 1976 and the Sea Fisheries Licencing Order 1992, SI 1992/2633.
[86] Environmental Protection Act 1990, ss 35-44.
[87] Scot Law Com DP No 108, Proposal 15, para 2.93.
[88] *Leeds Permanent Building Society v Aitken, Malone and Mackay* 1986 SLT 338.

of whether the purchaser's right is adjudgeable.[89] Corporeal moveables cannot be arrested in the seller's hands before ownership passes to the purchaser. This is because arrestment of corporeal moveables requires them to belong to the debtor but be in the possession of a third party.[90] Nor can arrestment be used against the seller's obligation to deliver the goods.[91] Such an obligation is not an "obligation to account" which forms the basis for arrestment.[92] In our discussion paper we proposed that the purchaser's right under a contract to purchase heritable or moveable property should be attachable by attachment order to the extent that it is not arrestable.[93] The Faculty of Advocates agreed in principle but doubted whether it would have any practical effect. They thought that warrants and options to acquire shares were arrestable in the same way as other securities. We agree. However, contracts to buy commodities such as specified quantities of oil and metals may be very valuable and are freely traded, although the short-term nature of many of these contracts may preclude attachment. Nevertheless, we think that attachment orders should be available for the cases where they might prove useful. This approach has the advantage that there is no need to draft any express exclusion from the diligence.

4.39 **Rights under trusts.** Rights under trusts which are heritable are adjudgeable: moveable rights under trusts are generally arrestable. Examples of adjudgeable heritable rights are the right of a beneficiary to a conveyance of heritable property and the right of the truster to heritable trust property. In Discussion Paper No 108 we considered whether such rights could be made arrestable instead of having to be attached by attachment order. We concluded that this would not be possible without substantial changes to the law of arrestment or trusts.[94] Arrestment of corporeal property[95] is only competent where the debtor's is in the possession of a third party.[96] Trust property is owned by the trustees,[97] not the benefiting debtor and therefore cannot be arrested. Moreover, the trustees' obligation to convey heritable property to the debtor is not an arrestable obligation.[98] There was no dissent from this view on consultation and we make no recommendation for change. Some rights under trusts which are presently adjudgeable would of course become attachable by land attachment. An example might be the right of a person with a registered title who had granted a voluntary trust deed for creditors.[99]

D. WARRANT FOR ATTACHMENT ORDER

In execution of a decree

4.40 As stated above,[100] attachment orders are to be a diligence in execution. The warrant for execution contained in an extract of a decree or other document should authorise the creditor to apply to the court for an attachment order.

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[89] Gretton, p 215.
[90] *Moore and Weinberg v Ernsthausen Ltd* 1917 SC(HL) 25.
[91] *Millar and Lang v Polak* (1907) 14 SLT 788.
[92] Bell, *Commentaries* ii 71.
[93] Scot Law Com DP No 108, Proposal 19, para 2.122.
[94] Scot Law Com DP No 108, para 2.127.
[95] Ships in the debtor's possession may be arrested by an admiralty arrestment.
[96] Scot Law Com DP No 108, para 2.128; Maher and Cusine, ch 5.
[97] Gloag & Henderson, para 46.2.
[98] See previous paragraph.
[99] The rights of a such a person are uncertain. See G L Gretton, "Radical Rights and Radical Wrongs" 1986 JR 51.
[100] Recommendation 38, para 4.6 above.

Prior charge

4.41 In Discussion Paper No 108 we proposed that an application for an attachment order should be competent only if a charge to pay had been served on the debtor and the charge had expired without payment.[101] All those who responded agreed. The Scottish Consumer Council and the Scottish Sheriff Courts Users Group thought that a prior charge was essential in that it would provide a very important form of protection and warning for the debtor. The charge would be a general one. On its expiry the creditor could use any competent diligence. The existing provisions in section 90 of the Debtors (Scotland) Act 1987 about the days of charge and the two year period for which an expired charge is a basis for proceeding with diligence would therefore apply to a charge which is followed by an application for an attachment order. We recommend that:

> **45. The warrant for diligence contained in an extract decree or other document of debt should authorise the charging of the debtor to pay the sum specified in the charge and on failure to pay within the days of charge an application for an attachment order.**

E. TIME TO PAY

Time to pay directions

4.42 As long as a time to pay direction contained in a decree is in effect, it would be incompetent for the creditor to apply for an attachment order. This is because a charge, which we have recommended should be an essential precursor of the application,[102] could not be served unless the debtor defaults.[103]

Time to pay orders

4.43 We are aware that time to pay orders are not widely used and that they have been criticised for not providing proper protection to decree debtors. We considered these issues in our *Report on Poinding and Warrant Sale*[104] and put forward recommendations to improve the effectiveness of time to pay orders. In the context of attachment orders we proposed in Discussion Paper No 108 that the debtor should be entitled to apply for a time to pay order under the Debtors (Scotland) Act 1987 at any time after service of the charge and up until the granting by the sheriff of a warrant of sale of the attached items.[105] An interim order sisting diligence under section 6(3) should prevent the creditor taking any further steps in the diligence (apart from serving a schedule of attachment in relation to an already granted order): the sheriff should also not be entitled to grant a pending application for an attachment order or a warrant of sale which should therefore fall. The time to pay order itself should prohibit the creditor from taking any further steps in the diligence or the diligence progressing in any way, apart from serving and registering a schedule of attachment in relation to an already granted order. Any attachment should remain in effect (unless recalled) so that if the debtor defaulted the creditor would then be entitled to apply

[101] Scot Law Com DP No 108, Proposal 3, para 2.15.
[102] Recommendation 45, para 4.41.
[103] 1987 Act, s 2(1)(a).
[104] Scot Law Com No 177, paras 5.2-5.51.
[105] Scot Law Com DP No 108, Proposal 14, para 2.58.

(or re-apply) for a warrant of sale. These proposals were agreed by those responding although the Scottish Consumer Council and the Scottish Sheriff Courts Users Group commented that time to pay orders provided little protection for debtors as they were not well known. Apart from a change of terminology from warrant of sale to the more flexible satisfaction order,[106] we adhere to our proposals.

4.44 We recommend that:

46. (1) An application for a time to pay order under the Debtors (Scotland) Act 1987 should be competent at any time after the service of a charge until the creditor's application for a satisfaction order in relation to the attached property is granted. An interim order sisting diligence (under section 6(3)) should prevent the creditor taking further steps in the diligence, other than serving or registering a schedule of attachment in pursuance of an existing attachment order. It should be incompetent for the sheriff to grant an attachment order or a satisfaction order and any pending application should fall.

(2) On making a time to pay order the sheriff should prohibit the creditor from taking any further steps in the diligence, apart from serving or registering a schedule of attachment in pursuance of an existing attachment order.

F. JURISDICTION

Which court?

4.45 Actions of adjudication can only be brought in the Court of Session, while the sheriff court has exclusive jurisdiction over poindings and arrestment of earnings. We originally proposed that attachment orders should fall within the privative jurisdiction of the sheriff court. Consultees were divided on the merits of the proposal, but the Faculty of Advocates and some other consultees favoured concurrent jurisdiction. Having considered the problems that might arise in relation to attachment orders, we would depart from our earlier view that privative jurisdiction is to be favoured. An important type of asset which comes within the scope of attachment orders is intellectual property. The value of such assets is often considerable: novel and complex issues can be anticipated in the attachment of such property. It would therefore be wise to offer parties at least the option of litigating such issues in the Court of Session. We now propose concurrent jurisdiction in the sheriff court and the Court of Session, although it remains our belief that the vast majority of applications for attachment orders will be raised in the sheriff court in order to save expense. As is usual, a case would be capable of transfer between different sheriff courts if a sheriff thought it necessary or expedient in the interests of justice,[107] and the normal rules for remit of cases between the sheriff court and the Court of Session would apply.[108]

[106] See Recommendation 54, para 4.82 below.
[107] OCR, rule 26.1.
[108] OCR, rule 26.2-3; Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 14.

4.46 We recommend that:

> **47. Attachment orders should be subject to the concurrent jurisdiction of the sheriff courts and the Court of Session.**

Jurisdiction between states and within the United Kingdom

4.47 The rules on the jurisdiction of the civil courts for most types of case are contained in the Civil Jurisdiction and Judgments Act 1982. Allocation of jurisdiction between the courts of different EU and EFTA states is determined by Schedules 1 and 3C to the Act respectively. In this section we consider issues of jurisdiction which arise where these Schedules do not apply. Schedule 8 to the 1982 Act sets out the grounds of jurisdiction in cases that do not involve an allocation of jurisdiction between EU (or EFTA) states or between the different UK legal systems. The issue arises whether an application for an attachment order should be left to the provisions of the 1982 Act or whether special provision should be made in the Act introducing the new diligence. We begin by considering rule 4(1)(d) of Schedule 8 which provides that in proceedings concerned with the enforcement of judgments, exclusive jurisdiction is granted to the courts for the place where the judgment has been or is to be enforced. We doubt whether this rule has any application in the present context. The rule applies where there is or will be a process of enforcement of a judgment.[109] However the rule does not itself provide a connecting factor for that process, as opposed to an action concerned with the process. We are of the view that the most appropriate connecting factor in jurisdiction for applications for an attachment order is the *situs* of the property which is to be subject to the diligence. The court plays an important role in the supervision of the diligence and that role is more effectively achieved by a court with territorial jurisdiction over the property in question than by a court elsewhere. Where an attachment order is to be used against heritable property, this outcome would be achieved by the application of rule 4(1)(a) of Schedule 8. This rule confers exclusive jurisdiction on the courts of the *situs* where the proceedings have as their object rights *in rem* in immoveable property. We would interpret that rule as applying to applications to attach any heritable property which is subject to the diligence of attachment orders. Where an application is made to attach moveable property, there are two relevant grounds of jurisdiction under Schedule 8. Rule 1 of that Schedule bases jurisdiction on the place of the defender's domicile. A further ground of jurisdiction is contained in rule 2(9) which states that a person may be sued "in proceedings which are brought to assert, declare or determine proprietary or possessory rights, or rights in security, in or over moveable property, or to obtain authority to dispose of moveable property, in the courts for the place where the property is situated."[110] Rule 2(9) of Schedule 8 would allocate jurisdiction to the court of the *situs* of the property to be attached, but leaving matters to be governed by Schedule 8 would also allow for the possibility that an application to attach moveable property could be made in the sheriffdom where the debtor is domiciled. We would expect that in most cases where an application for an attachment order was made in the sheriffdom of the debtor's domicile but the property was situated in another sheriffdom, the court would exercise its power to transfer the case to the sheriffdom of the *situs* in accordance with the general principles for transfers of cases.

[109] See eg *Bruckash Ltd v Lonie* 1990 SCLR 780 (poinding executed in Glasgow of an extract decree granted in Airdrie Sheriff Court. Rule 4(1)(d) had the effect that Glasgow Sheriff Court had exclusive jurisdiction to grant warrant of sale).

[110] A similar rule appears in Sch 4 to the 1982 Act which deals with allocation of jurisdiction between the UK legal systems (Sch 4, art 5(8)(b)).

Accordingly we take the view that the basis of jurisdiction for applications should be the *situs* of the property but for most types of property the existing rules of jurisdiction would be sufficient.

4.48 A qualification must be made to this general approach in the case of intellectual property. Determining the *situs* of intellectual property rights is far from simple. The general rule is that the *situs* of an intellectual property right is the territory of the state which granted the right and that questions of transferring the right are governed by the law of that state. This rule poses problems in respect of UK intellectual property for there is no means of further locating the property in one or other of the three separate legal systems and it seems to be the accepted view that intellectual property rights are situated throughout the UK.[111] Allocation of jurisdiction between the UK legal systems is governed by Schedule 4 to the 1982 Act.[112] The effect of Schedule 4 would be that the Scottish courts would have jurisdiction to deal with an application for an attachment order in respect of intellectual property rights where the defender is domiciled in Scotland (article 2). Furthermore as the intellectual property rights are situated throughout the UK the Scottish courts would have jurisdiction under article 5(8)(b). In this last case the courts of England and Wales and Northern Ireland would also have jurisdiction in respect of similar proceedings under their own laws for execution and in theory at least there is the possibility of a conflict of jurisdictions. However under existing English law there appears to be no method for attaching intellectual property.[113] In practice therefore a conflict of diligence processes against the same intellectual property is unlikely to arise. Moreover the possibility already exists for conflicts of jurisdiction under Schedule 4 (as where a defender is domiciled throughout the United Kingdom). Schedule 4 does not contain the provisions of the Brussels Convention on *lis pendens* but it is generally accepted that the courts will apply the doctrine of *forum non conveniens* in this situation.[114] We believe that a similar approach would be taken where there were conflicting applications for diligence against intellectual property.

4.49 To sum up. We now think that the provisions of Schedules 4 and 8 to the Civil Jurisdiction and Judgments Act 1982 would deal satisfactorily with the jurisdiction of the Scottish courts in applications for attachment orders and we make no recommendations for their amendment.

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[111] D P Sellar notes that in the parliamentary debate on the Patents Act 1977, the Solicitor-General emphasised that there is only one UK patent law, and that the rules for Scotland and England were to be treated as functionally identical: see D P Sellar "Rights in Security over 'Scottish Patents'" (1995-96) 1 SLPQ 137, 138 referring to Hansard, HL Deb Vol 379, col 1488 (15 February 1977). A unitary approach to intellectual property rights is also taken in the USA (*Stevens v Gladding* 58 US 447 (1854)) and Canada (David Vaver, "Can intellectual property be taken to satisfy a judgment debt?" (1991) 6 *Banking and Finance Law Review* 255).

[112] Subject to exceptions referred to in s 17 and Sch 5.

[113] *Edwards & Co v Picard* [1909] 2 KB 903 which is regarded as general authority for the proposition that neither execution nor the equitable appointment of a receiver is competent in respect of intellectual property. In Northern Ireland a similar rule applies that there is no process of execution against intellectual property. However a receiver may be appointed in respect of payments due to a debtor under intellectual property (Judgments Enforcement (Northern Ireland) Order 1981 (SI 1981/226 (NI 6)), arts 67-68).

[114] Anton & Beaumont, *Civil Jurisdiction in Scotland* (2nd edn), pp 234-235; Dicey & Morris, *The Conflict of Laws* (13th edn), p 392.

G. APPLICATIONS FOR ATTACHMENT ORDERS

Introduction

4.50 The new diligence of attachment order would consist of the following steps: charge to pay, application to the court for an attachment order, service of a schedule of attachment on the debtor, an application to the court for an order authorising the creditor to satisfy the debt out of the attached property (a "satisfaction order"), implementation of that order and finally a report to the court and an accounting between creditor and debtor. We have considered but have rejected the idea that the warrant of execution in the extract decree should itself authorise service of the schedule of attachment after a charge had expired without payment. First, it may not be clear that the property in question is attachable by attachment order. Secondly, a wide variety of interim and ancillary orders will often have to be made and conditions attached to orders.[115] These require the involvement of a court at the stage of granting the attachment order.

4.51 We have also considered combining the applications for an attachment order and a satisfaction order so that the creditor would apply for a combined order of attachment and satisfaction. On this approach once the combined order was granted, the creditor would be authorised to take steps to deal with the attached property in implement of the satisfaction order at any time within a certain statutory period. We think that this scheme would be too "front-loaded" in terms of procedure and expenses. Having a two-stage process allows creditors to obtain the security of an attachment order fairly cheaply. Many debtors will settle at, or soon after, this stage, so rendering the further expense of an application for a satisfaction order and implementing it unnecessary.

4.52 We therefore recommend that:

> **48. The creditor should have to apply to the court for an attachment order, and following service of a schedule of attachment on the debtor, apply to the court for a satisfaction order in relation to the attached property.**

The application and interim orders

4.53 In Discussion Paper No 108 we proposed that the creditor should apply to the sheriff for an attachment order by means of a summary application.[116] Summary applications are flexible and give sheriffs scope for shaping the procedure for a particular case to its circumstances. We think flexibility is necessary because of the range of types of attachable property and the ancillary orders that might require to be made. All those who responded agreed. In the Court of Session an application for an attachment order should proceed by way of petition. An application would specify the parties, the debt and the property sought to be attached and set out any interim and ancillary orders desired.

4.54 We envisaged in our discussion paper that the creditor's application should not be intimated to the debtor but that the sheriff should have power to order intimation.[117] The Sheriffs Principal thought that debtors should have an opportunity to oppose the application

[115] See paras 4.53-4.57; 4.69-4.76.
[116] Scot Law Com DP No 108, Proposal 5(1), para 2.23.
[117] Scot Law Com DP No 108, para 2.18.

and on reflection we agree with this view. Our concern was that intimation would give the debtor an opportunity of disposing of the property in advance of any attachment order being granted. We now think that simultaneous intimation to the debtor of the application[118] and an interim order prohibiting future voluntary disposal of the property would achieve a better balance between the interests of the creditor and debtor.

4.55 The effect of the interim order would be to prohibit the debtor from dealing with the property specified in it to the prejudice of the creditor, for example by disposing of it, burdening it or licensing it. It would also prohibit any specified third party to whom it was intimated from participating in a dealing. However, a disposal which the debtor was bound to carry out in terms of an antecedent obligation would not be struck at by the interim order. The order would be interim in that it would be replaced by an attachment when the attachment order took effect, except to the extent that it remained necessary to counter a dealing made in contravention of the interim order entered into before the attachment took effect. The debtor and any third party who was aware of the interim order should be liable to the creditor for any damages resulting from their wilful contravention of the order and a contravention should also be punishable as a contempt of court.

4.56 We imagine that most applications will not be opposed. Unopposed applications should be granted by the court without the need for any appearance by the creditor, provided it is satisfied that an attachment order is competent and the application is properly made.

4.57 We recommend that:-

49. (1) An application for an attachment order should be made by summary application in the sheriff court and by petition in the Court of Session.

(2) The court should be empowered to grant an interim order prohibiting the debtor and any specified third party from entering into a voluntary future dealing with the property sought to be attached. The creditor should serve a copy of the interim order on the debtor and any third party at the same time as the intimation of the application. The interim order should become effective on its service on the debtor. Any contravention of the interim order should render the contravenor liable in damages to the creditor and it should also be punishable as a contempt of court.

(3) The court should have power to grant any other interim orders of an ancillary nature.

H: SERVICE AND EFFECT OF SCHEDULE OF ATTACHMENT

Service of schedule

4.58 The next step after an attachment order had been granted would be the service of a schedule of attachment on the debtor and any third party specified in the order. If the attached property is registrable, the schedule should be registered in the appropriate

[118] The date fixed for the hearing on the application would also be intimated.

register. In Discussion Paper No 108 we suggested that the court should have to grant an ancillary order authorising the registration of a copy of the schedule of attachment.[119] We now think that the attachment order should itself authorise and require the creditor to register it in cases where registration was competent. This would avoid having to apply for an ancillary order. As an attachment order cannot be made in respect of registrable heritable property, it is clear that a schedule of attachment would not be capable of being registered in the property registers. We consider the question of registration in the personal register later.[120]

4.59 Service should have to be done by officers of court, but registration could be done by the creditors or their agents. Service of any ancillary orders on third parties should also be carried out by officers of court. The schedule of attachment should be in prescribed form and contain details of the parties and the debt, and specify the property attached. The schedule served on the debtor should be accompanied by a note containing a brief explanation of its effect in readily understandable terms.

4.60 In our discussion paper we proposed that the attachment should come into effect on the service of the schedule of attachment on the debtor.[121] Where the schedule was to be registered, in order to protect third parties transacting on the faith of the register the effective date of the attachment should be the date of registration. We also proposed that failure to serve the schedule on the debtor should not invalidate the registration of the schedule, but in order to ensure service on the debtor, the expenses of the diligence should not be chargeable against the debtor unless such service had been done.[122] There was no dissent on consultation. Nevertheless, we now think it would be better to make service on the debtor a necessary step even if the schedule was registered. Being the person primarily affected by the attachment, in all cases the debtor ought to be informed of it and its effects. The person submitting the schedule of attachment for registration should therefore have to enclose the officer's certificate of service of the schedule on the debtor.

4.61 The date when the attachment comes into effect would govern its priority with other attachments, diligences or ranking processes. Patent applications are not registered until they are published,[123] but notice of any transaction affecting them may be given to the Comptroller-General of Patents, Designs and Trademarks which confers priority.[124] As suggested in our discussion paper,[125] we think that the attachment should have effect from the date of service of the schedule of attachment on the Comptroller-General. If the application is granted the attachment should transfer to the patent itself.

[119] Scot Law Com DP No 108, para 2.19.
[120] *Ibid*, para 4.67.
[121] *Ibid,* Proposal 6(5), para 2.32.
[122] *Ibid,* Proposal 6(7), para 2.32.
[123] Patents Rules 1990, r 44.1.
[124] Patents Act 1977, s 33(1)(b).
[125] Scot Law Com DP No 108, para 2.27.

4.62 We recommend[126] that:

50. An attachment should:

(a) where the attached property is not registrable in a public register, come into effect at the date of service by officer of court of a prescribed form schedule of attachment on the debtor; and

(b) where the attached property is so registrable, come into effect at the date of registration of a copy of the schedule of attachment in the register. It should be incompetent to register a copy unless the schedule had been previously served on the debtor.

Effect of attachment

4.63 In Discussion Paper No 108 we proposed that an attachment effected under an attachment order should confer on the creditor a right over the attached property in security of payment of the debt, interest and expenses chargeable against the debtor.[127] As from the date of service of the schedule of attachment on the debtor, the attachment was also to be effectual as a personal prohibition on the debtor. While the attachment is in effect, the debtor would be prevented from transferring the attached property or from encumbering it with a subordinate real right, even if under an obligation to do so at the date of service. An assignation or other deed in favour of a third party in breach of this prohibition was to be voidable at the instance of the attaching creditor, unless the third party had acted in good faith, for value and without knowledge of the attachment. On being informed of the attachment, however, such a bona fide from onerous third party would be bound to retain any unpaid balance of the price for the benefit of the creditor.

4.64 Although there were no adverse comments from those responding we now favour a slightly different scheme. We think that prohibiting any dealing in the attached property and making any dealing voidable at the instance of the attaching creditor goes too far. First, a dealing that implements a pre-existing obligation should be allowed to proceed so that the third party acquires the property or a subordinate right in it free from the attachment. Secondly, a third party who enters into an onerous transaction with the debtor after the attachment becomes effective should not be affected by the attachment provided he acted in good faith and had no actual or constructive[128] knowledge of it. In a competition between such third parties and attaching creditors, the former ought to prevail. Creditors have to accept that their diligence may not be effective. On the other hand, third parties who had actual or constructive knowledge of the attachment, who acted in bad faith, or who gave no value should be affected by the attachment. The rights they acquire over the attached property should be subject to the prior security right of the creditor. For example, in the

[126] We draw to the attention of the competent authorities the issue whether this and other recommendations dealing with UK intellectual property falls within the legislative competence of the Scottish Parliament. Intellectual property (with the exception of plant varieties) is a reserved matter in terms of the Scotland Act 1998, Sch 5, Head C, section C4.
[127] Scot Law Com DP No 108, Proposal 6, para 2.32.
[128] The debtor would have constructive knowledge if the schedule of attachment was registered in a public register.

case of a sale, the attachment would transfer with the property and be enforceable against the new owner, or where the debtor licensed attached intellectual property, the creditor would be entitled to sell it free from the licence. Thirdly, on being informed of the attachment a third party who acquires rights in the attached property free of the attachment should become bound to pay the creditor (rather than the debtor) any part of the price remaining due. Finally, the attachment order should have the effect of prohibiting the debtor and any successor or owner, for as long as the property was subject to the attachment, from dealing with the attached property except in implement of a pre-existing obligation. This prohibition would increase the effectiveness of attachment orders because a breach would be treated as a contempt of court.

4.65 It might be thought that attachment orders would be rendered ineffective if debtors could readily dispose of unregistered attached property to third parties who would take it free of the attachment. However, in many cases persons who would have been served with a schedule of attachment would be contacted in relation to any proposed dealing. Examples are the managers of property in which the debtor had a timeshare, the landlord in an unregistered lease or tenancy-at-will and the grantor of a licence. Third parties who failed to ask them whether the property was subject to attachment would risk jeopardising their status as persons acting in good faith. In addition, creditors could seek an ancillary order prohibiting such persons from facilitating or participating in a dealing in breach of attachment.[129]

4.66 For some types of heritable property it would be possible for the debtor and a third party to enter into a transaction which extinguished the attached property and conferred new property rights on the debtor. Thus, where the debtor's personal right to a conveyance of heritable property in a trust was attached, the trustees could by granting the appropriate deeds terminate the debtor's personal right and make the debtor the owner of the property. We do not think that the creditor should be allowed to proceed with the attachment against the debtor's new right of ownership because none of the diligence documents would have been registered in the property registers. Although it would be subject to a latent attachment the debtor's right of ownership would appear to be unencumbered. We have come to the conclusion that the attachment order would come to an end. The creditor could then use a land attachment against the debtor's newly acquired property. It would be very difficult in the land attachment to give the creditor the benefit of steps already taken in the attachment order. The termination of an attachment order in these circumstances would address the Keeper's concerns about the effect of an unknown earlier attachment order when the debtor's right of ownership was subsequently registered in the Land Register. The solution to this problem is to enable the creditor to seek an ancillary order prohibiting the trustees from converting the debtor's attached right into one of ownership.

4.67 In our discussion paper we considered that an attachment order should not have to be registered in the personal register.[130] Although registration would increase the effectiveness of the diligence in that the existence of an attachment order would be publicised, it would also require third parties proposing to transact in attachable property to search the personal register. Given the wide variety of attachable property, a large number of transactions that do not currently involve a search of the personal register would require this step to be taken, so adding to the expense.

[129] See Recommendation 52(1), para 4.76 below.
[130] Scot Law Com DP No 108, para 2.29.

4.68 We recommend that:

51. (1) An attachment under an attachment order should confer on the creditor a right over the attached property in security of payment of the debt, interest and expenses chargeable against the debtor.

(2) The rights of any person acquiring the attached property from, or a subordinate real right over the attached property created by, the debtor should be subject to the creditor's security right unless that person acted in good faith, was without notice of the attachment and gave value.

(3) An attachment order against a right to acquire property should cease to have effect when that right is extinguished by the debtor acquiring the property itself.

(4) An attachment order should prohibit the debtor from dealing with the attached property, except in implement of a pre-existing obligation. Breach of the prohibition should be treated as a contempt of court.

(5) A third party who entered into a dealing with the debtor in relation to attached property should be bound to pay any unpaid part of the price to the creditor on becoming aware of the attachment.

Orders ancillary to an attachment order

4.69 In Discussion Paper No 108 we proposed that on making an attachment order the sheriff should be entitled to make any ancillary orders for the purpose of facilitating the fair and reasonable operation of the attachment.[131] We gave as examples[132] (1) where the debtor had an attachable right to a conveyance of heritable trust property, an order on the trustees prohibiting them from conveying it to the debtor, and (2) an order appointing a judicial factor to ingather and manage the attached property.

4.70 For the reasons set out in paragraph 4.66 above, a conveyance by the trustees would bring the attachment of the debtor's personal right to an end. Another example of a third party action terminating an attachment is a conveyance by a landlord converting the debtor's tenancy-at-will into ownership. We consider that ancillary orders should be available to prohibit third parties carrying out these actions or any others which defeat the attachment in whole or in part. The ancillary order would be served on the third party. Wilful contravention of the prohibition in the ancillary order should render the third party liable in damages to the creditor and be a contempt of court. Where the contravention brought an attachment to an end, the third party would be liable for the expenses of the attachment already incurred by the creditor, and if the debt became irrecoverable, for the debt itself up to the value of the attached property.

[131] *Ibid*, Proposal 5(2), para 2.23.
[132] *Ibid*, para 2.19.

4.71 The Sheriffs Principal commented that a judicial factor should be an independent appointee rather than, as we suggested in our discussion paper, the creditor's agent.[133] We are grateful for this comment which we accept. We envisage that a judicial factor would be appointed only very occasionally (perhaps to ingather and distribute royalty payments on behalf of several creditors) but where it was necessary an independent person would better protect the interests of both creditor and debtor.

4.72 Another ancillary order which we suggested could be useful was one authorising the creditor to complete the debtor's title by registering it in the debtor's name together with the attachment order.[134] This was approved on consultation. The creditor would have to be in possession of all the necessary links in title so that the debtor's title would have to be complete but for a formal step such as registration or intimation.[135] Completion of title could not apply where heritable property was concerned, for if the debtor's title to the property was complete but for registration, the property would be attachable by land attachment, not attachment order. We did not propose and do not recommend that the creditor should be entitled to have third parties ordered to grant any document in favour of the debtor.

4.73 We also suggested in our discussion paper that the creditor should be entitled to delivery or exhibition of the debtor's title or other documents held by a third party.[136] These documents would be necessary when the creditor came to sell the attached property. A delivery or exhibition order would be ancillary to an attachment order and should be granted only against third parties. Debtors should not be ordered to assist creditors with their diligence by having to produce documents on pain of contempt of court and possible imprisonment. We were also not in favour of imposing on debtors a general duty to co-operate with creditors. Such coercive measures are available in bankruptcy but we thought they should not be available in diligence. No comments on these issues were made on consultation and we would adhere to this position.

4.74 The Faculty of Advocates observed that intellectual property is likely to be licensed and queried the effect of an attachment order on it. We think that the creditor should attach only what the debtor has. If the property was licensed prior to attachment the creditor would attach the debtor's rights as licensor, but only so far as the right to be paid royalties is concerned. The creditor should not take over all the other rights and duties of the debtor under the licence.[137] The right to receive future royalty payments is best left to the satisfaction stage and should not be a part of the attachment order itself. Until then the creditor could freeze the royalty payments by obtaining an ancillary order prohibiting the licensee from paying them to the debtor. Other income-producing assets, such as a trust liferent, could be dealt with in a similar way.

4.75 The creditor should not be regarded as the temporary owner of the attached property. None of the debtor's rights and obligations in relation to the property should pass

[133] *Ibid*, para 2.19.
[134] *Ibid*, para 2.20.
[135] *Ibid*, para 2.20. Where such a title related to heritable property it would be registrable in the property registers and hence subject to land attachment, not an attachment order.
[136] *Ibid*, para 2.21.
[137] A decree of maills and duties had a similar effect in relation to rents due by the tenants of the debtor (Graham Stewart, p 520).

to the creditor by virtue of the attachment order.[138] However, the creditor may need to take some particular action in order to preserve the property pending completion of the diligence and could apply for an ancillary order to authorise such action.

4.76 We recommend that:

52. On making an attachment order the court should be empowered to make any ancillary orders for the purpose of facilitating the fair and reasonable operation of the attachment. These ancillary orders should include:

(1) An order prohibiting specified third parties from

(a) acting so as to defeat the attachment in whole or in part; or

(b) making payments due to the debtor in respect of the attached property.

Wilful contravention of the order should render the third party liable in damages to the creditor and should be a contempt of court.

(2) An order appointing an independent person as judicial factor to ingather and manage the attached property.

(3) An order requiring a specified third party to produce to the court documents relating to the debtor's right to the attached property.

(4) An order authorising the creditor to complete the debtor's title in the debtor's own name.

(5) An order authorising the creditor to take specified action in order to preserve the value of the attached property.

Duration of an attachment

4.77 It is inappropriate for the effect of an attachment to last indefinitely. In common with other diligences, its effect should lapse after a certain statutory period. The period for which attachment remains operative varies from one year for poindings,[139] three years for arrestments[140] and five years for the proposed new diligence of land attachment.[141] In our discussion paper we proposed that attachment under an attachment order should last for three years, the period applicable to arrestments. This was agreed on consultation. Items which are likely to be attached under an attachment order will often not be readily marketable. We think that the court should have power to extend the initial duration of an

[138] The purchaser of the attached property or the creditor with a decree of foreclosure would stand in place of the debtor.
[139] 1987 Act, s 27.
[140] Debtors (Scotland) Act 1838, s 22.
[141] See paras 3.184-3.185.

attachment order on cause shown. This power would be particularly useful where future income from an attached asset is directed to be paid to the creditor.

4.78 We recommend that:

53. An attachment should cease to have effect on the expiry of a period of three years following its coming into effect, but the court should have power to extend this period on cause shown.

I. SATISFACTION OF THE DEBT OUT OF THE ATTACHED PROPERTY

Introduction

4.79 Following attachment, a creditor should have to apply to the court for an order to enforce payment out of the attached property if the debtor refused to pay the debt. The intervention of a court is necessary to control the diligence and ensure that the debtor's interests are taken into account and where appropriate protected. We think that the range of remedies should extend beyond the usual remedies of sale or foreclosure in default of sale. The wide variety of attachable property and its often unusual nature demand a flexible response to the issue of realising value for the creditor out of the property. The court should have a discretion to grant an appropriate order which we call a "satisfaction order". For example, an order could be granted for sale of the property or for diverting to the creditor future sums due from an income-producing asset (such as licensed intellectual property or a liferent). Other more complex remedies could include the licensing or leasing of the attached property.

4.80 The creditor's application setting out the desired satisfaction order should be intimated to the debtor and others with an interest in the property. The debtor and others who receive notice should be entitled to make representations and object to the granting of the application. The court should have power of its own motion to refuse the application if the attachment was invalid or had ceased to have effect. In Discussion Paper No 108 we proposed that the sheriff should have power to refuse warrant of sale of the attached property where its value greatly exceeds the amount of the debt and it is not practicable to sell part of the property (the "disproportionate value" test). Another proposed ground of refusal was that the likely net proceeds of sale accruing to the attaching creditor were less than the likely expenses of sale (the "not worth it" test). The sheriff could exercise these powers of his own accord or on the motion of the debtor or any other interested party. The sheriff could also refuse warrant of sale where sale of the attached property would be unduly harsh.[142] With a wider range of satisfaction orders a more general formula is required. We think that the court should have to consider the impact of the proposed order on the debtor and others involved with the property and give due weight to the interests of the creditor, the debtor and the other parties, whether or not the application was opposed. This formula encapsulates our proposed tests and should govern not only the choice of satisfaction order but also any conditions the court sets on the operation of the selected order. An important factor would be the expected yield for the creditor as compared with the diligence expenses. We envisage that courts would refuse to grant an application unless the creditor was likely to receive in the foreseeable future a sum at least equal to the full diligence expenses. Among those whose interests should be considered are other creditors.

[142] Scot Law Com DP No 108, Proposal 8, para 2.38.

If another creditor was taking active steps to market the property, the court should normally refuse the attaching creditor's application.

4.81 The court should have power to postpone the starting date of a satisfaction order for a period of up to 12 months. This would be a useful alternative to an outright refusal, for example where an immediate sale of the attached property would be unduly harsh in the debtor's present circumstances. Where the court has granted a satisfaction order such as a diversion of income or a lease of the property, it should be competent for the creditor to apply at a later date for a sale or transfer. The initial remedy may fail to produce the expected return for the creditor. On the other hand, an order for the sale or transfer of the property to the creditor should not be capable of being re-opened at some later date.[143]

4.82 We recommend that:

54. (1) The attaching creditor should have to apply to the court which granted the attachment order for an order (termed a satisfaction order) for satisfying the creditor's debt out of the attached property. The clerk of court should fix a date for the hearing of the creditor's application which should be intimated to the debtor, the creditor and other interested parties who should be entitled to be heard.

(2) The satisfaction orders the court may make should include:

(a) an order for sale of the attached property and payment of the net free proceeds of sale to the creditor;

(b) an order vesting the attached property in the creditor at a price to be fixed by the court;

(c) an income transfer order whereby future payments due to the debtor out of the attached property are diverted to the creditor;

(d) an order authorising the creditor to lease or license the attached property on terms to be approved by the court.

The court should also have power to postpone the operation of the satisfaction order for up to 12 months and to grant ancillary orders to facilitate the operation of the satisfaction order.

(3) In deciding whether to grant a satisfaction order and if so what order to grant, the court should consider the impact on the debtor and other interested persons, giving due weight to the interests of the creditor, the debtor and the other persons.

(4) The power to refuse the satisfaction order applied for or to postpone its operation should be exercisable by the court of its own motion as well as on the motion of the debtor or other interested person. The court should

[143] A transfer of the property if it cannot be sold should be competent.

not exercise the power of its own motion without giving the creditor an opportunity to make representations.

Sale

4.83 Where the court orders a sale of the property it should appoint an independent person to market the property rather than allow the creditor to undertake this function. The appointed person should be under a duty to advertise the property and to take all reasonable steps to ensure that it is sold at the best price which can be reasonably obtained. Heritable creditors exercising a power of sale under a standard security[144] and suitably independent solicitors selling in pursuance of a land attachment are under a similar duty. When granting a satisfaction order or subsequently, the court could make ancillary orders in respect of the method of sale.

4.84 Purchasers of property which is not registered in a public register rely on warranties as to title provided by the seller and any predecessors in title. When intellectual property has been registered, warranties remain important because there is a blind period of about six weeks between an application for registration and an entry appearing in the register. It is not current practice for the seller's agents to grant letters of obligation to bridge this period. In our view no warranty of title should be implied against the debtor in any forced sale of attached property. The creditor's warranty should be limited to the regularity of the diligence. The purchaser should have the benefit of any warranty by a predecessor in title of the debtor and the creditor's conveyance should be deemed to contain an assignation of any such warranty.

4.85 In Part 3 we put forward two options for the sale of residential property subject to land attachment. The first was that it should be incompetent for the court to order the sale of property occupied by an individual as a principal or only dwellinghouse. The second option was to allow sales of dwellinghouses but only if it was reasonable to do so having regard to certain factors. Whatever option is chosen for land attachment should also be applied to the rare case of a dwellinghouse which is subject to an attachment order.

4.86 We recommend that:

55. (1) The court should, when ordering a sale of the attached property, appoint an independent person to market and sell it on behalf of the creditor.

(2) The independent person should be under a duty to advertise and generally take all reasonable steps to ensure that the attached property is sold for the best price that can reasonably be obtained.

(3) The purchaser of the attached property granted in implement of the order for sale should be assigned any warranties the debtor had the benefit of, but no warranty by the debtor should be given or implied. The creditor should warrant that the diligence had been carried out regularly.

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[144] 1970 Act, s 25.

(4) Our recommendations in relation to the sale of dwellinghouses subject to land attachment should apply to dwellinghouses attached by an attachment order.

Transfer of the property to the creditor

4.87 Another way of satisfying the creditor's debt out of the attached property would be for the court to make an order transferring the property to the creditor. The creditor should acquire the attached property at, and the debtor should be credited with, the value put on it by the court. The court should have the property valued by an independent valuer and then invite representations by the parties. A transfer order could be granted either as an initial remedy or if the creditor failed to find a purchaser for the property. A transfer in default of sale is termed foreclosure and is found in many similar situations, such as poinding,[145] and enforcement of standard securities.[146] We also recommend it for land attachment.[147] The transfer order should have the same effect as if the debtor had granted a deed of transfer in favour of the creditor. The creditor may have to take some further step, such a registration or intimation, to complete title to the property. We recommend that:

56. A transfer order may be granted on an initial application by the creditor for a satisfaction order or after the creditor has failed to sell the property in terms of an order for sale. The transfer order should have the same effect as if the debtor had granted a deed of transfer in favour of the creditor.

Income transfer orders

4.88 Where the attached property generates an income stream, the court may make an order diverting future income payments from the debtor to the creditor. This would be analogous to an earnings arrestment in respect of a pension or a decree of maills and duties in relation to rents due by a debtor's tenants. Creditors who had attached an annuity, trust liferent or licensed intellectual property could have their debts paid by instalments out of future income since it will often be difficult to find a purchaser for the property itself.

