SCOTTISH LAW COMMISSION
(Scot Law Com No 133)

Report on Statutory Fees for Arrestees

Laid before Parliament by the Lord Advocate under section 3(2) of the Law Commisions Act 1965

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Scottish Law Commission

Item 8 of our Second Programme of Law Reform

Statutory Fees for Arrestees

To: The Right Honourable the Lord Fraser of Carmyllie, QC,
Her Majesty's Advocate

We have the honour to submit our Report on Statutory Fees for Arrestees.

(*Signed*) C K DAVIDSON, *Chairman*
E M CLIVE
PHILIP N LOVE
IAIN MACPHAIL
W A NIMMO SMITH

KENNETH F BARCLAY, *Secretary*
14 October 1991

Contents

TABLE OF ABBREVIATIONS

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

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

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

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

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

Part I Introduction

Scope and arrangement of Report

1.1 In this Report, we submit recommendations for legislation introducing a system of statutory fees for arrestees (ie persons in whose hands arrestments have been laid) to compensate them for expenses incurred in complying with the arrestment. The Report is concerned only with arrestments of property and funds other than earnings.[1] The Report is submitted in pursuance of Item No. 8 of our Second Programme of Law Reform,[2] the reform of the law of diligence.[3]

1.2 In Part II we examine the background law on arrestments and the common law rules denying arrestees any compensation or recompense for expenses incurred in complying with an arrestment. We describe the contrasting system in England and Wales where creditors obtaining *Mareva* injunctions freezing debts due to a defendant in the hands of a third party (equivalent to arrestment on the dependence) and garnishee orders attaching debts due to a judgment debtor in the hands of a third party (equivalent to arrestment in execution) are required to compensate the third party to some extent for expenses incurred in complying with the injunction or garnishee order. We also give such information as we can on the scale of use of arrestments in Scotland.

1.3 In Part III we advance recommendations for the introduction of a system of statutory fees for arrestees.

1.4 In Part IV we advance recommendations on two matters which are to some extent related to statutory fees for arrestees but which concern reforms which could be enacted whether or not statutory fees for arrestees are introduced. The first is a recommendation that, in the case of arrestments in execution, an arrestee should be under a duty to disclose the existence and extent of funds or moveable property arrested in his hands even if he owes a duty of confidentiality to the debtor. The second is for legislation making it clear that an arrester has no right to recover from his debtor the expenses of an arrestment which has not attached any funds or property.

1.5 Part V contains a summary of our recommendations. A draft Bill giving effect to these recommendations is set out in Appendix A to this Report.

Acknowledgments

1.6 This Report follows on Discussion Paper No. 87 on *Statutory Fees for Arrestees* which was published in May 1990. A list of those persons and bodies who commented on that Paper is set out in Appendix B. We are very grateful to them for their comments which have greatly assisted us in the preparation of this Report.

1.7 We are most grateful to Ms Helen Jones, Mrs Ann Millar and Ms Fiona Rutherdale of The Scottish Office Central Research Unit (CRU) for undertaking on our

1. Statutory provision is already made for the payment of fees to employers complying with earnings arrestments. See Debtors (Scotland) Act 1987, s 71.
2. Scot Law Com No 8 (1968).
3. *Ibid* p 6. "Diligence" is the legal term used to denote primarily the methods of enforcing unpaid debts and other obligations due under decrees of the Scottish courts or on the dependence of actions in those courts. For current work under this Programme Item, see our *Twenty-fifth Annual Report 1989-90*, Scot Law Com No 128, paras 1.10-1.15, 2.6-2.12.

behalf the surveys of arrestments to which we refer in Part II.[1] Our thanks are also due to members of the Society of Messengers-at-Arms and Sheriff Officers who provided the CRU with data, and in particular to Mr Stuart Hamilton and Mr George Thomas of the Society, for their expert advice and assistance given to the CRU and ourselves in connection with the surveys; to the Committee of Scottish Clearing Bankers who provided statistics on arrestments served on their member banks, and assistance in connection with the surveys; to the Association of British Insurers and certain building societies who provided information on the cost of complying with arrestments; and to the Convention of Scottish Local Authorities who provided information on the recovery of expenses of abortive summary warrant arrestments.

1. See para 2.24.

Part II The Existing Law and Practice

(1) Preliminary

2.1 In this Part, we describe the background law on arrestments[1]; discuss the authorities showing that arrestees are not entitled to fees or recompense for complying with an arrestment[2]; compare the Scottish position with the position in England where garnishees and third parties complying with *Mareva* injunctions are entitled to some remuneration[3]; and finally give information on the scale of use of arrestments.[4]

(2) The background law on arrestments

2.2 *The main features of arrestments of corporeal moveables and of funds other than earnings*. An arrestment is "the diligence appropriate to attach obligations to account to the debtor by a third party and corporeal moveables belonging to the debtor which are in the hands of a third party".[5] The creditor using the arrestment is called "the arrester", the third party in whose hands the schedule of arrestment is laid is known as "the arrestee", and the arrester's debtor whose funds or other moveables are attached is called "the common debtor". An arrestment is the first, inchoate step in the diligence of arrestment and action of furthcoming. The arrestment prohibits the arrestee from paying the arrested funds, or delivering the arrested moveables, to the common debtor and creates a preference for the arrester in competition with other diligences and rights. An arrestment may be used on the dependence of an action for payment of a principal sum, or in execution of a decree for payment of a principal sum or judicial expenses or both, or in execution of an extract document of debt registered in the Books of Council and Session or sheriff court books, or a document of debt enforceable by statute as if so registered, or in pursuance of a summary warrant for the recovery of arrears of rates, taxes or community charge. In order to complete the diligence, the arrester must raise an action of furthcoming calling the arrestee and common debtor as defenders.[6] In an action of furthcoming, the arrester obtains a decree requiring the arrestee to pay to the arrester the sum arrested so far as necessary to satisfy the arrested debt, or as the case may be, for sale of so much of the moveable property belonging to the common debtor, which were in the arrestee's hands at the time of the execution of the arrestment, as are necessary to satisfy the arrester's debt. Normally an action of furthcoming is unnecessary because the debtor will usually either discharge the debt or grant a mandate to the arrestee for payment to the arrester out of the arrested funds and thereby avoid the expenses of an action of furthcoming.

2.3 The diligence of arrestment and furthcoming does not apply to the attachment of earnings or pensions which are now attachable by new statutory forms of diligence (called earnings arrestments, current maintenance arrestments, and conjoined arrestment orders).[7] We are not concerned in this Report with diligence against earnings and pensions in relation to which there is new statutory provision for fees for employer-arrestees operating such arrestments.[8]

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1. Paras 2.2 to 2.8.
2. Paras 2.9 to 2.11.
3. Paras 2.12 to 2.23.
4. Paras 2.24 ff.
5. Wilson *Debt* p 216; see generally Maher and Cusine, Chapter 5.
6. Graham Stewart, p 225 ff; Maher and Cusine, para 5.45 ff.
7. Debtors (Scotland) Act 1987, Part III (ss 46 to 73).
8. *Ibid*, s 71.

2.4 *Arrestment of ships and their cargo.* There is a special kind of arrestment applicable to ships, which has distinctive characteristics, one of which is that the arrestment may be used against the ship while she is in the hands of the defender or debtor.[1] The arrestment is executed against the ship herself by affixing the arrestment schedule to the mast or other prominent part of the ship.[2] There is thus strictly speaking no arrestee.[3] In the case of cargo on board ship, a copy of the arrestment is served on the ship master or other person in charge of the cargo.[4] Arrestments of cargo owned by the owner of the ship may be executed in the owner's hands (which is incompetent in the case of goods on land) and poinding of goods on board ship is not competent.[5]

2.5 *Extent of property attached by arrestment.* An arrestment is executed by the service of a schedule of arrestment on the arrestee, the form of which is regulated by the common law and not prescribed by act of sederunt. Normally the schedule of arrestment is in general terms attaching the principal sum (or the expenses) due by the arrestee to the common debtor and "all goods, gear, debts, sums of money or any other effects whatsoever", lying in the arrestee's hands belonging to the debtor or defender. If the principal sum (or expenses) specified in the schedule of arrestment is followed by the words "more or less", the sum attached thereby is not limited to the specified sum.[6] This "more or less" formula is generally used in arrestments proceeding on Court of Session and sheriff court ordinary cause arrestments, though for historical reasons arrestments proceeding on sheriff court summary cause warrants often arrest a maximum sum, omitting the words "more or less". In our Discussion Paper No. 84, we advance provisional proposals that there should be a limit to the amount of funds attached by an arrestment defined by reference to the principal sum plus further sums to cover interest and expenses.[7]

2.6 There is in general no requirement that the schedule of arrestment should specify particular funds or property arrested.[8] Where the arrestee is a large institution with a network of branches, such as a clearing bank or a building society, the arrestment will normally attach all funds and moveable goods of the defender or common debtor in the possession of the arrestee held at the head office and all the branches of the institution. There is no requirement that the schedule of arrestment must specify the particular branches of the arrestee's business and undertaking at which funds or moveable property of the defender or debtor are situated. The arrester will often not know, and have no means of knowing, whether the arrestee holds funds or goods belonging to the debtor, or at what branch of the arrestee's business any such funds or goods are held.

2.7 *Service of an arrestment.* An arrestment is executed by serving a schedule of arrestment on the arrestee (in the case of non-maritime arrestments). There are several different procedural methods whereby an arrestment may be served under a variety of different enactments and rules of the common law.[9] These were discussed in our Discussion Paper No 87.[10] Most arrestments are served on corporate bodies.

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1. Bankton *Institute* IV, 41, 9; Graham Stewart, p 105. The law and practice of arrestments of ships and cargo are discussed in our Discussion Paper No 84 on *Diligence on the Dependence and Admiralty Arrestments* (1989), Part III.
2. Graham Stewart, p 41; RC 140(a).
3. *Barclay, Curle & Co Ltd* v *Sir James Laing & Sons Ltd* 1908 SC 82 at p 89 per Lord McLaren.
4. RC 140(b); *Svenska Petroleum AB* v *HOR Ltd* 1986 SLT 513.
5. Bankton *Institute* IV, 41, 9 discussed in Discussion Paper No 84, paras 3.78 and 3.79.
6. *Ritchie* v *McLachlan* (1870) 8 M 815.
7. Discussion Paper No 84 on *Diligence on the Dependence and Admiralty Arrestments* (1989) Proposition 13 (para 2.163).
8. Even in the case of arrestments of ships on the dependence of an Admiralty action *in personam*, the warrant for arrestment need not specify a particular ship.
9. These include (1) personal service on the arrestee; (2) service at the arrestee's dwelling-place or place of business; (3) edictal service (in the case of Court of Session arrestments) on persons outside Scotland or whose whereabouts are unknown; (4) an equivalent procedure in the sheriff court for service on persons outside Scotland (OCR, rule 12) or on persons whose address is unknown (OCR, rule 11) (query whether this applies to arrestments in execution); (5) postal service (in the case of sheriff court summary cause arrestments).
10. Discussion Paper No 87, paras 2.8 to 2.11; and Appendix A.

On consultation there was no dissent from our view[1] that an arrestment served on a corporate body as arrestee is valid and effectual if served at a place of business of the arrestee within Scotland, even though it is only a branch place of business.[2] In cases governed by the sheriff court rules, service of a postal copy of the schedule of arrestment to the arrestee's "principal place of business" under OCR rule 111 is necessary to complete an effectual service made at a corporate body's branch place of business, but that extra requirement does not apply to arrestments under Court of Session warrants or extract registered documents of debt, service of which is still governed by the old Citation Acts. Likewise, on consultation, there was no dissent from our view that an arrestment in the hands of a banking corporation is no different from service on any other type of arrestee. Service may be, and frequently is, effected by service of the schedule on a branch of the bank together with a postal copy to the arrestee's principal place of business.

2.8 *Effect of arrestment and liability of arrestee for breach of arrestment.* So far as relevant, the main effect of an arrestment is to prohibit the arrestee from voluntarily parting with the arrested funds or goods to the prejudice of the arrester,[3] as by paying the arrested sum or delivering the arrested goods to the common debtor or indeed anyone else.[4] In the special case of an arrestment of ships, it immobilises the ship at the anchorage where the arrestment was executed.[5] If the arrestee does part with the arrested funds or goods in the knowledge, or in unjustifiable ignorance, of the arrestment, he will be liable in an action, at the instance of the arrester, of damages for breach of the arrestment.[6] The measure of damages is the amount of the actual loss sustained by the arrester as a result of the breach, being all that he could have recovered by an action of furthcoming and all that he has lost by the arrestee's wrong,[7] plus interest thereon. The damages will therefore generally be the amount of the debt due by the arrestee to the common debtor which has been wrongfully paid away, or the value of the goods wrongfully delivered, so far as not exceeding the amount of the principal sum and expenses due by the common debtor to the arrester.[8]

(3) No fees or recompense for arrestees for complying with an arrestment

2.9 On consultation, there was no dissent from our view[9] that, under the existing law, an arrestee is not entitled to claim, from the arrester or common debtor, recompense for the work which the arrestee has done, or reimbursement for the outlays and expenses which he has incurred, in complying with the arrestment. The authorities on arrestment and furthcoming make no provision for the recovery by the arrestee of recompense or for reimbursement of his outlays and expenses, either from the arrester or the common debtor. The common law rules on recompense for the redress of unjustified enrichment, while elastic and in the process of development, likewise suggest that the arrestee could not claim recompense from the arrester. Normally where a creditor has simply obtained payment of a debt by the use of legal process, he will not be treated as "unjustifiably enriched" (*lucratus*) in the relevant sense.[10]

1. Ibid, para. 2.9: see eg *McNairn* v *McNairn* 1959 SLT (Notes) 35; *O'Brien* v *A Davies and Sons Ltd* 1961 SLT 85.
2. This is subject to the additional qualification that the arrestee must be subject to the jurisdiction of the Scottish courts: see our Discussion Paper No 90 on *Extra-territorial effect of arrestments and related matters, passim*
3. Graham Stewart, p 125; pp 220, 221.
4. *High Flex (Scotland) Ltd* v *Kentallen Mechanical Services Co* 1977 SLT (Sh Ct) 91.
5. *Alexander Ward & Company Ltd* v *Samyang Navigation Co Ltd* 1975 SC (HL) 26 at p 54.
6. Walker *Delict* (2nd edn) p 502; Graham Stewart, p 220; *Laidlaw* v *Smith* (1841) 2 Robinson App Cas 490.
7. *McEwen* v *Blair and Morrison* (1822) 1 S 313; *Baron Hume's Lectures* vol VI p 113; *Grant* v *Hill* (1792) Mor 786, explained in Lord Ivory's Note to Erskine *Institute* III, 6, 14; Graham Stewart p 221.
8. *Idem.*
9. See Discussion Paper No 87 paras 2.15 to 2.18.
10. There is authority that where a third party makes improvements to security subjects, the third party has no claim in recompense against the creditor holding the security: *Selby's Heirs* v *Jollie* (1795) Mor 13438; *Soues* v *Mill* (1903) 11 SLT 98 at p 100 per Lord Kyllachy; *Trade Development Bank* v *Warriner and Mason (Scotland) Ltd* 1980 SC 74 at pp 85, 98, 103-104, 107; Gloag *Contract* (2nd edn) p 330.

2.10 There is likewise no Scottish authority directly holding that the arrestee can recover recompense from the common debtor. However, an arrestee will normally hold the common debtor's property under contract, and there is English authority[1] that there may be circumstances in which the arrestee could recover damages from the common debtor on the ground that the common debtor's failure to pay the debt, or to get the arrestment recalled, constitutes a deemed repudiation of that contract. This authority is discussed below in the context of maritime arrestments,[2] but if the principle is correct, it could apply to some arrestments of non-maritime subjects. It is unlikely however that such a claim would be upheld where the debt is not due and the property is arrested on the dependence. Moreover, it would not found a claim by the arrestee against the arresting creditor, and the defender or common debtor may not be worth suing.

2.11 We adhere to our view, from which there was no dissent on consultation, that if as a matter of policy an arrestee should be given the right to claim a measure of recompense or compensation from an arrester for services rendered, or outlays incurred, in complying with an arrestment, the right will require to be conferred by legislation.

(4) Comparison with English law

2.12 In English law, the right of a third party complying with debt enforcement measures to recompense for administrative and clerical expenses differs according as the expenses were incurred in complying with a *Mareva* injunction (which may be taken for present purposes as broadly equivalent to our arrestment on the dependence)[3] or a garnishee order (broadly equivalent to our arrestments in execution).

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

2.13 We understand that a *Mareva* injunction is normally addressed to third parties believed to hold assets of the defendant as well as to the defendant himself. Where it is addressed to the defendant's bank, it generally directs the bank to freeze his account or at least to ensure that any credit balance is not reduced below an amount specified by the injunction. Once a bank (or other third party) is given notice of a *Mareva* injunction affecting money or goods in its hands, it must not part with the money or goods except by authority of the court, the sanction being punishment for contempt of court. In *Z Ltd* v. *A-Z*[4] the Court of Appeal laid down certain rules or guidelines concerning the plaintiff's duties towards the bank, or other innocent third party, complying with a *Mareva* injunction, which included the following. (1) Insofar as the bank (or other third party) is required to take any action in order to comply with the *Mareva* injunction and is put to expense on that account, the bank is entitled to be reimbursed for its reasonable costs by the plaintiff. The plaintiff must give an undertaking to pay the bank's reasonable costs. (2) The bank should be told, with as much certainty as possible, what it is to do or not to do. The plaintiff should identify the bank account by specifying the branch and heading of the account or other assets of the defendant with as much precision as is reasonably practicable. (3) If the plaintiff cannot identify the bank account or other assets with precision, he may request the bank to conduct a search to see if the bank holds any assets of the defendant provided the plaintiff undertakes to pay the cost of the search. The search may be limited, eg to all branches in central London. The bank may not tell the plaintiff the result of the search lest it breach confidentiality but must freeze any assets.

1. *The Jogoo* [1981] 1 Lloyd's Rep 513, which related to an Admiralty arrest.
2. See paras 3.86 and 3.87.
3. For an explanation of *Mareva* injunctions, see our Discussion Paper No 84 on *Diligence on the Dependence and Admiralty Arrestments* (1989) para 2.48. Normally a *Mareva* injunction is granted on the dependence of court proceedings prior to final judgment, but it has now been held that it may be granted after final judgment and before execution: *Orwell Steel (Erection and Fabrication) Ltd* v *Asphalt and Tarmac (UK) Ltd* [1985] 3 All ER 747. A *Mareva* injunction is a personal order binding the defendant and third parties personally and does not create a preference for the plaintiff (unlike an arrestment).
4. [1982] 1 Q B 558 (CA) at p 575-577 per Lord Denning M R, applying *Searose Ltd* v *Seatrain UK Ltd* [1981] 1 WLR 894.

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

> "I do not think it is right that the bank should incur expense in ascertaining whether the alleged account exists, without being reimbursed by the plaintiff for any reasonable costs so incurred. Banks are not debt-collecting agencies; they are simply, in this context, citizens who are anxious not to contravene an order made by the court, an order which has been obtained on the application of, and for the benefit of, the plaintiff. Even where the particular branch of the bank is identified, some expense is likely to be incurred in ascertaining whether the defendant has an account at the branch. But where the branch is not identified, the bank will be put in a very difficult position. It is, I think, well known that Barclays Bank has over 3,000 branches in this country, and Lloyd's Bank has over 2,000 branches. Are they to circulate all their branches? If they did so, it would involve them in great expense; moreover, such an exercise cannot, in ordinary circumstances, reasonably be expected of them".

He also referred to the possibility:–[2]

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

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

(b) Administrative and clerical expenses of garnishees

2.15 *Statutory fees for administrative and clerical expenses of deposit-taking institutions operating garnishee orders.*[3] Under legislation passed in 1982, as subsequently amended, relating to High Court and county court garnishee orders,[4] where a garnishee order nisi is served on any "deposit-taking institution",[5] the institution may deduct from "the relevant debt or debts" an amount not exceeding a sum prescribed by statutory instrument "towards the administrative and clerical expenses of the institution in complying with the order". The amount of the prescribed sum is currently £30.[6] The right to deduct is exercisable from the time when the order nisi is served on the institution. The reference to "the relevant debt or debts" means the amount (at the time of service of the order) of the debt or debts of which a whole or part is expressed to be attached by the order[7]. It will be seen that what may be called the statutory fee is deducted from the sum due by the garnishee to the judgment debtor, and is thus payable by the judgment debtor rather than by the garnishor. A deduction of the statutory fee may, however, be made where the amount garnished is insufficient to cover both the statutory fee and the judgment debt and costs in respect of which the attachment is made, notwithstanding that the benefit of the attachment to the creditor is reduced as a result of the deduction of the statutory fee.[8] These statutory provisions only remunerate the garnishee if funds are attached

1. *Searose Ltd* v *Seatrain UK Ltd* [1981] 1 WLR 894 at p 896.
2. *Idem.*
3. A garnishee order nisi made by the High Court, and a garnishee summons issued by the county court, attaches a debt due by a third party (the garnishee) to a judgment debtor, and orders the garnishee to appear and show cause why he should not pay to the judgment creditor that debt or so much of it as will satisfy the judgment debt and the costs of the garnishee proceedings. If on the hearing the garnishee does not show cause, the order may be made absolute. See generally Rules of the Supreme Court, Order 49; County Court Rules, Order 30.
4. Supreme Court Act 1981, s 40A(1), and County Courts Act 1984, s 109(1), both introduced by the Administration of Justice Act 1982, s 55 and Sch 4, Pt I; and amended *inter alia* by the Administration of Justice Act 1985, s 52.
5. For the definition of a deposit-taking institution, see next paragraph.
6. Attachment of Debts (Expenses) Order 1983 (SI 1983/1621).
7. Supreme Court Act 1981, s 40A(1A); County Courts Act 1984, s 109 (1A), both inserted by the Administration of Justice Act 1985, s 52.
8. Supreme Court Act 1981, s 40A(1B); County Courts Act 1984, s 109(1B), both inserted by the Administration of Justice Act 1985, s 52.

by the garnishee order, and not for work done in unsuccessfully attempting to trace funds under a garnishee order which is ultimately found to have attached nothing.

2.16 *Definition of "deposit-taking institutions"*. A "deposit-taking institution" for this purpose means any person carrying on a business which is a deposit-taking business for the purposes of the Banking Act 1987.[1] Section 6 of that Act defines a "deposit-taking business" as one which either lends money deposited with it or finances any other activity of its business, wholly or to any material extent, out of the capital or interest of money deposited with it.[2] There are two main classes of deposit-taking institution, namely, (a) those institutions which are authorised by the Bank of England under Part I of the Banking Act 1987 to carry on a deposit-taking business and (b) the Bank of England and also those institutions which are exempt by the 1987 Act s. 4 from the need to obtain authorisation, and for that purpose are specified in a list of exempt persons in Schedule 2 to the Act. It has been observed that of the persons listed in Schedule 2 "[e]ssentially there are four main categories. First, those such as building societies, friendly societies, authorised insurance companies and credit unions each regulated under other enactments; secondly, those which are part of the public sector such as the National Savings Bank, local authorities, municipal banks and the Crown Agents; thirdly, those exempted by reason of their insignificant size and effect-penny savings banks, loan societies and school banks; and finally those on a list of international, supranational and inter-governmental bodies".[3]

2.17 Since the categories of deposit-taking institutions are not delimited primarily with the law on garnishee orders in mind, statute has conferred on the Lord Chancellor power to make an order by statutory instrument disapplying the provisions on garnishees' fees from prescribed descriptions of deposit-taking institutions.[4] We understand that the original intention was that the Lord Chancellor should be able to exclude the smallest institutions with not more than 20 branches or other outlets. No such order, however, has yet been made nor, we understand, is presently contemplated.

2.18 *Scale of use of garnishee orders*. It may be however that the need for allowing fees for abortive garnishee orders in England and Wales is less great than in the case of abortive arrestments in Scotland. Thus the overall numbers of garnishee orders nisi issued by the county courts in England and Wales in 1990 was only 3,808 (3,820 in 1989).[5] This contrasts with 1,344,326 warrants for execution against goods[6] and 48,118 attachment of earnings orders securing judgment debts in 1990.[7] It appears therefore that creditors in England and Wales rely less on enforcement against debts due to the debtor (and rely more on execution against his goods) than do Scottish creditors.[8] We were informed by the Lord Chancellor's Department that there are no statistics on the numbers of county court garnishee orders nisi which were abortive and therefore not followed up by an order absolute, but that it is estimated that probably about 20% of county court garnishee orders nisi are abortive and not made absolute. In the High Court there are only statistics for the Queen's Bench Division which made 2,405 orders absolute in 1990.[9] There are no statistics on garnishee orders made in the Chancery and Family Divisions. The relatively low numbers of abortive garnishee orders nisi (20% as compared with over 75% of arrestments served on

1. Supreme Court Act 1981, s 40(6) (as amended by the Banking Act 1987, s 108(1) and Sch 6, para 11) and s 40A(3); County Courts Act 1984, s 109 and s 147(1) (as amended by the 1987 Act, s 108(1), and Sch 6, para 15).
2. These definitions may be amended by order of the Treasury: 1987 Act, s 7. The relevant provisions of the 1987 Act came into force on 1 October 1987, (see SI 1987/1664).
3. *Scottish Current Law Statutes Annotated* (1987), volume 1, Banking Act 1987, annotation of section 4(1) by Mr Geoffrey Harding.
4. Supreme Court Act 1981, s 40A(4); County Courts Act 1984, s 109(4), both as amended by the Administration of Justice Act 1985, s 52.
5. Lord Chancellor's Department, *Judicial Statistics: Annual Report 1990* (1991) Cm 1573, Table 4.8.
6. *Idem*.
7. *Ibid*, Table 4.17.
8. See our Report on *Diligence and Debtor Protection* (1985) Scot Law Com No 95, paras 2.29 to 2.33; also Table 2A at p 14, which illustrate this point.
9. See Cm 1573 (*supra*) Table 3.11.

Scottish clearing banks[1]) may be due at least in part to the affidavit procedure described in the next paragraph.

2.19 *Affidavit by plaintiff applying for garnishee order.* One reason for the very restricted use of garnishee orders, as compared with arrestments in Scotland, may be that in applying to the High Court or county court for a garnishee order, the creditor must present an affidavit stating *inter alia* that to the best of his information or belief, the garnishee is indebted to the judgment debtor.[2] In the case of High Court applications, it is expressly provided that the affidavit must state the sources of the information or the grounds for the belief.[3] In both High Court and county court applications, where the garnishee is a deposit-taking institution with more than one place of business, the affidavit must also state the name and address of the branch at which the judgment debtor's account is believed to be held and the number of that account or, if it be the case, that all or part of this information is not known to the deponent.[4] Where the affidavit names the branch, the name and address of the branch is stated in the garnishee order itself.[5]

2.20 It seems that these are only procedural rules and do not limit the power of the court to garnish all debts due by the garnishee to the judgment debtor held in all branches of the garnishee institution within the jurisdiction nor do they alter the substantive law relating to the liability of the garnishee bank.[6] But their effect is presumably to deter plaintiffs from applying for garnishee orders except where they have information or grounds to believe that funds due to the judgment debtor are held by the garnishee in question, and as a result to reduce the incidence of abortive garnishee orders.

2.21 *Branches affected by garnishee orders.* We understand that a garnishee order against a bank will usually be drafted to attach all sums owed by the garnishee bank to the judgment debtor wherever situated within the jurisdiction.[7]

2.22 *Set off.* We are informed that since the garnishee order usually attaches all debts due by the garnishee to the judgment debtor, it is prudent practice for the garnishee bank to check whether it is owed money by the judgment debtor to protect its interests. If the garnishee bank finds that it is owed money and that the sum due by it to the judgment debtor after set off cannot satisfy the garnishee order nisi, it should appear before the master on the date fixed in that order to prove the set off and to have the order either discharged or varied. It may be open to the garnishee bank and the creditor to agree that there should be a set off and for the creditor to agree that the garnishee order nisi be discharged.

2.23 *Comparison with Scottish arrestments.* In some respects there is a close resemblance between arrestments and garnishee orders. For example neither a garnishee order nor an arrestment is restricted in its effect to funds in particular branches of the garnishee's or arrestee's business. But there are at least three striking differences relevant to the present enquiry. *First*, in Scots law, warrant for arrestment in execution, and even on the dependence, can be obtained by a pursuer as of right in the ordinary course of process, and may be used against any person whether or not the pursuer or creditor has reasonable cause to believe that he holds funds or goods

1. Information supplied by the Committee of Scottish Clearing Bankers: see paras 2.33 and 2.34 below.
2. RSC, Order 49, rule 2(c); CCR, Order 30, rule 2(c).
3. RSC, Order 49, rule 2(c).
4. RSC, Order 49, rule 2(d); CCR, Order 30, rule 2(d).
5. See *County Court Practice*, notes to CCR, Order 30, rule 2.
6. *Supreme Court Practice, 1989* (the White Book) Notes to Order 49, rr 2, 3. Cf *Vinall* v *De Pass* [1892] AC 90 (HL) at p 95 per Lord Halsbury: "The attachment is of all debts due. It is clear that within the meaning and purpose of the legislature, if there were other debts" [scil than the debt specified in the affidavit] "out of which this execution could be satisfied due from the same person, those debts ought to be made the subject of the execution".
7. See the prescribed forms of garnishee order. *Supreme Court Practice, 1989* Part 2, Forms Nos 72 to No 74; *County Court Practice, 1989* Forms N 84 and N 85.

belonging to the defender or common debtor.[1] No preliminary application to the court supported by an affidavit is required as in English garnishee procedure. *Second*, in England a garnishee may deduct from the garnished debt which he owes the judgment debtor a standard flat rate prescribed sum of £30. In Scotland an arrestee cannot recover any fee from the arresting pursuer or creditor or from the debtor. *Third*, the numbers of garnishee orders nisi made in England (3,800 in the county courts in 1990) is small compared to the numbers of arrestments executed in Scotland[2] but a high proportion (about 80%) of garnishee orders nisi are successful in attaching some funds whereas in Scotland probably less than 25% of arrestments served on clearing banks attach any funds, and until recently the proportion was only about 6%.[3]

(5) Nature and scale of use of arrestments

2.24 *Sources of empirical information.* The information in the following paragraphs derives mainly from a survey of arrestments of funds and moveables other than earnings conducted by The Scottish Office Central Research Unit (CRU) in July 1991, and information provided by the Committee of Scottish Clearing Bankers representing the four Scottish clearing banks.[4] Originally, the CRU conducted a survey of all arrestments served in the 7 months August 1990 to February 1991 based on returns made by firms of officers of court (messengers-at-arms and sheriff officers). Unfortunately, when the information which the survey yielded was compared with statistics compiled by the four Scottish clearing banks, considerable discrepancies were discovered.[5] Accordingly, despite other commitments, the CRU designed and conducted a new survey in July 1991 also based on returns made by officers of court but this time with special checking procedures designed to enable the source of any discrepancy to be identified. The survey returns were checked against records kept by the four Scottish clearing banks and the difference was found to be very small.[6] It should be noted that it was not possible to check the accuracy of statistics of arrestments laid in the hands of arrestees other than the Scottish clearing banks because the range of such arrestees is potentially infinite and they cannot be identified.

2.25 *Arrestments served in July 1991: types of arrestee.* The CRU Survey of arrestments served in July 1991 shows the numbers of arrestments served on different categories of arrestee: see Table A. Of the total number of arrestments served (3,233), by far the largest proportion, 2,603 (80.51%), were served on one or other of the four Scottish clearing banks. Only 630 arrestments were served on another type of arrestee. Only small numbers of arrestments were served on other types of financial institutions such as other banks (3.49%), building societies (2.88%) and insurance companies (0.31%), and unspecified financial institutions (0.43%). It will be seen that since four-fifths of all arrestments were served on one or other of the four Scottish clearing banks, those banks bear by far the largest part of the work imposed on arrestees in complying with arrestments in Scotland.

2.26 The total of 3,233 arrestments counted in the Survey were used to enforce 2,581 debts. 2,537 arrestments were served on a Scottish clearing bank to enforce 2,093 debts which were not enforced by arrestment in the survey period against any other type of arrestee such as a building society or insurance company; 570 arrestments were served on another type of arrestee to enforce 458 debts which were not enforced

1. In our Discussion Paper No 84 on *Diligence on the Dependence and Admiralty Arrestments* (1989) Part II we provisionally proposed that warrants for arrestment on the dependence should be granted by a judge (Lord Ordinary or sheriff) on an *ex parte* application, but the warrant would, as under the present law, be a general warrant authorising arrestment against any person who might hold funds or goods due to the defender or common debtor.
2. See para 2.25 ff below.
3. See paras 2.33 and 2.34 below.
4. Bank of Scotland; Clydesdale Bank plc; Royal Bank of Scotland plc; and TSB Bank Scotland plc.
5. Some returns by officers of court to CRU were found to be incorrect and unreliable, and a few officers of court failed to make returns.
6. The CRU Survey indicated that 2,603 arrestments were served on the four Scottish clearing banks in July 1991 while the records of those banks indicated that 2,646 arrestments were received by them in that month, a difference of only 43 arrestments, or 1.65% of the CRU statistic.

Table A: Arrestments Served in July 1991 by Type of Arrestee

Type of arrestee	*Arrestments*	
	Number	*Percentage*
Scottish clearing banks[1]	2,603	80.51
Other banks	113	3.49
Building societies	93	2.88
Insurance companies	10	0.31
Other financial institutions	14	0.43
Local or central government	44	1.36
Businesses	209	6.46
Others	147	4.55
	3,233	99.99

(1) Bank of Scotland; Clydesdale Bank plc; Royal Bank of Scotland plc; TSB Bank Scotland plc.
Source: CRU Survey of arrestments.

by arrestment in the survey period against a Scottish clearing bank. A small number of debts (30) were enforced by arrestments served in the survey period against both Scottish clearing banks and other types of arrestee: 126 arrestments were in this category of which 66 were served on Scottish clearing banks[1].

2.27 *Increase in arrestments on four Scottish clearing banks.* The Committee of Scottish Clearing Bankers informed us that they estimated that in the 10 years between January 1979 and December 1988, the number of arrestments served on their four member banks had increased about six-fold. The increase in arrestments was very marked even before the introduction of the community charge and the use of arrestments to enforce it. For example, the total number of arrestments served on the Royal Bank of Scotland was in 1986, 4,008; in 1987, 5,734; and in 1988, 7,374. Statistics of the total number of arrestments served on the four Scottish clearing banks in the 3 years from 1 July 1988 to 30 June 1991 are set out in Table B. It will be seen that the number of arrestments in the year to 30 June 1991 (43,731) was almost half as much again as the number of arrestments in the year to 30 June 1989, (24,703), an increase of 48.62% in two years. This suggests that in the 12 or 13 years to July 1991, arrestments served on those banks have increased about eight or nine-fold. The bulk of this increase is not attributable to the advent of the community charge. Rather arrestments enforcing community charge arrears have merely augmented an increase which was occurring naturally in any event.

Table B: Total Arrestments Served on Scottish Clearing Banks between 1 July 1988 and 30 June 1991

	(1) Year to 30.6.89	*(2) Year to 30.6.90*	*(3) Year to 30.6.91*	*(4) Increase of (3) over (1)*	*(5) Percentage increase of (3) over (1) (%)*
Bank of Scotland	7,661	8,371	12,732	5,071	66.19
Clydesdale Bank plc	8,313	7,801	10,264	1,951	23.47
Royal Bank of Scotland plc	8,747	8,768	13,538	4,791	54.77
TSB Bank Scotland plc	4,704	5,256	7,197	2,493	53.00
	29,425	30,196	43,731	14,306	48.62

Source: Information supplied by Committee of Scottish Clearing Bankers.

2.28 *Incidence of community charge arrestments.* Arrestments enforcing community charge arrears did not begin to be served until the first half of 1990. In mid-March 1990 one Scottish clearing bank had as many as 168 arrestments served on it on a single day, none of which related to community charge arrears or penalties. In January 1990, for example, the Bank of Scotland received 533 arrestments of which only 7

1. Source: CRU Survey of arrestments.

(1.3%) related to the community charge. However, in the 6 months to 30 June 1990, the Bank of Scotland received 4,024 arrestments of which 964 (24%) related to the community charge. Of the 43,731 arrestments served on the four Scottish clearing banks in the year to 30 June 1991, 24,703 (56.49%) related to community charge arrears and penalties. Table C shows the monthly statistics for community charge arrestments and all arrestments in that year.

Table C: Proportion of Arrestments against Scottish Clearing Banks Enforcing Community Charges between 1 July 1990 and 30 June 1991

	(1) Community charge arrestments	*(2) Total arrestments*	*(3) (1) as percentage of (2) (%)*
1990			
July	887	2,404	36.90
August	845	2,528	33.43
September	836	2,498	33.47
October	1,962	3,959	49.56
November	1,807	3,590	50.33
December	1,705	2,991	57.00
	8,042[1]	17,970	44.75
1991			
January	1,935	3,601	53.74
February	3,141	4,772	65.82
March	4,751	6,627	71.69
April	2,563	4,068	63.00
May	2,295	3,625	63.31
June	1,976	3,068	64.41
	16,661	25,761	64.68
Total for year	24,703	43,731	56.49

(1) *Note*: this includes 2,958 arrestments served on the Royal Bank of Scotland which included, in addition to community charge arrestments, a small proportion (under 5%) of arrestments relating to rates arrears. On and after January 1991, all statistics in column (1) relate to community charge arrestments only.
Source: Information supplied by Committee of Scottish Clearing Bankers.

2.29 *Sources of warrants for arrestments: July 1991.* The CRU Survey of arrestments served in July 1991 yielded information on the source or type of warrants for arrestments laid in the hands of arrestees. The sources of those warrants for arrestments served on the four Scottish clearing banks is shown in Table D. This reveals that the single main type of warrant for arrestment served on the Scottish clearing banks was a summary warrant for the recovery of community charge arrears, ie. in 59% of arrestments. This compares with the average of 56.49% for the year to 30 June 1991 shown in Table C. Summary warrants for rates and tax arrears accounted for 6%, and arrestments on the dependence of sheriff court ordinary cause actions accounted for 12%, of all arrestments served in July 1991 (Table D).

2.30 Table E shows the arrestments served on arrestees other than the four Scottish clearing banks by source or type of warrant in July 1991. The most frequently occurring source was warrants granted in sheriff court ordinary cause actions amounting to 52% of the arrestments: 39% were on the dependence of the action and 13% in execution of decree granted in the action.[1] Only 20% related to community charge arrears and penalties. Of 1,674 arrestments seeking to enforce community charge arrears or penalties executed in July 1991, 1,547 (92%) were served on one or other of the Scottish clearing banks and only 127 (8%) on other types of arrestee: see Tables D and E.

2.31 *Multiple arrestments: July 1991.* We were anxious to discover whether there is a widespread practice whereby creditors instruct multiple arrestments on all four

1. This contrasts with 19% of the arrestments served on the Scottish clearing banks under sheriff court ordinary cause warrants (12% on the dependence and 7% in execution): see Table D.

Table D: Arrestments served on Scottish Clearing Banks by Source or Type of Warrant in July 1991

Source or type of Warrant	*Arrestments*	
	Number	*Percentage*
Court of Session—on dependence of action	121	5
Court of Session—in execution of decree	37	1
Sheriff Court—ordinary cause—on dependence of action	300	12
Sheriff Court—ordinary cause—in execution of decree	175	7
Sheriff Court—summary cause—on dependence of action	30	1
Sheriff Court—summary cause—in execution of decree	76	3
Sheriff Court—small claims—on dependence of action	12	0.5
Sheriff Court—small claims—in execution of decree	127	5
Sheriff Court—summary warrant—taxes	35	1
Sheriff Court—summary warrant—rates	123	5
Sheriff Court—summary warrant—community charge	1,547	59
Extract registered document	20	0.5
Total	2,603	100

Source: CRU Survey of arrestments.

Table E: Arrestments served on Other Arrestees by Source or Type of Warrant in July 1991

Source or type of Warrant	*Arrestments*	
	Number	*Percentage*
Court of Session—on dependence of action	19	3
Court of Session—in execution of decree	20	3
Sheriff Court—ordinary cause—on dependence of action	248	39
Sheriff Court—ordinary cause—in execution of decree	79	13
Sheriff Court—summary cause—on dependence of action	16	2
Sheriff Court—summary cause—in execution of decree	23	4
Sheriff Court—small claims—on dependence of action	12	2
Sheriff Court—small claims—in execution of decree	35	6
Sheriff Court—summary warrant—taxes	17	3
Sheriff Court—summary warrant—rates	20	3
Sheriff Court—summary warrant—community charge	127	20
Extract registered document	14	2
Total	630	100

Source: CRU Survey of arrestments.

Scottish clearing banks in order to trace as well as attach debtors' funds. The CRU Survey of arrestments gives information on multiple arrestments as shown in Table F. This Table reveals that in July 1991, 2,603 arrestments were served in the hands of one or more of the four Scottish clearing banks[1] to enforce 2,108 debts. It also shows that 73% of arrestments against Scottish clearing banks were served against one bank; 2% of such arrestments were served against two banks; 6% of such arrestments were served against three banks; and 19% of such arrestments were served against all four banks. Put another way, 91% of debts were enforced by arrestment against only one bank; 1% of debts were enforced by arrestment against two banks; 2% of debts were enforced against three banks; and 6% of debts were enforced against all four banks. This evidence suggests that the practice of multiple arrestments is the exception rather than the rule but that it is nevertheless adopted in a not insignificant minority of cases. It is possible that the particular debts in the survey may be, or have been, enforced by arrestment in the hands of Scottish clearing banks outwith the survey period since to save expense a creditor may instruct arrestments against one bank first, and another bank later.

2.32 In July 1991, multiple arrestments were also used against other types of arrestee. Table G indicates that arrestees other than the Scottish clearing banks were served with 630 arrestments seeking to attach 473 debts. At one extreme, most debts

1. Of these 2,603 arrestments, 796 (31%) were served on the Bank of Scotland; 599 (23%) on the Clydesdale Bank plc; 738 (28%) on the Royal Bank of Scotland plc; and 470 (18%) on TSB Bank Scotland plc.

Table F: Arrestments on Scottish Clearing Banks in July 1991—Multiple Arrestments for One Debt

Number of banks	*Debts*		*Arrestments*	
	Number	*Percentage*	*Number*	*Percentage*
1 bank	1,911	91	1,911	73
2 banks	23	1	46	2
3 banks	50	2	150	6
4 banks	124	6	496	19
	2,108	100	2,603	100

Source: CRU Survey of arrestments.

Table G: Arrestments on Other Arrestees in July 1991—Multiple Arrestments for One Debt

Number of arrestees	*Debts*		*Arrestments*	
	Number	*Percentage*	*Number*	*Percentage*
1 arrestee	419	89	419	67
2 arrestees	32	7	64	10
3 arrestees	12	2	36	6
4 arrestees	3	1	12	2
5 arrestees	2	—	10	2
6 Arrestees	1	—	6	1
7 arrestees	1	—	7	1
14 arrestees	1	1	14	2
28 arrestees	1	—	28	4
34 arrestees	1	—	34	5
Total	473	100	630	100

Source: CRU Survey of arrestments

(89%) were enforced by the use of only one arrestment but at the other extreme in one case 34 arrestments on different arrestees were served to recover a single debt.

2.33 *"Success rate" in arrestments on Scottish clearing banks.* The CRU arrestment survey, being based on returns made by officers of court, does not give information on the number of arrestments which are successful in attaching funds or moveables and those which are abortive, because the officers serving the arrestment do not have that information.[1] The Scottish clearing banks were, however, able to give us information relating to the arrestments received by them. In their original representations to us in 1989, they estimated that only about 6% of arrestments served on them attached any funds. Two clearing banks were able to give us precise monthly statistics of the success rate in the year to 30 June 1991. In the case of the Clydesdale Bank plc in the four months from July to October 1990, the average success rate for all arrestments was 6.5% and the average for community charge arrestments was 22%. However in the 8 months from November 1990 to June 1991, the average success rate for all arrestments was 24.1% and for community charge arrestments was 35.1%. In the case of the Royal Bank of Scotland plc, the average for all arrestments in the three months from July to September 1990 was 5.5% (community charge 4%); for October 1990, 11% (community charge 11.5%) and for the 8 months November 1990 to June 1991, 17% (community charge 20%). TSB Bank Scotland plc and Bank of Scotland gave us estimates based on random samples as undernoted[2], which show

1. The Association of British Insurers gave us information in June 1990 (based on returns from 12 insurance companies) on the number of arrestments which are abortive but the returns did not reveal any very clear pattern and varied widely: the number of arrestments was very small. In the same month, the Building Societies Association estimated that at least 50% of arrestments in the hands of societies were abortive.
2. The TSB Bank Scotland estimated the average success rate for all arrestments in July to December 1990 as 19.9% (25.7% community charge) and in January to June 1991 as 24.8% (32.5% community charge). The Bank of Scotland gave us differently formulated estimates. In July to December 1990, the average success rate of community charge arrestments was 17% and for other arrestments 12%. In January and February 1991 the average success rate for community charge arrestments was 22% and for other arrestments 8%.

a similar picture. It has been suggested to us that the improvement in the "success rate" from about October 1990 reflected in these statistics is due to the fact that, following representations by the banks, officers of court targeted community charge arrestments against specific branches using information obtained from other sources.