4.89 Annuities and liferents that are alimentary (ie provided for an individual's support) are to some extent protected from arrestment. An arrestment attaches only arrears plus that portion of the current instalment which is in excess of the debtor's needs, unless the arrestment is laid for an alimentary debt in which case the whole instalment is attached.[148] Similarly, an adjudger of an alimentary annuity may receive only the portion of future instalments in excess of the debtor's needs.[149] In each situation the portion is fixed by the court. We think that similar debtor protection should exist for income transfer orders, whether or not the attached property is of an alimentary nature. The amount to be paid to the creditor would be stated in the income deduction order and could subsequently be varied on a change of circumstances. In bankruptcy, the sheriff, on application by the

[145] 1987 Act, s 37(6).
[146] 1970 Act, s 28.
[147] See paras 3.170-3.173.
[148] Graham Stewart, pp 97, 102 and 103.
[149] *Lewis v Anstruther* (1852) 15 D 260; but competency of adjudication doubted in *Cuthbert v Cuthbert's Trs* 1908 SC 967.

permanent trustee, may fix an allowance for the debtor and any dependants and direct that any income over and above that figure be paid to the trustee.[150]

4.90 An income transfer order should come into effect seven days after it has been served on the person making payments to the debtor. A similar period of grace applies in earnings arrestments[151] and gives the payer time to make the necessary administrative changes. A copy of the order would be served on the debtor. The order should place the creditor in the debtor's position only as regards the future payments. The creditor should not become liable for any of the debtor's obligations or entitled to any other rights the debtor may have in relation to the attached property.[152]

4.91 We recommend that:

57. (1) An income transfer order should direct that a specified portion of each future payment due to the debtor in respect of the attached property should be paid to the creditor while the order is in effect.

(2) An income transfer order should be served on the person making the payments and should come into effect seven days after service.

Report to court

4.92 The attaching creditor should be required to make a report to the court on the implementation of its satisfaction order. This enables the court to control the final stages of the diligence, tax the diligence expenses and declare the balance due to or by the debtor. Where a sale of the property was ordered the report should have to be lodged within a specified period (we suggested 28 days in our discussion paper[153]). An order transferring the attached property would be self-executing and would not involve the creditor in any material further expense. The expenses could be taxed and the balance declared when the order was granted without the need for a report later. If the court granted an income transfer order or authorised the licensing of the attached property it could also regulate the making of a report. One or more interim reports might be needed before a final report could be made.

4.93 In Discussion Paper No 108 we proposed that the sanction for failure to make a report timeously was that the court might not allow the creditor to recover all or part of the diligence expenses from the debtor.[154] This met with general approval on consultation, but the Joint Committee of the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers thought that a report must be made and that it was not a sufficient sanction merely to deny the creditor expenses which were otherwise recoverable. In addition to our proposed sanction there will in practice be other compulsitors. Dealings with attached property will usually be carried out either by persons appointed by the court or by the creditor's agents. These persons would be required to make the report. The former would be subject to penalties imposed by the court if they failed to carry out their

[150] 1985 Act, s 32.
[151] 1987 Act, s 69.
[152] A decree of maills and duties has a similarly restricted effect (Graham Stewart, p 520).
[153] Scot Law Com DP No 108, Proposal 11, para 2.48.
[154] Scot Law Com DP No 108, Proposal 11(2), para 2.48.

duties properly, while the latter would be subject to the disciplinary measures of the Law Society of Scotland.[155]

4.94 We recommend that:

58. (1) Where the court grants an order for the sale of the attached property, the creditor should submit to the court a report on sale and diligence expenses in prescribed form within 28 days of the date of settlement of the sale. Where the court grants any other satisfaction order (other than a transfer to the creditor) the making of reports should be regulated by ancillary order.

(2) The court should have power to make an order imposing on a creditor who makes a report late without reasonable excuse, or refuses to make a report, liability in whole or in part for the expenses of attachment otherwise chargeable against the debtor.

J. EXPENSES

Recovery from debtors

4.95 In Discussion Paper No 108 we proposed that the expenses of the creditor properly incurred in the diligence should be chargeable against the debtor. Thus the expenses of an application for an attachment order and for a warrant of sale (now a satisfaction order) should be chargeable against the debtor on the basis that they were unopposed. In other applications each party should, in general, bear their own expenses. The court could award expenses up to a prescribed sum against a party who acted frivolously in making or opposing an application.[156] The expenses were to be recoverable from payments made by the debtor, the proceeds of sale of the attached property or from the debtor's estate on subsequent insolvency. The creditor was not to be entitled to recover the expenses in any other manner, such as an action for payment.

4.96 On consultation, our proposals met with general approval. One solicitor suggested that as the attached property would mainly be commercial property and the parties in business, there was no need for any award of expenses to be restricted to a prescribed sum. Our proposals were modelled on the corresponding provisions in the Debtors (Scotland) Act 1987[157] and are in line with those we recommend elsewhere in this Report for land attachment and money attachment. We think there is considerable merit in having a uniform set of rules for diligence expenses.

Ascription

4.97 Rules of ascription will be needed to deal with partial satisfaction of the debt and diligence expenses. We would adopt the rules set out in section 94 of the 1987 Act.

[155] Solicitors (Scotland) Act 1980, s 34.
[156] Scot Law Com DP No 108, Proposal 10, para 2.45.
[157] Ss 92-95.

4.98 We recommend that:

59. (1) The expenses properly incurred by a creditor in executing the diligence of attachment order should be chargeable against the debtor. The expenses should, unless paid by the debtor, be recoverable from the proceeds of the attachment concerned but (apart from the expenses of the charge) not by any other legal process except supervening insolvency processes or processes for ranking creditors' claims on the attached property.

(2) Any expenses not recovered by the time the diligence is completed or ceases to have effect should cease to be chargeable against the debtor, except in supervening insolvency processes or processes for ranking creditors' claims on the attached property.

(3) The debtor should be liable for the expenses of an application for an attachment order and an application for a satisfaction order on the basis that it was unopposed. Each party should otherwise bear their own expenses in relation to court applications. The court should be empowered to award expenses not exceeding a prescribed sum if an application or an objection was frivolous.

(4) The proceeds of the diligence or any payment by the debtor while the diligence is in effect should be ascribed:

(a) to the expenses of the diligence which are chargeable against the debtor;

(b) to interest on the sum due under the decree or other document accrued to the date of the attachment coming into effect; and

(c) to any other sum due under the decree or other document (which will include the debt itself);

in that order.

K. MISCELLANEOUS

Co-owned property

4.99 In Discussion Paper No 108, we put forward two options for dealing with attachment of property in common ownership.[158] Attachment could either operate against the debtor's *pro indiviso* share with the creditor thereafter entitled to apply for an action of division and sale,[159] or the whole property could be attached and the third party co-owner could obtain release of the property on paying the value of the debtor's share.[160] On consultation opinion was divided on this point. Some respondents saw division and sale as a less complicated

[158] Scot Law Com DP No 108, Proposal 13, para 2.54.
[159] This is the approach taken in land attachment; see paras 3.198-3.202.
[160] This is the approach taken in poinding (1987 Act, s 41).

and less expensive procedure and pointed out that in practice the co-owner would be able to buy out the debtor's share. Others thought that division and sale was clumsy and expensive. The second option was also said to preserve the co-owner's rights.

4.100 We particularly requested views on the question of common ownership of intellectual property.[161] Here opinion shifted decisively in favour of the second option. It may be particularly awkward for the third party co-owner to share intellectual property with a stranger (the purchaser). For example, in a co-owned patent the purchaser is able to veto any licensing[162] and exploit the patent without reference to the other co-owner.[163] A sale could be equally disadvantageous for the co-owner. There is often a restricted market for intellectual property which may be of value only to those capable of exploiting it or wishing to prevent their competitors from acquiring it. As Philips remarks: "like Excalibur in the hands of King Arthur, many IP rights only prosper in the hands of their owners and are either unprofitable or unattractive to others".[164] A sale would also deprive the co-owner of opportunities to exploit the property.

4.101 We think that there should be a unitary scheme for the attachment of property in common ownership, rather than separate regimes for intellectual property and other attachable property. In the light of the responses on consultation we now favour the second option as it provides legal machinery for the co-owner to buy out the debtor's share and have the property released from the threat of sale. We therefore recommend that:

60. (1) Where property is owned in common by the debtor and a third party the whole property should be attached by virtue of an attachment order.

(2) The third party co-owner should be entitled to have the property released from attachment on paying the creditor the value of the debtor's share. The value should be as agreed between the parties or fixed by the court.

(3) Where the third party does not seek release and the property is subject to a satisfaction order, the creditor should pay the third party a proportionate share of the proceeds of the order, after deduction of the expenses of implementing the order but not the other diligence expenses or the debt.

Death of the debtor

4.102 In Part 3 we considered what effect the death of the debtor should have on land attachment. We concluded that the crucial date was when a copy of the notice of land attachment had been served on the debtor.[165] Where the debtor died after this date we recommended that the creditor should be entitled to complete the diligence. On the other hand, if the debtor died before this date the diligence should fall. The creditor would then have to take any necessary proceedings to constitute the debt against the executors, the estate or the heir of provision and do new diligence. We think that the same approach

[161] Scot Law Com DP No 108, Proposal 16, para 2.100.
[162] Patents Act 1977, s 36(3).
[163] Patents Act 1977, s 36(2).
[164] Philips, "IP as security for debt finance-a time to advance" [1997] EIPR 276, at p 276.
[165] See paras 3.190-3.197 above.

should be adopted for an attachment order with the date being when the attachment order came into effect. We recommend that:

61. (1) An attachment under an attachment order coming into effect on or after the date of the debtor's death should be ineffectual.

(2) An attachment under an attachment order coming into effect before the date of the debtor's death should transmit against the debtor's universal successors or heir of provision and accordingly the creditor should be entitled to proceed with the diligence. Provision should be made by rules of court adapting the procedure, including empowering the court to make ancillary orders dispensing with or modifying steps in that procedure.

Sequestration and liquidation

4. 103 In Part 7 we consider the issue of when an attachment order is rendered ineffectual by the subsequent sequestration or liquidation of the debtor.[166] Here we deal with the separate question of the effect of sequestration or liquidation on the creditor starting the diligence of attachment order or completing an existing diligence which is not affected by the cutting-down provisions. In Part 3 we recommend that a creditor should not be entitled to commence the diligence of land attachment on or after the date of sequestration or to proceed with a land attachment already begun unless a disposition in implement of sale of the attached land had already been registered or decree of foreclosure granted. If the diligence had not reached either of those stages the attached land would vest in the trustee who would dispose of it giving the attaching creditor a preference (if applicable) on the proceeds of its sale.[167] A similar recommendation was made in relation to liquidation.[168] We would extend the general principles underlying these recommendations to attachment orders. However, we express our recommendation in a more general way because of the wide variety of satisfaction orders the court may grant in relation to property attached by attachment order.

4. 104 A creditor should not be entitled to commence the diligence of attachment order or take any further step in relation to an already commenced diligence on or after the date of sequestration or liquidation. The attached property would vest in the trustee or be subject to the liquidator's powers, unless the debtor had been divested by a completed sale of the property or the court granting an order transferring it to the creditor. Where the diligence was not rendered ineffectual by the sequestration or liquidation, the trustee or liquidator should have to give effect to the creditor's preference. The way in which this was done would depend on the stage the diligence had reached. For example, if the court had authorised a sale of the property but the creditor had not found a purchaser, then the trustee or liquidator should take over the marketing and sale of the attached property. The creditor would get a preference on the proceeds of sale. On the other hand, if the creditor had concluded a contract of sale but not had delivered the appropriate deed of transfer to the purchaser, the trustee or liquidator should allow the transaction to proceed and require the creditor to remit any net proceeds of sale in excess of the creditor's debt. Where intellectual property had been licensed by virtue of a satisfaction order, the creditor should continue to receive royalties. But the trustee or liquidator may apply to the court for further orders if, for example, a sale of the licensed property seemed advantageous.

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[166] See para 7.11.
[167] Recommendation 36, para 3.216.
[168] Recommendation 37, para 3.220.

4. 105 We therefore recommend that:

62. (1) On or after the date of sequestration of a debtor or the date of commencement of winding up of a debtor company, it should not be competent:

(a) for the creditor to apply for an attachment order or the court to grant one, or

(b) for the creditor to take any further steps in pursuance of an already granted order.

(2) On the date of sequestration of a debtor's estate or winding up of a debtor company, any property of the debtor which had been attached and to which he retains title shall vest in the trustee or be subject to the liquidator's powers, but the trustee or liquidator should have to give effect to any preference the creditor has in relation to the attached property by virtue of the diligence.

Part 5 Money Attachment

Should there be a diligence attaching money?

5.1 In this Part we consider whether a new diligence against money (ie coins, bank notes and negotiable instruments) in the debtor's possession should be introduced. Such a diligence, which we call money attachment, would be only in execution of decrees or other enforceable documents where the sum due was immediately payable. It would not be competent on the dependence of payment actions or in security of future or contingent debts. At present money (with the possible exception of foreign currency) is not subject to diligence, although it forms part of the debtor's sequestrated estate. The question whether money can be poinded has been raised but never decided.[1] The invariable practice is to exclude such items from a poinding. A Crown debtor's whole moveable effects, including bank notes, money, bonds and bills, used to be poindable under section 32 of the Exchequer Court (Scotland) Act 1856, but this provision was to a large extent impliedly repealed by the Crown Proceedings Act 1947,[2] and expressly repealed by the Debtors (Scotland) Act 1987.[3] We have previously observed[4] that poinding and sale is an inappropriate diligence to attach money since it cannot safely be left in the debtor's possession and the later steps in the diligence - advertisement and sale of the poinded goods - being designed to turn property into cash, are inappropriate when the attached property is itself cash. It is generally accepted that legal tender is not subject to diligence at all,[5] but the view has been expressed that foreign currency may be poindable.[6]

5.2 In Discussion Paper No 108 we sought views on whether money attachment should be introduced as a new diligence in Scots law, but only in relation to the enforcement of civil debts.[7] Criminal courts in Scotland have extensive powers to make confiscation orders in relation to money which is the proceeds of crime, and to order the forfeiture of money which has been used in the commission of crime.[8] The proposals in our discussion paper were put forward against the background of the existing diligence of poinding and warrant sale against corporeal moveables or goods in the debtor's possession. Poinding and warrant sale will cease to be competent after 31 December 2002 or such earlier date as is prescribed by the Scottish Ministers.[9] A Working Group on a replacement for poinding and warrant sale was set up in June 2000. Its remit is to identify a workable but humane alternative within the Scots law of diligence. In this Part we assume that there will be some form of attachment and sale at least in respect of goods situated in a debtor's business premises, in the course of which officers of court go to the premises to attach goods situated there. If however a

[1] Graham Stewart, p 340; *Alexander v McLay* (1826) 4 S 439.
[2] S 26(1) any order including a decree in favour of the Crown (except for fines and penalties due to the Crown, s 26(3)) to be enforced in same way as in an action between subjects.
[3] Sch 8.
[4] Scot Law Com No 95, para 5.66.
[5] Stair Memorial Encyclopaedia, vol 8, para 278.
[6] Maher and Cusine, para 7.53.
[7] Scot Law Com DP No 108, Proposal 21, para 3.7, and Proposal 23, para 3.11 (attachment in dwellinghouses).
[8] Criminal Justice (Scotland) Act 1987, Part I; Prevention of Terrorism (Temporary Provisions) Act 1989; Criminal Justice (International Co-operation) Act 1990; Criminal Justice (Scotland) Act 1995, Part II.
[9] Abolition of Poindings and Warrant Sales Act 2001.

debtor's corporeal moveables and goods are to be completely exempt from diligence, then a new diligence for seizing money in the debtor's possession should not be introduced.

5.3 **The case for introducing attachment of money.** The main arguments in favour of introducing money attachment are as follows:

(a) The principle of universal attachability, namely, that all the assets of a debtor should be liable to diligence subject to exemptions to prevent undue hardship.[10] Some debtors, particularly the self-employed, may have in their possession substantial amounts of money but few other assets against which diligence can easily be done.[11]

(b) On sequestration, the whole estate of the debtor, including money and negotiable instruments in the debtor's possession, vests in the trustee for the benefit of creditors. The law would be inconsistent if a different approach were to be adopted for diligence.

(c) Many other countries have enforcement procedures for seizing or attaching money. Details of the procedures in Australia, Belgium, Canada, England and Wales, New Zealand, Northern Ireland, Sweden and the United States of America are set out in Appendix A.

(d) Officers of court executing diligence in the debtor's premises may come across money which would satisfy the creditor's debt more simply and cheaply than a sale of the debtor's possessions could.

5.4 **The case against introducing attachment of money.** The main arguments against introducing money attachment are as follows:

(a) Searches for money are necessarily intrusive and would be difficult to regulate and control. They would be deeply resented if carried out in debtors' homes.

(b) Money required for necessary living expenses should be protected from attachment. Only a certain portion of a debtor's pay from employment may be taken by means of an earnings arrestment,[12] while social security payments are exempt from ordinary arrestment.[13] These protections would be defeated if cash representing pay or benefits which debtors had obtained from the bank, social security office or post office could be taken by means of money attachment.

(c) An exemption from attachment of money in debtors' dwellings would favour those debtors who carry out a profession, trade or business from home over those who have separate business premises.

(d) Ownership of money is difficult to prove.

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[10] See paras 3.18-3.20.
[11] Money in a bank account may be arrested.
[12] 1987 Act, Part III.
[13] Social Security Administration Act 1992, s 187.

5.5 **Responses on consultation.** On consultation, one experienced solicitor was opposed to money attachment being introduced at all. In his view, the arguments against introduction outweighed the benefits. There was no need to have such a diligence which had the capacity to cause a lot of personal distress. While the other respondents supported, or did not object to, the introduction of money attachment in principle, this was often coupled with opposition to the attachment of money in dwellinghouses or to its use against individuals or non-business debtors.

5.6 As regards money attachment in dwellinghouses, it was said that searches for money in domestic premises would be deeply resented. The Society of Writers to the Signet recognised that the prevailing social and political trends are against the invasion of privacy with which many debt recovery procedures are associated. They argued that money attachment in dwellings should not be permitted. They said that the political implications, and the scope for abuse, dictated against such a course. The Committee of Scottish Clearing Bankers thought there was scope for money attachments only where the debtor was a company, partnership or sole trader and the attachment was executed on business premises.

5.7 Doubt was also expressed as to whether attachment of money in dwellinghouses would be of much use, as debtors were said not to amass money in their homes. The Faculty of Advocates thought that creditors would not be prejudiced if money attachment were not competent in dwellinghouses.

5.8 The Scottish Sheriff Court Users Group considered that money attachment should not be competent where the debtor was an individual. They dismissed the argument that debtors could simply keep all assets in cash in their homes as unlikely to happen with any frequency in the real world. Debtors were unlikely to have more than a minimal amount of cash in their homes and there was no justification for the time and expense of attempting to seize money. They were particularly concerned about its use in relation to council tax. As no charge is served following the grant of a summary warrant they observed that "sheriff officers could simply turn up at the debtor's home with a warrant and search the cupboards in the house. This would be distressing, intimidating and humiliating for the debtor. The group believe that this tactic should have no place in civilised society". The Committee of Scottish Clearing Bankers remarked: "At first sight there is something mediaeval about the prospect of creating a new form of diligence such as a money attachment order at the very dawn of a new millennium". They did not think that this was a form of diligence likely to be used by a bank against an individual unless the most exceptional circumstances existed. In particular it was "not realistic that a bank would use it against a personal customer".

5.9 The Joint Committee of the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers remarked that in the experience of their members, particularly messengers-at-arms and sheriff officers, when a poinding in business premises is being carried out, it is often clear that there are substantial sums of money in cash registers or in safes which present a better prospect of recovery for the creditor than the machinery, stock and office furniture etc available for poinding. Accordingly, they supported the introduction of money attachment and concluded that the diligence should extend to all types of premises occupied by the debtor, including dwellinghouses. To avoid arguments as to whether money attached had been set aside for special purposes, the Joint Committee suggested that provision should be made for a minimum sum to be left in the hands of the

debtor to meet immediate outgoings. The Joint Committee considered a sum of £100, variable by regulations, to be appropriate in the circumstances.

5.10 HM Customs and Excise observed that the seizure of money may be fraught with risks. For example, there may be difficulty in establishing ownership of money attached in a dwellinghouse.[14] However, they did not disagree with money attachment in principle. COSLA said that while unable to make a detailed response, they fully supported the new form of diligence, noting the safeguards for debtors.

5.11 In summary, all consultees (except one) who commented on the topic approved of, or did not object to, the introduction of the attachment of money found in business premises. Two consultees opposed the attachment of money where the debt was owed by an individual, though one thought it might be allowed in very exceptional circumstances. Only one consultee considered that money in the debtor's dwelling should be attachable.

5.12 **Assessment of the arguments.** We conclude that money attachment should be introduced, subject to several restrictions to protect debtors. First, it should not be competent to attach money situated in a dwellinghouse or in the residential part of mixed-use premises. Restriction to premises other than dwellinghouses would remove many of the objections to money attachment, and is unlikely to prejudice creditors unduly as most debtors do not keep substantial amounts of money at home. If there was a large sum it would be hidden and officers would have to rifle through drawers and cupboards in order to find it. There was clear support for such a restriction on consultation. Money in business premises is most unlikely to represent the debtor's social security benefits or the portion of the debtor's pay left after an earnings arrestment. Searches of non-residential premises are not as intrusive as searches of dwellinghouses. We are not in favour of exempting individuals as such from money attachment, as that would exempt sole traders who run a substantial business from their own business premises.

5.13 Secondly, money should not be attached if it is on the person of the debtor or any other individual. We think it would be socially unacceptable for an officer of court to conduct personal searches in order to find cash and other money. Nor should an officer of court be authorised to require individuals to hand over their handbags, wallets and purses for examination. The exercise of such powers would cause great and justifiable resentment.

5.14 We think there is no need to exempt a prescribed amount of money from attachment (as was suggested by the Joint Committee of the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers on consultation) if the diligence is to be restricted to non-residential premises. Such an exemption would serve to protect wages or benefits paid or drawn out in cash for essential living expenses. Cash in business premises is hardly likely to be derived from these sources. It might be thought that some money should be exempt as small shopkeepers or other traders might be relying on part of their takings to buy food and other necessary items for themselves and their families. Later in this Part we recommend that money attachment should be incompetent unless the proceeds of the diligence meet at least the full diligence expenses plus a proportion of the debt itself.[15] As

[14] We revert to this at para 5.31 below.
[15] Recommendation 67, para 5.27.

the minimum expenses would be over £50 there would be a *de facto* exemption of at least this amount of money.[16]

5.15 We recommend that:

63. (1) Provided a diligence exists against corporeal moveables owned by and in the possession of debtors, a new form of diligence in execution of sums due under decrees or other enforceable documents (to be called "money attachment") should be introduced for the attachment of money in the debtor's possession.

(2) Money attachment should be incompetent in respect of money situated in a dwellinghouse or in the residential part of a building.

(3) Officers of court carrying out money attachment should not have authority to search any individuals or their handbags, wallets or similar personal receptacles for money.

(4) Any new diligence against moveables in the debtor's possession should not be used to attach money.

What constitutes money?

5.16 Clearly cash (ie coins and banknotes) should be attachable. In our discussion paper we proposed that money attachment should also be competent in relation to negotiable instruments such as cheques, bills of exchange and promissory notes.[17] The categories of negotiable instrument are not closed, as the issue of whether a document is legally a negotiable instrument depends on the custom of merchants as recognised and affirmed by the courts.[18] The categories include bills of exchange (including cheques), promissory notes, dividend warrants, interest warrants, bankers' drafts, treasury and Exchequer bills, and various bearer securities.[19]

5.17 We consider that the new diligence of money attachment should in principle apply to cheques, bills of exchange, promissory notes and all negotiable instruments recognised as such by Scots law. First, since negotiable instruments are meant to pass from hand to hand like bags of money, they should be attachable by the same mode of diligence as we recommend for cash. Secondly, unless negotiable instruments are to be exempt from diligence (which would go against the principle of universal attachability[20]) they would otherwise have to be attached by the more complex and expensive diligence of attachment order. Thirdly, it would bring Scots law into line with other legal systems which have an effective system of enforcement against negotiable instruments. It might place too great a burden on officers of court to require them to identify, attach and remove all negotiable instruments from the debtor's premises. Most officers of court, and indeed many people in commercial practice, have no experience of some forms of negotiable instruments. Officers

[16] The exemption would be diminished and even vanish if moveable goods were also attached at the same time.
[17] Scot Law Com DP No 108, Proposal 21, para 3.7.
[18] Stair Memorial Encyclopaedia, vol 4, para 103.
[19] Gloag and Henderson, para 38-9.
[20] See para 5.3 above.

can recognise cash and cheques but, faced with commercial documents in a debtor's premises, cannot reasonably be expected to distinguish those which are negotiable from those which are not. An officer and the instructing creditor could be liable in damages if important documents which were not negotiable instruments were wrongfully removed. Conversely an officer might also be at risk of a claim by the instructing creditor for failing to recognise documents as negotiable instruments and so not attaching them. We suggest that an officer should have to be specifically instructed to attach money other than cash and cheques and that where such instructions were given the officer could engage the services of an expert in negotiable instruments who would go to the debtor's premises with the officer. Experts are already used in poindings when officers realise that the valuation of a particular item is outwith their expertise and "a professional valuer or other suitably skilled person" may be brought in to value it.[21] The expense of engaging an expert would be borne initially by the creditor and would serve to limit instructions to attach negotiable instruments to those cases where the probability of finding them was high. Although the view has been expressed that foreign currency can be poinded[22] we think that if money attachment is introduced it should be attachable by that diligence rather than the yet to be devised diligence for attaching moveables.

5.18 We recommend that:

64. (1) Cash (including foreign currency), cheques and other bills of exchange, promissory notes and all other forms of negotiable instrument should be attachable by the new diligence of money attachment.

(2) An officer of court should not be liable to the instructing creditor for failing to attach money other than cash or cheques unless specifically instructed to do so. An officer who receives such instructions may engage an expert to assist in identifying negotiable instruments. The expert's fee should form part of the expenses of the diligence.

Warrant for money attachment

5.19 In Discussion Paper No 108 we proposed that money attachment should be competent only if a sheriff, in a special application, made after a charge to pay had expired without payment, granted warrant to officers of court.[23] This proposal was based on the view that money attachment should be available only in exceptional circumstances where there was a real and substantial need. We therefore proposed that the creditor should have to show to the sheriff's satisfaction that the debtor had no substantial assets which could be attached by any other diligence, that there was reasonable cause to believe that sufficient money was present in the specified premises to make the diligence worthwhile, and that it was fair and reasonable to grant warrant.[24]

5.20 On consultation most of those responding agreed with our proposal. The Faculty of Advocates, however, thought that the sheriff should not have to be satisfied that it was fair and reasonable to grant the warrant, as this created unnecessary uncertainty. The Sheriffs

[21] 1987 Act, s 20(4).
[22] Maher and Cusine, para 7.53.
[23] Scot Law Com DP No 108, Proposal 22(1), para 3.12.
[24] *Ibid*, Proposal 22(3), para 3.12.

Principal queried how the sheriff was to be satisfied as to the criteria for granting warrant as they thought that mere statements in court by the creditor's agents should not be sufficient. The Joint Committee of the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers said that from a practical point of view, there were many advantages in allowing money to be attached contemporaneously with the execution of a poinding. Officers might come across money in the premises in the course of poinding goods there. In such a situation, they could hardly withdraw to apply to the sheriff for a warrant for money attachment and then return with confidence that the money would still be there. The Joint Committee thought that it would be preferable if the warrant for diligence in extract decrees authorised both poinding and attachment of money. They opposed any requirement that officers should be under an obligation to poind all available moveable property before attaching money. In their view, it should be left to the officers' discretion whether they attach money first or later.

5.21 In the other countries we have looked at a special warrant to seize money is not required.[25] The authority for diligence or seizure of goods also authorises the seizure of money. This, and the comments of the Joint Committee of the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers, have persuaded us to depart from the provisional proposals in our discussion paper for a separate application to the court for a warrant of money attachment. We now think that the warrant for diligence in extract decrees or other documents should authorise the attachment of money as a distinct and autonomous diligence in addition to those currently authorised. We agree with the Joint Committee that making available two separate diligences (attachment of moveables and money attachment), which could be executed simultaneously or separately as circumstances require, would be preferable to widening an attachment of moveables to include money attachment. The latter would give rise to difficulties because the details of the attachment stage would differ for goods and money and the steps by which an attachment of money may be completed would differ substantially from the procedure for selling attached goods. Where money and goods were attached at the same time there could however be a combined form of report to the sheriff.

5.22 We recommend that:

> **65. The warrant for diligence contained in an extract decree or other document should authorise the new diligence of money attachment which should be capable of being executed simultaneously with an attachment of moveable goods or separately.**

Charge to pay

5.23 A charge to pay is a formal demand in writing served by an officer of court on the debtor demanding payment of the sums due under the decree for payment within a specified time, in default of which certain diligences may be done.[26] Under our recommendations[27] a charge would also be an essential prelude to land attachment. In our discussion paper we proposed that the creditor should be entitled to apply for a warrant for attachment of money only if the debtor had been charged to pay and the charge had expired

[25] See Appendix A.
[26] 1987 Act, s 87.
[27] See Recommendation 4(1), para 3.39.

without payment being made.[28] All those who responded agreed. In our *Report on Diligence and Debtor Protection* we gave three reasons for retaining charges.[29] First, settlement of the debt (or abandonment by the creditor) is often made after a charge has been served. Service of a charge is a valuable means of eliciting payment in full or by instalments and so preventing further diligence. Secondly, a charge notifies debtors of their right to apply for a time to pay order. Thirdly, there might be resentment if officers were to turn up at debtors' premises to attach goods situated there without a prior warning that the enforcement process had reached that stage. We think that these points remain valid and therefore recommend that:

> **66. It should be incompetent to use money attachment to enforce a debt unless a charge to pay that debt had been served on the debtor and had expired without payment.**

Diligence to be incompetent unless sufficient money attached

5.24 The officer should be entitled to attach money only up to the sum recoverable under the decree or other document of debt. This sum should be the sum charged for, plus interest accrued, plus the diligence expenses chargeable against the debtor on the assumption that the diligence proceeds to realisation, less any payments to account that have been made.[30]

5.25 In our *Report on Poinding and Warrant Sale* we recommended that a poinding should be incompetent if the total appraised value of the non-exempt goods did not exceed the full expenses of poinding and selling the goods, plus the smaller of 10% of the debt or £50.[31] The purpose was to prevent poindings that conferred no or minimal economic benefit on either the debtor or the creditor. We would extend this recommendation to money attachment.[32] If insufficient money[33] was found the officer would make a formal report to this effect to the creditor and give a copy to the debtor. No report would be made to the sheriff as the diligence would terminate there and then.

5.26 The valuation of cash found would be straightforward. The officer could also readily convert foreign currency into sterling. Cheques and other negotiable instruments with a face value should be assumed to be worth their full face value. Bearer securities and other negotiable instruments without a face value would be more difficult, but the officer or the expert in attendance might be able to obtain an estimate of their value, for example by contacting a stockbroker. We would emphasise that a valuation at this stage would be simply for the purposes of deciding whether the attachment was competent.[34]

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[28] Scot Law Com DP No 108, Proposal 22(2), para 3.12.
[29] Scot Law Com No 95, para 5.8.
[30] A similar rule applies to poindings (1987 Act, s 19). If both money and goods were attached the combined values could be set against the combined expenses.
[31] Scot Law Com No 177, Recommendation 1, para 3.9.
[32] Where money and goods are attached then it would be the combined value of the goods and the money attached which would be used in deciding whether the diligences were competent.
[33] Or money and goods.
[34] Unlike poinding where the debtor is credited with the greater of the appraised value or the realised value (1987 Act, s 37(9)).

5.27 We recommend that:

67. (1) An attachment of money should be incompetent if the total estimated value of the items attached does not exceed the total of the expenses already incurred and the likely expenses of completing the diligence plus the lesser of 10% of the debt or £50 (or such other figures or formula as may be prescribed by the Scottish Ministers).

(2) Where money and goods are attached at the same time the competence of each diligence may, at the option of the officer of court, be assessed separately or the proceeds of both diligences may be weighed against the likely expenses of completing both.

(3) Where an attachment of money (whether with or without an attachment of goods) is incompetent by reason of paragraph (1) the officer should make a formal report of insufficient money (and goods) to the creditor. The report should list the money or goods, their value and the estimate of the expenses on which the decision not to proceed was based. A copy of this report should be handed to, or left on the premises for, the debtor.

Powers of entry and search

5.28 In our discussion paper we proposed [35] that it should not be competent to carry out an attachment of money on a Sunday, Christmas Day, New Year's Day, Good Friday or such other day as may be prescribed by Act of Sederunt, or to commence one before 8 am or after 8 pm or continue after 8 pm unless the officer has obtained prior authority from the sheriff.[36] Most of those consulted agreed. However, the WS Society thought that money should be attachable in business premises at any time they are actually open for business. For example, it should be competent to attach the takings of a pub or garage at 1 o'clock in the morning if it was open then. We are grateful for this comment. If officers arrived during "normal business hours" the previous night's takings might have been removed for banking or already banked. The disruption caused by an officer's visit in open business premises is the same whatever the hour. Many businesses now open on Sundays and Good Friday and even on New Years Day and Christmas Day. The restrictions should remain for entry to premises that are not open for business. We do not think that officers should be entitled to enter business premises that are unoccupied or closed during the hours of 8 pm to 8 am or on any of the above days for the purpose of attaching money there.

5.29 The authorisation of money attachment by the warrant for diligence in an extract decree or other document should include warrant to open shut and lockfast places. This would entitle an officer to enter any business premises occupied by the debtor and to open (or have opened) any locked cupboards, drawers, safes etc inside, using reasonable force if necessary.[37]

[35] Scot Law Com DP No 108, Proposal 24(3), para 3.18.
[36] These are the rules for poindings (1987 Act, s 17).
[37] These are the rules for poindings (1987 Act, s 87).

5.30 We recommend that:

68. (1) Money attachment should be incompetent in business premises:

(a) on a Sunday, Christmas Day, New Year's Day or Good Friday or on such other day as may be prescribed by Act of Sederunt; and

(b) between the hours of 8 pm and 8 am except with prior authority of the sheriff,

unless the premises are open for business.

(2) Officers of court executing a money attachment should be entitled to open shut and lockfast places.

Requirement of possession and presumption of ownership

5.31 Money will be attachable only if in the possession of and owned by the debtor. HM Customs and Excise observed that the seizure of money may give rise to difficulty in establishing ownership of sums found. The difficulty will arise in connection with cash and bearer instruments since cheques, bills and promissory notes would be expressed to be payable to the debtor. The solution lies in a presumption of ownership. We think that in executing a money attachment an officer of court should be entitled to proceed on the assumption that any money in the debtor's possession is owned by the debtor unless the officer knows or ought to know that the contrary is the case. The officer is not to be precluded from relying on that assumption by reason only of the fact that an assertion has been made that the money is not owned by the debtor.[38] We recommend that:

69. (1) Officers of court executing a money attachment should be entitled to presume that money in the possession of the debtor is owned by the debtor.

(2) Officers should be bound when carrying out a money attachment to make enquiries of any person present about the ownership of the money.

(3) Officers should not be entitled to rely on the above presumption in relation to any item of money if they know or ought to know (whether as a result of their enquiries or otherwise) that it does not belong to the debtor.

Procedure in executing a money attachment

5.32 We are unable to set out in detail the procedure for executing a money attachment as it would obviously be modelled on the procedure yet to be devised for attaching moveables in the debtor's possession. However the main steps seem clear. The officer accompanied by a witness would go to the debtor's business premises, demand payment of the debt and then search for money. Any creditor producing a warrant to attach money before the completion

[38] These are the rules for poindings (1987 Act, s 19).

of the attachment would be conjoined.[39] The officer would ask any person present about the ownership of any money found and proceed to attach it unless satisfied that it did not belong to the debtor.[40] We consider that the officer of court should enter in the prescribed form schedule of money attachment the total money and the total face value of the cheques in separate categories and itemise any other negotiable instruments with an estimate of their value.[41] A money attachment should be deemed to have been executed on the date when the schedule has been handed to any person present or left on the premises.[42] This would be the priority point in connection with the ranking of other diligences and sequestration.[43] The officer would then submit a report within a prescribed period to the sheriff court in whose jurisdiction the premises were situated.[44] The report would enable the sheriff to supervise the diligence and also provide a formal record of what was attached and the procedure followed. If the officer obtained a more accurate value for a negotiable instrument after completing the schedule this value should be mentioned in the report to the sheriff. Where corporeal moveables and money were attached at the same time one schedule detailing the attached goods and money could serve for both diligences. There could also be a single combined report.

5.33 The officer should remove the attached money from the premises. In Discussion Paper No 108 we proposed that the officer would lodge the attached money with the sheriff clerk who would bank the cash, retain any other items in safe custody and give the officer a receipt for the money lodged.[45] The Faculty of Advocates suggested that the officer should bank the cash. We are grateful for this suggestion. It would remove the need for the officer to keep the cash until lodging the report and for the court to receive and bank cash. Our recommendations for foreign currency are more complex. In other cases the foreign currency should be converted by the officer into sterling as soon as convenient after attachment and banked together with the cash. The officer's report would give details of the exchange rate used and commission charged. It has been said that in order to minimise exchange rate fluctuations conversion into sterling of the sum due under a decree granted in a foreign currency should be done as closely as possible to the date of payment[46]. However, the practice we recommend above avoids officers having to hold foreign currency in safe custody until the sheriff authorises payment. The officer should hold attached cheques and other negotiable instruments in safe custody to await the sheriff's order for disposal.

5.34 We recommend that:

70. (1) The procedure in executing a money attachment should generally be similar to the procedure to be devised for attaching corporeal moveables.

(2) The officer of court should complete a schedule of money attachment (in prescribed form) specifying the money attached and its value.

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[39] The 1987 Act, s 21(8) contains similar provisions for poinding.
[40] See Recommendation 69, para 5.31 above for the presumption as to ownership.
[41] See para 5.26 above.
[42] See 1987 Act, s 21(7) for a similar rule in relation to poinding.
[43] See para 7.11 below for sequestration.
[44] A report of a poinding has to be lodged within 14 days after the date of execution (1987 Act, s 22).
[45] Scot Law Com DP No 108, Proposal 26, para 3.24.
[46] *Commerzbank AG v Large* 1977 SC 375 at p 383 per Lord President Emslie.

(3) The officer of court should either hand the completed schedule of money attachment to the debtor or other person present or, where this is not possible, leave it on the premises. The money attachment should be deemed to have been executed at that time.

(4) The officer of court should submit a report of the money attachment to the sheriff court in whose jurisdiction the premises are situated within a prescribed period from the date of attachment.