2.34 To sum up, on this evidence the success rate for all arrestments served on clearing banks was about 6% till about October 1990. From November 1990 to June 1991, the success rate for all arrestments improved to between about 17% to 25% with community charge arrestments showing a higher success rate of between about 22% and 35%.

2.35 "*Customer connections*". The Scottish clearing banks were able to give us information on the number of arrestments which were used to enforce debts due by their customers ("customer connections") as distinct from debts due by persons who were not customers of the bank receiving the arrestment. In the half year to 31 December 1990, the average proportion of customer connections for the Clydesdale Bank plc was 37.76% (49.82% community charge); for the Royal Bank of Scotland plc was 53% (56% community charge); for the TSB Bank Scotland plc was 35.81% (49.62% community charge). In the case of the Bank of Scotland in the same period, the proportions were 55% customer connections for community charge arrestments and 45% for other arrestments. In the half year to 30 June 1991, the average proportion of customer connections for the Clydesdale Bank plc was 52.52% (65.74% community charge); and for the Royal Bank of Scotland plc was 39% (44% community charge).

2.36 On this evidence, the proportion of customer connections for all arrestments served on Scottish clearing banks in the year to 30 June 1991 varied between about 36% and 53% and for community charge arrestments was higher at between about 44% and 66%. This tends to show that the relatively low success rate of arrestments served on the 4 Scottish clearing banks (formerly about 6% and more recently about 17% to 25%)[1] is in many cases the result of failure to identify the defender's or common debtor's bank, but (at least in recent times) is, in as many and perhaps more cases, due to the fact that he has no credit balance in his bank account at the time of arrestment. The fact that between over a third and over a half of arrestments laid in the hands of Scottish clearing banks in recent times do relate to customers of the bank, coupled with the fact that multiple arrestments against all 4 banks are used in only 6% of debts enforced by such arrestments (see Table F) may suggest that arrestments are not used by creditors so indiscriminately as is sometimes supposed.

1. See para 2.34.

Part III Introduction of Statutory Fees for Arrestees

Preliminary: arrangement of Part III

3.1 In Section (1) of this Part we consider the introduction of statutory fees for arrestees in cases involving the arrestment of funds other than earnings and corporeal moveables other than maritime subjects (ships and their cargo).[1] We are here primarily concerned with the common case where pecuniary debts due by the arrestee to the common debtor are arrested and with abortive arrestments attaching nothing, but our recommendation for a flat rate fee is applicable also to cases where corporeal moveables are arrested. In Section (2) we consider a modification of this scheme which would allow arrestees holding corporeal moveables of the defender or common debtor the right to claim from the arrester compensation for the expenses actually incurred in preserving and maintaining the corporeal moveables.[2] Section (3) concerns the reimbursement of the expenses of third parties incurred in discharging cargo from ships or maintaining and preserving the cargo in cases where the ship or the cargo is arrested.[3] In Section (4) we reject various categories of exemptions from the system of statutory fees for arrestees.[4] Section (5) deals with the extension of the system of statutory fees for arrestees to arrestments under warrants for civil diligence in criminal proceedings and arrestments under civil warrants of moveable property affected by restraint orders made under statute in criminal proceedings.[5] On a point of detail, the representations made to us did not cover arrestments to found jurisdiction. These are not now favoured by the law,[6] and are relatively unusual in modern practice. Where they are used, they are normally combined with an arrestment on the dependence, which we recommend should attract a fee. An arrestment to found jurisdiction does not effect a true attachment and so while the arrestee may incur tracing expenses he incurs no other expenses. Separate provision for such arrestments would therefore be necessary and would complicate the legislation without corresponding benefit. We therefore exclude arrestments to found jurisdiction from our recommendations.

(1) Arrestments of funds (other than earnings) and corporeal moveables (other than maritime subjects)

(a) The need for reform

3.2 *Consultation: a sliding scale system.* In our Discussion Paper No 87, we provisionally proposed the introduction of a statutory sliding scale of fees for arrestees broadly proportionate to the number of offices (head office and branch offices) which an arrestee is compelled to include in a search to trace arrested funds. Following the precedent of statutory fees for garnishees in England and Wales, we proposed that this system would apply to institutions which are deposit-taking institutions within the meaning of the Banking Act 1987.[7] This system was proposed in response to information supplied by the Committee of Scottish Clearing Bankers representing the four Scottish clearing banks.[8] As we have seen[9] the bulk of arrestments used are

1. Paras 3.2 to 3.72.
2. Paras 3.73 to 3.81.
3. Paras 3.82 to 3.106.
4. Paras 3.107 to 3.115.
5. See paras 3.116-3.125.
6. European Judgments Convention, Article 3; Civil Jurisdiction and Judgments Act 1982, Sch 1.
7. See paras 2.15-2.17 above.
8. The Bank of Scotland, the Clydesdale Bank plc, the Royal Bank of Scotland plc, and TSB Bank Scotland plc.
9. See para 2.25 above.

served on these four banks. We were informed that while these banks operate computer systems which in some cases provide a central record of current account customers' names, these records are inadequate for tracing purposes for the reasons undernoted.[1] Accordingly, in practice each of the banks is required to send circulars to all of their branches in their networks on a daily basis advising them of arrestments which have been served. Thereafter, in order to trace whether the arrestment has attached anything due or belonging to the defender or common debtor, it is necessary for every branch of the bank concerned to search (a) its current account and deposit account records; (b) its deposit receipt records; (c) its safe custody records; and (d) its security records. In the Discussion Paper, we set out for comment and criticism detailed proposals for a sliding scale system. The system is explained in Appendix C to this Report. The effect of the scheme as applied to the four Scottish clearing banks is set out in the Table in that Appendix. To these fees there would have to be added the fee for the officer of court (messenger-at-arms or sheriff officer) serving the arrestment and in some cases fees for the solicitor who instructed the diligence.[2] In the case of arrestees who are not deposit-taking institutions, we proposed that a flat rate fee should be chargeable equivalent to the basic fee of £10 chargeable under our proposals by deposit-taking institutions. In addition however we proposed that such arrestees holding arrested corporeal moveables would be entitled to claim their expenses actually incurred so far as in excess of that fee.[3]

3.3 On consultation these provisional proposals met with a mixed response. At one extreme some consultees said that no fees should be chargeable by arrestees. Others said that the fee should only be a nominal flat rate fee. At the other extreme some consultees agreed that there should be substantial fees for arrestees and approved the sliding scale system which we proposed. Before submitting recommendations, it is therefore necessary for us to assess the arguments for and against the introduction of substantial fees for arrestees.

The arguments against statutory fees for arrestees

3.4 *(i) Arrestments available to creditors as of right.* On consultation, it was argued that the legal weapon of arrestment has long been recognised in the law of Scotland as available to pursuers and creditors free of charge as a matter of right. In our view, however, this proposition, while true, may merely mean that the injustice experienced by arrestees is of long standing.

3.5 *(ii) System of diligence benefits whole community.* It was argued that arrestments are part of the system of enforcing court decrees by diligence and thus part of the system of administration of justice which benefits the whole community, not least financial institutions. In our view, however, that fact is not a good reason for rejecting statutory fees for arrestees. Witnesses and jurors also participate in the system of administration of justice and yet are entitled to some payment.

3.6 *(iii) Financial institution arrestees take deposits in knowledge of liability to arrestment.* The Court of Session Judges observed that:

> "As the Commission itself accepts, banks and other institutions providing financial services choose to take deposits of money or goods from the public,[4] and they do so in the knowledge that they are liable to become subject to arrestments. They can therefore so far as reasonably practicable make arrangements for the tracing of the debtor and any funds or goods attached by the arrestment. In this day and age with modern systems of accounting and ready communication between branches, far more efficient and rapid than hitherto, it is not easy to appreciate the force of the comment in paragraph 3.4[5] that in modern conditions it will

1. The reasons given were threefold: (1) If the common debtor has a common name, eg John Smith, the computer will merely show that a John Smith has an account at a certain number of branches. (2) The banks do not have centralised computer records of deposit receipt holders nor of some other types of savings accounts. (3) The computer systems do not record items held in safe custody nor items held in security, nor details of certain other obligations such as bills of exchange accepted.
2. See para 3.64 below.
3. See Discussion Paper No 87, Proposition 11 (para 3.82).
4. Referring to our Discussion Paper No 87, para 3.4.
5. ie of our Discussion Paper No 87.

generally be regarded as unjust to require arrestees to carry out the work of tracing funds or goods".

In a similar vein the Legal Services Agency Ltd observed:

> "A bank, or any institutional lender, in holding itself out as being prepared to borrow from a person and make use of their money, or to extend credit to them, must be prepared to accept as a condition of so acting the possibility of their customer falling into debt, and should make provision for the expenses likely to arise from it.... The necessity of applying arrestments orders should be seen as a tax deductible trading expense, incurred by the banks as an occupational hazard of their business".

In our view, though banks and other deposit-taking institutions know only too well that they may become liable to arrestments which, under the existing common law rule, they must obey without charging fees for their administrative and clerical expenses, it does not follow that that rule is fair and reasonable and should be regarded as immutable. The foregoing argument does not address that question, which is crucial. The argument would only have validity if it were realistic and reasonable to expect clearing banks and other deposit-taking institutions to abandon their deposit-taking business in order to avoid liability to arrestments. But it is not disputed that deposit-taking institutions, which are closely regulated by the Banking Act 1987, perform an essential service for the community. It follows that their knowledge that they may become liable to arrestments is irrelevant to the question whether they should be entitled to fees for complying with the arrestments.

3.7 *(iv) Cost-spreading by arrestees.* The Court of Session judges, in arguing against introducing statutory fees, observed that the cost of complying with an arrestment is not borne by the bank or other financial institution arrestee but is in the last resort borne by the institution's customers who are as much potential creditors as they are potential debtors. These customers, it was observed, include a substantial proportion of the populace and virtually all corporate bodies. On the other hand, in arguing in favour of statutory fees, the Scottish Consumer Council remarked that inevitably the banks' costs of complying with arrestments "are passed on to the bank customers, and we believe that this is unfair". These arguments seem to us to cancel each other out. In any event, it is unsafe to make assumptions about the extent to which the costs incurred by banks and other financial institutions are borne by their customers or go to reduce dividends payable to shareholders. Financial institutions are corporate bodies competing in the market place and the law can operate unjustly against their interests just as it can operate unjustly against natural persons. It would be impossible to determine which natural persons eventually bear the costs given that for example both shareholders and customers include corporate bodies. In these circumstances, it seems to us reasonable to consider whether the absence of statutory fees is unjust to arrestee financial institutions as such and to accept that it is not relevant to inquire whether those institutions in fact pass on the cost to customers in the form of increased bank charges or to their shareholders in the form of reduced dividends.

3.8 *(v) Clearing banks allegedly responsible for credit explosion.* In our Discussion Paper No 87, we stated the provisional view that the law should not impose a burden on an "innocent" third party not concerned with the litigation or debt simply because his duties arise from an arrestment.[1] On consultation, the Legal Services Agency Ltd observed that:

> "it is arguable that the rise in indebtedness in general, and thus in arrestments as a means of enforcing these debts, is at least partly the result of the ease with which credit has been made available in recent years, for which policy the banks must bear a share of the blame. The Commission... do not seem to have acknowledged anywhere in their paper the possibility that the banks are not in fact as innocent as they would present themselves".

1. Discussion Paper No 87, para 3.73.

They supported the contention that the banks and other lending institutions are responsible for the increase in indebtedness with evidence drawn from a variety of sources[1].

3.9 In the context of this Report, it would not be right for us to make assumptions and value judgments about such a complex and potentially controversial matter as the extent to which (if at all) blame should be apportioned on clearing banks and other financial institutions for the recent increase in the supply of consumer credit and of bad debts requiring enforcement. We express no opinion on the extent to which financial institutions are or may be guilty of rashness or imprudence in the granting of credit and in the recovery of debts by diligence, but even if it were to be accepted that such rashness or imprudence exists and requires remedial legislation, it seems clear that the proper legislative response should be an enactment directly regulating the activities of those institutions in their role of suppliers of consumer credit and of creditors enforcing consumer debts. In this Report, however, we are concerned with the very different role of banks and financial institutions acting as arrestees in cases where they are not at all responsible for extending credit or instructing enforcement by diligence. We do not think it would be fair or reasonable to confuse the two roles of lender-creditor and arrestee since there is no necessary or relevant connection between them. Thus, for example, the four Scottish clearing banks receive as arrestees about 80% of all arrestments served[2]whereas, as the Legal Services Agency Ltd conceded, the volume of credit extended by finance houses exceeds that extended by the major United Kingdom clearing banks. Yet because of the nature of their business, finance houses are required to comply with arrestments much more rarely than are clearing banks.[3]

3.10 *(vi) Statutory fees for arrestees would unduly damage system of arrestments.* Some consultees argued that the introduction of substantial statutory fees for arrestees would unduly damage the existing system of arrestments and that this would have undesirable effects. It was observed by some consultees that substantial statutory fees for arrestees would induce creditors to give up the use of arrestments and instead to have resort to other less appropriate means of enforcement such as poindings and warrant sales or bankruptcy proceedings. Another consultee argued that substantial fees for arrestees would put arrestments out of the reach of some consumer creditors who would be deterred from exercising their legal rights.

3.11 Thus the Scottish Consumer Council, while not opposing statutory fees in principle, remarked:

> "In making arrestment procedures more stringent and fairer to all parties we would not want to see creditors resorting to the use of poindings and warrant sales as an alternative to arrestments".

The Joint Committee of the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers[4] said that they understood:

> "that the protests by the Banks about the burden laid upon them of investigation etc. where arrestments occur [are] related to the substantial increase in arrestments as a result of attempts by Local Authorities to recover payments of Community Charge.
>
> There is no doubt ... that public pressure upon Local Authorities is directed towards the desirability of avoiding warrant sales at all costs and, in these circumstances, it seems to the Joint Committee that it would be contrary to public policy, particularly at this time, for the Government to introduce any provision which would be likely to discourage arrestment".

1. See the response of the Legal Services Agency Ltd set out in [1990] *SCOLAG Bulletin* 164.
2. See para 2.25 above.
3. See para 2.25, Table A.
4. Hereafter in this Part referred to as "the Joint Committee".

They pointed out that local authorities would not willingly spend £200 of taxpayers' money[1] in attempting to recover between £300 and £400 of community charge, and concluded that:

> "If Local Authorities are not to be forced to instruct poindings and warrant sales, the Joint Committee feels that no further imposition of charges for arrestment can be contemplated. This is not to say that the Joint Committee does not appreciate that it is strange that arrestees in Scotland should be required to bear expenditure of this kind but that is, after all, the status quo and, if to change it is to threaten the efficacy of the system of arrestment, then the answer to the Banks must, the Joint Committee thinks, be no".

3.12 The Joint Committee's assumption that the problem arises only out of arrestments to recover community charge is not in fact correct. Arrestments seeking to enforce community charge arrears have merely augmented an increase which was occurring naturally in any event over a period of a dozen years or thereby[2]. Apart from that, only about 22% to 35% of arrestments in the hands of the four Scottish clearing banks seeking to enforce community charge arrears attach any funds.[3] It would seem to follow that the local authorities, unless they resort to bankruptcy proceedings, or can identify the defaulter's employer and use earnings arrestments, or unless the abortive arrestment acts as a spur to payment, may in any event require to resort to poindings and warrant sales, whether or not they attempt to use arrestments first.

3.13 Another consultee argued that if creditors were to restrict their use of arrestments because of the level of fees payable to arrestees, their likely alternative resort would be to raise sequestration or liquidation proceedings. It was likely (so the argument ran) that there would be a "very great" increase in the number of bankruptcy proceedings with implications for the public purse arising not only from the additional work of the courts but also from the remuneration of trustees in bankruptcy.

3.14 We find this forecast difficult to reconcile with the fact that so few arrestments attach any funds which has the unavoidable consequence that already creditors whose arrestments are abortive and who do not wish to, or cannot, resort to poindings or earnings arrestments, have often no alternative to bankruptcy proceedings under the present law and practice. Inhibitions may not be an option and do not recover money directly while adjudications for debt are little used.

3.15 While we think that these representations may be arguments against introducing statutory fees for arrestees at a full indemnity level, we do not think that they justify denying arrestees any compensation at all, having regard to the comparative lack of success of arrestments in directly attaching funds in any event.

3.16 The Legal Services Agency Ltd argued that substantial statutory fees for arrestees would put arrestments out of the reach of individual consumer creditors whose typical claim is measured in hundreds rather than thousands of pounds.[4] They said that the proposal went against the trend towards making court procedures open and accessible to consumer creditors (eg the introduction of small claims procedures) since it would dissuade such creditors from exercising their legal rights to enforce their debts. We think, however, first that if a consumer creditor has a good case, he will obtain an award of expenses, and will recover arrestment expenses unless the arrestment is abortive. The defender will normally be a corporate provider of goods and services able to pay the expenses. Second, the fee now recommended in this Report is a relatively small flat rate fee (of £10) rather than a substantial fee as was provisionally proposed in Discussion Paper No. 87. The burden on consumer creditors

1. Being the fees of sheriff officers together with the additional fees for arrestees at the level provisionally suggested in Discussion Paper No 87.
2. See para 2.27 above.
3. See paras 2.33 and 2.34 above.
4. The same consultee suggested that in future it will be the small consumer creditors least able to afford the proposed arrestment fees who would be most likely to use arrestments.

would be to that extent less onerous. Third, it seems to us likely that, even disregarding arrestments for rates, taxes and community charge arrears[1], most arrestments are instructed by corporate creditors or persons other than small consumer creditors. In July 1991, for example, arrestments under warrants obtained in small claims proceedings (the procedure likely to be used by small consumer creditors) accounted for only 5.5% of all arrestments served against the 4 Scottish clearing banks[2] and only 8% of arrestments served against other types of arrestee.[3] Moreover, recent research shows that of small claims actions raised between 30 November 1988 and 30 November 1989 in 6 sheriff courts, only 6.6% were raised by individuals.[4] It would not be right to relieve creditors of liability for arrestees' fees on the mistaken assumption that the majority of them are consumer creditors.

3.17 *(vii) Statutory fees should not be introduced as a deterrent to undiscriminating use of fishing arrestments.* Several consultees argued that since creditors often do not know, and have no means of knowing, the whereabouts of their debtor's bank accounts or other arrestable assets, there is nothing improper in creditors using arrestments which do not attach anything. In their view, unproductive arrestments, including "blanket" arrestments used against all four of the Scottish clearing banks, are justifiable even if the creditor does not pay any fees to the arrestee.

3.18 These consultees therefore criticised the provisional view that we expressed in Discussion Paper No 87 that substantial fees for arrestees would have the beneficial effect of making creditors "think twice" before using arrestments and would discourage "the undiscriminating use of fishing arrestments".[5] This view was expressed against the background that a small percentage (at that time only 6%) of arrestments served on the four Scottish clearing banks attach any funds or property[6] and predicated that it would be desirable to reduce the number of arrestments served on them as a means of relieving them of the heavy burden of much unproductive work involved in attempting to trace non-existent assets. It was also observed by one consultee that the recent considerable increase in the fees for messengers-at-arms and sheriff officers (taking effect on 2 April 1990 after our Discussion Paper had gone to press[7]) already made creditors think twice before using arrestments. It was said that further substantial fees at the level proposed in Discussion Paper No 87 would make multiple arrestments in the hands of the four Scottish clearing banks so costly as to be generally out of the question, whether used discriminately or indiscriminately. The same consultee said that expressions such as "fishing" or "speculative" arrestments and their "undiscriminating" use are inapt if used in a pejorative sense and that speculative arrestments have always been the legitimate resort of creditors who have no accurate information as to their debtor's assets. He called on us to explain what we meant by the "undiscriminating" use of speculative arrestments and how our proposals were reconcilable with permitting discriminating use while discouraging undiscriminating use. It was said that:

> "if a court grants decree for payment of a debt at a time when the creditor has a credit balance with one of the Scottish clearing banks, it would surely be absurd if the state, having through the courts declared the debtor's liability and warranted the use of diligence against him, were then to impose such a daunting price on the use of diligence that the creditor was deterred from lodging the necessary

1. In July 1991, these accounted for 65% of arrestments served on Scottish clearing banks (see Table D, para 2.29) and 26% of arrestments served on other arrestees (see Table E, para 2.30).
2. See Table D, para. 2.29 above.
3. See Table E, para 2.30 above.
4. *Report on Small Claims in the Sheriff Court in Scotland* (October 1991) Scottish Office Central Research Unit Papers, Chapter 2, Table 3 which shows that 8% of actions were raised by individuals or small businesses. Figure 3 of Chapter 2 shows graphically the proportion of actions raised by individuals and those raised by small businesses. We understand that the percentage raised by individuals was 6.6%: information supplied by CRU. In 1978 only 4.2% of pursuers raising summary cause actions were individuals (personal pursuers); *Report on Debt Recovery through the Scottish Sheriff Courts* (October 1980) Scottish Office Central Research Unit Papers, Table 3A.
5. See Discussion Paper No 87, paras 3.10, 3.31 and 3.42.
6. See paras. 2.33 and 2.34 above.
7. Act of Sederunt (Fees of Messengers-at-Arms) 1990 (SI 1990/379); Act of Sederunt (Fees of Sheriff Officers) 1990 (SI 1990/381). The fees were increased again with effect from 25 March 1991: see para 3.64 below.

arrestment. It must surely be public policy that debts should be paid if debtors have readily attachable funds, and in such circumstances *any* deterrent effect which the proposed fees had on creditors seeking to attach such existing balances would be reprehensible" (emphasis in original).

3.19 We concede that the recent increases in fees for sheriff officers and messengers-at-arms may well make creditors in future think twice before using arrestments. We also agree that creditors often do not, and cannot, know the whereabouts of their debtor's arrestable assets and that therefore the use of "fishing" arrestments is not an improper use of diligence in such cases. We think however that the issue of statutory fees for arrestees should not be viewed solely from the standpoint of creditors. The interests of arrestees as *ex hypothesi* innocent third parties who are compelled by law to assist creditors without benefit to themselves have also to be considered. Unproductive or fishing arrestments may appear altogether reasonable to creditors, yet very unreasonable to arrestees some of whom, notably the Scottish clearing banks, undertake much unproductive work for no benefit to themselves. While the recent increases in the fees for messengers-at-arms and sheriff officers may help to make it impolitic to enact fees at a level approximating to a full indemnity of the arrestee for the economic cost of complying with an arrestment, it would be unfair not to allow an arrestee a statutory fee of some kind, given that the arrestee may do as much, if not more, work to comply with an arrestment as an officer of court does in serving it and a solicitor in instructing it, both of whom are entitled to fees.

3.20 *(viii) Clearing banks should minimise own costs of complying with arrestments.* Several consultees argued that the clearing banks should themselves take steps to minimise their costs in complying with arrestments. Thus one consultee observed:

> "most customers of the clearing banks will be conscious that the banks have invested very heavily in computer technology over recent years and are likely to find it remarkable that they have not taken steps to have available at their head offices sufficient data to enable them to deal with arrestments there without the need for circularising branches".

The Legal Services Agency Ltd remarked:

> "The banks should look to minimising the cost to themselves of making the arrestment [effective], and the law should not encourage them otherwise. The picture presented by the SLC paper of thousands of arrestment notices circulating around the branches[1] seems to belong to a different age. It is hard to believe that, at a time when it is possible to withdraw money from a cashpoint or service till anywhere in Britain and indeed around the world, that the technology does not exist to maintain a record of accounts at the bank's central computer or head office such as would identify the debtor's accounts and other items held by the bank. With such a mechanism in place, the creditor would merely need to serve the arrestment on the head office, and the subsequent costs to the bank would be minimal. The submissions by the banks on this point merely suggest that the requisite systems do not exist, not that they *could* not". (emphasis in original).

The Joint Committee[2] remarked that the rejection of statutory fees would no doubt encourage the banks further to computerise their records so that the least possible expense will be incurred in carrying through the necessary research.

3.21 We ourselves are unable to say whether or when it would be possible for the Scottish clearing banks so to improve their computerised central record-keeping systems as to dispense with the need to circularise their entire local branch networks. Since it appears to be in the interests of the clearing banks to make such improvements if that is practicable at reasonable cost, we have hitherto thought it reasonable to assume that their omission to do so stems from an assessment that such improvements are not practicable at reasonable cost. We do not have the expertise or resources to examine whether such an assessment is valid or not. It is clear that some, possibly many, other types of corporate bodies apart from the clearing banks (such as Scottish Homes and Strathclyde Regional Council who commented on this matter) do have

1. See Discussion Paper No 87, para 2.25.
2. See p 19, fn 4.

to send circulars to branch offices to trace arrested funds. On the other hand, some other types of corporate body receiving arrestments have central computerised records which disclose sufficient information to make circulars to branch networks unnecessary. We were informed by the Association of British Insurers that insurance companies generally require to inspect central records only and do not require to circularise branches. Further, the Building Societies Association, and the few individual building societies whom we consulted on this point, also said that central records-such as the computerised index of investors and borrowers,-alone required to be searched. The National Savings Bank and Girobank also trace through central computerised records. There may be differences in the nature and scale of the business and undertaking of clearing banks and of these other financial institutions which explain the differences in the utility of centralised records as a means of tracing arrested funds.

3.22 In our view, the fact that it may be possible for the clearing banks to improve their computerised records so as to render branch circulars unnecessary is not a sufficient argument for rejecting statutory fees altogether. Even searching centralised records will involve some administrative or clerical expenses. The range of different practices of arrestees based on different record systems and the possibility that the clearing banks may eventually possess computerised records dispensing with the need for branch circulars are relevant to the question whether scale fees based on the size of branch networks are an appropriate method of regulating the fees. We revert to that question below.

3.23 *(ix) Statutory precedents.* The Legal Services Agency Ltd observed that the introduction of substantial fees for arrestees was clearly out of step with the token fee of 50p payable to employers for making a periodic deduction from earnings under the Debtors (Scotland) Act 1987, s. 71.[1] The statutory precedents, however, point different ways because, as we noted above,[2] garnishees who are deposit-taking institutions in England and Wales are entitled under English law to a fee of £30 deductible from garnished funds, and at common law, banks and other third parties implementing a *Mareva* injunction are entitled to substantial fees.[3] These precedents suggest that arrestees should be entitled to a fee of some kind. We consider the level below.

3.24 *(x) Unique burden on clearing banks no basis for general legislation.* Some consultees pointed out that Discussion Paper No 87 responded to representations made by the Committee of Scottish Clearing Bankers and that it did not appear that any complaints had in general been made by other bodies representing other deposit-taking institutions or more generally by those who from time to time may be required to comply with arrestments. It is clear that the burden of complying with arrestments lies heavily only on the four Scottish clearing banks, and that the volume of arrestments received by other bodies is of a much lower order of magnitude.[4] It is also true that, although several bodies supported statutory fees for arrestees when invited to comment on the Discussion Paper, the costs incurred by other types of deposit-taking institutions (such as insurance companies and building societies) in complying with arrestments are relatively speaking very small indeed in comparison with the costs of the four Scottish clearing banks.

3.25 It could be argued that, since the burden of arrestments is only heavy for the four Scottish clearing banks, the problem is one which these banks should solve by their own efforts and is not a sufficient ground for introducing statutory fees for all deposit-taking institutions, still less all arrestees. If, as appears to be the case, the high volume of arrestments served on the four Scottish clearing banks is a by-product of their success in taking deposits from the public in Scotland, it was argued that the increased administrative work is, as one consultee put it, "part of the inevitable

1. See also in England and Wales the Attachment of Earnings Act 1971, s 7(4) as amended by the Attachment of Earnings (Employer's Deduction) Order 1980 (SI 1980/558).
2. See para 2.15.
3. See paras 2.13, 2.14.
4. See para 2.25 and Table A above.

oncosts to which a Clearing Bank exposes itself as it increases its activities in competition with other financial institutions". On this view business success carries with it disadvantages which the banks should mitigate by their own efforts rather than by seeking a change in the law which has the disadvantages to which consultees refer.

3.26 While there is something in this argument, it could equally well be argued on behalf of the four Scottish clearing banks that the relevant factor is not the generality of arrestees but the generality of arrestments and that they receive as much as about 80% of all arrestments.[1] In other words, having regard to the fact that the four Scottish clearing banks receive about four-fifths of all arrestments, it is arguable that they have a claim that their complaints should be listened to and form the basis of legislation, even though they are only four corporate bodies and therefore a small minority of the total number of arrestees.

Arguments in favour of introducing statutory fees for arrestees

3.27 The arguments favouring the introduction of statutory fees for arrestees have to some extent been referred to in our discussion of the arguments against such fees, but it may be convenient to summarise them here.

3.28 *(i) Arrestee as innocent third party.* An arrestee is "a wholly innocent third party who has been dragged into somebody else's dispute".[2] Arrestees are not debt-collecting agencies but simply citizens who are required to comply with diligences served on them under a warrant of the court which has been obtained by a pursuer or creditor for his own benefit.[3] It seems unjust that the law should impose a pecuniary burden on an innocent third party, who *ex hypothesi* is not concerned with the litigation or debt, simply because his duties arise from the need to comply with an arrestment. This seems to us to be the fundamental factor favouring statutory fees for arrestees.

3.29 *(ii) Statutory and common law precedents.* The statutory and common law precedents are in favour of allowing arrestees some compensation for complying with arrestments. The Scottish precedent of an employer's charges (of 50p per deduction) for obtempering an earnings arrestment points to a token fee but at least suggests that the arrestee should be entitled to a fee.[4] The English precedents of statutory fees for garnishees[5] and common law fees for third parties obtempering *Mareva* injunctions[6] suggest that substantial fees should be payable.

3.30 *(iii) Analogy with other persons entitled to fees.* It seems unfair that sheriff officers and messengers-at-arms serving arrestments and solicitors instructing and reporting arrestments should be entitled to fees while arrestees, who may incur as much and indeed greater administrative and clerical expenses in tracing whether arrestable assets are held and in retaining such assets, receive no remuneration whatsoever. Likewise jurors and witnesses compelled to participate in the administration of justice receive payments.

3.31 *(iv) Increase in volume of arrestments.* In the case of the four Scottish clearing banks, some weight should be accorded to the fact that the numbers of arrestments which they are required to obey have increased about eight or nine-fold in the 12 or 13 years prior to July 1991.[7] Even before the impact of the community charge on arrestment practice (beginning in 1990), the increase was estimated at about six-fold in the 10 years to December 1988[8]. A burden which may possibly have been not unreasonable, or at least was borne without complaint, in the past appears to have become unreasonable because of that increase. The increase is not a temporary

1. See para 2.25 and Table A above.
2. This is the description of garnishees (equivalent to arrestees) given by Lord Goff of Chieveley in *Deutsche Schachtbau* v *SIT Co* [1990] AC 295 at p 355.
3. Cf the remarks of Robert Goff J in *Searose Ltd* v *Seatrain UK Ltd* [1981] 1 WLR 894 at p 896 quoted at para 2.14 above.
4. Debtors (Scotland) Act 1987, s 71.
5. See para 2.15.
6. See paras 2.13, 2.14.
7. See para 2.27 .
8. *Idem.*

phenomenon mainly attributable to community charge arrestments; rather those arrestments have merely increased a trend which was naturally occurring in any event. So the abolition of the community charge would not get rid of the problem. Even arrestees dealing with occasional arrestments, however, should be entitled to some fees just as jurors and witnesses, whose involvement in court proceedings is also temporary and occasional, are entitled to payments.

Recommendation for introducing statutory fees

3.32 In our view these arguments, especially the first, outweigh the arguments against the proposal. We recommend:

Fees for arrestees should be introduced by statute to give them some compensation for the administrative and clerical expenses incurred by the arrestee in tracing whether any funds or other moveables have been attached by the arrestment and, where such funds or other moveables have been so attached, in ensuring that they are not paid or relinquished in breach of the arrestment.

(Recommendation 1, Clause 1)

(b) Rejection of garnishee order procedure and compulsorily limited arrestments

3.33 We have referred above[1] to evidence from the Committee of Scottish Clearing Bankers that, of all the arrestments served on the four Scottish clearing banks, only a relatively small proportion attach any funds. We do not have statistics relating to the proportion of arrestments served on other institutions which are unproductive. It may be that the incidence of abortive arrestments in the hands of the four Scottish clearing banks is untypically high. In our Discussion Paper No 87, we expressed the view that, as a matter of preference if not of necessity, the reforms should reduce the number of arrestments served on deposit-taking institutions which attach nothing and thereby reduce the burden on arrestees of much unproductive work.[2] We regarded this aim as subsidiary.

3.34 We nevertheless considered in that Discussion Paper two legislative options which might be introduced to reduce the number of unproductive arrestments, namely:

(a) an application to the court and affidavit procedure modelled on garnishee procedure under English law[3]; and

(b) a requirement that an arrestment schedule served on a deposit-taking institution within the meaning of the Banking Act 1987 must specify the offices of the arrestee which would be affected by the arrestment, together with a fee per office affected.[4]

On consultation, all those who commented agreed with our provisional view[5] that these legislative options should not be adopted and that separate legislation (distinct from statutory fees for arrestees) is unnecessary. We therefore adhere to that view. As one consultee observed, the existence of abortive arrestments is to some extent inevitable and the introduction of statutory fees for arrestees, together with the increase in the fees for sheriff officers and messengers-at-arms, should suffice to discourage the excessively wide use of arrestments.

(c) Regulation of statutory fees

General

3.35 In the light of consultation we have concluded that a legislative scheme for regulating statutory fees for arrestees should have the following main features.

(1) So far as practicable, the fees should take the form of fees fixed by legal rules rather than a claim by the arrestee for a fee tailored to the work done or expense incurred by the arrestee in tracing and 'freezing' arrested funds and property (See paras. 3.36 and 3.37 below). This is subject to the special case of corporeal moveables mentioned at head (4) below.

(2) Fees should be exigible for abortive as well as successful arrestments. (See paras 3.38 and 3.39 below).

1. See paras 2.33 and 2.34.
2. Discussion Paper No 87, para 3.3.
3. See para 2.19 above.
4. Discussion Paper No 87, para 3.11.
5. *Ibid* paras 3.12 to 3.23.

(3) The fees should take the form of a flat rate fee at an appropriate level chargeable by all arrestees whether or not they are deposit-taking institutions within the meaning of the Banking Act 1987. Additional sliding scale fees proportionate to the number of branches in a deposit-taking institution on the lines suggested for such institutions in Discussion Paper No 87[1] should not be introduced. (See para 3.40 *et seq*).

(4) Arrestees in whose hands corporeal moveables are arrested should be entitled to claim additional fees tailored to the work done or expense incurred by the arrestee in complying with the arrestment. (See para. 3.72 *et seq*).

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

3.36 It seems clear that in the normal case of arrestments in which money is sought to be attached, the fees due to the arrestees should take the form of fees fixed by statute or statutory instrument rather than a claim by the arrestee which would involve the court in assessing the work actually done by the arrestee in tracing whether funds of the debtor had been attached by the arrestment and in ensuring that any funds so attached were retained. As we indicated in Discussion Paper No 87,[2] a number of factors, including the high volume of arrestments served on some deposit-taking institutions; the relatively low amounts of clerical and administrative expenses exigible for operating a single arrestment; the difficulty of reaching a fair assessment of what expenses are attributable to one arrestment when a fluctuating number of arrestments are dealt with daily; and the difficulty of deciding what items of expenditure (eg. overheads) to include or exclude in the calculation, together with the consequential wide scope for protracted disputes, all combine to make it imperative that the recompense should take the form of fixed fees which could be easily applied. On consultation, this view was approved by all who commented and we adhere to it. The Building Societies Association remarked that if arrestees were able to claim for work actually done, this could lead to an unjust result and financial institutions should not be able to profit from the fact that they have been served with arrestments. Special considerations arise where the subjects arrested are corporeal moveables which we consider below.[3]

3.37 We recommend:

As a general rule, fees for arrestees in respect of the administrative and clerical expenses incurred by them in tracing any arrested property and in securing its retention should take the form of fees fixed by statute or statutory instrument rather than a fee fixed by the court tailored to the actual work done or expense incurred in so complying.

(Recommendation 2; Clause 1)

(ii) Fees for abortive as well as successful arrestments

3.38 In our Discussion Paper No 87, we expressed the view that if the reform is to be successful it must allow arrestees fees for complying with an abortive arrestment (ie one attaching nothing) as well as for an arrestment which is wholly or partly successful. A provision which recompensed the clearing banks for only 6% of the arrestments served on them would not be fair and reasonable. The Building Societies Association, which in June 1990 observed that at least 50% of arrestments against building societies seem to be abortive, remarked that the fact that these arrestments are abortive does not detract in any way from the amount of administrative work involved. The evidence from the Committee of Scottish Clearing Bankers also suggests that, at least where pecuniary debts (as distinct from corporeal moveables) are arrested, the bulk of the work required in complying with an arrestment is generally concerned with tracing whether funds have been attached by the arrestment, rather than in retaining funds once arrested and paying them to the arrester. At all events, all consultees who commented on this question approved of our view that fees should be allowed for abortive arrestments. Such a rule would differentiate the fees for arrestees from the existing English system of fees for garnishees, where fees are only exigible in respect of successful garnishee orders,[4] but in their case, as we have

1. Discussion Paper No 87, paras 3.30 to 3.47; 3.51 to 3.53. See Appendix C to this Report.
2. Discussion Paper No 87, para 3.26.
3. See para 3.73 *et seq*.
4. See para 2.15 above.

seen,[1] the volume of garnishee orders is very small in comparison to the volume of arrestments against Scottish banks (not only in relative terms *per capita* of population, but even absolutely) and there are procedural restraints against the use of "fishing" garnishee orders.[2]

3.39 We recommend:

The statutory fees due to arrestees recommended above should be chargeable in respect of arrestments which attach nothing as well as arrestments which are wholly or partly successful in attaching funds or goods.

(Recommendation 3; Clause 1(1))

(iii) Flat rate fees rather than sliding scale fees

3.40 In our Discussion Paper No 87 we provisionally proposed that the statutory fee chargeable by deposit-taking institutions within the meaning of the Banking Act 1987 should take the form of a sliding scale fee rather than a flat rate fee.[3] In the ordinary case where an arrestment attaches the whole debt and goods due by the arrestee to the defender or common debtor, we suggested that a basic fee (say £10) might be payable to an arrestee having not more than 20 offices and, in any other case, a basic fee (of say £10) for the first 20 offices together with an additional fee of (say) £1 for every additional whole number of 20 offices. Where an arrestment was limited to accounts or goods kept at a specified office, the fees would apply in relation only to the offices so specified. To solve the problem that messengers-at-arms and sheriff officers would not necessarily know the size of the branch networks of some institutions, we provisionally proposed that the additional scale fees applicable to particular deposit-taking institutions would be prescribed by statutory instrument, made following representations by the institutions concerned.[4] In this way, the officer serving the arrestment could tender the fee when serving the arrestment. We further proposed that arrestees who are not deposit-taking institutions should be entitled to a flat rate fee equivalent in amount to the basic fee for deposit-taking institutions.

3.41 The proposal for scale fees broadly proportionate to the size of the branch network of the arrestee institutions was criticised on consultation and on reflection we now consider that a system of flat rate fees would be preferable for the following reasons.

3.42 First, a flat rate fee would require less complicated legislation than a sliding scale fee and other things being equal the simpler system is better. A flat rate fee would be known to sheriff officers and messengers-at-arms and could and should be tendered at the time of serving the schedule of arrestment without enquiry into the size of the branch network. It is noted that the English legislation on fees for garnishee deposit-taking institutions prescribes a flat rate fee of £30.[5]

3.43 Second, in the light of consultation, we consider that the system of regulating fees should not attempt to take account of differences in the internal organisation of the business and undertakings of arrestees and in particular the different methods which they employ in notifying the various departments, offices or branches in their organisation of the receipt of an arrestment. As the Court of Session judges observed, a system of flat rate fees "would accept that there must be anomalies but not require a structure which may equally bring in further anomalies depending upon the efficiency or otherwise of the organisation in tracing accounts to its various branches and the number of branches involved".

3.44 A scale fee broadly proportionate to the number of branches in the branch network of an arrestee organisation would give legislative effect to the practice of sending circulars to all branches of an organisation. This is the practice currently

1. See para 2.18 above.
2. See paras 2.18 and 2.19 above.
3. See Discussion Paper No 87, paras 3.30 to 3.46 and Proposition 5 at para 3.47. See Appendix C to this Report.
4. Discussion Paper No 87, paras 3.51 and 3.52, Proposition 7 at para 3.53.
5. See para 2.15 above.

adopted by the four Scottish clearing banks. It is likely that other corporate bodies receiving arrestments, including many bodies which are not deposit-taking institutions, also send circulars to branch offices. Scottish Homes, for example, informed us that their head office sends circulars to all thirteen of their district offices to notify them of the receipt of an arrestment. Strathclyde Regional Council Finance Department send notification of arrestments to six sub-regional offices. On the other hand, we understand that some deposit-taking institution arrestees, such as most, if not all, building societies and insurance companies, are able to identify arrested funds by searching central records kept at their head office without the need to notify branch offices by circulars.[1] In the case of such institutions, a scale fee proportionate to the branch network and predicated on the assumption that circulars will be sent to a network of branch offices, would be inappropriate and might over-compensate them. While therefore a flat rate system would create anomalies, the same is true of a sliding scale even though it was originally designed to avoid or minimise anomalies.

3.45 Third, related to the foregoing point is the fact that even where some arrestee organisations send circulars to all their branches notifying them of the receipt of arrestments, it is possible that this system of notification might in some cases be changed if in future improvements were to be made to the system of centralised records which render notification by circular unnecessary. We have already referred to comments by consultees that it is difficult to believe that the four Scottish clearing banks could not so improve their centralised record system as to eliminate the need for notifying branches by circular[2]. While we do not know whether such improvements could be made by those banks at reasonable cost at the present time, we think that, having regard to the rapid pace of change in computer technology, there is at least a possibility that they may be made in the future so that a system of scale fees broadly proportionate to the number of branches in the arrestee's branch network would become even more anomalous.

3.46 Fourth, a flat rate fee at a moderate level would, we think, be appropriate for all arrestees whether or not they are deposit-taking institutions. In our Discussion Paper No 87, we suggested a system of scale fees proportionate to branch networks for arrestees who are deposit-taking institutions and a flat rate fee for arrestees who are not deposit-taking institutions.[3] In the light of consultation, however, we now consider that the distinction between deposit-taking institutions and other types of arrestees is lacking in principle and logic. That distinction does not reflect any fundamental difference as respects either the volume of arrestments served on arrestee institutions or the methods of notifying branch offices of the receipt of an arrestment. Thus, in terms of the volume of arrestments, the main difference lies between the four Scottish clearing banks who together receive the great majority of arrestments (perhaps about 80%)[4] and other arrestees. Further, as we have seen, some deposit-taking institutions (notably the four Scottish clearing banks) notify arrestments to local branches whereas other deposit-taking institutions (such as building societies and insurance companies) do not. On the other hand, some arrestees who are not deposit-taking institutions send circulars to local branches and so far their practice resembles that of the four Scottish clearing banks. Against this backgound, any legislative distinction between deposit-taking institutions and other arrestees would not reflect any important factual difference. The distinction was borrowed from English legislation on flat rate fees for garnishees which is confined to deposit-taking institutions.[5] But in the light of consultation we now consider that, whatever may be the case in England and Wales, that distinction does not seem to us to reflect any difference relevant to Scottish arrestees.

3.47 We therefore conclude that a system of flat rate fees should be adopted applicable to all types of arrestee whether or not they are deposit-taking institutions. It is competent for an arrester to limit the scope of his arrestment to funds or goods

1. The Girobank and the National Savings Bank do not have branch office outlets and therefore search central records only.
2. See para 3.20 above.
3. Discussion Paper No 87, Proposition 5 (para 3.47) and 11 (para 3.82).
4. See para 2.25 and Table A above.
5. See paras 2.15 and 2.16 above.

held at a particular branch office of the arrestee, but under the existing law and practice, such an arrestment must occur very rarely, if ever, because it is not in the arrester's interest to make such a limitation. Even if an arrestment were so limited, it would not be reasonable to provide for a lower fee for a limited arrestment than the normal flat rate fee for a comprehensive arrestment because the arrestee might still have to search all his records to discover whether, on combining accounts, there was a debit balance to be set off against the arrested credit balance. A flat rate fee should apply therefore to limited arrestments as well as to comprehensive arrestments.

3.48 We recommend:

The statutory fees for arrestees recommended above should take the form of a flat rate fee payable to all types of arrestee whether or not the arrestee is a deposit-taking institution within the meaning of the Banking Act 1987.

(Recommendation 4; Clause 1(2))

(iv) The level of flat rate fees

3.49 In this Report, we are primarily concerned to devise legislation setting out the mode of regulating fees and enabling provision to be made by statute or statutory instrument prescribing fees of appropriate amounts. The level of fee prescribed is arbitrary and pre-eminently for Government and Parliament to decide in the light, no doubt, of consultation with interested bodies following submission of this Report. The selection of the appropriate level of fee is however of crucial importance to the success of the legislation and it may be helpful if we advanced recommendations on what that level should be.

3.50 The choice seems to lie between (1) at one extreme, a nominal or token fee; (2) at the other extreme, a fee which would indemnify arrestees for the full economic cost of tracing and ensuring the retention of arrested property; and (3) a moderate fee fixed somewhere between these two extremes. Before choosing the preferred option, something should be said about the policy factors which should govern the choice.