Creditor's application for payment

5.35 Creditors should have to apply to the sheriff for the attached money to be paid or made over to them. We are not in favour of officers simply handing over the cash to creditors as happens in some jurisdictions. The cash may turn out not to belong to the debtor or there may have been some fundamental irregularity in the diligence. Moreover, a money attachment would almost always be carried out with an attachment of moveables where a report has to be lodged in court and an application made for warrant of sale. In Discussion Paper No 108 we proposed that this application should be made within six weeks from the date of execution of the money attachment.[47] Although there was no dissent on consultation, we now think that this period is too long and suggest that an application should have to be made no later than 14 days after the date when the report of money attachment was lodged with the sheriff court. In other diligences the attachment lasts for a substantial period in order to give the debtor time to find money to pay the debt.[48] There is no such need when the thing attached is money itself. We consider that the officer of court should be entitled to apply on behalf of the creditor[49] and envisage that officers would generally apply at the same time as lodging their report of money attachment. The application should be intimated to the debtor who should be given an opportunity to oppose it. If no application was made within the 14 day period, the sheriff should order the officer to return it to the debtor and the sheriff clerk should intimate this order to the creditor and debtor.

5.36 In our discussion paper we proposed that the sheriff should have power to declare the attachment null on the basis of a material irregularity and to order the return of the money.[50] This was agreed. We also proposed that the sheriff should have a discretionary power, on the debtor's motion, to order all or part of the money attached to be returned. In exercising this discretion the sheriff should be required to balance the respective interests of the debtor and the creditor, but should return to the debtor money which is required for the necessary living expenses of the debtor and family.[51] The Faculty of Advocates thought the balancing of interests was too vague, while the Scottish Consumer Council and the Scottish Sheriff Court Users Group considered that guidance would be needed as to what constituted necessary living expenses. The Sheriffs Principal commented that a proof might be required to resolve issues before the sheriff could exercise the power. We saw this power as being a useful protection for debtors where money in their homes had been attached. However,

[47] Scot Law Com DP No 108, Proposal 27(5), para 3.29.
[48] Arrestment, 3 years; poinding, 1 year; adjudication, 10 years; land attachment, 5 years recommended.
[49] An officer may apply for warrant to sell poinded goods (1987 Act, s 30).
[50] Scot Law Com DP No 108, Proposal 27(3), para 3.29.
[51] *Ibid*, Proposal 27(4), para 3.29.

because we recommend that money attachment be restricted to business premises we do not think that such a power is needed.

5.37 While the debtor or an interested third party may wish to oppose the creditor's application for payment of the attached money, we do not think that they should have to wait for an application to be made. The debtor or an interested third party should be entitled to apply to the sheriff as soon as the money attachment has been executed for release of the money on the ground that the money did not belong to the debtor or there was a material irregularity in the diligence.

5.38 We recommend that:

71. (1) The creditor should be entitled to apply to the sheriff for an order for payment of the money attached. The debtor should be given an opportunity to oppose. The application should have to be made when the report of money attachment is lodged or within 14 days thereafter.

(2) If no application was made within 14 days the money should cease to be attached. The sheriff should, without any application being made to this effect, order the officer of court to repay or return the attached money to the debtor and the sheriff clerk should intimate this order to the parties.

(3) The debtor or any interested third party should be entitled to apply to the sheriff for release of all or part of the money attached. The creditor should be given an opportunity to oppose. The application for release should be competent as soon as the money attachment is executed.

(4) The sheriff should have power to declare the attachment null and order the attached money to be returned if satisfied that there was a material irregularity in the attachment or the money did not belong to the debtor. Where the creditor applies for payment the sheriff should have power to declare the attachment null and order the attached money to be returned on the ground of a material irregularity, even if the application was not opposed.

Realisation and payment to the creditor

5.39 We turn now to consider how the sheriff's order that all or part of the attached money be paid to the creditor should be implemented. In the case of attached cash (British currency and foreign currency which was converted into sterling) which the officer has banked under our earlier recommendation, the officer of court should be directed to pay the creditor by means of a cheque drawn on that bank account. In Discussion Paper No 108 we proposed ways of realising cheques and other negotiable instruments.[52] The officer was to hand the attached cheques to the sheriff clerk who then banked them on the sheriff's order. When the sheriff ordered payment to the creditor the sheriff clerk was to pay by a cheque drawn on the court bank account. For other negotiable instruments the clerk was to hand them to the creditor with the sheriff's order transferring the debtor's interest to the creditor. The Faculty of Advocates thought that the officer should retain attached cheques rather than

[52] Scot Law Com DP No 108, Proposal 28, para 3.32.

handing them to the sheriff clerk, while the Sheriffs Principal considered that cheques should be treated in the same way as negotiable instruments. We have subsequently had a discussion with an official from one of the Scottish clearing banks. We now think that the sheriff should appoint the officer of court as the irrevocable agent of the debtor for the purposes of liquidating the attached negotiable instruments (cheques, bills of exchange and other items) and receiving payment.[53] This seems simpler than a statutory assignation of these items in favour of the creditor followed by the officer acting as the creditor's agent. It avoids the creditor becoming a party to the instrument and having to intimate the assignation to the other parties. It also avoids any claim against the collecting or paying bankers on the ground that payment has been made to someone other than the true owner without having to legislate for that effect. As agent, the officer of court would be entitled to take any steps which the debtor could have taken, such as presenting the instrument for payment and receiving payment, raising an action for payment against any party liable under the instrument, or (subject to the exception in the next paragraph) negotiating the instrument. Where the officer transfers an instrument by indorsement, the transferee would succeed to the benefit of any claim by the debtor against the drawer or other indorsers, but should have no recourse against the officer or the debtor.

5.40 Section 81A of the Bills of Exchange Act 1882[54] provides that a cheque which is crossed and expressed to be payable "account payee" or "a/c payee" is not transferable and is valid only as regards the parties to it. Nearly all cheques are now in this form. Section 8(1) of the 1882 Act makes similar provision for bills expressed to be non transferable. The officer should be entitled by virtue of the sheriff's order to present such a cheque or bill for payment or to sue any party liable on it, but not to transfer it for value to a third party. The attached cheques in favour of the debtor would be paid into the officer's bank account together with a copy of the sheriff's order appointing the officer as agent of the debtor. Normally the cheques will clear, putting the officer in a position to pay the creditor. Only very occasionally would the officer have to sue (after taking the creditor's instructions) on a dishonoured cheque.

5.41 We recommend that:

72. (1) The sheriff's order for payment should authorise the officer of court to pay to the creditor a sum equivalent to the amount of the attached cash banked by the officer of court.

(2) The sheriff's order for payment should have the effect of constituting the officer of court as the irrevocable agent of the debtor in relation to attached cheques and negotiable instruments. In particular, the officer of court should be authorised:

(a) to present the cheque or instrument for payment and to receive payment thereon;

(b) to raise an action for payment against any party liable under the cheque or instrument; and

[53] This is the solution adopted in Alberta by the Civil Enforcement Act 1994, chapter C-10.5, s 50.

[54] As inserted by the Cheques Act 1992, s 1.

(c) except where the cheque or instrument is not transferable but only valid between the parties, to negotiate the instrument for value.

(3) The officer of court should be under a duty to obtain the highest amount which can reasonably be obtained from the attached cheques or instruments.

Expenses

5.42 The general rule in diligence expenses is that the creditor's necessary expenses in executing the diligence are chargeable against the debtor. In Discussion Paper No 108 we proposed that this rule should apply to money attachment and that the expenses should generally be recoverable only by means of that diligence or an insolvency or ranking process The expenses were not to be recoverable by means of a separate legal action or other diligence.[55] This was agreed on consultation. If moveables and money were attached at the same time then the total expenses could be recovered from the combined proceeds.

5.43 Turning to the expenses of applications to the sheriff, we proposed that the expenses of the creditor's application for payment should be chargeable against the debtor as that is to be an essential step in the diligence. The expenses of that application should generally be limited to what would have been incurred if the application were unopposed. The creditor and the debtor should have to bear their own expenses of further procedure caused by the debtor's opposition. As regards other applications each side should bear their own expenses. The sheriff however should have power to award expenses not exceeding a prescribed sum where a party acts frivolously.[56] The Faculty of Advocates thought that these rules would be unfair to creditors. We recommended similar rules in our 1985 *Report on Diligence and Debtor Protection* [57] in order not to discourage debtors from using the courts as we considered that a major factor inhibiting recourse to the courts was the fear of being found liable for expenses. These rules were included in the Debtors (Scotland) Act 1987[58] but the experience has been that few debtors apply to the courts in connection with diligence or oppose creditors applications.[59]

5.44 To put a brake on speculative money attachments we proposed that the expenses of obtaining and executing a warrant for money attachment should not be chargeable against the debtor at all if less than the amount of those expenses was attached. Our earlier recommendation that attachment should be incompetent unless the likely proceeds are sufficient to meet the full diligence expenses and a proportion of the debt achieves this in another way.

5.45 We recommend that:

73. (1) The expenses properly incurred by a creditor in executing the diligence of money attachment should be chargeable against the debtor.

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[55] Scot Law Com DP No 108, Proposal 29, para 3.36.
[56] These proposals were modelled on the 1987 Act, s 92 where the prescribed sum is £25.
[57] Scot Law Com No 95, para 9.37.
[58] S 92 and Sch 1.
[59] Fleming and Platts, *SOCRU Analysis of Diligence Statistics*, p 22 and Table 15; Fleming, *SOCRU Study of Facilitators*, p 78.

(2) The expenses should, unless paid by the debtor, be recoverable from the proceeds of the attachment concerned but (apart from the expenses of the charge) not by any other legal process except insolvency or ranking processes.

(3) Any expenses not recovered by the time the diligence is completed or ceases to have effect should cease to be chargeable against the debtor, except as aforesaid.

(4) Each party should bear their own expenses in relation to incidental court applications, but the debtor should be liable for the expenses of the creditor's application for payment of the attached money on the basis that it was unopposed and the court should be empowered to award expenses not exceeding a prescribed sum if an application or an objection was frivolous.

Ascription

5.46 Rules of ascription are required to deal with partial payments of the total sum due by the debtor. In terms of section 94 of the Debtors (Scotland) Act 1987 a payment is to be ascribed first to diligence expenses, then to interest accrued on the debt and finally to the debt itself. We think that the same rule should apply to money attachment. We therefore recommend that:

74. The proceeds of money attachment or any payment by the debtor while the diligence is in effect should be ascribed:

(a) to the expenses of the money attachment which are chargeable against the debtor;

(b) to interest on the sum due under the decree or other document accrued to the date of execution of the money attachment; and

(c) to any other sum due under the decree or other document (which will include the debt itself),

in that order.

Report to the sheriff

5.47 The final stage of money attachment as set out in Discussion Paper No 108 was a report to the sheriff setting out the proceeds of the diligence, the expenses and the balance due to or by the debtor.[60] A similar final stage in poinding allows the expenses to be taxed and the balance to be verified by the auditor of court, and the sheriff to supervise the way in which the diligence has been carried out.[61] We think that such a report should have to be lodged where money and moveables were attached at the same time or where not

[60] Scot Law Com DP No 108, Proposal 28(2), para 3.32.
[61] 1987 Act, s 39.

insubstantial expenses have been incurred in realising negotiable instruments other than cheques. But where only cash and cheques were attached the creditor could submit an account of the diligence expenses when applying to the sheriff for payment. The sheriff would then take the audited expenses into account in deciding how much of the attached money should be paid to the creditor in order to satisfy the debt, interest accrued and expenses. We recommend that:

75. (1) The officer of court should make a report in prescribed form to the sheriff setting out the proceeds of the money attachment, the expenses chargeable against the debtor and the balance due to or by the debtor.

(2) The sheriff should have the report audited by the auditor of court who would tax the expenses. After giving the creditor and debtor an opportunity to challenge the auditor's report the sheriff would declare the balance due to or by the debtor.

Time to pay

5.48 If a time to pay direction has been attached to a decree the creditor is prevented from charging the debtor to pay in terms of section 2(1)(a) of the Debtors (Scotland) Act 1987. This would prevent the creditor from carrying out a money attachment while the time to pay direction is in effect because of our earlier recommendation that an expired charge is to be a pre-requisite to that diligence.[62]

5.49 In our discussion paper we proposed that the debtor should be entitled to apply for a time to pay order under the Debtors (Scotland) Act 1987 at any time after the service of a charge up until the time when the sheriff granted a warrant for money attachment, and that an interim order under section 6(3) of that Act should prevent any application for warrant being made and any pending application should fall. All of those who responded were in favour of debtors having time to pay. In terms of our earlier recommendation[63] money could be attached without any further warrant from the sheriff at any time after a charge to pay has expired. We do not think that debtors should be allowed time to pay once money has been seized which can be used to pay the debt.[64] A time to pay application should therefore be competent only in the period from the service of the charge until a money attachment is carried out.[65] The effect of an interim order[66] in a time to pay application should be that a money attachment cannot thereafter be competently executed. If one is executed inadvertently the sheriff should have to recall it. The grant of a time to pay order should have the same effect.

[62] Recommendation 66, para 5.23.
[63] Recommendation 65, para 5.22.
[64] Once the diligence had been completed by payment of the attached money to the creditor the debtor could apply for a time to pay order in respect of any balance remaining due.
[65] Where moveables and money are attached together the debtor should be able to apply for a time to pay order up until the sheriff grants warrant of sale (the current rule for poinding, 1987 Act, s 5(5)(a)). The sheriff should set any attached money against the debt and grant a time to pay order for the balance.
[66] 1987 Act, s 8(1).

5.50 We recommend that:

76. (1) An application for a time to pay order under the Debtors (Scotland) Act 1987 in respect of a debt should be competent at any time after the service of a charge to pay until the execution of a money attachment for that debt.

(2) While an interim order sisting diligence under section 6(3) of that Act or a time to pay order is in effect it should be incompetent to execute a money attachment in respect of that debt.

Sequestration and liquidation

5.51 Section 37(4) of the Bankruptcy (Scotland) Act 1985 provides that no poinding executed on or after the date of sequestration is effectual to create a preference for the creditor. The poinded goods or the proceeds of their sale have to be handed over to the trustee.[67] The same rules should apply to money attachment.

5.52 We suggest in Part 7 that a money attachment executed more than six months prior to the date of sequestration should create a preference for the attaching creditor. Given the short time-scale for following through the diligence, it would be unusual for a money attachment executed more than six months prior to the date of sequestration to remain uncompleted at that date. If such an eventuality did occur, the rules for poinding should be adopted.[68] The attached money should vest in the trustee and would be disposed of by him under the sequestration. Where the debtor was a company the attached money should remain the property of the company and should be disposed of by the liquidator. In either case the creditor would have a preference on the proceeds of disposal.

5.53 We recommend that:

77. (1) On or after the date of sequestration of a debtor or the date of commencement of winding up a debtor company, it should not be competent for the creditor:

(a) to execute a money attachment, or

(b) to take any further steps in pursuance of an already executed attachment.

(2) On the date of sequestration of a debtor's estate, money of the debtor which had been attached should vest in the trustee unless before that date it had been paid to the creditor or realised in pursuance of a court order.

(3) Where prior to the date of the winding up, a creditor had attached the company's money, then the liquidator should have the power to take the money into his custody and sell it unless before that date the money had been paid to the creditor or realised in pursuance of a court order.

[67] Applied to liquidations by Insolvency Act 1986, s 185.
[68] 1985 Act, ss 31(1),(4) and 33(3); Graham Stewart, p 364.

Part 6 Inhibitions

Introduction

6.1 Inhibition is a diligence against heritable property situated in Scotland belonging to the debtor. On being registered in the personal register, an inhibition affects all such property without the need to specify it. Debtors who are inhibited are prohibited from dealing with their property to the prejudice of the inhibiting creditor. The inhibitor may reduce any dealings such as a sale or transfer of, or a grant of security over, the property that the debtor carries out after the inhibition becomes effective unless the dealing is in implement of a pre-existing obligation. Inhibition "freezes" the debtor's heritable property, but does not give the inhibitor any right to the debtor's property or to sell it. An inhibiting creditor also obtains some preference in ranking in relation to the inhibited property over debts which the debtor incurs after the inhibition takes effect.

6.2 Although an inhibition has limited scope, creditors generally regard it as an effective diligence. An inhibition may lead to payment of the debt, either immediately or when the debtor wishes to deal with the property. Often the debtor becomes insolvent during the lifetime of an inhibition and the inhibition may give the creditor some preference in the insolvency process over post-inhibition creditors.

6.3 Inhibition is a widely used diligence. There were 3,593 and 3,463 inhibitions registered in the personal register in 1999 and 2000 respectively.[1] Many inhibitions are used on the dependence of debt actions so as to ensure that the defender's property remains available to satisfy a decree in favour of the pursuer. If the pursuer is unsuccessful, the inhibition has no effect.[2]

A. RETENTION OF INHIBITIONS

6.4 In Discussion Paper No 107 we sought views on whether if land attachment were to be introduced in terms of the scheme we then put forward, inhibition should be abolished or retained with some or all of the proposed reforms.[3] The main arguments for abolishing inhibition were:

(1) The connection between an inhibitee and an owner of registered property might not be made, causing problems for third parties and, in land registration cases, the Keeper.

(2) The large number of inhibition documents makes searching the personal register for other items more difficult.

(3) Inhibitions may be ineffective or oppressive.

[1] Information kindly supplied by Mr M Webster, Registers of Scotland. These figures do not include notices of inhibition or discharges.
[2] *Gordon v Duncan* (1827) 5 S 602.
[3] Proposal 33, para 4.33.

(4) Retaining inhibitions while introducing notices of land attachment (which make the land litigious for the first 14 days) results in an unnecessarily complex system.

6.5 The professional searchers (including the Keeper's staff who search the registers) experience difficulties in connecting (a) the names of inhibitees appearing in the personal register with the name of the person being searched against, and (b) persons inhibited in the personal register with the owners of heritable property registered in the property registers. The same person may be described quite properly each time using a different address and/or a different version of the name. The difficulties are illustrated by the case of *Atlas Appointments Limited v Tinsley*.[4] Mr Tinsley had been inhibited as "Steve Tinsley" while in the title to property registered in the Sasine Register he was "Stephen John Tinsley". It was held that the inhibition was valid even though it was not discovered by the computer-assisted searching system ordinarily used at that time by the Keeper and professional searchers. Bona fide purchasers for value relying on a clear, or ostensibly clear, search may therefore find that their title to property registered in the Sasine Register may be reduced on the ground of an undiscovered but nevertheless valid inhibition. Even worse, it is not clear that they would have an effective right to compensation. In Land Register transactions bona fide purchasers are protected since unless the inhibition is discovered before registration the Keeper will not exclude indemnity when registering the purchaser's title. However, the Keeper may have to compensate an inhibitor whose inhibition was not discovered and noted on the title sheet when registering the purchaser's interest because the inhibitor cannot reduce the transaction.[5] These consequences would however be largely avoided by the introduction of schemes of protection which we proposed in our discussion paper and recommend later in this Part.[6] The notice of land attachment would not give rise to these problems since the notice would be registered in the property registers against the land in question rather than the personal register. A search of the property registers in connection with a transaction relating to the land could therefore not fail to discover the notice.

6.6 Inhibitions and other documents relating to inhibitions (such as notices of inhibition and discharges) make up the bulk of the entries in the personal register. Abolition of inhibition would make personal searches for the remaining items, such as awards of sequestration, easier and more likely to be accurate.

6.7 Land attachment which targets specified land owned by the debtor is arguably better than a "scatter gun" diligence like inhibition. Inhibition is effective if the debtor owns heritable property and the entries in the personal register and the property register can be connected. However if the debtor owns no heritable property in Scotland it is ineffective and simply clutters up a public register to no purpose. Inhibition may also be oppressive to debtors such as developers who are thereby prevented from carrying on with disposals in their normal course of business.

6.8 The retention of inhibition and the introduction of land attachment would arguably result in an unnecessarily complex system. There would be two forms of diligence with an

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[4] 1997 SC 200.
[5] See para 6.126 below.
[6] Recommendations 95 and 96, paras 6.123 and 6.134.

inhibitory effect, the normal inhibition and the litigiosity arising from a notice of land attachment.

6.9 In our discussion paper we listed the following arguments for retaining inhibition:

(1) Inhibition affects the debtor's whole heritable property, including attachable property which cannot be reached by land attachment.[7]

(2) Inhibition is relatively inexpensive and easy for creditors to use.

(3) Inhibition is a relatively humane diligence for debtors.

(4) Inhibition can be used on the dependence of an action and otherwise to give effect to a personal prohibition against transactions with heritable property.

(5) Retaining inhibition while introducing land attachment would give creditors a choice of diligence against heritable property.

6.10 An inhibition affects the debtor's whole heritable property without the need to specify it. It affects not only property to which the debtor has a title registered in the property registers but also unregistered registrable rights[8] and unregistrable rights.[9] Unregistered but registrable rights would be attachable by land attachment, but in practice the creditor may not have access to the relevant information or documents. We consider that it would not be acceptable to force debtors on pain of imprisonment to make these available to their creditors. In the absence of inhibition such rights would be attachable only by sequestration, where the permanent trustee is vested in the debtor's whole estate and has power to require documents to be produced. Unregistrable rights would be attachable by attachment order, but this is a more complex and expensive diligence than inhibition.

6.11 A creditor using inhibition does not need to specify the debtor's heritable property, so does not have to go to the trouble and expense of first finding out from the property registers or otherwise what heritable property the debtor owns. By contrast land attachment is likely to be a much more expensive diligence than inhibition. The creditor will have to specify the land sought to be attached. A search of the property registers for the whole of Scotland would cost several hundreds of pounds. Even if the creditor had information about the debtor's home or business premises a search in the property registers against that property would be necessary to provide the proper description needed for a notice of land attachment.

6.12 Inhibition does not by itself deprive debtors of the ownership or possession of their property. Residential occupiers cannot be made homeless through the forced sale of their homes. Inhibitees who wish to sell will usually be able to pay off the debt out of the proceeds of sale. Unlike the expiry of a charge to pay which precedes land attachment, inhibition does not render debtors apparently insolvent, which may trigger their insolvency, the calling up of standard securities or the irritancy of a lease.

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[7] Such as a lease for less than 20 years or a personal right to a conveyance of heritable property.

[8] Such as the right of a purchaser holding a delivered by unregistered disposition or a legatee to whom the executors have docketed a certificate of confirmation.

[9] Such as a lease for less than 20 years.

6.13 Inhibition is frequently used by pursuers on the dependence of actions for payment of money. At the start of litigation pursuers may not have time to ascertain what property the debtor owns. A relatively inexpensive global diligence that freezes whatever heritable property the debtor has is appropriate and ensures that the property remains available to satisfy any decree obtained.

6.14 The final argument for retaining inhibitions is that creditors should have a choice. They may prefer the global untargeted diligence of inhibition even though it may not be as effective as land attachment against specified items of property.

Responses on consultation

6.15 All those who responded to the question of whether inhibition should be abolished or retained with reforms, were in favour of retention. The Committee of Scottish Clearing Bankers suggested that there might be one diligence procedure against land combining inhibition and land attachment. We do not think it is possible to combine a global diligence with one where the property attached has to be specified. Several bodies considered that a global diligence affecting all the debtor's property was very useful, particularly on the dependence of payment actions. They said that creditors often have only a limited knowledge of their debtors' affairs and would be unwilling to spend considerable sums of money in discovering exactly what property (if any) the debtor possesses. Mr Connal, an experienced litigation solicitor, said he had had several cases where an inhibition had resulted in payment of the debt years afterwards because the debtor wished to deal with property of which the creditor had been unaware. In the light of the responses on consultation we have no hesitation in recommending that inhibition should be retained. Creditors should have a choice whether to use inhibition or land attachment or both, as the two diligences are complementary in their effect. We therefore recommend that:

> **78. The diligence of inhibition should be retained but with the reforms we recommend in Recommendations 80 to 97 below.**

Inhibition and adjudgeability

6.16 The diligence of inhibition affects only heritable, not moveable, property. The test for determining what is heritable for this purpose is that property which can be attached by adjudication for debt is affected by inhibition.[10] In Part 2 we recommend that the diligence of adjudication for debt should be abolished. In Part 3 we recommend that there should be a new diligence against the debtor's land (which we called land attachment). In Part 4 we further recommend that there should be a new diligence of attachment orders which would replace the existing role of adjudication as a residual diligence. As a residual diligence an attachment order would have effect against forms of heritable property which did not fall within the scope of land attachment. The effect of the abolition of adjudication for debt is that the criterion of adjudgeability can no longer be used as the test for property which is subject to inhibition. Accordingly there is a need to re-state this test to take account of the abolition of adjudication. We believe that the same general principle should apply that only heritable property subject to land attachment or an attachment order is affected by the diligence of inhibition.

[10] Graham Stewart, p 547 and authorities therein cited.

6.17 We recommend that:

79. Property in respect of which inhibition has effect should be heritable property which can be attached by land attachment or an attachment order.

B. WARRANT FOR INHIBITION

6.18 We turn to consider warrants for inhibition in execution of court decrees, writs registered for execution and documents having equivalent effect. At present the warrant for execution contained in an extract of a decree of the ordinary courts of law (Court of Session, the High Court of Justiciary, the Court of Teinds or the sheriff court) or an extract of a writ registered for execution in the Books of Council and Session or sheriff court books does not authorise inhibition.[11] A creditor seeking to enforce the decree or writ by inhibition has to apply for letters of inhibition to the Court of Session.[12] The prescribed form application is accompanied by the extract decree or writ and any other necessary documents. The application is signed by or on behalf of the Deputy Principal Clerk of Session if it is in order and the applicant is entitled to a warrant for inhibition.[13] The signed application is then signeted and the signeted form of application constitutes the letters of inhibition. If the Deputy Principal Clerk refuses the application, it may be placed before a Lord Ordinary whose decision is final.[14]

6.19 In Discussion Paper No 107 we proposed[15] that the warrant for execution in extracts of court decrees and registered writs for payment of money should authorise inhibition, even sheriff court decrees and writs registered in the books of the sheriff court. The present system merely interposes a purely formal step which adds to the expense of diligence. Creditors, agents and Court of Session staff have to spend time in preparing and processing respectively the applications for letters. In 2000 there were 3,438 applications for letters of inhibition.[16]

6.20 Our proposal was agreed by all those who responded. In our view, this reform is long overdue. It is only for historical reasons that inhibition is a purely Court of Session process. For the avoidance of doubt we also proposed that a warrant for inhibition emanating from a sheriff court should affect the inhibitee's heritable property throughout Scotland and should not be restricted to property within the sheriffdom.[17] This was also supported on consultation. While supporting the proposal, the Sheriffs Principal pointed out that it conflicted with the principle that a sheriff's orders were effective only in the sheriffdom. It is inevitable that a global diligence like inhibition has a Scotland-wide effect. Moreover, other sheriff court warrants for diligence may be executed throughout Scotland by virtue of section 91 of the Debtors (Scotland) Act 1987.[18]

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[11] 1987 Act, s 87.
[12] RCS, Rule 59.1 and Forms 59.1B-F.
[13] For example, that the decree is for payment of money (including expenses).
[14] RCS, Rule 59.1(4).
[15] Scot Law Com DP No 107, Proposal 6, para 3.39.
[16] Information supplied by the Deputy Principal Clerk of Session. There is a £25 fee for an application and creditors will also have pay their agents for preparing and submitting applications for letters.
[17] Scot Law Com DP No 107, Proposal 6, para 3.39.
[18] This removed the need to obtain a warrant of concurrence from the sheriff of any other sheriffdom in which the sheriff court warrant was to be executed.

6.21 Many other orders and awards are declared to be enforceable as if they were decrees of court,[19] awards registered in the Books of Council and Session[20] or equivalent to extract registered decrees arbitral.[21] In our discussion paper we pointed out that our proposal for extracts of decrees and registered writs to contain warrant for inhibition would mean that these various orders and awards would become enforceable in like manner.[22] We saw no reason to create a distinction between the various types of enforceable documents and there was no dissent on consultation.

6.22 Where an extract decree or writ for payment of money authorises inhibition, the creditor should not be entitled to apply for letters of inhibition. Letters will also be unnecessary for inhibition on the dependence and in security if the recommendations in our earlier *Report on Diligence on the Dependence and Admiralty Arrestments*[23] are implemented. In our discussion paper we asked whether there were any decrees or documents which were not dealt with by our proposal and previous recommendations and for which letters of inhibition needed to be retained.[24] Although no examples were given to us by those responding we do not think that letters of inhibitions should be abolished at this stage. It would be prudent to wait until the new system has been in operation for some time and it is clear that there are no situations where letters of inhibitions remain necessary.

6.23 So far we have considered inhibition as a diligence in execution of decrees and their equivalents involving payment of money, such as a debt or damages. However, inhibition is also competent on the dependence of pecuniary actions. In our *Report on Diligence on the Dependence and Admiralty Arrestments*[25] we recommended that the court (Court of Session or sheriff court) should, on an application by the pursuer, grant warrant for such inhibitions on the dependence of an action before it. This inhibition on the dependence would be automatically converted into an inhibition in execution on the granting of decree in favour of the pursuer. We adhere to that recommendation.

6.24 Inhibition is also competent on the dependence of an action, and in execution of a decree, of specific implement of an obligation to convey or grant a real right over land.[26] The extract decree does not authorise the normal diligences. The methods of enforcement include an application for the obligant's imprisonment[27] or for the clerk of court to sign the necessary documents in place of the obligant.[28] Inhibition prevents evasion of the decree by a disposal of the land. We think that the pursuer should have to apply for a warrant of inhibition (if there had been no inhibition on the dependence of the action) rather than this being authorised by the extract decree itself.

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[19] Eg a Scottish Land Court order-enforceable as if it were a decree of the sheriff having jurisdiction in the area in which it is to be enforced (Scottish Land Court Act 1993, Sch 1, para 16).

[20] Eg an order of the Lands Tribunal for Scotland (Lands Tribunal Act 1949, s 3(12), as amended by s 19 of the Land Tenure Reform (Scotland) Act 1974).

[21] Eg an order for payment of money made by an industrial tribunal (Employment Protection (Consolidation) Act 1978, Sch 9, para 7(2), as amended by the Employment Act 1980, Sch 1, para 27).

[22] Scot Law Com DP No 107, paras 3.41-3.45.

[23] Scot Law Com No 164, Part 3, paras 6.59-6.64.

[24] Para 3.40.

[25] Scot Law Com No 164, Recommendation 41(3), para 6.13.

[26] Graham Stewart, pp 528, 532; *Barstow v Menzies* (1840) 2 D 611; *Seaforth's Trs v Macaulay* (1844) 7 D 180.

[27] Law Reform (Miscellaneous Provisions)(Scotland) Act 1940, s 1. The court may substitute payment of a sum of money or such other order as appears just and equitable.

[28] See s 5A of the Sheriff Courts (Scotland) Act 1907 (added by s 17 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985) for implementation of sheriff court decrees.

6.25 We recommend that:

80. (1) Warrants of execution contained in:

(a) extract decrees of the Court of Session, the High Court of Justiciary, the Court of Teinds and the sheriff court;

(b) writs registered for execution in the Books of Council and Session or sheriff court books; and

(c) other orders or awards enforceable as if they were decrees or registered writs,

should, where the decree or other document contains or includes an obligation to pay money, authorise inhibition in addition to other diligences. Accordingly it should no longer be competent to obtain a warrant for inhibition in execution of such decrees, writs, orders or awards by way of an application for letters of inhibition.

(2) Warrant to inhibit in execution of a decree ordaining specific implement of an obligation to convey heritable property or to grant a real right in security or other right over such property should have to be granted, on application by the pursuer, by the court granting the decree.

(3) An inhibition in pursuance of a warrant for execution emanating (or treated as emanating) from a sheriff court, or a warrant granted by a sheriff under paragraph (2) above should affect the inhibitee's heritable property throughout Scotland, not merely property within the sheriffdom.

Consequential amendments will be needed to section 155 of, and Schedule PP to, the Titles to Land Consolidation (Scotland) Act 1868 as these provisions assume that the only warrants for inhibition are in letters of inhibition or a signeted summons.

6.26 In Discussion Paper No 107 we also looked at several special types of order for payment of money for which the available diligences are prescribed by the relevant statutes.[29] These were fines,[30] compensation orders,[31] child support liability orders[32] and summary warrants for recovery of central and local government tax arrears.[33] We asked whether inhibition should be available in relation to these. There was unqualified support

[29] Scot Law Com DP No 107, paras 3.46-3.51.
[30] Criminal Procedure (Scotland) Act 1995, s 221.
[31] Criminal Procedure (Scotland) Act 1995, s 252.
[32] Child Support Act 1991, s 38.
[33] Local Government (Scotland) Act 1947, s 247 as substituted by the 1987 Act, Sch 4, para 1 (non domestic rates); Taxes Management Act 1970, s 63 as amended by the 1987 Act, Sch 4, para 2 (income tax, corporation tax and capital gains tax) and the Stamp Duty Reserve Tax (Amendment) Regulations 1993; Local Government Finance Act 1992, Sch 8 (council tax and water charges); Finance Act 1997, s 52 (excise and customs duties apart from vehicle excise duty, value added tax, insurance premium tax, landfill tax, any agricultural levy of the European community, and sums recoverable as any of the above); Social security Act 1998, s 63 (social security contributions); Local Government etc (Scotland) act 1994, Sch 10, para 2(3) (charges for services provided by water and sewerage authority); Abolition of Domestic Rates etc (Scotland) Act 1987, Sch 2, para 7, as amended by Local Government Finance Act 1988, Sch 13, Part IV (community charge and community water charge); Car Tax Act 1983, Sch 1, as amended by the 1987 Act, Sch 4, para 3.

on consultation for inhibition to be available to enforce fines, compensation orders and child support liability orders. Accordingly we recommend that:

81. (1) The warrant for execution contained in the extract of an order imposing a fine or other financial penalty or of a compensation order should authorise inhibition in addition to the diligences already authorised.

(2) Section 38 of the Child Support Act 1991 (liability order by sheriff "apt to found Bill of inhibition") should be amended so that an extract of a liability order would automatically authorise inhibition at the instance of the Secretary of State of the person against whom the order was made in addition to the diligences already authorised.

6.27 Under section 32 of the Proceeds of Crime (Scotland) Act 1995, the Court of Session, on application by the Lord Advocate, may grant warrant for inhibition against any person interdicted by a restraint order or an interdict under section 28(8). The warrant has the effect of letters of inhibition and is to be registered forthwith in the personal register by the Lord Advocate. Restraint orders may be granted in the Court of Session where the criminal proceedings are taking place, or are to take place, in the High Court of Justiciary. Sheriffs may grant restraint orders in relation to proceedings in their courts.[34] We proposed in our discussion paper that the suggested extension of inhibition to sheriff court decrees should also apply in relation to sheriff court restraint orders. All those responding agreed, with the exception of Professor Gretton. We understand that the present requirement to apply to the Court of Session when a sheriff has granted a restraint order imposes a delay of one or two weeks. We continue to support extension to the sheriff courts. A consequential amendment would be needed to section 18(2) of the Drug Trafficking Act 1994 and paragraph 16 of schedule 4 to the Prevention of Terrorism (Temporary Provisions) Act 1989 which refer only to orders made by the Court of Session. There are two instances in this area where we think the Court of Session should continue to have exclusive jurisdiction to grant warrant for inhibition. First, under section 35 (recognition and enforcement of orders made in England and Wales), English orders are registered in the Court of Session for enforcement in Scotland. Warrant for inhibition on these orders under section 37 (inhibition of Scottish property affected by order registered under section 35) should therefore continue to be granted by the Court of Session.[35] Second, section 46 of the Proceeds of Crime (Scotland) Act 1995 provides for forfeiture of property where the accused dies before sentence. The Court of Session has exclusive jurisdiction to deal with this type of case.

6.28 Professor Gretton thought that inhibition on restraint orders should be abolished altogether since the Lord Advocate was unable to reduce a transaction in breach of the inhibition and adjudge the property disposed of. We do not agree that inhibition on restraint orders should be abolished as they have a useful role to play in combating drug trafficking, terrorism and other serious offences. Any problems with the enforcement of such inhibitions should be addressed so as to make them more effective. An inhibition on a restraint order has effect as if it were on the dependence of a payment action by the Lord

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[34] Proceeds of Crime (Scotland) Act 1995, s 28.

[35] However, s 37(3) should be repealed because it glosses s 158 of the Titles to Land Consolidation (Scotland) Act 1868 which has been repealed by the Act of Sederunt (Rules of the Court of Session 1994) 1994 (SI 1994/1443).

Advocate.[36] It is not competent to reduce a prejudicial transaction by the inhibitee on the basis of an inhibition on the dependence; the creditor must wait until decree in the payment action is granted.[37] A restraint order does not change into a confiscation order on conviction. It lasts until any confiscation order imposed on conviction is satisfied; it remains as if on the dependence so that reduction is incompetent. Furthermore, reduction only paves the way for the inhibitor to adjudge the property for the debt due. In a restraint order there is no actual debt due so that adjudication would be incompetent. We do not make any detailed recommendations for reform but merely draw these points to the attention of the competent authorities. We recommend that:

> **82. Where a sheriff has granted a restraint order under section 28 of the Proceeds of Crime (Scotland) Act 1995 a sheriff of that sheriffdom should have power to grant, on application by the procurator fiscal, warrant for inhibition against any person interdicted by that restraint order or an interdict under section 28(8).**

C. SERVICE AND REGISTRATION OF INHIBITIONS

Existing procedure for service and registration of inhibitions

6.29 After obtaining a warrant for inhibition (letters of inhibition, summons or certified copy interlocutor), the inhibitor instructs a messenger-at-arms[38] to serve a schedule of inhibition on the inhibitee. The prescribed form schedule contains the designations of the inhibitor and the inhibitee and a copy of the warrant is attached to it. It inhibits the inhibitee from "selling, disposing of, burdening or otherwise affecting your land and other heritable property to the prejudice of [name and address of inhibitor]".[39] When serving the schedule, the messenger must be in possession of the document containing the warrant to inhibit and must show that document to the inhibitee on request.[40]

6.30 Service is effected by any of the recognised modes of hand service, including personal service and service at the dwellinghouse or place of business. Although the Rules of the Court of Session 1994 abolished edictal service of most procedural writs, including summonses, edictal service of inhibitions was retained, presumably because the alternative of public advertisement of the inhibition would have been socially unacceptable. Edictal service involves the messenger leaving the schedule at the office of the Extractor of the Court of Session and sending a copy of the schedule to the inhibitee's last known address by registered or recorded delivery post. Edictal service has to be used where none of the other modes is applicable, for example, where an individual is not resident or present in Scotland.[41] Postal service of an inhibition is incompetent[42] except as an adjunct to edictal service.

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[36] Proceeds of Crime (Scotland) Act 1995, s 32(1).
[37] Erskine, Institute, II,11, 3; Gretton, p 132.
[38] Sheriff officers may serve the schedule in some circumstances: see Execution of Diligence (Scotland) Act 1926, s 1.
[39] RCS, Form 16.15-F replacing Sch QQ to the Titles to Land Consolidation (Scotland) Act 1868.
[40] RCS, rule 16.12(6).
[41] RCS, rule 16.12(4).
[42] RCS, rule 16.12(2).