3.51 *Policy factors determining the level of fee.* We consider that in fixing the level of the flat rate fee, regard should be paid to the following factors.

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

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

(3) The fee should make as high a contribution to the expenses incurred by arrestees in complying with arrestments as is consistent with the first factor.

The foregoing list derives from a similar list set out in Discussion Paper No 87[1] which we have amended in the light of consultation. In that Discussion Paper we suggested an additional factor namely that "the amount of the fee should be sufficiently high to make creditors think twice before instructing the use of arrestments. In other words, the level of fee should discourage the undiscriminating use of fishing arrestments".[2] On consultation that factor was criticised as irrelevant on the ground that "fishing arrestments" are the legitimate resort of creditors and pursuers who do not know the whereabouts of their debtor's arrestable assets. One consultee observed that that factor had been overtaken by the recent increase in fees for sheriff officers and messengers-at-arms enacted in April 1990,[3] which had the effect of compelling creditors and pursuers or their advisers to consider carefully beforehand whether an arrestment would be worth the increased expense. It may be that this comment is correct and accordingly we have omitted that factor from the foregoing list.

1. Discussion Paper No 87, para 3.31.
2. *Ibid*, head (2).
3. Act of Sederunt (Fees of Messengers-at-Arms) 1990 (SI 1990/379) and Act of Sederunt (Fees of Sheriff Officers) 1990 (SI 1990/381). The fees have been increased further by amending acts of sederunt as from 25 March 1991: see para 3.64 below.

3.52 Factor (3) replaces a differently expressed factor in our Discussion Paper to the effect that "the fee should give fair recompense to arrestees for their expense incurred in complying with an arrestment", and that "the notion of 'fair recompense' in this context should not mean the full economic cost of complying with an arrestment". This reflected our view that scale fees should be introduced approximating to a conservative estimate of the economic cost, that is one tending to be slightly below that cost. The actual economic cost however varies greatly even in the context of the practice of the four Scottish clearing banks so that a flat rate fee (as distinct from a scale fee) could not reflect that cost without either under-remunerating or over-remunerating some arrestees.[1] We now propose that the fee should make as high a contribution towards the arrestee's costs as is consistent with the need, recognised by the first factor, of not unduly deterring creditors and pursuers from using arrestments.

3.53 On consultation the factor which provoked the greatest divergence of views was the first, namely that the amount of the fee should not be so high that creditors and pursuers are unduly deterred from using arrestments. Some consultees, as we have seen, argued that *any* increase in fees beyond a token payment would unduly deter creditors from using arrestments. One consultee, who took this view, criticised the concept of "undue deterrence" and called on us to define it more clearly. In our view, however, the concept is incapable of more exact definition. It involves an assessment of what would be the likely effect on the use of arrestments resulting from the fixing of fees at different levels. This in turn raises questions of fact and degree, the answers to which are impossible to give with substantial certainty without a pilot scheme experimenting with different levels of fee. Such a pilot scheme would be an entirely novel and inappropriate device in the sphere of regulating fees for diligence. On the other hand, the criterion of not deterring creditors unduly from using arrestments cannot be disregarded simply because it is difficult to apply. It is of vital importance because it recognises the creditor's interest in using arrestments and what was perceived by some consultees as the public interest in promoting the use of arrestments in place of poindings and warrant sales or bankruptcy proceedings.

3.54 *Rejection of fee representing full economic cost.* On consultation, the Committee of Scottish Clearing Bankers emphasised that "they feel strongly that they, as innocent third parties in the arrestment scenario, should be compensated on a full cost basis for any expenses incurred". While several other consultees agreed with the sliding scale fees, no other consultee emphasised the need for compensation on a full cost basis probably because no other arrestees bear as heavy a burden of arrestments as the four Scottish clearing banks.

3.55 Some bodies have given us estimates of the costs of complying with arrestments. The Committee of Scottish Clearing Bankers informed us in January 1990 that the average cost per arrestment incurred by the head offices of their four member banks was in the range of £4.50p to £6, and the average cost per arrestment incurred by branch offices was in the range of 7p to 10p. We were informed that the bank which had the highest head office costs did not have the highest branch office costs and conversely the bank with the lowest branch office costs did not have the lowest head office costs. Taking the lowest average costs, the clearing bank which has 826 branch offices would require an indemnity fee of £62.32p per arrestment[2] and the clearing bank which has 268 branch offices would require an indemnity fee of £23.26p per arrestment.[3] Taking the highest average costs the corresponding indemnity fees would be £88.60p[4] and £32.50p.[5]

3.56 The Association of British Insurers gave us estimates in June 1990 provided by individual insurance companies of the average costs of complying with an arrestment. Company 1 (17 of 111 UK branches in Scotland) estimated £15; company 2 (4 branches in Scotland) estimated £20; company 3 (2 of 20 UK branches in Scotland) estimated

1. See para 3.59 below.
2. £57.82 (826 × 7p) plus £4.50.
3. £18.76 (268 × 7p) plus £4.50.
4. £82.60 (826 × 10p) plus £6.
5. £26.80 (268 × 10p) plus £6.

£25; and company 4 (6 of 38 UK branches in Scotland) estimated between £10 and £15. Among building societies whom we consulted in September to November 1990 Society 1 (58 branches in Scotland out of 410 UK branches) estimated £25 to £45, (depending on whether the Society holds funds and is served with a summons of furthcoming); Society 2 (40 branches in Scotland out of 424 UK branches) estimated £10 (whether or not an account is found); Society 3 (35 branches in Scotland of 36 UK branches) estimated £25; Society 4 (all 5 branches in Scotland) estimated £50. In August 1990, Strathclyde Regional Council estimated £17 per arrestment (based on $3\frac{1}{4}$ hours of staff time, being $1\frac{1}{4}$ hours at Regional head-quarters and 20 minutes at each of the 6 sub-regional offices).

3.57 While these estimates were not collated in accordance with any single uniform formula governing what should be included (staff-time, stationery, overheads etc) in the estimates, they do give an indication of what arrestee institutions themselves consider to be a fair estimate of the costs involved in complying with arrestments.

3.58 Against this background, we consider that the flat rate fee should not be fixed at a level covering the full economic cost of complying with arrestments. First, the enforcement of debts by diligence by itself, and as part of the system of administration of justice, benefits the whole community, including banks and other financial institutions who take deposits from or lend to the public, and it is reasonable that the fee should for that reason be less than the full economic cost of tracing arrested funds or moveables and retaining them once traced.

3.59 Second, it is not practicable to fix a flat rate fee which would at the same time indemnify all arrestees for the full economic cost of complying with arrestments and avoid the criticism that it would enable other arrestees to make a profit out of the work involved in complying with arrestments. If for example regard is paid to the four Scottish clearing banks alone, the indemnity fees would range between about £62 and £23 per arrestment, or between £88 and £32, depending on the basis of computation.[1] Moreover there is a considerable spread of fees estimated by other institutions ranging from about £10 to about £50.[2]

3.60 Third, if an arbitrary figure were selected which was intended to cover the full economic cost of complying with an arrestment incurred by most arrestees, it would be likely to be pitched at so high a level that it would unduly deter pursuers and creditors from resorting to arrestments.

3.61 *Nominal fees or modified fees.* On consultation, two bodies-the Joint Committee[3] and the Legal Services Agency Ltd-suggested a token or nominal fee which they suggested should not exceed £2 per arrestment. This proposal would no doubt be supported by those who wanted no fees, as a "second best" solution.

3.62 The main arguments favouring token fees were (a) that token fees would be consistent with the statutory token fees prescribed by employers for operating earnings arrestments;[4] and (b) that any greater fee would unduly deter creditors from using arrestments.

3.63 As regards legal precedents, we have seen that other statutory and common law precedents favour more substantial fees, namely the statutory fee of £30 for successful garnishee orders[5] and the common law rule for indemnifying third parties for complying with *Mareva* injunctions.[6] Since these relate to "attachments" in the hands of banks and other financial institutions, as distinct from employers, they are more closely analogous to ordinary arrestments than section 71 of the Debtors (Scotland) Act 1987. Another argument against token fees is that there are administrative costs in making any book entry showing the receipt of a fee, and it may be that

1. See para 3.55 above.
2. See para 3.56 above.
3. See p 19, fn 4.
4. Debtors (Scotland) Act 1987, s 71.
5. See para 2.15 above.
6. See para 2.14 above. .

the cost of administering a nominal or token fee of as little as £2 would outweigh the benefits to the arrestee of getting such a sum.

3.64 As respects the criticism that any fee above a nominal fee would deter creditors from using arrestments, regard must be paid to the existing fees for using an arrestment which were increased by act of sederunt on 2 April 1990 when a new method of calculating fees was introduced,[1] and increased again on 25 March 1991.[2] Probably most arrestments served on a Scottish clearing bank by the normal method of hand service require the officer of court to travel not more than 2 miles from his office to the nearest branch of the clearing bank and at least in the case of sheriff court arrestments to serve a postal copy on the bank's principal place of business. Before 2 April 1990, in a typical case the officer of court (and his witness) would serve the arrestment at the branch and in the case of a sheriff court arrestment (but not a Court of Session arrestment) would charge an extra fee for serving a postal copy on the principal office. The effect of the increase on the fees chargeable by the officer of court from the levels in force before 2 April 1990 to the levels in force after 25 March 1991, in this typical type of case (involving hand service and 2 miles travelling) is shown in Table H. On the basis of that Table, it will be seen that officers' fees for global arrestments in the hands of all four Scottish clearing banks in the circumstances outlined above have increased in the case of Court of Session arrestments, from £46.24p to £130.64p; in the case of sheriff court ordinary cause arrestments, from £59.32p to £118.20p; and in the case of sheriff court summary cause arrestments, from £35.20p to £72.36p. In addition to these fees, there may be additional fees of up to £8.93 per arrestment chargeable by the solicitor for instructing and reporting the diligence.[3]

3.65 It is possible that, as one consultee observed, some creditors or their advisers are already being forced by the increase in fees to think twice before using arrestments in circumstances where before the increase they would have instructed arrestments,

Table H: Increase between 17.7.89 and 25.3.91 in Fees for Officers of Court Serving Arrestments by Hand (2 Miles Travelling)

Type of arrestment	*Fee between 17.7.89 and 2.4.90* (£)	*Fee after 25.3.91* (£)	*Increase in amount* (£)	*Percentage increase* (%)
Court of Session	11.56	32.66	21.10	183%
Sheriff court ordinary cause	14.83	29.55	14.72	99%
Sheriff court summary cause	8.80	18.09	9.29	106%

Notes

1. Fees between 17.7.89 and 2.4.90 include VAT at 15%. Fees after 25.3.91 include VAT at 17.5%.
2. The fees in force between 17.7.89 and 2.4.90 are taken from the Act of Sederunt (Fees of Messengers-at-Arms) 1978 (SI 1978/1424) as amended by SI 1989/1019 with effect from 17.7.89; and the Act of Sederunt (Fees of Sheriff Officers) 1978 (SI 1978/1423) as amended by SI 1989/1018 also with effect from 17.7.89. The sheriff court fees include an outlay of 45p for recorded delivery postage.
3. The Court of Session arrestment fee between 17.7.89 and 2.4.90 does not include a fee for serving a postal copy which is not required by law in Court of Session arrestments but was and is required in sheriff court arrestments: OCR, rule 111. This explains why the Court of Session arrestment fee in force between 17.7.89 and 2.4.90 was lower than the corresponding sheriff court ordinary cause fee in that period.
4. The fees in force on and after 25.3.91 are taken from the Act of Sederunt (Fees of Messengers-at-Arms) 1990 (SI 1990/379) as amended by SI 1991/291 and the Act of Sederunt (Fees of Sheriff Officers) 1990 (SI 1990/381) as amended by SI 1991/290. Separate fees are not chargeable for postal copies.
5. The fees payable to a sheriff officer for arrestment for the recovery of rates, community charges or taxes under summary warrants are now on the same scale as the fee for ordinary cause arrestments: SI 1990/381, Schedule, regulation 15.
6. The fees for the period between 2.4.90 and 24.3.91 (including VAT at 15%) were Court of Session £28.03; sheriff court ordinary cause £25.38; and sheriff court summary cause £15.52.

1. Act of Sederunt (Fees of Messengers-at-Arms) 1990 (SI 1990/379); Act of Sederunt (Fees for Sheriff Officers) 1990 (SI 1990/381), both as originally enacted. See Table H, note 6.
2. Act of Sederunt (Fees of Messengers-at-Arms) 1991 SI 1991/291; Act of Sederunt (Fees of Sheriff Officers) 1991 (SI 1991/290). See Table H.
3. See Act of Sederunt (Fees of Solicitors in the Sheriff Court) 1989 (SI 1989/434) Chapter III, para 14(a) and (d) (as amended by SI 1990/716): VAT at 17.5% is included.

perhaps as a matter of course. It is in any event possible that, as some consultees argued, the addition of arrestees' fees of more than a token amount to the increased fees for officers would be likely to have a deterrent, or further deterrent, effect. At what point in the spectrum of possible flat rate fees this new deterrent effect would arise, or become unduly damaging to the system of arrestments, is very difficult to determine. We consider however that some weight should be given to the fact that since only a relatively small proportion of arrestments on the Scottish clearing banks attach anything[1] the system is not in any event very successful in attaching funds and that a reduction in the number of arrestments would relieve arrestees of unproductive work. We think that it would be not unfair to arrestees nor unduly damaging to the system of arrestments to introduce a fee somewhere between a nominal fee and a full indemnity. We suggest that a flat rate fee of about £10 would strike the right balance between the interests of creditors and the interests of arrestees.

3.66 Having regard to the estimates of arrestees' expenses outlined in paras 3.55 and 3.56 above, a fee of £10 would cover or make a very substantial contribution to the estimated expenses at the lower end of the spectrum (the lowest was £10) and a not insignificant contribution to the expenses of the largest of the Scottish clearing banks (which is somewhere between £66 and £88). It might also assist the Scottish clearing banks by reducing the number of arrestments served on them. In the typical case of hand service and 2 miles travelling predicated in Table H above, if the proposed arrestee's fee of £10 is added to each of the officer's current fees set out in that Table, the fee for a Court of Session arrestment would increase by 31% to £42.66p; for a sheriff court ordinary cause or summary warrant arrestment, by 34% to £39.55p; and for a sheriff court summary cause arrestment, by 55% to £28.09p.

3.67 *Recommendation on level of fee.* We recommend:

(1) The flat rate fee for arrestees should be fixed at a level somewhere between a nominal fee and a fee that would indemnify most arrestees for the full economic cost of complying with an arrestment.

(2) While the amount must be arbitrary, a fee of £10 per arrestment is recommended.

(Recommendation 5; Clause 1(2))

(v) Arrester's liability, and tender of fee

3.68 In our Discussion Paper No. 87, we proposed that the statutory fee should be payable in the first instance by the arrester to the arrestee. Such a rule would differ from the rule as to the fee of 50p payable to an employer for operating an earnings arrestment on each occasion on which he makes payment to the arresting creditor. There the fee is chargeable against the debtor-employee and deductible from his net earnings.[2] It would also differ from the rule as to garnishee orders where the garnishee deducts the fee of £30 from the debt owed to the judgment debtor, except where the sum garnished is insufficient to cover both the fee and the judgment debt and costs, in which case it will be deducted from the amount paid to the garnishor.[3] The fees payable to employers and garnishees, however, are chargeable only where the earnings arrestment or garnishee order attaches something in the hands of the employer or garnishee, and where therefore there are funds in the hands of the employer or garnishee from which the deduction can be made. By contrast, in the case of an arrestment of moveables and funds other than earnings, we have recommended that the fee should be chargeable by the arrestee even if the arrestment attaches nothing[4]. In such a case, the arrestee holds no funds from which the fee could be deducted. Indeed that will be the usual case. Moreover where corporeal moveables alone are arrested, the arrestee could not deduct the fee. It follows that the precedents of statutory fees for employers and garnishees are inappropriate in the present context and that the fee must be payable in the first instance by the arresting pursuer or creditor, or rather the officer of court acting on his behalf. Where the arrestment

1. See paras 2.33 and 2.34 above.
2. Debtors (Scotland) Act 1987, s 71. The same rule applies under that section to the fee for operating a current maintenance arrestment and a conjoined arrestment order.
3. Supreme Court Act 1981, s 40A(1), (1A) and (1B); County Courts Act 1984, s 109(1), (1A) and (1B). See para 2.15 above.
4. Recommendation 3, at para 3.39 above.

attaches something, the fee will be recoverable from the common debtor in accordance with the normal rules on recovery of the expenses of arrestments.[1] We revert below to the clarification of those rules in the case where the arrestment does not attach anything.[2]

3.69 On consultation, there was general agreement with our proposal that the tendering of the statutory fee by the officer of court to the arrestee should be a precondition of a valid and effectual arrestment.[3] It would be unrealistic and unfair simply to give arrestees a right to raise an action to recover unpaid fees: the general rule should be, "no fee, no arrestment". Such a rule would be easy to apply in a system of flat rate fees. Since the validity of the arrestment would depend on the tender of the fee prior to execution of the arrestment, it would be competent for the arrestee to waive the fee without affecting the validity of the arrestment, but that is likely to be an unusual case. In relation to sheriff court arrestments where the service of a postal copy is essential in some cases,[4] we recommend that the fee must be tendered before the service of the schedule of arrestment itself rather than the postal copy.

3.70 We recommend:

It should be a prerequisite of the validity of an arrestment that the officer of court has, before serving the schedule of arrestment, tendered the statutory fee to the arrestee.

(Recommendation 6; Clause 1(3))

(vi) Variation of fee by statutory instrument

3.71 We consider that the flat rate fee, which should be prescribed initially by statute, should be subject to variation by statutory instrument made by the Lord Advocate as the Government Minister having responsibility for oversight of the law of diligence,[5] in accordance with statutory precedent.[6] This was agreed on consultation. Although statutory provisions requiring the Lord Advocate to have regard to downward changes in arrestees' actual expenses, as well as inflation, might have been appropriate if the power had related to an elaborate system of sliding scale fees,[7] such provisions appear unnecessary in the case of the single flat rate fee now recommended.

3.72 We recommend:

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

(Recommendation 7; Clause 1(2) and (4))

(2) "Excess claims" by arrestees in respect of arrested corporeal moveables

3.73 In our Discussion Paper No 87, we provisionally proposed that the system of scale fees for arrestees who are deposit-taking institutions should be matched by provisions under which an arrestee who is not a deposit-taking institution should be entitled to the fixed basic fee allowed to such institutions under the scale fee system and in addition, where the subjects arrested were corporeal moveables (other than maritime subjects), should be entitled to claim recompense or compensation for expenses actually incurred so far as in excess of that basic fee.[8] While that proposal was generally approved on consultation by those who favoured the introduction of fees, it requires amendment consequential on our recommendation that a flat rate

1. See para 4.14 below for a summary of these rules.
2. See paras 4.16 to 4.20, and Recommendation 16 (at para 4.21).
3. See Discussion Paper No 87, para 3.51, and Proposition 7(6) (para 3.53).
4. Ordinary Cause Rules, rule 111; applied to summary cause arrestments by Act of Sederunt (Summary Cause Rules, Sheriff Court) 1976, s 3(2).
5. Prime Minister's Statement of 21 December 1972 (Hansard, HC Debs, cols 456-7).
6. Debtors (Scotland) Act 1987, s 71 (which confers on the Lord Advocate power by regulations to vary the employer's fee under that section for operating diligence against earnings).
7. Discussion Paper No 87, para 3.49; Proposition 6(2) (para 3.50).
8. Discussion Paper No 87, paras 3.73 to 3.81, Proposition 11(1) and (3)(b) (para. 3.82).

fee should be chargeable by all arrestees in respect of arrestments of subjects (other than maritime subjects), whether or not the arrestee is a deposit-taking institution.

3.74 It seems essential that the flat rate statutory fee which we recommend should apply in relation to the arrestment of corporeal moveables since at the time of arrestment when the fee is tendered, the officer of court may not know whether the arrestment will attach corporeal moveables either alone or along with a pecuniary debt. The question, however, arises whether an arrestee holding corporeal moveables belonging to the defender or common debtor should indeed be entitled to claim from the arrester necessary expenses actually incurred in complying with the arrestment so far as in excess of the recommended statutory flat rate fee.

3.75 The range of types of corporeal moveables which may be in the possession of arrestees is very wide indeed: examples include vehicles in a garage; commercial goods in a warehouse; oil in a storage tank; valuables on safe deposit with a bank; and animals in the custody of an auctioneer or veterinary practitioner. It seems likely that the impact of an arrestment on an arrestee in possession of corporeal moveables will usually be different in practical terms from the impact of an arrestment on an arrestee who only owes a pecuniary debt to the defender or common debtor. Where the arrestee is not a clearing bank or other deposit-taking institution, the arrestment is unlikely to be merely a "fishing arrestment" laid as a matter of course, and the arrestee will generally not have the same difficulties experienced by clearing banks in tracing whether he does in fact have goods in his possession attached by the arrestment. Moreover, unlike clearing bank arrestees, the arrestee will not normally have to cope with a large number of abortive arrestments.

3.76 *Arguments against excess claims.* It seems to us that the main arguments against allowing an excess claim are as follows.

(1) If as we have recommended a clearing bank or other arrestee in whose hands a pecuniary debt is arrested has to accept a statutory fee of an amount which may be considerably lower than the economic cost of complying with an arrestment, it would arguably be inconsistent to allow an arrestee holding corporeal moveables a fee covering the economic cost of complying with the arrestment.

(2) Persons who hold moveable property under contracts of deposit may insert provisions in the contract requiring the depositor to indemnify them for any increased costs arising out of an arrestment.

(3) In some cases the arrestee may have a claim for damages against a common debtor where the arrestment, or at least the common debtor's failure to have it recalled, falls to be treated as a deemed repudiation of the contract.[1]

(4) There is a risk that statutory excess claims might unduly deter pursuers and creditors from using arrestments to attach corporeal moveables.

(5) Statutory excess claims might unduly complicate the law and lead to protracted litigation possibly in respect of claims of relatively small amounts, whereas the flat rate fee is simple and easy to apply.

(6) No representations have been made to us concerning the need to introduce statutory fees or excess claims for arrestees holding corporeal moveables apart from the responses to our Discussion Paper No. 87.

3.77 *Arguments for excess claims.* The main arguments in favour of excess claims appear to be the following.