6.31 After service of the schedule of inhibition on the inhibitee, the warrant for inhibition together with the messenger's prescribed form certificate of execution[43] of the schedule are presented for registration in the personal register. An inhibition is effective from the date of its registration, unless (as is normal) a notice of inhibition has been registered in the personal register not more than 21 days beforehand. Such a notice is not intimated to the debtor and backdates the effectiveness of the subsequent inhibition to the date of the registration of the notice.[44]

6.32 At present, the schedule of inhibition has to be hand served by a messenger-at-arms, which is expensive. The fee for service of an inhibition at the inhibitee's dwellinghouse (which requires the messenger and a witness to travel there and to hand the schedule personally to the inhibitee or leave it at the dwellinghouse) varies from £41.90 to £85.25 depending on the distance from the messenger's place of business to the house. Additional fees are payable for the time spent in travelling if over an hour or 60 miles and any ferry dues are also chargeable.[45] If postal service of inhibitions were competent, the diligence would be cheaper. Thus for example, postal service of charges or arrestments attracts a fixed fee of £29.50.[46]

Proposals for a new system

6.33 In our discussion paper we put forward for consideration a simpler and less expensive procedure for serving and registering inhibitions.[47] The main elements were as follows:

> (1) It should be competent to serve the schedule of inhibition on the inhibitee by registered or recorded delivery post if the place of service is within the British Isles, or by means of hand service by officer of court. If postal service was ineffective the schedule should be re-served by officer of court.
>
> (2) The inhibition should become effective from the first moment of the day when the schedule of inhibition was served on the inhibitee or the schedule was registered, whichever is the later. Where the schedule was served by post the date of service should be the date when it was delivered, as established by a document from the Post Office or other evidence. In the absence of such a document or other evidence a letter which was not returned as undelivered should be deemed to have been delivered on the third day after the date of posting.
>
> (3) The inhibitee should be charged only the cost of postal service, unless re-service by officer of court was necessary in which case the inhibitee should be charged for the attempted postal service and the re-service.

6.34 The new scheme we put forward was broadly supported by those responding, but several consultees disagreed. The Keeper was against its adoption on the ground that those

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[43] RCS, Form 16-15H.
[44] Titles to Land Consolidation (Scotland) Act 1868, s 155. The notice is in the form of Sch PP.
[45] £19.85 per 30 minutes plus ferry dues. See also the General Regulations in Sch 1 to the Act of Sederunt (Fees of Messengers-at-Arms) 1994 (SI 1994/391), as amended by SSI 2000/421 for work carried out after 31 December 2000.
[46] Act of Sederunt (Fees of Messengers-at-Arms) 1994 (SI 1994/391), as amended by SSI 2000/421.
[47] Scot Law Com DP No 107, Proposal 11, para 3.69.

looking at the personal register would not be able to see whether or not a registered inhibition was effective. They would have to make further enquiries to find out if and when the inhibition had been served on the debtor. Inhibitors or their agents would therefore have to retain certificates of service for several years. We think that people ought to continue to be able to tell from the personal register when an inhibition became effective. It would be possible, as Mr Connal suggested to us, for the fact of service to be noted against the registered inhibition to provide a public and permanent record of service. But there might well be difficulties in matching the certificates of service presented for noting with the already registered inhibitions. Moreover, searchers would have to find two entries – the inhibition and the certificate of service – in order to report on instructions for a personal search. We are therefore in favour of retaining the basic structure of the present system. The main defect of that system is the retrospective backdating by the notice of inhibition. As we pointed out in our discussion paper,[48] inhibition is a personal prohibition so that it seems wrong in principle for it to be made effective for a period of up to 21 days before service on the inhibitee.[49] During this period inhibitees are unaware that they have been inhibited and might enter into obligations in relation to their heritable property which they would be unable to implement. This failure might give rise to a claim for substantial damages. This defect could be easily removed by the notice backdating only to the first moment of the day on which the inhibition is served on the inhibitee. Inhibitees are most unlikely to have entered into transactions involving their heritable property in that short interval.

6.35 To summarise, an inhibition would be served and registered in exactly the same way as at present. Also notices of inhibition would continue to be competent. If the inhibition was registered within 21 days of the date of registration of the notice it would take effect from the first moment of the day of service. This date is shown in the officer's certificate of service which is registered along with the inhibition. If no notice had been registered or the inhibition is registered more than 21 days after registration of the notice there would be no backdating. The inhibition would become effective on its registration. We therefore recommend that:

> **83. Section 155 of the Titles to Land Consolidation (Scotland) Act 1868 should be amended so that where an inhibition is registered not later than 21 days after a notice of inhibition, such inhibition shall take effect as from the first moment of the day on which it was served on the inhibitee.**

6.36 Many of those responding agreed with our proposal for postal service of inhibitions,[50] and also with a related proposal that solicitors and officers of court should be entitled to serve by post. Although our scheme did not make postal service mandatory, only the expenses of postal service were to be recoverable from the debtor, unless the registered or recorded delivery letter was returned as undelivered and the schedule of inhibition had to be re-served by officer of court. But there was substantial opposition to these proposals. The Joint Committee of the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers and the Royal Faculty of Procurators were among those who considered certainty of service to be an essential feature of the diligence and that this could best be

[48] *Ibid*, para 3.66.
[49] Edictal service breaches this principle because the date of service is the date of delivery of the schedule of inhibition to the Extractor's office rather than the date of the inhibitee's receipt of the postal copy. This breach is unavoidable if the whereabouts of the inhibitee are unknown, and it would be difficult to ascertain the date of receipt of the postal copy by inhibitees outwith the British Isles.
[50] Scot Law Com DP No 107, Proposal 12, para 3.73.

achieved by hand service by officers. In our *Report on Diligence and Debtor Protection*[51] we noted research evidence that up to 10% of certain court documents served by recorded delivery letter never reached the intended recipients. A recent evaluation of postal citation of witnesses in criminal proceedings found that a not insubstantial proportion of those cited said they did not receive a postal citation.[52] We think that the lower costs of postal service are outweighed by the lack of certainty as to whether the inhibition was served on the debtor.

Registration of schedule of inhibition

6.37 Under the present law, the creditor registers in the personal register the letters of inhibition or other warrant to inhibit[53] together with the messenger's certificate of service (or execution) of the schedule of inhibition on the debtor. We recommend above that the warrant of execution contained in an extract decree or registered writ should authorise inhibition.[54] The warrant for execution (unlike letters of inhibition) would not give any details of the debt or the parties involved, and the same may be true of the decree itself. We now think that the creditor should register a copy of the schedule of inhibition served on the debtor together with the officer's certificate of service, and that it should cease to be competent to register the letters of inhibition or other warrant to inhibit. Both the schedule and the certificate are presently prescribed by Act of Sederunt in relation to Court of Session inhibitions.[55] New forms will have to be provided for sheriff court inhibitions. Consideration should be given to making the certificate of service a docket on a copy of the schedule, so that only one document is presented for registration. We recommend that:

> **84. An inhibition should be registered by registering a copy of the schedule of inhibition served on the inhibitee together with the officer of court's certificate of service.**

Company number of inhibitee

6.38 Section 705 of the Companies Act 1985[56] provides that every company is to be allocated a number – the company's registered number. This number is a unique identifier that could be used for the purposes of inhibition. In our discussion paper we proposed[57] that where the inhibitee is a company registered in a part of the United Kingdom, the inhibition documents registered in the personal register must contain the company's registered number on pain of invalidity. This proposal was agreed by all those who responded. The Royal Faculty of Procurators commented that a company can readily change its name but not its number. Nonetheless, we now think that use of the company number should continue to be a matter of good practice. Making use of the correct number mandatory would mean that an inhibition would be invalid if the number was wrongly stated, even though the name and registered office of the company were correctly stated. We think that

[51] Scot Law Com No 95, para 5.14.
[52] Scottish Executive Central Research Unit "Evaluation of Postal Witness Citation and Countermanding: An Evaluation of the Mechanised System Piloted in Glasgow, Ayr and Lanark", Ian Clark, December 2000, Table 7.1.
[53] The signeted Court of Session summons or an unsigneted certified copy interlocutor.
[54] Recommendation 80, para 6.25.
[55] RCS Forms 16-15 F and H.
[56] As substituted by the Companies Act 1989, Sch 19, para 14.
[57] Scot Law Com DP No 107, Proposal 22, para 3.116.

this is too severe a sanction for a mistake such as the transposition of two digits in the company number. Accordingly we make no recommendation for reform.

D. THE EFFECT OF INHIBITIONS AND RANKING

The present law

6.39 The first main effect of an inhibition is to strike against any future deeds by the inhibitee voluntarily disponing the property affected by the inhibition or creating a subordinate real right (a standard security for example) over it ("post-inhibition deeds"). The other main effect of an inhibition is against debts incurred after the date when the inhibition became effective ("post-inhibition debts"). The debts remain valid and can be enforced by diligence, but the inhibitor is entitled in bankruptcy or other ranking procedures to be ranked and preferred on the inhibitee's heritage affected by the inhibition as if the post-inhibition debts did not exist. Pre-inhibition creditors are however neither prejudiced nor benefited by the inhibition, and so rank as if the inhibition had never existed.

6.40 An inhibition strikes only at obligations incurred voluntarily by the inhibitee after the inhibition.[58] Post-inhibition deeds or debts which the inhibitee is bound to grant or incur as a result of pre-inhibition obligations do not contravene the inhibition. Suppose, for example, the inhibitee incurs rent or hire charges in respect of a period after the inhibition under a lease or hiring agreement entered into before the inhibition.[59] As these sums were due in terms of an obligation incurred prior to the inhibition, the inhibitor would not gain any preference by exclusion of them.

6.41 The "preference by exclusion" method of ranking was developed by the Court of Session in a series of cases in the late 17th and 18th centuries.[60] These ranking rules were later codified by Bell in his five "canons of ranking":[61]

> "1. That the first operation in the ranking and division is, to set aside, for each of the creditors who hold real securities, the dividend to which his real right entitles him, without regard to the exclusive preferences.
>
> 2. That the rights of exclusion are then to be applied in the way of drawback, from the dividends of those creditors whose real securities are affected by them; taking care that they do not encroach on the dividends of other creditors.
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> 3. That the holder of such exclusive right is entitled thus to draw back the difference between what he draws upon the first division, and what he would have drawn had the claim struck at by the inhibition not existed.
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> 4. That if the exclusive preference affects more than one real security, it is to be applied against those creditors only by whose ranking on their real right the holder

[58] Titles to Land Consolidation (Scotland) Act 1868, s 155.
[59] *Scottish Waggon Co Ltd v Hamilton's Tr* (1906) 13 SLT 779.
[60] The main cases are: *Miln v Nicholson's Creditors* (1698) Mor 2876, 1 Ross's Leading Cases 259; *Cockburn's Creditors v Langton* (1709) Mor 2877, 1 Ross's Leading Cases 266; *Campbell v Drummond* (1730) Mor 2891, 1 Ross's Leading Cases 270; *Lithgow v Creditors of Armstrong of Whitehaugh* (1747) Mor 2896; and *Cockburn's Creditors v Langton* (1760) Mor 6995, 1 Ross's Leading Cases 281.
[61] Bell, *Commentaries* ii, 519.

of it suffers prejudice; against the last, for example, of the postponed creditors affected by it, in the first place; and so back, till the holder of the exclusion draws all that he would have been entitled to draw had the excluded claims not been ranked. If it affects a number of creditors entitled to rank *pari passu*, it will affect them proportionally to the amount of their several debts.

5. That where there are secondary consents and exclusions among those holding exclusive preferences, they are to have effect only against, and in favour of the parties by and to whom they are granted, without benefiting or hurting other creditors. This is to be accomplished by applying the original exclusion in the first place, and then giving to the person in whose favour the secondary consent is granted, a right to draw back, from him who grants it, a share of his dividend, equivalent to the sum which would have fallen to the person favoured, had the first exclusion not been in existence."

6.42 These canons have been approved and applied by the courts subsequently.[62] The fifth canon is of little practical use today. It deals with the situation where the inhibitor waives the preference, by consenting to the inhibitee contracting a debt or granting a security to a particular creditor. Such waivers are, we understand, unknown in modern practice.

Abolition of the preference over future debts

6.43 In our discussion paper we proposed retaining the first effect of an inhibition - prohibition of future voluntary deeds, but abolishing the second effect - preference by exclusion of future voluntary debts.[63] We considered that the rules of inhibition ranking were not easy to apply even when only one inhibition is involved.[64] The situation where there are two or more inhibitions on different dates affecting different debts is not clear and the authorities are unsatisfactory. The situation is further complicated by the fact that some common debts (central and local government taxes, fuel and telephone debts for example) will not be affected by the inhibition even though they were incurred after it. This is because the creditors could not be said to have extended credit voluntarily.[65] There are often practical difficulties as well. To operate the rules, one has to know whether the other creditors' debts were incurred before or after the date of the inhibition. The financial records of debtors are often incomplete and much time may have to be spent in trying to obtain the necessary information. Another argument against the exclusionary preference over future debts is that it confers too great a benefit on the inhibitor as against other later creditors. While it is reasonable to expect a creditor lending on heritable security to search the personal register in order to see whether the borrower is inhibited (and indeed it is standard practice to do so), it is unreasonable to expect suppliers of goods or services on credit to take such a step before making the supply. Suppliers may be more ready to extend credit to homeowners, but rarely check whether the property would be available if default occurs.

[62] *Gordon v Campbell* (1842) 1 Bell 563 (HL); *Baird and Brown v Stirrat's Tr* (1872) 10 M 414; *Scottish Waggon Co Ltd v Hamilton's Tr* (1906) 13 SLT 779; *Halifax Building Society v Smith* 1985 SLT (Sh Ct) 25.
[63] Scot Law Com DP No 107, Proposal 4, para 3.22.
[64] Gretton, ch 7 contains several worked examples.
[65] Gretton, pp 99-100.

6.44 We recognised that abolishing the preference over future debts would reduce the effectiveness of inhibition. An inhibition would confer no preference in the inhibitee's sequestration or liquidation except in the unusual case where the debtor had granted a post-inhibition deed in breach of the inhibition. Subject to that exception,[66] the inhibitor would rank equally with the other unsecured creditors.

Consultees' views

6.45 Most of those responding to our discussion paper agreed with our proposal that an inhibition should not create a preference in any ranking process by exclusion of post-inhibition debts. Several practising solicitors mentioned that this rule of preference was not widely known or used. The Royal Faculty of Procurators disagreed, as in their view the rule was useful in giving inhibitors a preference in sequestrations and informal rules existed to establish the date of debts. However, we consider that time and effort has to be spent in obtaining and evaluating such information in order to apply the rules. The Institute of Credit Management was also opposed to any reduction in the present rights of inhibitors. Professor Gretton disagreed strongly with our proposal. He thought that the complexity of the exclusionary preference was no reason for its abolition. Much law is inevitably complex. He also considered that the two effects of an inhibition, reduction of future voluntary deeds and the exclusionary preference over future debts, were inseparable. The following example illustrates his point:

> A inhibits X. Some time later X borrows money from Y and grants a heritable security. The inhibitor A can reduce the security and use land attachment to gain priority over Y. But Y could register a land attachment which would not be affected by the inhibition.

We do not think there is sufficient force in this point. First, securities granted in breach of an inhibition will be very rare because creditors seeking heritable security will inevitably carry out a personal search against the borrower.[67] Secondly, secured creditors are most unlikely to use land attachment while their security remains unreduced. Moreover, the terms of creditor Y's loan would normally preclude enforcement by diligence unless the borrower X had defaulted in some way. Thirdly, we think that post-inhibition creditors should be able to obtain priority over an inhibitor by using a land attachment.

6.46 Inhibition is a diligence against heritable property. We consider that the second effect goes beyond this as it excludes later moveable debts as well as later heritably secured debts in ranking creditors on the property affected by the inhibition. Confining the effect of inhibition to reduction of future deeds relating to the property would prevent later creditors from gaining a preference through the granting of a standard security over the property but would not affect the debt itself. We see inhibition becoming simply a global freeze diligence. Creditors could obtain a more extensive preference over other creditors in a more easily understandable way by using land attachment instead of inhibition. A land attachment confers a real right of security and ranks with other real rights in order of registration.

[66] See paras 6.87-6.92 below.

[67] We recommend below (Recommendation 95, para 6.123) that even if the inhibition is not disclosed by the personal search, heritable creditors and other disponees will be protected against reduction provided they acted in good faith.

Provided the creditor knows of the existence of specific property owned by the debtor, such as business or residential premises, it is almost as easy to use land attachment as inhibition.

6.47 We do not think that it is possible to reduce the complexity of inhibition ranking by amending the rules set out in paragraph 6.41 above. This complexity is inherent in a preference by exclusion. We remain of the view that the complexities of inhibition ranking outweigh its benefits and recommend that:

> **85. An inhibition, while continuing to render reducible future voluntary deeds, should cease to confer a preference by exclusion over debts voluntarily incurred after the date of the inhibition in the ranking of creditors in a sequestration, liquidation or other ranking process on the debtor's heritable property.**

Inhibition and after-acquired property

6.48 At common law an inhibition affected all the heritable property and rights owned by the inhibitee at the date of registration of the inhibition and all such lands and rights that the inhibitee acquired afterwards.[68] Implementing a recommendation by a Royal Commission,[69] legislation (now section 157 of the Titles to Land Consolidation (Scotland) Act 1868) altered this rule by making inhibitions ineffective against after-acquired lands and rights (commonly known as *acquirenda*). The section also contains a proviso excepting after-acquired lands under entails or other indefeasible titles which is of minimal practical significance nowadays.

6.49 In Discussion Paper No 107 we considered a suggestion that the policy of section 157 should be reversed so that an inhibition would affect, as it did at common law, all heritable property of the inhibitee whether acquired before or after the registration of the inhibition.[70] Most of the other diligences open to ordinary unsecured creditors (arrestment, poinding and adjudication) affect only the debtor's property at the date of attachment. The landlord's hypothec and a floating charge give a non-possessory security over the property from time to time of the tenant or company, but at the date of sequestration[71] under the hypothec or crystallisation of the floating charge only the property then on the leased ground or owned by the debtor respectively is attached. We doubted whether creditors should be entitled to freeze whatever property their debtors acquire during the life-time of an inhibition, particularly where an inhibition is used on the dependence before the debt has been found to be due. On the whole we did not think that the case for this amendment had been made out. All those consulted agreed and we recommend no change in the existing rule.

[68] Graham Stewart, p 550.

[69] *Second Report of the Law Commissioners, Scotland* (1835) p 19 (Chairman: G J Bell). The report simply states: "the inhibition ought not to have effect against estates subsequently acquired, but to be limited to that property which belongs to the debtor at the time of registration, leaving it to the creditor, if the debtor should afterwards acquire or succeed to other property, to use a new inhibition in order to affect it". The recommendation seems to have been part of a general policy of "reducing the diligence of inhibition within reasonable and beneficial limits": p 20.

[70] Scot Law Com DP No 107, para 3.120.

[71] Ie an action of sequestration enforcing the hypothec as distinct from sequestration in bankruptcy.

When does the purchaser of heritable property acquire lands for the purposes of inhibition?

6.50 It is not clear at what date a person acquires "lands" (defined in section 3 as including "all heritable subjects, securities, and rights") for the purposes of section 157 of the 1868 Act.[72] Take the case of the purchase of heritable property. In this transaction there are three possible dates when it could be said that the purchaser acquires lands:

(a) the date on which missives for the purchase were concluded;

(b) the date on which the disposition was delivered to the purchaser; or

(c) the date on which the purchaser registered the disposition in the property registers.

One way of looking at this issue is to ask whether a purchaser under missives, or the holder of an unregistered disposition, has acquired heritable subjects or a right that is sufficiently heritable in character to be subject to an inhibition. The purchaser who obtains a real right to the property by registering the disposition in the property registers clearly has acquired lands which will be affected by a later inhibition.

6.51 In *Leeds Permanent Building Society v Aitken Malone and Mackay*[73] it was held that an inhibition against a purchaser, which was registered between missives and delivery of the disposition, did not affect the property because the right of a purchaser under missives was not a heritable right. The Lord Ordinary relied on dicta by Lord President Emslie in *Gibson v Hunter Home Designs Ltd*[74] to the effect that no right of property vests in a purchaser until delivery of the relevant disposition. The fact that the right of a purchaser under missives is heritable in the purchaser's succession was regarded as irrelevant because what is heritable for the purposes of succession is not necessarily heritable for the purposes of diligence.[75] Where a purchaser under missives assigns the contractual rights to a third party who then receives and registers a disposition, it is the practice for solicitors to instruct a search in the personal register against the assigning purchaser.[76] However, this may be erring on the side of caution rather than acceptance by the profession that the purchaser's right is one that is capable of being affected by an inhibition.

6.52 Turning to the next stage, has the holder of an unregistered disposition acquired heritable subjects or a heritable right for the purposes of inhibition? In *Low v Wedgwood*[77] it was held that an inhibition was effective against the holder of an unregistered assignation of a registered heritable security. The case of *Sharp v Thomson*[78] has highlighted the uncertainty and divergent views about when ownership passes.[79] Lord Jauncey considered that on delivery of the disposition the purchaser's right moved from a personal right to demand

[72] See Gretton, pp 75-77.
[73] 1986 SLT 338.
[74] 1976 SC 23 at p 27.
[75] Graham Stewart, p 547.
[76] Gretton, p 189.
[77] 6 Dec 1814 FC.
[78] 1997 SC (HL) 66.
[79] See para 3.49 above.

implementation of the missives to "a personal right of ownership".[80] Lord Clyde took the view that the holder of an unregistered disposition had acquired such rights as to make it reasonable to use the language of ownership in relation to him.[81] *Cheltenham & Gloucester Building Society v Mackin*,[82] involved purchasers who were inhibited after delivery of the disposition but before it was registered. The sheriff held, on the basis that a purchaser acquires a real right only on registration of the disposition, that the inhibition did not affect the land involved. But this confuses real rights and heritable rights.

6.53 The existing law as to whether the holder of an unregistered disposition of property has a heritable right, or heritable subjects, capable of being affected by a later inhibition is not clear. In our discussion paper we expressed a tentative preference for a purchaser being regarded as having acquired property for the purposes of section 157 of the Titles to Land Consolidation (Scotland) Act 1868 at the date of the conclusion of the contract to purchase. An inhibition before settlement of the transaction would prevent the inhibitee assigning the contractual right to a conveyance of the property and also disposing of the property itself after settlement. Most of those who commented agreed. However, Professor Gretton pointed out that our proposal would create conveyancing difficulties. People would be unable to ascertain from the registers whether land to which the inhibitee had registered a title after the date of an inhibition was affected by that inhibition. The answer would depend on whether missives had been concluded before or after the inhibition. We accept this point, but the only date of acquisition that avoids this problem is the date of registration of the purchaser's disposition.

6.54 The Faculty of Advocates was also opposed. They preferred the date of delivery because of the difficulties of applying the rules of inhibition to the parties' contractual rights under the missives. To what extent would the inhibition prevent the purchaser/inhibitee from exercising rights under the contract of purchase? Would an inhibition prevent the parties varying the contract or the inhibitee from accepting the seller's repudiation of the contract? The Faculty also thought it would be difficult to apply the remedy of reduction and adjudication in the event of a breach of the inhibition when the purchaser had only a personal right under the contract.

6.55 The issue of when a person acquires land for the purposes of inhibition is too important for the law to be left in its present uncertain state. Earlier in this Part we re-state the existing rule of what property is subject to inhibition in terms of the new diligences of land attachment and attachment order which are to replace adjudication. We recommend that heritable property which can be attached by land attachment or attachment order should be affected by inhibition.[83] We also recommend that an unregistered but registrable title to land (such as a delivered but unregistered disposition) should be attachable by land attachment.[84] It would be inconsistent for inhibition to affect only registered titles, but these earlier recommendations leave open the choice between conclusion of missives and delivery of the disposition. At the missives stage the purchaser's right would be attachable by an attachment order and hence would be affected by inhibition if that right is regarded as heritable property. On reconsideration we are now in favour of the point of acquisition

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[80] 1997 SC (HL) 66 at pp 70 H,I and 74 C,D.

[81] *Ibid* at p 80E - G.

[82] 1997 GWD 32-1645 (an action for professional negligence against a solicitor acting for the building society).

[83] Recommendation 79, para 6.17.

[84] Recommendation 5, para 3.50.

being when the disposition was delivered. We think there is force in the comments made by the Faculty of Advocates that applying inhibition to personal contractual rights would be difficult. Another consideration in favour of the date of delivery is that it can be applied to all transactions even those, such as lifetime or testamentary gifts, where there is no antecedent contract.

6.56 We therefore recommend that:

> **86. Lands should be treated as having been acquired for the purposes of section 157 of the Titles to Land Consolidation (Scotland) Act 1868 at the date of the delivery of the deed transferring the property to the acquirer. An inhibition against the acquirer should prevent him from disposing of or burdening not only his rights under the delivered but unregistered deed but also his real right once the deed is registered.**

E. INHIBITION AND A SALE BY OR ON BEHALF OF ANOTHER CREDITOR

Sale by permanent trustee or liquidator

6.57 In terms of section 31(2) of the Bankruptcy (Scotland) Act 1985 the permanent trustee has power to sell an inhibited debtor's heritable property free of "any prior inhibition" but, in ranking creditors on the proceeds of the sale of the property affected by the inhibition, effect is given to the inhibition's preference.[85] In Discussion Paper No 107 we considered that the trustee should continue to be entitled to sell property which is subject to an inhibition.[86] If inhibitors were entitled to reduce or veto any sale by the trustee, they would gain priority over all the other unsecured creditors for the full amount of their debt. This would give inhibition too great an effect, since in the absence of sequestration the inhibitor would not, by virtue of the inhibition alone, be entitled to any payment. There was no dissent on consultation. Professor Gretton pointed out that the inhibition has to be against the sequestrated debtor otherwise the trustee of a sequestrated purchaser would be entitled to sell free of any inhibition against the seller. We do not think that section 31(2) needs a clarifying amendment as it would not be construed in that way.

6.58 A company may be wound up voluntarily or by the court. In either case a liquidator is appointed to manage the winding up. In a winding up by the court the liquidator is expressly given[87] the same powers (subject to any orders made by the court) as a trustee on a bankrupt's estate. Such a liquidator therefore has power to sell property of the company covered by an inhibition free from that inhibition, but must give the inhibitor due ranking on the proceeds without the need for further diligence by the inhibitor.[88] There is no statutory provision expressly conferring such powers on liquidators in voluntary liquidations and there is doubt as to the position.[89] Voluntary liquidators used to have the same general powers as liquidators appointed by the court[90] but this is no longer the case. The general powers of voluntary liquidators are set out in sections 165 and 166 of the

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[85] If Recommendation 85, para 6.47 is implemented inhibitors would enjoy no preference by exclusion of later debts.
[86] Scot Law Com DP No 107, Proposal 28(1), para 3.149.
[87] Insolvency Act 1986, s 169(2).
[88] 1985 Act, s 31(2).
[89] Gretton, p 177.
[90] Companies Act 1985, s 598(2) (now repealed).

Insolvency Act 1986. It remains to note that under section 112 a voluntary liquidator may apply to the court for the court to exercise the powers it would have on a winding up by the court.

6.59 In our discussion paper we proposed that the liquidator in a creditors' voluntary liquidation should have the power to dispose of the company's property free of any inhibition.[91] The inhibitor would rank on the proceeds along with other unsecured creditors. In a creditors' voluntary liquidation the company will be insolvent and the inhibitor should not be entitled to be paid in full as the price for discharging the inhibition. We did not extend our proposal to a members' voluntary liquidation where the company is solvent and all creditors including the inhibitor should be paid in full. We saw no reason why a liquidator in a members' voluntary liquidation should enjoy the power to sell notwithstanding the inhibition. This proposal was agreed by all those who responded. The Royal Faculty of Procurators said that liquidators in a creditors' winding up often have to make "nuisance payments" to inhibitors who take advantage of the current uncertainty. We recommend that:

> **87. The liquidator in a creditors' (but not a members') voluntary winding up of a company should be entitled to dispose of heritable property affected by an inhibition against the company. Any claim of the inhibitor should be dealt with in the ranking on the proceeds of sale.**

Effect of inhibition if another secured creditor sells the property

6.60 We turn now to consider the ranking of an inhibitor whose inhibition became effective after the granting of a standard security by the inhibitee.[92] The secured creditor may sell the property by virtue of the standard security and the registration of the purchaser's title disburdens the property of the inhibition.[93] The inhibition does not prevent the creditor's sale as it only prohibits the inhibitee from dealing with the property. What preference (if any) the inhibitor enjoys over the net free proceeds of sale is a difficult question. As we explained in Discussion Paper No 107 there is no clear answer.[94]

6.61 Section 27(1) of the Conveyancing and Feudal Reform (Scotland) Act 1970 directs a selling standard security holder to hold the proceeds of sale in trust and to apply them in the following order:

> "(a) first, in payment of all expenses properly incurred by him in connection with the sale, or any attempted sale;
>
> (b) secondly, in payment of the whole amount due under any prior security to which the sale is not made subject;

[91] Scot Law Com DP No 107, Proposal 29, para 3.151.
[92] If the inhibition became effective before the granting of the standard security, the inhibitor can obtain a preference by reducing and using land attachment.
[93] 1970 Act, s 26(1), modified by the Abolition of Feudal Tenure etc. (Scotland) Act 2000, s 69.
[94] Scot Law Com DP No 107, paras 3.156-3.163.

(c) thirdly, in payment of the whole amount due under the standard security, and in payment in due proportion, of the whole amount due under a security, if any, ranking *pari passu* with his own security, which has been duly recorded;

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

Any surplus is payable to the previous owner/debtor or any person authorised to give a receipt for this amount.[95]

6.62 The decided cases indicate at least four different approaches. The first approach, exemplified by *Ferguson and Forster v Dalbeattie Finance Co*,[96] is to say that an inhibition does not affect a sale by a heritable creditor since it strikes only at the inhibitee's voluntary acts. It therefore confers no preference over other creditors or the inhibitee. The second approach treats the inhibition as a sort of postponed security giving the inhibitor a preference.[97] The third, somewhat similar, approach is that the inhibition is regarded as a security with a preference calculated according to the inhibition ranking rules. The inhibitor therefore ranks *pari passu* with pre-inhibition creditors and in priority to post-inhibition creditors and the debtor.[98] The final approach is that the inhibition confers no preference unless the inhibitor had adjudged the property or arrested the proceeds.[99]

6.63 In our discussion paper we considered that the last approach accorded best with the nature of an inhibition – that it is prohibitory and does not by itself give the inhibitor any active title to demand payment. Accordingly we proposed that inhibitors should be entitled to rank on the proceeds of sale only if they had attached the property by land attachment or arrested the proceeds of sale.[100] All of those who responded agreed with our proposal except one solicitor. In his view it would be grossly inequitable for the debtor to receive the proceeds of sale while the inhibitor received nothing. Our proposal would allow an inhibitee to avoid the inhibition by having the property sold by a co-operative heritable security holder. He also said that arrestment was difficult in practice. We think that giving an inhibitor a right to be paid out of the proceeds of sale solely by virtue of the inhibition gives the diligence too great an effect. It would confer a preference over other unsecured creditors, including those whose debts were incurred before the inhibition. Moreover, conferring a preference even over post-inhibition creditors would not be in line with our previous recommendation that inhibition should cease to have such an effect.[101]

6.64 There are practical difficulties in arresting the proceeds of sale in order to gain a preference, but we think that these can be overstated. The proceeds of sale can be arrested

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[95] 1970 Act, s 27(1).
[96] 1981 SLT (Sh Ct) 53. See also *McGowan v Middlemass and Sons Ltd* 1977 SLT (Sh Ct) 41.
[97] *George M Allan Ltd v Waugh's Tr* 1966 SLT (Sh Ct) 17, followed in *Abbey National Building Society v Aziz* 1981 SLT (Sh Ct) 29.
[98] *Halifax Building Society v Smith* 1985 SLT (Sh Ct) 25, followed in *Abbey National Building Society v Barclays Bank plc* 1990 SCLR 639 (Sh Ct). See also *Bank of Scotland v Lord Advocate* 1977 SLT 24 decided on ss 122 and 123 of the Titles to Land Consolidation (Scotland) Act 1868, which are similar but not identical to those in the 1970 Act. However the sheriff principal in *Smith* who decided that an inhibition was a "security" for the purposes of s 27 was not referred to *Scottish Waggon Co Ltd v Hamilton* (1906) 13 SLT 779, which decided the opposite in the context of bankruptcy.
[99] *Alliance and Leicester Building Society v Hecht* 1991 SCLR 562 (Sh Ct).
[100] Scot Law Com DP No 107, Proposal 30, para 3.164.
[101] Recommendation 85, para 6.47.

in the hands of the selling secured creditor at any time from the settlement of the sale to the disbursement of the proceeds, as section 27(1) of the Conveyancing and Feudal Reform (Scotland) Act 1970 imposes an obligation on the creditor to account to the debtor for the proceeds of sale after satisfying the various prior claims.[102] Once the inhibitor is aware that the inhibitee's property is being sold it should not be too difficult to identify the selling heritable creditor and take steps to arrest at the appropriate moment.

Sale by receiver under floating charge

6.65 The same inhibition ranking issues arise with the sale of an inhibited company's heritable property by a receiver acting under a floating charge granted before the inhibition. In the following discussion we proceed on the basis of the existing law that a bare arrestment (and by analogy an inhibition[103]) executed between the creation and crystallisation of a floating charge rank after it.[104] In a sale by a standard security holder the recording of the purchaser's disposition disburdens the property of any postponed securities and diligences (including an inhibition).[105] There is no such provision in relation to a sale by a receiver. The receiver may however apply to the court for the inhibition to be recalled as ineffective in relation to the property or for an order under section 61 of the Insolvency Act 1986 for authority to sell free of the inhibition. Without such a discharge or order the title is regarded as not fully marketable and the Keeper will when registering the purchaser's title in the Land Register exclude indemnity in respect of the inhibition and any subsequent action of reduction and adjudication.

6.66 The position of the net free proceeds of sale is unclear. After satisfying the debt of the floating charge holder, should they be used to satisfy the inhibitor with any balance being paid to the debtor company, or should the company be paid the whole net free proceeds? In *Armour and Mycroft Petrs*[106] the Lord Ordinary granted an order under section 61 of the Insolvency Act 1986 allowing the receiver to sell free from any post-creation inhibition on condition that the receiver paid the inhibitor's debt out of the balance otherwise due to the company. Such an order is at the discretion of the court. One of the factors influencing the decision was that there were no other receivers or secured creditors with claims on the free proceeds of sale. The possible existence of other unsecured creditors was not known.

6.67 In our discussion paper we considered that the position of a receiver was unsatisfactory but did not put forward any proposals as we thought that any change should be made in the context of a wider review of floating charges and diligence.[107] However, two respondents thought that a limited reform addressing the problems we had highlighted could usefully be made in advance of any later more comprehensive review. It was said that a section 61 application is troublesome and quite expensive. We now recommend that a receiver should be entitled to sell property notwithstanding the existence of an inhibition

[102] *Lord Advocate v Bank of India* 1991 SCLR 320 (Sh Ct), aff'd 1993 SCLR 178; Stair Memorial Encyclopaedia, vol 8, para 264.
[103] *Armour and Mycroft Petrs* 1983 SLT 453 and *Taymech Ltd v Rush and Tomkins Ltd* 1990 SLT 681.
[104] *Lord Advocate v Royal Bank of Scotland* 1977 SC 155. This decision has been criticised and we endorsed the criticisms in our *Report on Diligence on the Dependence and Admiralty Arrestments,* Scot Law Com No 164 (1998), paras 9.10 ff.
[105] 1970 Act, s 26(1), as modified by the Abolition of Feudal Tenure etc. (Scotland) Act 2000, s 69.
[106] 1983 SLT 453.
[107] Scot Law Com DP No 107, para 3.172.

executed after the creation of the floating charge, and that the inhibitor should not rank on the proceeds of sale without a land attachment or an arrestment. This would avoid the expenses of a section 61 application and allow the Keeper to register the purchaser's title without indemnity which would make it more marketable.

6.68 Sales by standard security holders and receivers are merely examples of forced sales by persons other than the owner of property affected by an inhibition. Other examples include a sale by the creditor under an *ex facie* absolute disposition, a statutory charging order or a land attachment. Sequestration and liquidation are different in that pre-sequestration inhibitors and creditors generally have a title to rank on the debtor's estate by virtue of the statutory provisions applying to these insolvency procedures.

6.69 We therefore recommend that:

88. (1) Where another creditor sells property subject to an inhibition by virtue of powers granted before the date the inhibition became effective, the inhibitor should not be entitled to rank on the proceeds of sale by virtue only of the inhibition.

(2) A receiver acting under a floating charge created before the date when an inhibition became effective should be entitled to sell property affected by the inhibition, leaving the inhibitor to claim on the proceeds of sale.

F. BREACH OF INHIBITION

6.70 Section 44(3)(a) of the Conveyancing (Scotland) Act 1924 provides that inhibitions (and notices of litigiosity etc) "shall prescribe and be of no effect on the lapse of five years from the date on which the same shall respectively take effect". It gives rise to a number of questions which do not admit of a clear answer. First, to what extent (if at all) is the five year period of negative prescription subject to the normal rules of interruption? Secondly, does an inhibitor's right of reduction lapse when the inhibition prescribes or is it sufficient that the breach occurs within the lifetime of the inhibition? Thirdly, what act constitutes a breach of the inhibition?

Interruption of prescription of inhibitions?

6.71 There are two main rules of interruption of prescription. First, if the obligation is the subject of a relevant claim by the creditor or a relevant acknowledgement by the debtor, then any time which has already run is cancelled so that the prescriptive period has to run afresh. This applies to the five and twenty year negative prescriptions.[108] Secondly, time during which the creditor was under legal disability, or was induced not to act by the debtor's fraud or error, does not count. This applies to the five year prescription only.[109] In Discussion Paper No 107 we pointed out that it seems generally to be assumed by conveyancers that an inhibition is not subject to those rules but there is little authority one way or the other. We therefore proposed that an inhibition should be extinguished on the expiry of five years from its date and that period should not be liable to extension, still less to interruption (ie

[108] Prescription and Limitation (Scotland) Act 1973, ss 6 and 7.
[109] Prescription and Limitation (Scotland) Act 1973, s 6(4).

cancellation of time already run so that a new five year period has to elapse), by acts of the inhibitor or acknowledgements of indebtedness by the inhibitee.[110] All those who responded agreed. The Faculty of Advocates observed that the normal interruption rules could not apply otherwise the personal register would not show whether an inhibition was in effect. The present doubts could be avoided by using the concept of termination or lapse of the inhibition rather than its prescription. We therefore recommend that:

89. In order to make it clear that the rules of interruption of negative prescription do not apply to the prescription of inhibitions, section 44(3)(a) of the Conveyancing (Scotland) Act 1924 should be amended by providing for the termination or lapse of an inhibition on the expiry of the period of five years after it comes into effect.

Reduction competent after inhibition has prescribed?

6.72 It is not clear how much time an inhibitor has to reduce a transaction which is in breach of the inhibition. Suppose F is inhibited by G with the inhibition taking effect on 15 February 1996. Later F sells property to H whose disposition is registered in the property registers on 2 January 2001. One view is that G, the inhibitor, cannot raise an action of reduction outwith the five year lifetime of the inhibition itself, ie G has only until 15 February 2001 in which to act. In other words, the right to reduce by virtue of the inhibition prescribes at the same time as the inhibition itself. The other view is that, while the inhibition prescribes in five years, the right to reduce any deed breaching the inhibition does not prescribe with the inhibition and that the creditor's right of reduction is not cut off till the expiry of the period of the long negative prescription, currently 20 years.[111] However, in Sasine transactions the purchaser H will be free from the threat of reduction before this, because positive prescription will render H's title unchallengeable after 10 years from the date of its registration.[112] In Land Register cases reduction will be incompetent unless the inhibition is entered on the title sheet.[113] If the inhibition is entered, the Keeper excludes indemnity against reduction and adjudication by the inhibitor, but the title becomes unchallengeable after 10 years.[114]

6.73 There are no reported cases dealing with this question. Graham Stewart[115] supports the first view, the right to reduce prescribing with the inhibition, but before 1924 inhibitions and hence the right to reduce could be renewed.[116] Modern opinion seems divided, not only about the law but also about which view is generally accepted by solicitors.[117] Professor McDonald reports that the profession are apparently unanimously of the view that the right to reduce prescribes with the inhibition and act on that view in instructing searches (but he acknowledges Professor Gretton's point that this is by no means necessarily conclusive).[118] On Professor McDonald's view the memorandum of search should instruct a personal

[110] Scot Law Com DP No 107, Proposal 27, para 3.144.
[111] Prescription and Limitation (Scotland) Act 1973, s 8.
[112] 1973 Act, s 1.
[113] See para 6.126 below.
[114] 1973 Act, s 1.
[115] P 575.
[116] Conveyancing (Scotland) Act 1874, s 42.
[117] D J Cusine, "Further Thoughts on Inhibitions" (1987) 32 JLSS 66 states that the question is open and reports Professor Halliday's views that the right to reduce prescribes with the inhibition. Gretton, p 68 inclines to the opposite view.
[118] *Conveyancing Manual*, (6th edn; 1993), para 33.35.

search against all grantors of conveyances within the period of the positive prescription, each one for five years prior to the date of completion of *the purchaser's* title (ie the purchaser in the instant transaction).[119] On the other hand Professors Gretton and Reid state "the current predominant view" to be that there should be a personal search against each grantor since (but not including) the foundation writ, each one for five years prior to *that grantor's* divestiture.[120]

6.74 In our discussion paper our provisional view and our proposal was that where a transaction in breach of the inhibition occurs within the statutory five year period the inhibitor's right of reduction should not prescribe with the inhibition with the result that an action of reduction could be raised after the five year period had elapsed. The alternative view seemed to us illogical and to prejudice inhibiting creditors unduly. It produces the strange effect that the right to reduce a deed which was delivered at the end of the first year of the inhibition prescribes in four years, while the right in relation to a deed delivered in the last week prescribes in a matter of days.[121] Inhibitees could defeat inhibitions by disposing of their property shortly before the end of the five year period.

6.75 Most of those responding agreed with our proposal that an inhibitor's right of reduction should not prescribe with the inhibition itself. The Faculty of Advocates said there was a clear distinction to be made between the creation of the right to reduce (by a breach during the lifetime of the inhibition) and enforcement of that right by raising an action of reduction. The Centre for Research into Law Reform disagreed arguing that it should be up to the inhibitor to take action promptly. This disregards the point that even with all due diligence it could be impossible to enforce a breach that occurs in the last few months of the inhibition.

6.76 The Keeper said that acceptance of the proposal would make searching in Land Register transactions more onerous. An example will help to illustrate the problem.

> A acquires the property in 1988 and is inhibited in October 1989. In August 1994 A sells the property to B. In November 2000 B sells to C.

6.77 At present the Keeper in dealing with the first registration of C's title in the Land Register would search the personal register only five years back from November 2000. This practice proceeds on the view that the inhibitor's right to reduce prescribed with the inhibition in October 1994. Since the Keeper's search does not disclose the inhibition in 1989 it is not apparent that the disposal to B in 1994 was in breach of the inhibition. The prior search carried out when B's title was registered in the Sasine Register is not submitted to the Keeper with other documents for first registration.[122] This prior search would have disclosed the inhibition in 1989 and that the sale to B was in breach of it.

6.78 The Keeper could avoid having to carry out a more extensive search by asking to see the prior search. This would not impose any extra expense on C's agents since it should be with B's titles that were delivered to them at the settlement of C's purchase. The extended search problem does not arise in Sasine transactions since the search which is continued on

[119] *Ibid*, para 33.37.
[120] Gretton and Reid, *Conveyancing*, (2nd edn, 1999) p 151.
[121] Gretton, p 68.
[122] *Registration of Title Practice Book*, (2nd edn, 2000) para 5.12.

C's purchase would show the inhibition and that A's disposal to B was in breach of it. The problem does not arise in pure land registration transactions either. If in the example given all the transactions had been registered in the Land Register the Keeper should have discovered the inhibition in the course of registering B's title and would have noted it on the title sheet and excluded indemnity. The Land Register search on registering C's title would show the inhibition but no reduction or adjudication. The Keeper ought to register C's title with no exclusion of indemnity since on his practice the inhibitor's right to reduce had prescribed several years ago. But an action of reduction may have been raised timeously (ie before October 1994) but be proceeding slowly so the Keeper will play safe and register C's title with exclusion of indemnity only removing the exclusion in 2004 when B's title become unchallengeable due to positive prescription.

6.79 As regards the duration of the time limit on the personal right to reduce a transaction contravening an inhibition, we saw no reason to depart from the normal period of 20 years.[123] In the case of titles registered in the Sasine Register, the 20 year period of negative prescription (which extinguishes personal rights of reduction) would in practice be irrelevant because the inhibitor's personal right of reduction would be extinguished by the 10 year period of the positive prescription period (which renders the title of a disponee unchallengeable). In the Land Register, if an inhibition is discovered, then the disponee's title will be registered with exclusion of indemnity from reduction by the inhibitor. Once again the right of reduction will prescribe after 10 years when the disponee's title becomes unchallengeable.[124]

6.80 Most of those responding agreed with our provisional view that an inhibitor should have the normal period of 20 years after breach in which to bring an action of reduction. But the Faculty of Advocates, the Sheriffs Principal, and the Joint Committee of the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers were all in favour of a much shorter period of five years, as inhibitors should be encouraged to act promptly. We remain of the view that the appropriate prescriptive period is 20 years. In practice, for the reasons stated in the previous paragraph, the period would be only 10 years. A much shorter period would reduce the effectiveness of inhibition as inhibitors may well be unaware of the breach for a considerable time. Periods of prescription differing from those in the Prescription and Limitation (Scotland) Act 1973 should not be created without good reason, otherwise one ends up with a multiplicity of periods applying to particular situations, the mischief the legislation was aimed at. The five year negative prescriptive period in section 6 of the 1973 Act would not be a suitable alternative. It is extended if the creditor was under a legal disability or had refrained from acting due to fraud or error on the part of the debtor, facts which those looking at the personal register would be unaware of.

6.81 Summing up we recommend that:

90. An inhibitor's right to reduce a deed in breach of the inhibition should prescribe at the end of the period of 20 years after the date of the breach.

[123] Prescription and Limitation (Scotland) Act 1973, s 8.
[124] 1973 Act, s 1.

What constitutes a breach of inhibition?

6.82 In Discussion Paper No 107 we considered what act of an inhibitee constitutes a breach of an inhibition so that, if it is done within the present five year lifetime of the inhibition, the inhibitor will be entitled to reduce the transaction and to adjudge the property.[125] The example of a sale of heritable property is used to illustrate the issues.

> A inhibits B, the inhibition becoming effective on 1 September 1995. On 1 August 2000 B concludes missives to sell the property to C. The disposition by B in favour of C is delivered on 29 August 2000 and C registers it in the property registers on 5 September.

Has B breached the inhibition by concluding missives or delivering the disposition within the lifetime of the inhibition? Or has there been no breach because the purchaser C obtained a real right by registration only after the inhibition ceased to have effect on 1 September 2000? Clearly the inhibition would be breached if C's title were to have been registered before 1 September 2000 since all the steps necessary to give a third party transacting with the inhibitee a real right to the property in question would then have been completed while the inhibition subsisted.

6.83 Under the existing law the conclusion of missives does not constitute a breach. The current form of the schedule of inhibition[126] inhibits the inhibitee from "selling, disposing of, burdening or otherwise affecting your land and other heritable property to the prejudice of [the inhibitor]". The reference to the word "selling" might be construed as referring to missives of sale. Bell however describes the effect of an inhibition in terms of forbidding the inhibitee to grant any conveyance or execute any deed and prohibiting the public from receiving any conveyances from the inhibitee.[127] At the stage of conclusion of missives, the inhibitee is still the owner, the inhibitor can enforce the debt by adjudging the property (without the need to reduce the missives first) and the purchaser has merely a contractual right to acquire it.

6.84 In our discussion paper we considered that it is the delivery of the disposition which does and should constitute a breach of the inhibition rather than the divestiture of the inhibitee by the third party acquiring a real right. An inhibition does not prevent the disponee completing title by registering the disposition obtained from the inhibitee.[128] The earlier date accords with Bell's description of the effects of an inhibition referred to in the previous paragraph. Until the disposition is delivered, the inhibitee can prevent the purchaser from acquiring title to the property by refusing to implement the missives. There would then be a liability in damages to the purchaser for breach of contract but not a breach of the obligation to the inhibitor. Delivery of the disposition is not a public act but the inhibitor may take effective action on becoming aware of it. If the inhibitor became aware of the breach before the disposition was registered in the property registers, an adjudication or land attachment could be used. In the leading case of *Mitchells v Ferguson*[129] it was decided that a debtor's property remains adjudgable by creditors until the debtor is divested by the

[125] Scot Law Com DP No 107, paras 3.131-3.136.
[126] RCS Form 16-15A-F (replacing Sch QQ to the Titles to Land Consolidation (Scotland) Act 1868).
[127] *Commentaries* ii, 141-142.
[128] Graham Stewart, p 145.
[129] (1781) Mor 10296; Hailes 879; 3 Ross L C 120.

disponee registering the disposition.[130] The inhibitor is more likely to learn of the disposal after the disposition in favour of the third party disponee has been registered. In this situation the inhibitor must first reduce the third party's title before adjudging.

6.85 Our proposal that it should be the delivery of a deed that was a breach of an inhibition attracted dissent only from one solicitor who thought that the breach should be the registration of the breaching deed. We disagree as that would make it too easy to evade an inhibition. Disponees taking in breach of inhibition would simply have to wait until the inhibition prescribed before registering their deeds. It would also be strange for an inhibition (which is a personal prohibition) to be breached, not by the act of the person inhibited, but by the act of a third party disponee. The Institute of Credit Management favoured breach coming at the earliest possible stage in order to assist inhibitors. They preferred the breach to be constituted by the conclusion of missives, but if this was not acceptable then breach should take place when the deed was delivered. We recognised in our discussion paper that delivery being the breaching event would give rise to some practical problems. First, the date of delivery is not publicly known or registered so that the fact that there has been a breach of inhibition may not be obvious from inspection of the registers. Secondly, use of the date of delivery might complicate searches in the personal register. At present the predominant view is that there should be a personal search against each grantor since (but not including) the foundation writ, each one for five years prior to that grantor's divestiture (ie when the successor acquired a real right by registration).[131] In the example in paragraph 6.82 above, a five year search from 5 September 2000 (when the purchaser's disposition was registered) would not disclose the inhibition of 1 September 1995 which would nevertheless be breached by delivery on 29 August 2000. The five year search would have to be from the date of delivery of the disposition, but this date might be difficult to establish. To be absolutely safe one would have to search against all grantors since the foundation writ for the whole period of their ownership. In the vast majority of cases the interval between delivery and registration of the disposition is only a few days. A personal search for six years instead of five should suffice for all but the most exceptional cases, and we understand that this would increase the cost of the search by only about £1.

6.86 We would adhere to our proposal. The practical difficulties outlined in the previous paragraph are not such as would make the delivery theory unworkable. Another advantage of selecting delivery as the breaching event is that this rule can be applied without modification to conveyancing transactions where there is no antecedent contract or missives. We therefore recommend that:

> **91. An inhibition should be treated as breached on the date when the inhibitee delivers to a third party a voluntary deed relating to heritable property affected by the inhibition.**

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[130] Doubt was cast on this decision by Lord Jauncey in *Sharp v Thomson* 1997 SC (HL) 66 at p 74E-I, but it is thought that it remains authoritative. We intend to examine this issue in our work on a reference we received on 27 September 2000 to consider the implications of that case. In practice a land attachment used after delivery but before registration of the disposition would normally be ineffective as it acts as a notice of litigiosity for the first 14 days.

[131] Gretton and Reid, *Conveyancing* (2nd edn, 1999) p 151.

G. REMEDIES ON BREACH OF INHIBITION

Deeds granted in breach of an inhibition

6.87 We turn now to consider the remedy available to an inhibitor where the inhibitee has disposed of property affected by the inhibition or granted a subordinate real right (such as a standard security) over it in breach of the inhibition. Take, for example, a disposition by the inhibitee to a third party purchaser. At present the inhibitor may obtain from the Court of Session a decree of reduction of the third party's title on the ground of inhibition, traditionally termed a reduction *ex capite inhibitionis*. This reduction operates for the benefit of the inhibitor only (*ad hunc effectum*) and does not benefit other creditors, even other inhibitors.[132] The reduction entitles the inhibitor to adjudge the property even though for other purposes and as far as other creditors are concerned it remains the third party's property. The third party remains owner but the property is burdened with the inhibitor's adjudication. Where the deed breaching the inhibition is a standard security the inhibitor's adjudication is ranked prior to the standard security. Under our recommendations in Part 3 above the remedy following reduction would be land attachment rather than adjudication.

6.88 In Discussion Paper No 107 we proposed that the remedy of reduction and adjudication/land attachment should continue.[133] Third parties who transacted with the inhibitor in good faith and were justifiably ignorant of the inhibition prior to delivery of the deed were to be protected. For the avoidance of doubt we also proposed that if a disposition of the property was reduced and the inhibitor attached the property, then any security granted over the property by the disponee should rank after the inhibitor's land attachment.[134] These proposals were agreed by all those who commented.

6.89 In current practice an inhibitor raising an action of reduction will normally register in the personal register a notice of summons of reduction at the start of the action. The effect of this notice is to render the property which is the subject of the action litigious and as such should prevent any disposal by the defender pending the action.[135] It also serves as a warning to those considering entering into a transaction with the defender. In our discussion paper we proposed that the current practice should continue but that the notice should specify the property in the deed under reduction and be registered in the property registers.[136] Unlike an inhibition which is a global diligence, a notice of summons of reduction affects only particular property and should we thought appear in the property registers. Moreover, it would be more effective in that any search over the property would be bound to disclose it, whereas matching entries in the personal register with proprietors in the property registers is less certain.[137] This proposal was agreed by all those who responded, but the Property Managers Association favoured registration of the notice being mandatory. We now think that registration of such a notice should be mandatory in order to prevent a disponee settling on a clear search and then finding that a decree of reduction has been registered in the interval between settlement and registration.

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[132] Gretton, pp 128-131; *McLure v Baird* 19 Nov 1807 FC; Erskine, *Institute*, II,11,14.
[133] Scot Law Com DP No 107, Proposal 5(1), para 3.30.
[134] *Ibid*, Proposal 5(4), para 3.30.
[135] Titles to Land Consolidation (Scotland) Act 1868, s 159; Gretton, p 129.
[136] Scot Law Com DP No 107, Proposal 5(3), para 3.30.
[137] See paras 6.103-6.105 below.

6.90 Under the existing law, the inhibitor may reduce a lease granted by the inhibitee of property affected by the inhibition as it will lessen the value of the property. However, a lease for a fair rent and for an ordinary duration is not reducible.[138] "Fair rent" and "ordinary duration" are vague terms and such authorities as there are date from an era when the law of leases was very different from today.[139] We asked in our discussion paper whether an inhibitor should be entitled to reduce a lease granted by the inhibitee in breach of the inhibition, whatever the terms of the lease.[140] Security of tenure which many classes of tenant now enjoy means that the granting of a lease reduces substantially the value of the property and hence the value of an inhibition affecting it. An inhibitor who reduced the lease and attached the property would be entitled to sell the property with vacant possession.[141] There was a mixed response on consultation. The majority agreed with reduction of all leases. The Institute of Credit Management said that its members had had experience of inhibitees avoiding the effect of an inhibition by granting a short lease to an associated person. The Faculty of Advocates also agreed, but said there would be some hard cases. Three practising solicitors thought that the reduction of all leases went too far and that leases for a year or so ought to be exempt.[142]

6.91 In the light of the responses we are now in favour of a more flexible approach to the reduction of leases. We accept that it is not reasonable to require a short-term tenant to obtain a personal search against the landlord in order to check for an inhibition. Short-term tenancies of dwellinghouses, shops or other business premises are often entered into without legal advice. The expenses of involving a lawyer and obtaining a personal search would add substantially to the tenant's costs. We are also conscious that making all leases reducible could add to the problem of homelessness as many dwellings are let on a short assured tenancy.[143] The court should have a discretion whether or not to reduce a lease which is capable of enduring for less than five years as at the date of commencement of the action of reduction. Factors that the court could take into account would include the level of the rent and the value of the property with a short term tenant, the hardship that would be suffered by the tenant and the circumstances in which the lease had been granted. There should be no discretion in relation to leases with five or more years left to run.

6.92 Summing up the preceding paragraphs we recommend that:

92. (1) Where an inhibitee grants a deed in breach of the inhibition, the inhibitor should continue to be entitled to raise an action of reduction on the ground of inhibition and to attach the property affected by the deed in question. A reduction on the ground of inhibition should continue to benefit the inhibitor only.

(2) On commencing an action of reduction on the ground of inhibition, the inhibitor should have to register in the property registers a notice of litigiosity specifying the land in the deed under reduction. Rules of court

[138] Gretton, pp 103-104.
[139] Bell, *Commentaries* ii, 142; Hume, *Lectures* vol VI, p 70; *Wedgewood v Catto* 13 Nov 1817 FC; *Earl of Breadalbane v McLauchlan* (1802) Hume 242; *Gordon v Milne* (1780) Mor 7008; *Earl of Tullibardine v Dalzell* (no date) Mor 8370.
[140] Scot Law Com DP No 107, Proposal 5(2), para 3.30.
[141] "Non reducing" creditors using land attachment would be bound by a prior lease.
[142] One respondent suggested a period of 2-5 years for non-reduction of leases, the other a lease with less than one year to run at the start of the action of reduction.
[143] Housing (Scotland) Act 1988, s 32.

should provide that the action cannot proceed unless evidence of registration is lodged in process. An inhibitor who fails to obtain a decree of reduction should be bound to discharge the notice.

(3) It should be made clear that where the inhibitee breaches the inhibition by disposing of property to a third party, any heritable security or land attachment over the property by a creditor of the third party should be postponed to the reducing inhibitor's land attachment.

(4) A lease granted by an inhibitee in breach of the inhibition should be reducible if the lease is capable of enduring for a period of five or more years as at the date of raising the action of reduction. A lease which is not capable of so enduring should be reduced provided the court is satisfied that in all the circumstances it would be fair and reasonable to reduce it.

H. EXPENSES OF INHIBITION

6.93 A creditor using inhibition in execution[144] must pay all the court dues, solicitors' and officers' fees and registration dues involved in obtaining the warrant for and executing the inhibition. It is generally thought,[145] although direct authority is sparse,[146] that an inhibitor is not entitled to recover these expenses of inhibition from the debtor. At common law, a diligence ceases to have effect if the debtor makes or tenders payment of the sum due under the decree only (ie without diligence expenses).[147] However, it appears in practice that many inhibitors will not grant a discharge of the inhibition unless they are paid in full; principal sum, interest, expenses of diligence and any expenses connected with the discharge.[148] Few inhibitees are prepared to petition the court for recall of an inhibition which the inhibitor refuses to discharge because the expenses of the inhibition have not been paid, even though the expenses of such a petition would be awarded against the inhibitor.[149]

6.94 In Discussion Paper No 107 we considered whether the creditor should be entitled to recover the expenses of executing the inhibition from the inhibitee or whether they should remain the liability of the inhibitor. In the only reported case[150] the expenses of an inhibition were held not chargeable against the debtor on the grounds that inhibition is merely prohibitory, a diligence of precaution or protection which cannot be carried further so as to become a direct step in enforcing payment. This is correct in legal theory, but in practice inhibition is frequently resorted to and creditors regard it as an effective diligence for enforcing payment of decree debts. In most other diligences (arrestment, earnings arrestment, poinding and sequestration for rent, but not adjudication or civil imprisonment) the expenses of the diligence are chargeable against the debtor. However, the rule that the debtor is not liable for the expenses of adjudication has to be seen against the background that the value of the land adjudged may vastly exceed the debt and an adjudger who obtains an irredeemable title may not be required to account to the debtor for any excess. In

[144] We deal with inhibition on the dependence at para 6.101 below.
[145] Graham Stewart, p 555; Gretton, p 45.
[146] *Clark v Scott and Connell, (1878)* Guthrie's Sh Ct Cases 204 seems to be the only reported case.
[147] *Inglis v McIntyre* (1862) 24D 541; *Harvie v Luxram Electric Ltd* (1952) 68 Sh Ct Rep 181. For arrestments, earnings arrestments and poindings diligence expenses must now be paid or tendered as well, 1987 Act, s 95(1).
[148] Gretton, p 45.
[149] Graham Stewart, p 567; *Lickley Petr* (1871) 8 S L Rep 624.
[150] *Clark v Scott and Connell* (1878) Guthrie's Sh Ct Cases 204.

principle a debtor should be liable for the expenses of any diligence used to enforce payment of the debt. The debt has been found due by legal proceedings and if the debtor thereafter refuses to pay, it seems only right that the creditor's expenses in enforcing payment should be borne by the debtor. Were this not the rule modest debts would become unenforceable. We then considered whether there any special features of inhibition that could justify departing from this general rule.

6.95 In our discussion paper we pointed out that there is no fund out of which the expenses of inhibition used against debtors may be claimed. Unlike poinding or arrestment, there is no property which can be sold or fund which can be utilised for payment of the debt and diligence expenses. We were not in favour of permitting creditors to recover inhibition expenses by means of an action for payment. That would multiply legal proceedings, potentially to infinity if the creditor inhibited in order to enforce a decree for payment of the expenses of inhibition in enforcing a previous decree and so on. Indirect methods of recovery, other than by a fresh action for payment, would have to be used. We put forward for consideration four indirect methods of recovery. The first was that an inhibitor would not be obliged to discharge the inhibition unless the diligence expenses were paid as well as the debt. As we noted[151] this is to some extent the present practice but not the present law. If the creditor refused to grant a discharge on being tendered the amount of the debt and expenses, then the debtor should be entitled to apply to the court for a recall of the inhibition and the inhibitor should be liable for the expenses of the application.[152] The second was that in a sequestration, liquidation or other ranking process the inhibitor should be entitled to rank for both the debt and the diligence expenses. The other two methods would be by means of a land attachment or attachment order. If the inhibition were breached the creditor should be entitled to reduce and attach for the expenses of the inhibition as well as for the debt and the expenses of attachment.

6.96 Another objection that may be advanced against making the debtor liable for the expenses of inhibition is that it would encourage the use of inhibition, particularly for modest debts. Greater use of inhibition would have an adverse effect on conveyancing transactions. The more inhibitions there are, the more troublesome a search in the personal register is and the greater the likelihood of errors in matching the names of sellers etc to the names of inhibitees or finding possible matches which have to be investigated.

6.97 Nearly all of those who responded favoured making the expenses of an inhibition in execution chargeable against the debtor. The Property Managers Association said that factors used inhibition to enforce payment of maintenance charges for property belonging to non-resident owners, as other diligences were often unavailable. The arrears for each owner could be in the order of a few hundred pounds but the present law made use of inhibition unattractive. One commentator thought that the present law discourages inhibition for small debts. We do not think that altering the rule on expenses will lead to a large increase in the number of inhibitions for modest debts. First, many creditors recover the expenses already and there is evidence[153] that inhibition is used to some extent for modest debts. Secondly, creditors will continue to prefer attaching diligences, such as arrestment or poinding (if available) for modest debts.

[151] Scot Law Com DP No 107, para 3.177.
[152] This is the present law where the creditor refuses a discharge on the amount of the debt being tendered.
[153] See Scot Law Com DP No 107, para 3.180.

6.98 Those responding were also in favour of the indirect methods we proposed for the recovery from debtors of the expenses of inhibition used against them.[154] The Royal Faculty of Procurators thought that there had to be a satisfactory formula for quantifying the reasonable expenses of inhibition. We think that this is already the situation. The expenses of the various steps involved, apart from the fee of the creditor's agents for dealing with the discharge of the inhibition, are all specified in Acts of Sederunt or other subordinate legislation.[155]

6.99 Section 94 of the Debtors (Scotland) Act 1987 ascribes payments made by, or on behalf of, the debtor while an arrestment or poinding is in effect; first to the diligence expenses, secondly to interest and finally to the debt itself. We would adopt this rule for inhibition expenses in order to deal with cases where the payments recovered by the inhibitor were insufficient to meet the debt and expenses in full. The expenses of multiple inhibitions by the same creditor should also be regulated. Section 90 provides that a charge for payment lasts for two years and that a creditor can recharge at the debtor's expense at the end of that period. The expenses of a further charge within the lifetime of an existing charge has to be borne by the creditor not the debtor. We think that these rules should be adopted for inhibitions which last for five years.

6.100 We recommend that:

93. (1) The expenses of executing an inhibition in execution of a decree (or other document on which inhibition is competent) and executing a further inhibition when the previous inhibition lapses at the end of the period of five years should be chargeable against the inhibitee. The expenses of a further inhibition for the same debt executed while an inhibition is in effect should not be chargeable against the inhibitee.

(2) It should not be competent for the inhibitor to bring a separate action against the inhibitee or to do other diligence (apart from a land attachment and attachment order as in (2)(c)) for the recovery of the expenses of the inhibition. The inhibitor should be entitled to recover the expenses by any of the following methods:

(a) the inhibitor should not be obliged to discharge the inhibition unless the debt and the diligence expenses are tendered, and any rule of law that requires an inhibitor to grant a discharge on payment of the debt alone should cease to have effect;

(b) the inhibitor should rank in a sequestration, liquidation or other ranking process for the debt and diligence expenses;

(c) the inhibitor who reduces a transaction in breach of the inhibition and attaches (by way of land attachment or

[154] See para 6.95 above.

[155] Agent's fee for obtaining letters of inhibition, court dues for granting inhibition, agent's fee for instructing messenger to inhibit, messenger's fee for serving schedule of inhibition and preparing certificate of service, agent's fee for registering inhibition in the personal register, dues of registration. Debtors would pay their own agents to prepare the discharge of the inhibition and register it once it had been signed by the creditor.

attachment order) should be entitled to attach the property in question for the debt and the expenses of the inhibition.

(3) A payment to account of the debt and inhibition expenses is to be ascribed:

(a) to the expenses of executing the inhibition which are chargeable against the debtor;

(b) to interest on the sum due under the decree or other document warranting the inhibition accrued to the date of the coming into effect of the inhibition;

(c) to any other sum due under the decree or other document (which will include the debt itself),

in the above order.

6.101 In our *Report on Diligence on the Dependence and Admiralty Arrestments* we recommended that the court should award the pursuer the taxed expenses of obtaining and executing a warrant for arrestment on the dependence, but may modify or refuse them if the pursuer was unreasonable in applying for the warrant or if modification or refusal is reasonable in the circumstances (including the outcome of the action).[156] If debtors are to be liable for the expenses of inhibition in execution (as they are for the expenses of arrestment in execution) then we think that the rules for the expenses of inhibition on the dependence should be the same as for arrestment on the dependence. Accordingly we recommend that:

94. The court should award the pursuer the taxed expenses of obtaining a warrant for, and executing, an inhibition on the dependence except to the extent that the court modifies or refuses them on the ground that:

(a) the pursuer was unreasonable in applying for the warrant; or

(b) the modification or refusal is otherwise reasonable in the circumstances, including the result of the action.

I. INHIBITIONS AND THE PROPERTY REGISTERS

Introduction

6.102 In this section we consider the problems that arise in conveyancing transactions because of the later emergence of an inhibition undiscovered at the date of settlement. The foundation of the Scottish system of heritable conveyancing is the principle that persons transacting with heritable property in good faith and for value should be entitled to rely on the property and personal registers. It is not acceptable that purchasers in good faith and for value can suffer loss through no fault of their own or those acting for them and we have devised schemes for protecting them. For technical reasons the details of the scheme

[156] Scot Law Com No 164, Recommendation 11, para 3.111.

applicable to writs registered in the Register of Sasines differ to some extent from those applicable to Land Register writs.

Criteria of validity of inhibition

6.103 There are inherent difficulties in matching persons affected by inhibitions registered in the personal register with owners of heritable property registered in the property registers because each register may contain an equally correct but different designation. Two forms of the same name occurred in *Atlas Appointments Limited v Tinsley.*[157] An inhibition was registered against "Steve Tinsley, 68A Hamilton Place, Aberdeen". This was not found by searchers who had been instructed to search against "Stephen John Tinsley, 68A Hamilton Place, Aberdeen", his designation in the property register. The searchers searched the index of the personal register in 1990 using the Soundex computer searching programme which at that time was not designed to find "Steve" given "Stephen John". A manual search of the paper copy of the personal register index would have found the inhibition.

6.104 It was held that an inhibition is valid if the designation of the person in the inhibition is such as to make the identity of the person inhibited clear to a third party. The primacy of the terms of the actual entry in the personal register, as distinct from its discoverability by a particular method of search, was emphasised. The argument that the entry had to have been discoverable by a Soundex-assisted search was wrong because "it attaches importance, not to the entries in the Register themselves, but to the way in which those entries are traced and to whether they could be traced with a particular method of searching".[158] If someone is bound by a registered inhibition, "then he must be bound irrespective of the name which he happens to use in any subsequent transaction".[159] Otherwise inhibitees could defeat an inhibition simply by using a different form of their names when granting a subsequent conveyance. The criterion of discoverability was seen as having a subordinate evidential role. The fact that the terms of an entry are such that a searcher, "armed with the full name of the person to which the inhibition was intended to relate together with his address as shown in the entry, would be unable to find the entry", may be evidence that the entry does not identify the person. There, however, "it is the failure of the entry to identify the person inhibited, rather than the failure of the searcher to find the entry, that results in the conclusion that the inhibition is not valid".[160]

6.105 In Discussion Paper No 107 we asked for views on whether there should be any change in the criterion for the validity of an inhibition as expressed in the *Tinsley* case.[161] All those responding were against any change. We do not think that any statutory formula could improve on this criterion. In our opinion the thrust of reform should not be towards increasing the requirements for an inhibition to be valid, but rather towards protecting third parties who have transacted in good faith and in ignorance of an inhibition. We therefore make no recommendation for change.

[157] 1994 SC 582 (OH (Lord McCluskey) and Second Division); 1996 SCLR 476 (OH, Lord Penrose); 1997 SC 200 (First Division).
[158] 1997 SC 200, at p 207C per Lord President (Rodger).
[159] 1997 SC 200, at p 206D per Lord President (Rodger).
[160] 1997 SC 200, at p 215F-G per Lord Macfadyen.
[161] Scot Law Com DP No 107, Proposal 14, para 3.84.

Deemed knowledge of a registered inhibition

6.106 Registration of an inhibition puts the public on notice that they are prohibited from receiving conveyances from the inhibitee or giving the inhibitee credit.[162] People are deemed to know of the existence of an inhibition which has been registered. It follows that, as the law currently stands, they cannot plead good faith if they accept a conveyance from a person who is inhibited, even though they were unaware of the inhibition and had taken reasonable steps to discover its existence. They are therefore at risk of an action of reduction which may result in their having to pay the debt due to the inhibitor or having the property they acquired from the inhibitee burdened by the inhibitor's adjudication, and may not be able to recover their loss from others.

6.107 There has been a very large increase in the number of inhibitions and inhibition documents registered in the personal register over the last 40 years,[163] bringing with it an increased risk of professional searchers failing to discover a relevant registered inhibition. The rule, affirmed in *Atlas Appointments Ltd v Tinsley*,[164] that inhibitees are bound by an inhibition irrespective of the name or designation they use in later transactions, is necessary for the effectiveness of the system of inhibitions. But it is likely to give rise to more cases where an inhibition is effectual even though a search by modern methods in the personal register failed to discover it. Neither the inhibitor nor the third party may have been at fault. The inhibitor may have used a perfectly adequate and correct designation and the third party may have taken reasonable steps to discover the inhibition. There are inherent difficulties in searching the personal register in that the same person may be named or designed differently in the registered inhibition and in the instructions to the searchers. These could be minimised if creditors searched the property registers to obtain the designation of the debtor used there before inhibiting. But as the Royal Faculty of Procurators pointed out, such a search is burdensome for creditors.

6.108 In our discussion paper we suggested that it was no longer appropriate that the public should be deemed to be aware of inhibitions simply because they have been registered.[165] The majority of those responding agreed, but the Royal Faculty of Procurators thought that such a change would lessen the effect of inhibitions and hence prejudice creditors. Professor Gretton also disagreed. In his opinion the correct approach was to protect those who were justifiably ignorant of a registered inhibition, rather than abolishing the public knowledge rule. We have reformulated our rules for protecting third parties who transact in good faith with inhibitees in such a way as to retain the general principle that the public should be deemed to be aware of registered inhibitions.

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[162] Bell, *Commentaries* ii, 134, preserved by s 16 of the Land Registers (Scotland) Act 1868.

[163] Total entries in the Register of Inhibitions and Adjudications: 1958, 635; 1959, 758; 1960, 674; Annual Reports of the Keeper of the Registers of Scotland. Many of these will have been notices or discharges of inhibitions or bankruptcy documents. The corresponding figures for 1999 and 2000 (supplied by Mr Webster of the Registers of Scotland) are 14,375 and 14,758 respectively, of which around half relate to inhibitions.

[164] 1997 SC 200.

[165] Scot Law Com DP No 107, Proposal 13, para 3.79.

Protecting third party disponees in conveyancing transactions

(a) Register of Sasines

6.109 In transactions where the disponee's deed will be registered in the Sasine Register, the existing law does not adequately protect third parties who transact with inhibitees for value and in justifiable ignorance of the existence of an inhibition.[166] The third party is likely to have a claim against the inhibitee under any contract relating to the transaction (such as missives) or warrandice,[167] but such remedies may be of limited or no value, if, as is often the case, the inhibitee is insolvent.

6.110 Parties transacting in good faith and for value on the faith of the registers should be protected and should not be required to resort to damages actions to recover losses caused by an undiscovered inhibition of which they were justifiably ignorant. It seems unavoidable that the protection will have to be at the expense of inhibitors who are prevented from making their inhibitions effectual. As between the inhibitor and the innocent purchaser, we are firmly of the opinion that the loss must fall on the former. The inhibitor has merely lost an opportunity to gain an advantage over other creditors, and may be left with an inhibition which, though valid, is ineffective because the inhibitee has no heritable property left.[168] But all creditors doing diligence take the risk that it may not be effective. The third parties on the other hand will suffer very substantial financial loss in circumstances where they were not at fault and had taken reasonable steps to discover the inhibition.

6.111 In Discussion Paper No 107 we proposed that an inhibition should not affect a deed breaching it if the grantee was justifiably ignorant of its existence at the date of delivery of the deed. Ignorance of the inhibition at delivery was to be treated as justifiable if the grantee had taken reasonable steps to discover the inhibition before that time.[169] In view of the widespread use of computer searching programs, such as Soundex and its replacement SSA, by those searching the personal register we also proposed that carrying out a computer-assisted search by means of an appropriate program should be regarded as taking reasonable care to discover the existence of an inhibition.[170] On consultation there was general agreement with the protection of bona fide grantees, but many of those responding expressed concern that the concepts of "justifiable ignorance" and "reasonable" steps were vague. This they thought could lead to substantial uncertainty and litigation. We have amended our scheme to meet these concerns.

6.112 The starting point continues to be that third parties would be bound by a registered inhibition. This is because they would be deemed to know of its existence by virtue of its registration in a public register. Our general policy is that third parties should be protected if they had acted in good faith and had obtained a clear personal search prior to settlement

[166] We deal with Land Register transactions at paras 6.124-6.134 below.
[167] Absolute warrandice may be express and is implied in any sale or security or other onerous transaction. It protects the third party from any acts or deeds of the grantor, from any defects in the title of the grantor and from eviction on any ground prior to the granting of the deed implementing the transaction (Halliday, *Conveyancing Law and Practice* (2nd edn 1996), paras 4.33-34).
[168] In paras 6.120-6.122 we consider whether the inhibitor should be able to recover from persons other than the inhibitee.
[169] Scot Law Com DP No 107, Proposal 15, para 3.88.
[170] *Ibid*, Proposal 21, para 3.115.

of the transaction against all relevant persons within the prescriptive period.[171] More precisely, the delivery of a deed implementing a transaction between an inhibitee and a third party should not be in breach of an effective inhibition provided that a search of the personal register covering the date on which the registered inhibition became effective but which did not disclose that inhibition was produced to the third party before settlement of the transaction. A third party who had actual knowledge of the inhibition prior to settlement would be in bad faith and would not be protected by the clear personal search. Personal searches are usually carried out just before settlement and our scheme would reinforce this practice. A third party who settled on the basis of a personal search carried out well before settlement would not be protected under our scheme against any inhibition registered later, but, as at present, might be able to claim on the letter of obligation issued by the inhibitee's agents. [172]

6.113 Another area of concern was the vagueness of the notion of an appropriate program in our proposals. It was pointed out that the effectiveness of a search depended as much on the skill of the searcher and the quality of the search instructions as on the computer software used. The third party has little[173] or no control over these aspects as the search is instructed by the inhibitee's agents. We think that the solution lies in the requirement that the third party is in good faith. Third parties should be protected unless they knew, or ought reasonably to have known, at delivery that the search had not been carried out in a proper manner. This will strike at collusion between the inhibitee and the third party and at obviously defective searches.

6.114 We turn now to the question of onus. The inhibitor on discovering the transaction would raise, or threaten to raise, an action of reduction and land attachment as the transaction would be prima facie in breach of the inhibition. The onus of establishing that the transaction was not affected by the inhibition would rest on the third party and could be discharged by exhibiting the clear pre-settlement personal search. In the overwhelming majority of cases that would be the end of the matter. Very rarely the third party might have had actual knowledge of the inhibition or have known (or ought to have known) that the search had not been carried out properly. The onus of establishing any such fact must rest on the inhibitor, as otherwise the third party would be faced with the impossible task of proving a negative.

6.115 In our discussion paper we asked whether the scheme for protecting third parties should be confined to grantees for value or should be extended to donees.[174] We pointed out that extending protection to donees avoids the question of what value has to be given (full value or adequate consideration for example) and the evidential problems of establishing that that level of value was given. It might also be regarded as unfair to expose donees to the threat of reduction since they may have entered into obligations or re-arranged their affairs on the faith of the gift. On the other hand, in other areas of law onerous third parties are afforded a greater level of protection than gratuitous parties. Thus a trustee in sequestration may challenge an alienation made by the bankrupt, but the court cannot grant

[171] In most cases a search against the disponer would suffice as the other persons would have been searched against in connection with earlier transactions and this search would be made available to the third party.
[172] An inhibition registered a short period before settlement of the transaction could well be ineffective as the seller would by then already be under an obligation to grant and deliver the necessary deed.
[173] The search instructions are revised by the grantee's agents but they usually have no means of checking information about the inhibitee, apart from the designation in the property register.
[174] Scot Law Com DP No 107, Proposal 16, para 3.91.

decree of reduction if the person seeking to uphold the alienation establishes that the alienation was made for adequate consideration.[175] Similarly, a court may not set aside a transaction by one spouse which had the effect of defeating in whole or in part any claim by the other spouse for aliment or financial provision on divorce if the third party acquired the property in good faith and for value.[176]

6.116 This proposal received a mixed response on consultation. The majority agreed with our proposal. But the former Accountant in Bankruptcy thought that protecting gratuitous disponees against reduction by an inhibitor would make reduction of gifts by the permanent trustee more difficult. However, the ground of the trustee's reduction is quite different. The fact that the donee had obtained a clear personal search against the inhibitee would offer no protection against a challenge under section 34 of the Bankruptcy (Scotland) Act 1985 or at common law.[177] One body suggested that there should be no protection where the donee was an "associate" or a "connected person" in terms of sections 249 and 435 of the Insolvency Act 1986. We think that such an exception would render the protection of donees almost nugatory. Associates and connected persons include all those connected by a close family or commercial relationship and these are the very people most likely to be the recipients of gifts. It is not current practice to carry out a personal search against the donor of gifted property. We consider that our proposed scheme should be extended to donees who would then have to obtain a clear search in order to obtain protection.