(1) The expenses incurred by arrestees holding corporeal moveables are different in kind from the expenses incurred by arrestees in arrestments of pecuniary debts due by the arrestee to the defender or common debtor. In the case of an arrested pecuniary debt, the arrestee's obligation is merely a duty not to pay the arrested debt and meanwhile the arrestee's general funds are not laid under any embargo.[2] An arrestee in whose hands a pecuniary debt is sought to be arrested may incur

1. See *The Jogoo* [1981] 1 Lloyd's Rep 313, discussed at para 3.86 below.
2. *Barclay, Curle and Co Ltd* v *Sir James Laing & Co Ltd* 1908 SC 82 at p 87 per Lord President Dunedin.

expense in tracing whether funds are due to the common debtor and in the case of a clearing bank these are the main expenses. The arrester does not thereby obtain any direct benefit in terms of enhancement or preservation of the value of the arrested subjects. By contrast, detention or maintenance of corporeal moveable property held by the arrestee does enhance or at least preserve the value of the property. The arrestee cannot in safety deal with the property[1] and may be put to much expense in keeping the property in safe custody.

(2) Where a defender or common debtor is in financial difficulties as may often be the case where an arrestment is used against his assets, the arrestee might find that a contractual right to be indemnified by the defender or common debtor for increased costs arising from an arrestment, or a claim for damages for deemed repudiation of the contract of deposit, would be worthless.

(3) It is by no means certain that excess claims would unduly deter creditors from using arrestments to attach corporeal moveables, because the claim would not arise if the arrestment were unsuccessful and because we recommend that the claim should be treated as an expense of the arrestment falling to be paid out of the proceeds of the judicial sale of the moveable property.

(4) On consultation, those who favoured statutory fees for arrestees generally favoured excess claims in respect of corporeal moveables. The absence of complaint by arrestees holding corporeal moveables does not imply that hardship is not being imposed on them.

3.78 *Introduction of excess claims* On balance, we think that the arguments favouring the introduction of statutory excess claims outweigh the contrary arguments and accordingly we adhere to our view that such claims should be competent. However the wide range of types of corporeal moveable asset and the differing circumstances of arrestees present problems in defining the grounds of an excess claim.

3.79 The excess claim should in our view be subject to two limitations. First, the claim should only cover expenses which the arrestee has necessarily incurred in maintaining or preserving arrested corporeal moveable property, as distinct from what might be called "tracing and freezing expenses", ie administrative and clerical expenses incurred in tracing whether corporeal moveables of the common debtor or defender are held by the arrestee, and in ensuring that the arrestee and his employees do not part with them while the arrestment is in effect. These "tracing and freezing expenses" are also incurred by arrestees holding arrested pecuniary funds who are only entitled to a flat rate fee. So where jewellery is held by a bank on safe deposit, or goods or animals are held by an auctioneer for sale, the tracing and freezing expenses should be treated as covered by the flat rate fee. The claim for maintaining and preserving the corporeal moveables however might legitimately contain an element for additional administrative and clerical expenses, for example in negotiating the rent of a warehouse needed to preserve the arrested goods. Second, in principle the claim should only cover any increase in such expenses of maintaining or preserving the arrested corporeal moveable property as are attributable to the arrestment. In other words, if the claim or its amount were disputed, the arrestee would have to show that his claim relates only to expenses which he would not have had to incur but for the arrestment. In some cases, it will be clear how far the continued detention of corporeal moveable property by the arrestee is attributable to the arrestment. For example there may be a known date when commercial goods in a warehouse, or a vehicle under repair in a garage, or oil in a storage tank in a harbour awaiting loading on to a ship were due to be uplifted by or to the order of the common debtor or his nomineee. In many other cases, however, it may not be clear how long the corporeal moveable property would have remained in the arrestee's custody in the absence of the arrestment. In such cases the onus of proof would be important and it should be incumbent on the arrestee to show that his claim related to expenses which on a balance of probabilities he would not have had to incur if the property had not been arrested.

1. *Idem.*

3.80 As a matter of procedure, the officer of court would tender the flat rate fee on or before serving the schedule of arrestment. As we suggested in Discussion Paper No 87,[1] the arrestee would be entitled to claim any excess expenses above the flat rate fee at or after the time when he lawfully relinquishes possession of the moveables which would be either (a) when the arrestment ceases to have effect (eg. on decree in the defender's favour extinguishing an arrestment on the dependence, or on payment of the debt secured by the arrestment, or on judicial recall or the arrester's abandonment of the diligence) or (b) when the goods are uplifted for sale in pursuance of a decree for sale in an action of furthcoming. We consider that the procedure for making the claim should be regulated by act of sederunt. A written claim accompanied by a detailed account of expenses should be intimated to the arrester. In the case of an arrestment on the dependence of a successful action and an arrestment in execution, the common debtor would bear the ultimate liability for the arrestment expenses and the claim and account should be intimated to him to give him an opportunity to object. In the case of an arrestment on the dependence of an unsuccessful action, the defender would not be so liable and intimation should not be made to him. The form of claim should probably be prescribed by act of sederunt, because it would require to notify the arrester and common debtor of the main aspects of the procedure to be followed, which would depend on whether or not an objection is made to the claim. The arrester and common debtor would have 28 days after receipt of the claim in which to object. An objection should be made in writing to the arrestee and intimated to the other party having a right to object. In the absence of objection within the 28 days the claim should be paid. If either the arrester or common debtor objects to the claim, the claim should be referred for determination to the auditor of the court which has or would have jurisdiction in an action of furthcoming in respect of the arrested moveables. There should be an appeal from the auditor of court to a judge (Lord Ordinary or sheriff). On consultation there was general agreement that a disputed claim should be referred to the auditor of court with an appeal to a judge. The Association of Sheriffs Principal said that the procedure would be unlikely to present the sheriff court with any practical or procedural difficulty. The detailed procedure described above is a modified and expanded version of a procedure suggested in outline by the Faculty of Advocates on consultation.

3.81 *Recommendations on excess claims relating to corporeal moveables* We recommend:

(1) Where the things arrested consist of or include corporeal moveable property (other than a maritime *res*), the arrestee should be entitled to claim, in addition to the flat rate fee paid on or before execution of the arrestment, compensation from the arrester for any expenses necessarily incurred by him in maintaining or preserving that property but only insofar as these expenses would not have been incurred but for the arrestment.

(2) Where corporeal moveables are arrested, the flat rate fee should be treated as compensating the arrestee for administrative and clerical expenses incurred in tracing the moveables and in ensuring that the arrestee or those for whom he is responsible do not part with them while the arrestment is in effect, and accordingly such expenses should not be included in a claim for maintaining or preserving the moveables.

(3) If the excess claim or its amount is disputed, it should be incumbent on the arrestee to show on a balance of probabilities that the expenses would not have been incurred but for the arrestment.

(4) The arrestee should be entitled to make such a claim only at or after the time when he lawfully relinquishes possession of the moveable property.

(5) The arrester and the common debtor (who would bear the ultimate liability for the expenses) should have an opportunity to object to the claim and, on such an objection, the claim should be referred to the auditor of the court which has jurisdiction in respect of the arrested moveables, for determination subject to an appeal to a judge (sheriff or Lord Ordinary).

1. Discussion Paper No 87, para 3.80; Proposition 11(5) (para 3.82).

(6) Provision should be made by act of sederunt regulating the procedure to be followed in the making and disposal of a claim.

(Recommendation 8; Clause 2)

(3) Reimbursement of expenses of third parties arising from arrestments of ships or of cargo on board ship

(a) Preliminary: the nature of the problem

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

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

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

3.83 *Exclusion of arrestments in rem from Report.* Arrestments *in rem* of ships and of other maritime subjects (eg cargo and freight) are excluded from this Report because we are here concerned with compensation or fees for expenses incurred by a third party arrestee in complying with an arrestment, being an "innocent" third party who happens to hold funds or property of the defender or common debtor. In an arrestment *in rem* and an action *in rem*, there is no defender or common debtor and no third party arrestee properly so called. The arrestment *in rem* and action *in rem* are special Admiralty processes directed against the ship herself, irrespective of her ownership, and enforcing a lien arising out of damage done to the ship or services (eg. salvage) rendered to the ship. The type of situation with which we are concerned in this Report does not therefore arise.

3.84 *Arrestments of ships securing personal debts or to recover statutory charges or fines.* Arrestments of ships securing personal obligations of payment owed by the owner of the ship to the arrester more closely resemble ordinary arrestments of non-maritime subjects. There is, however, an important difference. An arrestment of a ship securing a personal debt of the owner of the ship is a "real diligence" in a procedural sense being directed against the ship herself and may be executed against the ship although she is in the possession of her owner (the defender in the personal action or debtor in a decree granted in such an action). By contrast, ordinary arrestments of non-maritime subjects are laid in the hands of a third party arrestee who is not concerned as a party to the action on the dependence of which the arrestment is laid or, as the case may be, as a debtor in the decree in the personal action on which the arrestment in execution proceeds. We are not concerned in this Report with arrestments of ships in the possession of the defender or debtor since they do not involve "innocent" third parties. For similar reasons we also exclude from this Report most arrestments of vessels under special enactments for the recovery of charges or fines or penalties imposed under the enactment.[1] In such cases, it seems that the arrestment is usually a real diligence against the vessel and thus is not normally laid in the hands of an "innocent" third party. In three of these enactments what is arrestable is the vessel and her equipment (tackle, apparel and furniture),[2] and in one of these enactments what is arrestable is the vessel and her equipment and any property on board.[3] In these cases the arrestment will not be laid in the hands of an innocent third party and no fees should be exigible by the arrestee. In three other enactments, however, what is arrestable is a fishing boat "and its gear and catch and any property of the person convicted".[4] While an arrestment of the boat and its gear and catch will not, or not normally, be laid in the hands of an innocent third party,

1. See next three footnotes.
2. Harbours, Docks, and Piers Clauses Act 1847, s 57; Merchant Shipping Act 1894, s 693; Prevention of Oil Pollution Act 1971, s 20(1).
3. Sea Fisheries Act 1882, s 20(2).
4. Sea Fisheries Act 1968, s 12(2)(a); British Fishing Boats Act 1983, s 5 (2)(a); Inshore Fishing (Scotland) Act 1984, s 8(2)(a).

it may be that an arrestment of other property of the person convicted would be laid in the hands of such a third party and in the latter case that third party should be entitled to fees. On the basis of this and the preceding paragraph we therefore recommend:

(1) The new system of statutory flat rate fees and excess claims recommended above should not apply to:

(a) an arrestment *in rem* of a maritime *res*; or

(b) an arrestment of a ship on the dependence of an action *in personam* or in execution of a decree in such an action.

(2) The new system of fees and excess claims should not apply to arrestments of vessels and their equipment under special enactments for the recovery of a charge or fine or penalty imposed by that enactment. However in the case of arrestments under three enactments relating to the arrestment of a fishing boat and its gear and catch and any property of the person convicted, where an arrestment of the property of the person convicted is laid in the hands of an innocent third party, that third party should be entitled to such fees. The three enactments are the Sea Fisheries Act 1968, s. 12(2)(a); the British Fishing Boats Act 1983, s. 5(2)(a); and the Inshore Fishing (Scotland) Act 1984, s. 8(2)(a).

(Recommendation 9; Clause 8(1)(c), (d) and (h), (4) and (5))

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

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

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

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

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

In our Discussion Paper No 87, we raised the question whether, if arrestees holding non-maritime subjects belonging to the defender or common debtor are to be recompensed for expenses incurred in complying with an arrestment, in principle the above-mentioned third parties should not likewise be recompensed for such expenses, though technically they are not all arrestees? Before considering that question, and the comments thereon of those whom we consulted, it is necessary to consider what remedies, if any, are available to such third parties under the existing law. We consider first cases involving arrestments of ships (categories (a) and (b) above)[2] and thereafter cases involving arrestments of cargo (category (c) above).[3]

(b) Arrestments of ships: expenses of third parties discharging cargo

(i) The existing law

3.86 *Third party cargo-owner's expenses in discharging cargo from arrested ship.* We have not traced any direct Scottish authority showing that a third party cargo-owner may claim expenses (eg. for discharging cargo) from the arrester of the ship in which the third party's cargo was being carried at the time of the arrestment. In an English case, *The Jogoo*[4], an unsuccessful claim was made by a cargo-owner to

1. Cf *Svenska Petroleum AB* v *HOR Ltd* 1982 SLT 343.
2. See paras 3.86 to 3.98 below.
3. See paras 3.99 to 3.106 below.
4. [1981] 1 Lloyd's Rep 513.

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

3.87 The judgment in *The Jogoo*[5] provides persuasive authority in Scots law that where a ship is arrested, the cargo-owners in certain circumstances would have an action of damages against the ship-owners on the ground of their repudiation, or deemed repudiation, of the contract by failing to pay the debt claimed by the arrester or failing to have the arrestment timeously recalled on caution or consignation. The damages would include the cost of discharging the cargo. But in the case of an arrestment on the dependence (as distinct from an arrestment in execution) such a remedy would presumably only be available if the arrester's claim was ultimately upheld by the court. If the arrestment was laid on the dependence to secure a debt which eventually turned out not to be due, it is difficult to see on what grounds of legal principle the ship-owner defender could be deemed to have repudiated the contract of carriage entered into with the cargo-owner. In these circumstances, however, it might be held that the contract of carriage had been frustrated by the supervening arrestment.[6] In such a case, under Scots law (differing in this respect from English law) the cargo-owner would be entitled to recover from the ship-owner defender freight which had been paid in advance on the principle *causa data causa non secuta*.[7] Since he could not claim damages from the ship-owner defender, however, he would not be entitled to claim the expenses of discharging the cargo as an element in those damages.

3.88 Another possibility we have considered is whether the cargo-owners might have a claim in recompense for the redress of unjustified enrichment either against the arrester or against the owners of the ship. Since the cargo-owner is not an arrestee, the allowance of a claim in recompense for these expenses would not infringe any rule of the law on arrestment expenses to the effect that arrestees' expenses are not recoverable from the arrester. In *The Jogoo*[8] a claim in restitution (the corresponding

1. *Ibid* at p 515.
2. *Ibid* at p 517.
3. *Ibid* at p 516.
4. D G Jackson *Enforcement of Maritime Claims* (1985) p 178.
5. [1981] 1 Lloyd's Rep 513.
6. Where the defender ship-owner did owe the debt secured by the arrestment, he could probably not invoke the doctrine of frustration since the event (the arrestment) making performance impossible would be treated as "self-induced", ie due to his own conduct or fault in failing to pay his debts or obtain recall of the arrestment. See however W W McBryde *The Law of Contract in Scotland* (1987) pp 352-354 on the uncertainty surrounding the law on self-induced frustration.
7. *Watson and Co* v *Shankland* (1871) 10 M 142. In English law, freight and other payments in advance were not recoverable at common law if frustration of the contract supervened: *Fibrosa Spolka Akcyjna* v *Fairbairn Lawson Combe Barbour Ltd* [1943] A C 32. The law was changed by the Law Reform (Frustrated Contracts) Act 1943 generally but in terms of s 2(5)(a), that Act does not apply "to any charter-party except a time charter-party or charter-party by way of demise, or to any contract (other than a charter-party) for the carriage of goods by sea".
8. [1981] 1 Lloyd's Rep 513.

branch of English law) was rejected[1] but Scots law stems from different roots and is more generous to unsolicited interveners than English law.[2] The question is whether recompense might be claimed on the basis that the discharge of the cargo benefited the arrester or the debtor ship-owners because when the ship was eventually sold after the cargo-owners had removed the cargo, the price received was higher than it would have been if the cargo had still been on board. The measure of recovery would be the extent of the enrichment not the cost of removing the cargo, but the two measures might yield the same result. There is however authority in our law that improvements to security subjects do not found a claim in recompense against the creditor holding the security, since the improvements merely broaden or enhance the value of the creditor's security but do not in the relevant sense enrich the creditor who never receives more than his debt out of the proceeds of sale of the security subjects.[3] This authority seems apposite since discharge of cargo is in this context equivalent to an improvement of the value of the security subjects. On the other hand, the debtor ship-owner would be benefited since any enhancement of the value of the security would either go to the reduction of his debt or be received by him as excess proceeds of sale. There are, however, two possible impediments to a claim by the cargo-owner in recompense against the debtor. The first is that where the debtor is liable in damages (including the cost of discharge of cargo) for a deemed repudiation of the contract of carriage, a claim in recompense might well be excluded by the general (though not invariable) rule that recompense is a subsidiary remedy to be invoked normally only where the claimant had at the relevant time no other remedy.[4] The second possible impediment to a claim in recompense is that such a claim will generally not be upheld if the defender's enrichment is an incidental benefit arising from expense incurred by the claimant for his own benefit (*in suo*),[5] in this case the discharge of the cargo for his own benefit.

3.89 A claim in recompense would be most needed, and probably would only be competent, where no claim for damages lay, ie (if the foregoing analysis is correct) where the defender-owner of the ship was successful in defending his action and the arrestment was regarded as frustrating the contract of carriage of the cargo. In this type of case, it would be difficult to argue that the defender-owner of the ship has been unjustifiably enriched by the cargo-owner's discharge of the cargo. The defender-owner of the ship would be liable on the principle *causa data causa non secuta* to restore the advance of freight but probably not liable in recompense for the expenses of discharge of the cargo. Since the arrestment was used in the ordinary course of process, albeit on the dependence of an action which turned out to be unsuccessful, the third party cargo-owner would have no claim from the arresting pursuer for damages for the expense incurred in discharging the cargo.

3.90 *Ship chartered to third party arrested for owner's debt: expenses of charterer.* Where a ship is chartered to a third party and the ship is arrested for the owner's debt, similar considerations arise. If the arrestment were on the dependence of a successful action or in execution of a decree in such an action, it is probable that the failure of the debtor to pay his debts or to have the arrestment recalled timeously on caution or consignation would (by parity of reasoning with *The Jogoo*[6]) be treated as a deemed repudiation of the charter party. The third party charterer, on this view, would be entitled to claim from the debtor the expenses of discharging the cargo as an element in his claim for damages for breach of the charter-party.[7] If, however,

1. *Ibid* at pp 516 and 517 where Sheen J remarked: "I will assume that one result of the discharge of the cargo was that when *Jogoo* was subsequently sold by order of the Court, the price paid was higher than it would have been if the cargo had still been on board. Even on that assumption the interveners have no claim against the mortgagees, because there is no principle of law which requires a person to contribute to an outlay merely because he has derived a material benefit from it", citing *The Ruabon Steamship Co* v *London Assurance* [1900] AC 6.
2. Thus for example English law has no doctrine of *negotiorum gestio*.
3. See p 5, fn 10.
4. *Varney (Scotland) Ltd* v *Lanark TC* 1974 SC 245.
5. *Fernie* v *Robertson* (1871) 9 M 437 at p 442 per Lord Neaves; *Rankin* v *Wither* (1886) 13 R 903; *Site Preparations Ltd* v *Secretary of State for Scotland* 1975 SLT (Notes) 41; cf *Varney (Scotland) Ltd* v *Lanark TC* 1974 SC 245 at pp 251, 255, 260; *Lawrence Building Co Ltd* v *Lanark C C* 1978 SC 30 at pp 42, 43; 53 to 55.
6. [1981] 1 Lloyd's Rep 513: paras 3.86, 3.87 above.
7. He would probably not have a claim in recompense: see para 3.88 above.

the debtor-owner of the ship was successful in defending the action on the dependence of which the arrestment was laid, the charterer would probably not have a claim against him in recompense.[1] Again the third party charterer would have no claim against the arrester.[2]

(ii) Recommendations for reform

3.91 *Arrestment of ship on dependence of unsuccessful action: expenses of third party discharging cargo.* We have seen that where a ship belonging to the defender carrying the cargo of a third party is arrested on the dependence of an unsuccessful action, and in consequence of the arrestment the cargo-owner discharges the cargo, the third party cargo-owner, while entitled to repayment of an advance of freight, has no claim for reimbursement of the expenses incurred in discharging the cargo either against the debtor-owner of the ship or against the arresting pursuer.[3] In our Discussion Paper No 87 we provisionally proposed that the cargo-owner should be entitled to claim from the pursuer reimbursement of the reasonable expenses of discharging the cargo.[4] For similar reasons, we provisionally proposed that where a ship belonging to the defender and chartered to a third party is arrested on the dependence of an unsuccessful action, and in consequence thereof the charterer discharges the cargo, the charterer, being likewise without a remedy, should have a right to claim from the arresting pursuer his reasonable expenses incurred in discharging the cargo.[5]

3.92 On consultation, all those who commented agreed with these provisional proposals. The Faculty of Advocates, for example, observed that where the action is unsuccessful, the arresting pursuer should be liable to reimburse parties who had been put to expense as a result of the arrestment. We therefore adhere to these proposals.

3.93 We recommend:

Where:

(a) a ship belonging to the defender carrying the cargo of a third party is arrested on the dependence of an action which turns out to be unsuccessful; and

(b) in consequence of the arrestment, the cargo-owner, or where the ship is chartered the charterer, discharges the cargo, the cargo-owner or, as the case may be, the charterer should have a right to claim from the arrester reimbursement of the reasonable expenses incurred by him in discharging the cargo.

(Recommendation 10; Clause 4)

3.94 *Arrestment of ship on dependence of successful action or in execution: third party's expenses.* Where a ship belonging to the debtor carrying the cargo of a third party is arrested on the dependence of a successful action or in execution of a decree, and in consequence of the arrestment, the cargo-owner discharges the cargo, different considerations arise. It is likely that the cargo-owner would have a claim for damages against the owner of the ship for his deemed repudiation of the contract of carriage.[6] In our Discussion Paper No 87,[7] we suggested that there is something to be said for leaving the cargo-owner to his common law remedy. We remarked that in such a case, the moral responsibility for meeting the expenses of discharge of the cargo may be thought to lie with the debtor rather than the arrester whose action has been *ex hypothesi* successful or who has arrested in execution. The result would be that the cargo-owner's claim would rank as an ordinary debt on the surplus proceeds of the judicial sale of the ship after deduction of the arrester's expenses of sale and satisfaction of the arrester's debt. The alternative, (which was rejected in *The Jogoo*[8]) is to treat the expenses of discharge of the cargo as part of the expenses of sale and thus having priority over the arrester's claim but recoverable by the arrester out of the proceeds of sale.

1. See para 3.89 above.
2. See para 3.88 above.
3. See para 3.89 above.
4. Discussion Paper No 87, Proposition 12(1) (para 3.93).
5. *Ibid*, Proposition 13(1) (para 3.96).
6. See para 3.87 above.
7. Discussion Paper No 87, para 3.92.
8. [1981] 1 Lloyd's Rep 513: see para 3.87 above.