6.117 So far we have considered the position of third parties transacting with inhibitees, but that of remoter singular successors in the progress of titles also needs to be considered. At present all those deriving title from an inhibitee in Sasines transactions are unprotected. The mere fact of registration of an inhibition in the personal register prevents any person from being in good faith since the register's contents are deemed to be known by everyone having an interest.[178]

6.118 In our discussion paper we suggested that this gap should be closed by adopting what in other contexts has been called "the shelter principle".[179] Accordingly we proposed that where a person deriving right directly from the inhibitee is protected against reduction on the ground of inhibition, that protection should enure for the benefit of every singular successor, even one aware of the inhibition. Most of those consulted agreed, but two bodies were opposed. One gave no reasons. The Institute of Credit Management thought that associates, connected persons and those in bad faith should not be protected. We think that our scheme of protection for the original grantee would be rendered almost valueless without absolute protection for singular successors. In many cases where the inhibition was not discovered prior to delivery of the deed it will come to light after the third party registers the deed. If singular successors are not protected, then the third party would in practice be unable to sell the property without paying the debt due to the inhibitor and getting the inhibition discharged. By framing our scheme of protection in terms of the

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[175] 1985 Act, s 34(4)(b). The meaning of adequate consideration was dealt with in *Short's Tr v Chung* 1991 SLT 472, *Matheson's Tr v Matheson* 1992 SLT 685 and *MacFadyen's Tr v MacFadyen* 1994 SLT 1245.

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

[177] Gratuitous alienations are challengeable at common law, see McBryde, *Bankruptcy*, (2nd edn), paras 12.01-12.05; *Bank of Scotland, Petr* 1988 SLT 690.

[178] Gretton, p 39, and see para 6.106 above.

[179] This label, which was suggested to us by Professor Gretton, derives from the American law on negotiable instruments.

inhibition not affecting the transaction between the inhibitee and the third party, protection of successors in title is achieved automatically by the existing principles of property law.

6.119 The position of persons transacting in good faith with a third party whose title is reducible on the ground of inhibition has also to be considered. An inhibitee may well try to defeat the inhibition by transferring the property to an associate who then sells it on to an unsuspecting purchaser. Under the existing law persons transacting for value with the holder of a title which, unknown to them, is reducible on the ground of inhibition would not obtain an unchallengeable title even if the disposition or other deed is registered before the inhibitor's decree of reduction.[180] This is because they are not in good faith as every person is deemed to know of the existence of a registered inhibition.[181] We think that such persons should be protected. We would therefore extend our scheme of protection to all bona fide successors of an "unprotected" third party. A disponee transacting with a third party would clearly not be in good faith if aware of the inhibition or that the third party's title was reducible. The pre-settlement search in connection with this transaction between the third party and the disponee, even if it did not disclose the inhibition, would disclose any notice of litigiosity in connection with an action of reduction by the inhibitor as we recommend that it must be registered in the property registers.[182] A clear search should protect a bona fide disponee.

6.120 Under the scheme we now recommend those who transact with inhibitees in good faith on the basis of a clear search would be protected and the inhibitor would be unable to enforce the debt by reduction and land attachment of the property concerned. In our discussion paper we sought views on whether those who were at fault in producing an erroneously "clear search" against the inhibitee should be liable in damages to the inhibitor.[183] For example, the searchers may have missed an exact match or failed to disclose entries that were sufficiently close to warrant further investigation, while the inhibitee's agents instructing the search may have given the searchers an incorrect designation for their client. The imposition of liability would, we suggested, serve to check any laxity in the carrying out of personal searches. The damages would be the amount the inhibitor would have received had reduction and land attachment been permitted. Liability for damages for pure economic loss is limited for reasons of public policy and allowed only where there is sufficient proximity between the person at fault and the person who suffers loss for a duty of care to arise and it is fair, just and reasonable to impose liability.[184] We thought that once our scheme of protection was in place there would be sufficient proximity between the inhibitor on the one hand and the searchers and their instructing agents on the other hand for the imposition of a duty of care not to be unreasonable. They would be aware of the third party's existence, that the results of the search would be communicated to, and used by, the third party in connection with the transaction and that the third party would be protected, and any inhibitor prejudiced, by an incorrect clear search. If certain people are to have a duty of care to inhibitors then the standard of care has to be considered. One possibility is that a person's conduct would have to fall below that of a reasonable member of that occupation. Usual practice would be significant in deciding what a reasonable searcher or solicitor would do. Another test, used in the area of professional negligence where there

[180] S 46 of the Conveyancing (Scotland) Act 1924 protects only those who "in bona fide onerously acquire right" to a reducible title, and then only if their title is registered before the decree of reduction is registered.
[181] See para 6.106 above.
[182] Recommendation 84, para 6.37 above.
[183] Scot Law Com DP No 107, Proposal 18, para 3.96.
[184] *Caparo Industries plc v Dickman* [1990] 2AC 605; *Nordic Oil Services Ltd v Berman* 1993 SLT 1164.

may be a diversity of opinion and practice, would be that the person is at fault only if the course adopted was one which no member of ordinary skill of that profession would have adopted if acting with ordinary care.[185]

6.121 The alternative approach we put forward was that inhibitors should be left to bear the losses caused by their inability to reduce because a clear search was wrongly issued. Inhibitors perhaps ought to accept that their diligence for one reason or another will not always be successful.

6.122 Most of those responding agreed that inhibitors should be entitled to claim damages, otherwise searchers would then have no incentive to maintain standards. The Royal Faculty of Procurators took the view that our proposal to allow a claim by the inhibitor was novel and artificial and would have to be introduced by statute. They thought that inhibitors should be entitled to reduce and attach if they could show that the inhibition should have been discovered. Disponees would then settle with the inhibitors and claim against the searchers. We do not accept this argument. Third parties who transact in good faith on the basis of a clear search should not be exposed to the worry and expense of the inhibitor's legal proceedings for reduction and the proceedings they would then have to take in an attempt to establish fault on the part of some person in the searching process. There was however very little support for new statutory provisions entitling inhibitors to claim for losses arising out of their inability to reduce protected transactions. Most consultees preferred to leave matters to the common law. We think that existing principles of the law of contract and delict would allow inhibitors to claim in appropriate situations and that the courts should be left to develop the law in this area.

6.123 To sum up, we recommend that:

95. (1) The delivery of a deed implementing a transaction (whether onerous or gratuitous) between an inhibitee and a third party should not breach the inhibition provided that:

(a) a search of the personal register against the inhibitee was produced to the third party prior to delivery; and

(b) the inhibition was in effect in the period covered by the search but it (or any notice of inhibition which was followed within 21 days by an inhibition) was not disclosed by that search,

unless the third party had actual knowledge of the inhibition or notice prior to delivery.

(2) The scheme of protection in (1) above should not apply if the third party knew, or ought reasonably to have known, at the time of delivery that the search had not been instructed and carried out in a proper manner.

(3) If the third party is protected from reduction by virtue of (1) and (2) above, then any successor in title of the third party should also be protected

[185] *Hunter v Hanley* 1955 SC 200.

even if the successor had actual knowledge of the inhibition or the inadequacy of the search.

(4) The scheme of protection in (1) and (2) above should apply with necessary modifications to any person who transacts with a third party or successor whose title is reducible on the ground of an inhibition.

(5) The remedies of an inhibitor prevented from reducing a deed by virtue of (1)-(4) above should be left to the common law as developed by the courts.

(b) Land Register

6.124 **The current position.** We turn now to consider protection in the case of property registered or registrable in the Land Register. The current provisions of the Land Registration (Scotland) Act 1979 concerning inhibitions give rise to doubts and difficulties. Under section 6(1)(c) of the 1979 Act the Keeper is under a statutory duty to enter on the title sheet of an interest in land registered in the Land Register "any subsisting entry in the Register of Inhibitions and Adjudications adverse to the interest". The Act is silent as to when this entering has to be done. It would be an impossible task for the Keeper to identify and alter every affected title sheet as soon as an inhibition is registered in the personal register. We understand that the current practice is that the inhibition is entered on the relevant title sheet only where the Keeper prepares or updates a title sheet when registering the interest of the disponee or issuing a requested office copy. Entry on registration of the disponee's interest is in line with Professor Gretton's view that the title of the inhibitee is not affected by registration of the inhibition, and that the inhibition is adverse only to the interest of the disponee who has transacted with the inhibitee in breach of the inhibition.[186] It is necessary for the Keeper to enter an inhibition on the title sheet when registering the disponee's interest in order to alert the public to the existence of the inhibition and the possibility of reduction of the disponee's title. The reason is that once the disponee has been registered as proprietor it is no longer possible to find out from the Land Register the name and designation of the inhibitee or any previous proprietors in order to carry out a search of the personal register to see whether they were inhibited.[187] Even if this practice was altered so that previous proprietors were shown, the difficulty would remain as there could be unregistered proprietors (such as executors) who should be searched against. A complete solution would involve the Keeper disclosing all the deeds giving rise to entries in the Land Register, but this would run counter to the idea of land registration.

6.125 When the Keeper enters an inhibition on the title sheet on registering the disponee's interest, a note is added under section 12(2) of the 1979 Act excluding indemnity against future reduction by the inhibitor.[188] The inhibitor may then apply for the register to be rectified to show on the title sheet any decree of reduction, since in terms of section 9(3)(a)(iv) rectification prejudicing a proprietor in possession (in this case the disponee) is competent where the rectification relates to a matter in respect of which indemnity has been excluded under section 12(2) of the Act. After the reduction has been

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[186] Gretton, pp 39-43.

[187] The Land Register, unlike the Sasine Register, shows only the current proprietors of registered interests. The Accountant in Bankruptcy in his comments on our proposals said that this caused difficulties to trustees in challenging alienations by debtors of their property.

[188] Gretton, pp 40-41.

given effect to by rectification, the inhibitor is entitled to register a decree of adjudication even though it prejudices the disponee.[189]

6.126 Where the Keeper, on registering the disponee's interest, fails to enter the inhibition, there will be no exclusion of indemnity against future reduction by the inhibitor. The inhibitor cannot apply for the register to be rectified so as to show the decree of reduction unless the disponee has been fraudulent or careless or agrees.[190] A disponee taking title from an inhibitee might be fraudulent if aware of the existence of the inhibition in spite of obtaining a clear personal search, or careless if no search of the personal register was obtained before settlement. If the register cannot be rectified to show the inhibition the inhibitor may apply to the Keeper for payment of indemnity.[191] We understand that the Keeper pays not insubstantial sums of money annually to inhibitors by way of indemnity. The amount of indemnity payable may be reduced where the claimant's fraud or carelessness has contributed to the loss.[192]

6.127 **Our proposals.** In Discussion Paper No 107 we proposed a new scheme for the protection of third party disponees in Land Register transactions, the key to which was the entry of the inhibition on the disponee's title sheet. If the Keeper is to confer protection against reduction upon the disponee then we thought that this should depend on a step under the Keeper's control, entry of the inhibition on the title sheet. The Keeper would enter an inhibition on the disponee's title sheet when registering the interest that the disponee obtained from the inhibitee.[193] If the Keeper entered an inhibition, the inhibitor should be entitled to reduce and use land attachment without rectification,[194] because indemnity against loss caused by such action had been excluded. If the inhibition was not entered on the title sheet the inhibitor could apply to the Keeper for the register to be rectified by entering the inhibition on the title sheet where the disponee had been fraudulent or careless.[195] Only once the inhibition had been entered would the inhibitor be entitled to reduce and attach. If the Keeper was unable to rectify and enter the inhibition because the disponee had not been fraudulent or careless the inhibitor could apply to the Keeper for a payment of indemnity. We considered that such indemnity should be payable only where the Keeper had been at fault in failing to enter the inhibition on the title sheet.[196]

6.128 There was general agreement with our proposed new scheme. The Royal Faculty of Procurators, however, thought that it benefited the Keeper and third parties at the expense of inhibitors. Creditors would have to search the Land Register in order to obtain the designation of the debtor used in that register in order to be sure of the inhibition being discovered and entered on the title sheet. We accept this point, but as we pointed out

[189] 1979 Act, s 2.
[190] 1979 Act, s 9(3)(a). It may be that the register does not need to be rectified to show a reduction on the ground of inhibition as it does not alter the ownership of the property but merely paves the way for an adjudication, see discussion paper, paras 3.104-105.
[191] 1979 Act, s 12(1)(b).
[192] 1979 Act, s 13(4). Thus, for example, an inhibitor whose inhibition is not discovered because of failure to use in the inhibition documents the designation of the inhibitee in the property registers, may well be paid a reduced amount. An inhibition which fails to meet the test for effectiveness laid down in *Atlas Appointments Ltd v Tinsley* 1997 SC 200 should not give rise to any payment of indemnity.
[193] Scot Law Com DP No 107, Proposal 19(a), para 3.99.
[194] *Ibid*, Proposal 20(1), (2), para 3.111.
[195] *Ibid*, Proposals 19(b) and 20(4), paras 3.99 and 3.111.
[196] *Ibid*, Proposal 20(5), para 3.111.

earlier[197] remain of the opinion that an innocent third party purchaser is more worthy of protection than an inhibitor.

6.129 Another objection to our scheme was that it placed the onus on the Keeper of deciding if the transaction between the inhibitee and disponee was in breach of the inhibition. This onus already exists in current practice. The Keeper on discovering the inhibition will ask the disponee's agents for further information. Thus, for example, if it appears that the inhibition became effective after the date of the missives the transaction would not be in breach and the Keeper would not enter the inhibition on the title sheet.

6.130 Professor Gretton remarked that our scheme depended on the concepts of rectification, inaccuracy and proprietor in possession as used in the 1979 Act. These were uncertain in meaning and did not provide a firm foundation for our scheme. Developments since the publication of our discussion paper have reinforced this view. First, a gratuitous alienation may be recovered for the sequestrated estate by registration of a reconveyance of the property by the alienee to the trustee,[198] thus circumventing the difficulty of rectification of the register following a decree of reduction.[199] Should the alienee fail to grant a re-conveyance on being ordered to do so by the court it may be signed by the clerk of court. Secondly, it is only a "proprietor in possession" that is protected against rectification under section 9(3) and it has been held that such proprietors are limited to owners and do not include those with other interests over the property such as a security.[200]

6.131 The Joint Committee of the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers objected that our scheme would breach the faith of the registers if an inhibition could be entered and the disponee's title rendered reducible after its registration. They noted there is a gap between when a search is carried out and settlement during which time the inhibition could be entered on the title sheet to the prejudice of any fourth party transacting with the disponee.

6.132 Since our discussion paper was published in October 1998 there has been a significant development. The Keeper has suggested to us that we should review the Land Registration (Scotland) Act 1979 and this was supported by the Civil Law Division of the Scottish Executive Justice Department. We included this review as a medium term project in our *Sixth Programme of Law Reform* published in March 2000.[201] We do not wish to pre-empt our review by making detailed recommendations in this Report about the protection of bona fide disponees who are unaware of a registered inhibition or the indemnity provisions in the 1979 Act. We therefore confine ourselves to some general points. First, the underlying principles of protection should be the same as for Sasine transactions as set out in paragraphs 6.109 to 6.123 above. This means that a transaction between a third party and an inhibitee would not be in breach of an inhibition if the third party had obtained a clear pre-settlement search covering a period which included the date of registration of the inhibition (or notice of inhibition) unless the third party knew before settlement of the existence of the inhibition or knew (or ought to have known) that the search had not been properly carried out.

[197] Para 6.110.
[198] *Short's Tr v Chung* (No 2) 1999 SLT 751.
[199] *Short's Tr v Keeper of the Registers of Scotland* 1996 SC(HL) 14.
[200] *Kaur v Singh* 1999 SLT 412.
[201] Scot Law Com No 176, para 2.16.

6.133 Secondly, section 6(1)(c) of the 1979 Act (Keeper to enter on title sheet of interest any subsisting entry in personal register adverse to that interest) should be amended so that the Keeper is obliged to enter an inhibition[202] only when registering the interest of the disponee who had acquired in breach of the inhibition. The Keeper should not be under the duty, which a literal reading of section 6(1)(c) requires, of searching the Land Register and altering every affected title sheet as soon as an inhibition is registered in the personal register. As we point out in paragraph 6.124 above this would be an impossible task. Conversely, if an inhibition had been entered on a title sheet, the Keeper should be under a duty to remove it if the inhibition is subsequently discharged or restricted to other property. But an application should have to be made to the Keeper for this to be done. The Keeper could not search the Land Register to discover the title sheets affected for every discharge registered in the personal register. Further, the Keeper should not be obliged to search the personal register and enter any relevant inhibition when requested to supply an office copy of a Land Register title sheet. Those who wish to know of entries in the personal register which could potentially affect a transaction involving an interest on the title sheet should have to instruct a search of that register.

6.134 Summing up we recommend that:

96. (1) Section 6(1)(c) of the Land Registration (Scotland) Act 1979 (Keeper's duty to enter on title sheet of interest in land any subsisting entry in personal register adverse to that interest) should be replaced by a new provision imposing on the Keeper a duty to enter an inhibition on a title sheet only when registering an interest in land which a person has acquired from the inhibitee where the deed conveying or creating that interest was granted by the inhibitee in breach of the inhibition.

(2) The Keeper should, on application by the third party or any other person having an interest, amend the title sheet to show any subsequent discharge or restriction of the entered inhibition.

(3) The Keeper should not be under a duty, when requested to issue an office copy of a title sheet, to search the personal register and enter any subsisting inhibition in the personal register adverse to an interest on that title sheet.

J. SALES BY JUDICIAL FACTORS

6.135 A judicial factor is a person appointed by the court to take over the management of another's property and financial affairs. The present law is not clear regarding the effectiveness of an inhibition when a judicial factor sells inhibited property.[203] In *Ferguson v Murray*[204] a judicial factor was appointed to manage heritable property belonging to a lapsed trust. The property was subject to a bond and the heritable creditor brought an action of maills and duties to ingather the rents. It was held that this diligence prevailed over a

[202] This might be extended to all the other items registered in the personal register, such as notices of awards of sequestration under the 1985 Act, s 14.
[203] Gretton, p 89.
[204] (1853) 15 D 682.

judicial factor as it would have prevailed over any trustees of the trust. It was observed that the situation might have been different if there had been several heritable creditors and the judicial factor had been appointed to collect the rents on behalf of all.[205] *Ker v Brown*[206] was very similar except that the diligence was an arrestment, which it was held prevailed over the judicial factor subsequently appointed to the lapsed trust. These cases suggest that an inhibition should remain effective against a judicial factor, but on the other hand an inhibition is a personal prohibition rather than an attaching diligence (such as an arrestment or maills and duties). Finally in *Reid's J F v Reid*[207] it was decided that, apart from various statutory provisions regarding claims of creditors, a judicial factor appointed on the estate of an insolvent deceased person was not assimilated to that of a trustee on a sequestrated estate. Professor Halliday considered it doubtful that such a judicial factor had power to sell free of an inhibition against the bankrupt.[208] A judicial factor may apply to the Accountant of Court under section 2 of the Trusts (Scotland) Act 1961 for authority to sell property but this only authorises a sale which is or may be at variance with the terms and purposes of the judicial factory. It would not empower the Accountant of Court to sanction a sale in contravention of a valid and effective inhibition. A judicial factor may also apply to the court under section 7 of the Judicial Factors Act 1849 for special powers outwith the normal powers of administration. There is no closed list of special powers and what may be granted depends on the circumstances of the particular case.

6.136 It can be argued that an inhibition strikes only at voluntary acts of the inhibitee and that acts of the judicial factor are not acts of the inhibitee. In Discussion Paper No 107 we considered that it would be wrong in principle to give a judicial factor higher rights as against the inhibitee's creditors than the inhibitee has. In order to remove any doubts in the existing law we proposed that an inhibition against the owner of property subject to a judicial factory should be equally effective against the judicial factor.[209] Our proposal was supported on consultation, but the Joint Committee of the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers queried whether it was intended to apply to a factor appointed to an insolvent estate. A judicial factor may be appointed to the estate of a deceased person under section 11A of the Judicial Factors (Scotland) Act 1889.[210] The factor ranks the claims according to section 51 of, and Schedule 1 to, the Bankruptcy (Scotland) Act 1985. None of the other provisions dealing with sequestrated estates applies[211] (including the permanent trustee's power to sell notwithstanding an inhibition[212]), but an inhibition against an individual falls on death so that the factor has unrestricted power to sell the deceased's heritable property. The situation would be different if the deceased's executor had been inhibited and the factor had taken over as manager or administrator from the executor. In that situation we consider that the inhibition should be effective against the factor. The Council of the Law Society of Scotland may apply under section 41 of the Solicitors (Scotland) Act 1980 for the appointment of a judicial factor on the estate of a solicitor who has failed to comply with the Solicitors Account Rules. Other appointments of judicial factors to individuals, partnerships and companies are possible under statute[213] or

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[205] *Key v Cleugh* (1840) 3 D 252.
[206] (1902) 10 SLT 272.
[207] 1959 SLT 120.
[208] D J Cusine (ed), *The Conveyancing Opinions of J M Halliday* (1992) pp 581-584.
[209] Proposal 31, para 3.175.
[210] Inserted by the 1985 Act, Sch 7, para 4.
[211] *Reid's JF v Reid* 1959 SLT 120.
[212] 1985 Act, s 37(2).
[213] Partnership Act 1890, s 39.

common law. The factor should not be entitled to sell in the face of an effective inhibition against the owner. But if the estate turns out to be insolvent we think that sequestration or liquidation would generally follow. Then the permanent trustee has power to sell notwithstanding any inhibition and we recommend earlier[214] that a liquidator in a creditors' liquidation should have the same power. We recommend that:

97. The exercise of any powers conferred on a judicial factor in respect of heritable property affected by an inhibition against the owner should be challengeable by the inhibitor on the ground of inhibition.

[214] Recommendation 87, para 6.59.

Part 7 Abolition of Equalisation of Adjudication for Debt

The existing law

7.1 Equalisation of adjudications for debt was introduced by the Diligence Act 1661, long before the introduction of sequestration in bankruptcy in 1772.[1] The 1661 Act proceeds on the narrative that:

> "creditors, in regard they live at distance or upon other occasions are prejudged and prevened (sic) by the more timeous diligence of other creditors so that, before they can know the condition of the common debtor, his estate is comprised and the posterior comprisers have only right to the legal reversion, which may and doth often prove ineffectual to them, not being able to satisfy and redeem the prior comprisings, (their means and money being in the hands of the common debtor) ...".

The 1661 Act provides that all adjudications for personal debts[2] before, or within a year and a day after, the first effectual adjudication should come in *pari passu* together as if one adjudication had been obtained for the whole of the sums in the several adjudications. The first effectual adjudication was declared to be that in which the first real right and infeftment was completed.[3] The equalised adjudgers have to indemnify the first effectual adjudger for all of his expenses. One difference from equalisation of arrestments and poindings under the Bankruptcy (Scotland) Act 1985[4] is that under the 1661 Act an unsecured creditor has to adjudge in order to claim equalisation whereas under the 1985 Act a creditor producing liquid grounds of debt or a decree for payment within the statutory equalisation period is entitled to rank as if he had executed an arrestment or poinding.

7.2 When sequestrations and liquidations were introduced, the equalisation rules were not abolished. Rather sequestrations and liquidations were and are deemed by statute to be constructive adjudications[5] with the effect that the general body of creditors rank *pari passu* on the proceeds of the first effectual adjudication if the date of sequestration, or in a winding up by the court the date of the court's winding up order,[6] occurs within the statutory equalisation period.

Previous consideration

7.3 The abolition of equalisation of adjudications was proposed in our Discussion Paper No 79 on *Equalisation of Diligences.* On consultation, one respondent expressed concern that if the diligence of adjudication were simplified, speeded up and made less expensive, as

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[1] Bankruptcy Act 1772.
[2] Ie other than *debita fundi* which are a class of debts secured over land.
[3] Graham Stewart, pp 638-640.
[4] 1985 Act, Sch 7, para 24.
[5] 1985 Act, s 37(1)(a), applied to liquidations by the Insolvency Act 1986, s 185.
[6] 1985 Act, s 37(1)(a); 1986 Act, s 185(1)(a);(2)(c); and (3); *Morrison v Integer Systems Control Ltd* 1989 SCLR 495 (Sh Ct).

proposed in Discussion Paper No 78, it would be used a great deal and in most cases to the advantage of individual creditors who have sufficient knowledge of the situation to utilise it to the disadvantage of the creditors as a whole. In our *Report on Diligence on the Dependence and Admiralty Arrestments,* in which we recommended the abolition of equalisation of arrestments and poindings, we referred to the possibility that the provisions for equalisation of adjudications, if modernised and reformed, might meet that criticism.[7] They are after all expressly designed to prevent creditors with prior knowledge of the debtor's insolvency from stealing a march on the general body of creditors by using adjudication - the very mischief identified by our respondent.

The case for abolition

7.4 On reflection, however, we think that the case for abolition outweighs the case for retention and reform. The case for abolition is broadly the same as the case for abolishing equalisation of arrestments and poindings which we set out in our *Report on Diligence on the Dependence and Admiralty Arrestments*[8] (though there are some differences[9]). Our reasons for favouring abolition are summarised below.

7.5 First, equalisation of adjudications qualifies the general principle that a creditor who is first to attach the debtor's land enjoys the benefit of his diligence to the exclusion of other creditors. Where the debtor's assets are not enough to pay his debts, he is by definition insolvent and in the context of insolvency fair sharing of the assets among *all* unsecured creditors is the only way of achieving satisfactory justice for the general body of creditors. However where the debtor is solvent there is no compelling reason why a creditor who has attached a particular asset should be forced to share the benefit he derives with other creditors. As we noted earlier, sequestration and liquidation were not available when equalisation of adjudications was introduced in 1661, and we take the view that the sharing of a debtor's assets is better placed in the context of insolvency processes.

7.6 Second, we doubt whether equalisation of diligence, including adjudications, is frequently used outside of insolvency. Adjudications are much less frequently used than other diligences, such as arrestments and poindings. But even in the context of those diligences there is little evidence that the equalisation provisions are widely known and resort made to them. In our *Report on Diligence on the Dependence and Admiralty Arrestments* we set out the views of experienced practitioners who had encountered equalisation only rarely.[10] It is worth noting that empirical research on creditors did not even mention equalisation as a factor influencing creditors' policies.[11]

7.7 Third, the law on equalisation of adjudications is complex, and not always easy to apply. To adapt the law to the new diligences of land attachment and attachment orders

[7] Scot Law Com No 164, paras 9.35-9.36.
[8] *Ibid*, paras 9.37-9.45.
[9] For example in the case of equalisation of arrestments and poindings, it is possible that there can be multiple overlapping equalisation periods because on each occasion when apparent insolvency is constituted anew, a new statutory equalisation period comes into being: see Scot Law Com DP No 79, paras 5.42-5.56; G L Gretton, "Multiple Notour Bankruptcy" (1983) 28 JLSS 18.
[10] Scot Law Com No 164, para 9.46.
[11] See B Doig and A Millar, *Debt Recovery – A Review of Creditors' Practices and Policies* (Scottish Office Central Research Unit) (1981)

would not be a straightforward task, and we doubt whether it would be worthwhile to make detailed provisions for an area of law that might rarely be used in practice.

7.8 We recommend that:

> **98. (1) The Diligence Act 1661 (which makes provision for the *pari passu* ranking of adjudications within a year and a day of the first effectual adjudication) should be repealed.**
>
> **(2) No similar provision should be made for the equalisation of land attachment, attachment orders, and money attachment.**

Insolvency processes and cutting down of diligences

7.9 **Land attachments.** If the above recommendation and that contained in our *Report on Diligence on the Dependence and Admiralty Arrestments* in respect of poinding and arrestment were to be implemented the effect would be that all of the existing law on the equalisation of diligences would be abolished without replacement. In Discussion Paper No 79 we noted that if the 1661 Act on equalisation of adjudications were to be repealed, there would be need for consequential amendment to section 37 of the Bankruptcy (Scotland) Act 1985. Section 37 renders ineffectual as against the trustee in sequestration the diligences of arrestment and poinding executed within 60 days of the date of sequestration. A similar provision exists in respect of any inhibition which takes effect within 60 days of that date. No express provision deals with the cutting down of adjudications effective prior to sequestration. Rather this effect is brought about by section 37(1)(a) which provides that a sequestration is deemed to be the equivalent of an adjudication. This provision interacts with the 1661 Act to bring about the effect that all adjudications within a year and a day of the date of sequestration are equalised with the sequestration and in effect cut down by it. In Discussion Paper No 79 we noted that if equalisation of adjudications were abolished section 37 would require amendment in respect of the new diligence to replace adjudications for debt. On the model of the law on arrestments and poinding we suggested that the cut-off period should be 60 days before sequestration or winding up. On consultation, it was pointed out that that 60 days was a substantial reduction of the period of a year and a day under the 1661 Act and that it might be too short a period to allow fair sharing of attached land where the debtor is subsequently sequestrated or wound up. We accepted this argument and in our later Discussion Paper on *Diligence Against Land* we suggested a period of six months instead.[12] We adhere to that later proposition.

7.10 We recommend that

> **99. (1) No land attachment of a debtor's property for which a certificate of service on the debtor has been registered:**
>
> > **(a) within the period of six months before the date of the debtor's sequestration and whether or not subsisting at that date; or**
> >
> > **(b) on or after that date,**

[12] Scot Law Com DP No 107, Part 2, s B, Propositions 31 and 33.

should be effectual to create a preference for the attaching creditor in a question with the permanent trustee.

(2) A creditor whose land attachment is registered within the above-mentioned period of six months should be entitled to payment, out of the proceeds of sale of the attached property, of the expenses incurred:

(a) in obtaining the extract of the decree or other document containing the warrant for land attachment;

(b) in executing the charge and steps in the diligence of land attachment; and

(c) in taking any further necessary action in respect of the land attachment.

(3) Section 37(1)(a) of the Bankruptcy (Scotland) Act 1985 should be repealed.

7.11 **Attachment orders, money attachment, arrestments, and poindings.** In this Report in addition to land attachment we also recommend the introduction of two further new diligences, money attachment and attachment orders. In Discussion Paper No 108, we proposed that the appropriate period for cutting down these diligences by sequestration should be 60 days, the period applicable to arrestments and poindings.[13] On consultation it was pointed out to us that in practice the period for cutting down earlier arrestments and poindings is often greater than 60 days before sequestration or winding up. This arises from the interaction of the rules on cutting down with those on equalisation of diligences. Sequestration itself is deemed to be the equivalent of an arrestment and a poinding. Where an arrestment (or poinding) falls within the period of equalisation (that is, 60 days prior to the debtor's apparent insolvency or four months after it), and a subsequent sequestration occurs in the same period, the sequestration and the diligence are 'equalised' and in effect the diligence is cut down.[14] The effect of apparent insolvency prior to sequestration can be to extend the period of cutting down of diligences to almost six months.[15] If, as we have recommended, the provisions on equalisation of diligences were to be abolished, the period for cutting down the diligences of arrestment and poinding would for many cases be shortened from a period of four to six months to 60 days. We now take the view that the period for cutting down prior diligences by sequestration and liquidation should be six months for arrestment and poinding and that the same period should apply in respect of the proposed new diligences of attachment orders and money attachment.[16] Six months is the cutting down period which we recommended for land attachments. This period also coheres with the provisions for the reduction of unfair preferences (including the granting of

[13] Scot Law Com DP No 108, paras 2.31; 3.38.
[14] *Stewart v Jarvie* 1938 SC 309.
[15] This is certainly the case with arrestments, which by themselves do not bring about the apparent insolvency of the debtor. By contrast, the execution of a poinding will usually involve the debtor's apparent insolvency (1985 Act, s 7(1)(c)(ii), (iii)). The situation is made more complex by the possibility of different but overlapping apparent insolvencies.
[16] A similar period of 60 days applies to the diligence of poinding of the ground (1985 Act, s 37(6)). The diligence of poinding of the ground will be abolished when the Abolition of Poindings and Warrant Sales Act 2001 is brought into effect (2001 Act, s 1(1), (3)). This provision gives effect to our proposal in Scot Law Com DP No 78, paras 8.10-8.11.

securities) within six months before sequestration and liquidation.[17] We are aware that this is not a matter which was raised in our previous consultations. Indeed this recommendation differs from those made in Discussion Paper No 108 on attachment orders and money attachment and we would welcome further comment on it.

7.12 We recommend that:

> **100. (1) An attachment order or money attachment which comes into effect within six months before the debtor's sequestration should be ineffectual in a question with the trustee or liquidator, except as to the expenses of the diligence.**
>
> **(2) In the Bankruptcy (Scotland) Act section 37, subsections (4) (arrestment and poinding), and (6) (poinding of the ground), for the expression '60 days' there should be substituted 'six months'.**

7.13 **Inhibition**. Prior to the Bankruptcy (Scotland) 1985 Act there were no provisions for the cutting down of prior inhibitions by sequestration or liquidation. In our *Report on Bankruptcy* we argued that since inhibition gave the inhibitor a preference in respect of post-inhibition debts, no inhibition within 60 days of sequestration should be effective and the inhibitor's rights should pass to the trustee.[18] This recommendation was implemented by section 37(2) and (3) of the 1985 Act. We have recommended in Part 6 that inhibition should cease to have any effect in relation to post-inhibition debts. The terms of section 37(2) and (3) have been strongly criticised,[19] and we doubt whether the provisions have any remaining rationale.

7.14 We recommend that:

> **101. Section 37(2) and (3) of the Bankruptcy (Scotland) Act 1985 should be repealed**.

[17] 1985 Act, s 36(1).
[18] Scot Law Com No 68, paras 13.14-13.15.
[19] See especially Gretton, pp 160-164.

Part 8 List of Recommendations

1. The diligence of adjudication for debt should be abolished.

(Para 2.14)

2. The Register of Inhibitions and Adjudications should be re-named the "Register of Inhibitions."

(Para 2.16)

3. (1) There should be a new diligence, to be known as land attachment, which takes effect by registration by the creditor in the property registers of a notice of land attachment.

(2) The effect of completing the registration of a notice of land attachment is to confer on the creditor a subordinate real right in security for payment of the debt.

(3) After a period of six months the creditor would be entitled to apply to the sheriff for (i) warrant of sale of the attached land to extinguish or reduce the debt, or (ii) in default of sale, for decree of foreclosure of the attached land in favour of the creditor.

(4) The creditor would be entitled to register a notice of land attachment against the debtor's principal dwellinghouse. We make no recommendation on whether a warrant of sale or decree of foreclosure could be granted in respect of the debtor's attached principal dwellinghouse.

(Para 3.32)

4. (1) A warrant for diligence in an extract of a decree or a decree equivalent should have the effect of authorising the creditor, among other things:

(a) to charge the debtor to pay the debt, interest and expenses within the days of charge on pain of attachment of land;

(b) after expiry of the days of charge without payment, to register in the property registers a notice of land attachment over land specified in the notice.

(2) For this purpose a decree or decree equivalent should include:

(a) a decree for the payment of money of the ordinary courts of law (Court of Session, High Court of Justiciary, Court of Teinds or a sheriff court);

(b) a civil judgment granted outwith Scotland by a court, tribunal or arbiter and, by virtue of any enactment or rule of law, enforceable in Scotland;

(c) a document of debt registered for execution in the Books of Council and Session or sheriff court books;

(d) a bill protested for non-payment by a notary public;

(e) a document or settlement which, by virtue of an Order in Council made under section 13 of the Civil Jurisdiction and Judgments Act 1982, is enforceable in Scotland;

(f) an order of a criminal court imposing a fine or other financial penalty or making a compensation order containing a warrant for diligence;

(g) a liability order within the meaning of section 32(2) of the Child Support Act 1991; and

(h) an order or determination which by virtue of any enactment is enforceable as if it were an extract registered decree arbitral bearing a warrant for execution granted by the sheriff.

(3) A notice of land attachment may not be registered after the lapse of two years from the date of service of the charge on the debtor but a creditor may reconstitute his right to register a notice by the service of a further charge in terms of section 90 of the Debtors (Scotland) Act 1987.

(4) Land attachment should not be competent on the dependence of an action or in security of future or contingent debts.

(Para 3.39)

5. (1) The diligence of land attachment should apply to land of a debtor whose title is, at the date of registration of the notice of land attachment, registered in the property registers or capable of being so registered.

(2) "Land" for this purpose should include land itself and a subordinate real right in land being a right which:

(a) is capable of being held separately;

(b) is not a right of ownership; and

(c) is registered in the property registers.

(3) It should not be competent to use land attachment to attach a lease :

(a) which is not assignable; or

(b) which excludes assignation except with the landlord's consent.

But a lease of the latter type which provides that the landlord's consent shall not be unreasonably withheld should be attachable.

(Para 3.50)

6. (1) The notice of land attachment should set out the names and designations of the creditor and debtor and specify:

   (a) the decree or other document constituting the debt and containing (or deemed by law to contain) the warrant for the diligence;

   (b) the amount of the debt secured by the land attachment (principal sum and litigation expenses, interest to date, the expenses of its registration and of executing the prior charge, less payments to account); and

   (c) the land attached thereby.

   (2) A notice of land attachment should:

   (a) render the land litigious for a period of 14 days after registration of the notice of land attachment; and

   (b) on the expiry of that period, confer on the creditor a subordinate real right in security for payment of the debt.

   (3) In rendering the land litigious, the notice of land attachment should have the same effect as an inhibition restricted to the land described in the land attachment, subject to the reforms of inhibitions proposed in Part 6 of this Report.

   (4) Where a disposition of the land is registered during the period of litigiosity a notice of land attachment does not operate to confer any real right on the attaching creditor except where the disposition has been granted in breach of the litigiosity.

   (5) A registered notice of land attachment should imply an assignation to the creditor of the title deeds, including searches and all unregistered conveyances affecting the attached land.

   (6) Notice given to a holder of a prior standard security of a registered notice of land attachment has the effect of restricting the scope of that security in terms of section 13 of the Conveyancing and Feudal Reform (Scotland) Act 1970 (ranking of standard securities).

   (7) A copy in a prescribed form of the notice of land attachment should be served on the debtor by an officer of court (messenger-at-arms or sheriff officer) after the date of registration of the notice.

   (8) If a certificate by the officer of court of service of a copy of the notice of land attachment on the debtor has not been registered in the property registers within 14 days after the date of registration of the notice, the diligence should thereafter be deemed to be, and always to have been, void.

(Para 3.65)

7. The rule that registration of an adjudication has the effect of accumulating the principal sum, interest and expenses into a capital sum bearing interest thereafter

should not apply to the new diligence of land attachment, and accordingly land attachment should secure interest accrued and continuing to accrue until sale or foreclosure but not interest on accrued interest.

(Para 3.67)

8. If as we recommend above an expired charge becomes an essential prelude to registering a notice of land attachment, then such registration should not constitute or reconstitute apparent insolvency in the statutory sense.

(Para 3.69)

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

(Para 3.72)

10. In the new diligence of land attachment, the registration of a notice of land attachment to enforce a moveable debt should not have the effect of changing the character of the debt from moveable to heritable.

(Para 3.74)

11. (1) Where a time to pay direction under section 1 of the Debtors (Scotland) Act 1987 is in effect it should not be competent for the creditor to serve a charge or to take any steps in the diligence of land attachment.

(2) An application for a time to pay order under section 6 of the Debtors (Scotland) Act 1987 should be competent at any time after service of a charge until a warrant of sale of the attached land has been granted. While a time to pay order is in effect a creditor who has served a charge on the debtor may register a notice of land attachment but may take no further steps in the diligence other than serving a copy of the notice and registering the certificate of service. An interim order sisting diligence should allow the creditor to register a notice of land attachment, to serve a copy of the notice, and to register a certificate of service but would prevent him taking any further steps in the diligence. Expenses incurred by the creditor which are chargeable against the debtor will be recoverable according to the provisions of section 93(4) and (5) of the 1987 Act.

(3) While a time order under section 129 of the Consumer Credit Act 1974 is in effect, it should be incompetent to commence or continue any diligence (other than registering an inhibition or a notice of land attachment) against the individual concerned.

(Para 3.84)

12. (1) A creditor should be entitled to register a notice of land attachment no matter the size of debt owing by the debtor at the time of the registration.

(2) An application for warrant to sell attached land is to be incompetent unless the amount of the debt owing to the creditor at the date of application is £1,500 (or such other sum as may be prescribed) or more.

(3) However warrant to sell attached land should be competent irrespective of the level of debt where the debtor has attachable land in Scotland and, under the rules of private international law, the court lacks jurisdiction to award sequestration of his estate or, if the debtor is a company, to make an order winding up the company.

(Para 3.95)

13. (1) It should not be competent to grant a warrant to sell attached land where the likely net proceeds of the sale of the attached property would not exceed the sum of (a) the expenses of the diligence which are chargeable to the debtor and (b) part of the debt owing to the creditor.

(2) "Net proceeds" means the amount of the price paid if the attached land were to be sold less any amount owing under any debt in respect of which there is a prior security over the land.

(3) The amount by which the debt must be reduced to justify granting of warrant of sale should be the lesser of £500 or 10% of the debt (or such other figures or formula as prescribed by the Scottish Ministers).

(4) On presentation of an application for warrant to sell attached land which appears in order the sheriff shall grant (*inter alia*) the following orders:

(a) an order requiring any prior security holder to disclose the amount outstanding on the security;

(b) an order appointing a surveyor or other qualified person to report on the open market value of the land and authorising the reporter to take all necessary steps (including inspecting the land) to produce such a report.

(Para 3.99)

14. In dealing with an application for warrant of sale of attached land a sheriff, if satisfied on the motion of an interested person, that it would be unduly harsh to allow the diligence to proceed, should have the power:

(a) to refuse the application;

(b) to grant warrant but to extend the period before which sale can take place.

(Para 3.101)

15. (1) Any exemption of an attached dwellinghouse from sale should apply only to a "principal dwellinghouse."

(2) For this purpose a "principal dwellinghouse" is an attached dwellinghouse which, immediately before the date of the application for warrant of sale, is occupied as an only or principal dwellinghouse by (a) the debtor; (b) a spouse of the debtor having occupancy rights under the Matrimonial Homes (Family Protection) (Scotland) Act 1981; or (c) a cohabiting partner having occupancy rights under section 18 of that Act.

(3) A dwellinghouse includes any part of a building occupied as a separate dwelling, and in particular includes a flat, and also includes any yard, garden, out-house and pertinents belonging to the house and usually enjoyed with it.

(4) A principal dwellinghouse may be subject to sale where (I) the part containing the dwelling cannot practically be separated from the rest of the land or (ii) sale of the land without the dwellinghouse would be likely to result in a price substantially less than sale of the land containing the dwellinghouse. Where a principal dwellinghouse is subject to land attachment, the provisions on protecting the debtor and other occupiers set out in Recommendation 16 are to apply.

(Para 3.109)

16. (1) In an application for warrant of sale of an attached principal dwelling (as defined in Recommendation 15), the sheriff should refuse to grant a warrant or should extend the period of sale if it is reasonable to do so in all the circumstances. In assessing what is reasonable the sheriff should have regard in particular to the following factors:

(a) the nature of the debt and the reasons for its being incurred;

(b) the debtor's ability to pay the debt (including interest and chargeable diligence expenses) within an extended period;

(c) any action taken by the creditor to assist the debtor to fulfil those obligations;

(d) the ability of those occupying the dwellinghouse as their sole or principal residence to obtain reasonable alternative accommodation; and

(e) the personal circumstances of any such occupiers.

(2) Section 40(2) of the Bankruptcy (Scotland) Act 1985 should be amended so as to include among the factors which the court has to consider: "(e) the ability of those occupying the dwellinghouse as their sole or principal residence to obtain alternative accommodation."

(Para 3.124)

17. (1) An application for warrant of sale of attached land should not be made before the expiry of a period of six months after the date of registration of the certificate of service of a notice of land attachment.

(2) A third party who had concluded missives for the purchase of land from the debtor prior to registration of a notice of land attachment should be entitled to enter proceedings of application for warrant to sell attached land, or where warrant had been granted, to make an application to the court. He would apply for an order sisting the application for warrant of sale or an order sisting the operation of the warrant.

(3) In considering an application by a purchaser under prior missives the sheriff should so exercise his powers as to secure, so far as reasonably practicable, the implementation of the missives and in particular that the purchaser will acquire from the debtor a title to the land free and disburdened of the land attachment if the purchaser:

(a) becomes entitled under the missives to delivery of such a title; and

(b) pays the contract price (so far as required to satisfy the sum secured by the land attachment) to or on behalf of the attaching creditor, instead of to the debtor.

(4) For this purpose the sheriff should have power:

(a) to sist an application for warrant of sale, to extend the period of sale under a warrant of sale or to sist the operation of a warrant to allow time for any outstanding terms and conditions in the missives to be satisfied and for the sale under missives to proceed;

(b) as a condition of exercising any of the above powers, to order the purchaser to pay the contract price direct to the creditor or to an already appointed independent solicitor on behalf of the creditor, in whole or partial satisfaction of his debt, instead of to the debtor; and

(c) to make such incidental or consequential orders as he thinks fit.

Such a payment would disburden the land of the land attachment.

(5) There should be two qualifications of the foregoing powers in the creditor's interest. First, the missives must not be collusive (in the sense of being designed to defeat the rights and remedies of the debtor's creditors). Second, the debtor and purchaser must proceed with the sale transaction without undue delay and otherwise act reasonably having regard to the attaching creditor's interests.

(Para 3.132)

18. (1) An application for a warrant to sell attached land must be made to a sheriff of the place where any part of the attached land is situated.

(2) The sheriff if satisfied that the application is in order shall grant:

(a) orders fixing a date for the hearing of the application and orders for intimation of the hearing to appropriate parties;

(b) an order for a report on the value of the attached land ; and

(c) an order requiring holders of prior securities over the land to disclose the amount of outstanding debt.

(Para 3.138)

19. (1) Prior to the hearing of an application for warrant to sell attached land, the creditor must lodge a note of the outstanding debts on any securities on the land and a report by a surveyor on the value of the land. The creditor must also lodge an updated search of the property registers.

(2) A sheriff cannot grant warrant to sell attached land unless satisfied that (i) the amount of debt owing to the creditor is £1,500 or more or the application falls into the exception to that limit (ii) the land may properly be sold as part of the diligence and (iii) the proceeds of sale are likely to exceed the sum of all the diligence expenses chargeable against the debtor plus the lesser of 10% of the debt or £500.

(3) A sheriff must consider representations by any party on whom intimation of the hearing has been made, including the debtor, where the land to be attached is a principal dwellinghouse any occupier of the land, a holder of any prior security, and purchasers under existing missives for sale of the land.

(4) If satisfied that the debtor's interests would not be prejudiced, the sheriff should have power to restrict the warrant of sale to part of the attached property.

(5) The warrant must specify a period within which any sale can take place. The period may be extended on application by or on behalf of the creditor or any other party with an interest. The sheriff may authorise sale of the attached land in lots. The sheriff may also make any ancillary order as he considers appropriate in connection with the sale of the attached land.

(6) On granting warrant of sale the sheriff should appoint a suitably independent solicitor (SIS) to market and sell the attached land.

(7) Where the warrant of sale authorises the sale of the land in lots the SIS acting on behalf of the creditor shall have power to create such rights and impose such duties and conditions as he considers may be reasonably required for the proper management, maintenance and use of the land.

(Para 3.150)

20. (1) Where the creditor has instructed the SIS to proceed with the sale of the attached land the SIS may by notice served on the debtor or any other person entitled to occupy the land, terminate any right of the debtor (or such other person) to continue to occupy the land, with effect from a day not less than seven days from the date of service.

(2) Any right of a person (other than the debtor) to occupy the land which before a notice of land attachment relating to the land was registered would have been binding on a singular successor of the debtor should not be affected by any such notice to remove from the land.

(3) From the date on which the notice takes effect until the land attachment ceases to have effect the creditor (in place of the debtor) should have the debtor's rights and obligations as proprietor of the land, including (a) any right of the debtor to receive rent from any tenant (but only as regards rent payable on or after the date on which the SIS intimates in writing to the tenant that notice has been given) and (b) any lease and any permission or right of occupancy granted in respect of the land but not including the power to grant a lease.

(4) After the notice takes effect, the SIS

(a) may apply to the sheriff for an order (i) authorising him to effect works of reconstruction, alteration or improvement if they are works reasonably required to maintain the market value of the land and (ii) to recover from the debtor any expenses reasonably incurred in so doing;

(b) may bring an action of ejection against the debtor; and

(c) shall have title to bring any action of removing, intrusion or ejection which the debtor might competently have brought in respect of the land.

(Para 3.156)

21. (1) A SIS should be entitled, unless the sheriff otherwise directs, to sell the attached land by private bargain or public auction after due advertisement. The SIS should be under a general duty to take all reasonable steps to ensure that the sale price is the best that can reasonably be obtained.

(2) An attachment and sale should be valid notwithstanding that the debtor and any other person to whom intimation has to be made is in nonage or under legal disability.

(3) The SIS should have authority, by virtue of the sheriff's warrant, to grant a disposition on behalf of the creditor in favour of the purchaser in implement of the contract of sale. The disposition should be deemed to include an assignation by the debtor to the purchaser of all obligations of warrandice owed to the debtor and an obligation by the creditor of warrandice from his own facts and deeds. The creditor's right to the writs proposed in Recommendation 6 would be assigned automatically under the Land Registration (Scotland) Act 1979, section 16.

(4) Prior to settlement the SIS must issue to the purchaser a certificate that the diligence has been regularly executed and continues to have effect. This certificate will protect a purchaser in good faith even if there had been an irregularity in the execution of the diligence or the diligence had ceased to have effect.

(Para 3.160)

22. (1) Registration of the purchaser's disposition in the property registers should have the effect of disburdening the land disponed of the selling creditor's land attachment and all other diligences and heritable securities ranking *pari passu* with or

postponed to that attachment, but not of any real right or preference ranking prior to it.

(2) The proceeds of sale should be applied by the SIS to meet the following debts in the following order:

(a) the creditor's expenses in connection with the sale and any attempted sale incurred after the granting of the warrant of sale;

(b) the sums due to the creditors holding prior securities, attachments or diligences, except the amount due under a prior security which is not redeemed;

(c) the amount due to the attaching creditor (less the expenses in (a)), or where there are *pari passu* attachments, diligences and securities the sums due to the attaching creditor and the others in their due proportions; and

(d) the sums due to creditors with attachments, diligences or securities postponed to that of the attaching creditor, in accordance with their rankings.

(Para 3.164)

23. (1) The SIS should be required to submit to the sheriff a report of sale and diligence expenses in prescribed form within 28 days of the date of settlement of the sale.

(2) Where a report of sale is made late without reasonable excuse or where the SIS refuses to make a report, the sheriff should have power to make an order forfeiting in whole or in part the SIS's entitlement to a fee and the reimbursement of any expenses and outlays incurred in carrying out his functions.

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

(a) tax the expenses chargeable against the debtor;

(b) certify the balance due to or by the debtor; and

(c) report to the sheriff,

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

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

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

(b) if satisfied that there has been a substantial irregularity in the diligence to declare the diligence to be void and make consequential orders.

(Para 3.169)

24. (1) Where the SIS fails to sell the attached property by public auction, or parts by private bargain and the rest by public auction, for sufficient to pay off the debt and prior and *pari passu* creditors' securities and diligences, he should be entitled to apply to the sheriff court which granted the warrant of sale for a decree of foreclosure.

(2) The sheriff, after ordering such intimation and enquiry as seems fit and giving the debtor and other creditors an opportunity to be heard, should have power:

(a) to sist the application for up to three months;

(b) to order the unsold property to be auctioned with a reserve price, or to be re-advertised for sale at that fixed price and if still unsold auctioned at that reserve price. The creditor should be entitled to bid and buy at the auction; and

(c) to grant decree of foreclosure, either immediately or in the event that the property remains unsold.

(3) Registration of the decree in the property registers should:

(a) extinguish the debtor's right to bring the attachment to an end by paying the debt;

(b) vest the creditor in the heritable property described at the upset price at which it was last auctioned; and

(d) disburden the property of the creditor's attachment and all postponed securities and diligences.

(Para 3.173)

25. (1) The expenses properly incurred by a creditor in executing the diligence of land attachment should be chargeable against the debtor. The expenses should, unless paid by the debtor, be recoverable from the proceeds of the attachment concerned but (apart from the expenses of the charge) not by any other legal process except supervening insolvency processes or processes of ranking creditors' claims on the attached land.

(2) Any expenses not recovered by the time when the diligence is completed or ceases to have effect should cease to be chargeable against the debtor, except as mentioned in (1).

(3) Each party should bear his own expenses in relation to incidental court applications but where any party makes or objects to an application for warrant to sell attached land, or authority to bring an action of division and sale, or for decree

of foreclosure, on frivolous grounds the court should be empowered to award expenses not exceeding a prescribed sum against that party.

(Para 3.176)

26. Sums paid while a land attachment is in effect and the proceeds of an attachment should be ascribed first to expenses, secondly to interest accrued to the date of registration of the notice of land attachment and lastly to the principal sum together with any further interest.

(Para 3.178)

27. An assignation of the debt should carry with it the benefit of steps in the diligence of land attachment already taken by the cedent in relation to that debt.

(Para 3.180)

28. (1) An assignee, executor or other person acquiring from the original creditor, directly or through a third party, the right to an extract decree or document of debt bearing a warrant for diligence, should be entitled to apply to the clerk of court for a supplementary warrant under section 88 of the Debtors (Scotland) Act 1987 authorising him to execute a charge to pay and to register a notice of land attachment in his own name under the extract.

(2) Where a notice of land attachment has already been registered at the time when the person acquires the right to the warrant and diligence, the person acquiring the right should be entitled:

(a) to continue with the diligence without a supplementary warrant; and

(b) to register a notice in the prescribed form in the property registers deducing his title from the original creditor by means of links in title.

(Para 3.183)

29. (1) A notice of land attachment should cease to have effect on the expiry of a period of five years after the date of its registration.

(2) The creditor should be entitled to extend the period for a further five years by registering, within the last two months of this period, a document in a prescribed form to be known as a notice of extension. More than one extension should be competent.

(Para 3.185)

30. The debtor should be entitled, at any time up to the conclusion of the contract of sale or the registration of a decree of foreclosure, to bring a land attachment to an end by paying or tendering the full amount (including expenses chargeable against the debtor) due to the creditor.

(Para 3.187)

31. (1) A land attachment may be discharged or restricted by the creditor.

(2) A land attachment may be recalled or restricted by the sheriff on the ground that:

(a) the warrant is invalid in whole or in part;

(b) the execution of the diligence is irregular or incompetent; or

(d) the diligence has ceased to have effect.

(Para 3.189)

32. (1) Where a copy of a notice of land attachment has not been served prior to the debtor's death, the land attachment should be ineffectual.

(2) Where an executor has confirmed to the estate of a deceased debtor, a creditor of the deceased should constitute his debt by decree for payment against the executor as under the present law and be entitled to do diligence under the decree against the executry estate in the normal way.

(3) Where no executor has confirmed to the estate of a deceased debtor, it should cease to be competent to confirm as executor-creditor to the deceased debtor's heritable property, and land attachment (or where appropriate an attachment order) should be competent.

(4) Where on the expiry of six months after a debtor's death, the succession to his estate is vacant (ie no executor has confirmed to his estate and either no person has succeeded to the deceased's heritable property by virtue of a special destination or such a person has renounced his succession), a creditor of the deceased should be entitled to raise an action in the sheriff court of constitution of the debt and declarator of the extent of the debt due by the deceased to the pursuer (traditionally known as an action of constitution *cognitionis causa tantum*). Decree in the action should authorise land attachment (or an attachment order) in place of an action of adjudication for debt *contra haereditatem jacentem* which should cease to be competent. Provision should be made by rules of court adapting the statutory procedure in land attachment to the case of a vacant succession, including provision conferring powers on the sheriff to make ancillary orders dispensing with or modifying steps in that procedure.

(5) Where property has passed under a special destination a creditor of the deceased should raise an action of declarator of the value of the property passing under the destination and constitute his debt by decree for payment against the person succeeding under the special destination and be entitled to do diligence (including land attachment) under the decree against that person's property in the normal way.

(Para 3.195)

33. A real right constituted by a registered notice of land attachment will transmit against the debtor's universal successors or heir of provision on his death and accordingly the creditor should be entitled to proceed with the diligence. Provision should be made by rules of court adapting the statutory procedure in the diligence to

that case, including provision conferring powers on the sheriff to make ancillary orders dispensing with or modifying steps in that procedure.

(Para 3.197)

34. (1) Land which is subject to the diligence of land attachment includes land which the debtor owns in common with another person or persons.

(2) Where an application is made for warrant of sale of attached land held by the debtor in common with another person, the sheriff should have the same powers in respect of the land as are available to him in an action of division and sale of the land.

(3) In any such application, the same protections for the debtor and third parties should be available as are recommended for an application for decree of attachment of land owned by the debtor absolutely.

(4) Where in respect of the commonly owned land the sheriff grants a decree of division (ie partition of the land with each co-owner becoming exclusive owner of a part of the land), the decree should in the normal way declare specified parts of the land to pertain and belong to the debtor and other owners respectively and their respective successors, heritably and irredeemably, as their own separate and absolute properties. The warrant of sale would apply only to the part of the land belonging to the debtor.

(5) Where in respect of the commonly owned land the sheriff grants a decree of sale, the warrant of sale has effect against all of the land. The warrant of sale shall direct the SIS to pay to the non-debtor co-owner or co-owners the part of the price due to them.

(Para 3.202)

35. (1) In a sequestration, the permanent trustee's act and warrant should convey to the trustee the debtor's heritable estate in Scotland, ownership being acquired on registration in the property registers. Accordingly, section 31(1)(b) of the Bankruptcy (Scotland) Act 1985 should be amended to provide that subject to the qualification set out in paragraph (2), the act and warrant would vest the debtor's heritable property in the trustee for purposes of the sequestration.

(2) The present rule should continue whereby the property vests in the permanent trustee *tantum et tale*.

(Para 3.207)

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

(a) to commence a diligence of land attachment; or

(b) to proceed with a land attachment already begun unless a contract of sale of the attached property had been concluded under the warrant of sale or unless decree of foreclosure has been granted.

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

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

(a) the property has been sold under warrant of sale and the disposition in implement of sale had been registered in the property register; or

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

(3) Where missives have been concluded for the sale of the attached land under a warrant of sale and the land thereafter vests in the trustee at the date of sequestration, then:

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

(b) the attaching creditor should be bound to account for and pay to the trustee the net free proceeds of sale after satisfying the debt secured by the attachment, and any prior or *pari passu* debt.

(4) If the sale does not proceed or is subsequently set aside, the trustee should have power to sell the attached subjects with the creditor's consent or, failing such consent, the authority of the court which granted the warrant of sale.

(Para 3.216)

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

(a) to commence a diligence of land attachment; or

(b) to proceed with a land attachment already begun unless a contract of sale of the attached property had been concluded under the warrant of sale or unless decree of foreclosure has been granted.

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

(2) Where prior to the date of the winding up of a debtor company, a creditor has attached the company's property and the property has been sold under warrant of sale or decree of foreclosure has been granted in favour of the attaching creditor, then the liquidator should not have the power:

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

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

(3) Where the attached land has been sold under a warrant of sale before the date of commencement of the winding up, Recommendation 36(3) should apply with any necessary modifications.

(4) If the contract of sale is terminated before the attaching creditor's disposition is delivered to the purchaser, the liquidator should have power to sell the attached subjects with the creditor's consent or, failing such consent, the authority of the court.
(Para 3.220)

38. The diligence of adjudication for debt against items other than heritable property registered or registrable in the Land Register or the Register of Sasines should be abolished and replaced by a new diligence, to be called an attachment order, in execution of sums due under a decree or other enforceable document.
(Para 4.6)

39. (1) It should be competent, subject to the qualifications and exemptions contained in later recommendations, to attach by attachment order all property (in its widest sense) which is capable of being transferred.

(2) The tenant's interest in an unregistrable lease should be attachable by attachment order unless assignation is expressly prohibited or permitted only with the consent of the landlord or assignation is prohibited by any enactment or rule of law. A provision which permits assignation with the consent of the landlord, which consent is not to be unreasonably withheld, should not bar attachment.

(3) The interest of the debtor as tenant of a croft should not be attachable by attachment order.
(Para 4.14)

40. It should not be competent to attach by means of an attachment order the debtor's interest as tenant in a lease where the subjects are a dwellinghouse used as an individual's only or principal residence.
(Para 4.16)

41. It should not be competent to attach by attachment order any property of the debtor which is attachable by any other diligence.
(Para 4.17)

42. Any property which is, in terms of any enactment or rule of law, exempt from another diligence or from diligence generally should not be attachable by attachment order.
(Para 4.18)

43. (1) Arrestment should be the only competent diligence for attaching:

(a) Bank of Scotland shares;

(b) All sums due under a personal bond, except where the creditor is heritably secured;

(c) Debts secured by a floating charge, whatever the nature of the assets charged.

(2) The Arrestment Act 1661 and the Bonds Act 1661 should be repealed and all personal bonds should be classified as moveable in nature, except where the creditor is heritably secured.

(Para 4.32)

44. It should be competent to attach an annuity (except an annuity which is arrestable by an earnings arrestment) or a liferent of a trust fund by means of attachment order, notwithstanding its alimentary nature and any prohibition against assignation or the use of diligence.

(Para 4.36)

45. The warrant for diligence contained in an extract decree or other document of debt should authorise the charging of the debtor to pay the sum specified in the charge and on failure to pay within the days of charge an application for an attachment order.

(Para 4.41)

46. (1) An application for a time to pay order under the Debtors (Scotland) Act 1987 should be competent at any time after the service of a charge until the creditor's application for a satisfaction order in relation to the attached property is granted. An interim order sisting diligence (under section 6(3)) should prevent the creditor taking further steps in the diligence, other than serving or registering a schedule of attachment in pursuance of an existing attachment order. It should be incompetent for the sheriff to grant an attachment order or a satisfaction order and any pending application should fall.

(2) On making a time to pay order the sheriff should prohibit the creditor from taking any further steps in the diligence, apart from serving or registering a schedule of attachment in pursuance of an existing attachment order.

(Para 4.44)

47. Attachment orders should be subject to the concurrent jurisdiction of the sheriff courts and the Court of Session.

(Para 4.46)

48. The creditor should have to apply to the court for an attachment order, and following service of a schedule of attachment on the debtor, apply to the court for a satisfaction order in relation to the attached property.

(Para 4.52)

49. (1) An application for an attachment order should be made by summary application in the sheriff court and by petition in the Court of Session.

(2) The court should be empowered to grant an interim order prohibiting the debtor and any specified third party from entering into a voluntary future dealing with the property sought to be attached. The creditor should serve a copy of the interim order on the debtor and any third party at the same time as the intimation of

the application. The interim order should become effective on its service on the debtor. Any contravention of the interim order should render the contravenor liable in damages to the creditor and it should also be punishable as a contempt of court.

(3) The court should have power to grant any other interim orders of an ancillary nature.

(Para 4.57)

50. An attachment should:

(a) where the attached property is not registrable in a public register, come into effect at the date of service by officer of court of a prescribed form schedule of attachment on the debtor; and

(b) where the attached property is so registrable, come into effect at the date of registration of a copy of the schedule of attachment in the register. It should be incompetent to register a copy unless the schedule had been previously served on the debtor.

(Para 4.62)

51. (1) An attachment under an attachment order should confer on the creditor a right over the attached property in security of payment of the debt, interest and expenses chargeable against the debtor.

(2) The rights of any person acquiring the attached property from, or a subordinate real right over the attached property created by, the debtor should be subject to the creditor's security right unless that person acted in good faith, was without notice of the attachment and gave value.

(3) An attachment order against a right to acquire property should cease to have effect when that right is extinguished by the debtor acquiring the property itself.

(4) An attachment order should prohibit the debtor from dealing with the attached property, except in implement of a pre-existing obligation. Breach of the prohibition should be treated as a contempt of court.

(5) A third party who entered into a dealing with the debtor in relation to attached property should be bound to pay any unpaid part of the price to the creditor on becoming aware of the attachment.

(Para 4.68)

52. On making an attachment order the court should be empowered to make any ancillary orders for the purpose of facilitating the fair and reasonable operation of the attachment. These ancillary orders should include:

(1) An order prohibiting specified third parties from

(a) acting so as to defeat the attachment in whole or in part; or

(b) making payments due to the debtor in respect of the attached property.

Wilful contravention of the order should render the third party liable in damages to the creditor and should be a contempt of court.

(2) An order appointing an independent person as judicial factor to ingather and manage the attached property.

(3) An order requiring a specified third party to produce to the court documents relating to the debtor's right to the attached property.

(4) An order authorising the creditor to complete the debtor's title in the debtor's own name.

(5) An order authorising the creditor to take specified action in order to preserve the value of the attached property.

(Para 4.76)

53. An attachment should cease to have effect on the expiry of a period of three years following its coming into effect, but the court should have power to extend this period on cause shown.

(Para 4.78)

54. (1) The attaching creditor should have to apply to the court which granted the attachment order for an order (termed a satisfaction order) for satisfying the creditor's debt out of the attached property. The clerk of court should fix a date for the hearing of the creditor's application which should be intimated to the debtor, the creditor and other interested parties who should be entitled to be heard.

(2) The satisfaction orders the court may make should include:

(a) an order for sale of the attached property and payment of the net free proceeds of sale to the creditor;

(b) an order vesting the attached property in the creditor at a price to be fixed by the court;

(c) an income transfer order whereby future payments due to the debtor out of the attached property are diverted to the creditor;

(d) an order authorising the creditor to lease or license the attached property on terms to be approved by the court.

The court should also have power to postpone the operation of the satisfaction order for up to 12 months and to grant ancillary orders to facilitate the operation of the satisfaction order.

(3) In deciding whether to grant a satisfaction order and if so what order to grant, the court should consider the impact on the debtor and other interested

persons, giving due weight to the interests of the creditor, the debtor and the other persons.

(4) The power to refuse the satisfaction order applied for or to postpone its operation should be exercisable by the court of its own motion as well as on the motion of the debtor or other interested person. The court should not exercise the power of its own motion without giving the creditor an opportunity to make representations.

(Para 4.82)

55. (1) The court should, when ordering a sale of the attached property, appoint an independent person to market and sell it on behalf of the creditor.

(2) The independent person should be under a duty to advertise and generally take all reasonable steps to ensure that the attached property is sold for the best price that can reasonably be obtained.

(3) The purchaser of the attached property granted in implement of the order for sale should be assigned any warranties the debtor had the benefit of, but no warranty by the debtor should be given or implied. The creditor should warrant that the diligence had been carried out regularly.

(4) Our recommendations in relation to the sale of dwellinghouses subject to land attachment should apply to dwellinghouses attached by an attachment order.

(Para 4.86)

56. A transfer order may be granted on an initial application by the creditor for a satisfaction order or after the creditor has failed to sell the property in terms of an order for sale. The transfer order should have the same effect as if the debtor had granted a deed of transfer in favour of the creditor.

(Para 4.87)

57. (1) An income transfer order should direct that a specified portion of each future payment due to the debtor in respect of the attached property should be paid to the creditor while the order is in effect.

(2) An income transfer order should be served on the person making the payments and should come into effect seven days after service.

(Para 4.91)

58. (1) Where the court grants an order for the sale of the attached property, the creditor should submit to the court a report on sale and diligence expenses in prescribed form within 28 days of the date of settlement of the sale. Where the court grants any other satisfaction order (other than a transfer to the creditor) the making of reports should be regulated by ancillary order.

(2) The court should have power to make an order imposing on a creditor who makes a report late without reasonable excuse, or refuses to make a report, liability in whole or in part for the expenses of attachment otherwise chargeable against the debtor.

(Para 4.94)

59. (1) The expenses properly incurred by a creditor in executing the diligence of attachment order should be chargeable against the debtor. The expenses should, unless paid by the debtor, be recoverable from the proceeds of the attachment concerned but (apart from the expenses of the charge) not by any other legal process except supervening insolvency processes or processes for ranking creditors' claims on the attached property.

(2) Any expenses not recovered by the time the diligence is completed or ceases to have effect should cease to be chargeable against the debtor, except in supervening insolvency processes or processes for ranking creditors' claims on the attached property.

(3) The debtor should be liable for the expenses of an application for an attachment order and an application for a satisfaction order on the basis that it was unopposed. Each party should otherwise bear their own expenses in relation to court applications. The court should be empowered to award expenses not exceeding a prescribed sum if an application or an objection was frivolous.

(4) The proceeds of the diligence or any payment by the debtor while the diligence is in effect should be ascribed:

(a) to the expenses of the diligence which are chargeable against the debtor;

(b) to interest on the sum due under the decree or other document accrued to the date of the attachment coming into effect; and

(c) to any other sum due under the decree or other document (which will include the debt itself);

in that order.

(Para 4.98)

60. (1) Where property is owned in common by the debtor and a third party the whole property should be attached by virtue of an attachment order.

(2) The third party co-owner should be entitled to have the property released from attachment on paying the creditor the value of the debtor's share. The value should be as agreed between the parties or fixed by the court.

(3) Where the third party does not seek release and the property is subject to a satisfaction order, the creditor should pay the third party a proportionate share of the proceeds of the order, after deduction of the expenses of implementing the order but not the other diligence expenses or the debt.

(Para 4.101)

61. (1) An attachment under an attachment order coming into effect on or after the date of the debtor's death should be ineffectual.

(2) An attachment under an attachment order coming into effect before the date of the debtor's death should transmit against the debtor's universal successors or heir of provision and accordingly the creditor should be entitled to proceed with the diligence. Provision should be made by rules of court adapting the procedure, including empowering the court to make ancillary orders dispensing with or modifying steps in that procedure.

(Para 4.102)

62. (1) On or after the date of sequestration of a debtor or the date of commencement of winding up of a debtor company, it should not be competent:

(a) for the creditor to apply for an attachment order or the court to grant one, or

(b) for the creditor to take any further steps in pursuance of an already granted order.

(2) On the date of sequestration of a debtor's estate or winding up of a debtor company, any property of the debtor which had been attached and to which he retains title shall vest in the trustee or be subject to the liquidator's powers, but the trustee or liquidator should have to give effect to any preference the creditor has in relation to the attached property by virtue of the diligence.

(Para 4.105)

63. (1) Provided a diligence exists against corporeal moveables owned by and in the possession of debtors, a new form of diligence in execution of sums due under decrees or other enforceable documents (to be called "money attachment") should be introduced for the attachment of money in the debtor's possession.

(2) Money attachment should be incompetent in respect of money situated in a dwellinghouse or in the residential part of a building.

(3) Officers of court carrying out money attachment should not have authority to search any individuals or their handbags, wallets or similar personal receptacles for money.

(4) Any new diligence against moveables in the debtor's possession should not be used to attach money.

(Para 5.15)

64. (1) Cash (including foreign currency), cheques and other bills of exchange, promissory notes and all other forms of negotiable instrument should be attachable by the new diligence of money attachment.

(2) An officer of court should not be liable to the instructing creditor for failing to attach money other than cash or cheques unless specifically instructed to do so. An

officer who receives such instructions may engage an expert to assist in identifying negotiable instruments. The expert's fee should form part of the expenses of the diligence.

(Para 5.18)

65. The warrant for diligence contained in an extract decree or other document should authorise the new diligence of money attachment which should be capable of being executed simultaneously with an attachment of moveable goods or separately.

(Para 5.22)

66. It should be incompetent to use money attachment to enforce a debt unless a charge to pay that debt had been served on the debtor and had expired without payment.

(Para 5.23)

67. (1) An attachment of money should be incompetent if the total estimated value of the items attached does not exceed the total of the expenses already incurred and the likely expenses of completing the diligence plus the lesser of 10% of the debt or £50 (or such other figures or formula as may be prescribed by the Scottish Ministers).

(2) Where money and goods are attached at the same time the competence of each diligence may, at the option of the officer of court, be assessed separately or the proceeds of both diligences may be weighed against the likely expenses of completing both.

(3) Where an attachment of money (whether with or without an attachment of goods) is incompetent by reason of paragraph (1) the officer should make a formal report of insufficient money (and goods) to the creditor. The report should list the money or goods, their value and the estimate of the expenses on which the decision not to proceed was based. A copy of this report should be handed to, or left on the premises for, the debtor.

(Para 5.27)

68. (1) Money attachment should be incompetent in business premises:

(a) on a Sunday, Christmas Day, New Year's Day or Good Friday or on such other day as may be prescribed by Act of Sederunt; and

(b) between the hours of 8 pm and 8 am except with prior authority of the sheriff,

unless the premises are open for business.

(2) Officers of court executing a money attachment should be entitled to open shut and lockfast places.

(Para 5.30)

69. (1) Officers of court executing a money attachment should be entitled to presume that money in the possession of the debtor is owned by the debtor.

(2) Officers should be bound when carrying out a money attachment to make enquiries of any person present about the ownership of the money.

(3) Officers should not be entitled to rely on the above presumption in relation to any item of money if they know or ought to know (whether as a result of their enquiries or otherwise) that it does not belong to the debtor.

(Para 5.31)

70. (1) The procedure in executing a money attachment should generally be similar to the procedure to be devised for attaching corporeal moveables.

(2) The officer of court should complete a schedule of money attachment (in prescribed form) specifying the money attached and its value.

(3) The officer of court should either hand the completed schedule of money attachment to the debtor or other person present or, where this is not possible, leave it on the premises. The money attachment should be deemed to have been executed at that time.

(4) The officer of court should submit a report of the money attachment to the sheriff court in whose jurisdiction the premises are situated within a prescribed period from the date of attachment.

(Para 5.34)

71. (1) The creditor should be entitled to apply to the sheriff for an order for payment of the money attached. The debtor should be given an opportunity to oppose. The application should have to be made when the report of money attachment is lodged or within 14 days thereafter.

(2) If no application was made within 14 days the money should cease to be attached. The sheriff should, without any application being made to this effect, order the officer of court to repay or return the attached money to the debtor and the sheriff clerk should intimate this order to the parties.

(3) The debtor or any interested third party should be entitled to apply to the sheriff for release of all or part of the money attached. The creditor should be given an opportunity to oppose. The application for release should be competent as soon as the money attachment is executed.

(4) The sheriff should have power to declare the attachment null and order the attached money to be returned if satisfied that there was a material irregularity in the attachment or the money did not belong to the debtor. Where the creditor applies for payment the sheriff should have power to declare the attachment null and order the attached money to be returned on the ground of a material irregularity, even if the application was not opposed.

(Para 5.38)

72. (1) The sheriff's order for payment should authorise the officer of court to pay to the creditor a sum equivalent to the amount of the attached cash banked by the officer of court.

(2) The sheriff's order for payment should have the effect of constituting the officer of court as the irrevocable agent of the debtor in relation to attached cheques and negotiable instruments. In particular, the officer of court should be authorised:

(a) to present the cheque or instrument for payment and to receive payment thereon;

(b) to raise an action for payment against any party liable under the cheque or instrument; and

(c) except where the cheque or instrument is not transferable but only valid between the parties, to negotiate the instrument for value.

(3) The officer of court should be under a duty to obtain the highest amount which can reasonably be obtained from the attached cheques or instruments.

(Para 5.41)

73. (1) The expenses properly incurred by a creditor in executing the diligence of money attachment should be chargeable against the debtor.

(2) The expenses should, unless paid by the debtor, be recoverable from the proceeds of the attachment concerned but (apart from the expenses of the charge) not by any other legal process except insolvency or ranking processes.

(3) Any expenses not recovered by the time the diligence is completed or ceases to have effect should cease to be chargeable against the debtor, except as aforesaid.

(4) Each party should bear their own expenses in relation to incidental court applications, but the debtor should be liable for the expenses of the creditor's application for payment of the attached money on the basis that it was unopposed and the court should be empowered to award expenses not exceeding a prescribed sum if an application or an objection was frivolous.

(Para 5.45)

74. The proceeds of money attachment or any payment by the debtor while the diligence is in effect should be ascribed:

(a) to the expenses of the money attachment which are chargeable against the debtor;

(b) to interest on the sum due under the decree or other document accrued to the date of execution of the money attachment; and

(c) to any other sum due under the decree or other document (which will include the debt itself),

in that order.

(Para 5.46)

75. (1) The officer of court should make a report in prescribed form to the sheriff setting out the proceeds of the money attachment, the expenses chargeable against the debtor and the balance due to or by the debtor.

(2) The sheriff should have the report audited by the auditor of court who would tax the expenses. After giving the creditor and debtor an opportunity to challenge the auditor's report the sheriff would declare the balance due to or by the debtor.

(Para 5.47)

76. (1) An application for a time to pay order under the Debtors (Scotland) Act 1987 in respect of a debt should be competent at any time after the service of a charge to pay until the execution of a money attachment for that debt.

(2) While an interim order sisting diligence under section 6(3) of that Act or a time to pay order is in effect it should be incompetent to execute a money attachment in respect of that debt.

(Para 5.50)

77. (1) On or after the date of sequestration of a debtor or the date of commencement of winding up a debtor company, it should not be competent for the creditor:

(a) to execute a money attachment, or

(b) to take any further steps in pursuance of an already executed attachment.

(2) On the date of sequestration of a debtor's estate, money of the debtor which had been attached should vest in the trustee unless before that date it had been paid to the creditor or realised in pursuance of a court order.

(3) Where prior to the date of the winding up, a creditor had attached the company's money, then the liquidator should have the power to take the money into his custody and sell it unless before that date the money had been paid to the creditor or realised in pursuance of a court order.

(Para 5.53)

78. The diligence of inhibition should be retained but with the reforms we recommend in Recommendations 80 to 97 below.

(Para 6.15)

79. Property in respect of which inhibition has effect should be heritable property which can be attached by land attachment or an attachment order.