3.95 We therefore sought views on the question whether the cargo-owner's reasonable expenses in discharging the cargo should:

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

(b) found a claim by the cargo-owner against the arrester and be recoverable by the arrester from the debtor ship-owner as part of the expenses of diligence and as such rank *pari passu* with the other expenses of the judicial sale as a prior debt on the proceeds of sale.[1]

We also sought views on the same options in the similar case arising where a ship belonging to the debtor and chartered to a third party is arrested on the dependence of a successful action or in execution and in consequence thereof the charterer discharges the cargo.[2]

3.96 On consultation, two respondents thought that the third party (ship-owner or charterer) should have a claim against the arrester of the ship for the expenses of discharging the cargo with the effect that the claim would have priority as part of the diligence expenses in the proceeds of sale of the ship. Other consultees however thought that the third party should be left to his common law claim. Approaching the question from the standpoint of principle, the Faculty of Advocates remarked:

> "Where the action is successful the arresting creditor should *not* be liable to any third party who may have been affected by the arrestment. To give third parties a right against the arresting creditor would be to give the third parties a preference over the arresting creditor which would be inconsistent with the underlying objective of the diligence which is to secure an advantage for the arresting creditor over other creditors". (emphasis in original).

In similar vein, Messrs Mackinnons, solicitors and advocates in Aberdeen, observed that:

> "it will frequently be the case that in circumstances where a vessel has been arrested its owners may have a number of other debts outstanding, and there may accordingly be a number of other creditors all seeking to rank upon the free proceeds of sale of the vessel. If the suggestion inherent in [Proposition 12(2)(b)][3] is accepted then this would have the effect that the owner of the cargo is put in a better position with regard to his claim against the vessel owners for the expense incurred in discharging the cargo than other equally deserving creditors of the vessel owner. We do not consider that the cargo owner in that situation should be entitled to be put in any better position than other creditors. We cannot see that, for the purposes of determining priority, his claim should be treated any more favourably than that of a creditor who has supplied goods to the vessel owner, and the vessel owner, in breach of the contract of sale and purchase, has not made payment. We do not see that the cargo owner in that situation ought to have his claim for the cost of discharging the cargo paid in full, while other creditors may rank for a small dividend, or indeed receive nothing at all".

3.97 Approaching the question from the standpoint of the availability of insurance against the risk of arrestment, the Joint Committee[4] said:

> "that the cost incurred by the cargo owner in discharging the cargo from the arrested ship is very similar in type to the cost which would be incurred by the cargo owner in the event of the ship being detained for some other reason or being unable to sail because of mechanical defect or the like.
>
> In these circumstances, it seems to the Joint Committee that no special arrangement should be made for payment by the arrester and that the claim for these costs should be a claim by the cargo owner against the debtor.

1. Discussion Paper No 87, Proposition 12(2) (para 3.93).
2. Discussion Paper No 87, Proposition 13(2) (para 3.96).
3. See para 3.95 above, option (b).
4. See p 19, fn 4.

It seems to the Joint Committee that it should be fairly simple for the cargo owner to insure his goods in a way which would cover this cost, as he no doubt already does to cover the cost of discharging the cargo and having it carried by other carriers in the event of the ship being detained for other reasons."

3.98 We agree with these remarks and accordingly we recommend:

(1) Where:

(a) a ship belonging to the debtor carrying the cargo of a third party is arrested on the dependence of a successful action or in execution; and

(b) in consequence of the arrestment the cargo-owner, or if the ship is chartered the charterer, discharges the cargo,

the cargo-owner or, as the case may be, the charterer should not be entitled to claim the expenses of discharging the cargo from the arresting pursuer or creditor.

(2) It is thought that at common law, the debtor's failure to pay the debt or have the arrestment timeously recalled on caution or consignation would be treated as a deemed repudiation of his contract with the cargo-owner or charterer, giving rise to liability in damages for the expenses of discharging the cargo, and accordingly that it is unnecessary for provision to be made by statute giving the cargo-owner or charterer a remedy against the debtor for reimbursement of those expenses.

(Recommendation 11)

(c) Arrestment of cargo on board ship: expenses of arrestee (ship-owner or charterer) discharging cargo

3.99 *The present law.* We have seen that an arrestment is the only competent diligence for attaching cargo on board ship. Where the owner of the cargo is also owner or charterer of the ship, an arrestment in his hands is therefore competent.[1] In such a case, the arrestee is not an "innocent" third party not concerned with the litigation or debt and accordingly the case falls outside the scope of this Report. In the usual case, the cargo is not owned by the arrestee shipowner or charterer who is in the same position for present purposes as an arrestee in whose hands corporeal moveables are arrested. It is this type of case with which we are concerned in this and the following paragraphs. Where cargo on board a ship about to sail is arrested in the hands of the ship-master (representing the ship-owner or charterer) for the debt of the cargo owner, the arrestee ship-owner or charterer may incur expense in discharging the cargo to allow the ship to sail and other expenses arising out of the restriction against moving the ship out of the territorial jurisdiction of the court with the cargo on board.[2] The law as to expenses applicable to this class of case appears to be the same as in the case of other arrestments of corporeal moveables in the hands of a third party.[3] In other words, the arrestee must comply with the arrestment and is not entitled to claim reimbursement of his expenses from the arrester. The ship-owner or charterer arrestee may however have a contractual remedy to recover his expenses or damages from the owner of the cargo on the ground of a deemed repudiation by the owner of the contract of carriage by parity of reasoning with *The Jogoo* [4]at least in a case where the arrestment is either on the dependence of a successful action or in execution.

3.100 *Recommendations for reform.* In our Discussion Paper No 87 we provisionally proposed that if the expenses of complying with an arrestment of corporeal moveables were to be recoverable by the arrestee from the arrester, then that proposal should in principle apply to a ship-owner or charterer arrestee who complies with an arrestment of cargo by discharging and warehousing the cargo. We were unable to suggest any ground on which an exception should be made from the proposed new rule.[5] We further provisionally proposed that where the arrester of a ship's cargo for the debt of the cargo owner is entitled to recover the expenses of the arrestment out of the proceeds of a judicial sale of the cargo, (ie. where the arrestment is on the dependence

1. See para 2.4 above, last fn .
2. eg *Svenska Petroleum AB* v *HOR Ltd* 1982 SLT 343.
3. See para 2.9.
4. [1981] 1 Lloyd's Rep 513: see paras 3.86 and 3.87 above.
5. Discussion Paper No 87, para 3.98; Proposition 14(1) (para 3.101).

of a successful action or in execution), the arrester should be entitled to include in those expenses the expenses of the arrestee for which the arrester is liable.[1]

3.101 On consultation all but one of those who commented agreed with the foregoing proposals. The Faculty of Advocates remarked:

> "Where the action is successful the arresting creditor should be liable, in the first instance, to pay the *arrestee* his expenses directly arising from the arrestment, any sum so paid being recoverable as a prior debt on the proceeds of sale. The justification for this is that the arresting creditor will have benefited from this expenditure and should therefore reimburse it" (emphasis in original).

The Joint Committee[2] also emphasised the benefit to the arrester as a justification for the arrestee's right to recover expenses. They distinguished between the case where cargo is arrested and the arrestee discharges and preserves the arrested cargo from the case where a ship is arrested and a third party discharges her cargo. As we have seen,[3] in the latter case they argued that the third party should not have a claim for expenses against the arrester. As to the former case, they observed that:

> "it is in the interests of the arrester that the arrested cargo be discharged and kept in safe custody within the jurisdiction until settlement has occurred between the debtor and arrester.
>
> Accordingly the Joint Committee agrees that the costs incurred by the ship-owner or charterer in discharging the cargo and arranging thereafter for the cargo to be kept in safe custody should be borne by the arrester and should form part of the expenses of the diligence...".

3.102 It is clear that where the cargo is arrested for the cargo-owner's debt, and as a consequence of the arrestment the arrestee ship-owner or charterer discharges and preserves the cargo, the arrester is indeed benefited. Where the arrestment is executed when the ship is about to sail, since it is the cargo and not the ship herself which is arrested, the ship must be allowed to sail out of the jurisdiction without the cargo on board. The discharge and preservation of the cargo by the arrestee within the jurisdiction is therefore an essential prelude to a judicial sale to satisfy the arrester's debt. The expenses of discharge and preservation would not have been incurred but for the arrestment. Where the cargo is arrested at the port of discharge, where it was going to be unloaded anyway, the discharge of the cargo is not attributable to the arrestment, and only the expenses of preserving the cargo so far as attributable to the arrestment should be chargeable by the arrestee against the arrester.

3.103 It might be objected, on the other hand, that where a ship is arrested for the owner's debt and a third party (cargo-owner or charterer) discharges the cargo, the arrester is also benefited because in the judicial sale the ship will fetch a higher price without the cargo on board. Yet we have argued that a third party should not have a claim. Why this difference? The answer to this objection seems to be that, as we have seen,[4] by parity of reasoning with the rule on improvements to security subjects, the enhancement of the sale-value of an arrested ship does not ultimately benefit the arrester who never receives more than his debt from the proceeds of sale of the ship, but rather benefits the debtor because the enhancement in the price on sale either reduces his indebtedness or is paid to him as the surplus proceeds of sale. We think that this difference justifies rules allowing an arrestee's claim against the arrester for expenses where cargo is arrested and disallowing the third party's claim against the arrester where the ship is arrested.

3.104 This solution would mean that the expenses of the arrestee ship-owner or charterer would be treated as part of the expenses of the arrestment and have priority along with the other expenses of the diligence in any ranking on the proceeds of sale. We have seen that if the arrestment of cargo were on the dependence of a successful action or in execution, the expenses incurred by the arrestee ship-owner or charterer

1. *Ibid*, para 3.99, Proposition 14(2) (para 3.101).
2. See p 19, fn 4.
3. See para 3.97 .
4. See para 3.88.

in discharging and preserving the cargo might be treated as an element in a claim of damages by the arrestee against the cargo-owner for his deemed repudiation of the contract of carriage. One consultee argued that the arrestee should rely on this remedy rather than a statutory claim for expenses against the arrester since, in their view, the arrestee should not have priority over other creditors on the proceeds of the judicial sale of the cargo. In strict analysis, however, the claim for expenses as a prior charge on the proceeds of sale is a claim by the arrester for reimbursement of expenses paid to the arrestee, not a claim by the arrestee. Moreover in principle the arrestee's expenses are undoubtedly part of the expenses of the arrestment and should be treated in the same way as the other expenses of the arrestment.

3.105 We propose that the same substantive and procedural rules recommended for expenses in maintaining and preserving non-maritime subjects should apply with any necessary modifications in relation to arrestment of cargo.

3.106 We recommend:

(1) Where cargo on board ship is arrested for the debt of the cargo-owner, and the arrestee is not the same person as the cargo-owner, the arrestee should be entitled to claim, in addition to the flat rate fee paid on or before execution of the arrestment, compensation from the arrester for any expenses necessarily incurred by him in discharging the cargo from the ship or in maintaining or preserving the cargo but only insofar as those expenses would not have been incurred but for the arrestment.

(2) The recommendations in paragraphs (2) to (6) of Recommendation 8 (para. 3.81) above should apply in relation to a claim such as is mentioned in the preceding paragraph.

(Recommendation 12; Clause 3)

(4) Exemptions from statutory fees for arrestees?

3.107 *Preliminary*. In our Discussion Paper No 87 we sought views on whether any classes of arrestment should be exempted from the proposed system of statutory fees for arrestees.[1] On consultation, there was general agreement with our provisional view that there should be no such exemption, except that as mentioned below one consultee pressed for an exemption for community charge arrestments and another consultee suggested an exemption for arrestments in pursuance of restraint orders under the Criminal Justice (Scotland) Act 1987. The main possible types of exemption seem to be as follows.

3.108 *Small debts*? One possibility which we canvassed was to exempt arrestments enforcing debts of a small or very small amount.[2] We rejected this proposal on the ground that since the amount of work involved in complying with an arrestment does not vary with the size of the debt which the arrestment enforces, the arrestee's fees should be the same whether the debt were small or great. Moreover, in a system of flat rate fees for pecuniary debts, the level of fee would not vary with the amount of work done by the arrestee and we see no reason why it should vary with the amount of the debt.

3.109 *Fiscal debts*? In some respects, fiscal debts (such as arrears of taxes, rates and community charges, and civil penalties connected with such fiscal debts enforceable in the same manner, ie penalties for failure to provide information to a community charge registration officer[3]) have certain privileges in the domain of enforcement of debt by diligence. It is for example not competent for the courts to make time to pay directions or time to pay orders in respect of such fiscal debts and penalties (ie

1. Discussion Paper No 87, paras 3.60 to 3.67, Proposition 9 (para 3.68).
2. For statistics of arrestments relating to small claims (upper limit £750) and summary causes (upper limit £1,500) in July 1991, see Table D (para 2.29) and Table E (para 2.30). The average arrears of community charge sought to be attached by arrestments served on the four clearing banks was £292 in that month.
3. Abolition of Domestic Rates Etc (Scotland) Act 1987, s 17(10) and (11): s 17(11) provides that the civil penalty "shall be a debt due to the regional or islands authority, recoverable by them as such as if it were arrears of community charges...".

orders giving tax, rates or community charge defaulters an extension of time to pay in a lump sum or by instalments free of the immediate threat of diligence).[1] Again the Inland Revenue still have a preference for payment of certain taxes out of other people's diligences,[2] and some fiscal debts have preferences in bankruptcy sequestrations and liquidations.[3] Moreover the public authorities recovering arrears of rates, taxes and community charges may obtain summary warrants (authorising *inter alia* arrestment) on the basis of a certificate of arrears without the need for a court action.[4]

3.110 On consultation the Solicitor to Strathclyde Regional Council observed that where the Council is seeking to recover unpaid community charge, after grant of a summary warrant, recovery is being made in the public interest, and accordingly the Council should not require to pay a statutory fee to arrestees.

3.111 On the other hand, as we pointed out in Discussion Paper No 87,[5] the recent legislative trend has been towards restricting the extent of privileges for fiscal debts.[6] Moreover the arguments favouring such privileges,[7] such as that the public authorities recovering arrears of fiscal debts do not choose their debtors, do not seem to us to warrant a rule conferring on arrestments securing fiscal debts immunity from the charging of fees by arrestees. No mode of enforcement, equivalent to Scottish arrestments of funds other than earnings, is available in the procedures in England and Wales for enforcing liability orders for the recovery of arrears of community charge since garnishee orders are not included among those procedures[8] so there is no precise English precedent which may be relied on in considering whether community charge arrestments should be in a special position. We note however, that attachment of earnings orders enforcing community charge arrears in England and Wales provide for a fee for employers of £1 on each occasion on which a deduction is made from earnings.[9] Moreover, no immunity from statutory fees for garnishees applies to garnishees complying with garnishee orders enforcing fiscal judgment debts in England and Wales[10]. We are informed that the Inland Revenue in England and Wales use garnishee orders in a very small number of cases, normally less than 10 every year. Nevertheless the principle of exemption for Inland Revenue debts is not recognised by statute. Furthermore, there is no immunity from fees for employers complying with arrestments enforcing fiscal debts in Scotland.[11] We consider that the public interest would be satisfied by fixing the level of fees for arrestees at a moderate amount below the economic cost of complying with an arrestment, and we do not think that arrestees should in addition be expected to forego fees for complying with community charge arrestments and in effect to subsidise them. In recent times over half of arrestments served on the 4 Scottish clearing banks have been used to enforce community charge arrears pursued by summary warrant. In the year to 30 June 1991, the proportion was 56.49%.[12] In July 1991, the proportion was 59% and a further 6% were used to enforce either arrears of central government taxes (1%) or local

1. See Debtors (Scotland) Act 1987, ss 1(5)(d) to (f) and 5(4)(c) to (f) both as amended by the Abolition of Domestic Rates Etc (Scotland) Act 1987, s 33.
2. Taxes Management Act 1970, s 64 as amended by the Finance Act 1989, s 155: see Scot Law Com No 95 (1985) Recommendation 7.19 (para 7.106) recommending abolition of this provision as originally enacted. Our recommendation for abolition of the comparable provision for rates was implemented by the Debtors (Scotland) Act 1987, s 74(4) and Sch 8. See generally Maher and Cusine, para 8.17.
3. Bankruptcy (Scotland) Act 1985, s 51 (1) and (2) and Sch 3; Insolvency Act 1986, s 386 and Sch 6.
4. See the statutes referred to at p 58, fn 1 below.
5. Discussion Paper No 87, para 3.64.
6. The local authorities' preferences for unpaid rates and the Inland Revenue's preferences for unpaid income tax, corporation tax and capital gains tax have been abolished by exclusion from the provisions referred to at para 3.109 above. The remaining preferences relate to those fiscal debts where the debtor may be regarded as a collector on behalf of the state, eg VAT, car tax and gaming duties and certain social security contributions.
7. There are canvassed and criticised in our Reports on *Bankruptcy and Related Aspects of Insolvency and Liquidation* Scot Law Com No 68 (1982) para 15.3 ff and in the Report of the Review Committee on *Insolvency Law and Practice* (1982) Cmnd. 8558, Chapter 32, (Chairman, Sir Kenneth Cork.)
8. See Local Government Finance Act 1988, Sch 4; Community Charges (Administration and Enforcement) Regulations 1989, Part IV (SI 1989/438).
9. Community Charges (Administration and Enforcement) Regulations 1989, reg 34(1). (SI 1989/438).
10. See Supreme Court Act 1981, s 40A; County Courts Act 1984, s 109.
11. Debtors (Scotland) Act 1987, s 71.
12. See para 2.28 and Table C.

goverment rates (5%).[1] A significant proportion of arrestments served on other types of arrestee relate to fiscal debts. In July 1991, the proportion relating to arrestments under summary warrant was 26%.[2] It is clear that arrestees, especially the Scottish clearing banks, would suffer a very considerable loss of fee-income as a result of the proposed exemption. Having regard to the fact that the clearing banks and other arrestees are in no way responsible for either the imposition of the charge or the defaulter's failure to pay, but are simply in the position of innocent citizens required to comply with the arrestment, we do not think that the proposed exemption would be justifiable.

3.112 *Arrestments rendered ineffectual by bankruptcy proceedings?* Under the legislation in England and Wales providing for fees for garnishees, it is provided that the statutory fee may not be deducted or retained by the garnishee if by reason of certain provisions of the Insolvency Act 1986[3], the creditor is not entitled to retain the benefit of the attachment.[4] Under the Insolvency Act provisions, where a creditor has attached debts due to a debtor individual or company, and subsequently the individual is adjudged bankrupt or the company is wound up, the creditor is not entitled to retain the benefit of the attachment against the official receiver or trustee of the bankrupt's estate or the liquidator of the company, unless the creditor has completed the attachment before the commencement of the bankruptcy or winding up.[5]

3.113 Under the corresponding Scottish provisions, however, which render arrestments ineffectual to create a preference for the arrester where sequestration in bankruptcy or winding up of a company occurs within 60 days after the execution of the arrestment[6], the arrester is entitled to claim the expenses of executing his arrestment out of the arrested estate[7], notwithstanding that his arrestment has been rendered ineffectual. Since the fees chargeable by the arrestee would be part of the expenses of the arrestment, it follows that in principle the arrester should be entitled to claim them along with other arrestment expenses in subsequent sequestration or liquidation proceedings against the common debtor. We do not see why the fees of the arrestee should not be chargeable by reason only of the fact that the arrestment is subsequently rendered ineffectual in a question with the trustee in bankruptcy or liqidator. The purpose of the statutory rules is to preserve equality among the general body of creditors, including those whose arrestments are "cut down" by subsequent insolvency proceedings, and there seems to be no good reason to provide an exception to the ordinary rules on expenses in order to penalise an arrestee for the benefit of the general body of creditors. On consultation, there was no dissent from these views[8] and we therefore adhere to them.

3.114 *Statutory instruments excluding institutions?* We have already noted[9] that in England and Wales the Lord Chancellor is empowered to make an order by statutory instrument excluding institutions described in the order from the power to charge fees for complying with garnishee orders[10] but that the power has never been exercised. On consultation there was no dissent from our conclusion that a corresponding power is unnecessary in Scotland.

3.115 We recommend:

(1) No exemptions from the statutory fees for deposit-taking institutions complying with arrestments should be provided in respect of small debts, or of arrears of taxes, rates or community charge, or of cases where an arrestment is rendered ineffectual by subsequent insolvency proceedings against the common debtor.

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1. See para 2.29 and Table D.
2. See para 2.30 and Table E; 20% community charge; 3% rates; 3% taxes.
3. Insolvency Act 1986, s 183 (companies) and 346 (individual bankrupts).
4. Supreme Court Act 1981, s 40A(2); County Courts Act 1984 s 109.
5. *Idem.*
6. Bankruptcy (Scotland) Act 1985, s 37(4); Insolvency Act 1986, s 185.
7. Bankruptcy (Scotland) Act 1985, s 37(5); Insolvency Act 1986, s 185.
8. See Discussion Paper No 87, paras 3.65 and 3.66.
9. See para 2.17 above.
10. Supreme Court Act 1981, s 40A(4)(c); County Courts Act 1984 s 109(4)(c).

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

(Recommendation 13)

(5) Arrestees' fees for complying with arrestments under warrants in special statutory procedures

3.116 A question which was not canvassed in Discussion Paper No 87 is whether statutory fees for arrestees should be chargeable where arrestments are used (a) under warrants for civil diligence granted in criminal proceedings; or (b) to attach moveables affected by a new type of statutory order made by the Court of Session, called a restraint order, which itself is ancillary to a confiscation order or a forfeiture order made in criminal proceedings.

(a) Arrestments under warrants for civil diligence in criminal proceedings

3.117 In criminal proceedings, the court may grant warrant for recovery of certain sums by civil diligence, including:

(a) fines due by offenders, especially bodies corporate and unincorporate, but also individuals;[1]

(b) caution for good behaviour which has been forfeited;[2]

(c) expenses awarded against an accused in summary prosecutions;[3] and

(d) sums due under compensation orders requiring the offender to compensate the victim of his crime for the resulting personal injury, loss or damage.[4]

Generally speaking these sums must be paid to the clerk of court who must account for them to the person entitled thereto.[5]

3.118 Civil diligence in such cases is carried out by sheriff officers acting on the instructions of the clerk of court responsible for recovering the sums. No special provision is made in respect of the fees for executing the diligence. These therefore have to be paid by the clerk of court to the sheriff officer from public funds, and may be recovered as expenses from the proceeds of the sale of poinded or arrested goods or from arrested sums made furthcoming by the arrestee to the clerk of court. It seems to us that if the fees of sheriff officers have to be paid by clerks of court from public funds, the recommended fees of arrestees should also be so paid. It would not be right to discriminate against arrestees by disallowing payment of their fees.

3.119 We recommend:

Where an arrestment is used in pursuance of a warrant for civil diligence granted by a court in criminal proceedings to enforce the payment of a sum decerned for in those proceedings (including a fine, caution, expenses or a sum due under a compensation order), the arrestee should be entitled to payment of the fee recommended above as if the sum had been decerned for in civil proceedings.