(Para 6.17)

80. (1) Warrants of execution contained in:

(a) extract decrees of the Court of Session, the High Court of Justiciary, the Court of Teinds and the sheriff court;

(b) writs registered for execution in the Books of Council and Session or sheriff court books; and

(c) other orders or awards enforceable as if they were decrees or registered writs,

should, where the decree or other document contains or includes an obligation to pay money, authorise inhibition in addition to other diligences. Accordingly it should no longer be competent to obtain a warrant for inhibition in execution of such decrees, writs, orders or awards by way of an application for letters of inhibition.

(2) Warrant to inhibit in execution of a decree ordaining specific implement of an obligation to convey heritable property or to grant a real right in security or other right over such property should have to be granted, on application by the pursuer, by the court granting the decree.

(3) An inhibition in pursuance of a warrant for execution emanating (or treated as emanating) from a sheriff court, or a warrant granted by a sheriff under paragraph (2) above should affect the inhibitee's heritable property throughout Scotland, not merely property within the sheriffdom.

(Para 6.25)

81. (1) The warrant for execution contained in the extract of an order imposing a fine or other financial penalty or of a compensation order should authorise inhibition in addition to the diligences already authorised.

(2) Section 38 of the Child Support Act 1991 (liability order by sheriff "apt to found Bill of inhibition") should be amended so that an extract of a liability order would automatically authorise inhibition at the instance of the Secretary of State of the person against whom the order was made in addition to the diligences already authorised.

(Para 6.26)

82. Where a sheriff has granted a restraint order under section 28 of the Proceeds of Crime (Scotland) Act 1995 a sheriff of that sheriffdom should have power to grant, on application by the procurator fiscal, warrant for inhibition against any person interdicted by that restraint order or an interdict under section 28(8).

(Para 6.28)

83. Section 155 of the Titles to Land Consolidation (Scotland) Act 1868 should be amended so that where an inhibition is registered not later than 21 days after a notice of inhibition, such inhibition shall take effect as from the first moment of the day on which it was served on the inhibitee.

(Para 6.35)

84. An inhibition should be registered by registering a copy of the schedule of inhibition served on the inhibitee together with the officer of court's certificate of service.

(Para 6.37)

85. An inhibition, while continuing to render reducible future voluntary deeds, should cease to confer a preference by exclusion over debts voluntarily incurred after the date of the inhibition in the ranking of creditors in a sequestration, liquidation or other ranking process on the debtor's heritable property.

(Para 6.47)

86. Lands should be treated as having been acquired for the purposes of section 157 of the Titles to Land Consolidation (Scotland) Act 1868 at the date of the delivery of the deed transferring the property to the acquirer. An inhibition against the acquirer should prevent him from disposing of or burdening not only his rights under the delivered but unregistered deed but also his real right once the deed is registered.

(Para 6.56)

87. The liquidator in a creditors' (but not a members') voluntary winding up of a company should be entitled to dispose of heritable property affected by an inhibition against the company. Any claim of the inhibitor should be dealt with in the ranking on the proceeds of sale.

(Para 6.59)

88. (1) Where another creditor sells property subject to an inhibition by virtue of powers granted before the date the inhibition became effective, the inhibitor should not be entitled to rank on the proceeds of sale by virtue only of the inhibition.

(2) A receiver acting under a floating charge created before the date when an inhibition became effective should be entitled to sell property affected by the inhibition, leaving the inhibitor to claim on the proceeds of sale.

(Para 6.69)

89. In order to make it clear that the rules of interruption of negative prescription do not apply to the prescription of inhibitions, section 44(3)(a) of the Conveyancing (Scotland) Act 1924 should be amended by providing for the termination or lapse of an inhibition on the expiry of the period of five years after it comes into effect.

(Para 6.71)

90. An inhibitor's right to reduce a deed in breach of the inhibition should prescribe at the end of the period of 20 years after the date of the breach.

(Para 6.81)

91. An inhibition should be treated as breached on the date when the inhibitee delivers to a third party a voluntary deed relating to heritable property affected by the inhibition.

(Para 6.86)

92. (1) Where an inhibitee grants a deed in breach of the inhibition, the inhibitor should continue to be entitled to raise an action of reduction on the ground of

inhibition and to attach the property affected by the deed in question. A reduction on the ground of inhibition should continue to benefit the inhibitor only.

(2) On commencing an action of reduction on the ground of inhibition, the inhibitor should have to register in the property registers a notice of litigiosity specifying the land in the deed under reduction. Rules of court should provide that the action cannot proceed unless evidence of registration is lodged in process. An inhibitor who fails to obtain a decree of reduction should be bound to discharge the notice.

(3) It should be made clear that where the inhibitee breaches the inhibition by disposing of property to a third party, any heritable security or land attachment over the property by a creditor of the third party should be postponed to the reducing inhibitor's land attachment.

(4) A lease granted by an inhibitee in breach of the inhibition should be reducible if the lease is capable of enduring for a period of five or more years as at the date of raising the action of reduction. A lease which is not capable of so enduring should be reduced provided the court is satisfied that in all the circumstances it would be fair and reasonable to reduce it.

(Para 6.92)

93. (1) The expenses of executing an inhibition in execution of a decree (or other document on which inhibition is competent) and executing a further inhibition when the previous inhibition lapses at the end of the period of five years should be chargeable against the inhibitee. The expenses of a further inhibition for the same debt executed while an inhibition is in effect should not be chargeable against the inhibitee.

(2) It should not be competent for the inhibitor to bring a separate action against the inhibitee or to do other diligence (apart from a land attachment and attachment order as in (2)(c)) for the recovery of the expenses of the inhibition. The inhibitor should be entitled to recover the expenses by any of the following methods:

(a) the inhibitor should not be obliged to discharge the inhibition unless the debt and the diligence expenses are tendered, and any rule of law that requires an inhibitor to grant a discharge on payment of the debt alone should cease to have effect;

(b) the inhibitor should rank in a sequestration, liquidation or other ranking process for the debt and diligence expenses;

(c) the inhibitor who reduces a transaction in breach of the inhibition and attaches (by way of land attachment or attachment order) should be entitled to attach the property in question for the debt and the expenses of the inhibition.

(3) A payment to account of the debt and inhibition expenses is to be ascribed:

(a) to the expenses of executing the inhibition which are chargeable against the debtor;

(b) to interest on the sum due under the decree or other document warranting the inhibition accrued to the date of the coming into effect of the inhibition;

(c) to any other sum due under the decree or other document (which will include the debt itself),

in the above order.

(Para 6.100)

94. The court should award the pursuer the taxed expenses of obtaining a warrant for, and executing, an inhibition on the dependence except to the extent that the court modifies or refuses them on the ground that:

(a) the pursuer was unreasonable in applying for the warrant; or

(b) the modification or refusal is otherwise reasonable in the circumstances, including the result of the action.

(Para 6.101)

95. (1) The delivery of a deed implementing a transaction (whether onerous or gratuitous) between an inhibitee and a third party should not breach the inhibition provided that:

(a) a search of the personal register against the inhibitee was produced to the third party prior to delivery; and

(b) the inhibition was in effect in the period covered by the search but it (or any notice of inhibition which was followed within 21 days by an inhibition) was not disclosed by that search,

unless the third party had actual knowledge of the inhibition or notice prior to delivery.

(2) The scheme of protection in (1) above should not apply if the third party knew, or ought reasonably to have known, at the time of delivery that the search had not been instructed and carried out in a proper manner.

(3) If the third party is protected from reduction by virtue of (1) and (2) above, then any successor in title of the third party should also be protected even if the successor had actual knowledge of the inhibition or the inadequacy of the search.

(4) The scheme of protection in (1) and (2) above should apply with necessary modifications to any person who transacts with a third party or successor whose title is reducible on the ground of an inhibition.

(5) The remedies of an inhibitor prevented from reducing a deed by virtue of (1)-(4) above should be left to the common law as developed by the courts.

(Para 6.123)

96. (1) Section 6(1)(c) of the Land Registration (Scotland) Act 1979 (Keeper's duty to enter on title sheet of interest in land any subsisting entry in personal register adverse to that interest) should be replaced by a new provision imposing on the Keeper a duty to enter an inhibition on a title sheet only when registering an interest in land which a person has acquired from the inhibitee where the deed conveying or creating that interest was granted by the inhibitee in breach of the inhibition.

(2) The Keeper should, on application by the third party or any other person having an interest, amend the title sheet to show any subsequent discharge or restriction of the entered inhibition.

(3) The Keeper should not be under a duty, when requested to issue an office copy of a title sheet, to search the personal register and enter any subsisting inhibition in the personal register adverse to an interest on that title sheet.

(Para 6.134)

97. The exercise of any powers conferred on a judicial factor in respect of heritable property affected by an inhibition against the owner should be challengeable by the inhibitor on the ground of inhibition.

(Para 6.136)

98. (1) The Diligence Act 1661 (which makes provision for the *pari passu* ranking of adjudications within a year and a day of the first effectual adjudication) should be repealed.

(2) No similar provision should be made for the equalisation of land attachment, attachment orders, and money attachment.

(Para 7.8)

99. (1) No land attachment of a debtor's property for which a certificate of service on the debtor has been registered:

(a) within the period of six months before the date of the debtor's sequestration and whether or not subsisting at that date; or

(b) on or after that date,

should be effectual to create a preference for the attaching creditor in a question with the permanent trustee.

(2) A creditor whose land attachment is registered within the above-mentioned period of six months should be entitled to payment, out of the proceeds of sale of the attached property, of the expenses incurred:

(a) in obtaining the extract of the decree or other document containing the warrant for land attachment;

(b) in executing the charge and steps in the diligence of land attachment; and

(c) in taking any further necessary action in respect of the land attachment.

(3) Section 37(1)(a) of the Bankruptcy (Scotland) Act 1985 should be repealed.
(Para 7.10)

100. (1) An attachment order or money attachment which comes into effect within six months before the debtor's sequestration should be ineffectual in a question with the trustee or liquidator, except as to the expenses of the diligence.

(2) In the Bankruptcy (Scotland) Act section 37, subsections (4) (arrestment and poinding), and (6) (poinding of the ground), for the expression '60 days' there should be substituted 'six months'.
(Para 7.12)

101. Section 37(2) and (3) of the Bankruptcy (Scotland) Act 1985 should be repealed.
(Para 7.13)

Appendix A

SURVEY OF COMPARATIVE LAW ON ATTACHMENT OF MONEY

Most jurisdictions provide for the attachment of money or instruments in one form or another. This is on the basis of universal attachability. However, in France bills of exchange and cheques are specifically exempt from seizure[1] on the basis of promoting the security of these titles and to ensure their continued acceptance as methods of payment.[2] This exemption is uncommon in other jurisdictions.

The following information details existing procedures for the attachment and realisation of money and negotiable instruments in a number of jurisdictions.

Australia

Money is liable to seizure in a number of the Australian territories.

In the Australian Capital Territory under a writ of execution personal property may be seized (other than any right or interest in respect of land) that is or may be in the debtor's possession, to which the debtor is or may be entitled or that the debtor can assign or dispose of.[3] This includes the seizure by a bailiff of "any money, banknotes, cheques, bills of exchange, promissory notes, bonds, specialities or securities for money"[4] belonging to the debtor. A similar provision exists in New South Wales[5] and Queensland.[6] It is also clear that money can be seized under a warrant of seizure or a writ of *fieri facias* in Tasmania,[7] Victoria,[8] Northern Territory,[9] South Australia[10] and Western Australia.[11]

The statutory provisions and Rules generally adopt the same procedure for the realisation of money and instruments. This entails that the sheriff or other officer carrying out the seizure will pass to the creditor money and banknotes or a sufficient part thereof in satisfaction of the debt. In South Australia the Enforcement of Judgments Act 1991 provides that money will be passed to the creditor unless it has a value greater than its face value.[12] The sheriff or other officer will hold cheques, bills of exchange, promissory notes etc as security for the

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[1] Kennett, Enforcement of Judgments, European Review of Private Law, 1997, vol 5, p 349; Art 140, 185 Code de Commerce; Art 32 of decree law of 30 October 1935.
[2] P 349.
[3] Magistrates Court (Enforcement of Judgments) Act 1994 s 21 which inserts s 278BG(1) into the Magistrates Court (Civil Jurisdiction) Act 1982.
[4] S 278BH(1) as inserted.
[5] Judgment Creditors' Remedies Act 1901, s 4 (as amended by the Supreme Court Act 1970).
[6] Supreme Court Act 1995, s 98(1), definition of 'goods' in Magistrates Court Rules 1960, rule 9(1).
[7] Civil Process Act 1839, s 1.
[8] Magistrates Court Civil Procedure Rules 1999 SR 58/1999, rule 27.09.
[9] Local Court Rules, rule 29.09.
[10] Enforcement of Judgment Act 1991, s 7.
[11] Local Courts Act 1904 s 126, definition of 'goods' in s 3.
[12] S 7(7).

amount to be levied.[13] In New South Wales[14] and Queensland[15] it is provided that the sheriff or other officer may sue in his own name for recovery of the sum if and when time for payment arrives. In Queensland it is provided that the sheriff need not carry out this action until he obtains sufficient indemnification for the costs and expenses associated with the aforementioned by the creditor entering into a bond with two sufficient sureties.[16] In the Australian Capital Territory,[17] Northern Territory,[18] Victoria[19] and Western Australia[20] it is provided that it is the creditor who is entitled to demand and receive payment and sue in the name of the debtor for the recovery of the sum made payable or secured.

Certain items are exempt from seizure in all territories. These include necessary items of clothing, beds, bedding, certain kitchen items and ordinary tools of trade, equipment and professional instruments. No specific exemption applies in any territory to the seizure of cash or instruments. However in the Australian Capital Territory on seizing property under a writ of execution the bailiff shall deliver to the debtor or leave at the place where the property is seized a notice that among other things informs the debtor that he may make an application for a declaration exempting specified property from execution.[21] The Registrar can make such a declaration where he is satisfied that if the declaration were not made the debtor or a member of his family would be likely to suffer exceptional hardship.[22]

Belgium

The debtor's tangible and moveable assets except those assets explicitly excluded, can be seized under the Code of Civil Procedure. No exclusion relates to money or negotiable instruments and it is inferred that such items can be seized.

The bailiff must serve a payment order on the debtor at least one day prior to executing the seizure of moveable property.[23]

In general the debtor remains in possession of seized goods and must not dispose of them by selling, giving them away or by destroying them.[24] If there is a serious risk that the debtor will dispose of the items the creditor can petition the Judge of Seizures and arrange for the goods to be placed under the custody of an administrator (sequester).[25] Under Belgian law the removal from the debtor's possession of money and various types of negotiable instruments is expressly authorised.[26] These items will usually be placed in an official depository[27] or given to an appointed sequestrator/custodian.[28]

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[13] New South Wales, Judgment Creditors' Remedies Act 1901, s 6; Northern Territory, Local Court Rules, rule 9.09; Victoria, Magistrates Court Civil Procedure Rules 1999, rule 29.09; Queensland, Supreme Court Act 1995, s 8(1) and Magistrates Courts Rules 1960, rule 243(1); Western Australia, Local Courts Act 1904, s 127.
[14] Judgment Creditors' Remedies Act 1901, s 9.
[15] Supreme Court Act 1995, s 98(1).
[16] S 98(2).
[17] S 278BH(2) as inserted by Magistrates Court (Enforcement of Judgments) Act 1994, s 21.
[18] Local Court Rules, rule 29.09.
[19] Magistrates Court Civil Procedure Rules 1999, rule 27.09.
[20] Local Courts Act 1904, s 127.
[21] S 278BM(c) as inserted by Magistrates Court (Enforcement of Judgments) Act 1994, s 21.
[22] S 278BN(3) as inserted.
[23] Art 1499 Ger W.
[24] Peter Kaye, *Methods of Execution of Orders and Judgments in Europe*, p 33.
[25] P 34.
[26] Art 1506 Ger W.
[27] Art 1506 Ger W.
[28] Kennett, p 321 at 363 (Broeckx) Questionnaire response.

Canadian Provinces and Territories

Many Canadian territories and provinces provide methods by which cash and negotiable instruments may be seized under a writ of execution.

In Alberta the Civil Enforcement Act provides that "all exigible personal property of an enforcement debtor is liable to seizure"[29] and it is clear that this includes cash and instruments.[30] 'Money' is not specifically defined but the Act adopts the meaning given to money in the Personal Property Security Act.[31] This states that "money means a medium of exchange authorised by the Parliament of Canada or authorised or adopted by a foreign government as part of its currency."[32] This definition would therefore encompass notes, coinage and foreign currency. 'Instrument' is defined in the Civil Enforcement Act as:

(i) a bill, note or cheque within the meaning of the Bills of Exchange Act (Canada),

(ii) any other writing that evidences a right to the payment of money and is of a kind that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment, or

(iii) a letter of credit or an advice of credit if the letter or advice states that it must be surrendered on claiming payment under it.[33]

Other provinces and territories specifically define what can be seized and this generally includes money, banknotes, bills of exchange, promissory notes, bonds, specialities or securities for money.[34] In Manitoba credit card receipts and similar instruments of the debtor or in which the debtor has an interest can also be seized.[35]

In British Columbia and Ontario money and banknotes should be delivered to the creditor and cheques, promissory notes etc are to be held by the sheriff or other officer enforcing the writ of execution as security for the amount to be levied under the writ.[36] The sheriff or other officer can sue for the recovery of sums secured in his own name if and when time for payment arrives.[37] The proceeds from realisation will then be paid to the creditor once expenses have been deducted.

In Manitoba the procedure differs slightly from the aforementioned in that once the sheriff has seized or realised the money he is obliged to give notice of the seizure or realisation in the Manitoba Gazette.[38] After publication of the notice the sheriff must hold the money for fourteen days before he may distribute the funds to the creditor.[39]

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[29] RSA Ch C-10.5, s 43(1).
[30] S 50.
[31] Alberta, Chap P-4.05; see Civil Enforcement Act, s 31(b).
[32] S 31(b)(v).
[33] S 1(1)(x).
[34] British Columbia, Court Order Enforcement Act, RSBC 1996 C 78, s 58; Manitoba, The Executions Act, SM, C.E160 s 7(1); Ontario, Execution Act, RSO, CE-24, s 19(1).
[35] The Executions Act, s 7(1).
[36] British Columbia, Court Order Enforcement Act, s 58; Ontario, Execution Act, s 19(1).
[37] *Ibid.*
[38] The Executions Act, s 20(1).
[39] S 20(4).

In Alberta the judgment creditor may not initiate writ proceedings in respect of a money judgment against the personal property of the judgment debtor unless a writ is registered in the Personal Property Register.[40] Registration has the effect of binding all the enforcement debtors' exigible personal property.[41] Once the writ is appropriately registered then the enforcement creditor, subject to the exemptions and the foregoing is entitled to take possession of the assets of the debtor.

Once cash and instruments are seized the agency who carried out the seizure must within three days of the date of receiving money deposit that money in a trust account maintained in a bank, treasury branch, loan corporation, trust corporation or credit union at an office that is located in Alberta.[42] The judgment debtor has fifteen days to object to the seizure[43] and where such a notice of objection is served on the enforcement agency the agency must not sell or otherwise dispose of the property unless permitted to do so by the court.[44] Possible grounds of objection to the seizure of cash are that the cash is not that of the debtor but belongs to someone else,[45] it is the subject of a trust or a security agreement which precludes it being seized,[46] and that the cash or cheques represent the proceeds of the sale of an exempt item and should retain its exempt status for example, the sale of a vehicle or house which is exempt to the amount of cash involved.[47] Once the period during which the debtor may file a notice of objection has expired, cash will be distributed to the creditor. In regard to instruments the agency that seized the items becomes the irrevocable agent of the debtor for the purposes of liquidating the instrument.[48] The agency may then present the instrument for payment and receive payment, sue any person liable on the instrument in the name of the debtor or negotiate the instrument.[49] No further court authority is needed to realise the asset.[50]

The sheriff or other officer is not bound to sue any party liable on a cheque etc unless he obtains sufficient indemnification against the cost of realisation, expenses incurred or any damages that may be payable.[51]

Most provinces and territories exempt certain items of personal property from seizure.[52] These exemptions are exemptions by description of the property and do not include a minimum cash exemption. Limits are prescribed by the Acts and Regulations on the maximum exempt value of these items. In Alberta additional exemptions are any payments made to an enforcement debtor that is a social allowance, handicap benefit or widows

[40] Civil Enforcement Act, s 26(a).
[41] S 33(2)(a).
[42] Alberta, Civil Enforcement Regulations, regulation 18(1).
[43] Civil Enforcement Act, s 46(1).
[44] S 46(2).
[45] Information supplied by Peter J M Lown QC, Director, Alberta Law Reform Institute.
[46] Civil Enforcement Act, s 35.
[47] Civil Enforcement Regulations, regulation 37(2). This will be exempt for a period of 60 days from the day of sale of the exempt item.
[48] Civil Enforcement Act, s 50(b).
[49] S 50(c).
[50] Information supplied by Peter J M Lown QC .
[51] British Columbia, Court Order Enforcement Act, s 61(1); Ontario, Execution Act, s 19(6); Manitoba, The Executions Act, s 38.
[52] Alberta, Civil Enforcement Act, ss 88-93; Manitoba, The Executions Act, s 23; Ontario, Execution Act, s 2; British Columbia, Court Order Enforcement Act, s 71.

pension provided the proceeds from payment are not intermingled with any other funds of the enforcement debtor.[53]

The seizure of cash and instruments is provided for on the premise that an enforcement creditor should be entitled to seize anything which can be used to realise and pay the judgment debt, subject to the exemptions which are in place. However it has been commented that it does appear to be unusual to seize cash and cheques otherwise than incidental to the seizure of other items.[54] Only where the proceeds of a specific transaction are targeted does this become a specific target of seizure.

England and Wales

At common law the requirement that property seizeable under a writ of *fieri facias* should be capable of sale meant that money could not be seized.[55] This was thought to exclude deeds and other documents which cannot be transferred without an assignment.[56] A statutory exception to this rule was created in the Judgments Act 1838.[57] Today money can be seized under a warrant of execution in the county court[58] and under a writ of *fieri facias* in the High Court.[59] It is provided that "any money, banknotes, bills of exchange, promissory notes, bonds, specialities, or securities for money"[60] belonging to the debtor can be seized.

In the High Court a writ of *fieri facias* can be enforced without prior service of the judgment on the debtor.[61] In the county court where a warrant of execution is issued the court office, unless directed otherwise, will send a warning notice to the debtor and the warrant will not be levied until seven days thereafter.[62]

Money must be in the debtor's possession and control and not merely payable to,[63] or held in trust for him.[64] On seizure of money or banknotes the sheriff must deliver them to the creditor and pay over any surplus remaining after payment of his expenses to the debtor.[65]

In regard to bills of exchange, promissory notes, bonds etc seized under the County Courts Act 1984[66] the registrar[67] holds these items as security for the amount to be levied and the plaintiff may sue in the name of the defendant, or in the name of any person in whose name the defendant might have sued, for the recovery of the sum secured or made payable, when

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[53] Civil Enforcement Regulations, regulation 37(2)(b).
[54] Information supplied by Peter J M Lown QC.
[55] *Glasspoole v Young* (1829) 9 B & C 696 at p 701.
[56] Lord Chancellor's Department, Report of the Independent Review of Bailiff Law, June 2000, para 7.13; *Francis v Nash* (1733) Cas T Hard 53.
[57] S 12.
[58] County Courts Act 1984, s 89(1)(b).
[59] Supreme Court Act 1981, s 138(3A)(b) as inserted by the Courts and Legal Services Act 1990, s 15.
[60] 1984 Act, s 89(1)(b); 1981 Act, s 138(3A)(b). The wording of the two Acts follows that of the Judgments Act 1838.
[61] Kennet, 321 at p 358; *Land Credit Co of Ireland v Fermoy* (1870) LR 5 ch 323.
[62] Civil Procedure Rules, CCR, Ord 26, rule 1(4).
[63] *Harrison v Paynter* (1840) 6 M & W 387.
[64] *Brown v Perrott* (1841) 4 Beav 585.
[65] Judgments Act 1838, s 12. In the course of our research we consulted a number of under sheriffs in England and Wales. We have been informed by one under sheriff that if money were seized it would be deposited in a client account and after deduction of expenses the balance due would be paid to the creditor on the expiration of fourteen days. This period is analogous to that under the Insolvency Act 1986, s 184(3).
[66] S 91.
[67] Definition, s 147.

the time for payment arrives. A cheque made payable to the debtor and in the hands of the Accountant General of the High Court, but not delivered, cannot be seized.[68]

A number of exemptions to seizure under a writ or warrant exist. These were widened in 1990[69] and include books, vehicles, tools and implements used for employment or in trade, wearing apparel, bedding and furniture. The full list is similar to the list of goods exempt in bankruptcy under the Insolvency Act 1986.[70] There are no exemptions applicable to the seizure of money.

However, a qualification in regard to the seizure of money exists in regard to distress. In regard to distress for rent under section 102 of the County Courts Act 1984 a landlord of any tenement where goods are seized may claim rent that is in arrears at the date of seizure of goods, belonging to the debtor tenant. This must be done within five days of the date of seizure. However money is not distrainable unless it is in a bag or in such a closed or sealed receptacle that it can be identified[71] ie a till and its contents may be seized. The reason for this rule is thought to be found in the original law when distress was a form of pledge.[72] It is an absolute exception to the rule that all goods belonging to the debtor can be distrained and not merely a conditional exception where conditional items can be distrained if no other items are sufficient to distress.[73]

Promissory notes, bonds, specialities, or securities for money belonging to the debtor are excluded in distraint for road traffic debts.[74]

The Lord Chancellor's Department is undertaking a review of bailiff law which forms part of a wider review of enforcement in the civil courts. Their Report[75]which was published in June 2000 recommends that any new statutory provisions should authorise the seizure of money, banknotes and bills of exchange, promissory notes, bonds, specialties and securities for money[76] following the approach in the Supreme Court Act 1981 and the County Courts Act 1984.

It is recognised that although at present money etc can be seized, in practice money and banknotes will be seized by the sheriff or other officer but that it is uncommon in regard to the other items – bills of exchange, promissory notes, bonds etc.[77] This is generally believed to be due to the absence of any guidance in the form of rules of court corresponding to the practicalities of disposing of these items and the associated complexities of realisation.[78] However the view was also put forth that the lack of strict rules specifying the method by which the statutory provisions are to be implemented in practice was beneficial and allows

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[68] *Courtoy v Vincent* (1852) 15 Beav 486.
[69] Courts and Legal Services Act 1990, s 15 which inserted s 138(3A)(a) into the Supreme Court Act 1981. S 15(2) substituted the exemptions contained in the County Courts Act 1984, s 89(1).
[70] S 283(2).
[71] Halsburys Law of England, 4th edn, vol 13, para 239; *Wilson v Ducket* (1675) 2 Mod Rep 61.
[72] Halsburys Law of England, vol 13, para 239.
[73] Halsburys Law of England, vol 13, para 227.
[74] Lord Chancellor's Department Report, June 2000; Enforcement of Road Traffic Debts (Certificated Bailiffs) Order 1993, SI No. 2073 r (b).
[75] Lord Chancellor's Department, Report of the Independent Review of Bailiff Law.
[76] Recommendation (17).
[77] This was the general consensus amongst the under sheriffs that we consulted. It was stated that the seizure of such items would be more common in larger urban areas where common business practice regularly uses such items.
[78] No direct reference is made in the Civil Procedure Rules to the method of disposal of money and instruments.

procedures to be adopted on a 'case by case' basis and permits changes to be made when new credit or cash transfer systems evolve.

It has been put to us that a specific problem exists in regard to cheques and in particular where a debtor would be required to endorse the cheque in favour of the sheriff but he refused to do this. However it has also been stated that the ability to seize cheques is a useful power. If it was impossible to seize cheques then even where a debtor in good faith said that he would cash the cheque in satisfaction of the debt, the bank may itself 'seize' the funds in reduction of an overdraft. It was suggested that a sheriff or other officer would only seize items such as bills of exchange and promissory notes where the creditor has instructed the officer to do so.

New Zealand

The District Courts Act 1947 provides that under a warrant of distress a bailiff or constable may seize "any money, banknotes, bills of exchange, promissory notes, bonds, specialties, or other securities for money"[79] belonging to the debtor.

The bailiff delivers bills of exchange and similar items to the Registrar, for the benefit of the party upon whose application execution has been issued, as security for the amount directed to be levied.[80] The said party may sue in the name of the person against whom execution has issued, or in the name of any person in whose name the person against whom execution has issued might have sued, for the recovery of the sum or sums secured or made payable when the time for payment arrives.[81]

Northern Ireland

Under the Judgments Enforcement (Northern Ireland) Order 1981[82] an enforcement officer may seize, among other things "money, bills of exchange, bonds and promissory notes and any other securities for money belonging to the debtor."[83]

Before the Enforcement of Judgments Office makes an enforcement order the Office will examine the debtor as to his means[84] and then make a provisional enforcement order which the creditor or debtor may object to.[85] Subject to objection the Order will be made eight days thereafter.[86]

The effect of an order of seizure is to place the items seized in the custody and possession of the Enforcement Office and "charging it with the amount recoverable on foot of the judgment in favour of the creditor for whose benefit the Order is made."[87]

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[79] S 85.
[80] S 86(1).
[81] S 86(2).
[82] SI 1981/226 (NI 6).
[83] Art 31 and 32(b).
[84] Art 27.
[85] Judgment Enforcement Rules (Northern Ireland) 1981 (SRNI 1981 No 147), rules 58 and 59.
[86] Kaye, *Methods of Execution of Orders and Judgments in Europe*, p 251.
[87] 1981 Order, Art 34(1).

Money seized will be held by the Office for a specified period before being made over to the creditor.[88]

In regard to bills of exchange, bonds, promissory notes or any other securities for money the Office will hold these as security for the amount recoverable on foot of the judgment[89] and the Chief Enforcement Officer or the creditor may sue in the name of the debtor for the recovery of the sum so secured when the time arrives for recovery of the sum.[90] We are informed that in practise this situation seldom arises and a more informal procedure may be followed whereby the drawer of a cheque or bill of exchange will agree to re-issue a similar cheque in the name of the Office.[91]

In regard to the seizure of money we are informed that this usually takes place in business premises (cash and cheques in a till) but may occur in domestic situations also.[92]

Certain items are exempt from seizure. These include essential domestic items such as wearing apparel, furniture, bedding, tools and implements of trade.[93] No specific exemption applies to the seizure of cash, cheques etc

Sweden

All kinds of property belonging to the debtor can be attached (utmätt) provided it is not exempt property in terms of the statute.[94]

A condition for attaching certain property is that it may be capable of being conveyed[95] and that it has a market value.[96] Money including foreign currency, cheques, postal orders and other papers of value can be attached.[97] It is possible that money contained in a wallet can be attached also.[98]

The enforcement authority should in the first place take such property which bring about the least cost, damage and inconvenience for the debtor[99] and in practice this means cash, bank balances in credit or other liquid assets.[100] The Enforcement Authority will seize real and personal property belonging to the debtor, sell the property (or otherwise convert it into money) and use the money to pay the applicant's claim.[101] When money is attached there is no need for sale. The items seized are taken to the Enforcement Office where they are deposited in an account for further distribution to the creditor.[102] The Enforcement

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[88] 1981 Rules, rule 80. This rule requires the Office to hold all monies which have been lodged in the Office from or on behalf of a debtor, either in respect of goods seized and sold or monies paid into the Office to prevent seizure or sale subsequent to seizure, or under an Order appointing Receiver, a Garnishee or otherwise, for a period of 28 days.
[89] 1981 Order, Art 39(1).
[90] Art 39(2).
[91] Letter from Mr Napier, Master, Enforcement of Judgments Office, Belfast.
[92] See Discussion Paper No 108, para 3.3.
[93] 1981 Order, Art 33.
[94] Utsökningsbalken, 1981:774, ch 4, § 2, p1.
[95] Chapter 5, § 5.
[96] Gregow, Utsökningsrätt, p 81.
[97] Information supplied by Gunnar Bergqvist, Senior Enforcement Officer, Enforcement Authority (Kronofogdemyndigheten), Sweden.
[98] Information supplied by Gunnar Berqvist.
[99] Ch 4, § 3.
[100] Kaye, *Methods of Execution of Orders and Judgments in Europe*, p 312.
[101] P 306.
[102] Information supplied by Gunnar Bergqvist.

Authority (Kronofogdemyndigheten) do not require to obtain a court order to realise and distribute these items to the creditor.[103]

Certain goods are exempted from execution. The exemptions are divided into two types – the *beneficium* which consists of goods exempted because of the debtor's needs and apply only to natural persons and to the estate of a deceased person.[104] The second type is goods exempted because of their character or for social reasons. The *beneficium* includes money/cash, bank balances in credit, debts owing and basic necessities.[105] This exemption applies on the basis that access to these items is reasonably necessary for the upkeep or maintenance of the debtor and his family until such time as he can expect an income that will cover this need. This exemption applies for a period of one month only. The sum is not fixed but the Enforcement Authority will consider the needs of the debtor's family,[106]any handicap or sickness in regard to granting the exemption,[107] housing costs, the debtor's cost of transport to work and the period until which the debtor will receive his next salary or pension payment.[108] The amount to be exempt will be determined by the Enforcement Authority.[109] The debtor has the opportunity to appeal to the district court (Tinmgsrätt).

One particular problem was highlighted to us where seizure of foreign currency had taken place. Money was seized in Dollars and the money was converted into Swedish Kronor for the benefit of the creditor. A few days later the Swedish government devalued the Kronor by 14%. After a long process the Supreme Court (Högsta demstolen) found that the Swedish government had to pay compensation for the damage incurred to the creditor.[110]

We have been informed that it is uncommon in practice for attachment to take place in the debtor's home.[111]

United States of America

Research conducted on a number of US states shows that many specifically provide for the seizure of money and instruments.[112]

In the state of California the Code of Civil Procedure provides that where the defendant is a natural person, it is possible to seize under a writ of attachment money,[113] negotiable documents of title,[114] instruments[115] and securities.[116]

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[103] Information supplied by Gunnar Bergqvist.
[104] Ch 5, § 1.
[105] Ch 5, § 1.
[106] Ch 5, § 2, p 1.
[107] Ch 5, § 2, p 2.
[108] Information supplied by Gunnar Bergqvist.
[109]An example was given to us for the living costs per month of a single person, excluding costs for housing, commuting, illness of 3.866 SEK (about £280-300). This is determined according to the same principles that are applied in regard to exemptions applicable to the attachment of salary. Gunnar Bergqvist.
[110] Information supplied by Gunnar Bergqvist. This example was said to have taken place in the autumn of 1982.
[111] Information supplied by Gunnar Bergqvist.
[112] Sample of the following states: California, New York, District of Columbia, Washington, Mississippi, South Carolina, Colorado.
[113] S 487.010(c)(7).
[114] S 487.010(c)(8).
[115] S 487.010(c)(9).
[116] S 487.010(c)(10).

Money can be seized on premises where a trade, business, or profession is conducted by the debtor and can also be seized where it is located elsewhere than on such premises. In regard to the latter the first $1,000 is exempt from seizure.[117]

'Instrument' is defined as including a check, draft, money order or other order for the withdrawal of money from a financial institution, the United States, any state, or any public entity within any state.[118] On seizure of the aforementioned items the levying officer shall endorse the instrument and present it for payment.[119] This is done by writing on the instrument the name of the defendant, the name and official title of the levying officer and the title of the court and the cause in which the writ was issued.[120] This endorsement is as valid as if endorsed by the debtor himself.[121]

Money and the funds obtained from the payment of the instrument are held by the levying officer subject to the lien of attachment.[122] The lien of attachment continues in effect until the officer receives a written direction to release the property from the creditor's attorney or when a certified copy of a court order for release is received.

In the District of Columbia under a writ of *fieri facias* a marshal may seize money, checks, promissory notes, bonds or certificates of stock.[123] Where money is seized the marshal may not expose the money to sale but shall account for it as money collected.[124] Bills etc will be sold as other personal property is sold and the marshall may endorse the items to pass title to the purchaser.[125] The procedure for sale involves items being appraised by two sworn appraisers and sold at public auction after the expiration of ten days notice by advertisement.[126]

In a number of other states the property that is defined as subject to seizure is framed in more general terms. In the state of New York a money judgment may be enforced against any property which can be assigned or transferred.[127] In Washington all personal property belonging to the judgment debtor and which is not exempted is liable to execution.[128] In South Carolina the whole real and personal estate of the debtor, including money and banknotes can be attached.[129]

All states exempt certain items from seizure and a number of states contain wide ranging exemptions.[130] Generally property that is necessary for support of the debtor and the debtor's family is exempt and such items as wearing apparel, beds, bedding, tools and material required for carrying on a business are exempt to a prescribed amount. From the research conducted it was established that only one state exempted money specifically[131] and

[117] S 487.010(c)(7).
[118] S 488.710(a).
[119] S 488.710(b).
[120] S 488.710(c).
[121] S 488.710(c).
[122] S 488.710(c).
[123] District of Columbia Code, § 15-311. In Mississippi the wording of the Code allows seizure of money, banknotes, bills, evidences of debt circulating as money. § 13-3-133.
[124] § 15-312.
[125] § 15-312.
[126] § 15-314.
[127] New York State Consolidated Laws, Civil Practice Law and Rules, s 5201(b).
[128] Revised Code of Washington, s 6.17.090.
[129] SC Code of Laws 1999, S-15-19-230.
[130] Eg New York, ss 5205-5206; Washington, ch 6.15.
[131] California, s 487.010(c)(7).

only in regard to seizure in a non-business context. Other exemptions in place include all payments from a retirement account,[132] payments for support of the debtor's wife or children,[133] money as security for rental of real property to be used as the debtor's residence,[134] money for gas, electricity, telephone services,[135] insurance money[136] and disability insurance.[137]

[132] New York, s 5205(7)(c)(2).
[133] S 5205(d)(3).
[134] S 5205(g).
[135] S 5205(g).
[136] Washington, s 6-15.030.
[137] S 6-15.035.

Appendix B

List of those submitting written comments on

Discussion Paper No 78
Adjudications for Debt and Related Matters

Discussion Paper No 79
Equalisation of Diligences

Discussion Paper No 107
Diligence Against Land

Discussion Paper No 108
Attachment Orders and Money Attachment

Accountant in Bankruptcy
The Building Societies Association
Centre for Research into Law Reform, University of Glasgow
Citizens Advice Scotland
Committee of Scottish Clearing Bankers
Mr R Craig Connal, Solicitor, Glasgow
Convention of Scottish Local Authorities
Mr James W Craig, Solicitor, Glasgow
HM Customs and Excise
Faculty of Advocates
Glasgow Anti-Poverty Project
Professor William M Gordon, University of Glasgow
Professor George Gretton, University of Edinburgh
Mr David Guild, Solicitor, Edinburgh
Institute of Credit Management
Mr George Jamieson, Solicitor, Paisley
Joint Committee of the Law Society of Scotland and the Society of Messengers-At-Arms and Sheriff Officers
The Keeper of the Registers of Scotland
Property Managers Association Scotland Limited
Reid Doig Rogers, Solicitors
Royal Faculty of Procurators
Scottish Consumer Council
Scottish Homes
Scottish Sheriff Court Users Group
Sheriffs Principal
Society of Writers to the Signet
Mr Ian N D Walker, Solicitor, Glasgow

Printed in the UK for The Stationery Office Limited on behalf of the Queen's Printer for Scotland 5/01