(Recommendation 14; Clause 8(3))

(b) Arrestments of moveable property affected by statutory restraint orders

3.120 Another type of arrestment is the creation of recent statutes. The Criminal Justice (Scotland) Act 1987 Part I empowers the courts to order the confiscation of proceeds made from certain drug trafficking offences and provides for the tracing and freezing of assets. The Act enables the Court of Session to grant "restraint orders" pending criminal proceedings, the effect of which is to prohibit the accused person,

1. Criminal Procedure (Scotland) Act 1975, s 333(a); 411(1).
2. *Ibid*, s 303(1)(c); 304(3).
3. *Ibid*, s 435(g).
4. Criminal Justice (Scotland) Act 1980, s 66(1); only the court may enforce compensation orders, *ibid* s 60(2).
5. Criminal Procedure (Scotland) Act 1975, s 412 (fines and expenses); Criminal Justice (Scotland) Act 1980, s 60(1) (compensation orders). But fines imposed in the High Court are payable to HM Exchequer: 1975 Act, s 203.

and certain other persons, from dealing with realisable property.[1] The Act also enables the Court of Session to grant warrant for the arrestment of moveable realisable property affected by a restraint order.[2] There are similar cross-border provisions in the Criminal Justice Act 1988.[3]

3.121 The Prevention of Terrorism (Temporary Provisions) Act 1989, applying throughout the United Kingdom, makes it an offence to deal with terrorist funds or to facilitate their retention or control. The Act enables the court, on conviction of any of those offences, to make a "forfeiture order" which orders the forfeiture of any money or property in the possession or control of the convicted person at the time of the offenceThe Court of Session is empowered to make a restraint order prohibiting a person specified in the order from dealing with property liable to forfeiture in pending criminal proceedings or which has been forfeited under a forfeiture order.[5] Moreover, the Court of Session may grant warrant for arrestment of moveable property affected by a restraint order.[6]

3.122 We were informed that as at the end of August 1990, 8 restraint orders had been made under the Criminal Justice (Scotland) Act 1987 and an arrestment had been used in each case. Such arrestments may become more widespread if legislation is eventually enacted introducing a general power to make confiscation orders, coupled with an ancillary power to make restraint orders, as provisionally proposed in our Discussion Paper No 82 on *Forfeiture and Confiscation*.

3.123 On consultation, one respondent submitted that statutory fees for arrestees should not be chargeable in respect of an arrestment which is accessory to a restraint order. It was argued first that the main reasons for introducing such fees adduced in Discussion Paper No 87-namely the high percentage of abortive arrestments and the substantial work involved in the head and branch offices of banks tracing accounts held in any branch-did not apply to arrestments ancillary to restraint orders. We were informed that it is not the practice of the Crown to use "fishing arrestments" in connection with restraint orders. Rather, an arrestment is only used when it is known, following upon investigation in terms of sections 38 and 39 of the 1987 Act, both that there are funds at a particular account at a particular branch and that those funds are substantial enough to justify the use of an arrestment. The arrestment is served on the branch concerned, specifies the account with great precision, and attaches all funds in the account. The arrestee therefore only requires to freeze the account and does not require to trace funds. Second, in relation to drug trafficking it was said that on the intimation of a restraint order to a financial institution, section 43 of the 1987 Act[7] would arguably make it an offence for that institution or its officers to allow funds to be withdrawn from the account. If that interpretation of that section is incorrect, an informal "freezing" by the institution of the account would place the institution at risk of successful litigation by the account holder. In that state of uncertainty, it was said that the arrestment puts the duties of the institution beyond doubt and thus is a benefit rather than a burden from the arrestee's standpoint. Third, it was argued on public policy grounds that it is every citizen's duty to assist in the proper prosecution of crime, and he should not be entitled to a fee for doing a public duty. It was observed that no fee is payable to an arrestee for work which he is required to do by an inspection under sections 38 and 39 of the 1987 Act, or a warrant under the Bankers' Book Evidence Act 1879 or a common law search warrant, even though the work involved is much more substantial than that involved in complying with an arrestment ancillary to a restraint order.

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1. Criminal Justice (Scotland) Act 1987, ss 8 to 12.
2. *Ibid*, s 11(1)(b).
3. Under Part VI of the 1988 Act a restraint order made by the High Court in England and Wales (ancillary to a confiscation order relating to the proceeds of an offence) may be recognised in Scotland and enforced by an arrestment under section 92 of that Act.
4. Prevention of Terrorism (Temporary Provisions) Act 1989, s 13(2)(3)(4).
5. *Ibid*, Sch 4, para 13.
6. *Ibid*, Sch 4, para 16(1)(b).
7. This section makes it an offence for a person to assist another person to retain the proceeds of drug trafficking.

3.124 Although the question of fees for arrestees obtempering restraint order arrestments may possibly be important from the standpoint of principle, as setting a precedent for the payment of fees to persons assisting in the prosecution of crime, it is by itself of minimal practical importance in the normal case of an arrestment of an accused person's bank account, or pecuniary debt due to such a person, because of the relatively low level of fee (£10) which we now recommend and the relative rarity of such arrestments. The minimal importance, however, could be used as an argument for or against applying the recommended normal fee to restraint order arrestments. It should be noted on the other hand that restraint order arrestments could be used to attach corporeal moveable property and in such a case the arrestee might be put to considerable expense in maintaining and preserving the arrested property. While it is readily conceded that citizens have a moral duty to assist in the proper prosecution of crime, the extent of their duty to do so gratuitously is a matter of degree and it is arguable that necessary expenses incurred in obtempering a binding arrestment of corporeal moveables in connection with a restraint order should be chargeable against the public purse. In these circumstances we have, with some hesitation, concluded that a compromise solution might strike a proper balance between the public interest and the interests of arrestees. We suggest that the flat rate fee should not be chargeable by an arrestee for obtempering a restraint order arrestment but that where the property arrested consists of corporeal moveables, the arrestee should be entitled to claim the necessary expenses incurred in maintaining and preserving those moveables.

3.125 We recommend:

(1) Where corporeal moveables are arrested in pursuance of a warrant for the arrestment of moveable property affected by a restraint order ancillary to a confiscation order or forfeiture order made under any enactment, the arrestee should be entitled to claim compensation from the arrester for any expenses necessarily incurred by him in maintaining or preserving those moveables but only if or insofar as those expenses would not have been incurred but for the arrestment.

(2) The claim should be made in the first instance to the Crown Office representing the Lord Advocate as the arrester, and if the claim or its amount is disputed, it should be referred to the Auditor of the Court of Session for determination subject to an appeal to a Lord Ordinary.

(Recommendation 15; Clause 6)

Part IV Other Reforms

Preliminary

4.1 We conclude this Report by discussing two matters which are to some extent related to statutory fees for arrestees but which concern reforms that could be enacted whether or not statutory fees for arrestees are introduced. These are reform of the law relating to, first, the rights and duties of an arrestee to disclose the existence or extent of funds or moveables arrested in his hands notwithstanding that he owes a duty of confidentiality to the debtor, and, second, the question whether an arrester has a right to recover the expenses of an abortive arrestment, ie one which does not attach any funds or moveables.

(1) Disclosure by arrestee to arrester of existence or extent of funds or property arrested

(a) The present law

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

4.3 Where the arrestee (such as a bank)[3] owes the common debtor a duty to maintain confidentiality concerning the existence or extent of funds or property held by the arrestee on the debtor's behalf, it may be that in certain circumstances the arrestee cannot disclose to the arrester whether an arrestment has attached anything, without breaching that duty of confidentiality. It is understood that in practice the Scottish banks will not disclose whether anything has been attached by an arrestment on the dependence,[4] but will disclose what sum has been attached by an arrestment in execution, or its equivalent an arrestment on the dependence which has been converted by decree for payment into an arrestment in execution.[5] On consultation the Committee of Scottish Clearing Bankers accepted that this was their general practice though the Faculty of Advocates affirmed that the practice is not invariable and that banks will sometimes withhold information. A creditor holding an arrestment in execution can enforce payment by the arrestee by an action of furthcoming whereas a creditor arresting on the dependence does not, or not yet, have that right. According to a standard text-book on banking law in Scotland:[6]

> "It is the duty of a bank if it has any funds in its hands belonging or owing to the common debtor to disclose the amount of these to the arrester to enable a proper action of furthcoming to be raised. It should be noted that the bank's duty of confidentiality prevents it from disclosing details of its customer's affairs where the

1. Graham Stewart, p 229.
2. *Veitch* v *Finlay and Wilson* (1893) 10 Sh Ct Rep 13. In this case (in which the arrestee was a firm of solicitors) the sheriff observed (at p 14): "In many cases it may be very reasonable for the arrestee to inform the arrester before the action of furthcoming has been raised that he has not funds belonging to the common debtor,...". But questions of confidentiality were not in issue or at least were not canvassed in the judgment.
3. *Tournier* v *National Provincial and Union Bank of England* [1924] 1 KB 461.
4. Wilson *Debt* p 160.
5. *Ibid* p 225.
6. Wallace and McNeil, p 209.

arrestment is on the dependence of an action since the customer's liability to the arrester has not been judicially determined".

No authority is cited for these propositions. The proposition that a bank complying with an arrestment in execution has a legal duty to disclose the amount of funds arrested is not reconcilable with the authority in the previous paragraph that an arrestee has no legal duty to disclose that nothing has been arrested. Moreover, one of the objects of an action of furthcoming is to ascertain the extent of the debt due by the arrestee to the common debtor or the goods in the arrestee's hands.[1] It is difficult therefore to base the alleged duty of a bank arrestee to disclose funds arrested in execution on the motive of enabling a proper action of furthcoming to be raised by the arrester. In the leading *Tournier* case[2] establishing a bank's duty of secrecy or confidentiality with respect to its customer's accounts, certain exceptions to the scope of the duty were recognised. In a passage regarded as the classic exposition of the exceptions, Bankes L J said[3]:

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

The example given of the first category was the duty to obey an order under the Banker's Books Evidence Act 1879.[4] An analogy would be the duty of a bank arrestee to disclose the amount arrested in an action of furthcoming. Such a duty is implicit in the very objects of an action of furthcoming which include the ascertainment of the amount arrested.[5] Where an arrestment in execution is used, compulsion of disclosure by law has not yet been imposed, but it may be regarded as imminent since disclosure may be compelled in an action of furthcoming, and it may be that such imminence would suffice to bring the disclosure within the exception of compulsion by law. The matter is not, however, free from doubt.

4.4 Probably the only other category of exceptions from the duty of confidentiality which might conceivably be relied on is the third, viz where disclosure is in the interests of the bank. The example of the third class given by Bankes L J in the *Tournier* case[6] is where a bank issues a writ [or in Scotland raises a summons or initial writ] claiming payment of an overdraft stating on the face of the writ [or summons] the amount of the overdraft. There is, however, a dearth of other authority explaining the scope of this exception. It is true that a bank holding arrested funds has an interest in avoiding being sued in an action of furthcoming. It is also true that *Tournier*, being an English case, would scarcely be likely to deal with the special considerations applicable to the distinctive case of Scottish arrestments. Nevertheless it is not clear that the arrestee's interest is sufficiently substantial under the present law to entitle a bank to disclose to an arrester an amount arrested in execution.

(b) Recommendations for reform

4.5 As we indicated above, it is the practice of the Scottish clearing banks to preserve confidentiality as to whether an arrestment on the dependence laid in their hands has attached any funds and, if so, what amount. It is also their general (but perhaps not invariable) practice to disclose that information if the arrestment is in execution or its equivalent, an arrestment on the dependence converted by decree for payment into an arrestment in execution. Whatever the true effect of the common law may be, we think that that practice is sensible and practical. Presumably in most cases the common debtor would authorise the arrestee bank to disclose the funds arrested or himself disclose that information, and indeed give a mandate for paying those funds without furthcoming or himself pay the funds, all to prevent him incurring

1. Graham Stewart, p 226. This is accepted by Wallace and McNeil, *loc cit.*
2. *Tournier* v *National Provincial and Union Bank of England* [1924] 1 KB 461. For other cases (not concerning bankers) holding that the duty of condfidentiality is subject to the overriding duty to the court in the public interest, see eg *Parry-Jones* v *Law Society* [1968] 1 All E R 177; *W* v *Eqdell* [1989] 2 WLR 689.
3. *Ibid* at p 473.
4. *Idem*. Many other examples are collated in the Report of the Review Committee on *Banking Services: Law and Practice* (1989) Cm 622, (chairman, Professor R B Jack CBE) para 5.07 and Appendix Q.
5. Graham Stewart, p 226, cited above.
6. [1924] 1 KB 461 at p 473.

further liability for the expenses of an action of furthcoming. Where, however, the common debtor refuses or delays in authorising disclosure or payment, the arrestee as well as the common debtor may be sued in an action of furthcoming and therefore the arrestee has an interest to disclose the existence (if any) and amount of the funds and property arrested. Since the arrester can compel disclosure in an action of furthcoming, there is no good reason why the arrestee should not be entitled to make the disclosure to the arrester before such an action is raised. It would, in our view, be unsatisfactory to require an arrester to raise an action of furthcoming for the sole purpose of discovering that no funds or property had been attached by the arrestment.

4.6 For these reasons, in our Discussion Paper No 87[1], we suggested that the arrestee's interest should be regarded as sufficient to override any duty of confidentiality which the arrestee may owe to the common debtor. Any legislation clarifying the matter should not be confined to banks or other deposit-taking institutions but should extend to any arrestee, such as a firm of solicitors, in whose hands an arrestment in execution has been laid. We note that the Report of the Review Committee on *Banking Services: Law and Practice*[2] recommended a statutory codification and consolidation of the law on the banker's duty of confidentiality based on the *Tournier* exceptions and, that in the proposed legislation the third *Tournier* exception ("where the interests of the bank require disclosure"), would include *inter alia* cases of "disclosure to a court in the event of legal action to which the bank is a party".[3] This does not seem wide enough to cover arrestments in execution prior to the raising of an action of furthcoming. We provisionally proposed in Discussion Paper No 87 that it should suffice that the arrestee would have a right (or immunity from damages for breach of confidence) to disclose to the arrester the existence (or non-existence) and extent of any funds and property attached, rather than a duty owed to the court or arrester.

4.7 On consultation proposals on these lines were supported by all consultees but some modifications were suggested. In the light of these suggestions, we recommend some changes to our original proposal.

4.8 *Arrestee's duty or right of disclosure.* The Joint Committee of the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers argued that it would not suffice merely to provide that the arrestee would not be in breach of any duty of confidence in disclosing the information. They suggested that the arrestee should be obliged to produce the information (both in regard to arrestments on the dependence and arrestments in execution). The Faculty of Advocates argued in favour of a duty of disclosure applicable to arrestments in execution and after decree an arrestment on the dependence, remarking that for the arrestee "to withhold the information is simply to put the creditor to the expense of a possibly fruitless action of furthcoming". Noting that our provisional proposal for a right of disclosure proceeded on the assumption that Scottish banks in practice make disclosure, the Faculty observed that "if this assumption is correct there will be no harm in the imposition of a statutory duty". They doubted, however, whether the assumption is correct; remarked that "certainly it is not the invariable practice to disclose"; observed that an arrestee's right of disclosure would have "no practical benefit where a bank is reluctant to disclose for any reason"; and concluded that "only the imposition of a positive statutory duty will have any practical benefit". On reflection, we agree that the arrestee should have a duty, and not merely a right, of disclosure. Otherwise there is a risk that the arrestee might withhold the information absolutely, or agree to give it only on payment of a fee.

4.9 *Duty to apply only in relation to arrestments in execution.* We think however that the duty should apply only in relation to arrestments in execution and not in relation to arrestments on the dependence. This would be in accordance with the existing general practice of the Scottish clearing banks. This is particularly important because, differing from the Joint Committee, we think that the extent as well as the

1. Discussion Paper No 87, paras 3.69 to 3.71; Proposition 10 (para 3.72).
2. (1989) Cm 622, para 5.29 ff, especially paras 5.38 to 5.43.
3. Ibid para 5.42.

existence of funds should be disclosed. The arrester's right to obtain disclosure might be open to abuse by the use of arrestments on the dependence of a trumped up action specially designed to elicit the confidential information. In principle the duty of disclosure should arise only when decree has been granted and the action finally disposed of because it is not till then that the title to raise an action of furthcoming following on an arrestment on the dependence emerges. Moreover, we do not think that either a duty or right of disclosure should arise until liability is constituted because it is not till then that it is clear that the debt is due: there should not be disclosure when the debt has not yet been held by the court to be due. In response to comments by HM Customs and Excise, that the concept of "arrestment in execution" should be clearly defined for the purposes of the arrestee's duty of disclosure, we recommend that the concept should have reference to an arrestment in execution of an extract decree, a summary warrant, an extract document of debt registered in the books of court for execution or a document of debt enforceable by diligence as if so registered. In all these cases the arrester's title to raise an action of furthcoming emerges as soon as the arrestment is executed. The concept should also have reference to an arrestment on the dependence which has become equivalent to an arrestment in execution in the ordinary course of process.[1] There is however a difficulty concerning the precise point in time at which the conversion of an arrestment on the dependence to an arrestment in execution takes place. There seem to be two possible tests. One test is that the conversion takes place when the action is finally disposed of, that is to say after decree has been granted and the appeal (or reclaiming) days have expired without an appeal being taken or, if an appeal has been taken, the appeal has been finally disposed of, and no further appeal is competent.[2] The other test is that the action must be finally disposed of in the sense that decree has been extracted, and this seems to have been the view of Graham Stewart who states the principle as being that "Until the pursuer is in the position of being able to arrest in execution he may arrest on the dependence".[3] The cases generally relate to incompetent actions of furthcoming raised before decree has been granted in the depending action[4] or before the appeal days have expired,[5] and we have not traced any case which relates to an action of furthcoming raised in the critical period after expiry of the appeal days but before extract. In the absence of primary authority, we think that the courts would be likely to follow the opinion of Graham Stewart on a matter such as this, and that the legislation should provide that the arrestee's duty of disclosure arises in relation to an arrestment on the dependence when decree in the depending action is extracted. We exclude from our recommendations arrestments to found jurisdiction. These are diligences only in name, being a special procedure to establish jurisdiction in an action rather than a process for attaching property. Different considerations apply to them. Disclosure by the arrestee would be needed in the course of the action rather than after extract, and a full disclosure would generally be unnecessary since the arrestment founds jurisdiction if it "arrests" some funds or items of commercial value, even if the amount or value is small. Arrestments to found jurisdiction are not now favoured by the law,[6] and in the absence of complaint we see no need to impose a special duty of disclosure on an arrestee in such an arrestment.

4.10 *Extent of disclosure.* The Joint Committee of the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers suggested that, to strike a balance between the interests of the common debtor and the interests of the arrestee, the arrestee should be obliged to disclose only the bare fact that something had been arrested, and should not be required to disclose the full amount of the funds or property arrested. We think however that if the duty were only to apply to arrestments in execution, the duty of disclosure should encompass the extent as well as the existence of the arrested funds or property. Otherwise there is a risk that the arrester

1. As to the conversion of an arrestment on the dependence to an arrestment in execution, see *Abercrombie* v *Edgar and Crerar Ltd* 1923 SLT 271; W J Lewis "Arrestment on the Dependence" 1933 SLT (News) 117; Graham Stewart p 231.
2. Graham Stewart, pp 21; 231, 232 could be construed in this sense (but see next footnote); Maher and Cusine, para 4.40.
3. Graham Stewart, p 22.
4. eg *Cresswell* v *Colquhoun and Co* 1987 SLT 329; *Gordon* v *Hill* (1841) 3 D 517.
5. eg *Paul* v *Henderson* (1852) 24 Sc Jur 310.
6. European Judgments Convention, Article 3; Civil Jurisdiction and Judgments Act 1982, Sch 1.

might raise an action of furthcoming only to discover that the amount of the arrested funds or the value of the property did not justify the action. In any event, the Scottish clearing banks already disclose the extent of the property or funds arrested in execution and this practice does not seem to have attracted public complaints. We see no reason to depart from that practice.

4.11 *No charges for disclosure.* The Committee of Scottish Clearing Bankers proposed that the arrestee should be entitled to make charges for disclosure. On the other hand the Joint Committee pointed out that the arrestees would be required to carry out investigations on receipt of the arrestment so that they would already have the necessary information to meet the arrester's request for information as to the existence and extent of any funds and property arrested. They argued that it would not be reasonable, under the guise of charging for work done in pursuance of the request, to allow the arrestee to recover payment for the original investigation. We agree with these remarks of the Joint Committee.

4.12 We recommend:

(1) Where an arrestment in execution has been laid, or an arrestment on the dependence has been followed by extract of the decree for the principal sum or expenses in the depending action, the arrestee, if requested to do so by the arrester or his agents, should be under a duty to disclose to the arrester or his agents whether any funds and other moveable property have been attached by the arrestment and the nature and extent of those funds or property. Such a disclosure should not be treated as a breach of any duty of confidentiality which the arrestee may owe to the common debtor with respect to those funds or property.

(2) The sanction for breach of the duty of disclosure should be liability imposed on the arrestee for the expenses incurred by the arrester in any action of furthcoming in respect of those funds or property.

(3) An arrestee should not be entitled to make any charges to the arrester for implementing the foregoing duty of disclosure.

(4) For the above purposes, an arrestment in execution includes an arrestment in pursuance of an extract decree in court proceedings, a summary warrant, an extract document of debt registered for execution in the books of court, and a document of debt enforceable by diligence as if so registered.

(Recommendation 16; Clause 7)

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

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

(a) Arrestments under warrants in civil actions

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

1. Graham Stewart p 133; Maclaren *Expenses* p 116.
2. Graham Stewart p 133.
3. See our Discussion Paper No 84 on *Diligence on the Dependence and Admiralty Arrestments* (December 1989) para 2.124.

proposed that the court should have a discretionary power to award the expenses of an arrestment on the dependence.[1] Third, if the expenses of an arrestment on the dependence are a debt chargeable against the defender, then under the Debtors (Scotland) Act 1987, s 93(2), they are recoverable from the debtor out of the arrested property and the court will grant decree in the action of furthcoming for the payment of the balance of any expenses not so recovered. (Previously there was doubt in some cases whether an arrestment secured the expenses of the arrestment). Fourth, the creditor is entitled at common law to recover the expenses of an arrestment in execution.[2] Fifth, previously there was doubt whether the expenses of an arrestment in execution were secured by an arrestment. This doubt has been removed by the provisions of the Debtors (Scotland) Act 1987, s 93(2) referred to above.

4.15 Sixth, it is probably the accepted view that the expenses of an arrestment which attaches nothing are not recoverable from the debtor.[3] So far as we are aware, despite the large number of abortive arrestments served, the general if not invariable practice is that the arrester does not attempt to recover the expenses of service. We have not, however, traced any direct authority which clearly states (or contradicts) such a rule, and it may be that there is some doubt about this.[4]

4.16 *Proposals for clarifying legislation.* In our Discussion Paper No 87, we invited views on a proposal that any doubt should be removed by a statutory provision to the effect that the expenses of an arrestment attaching nothing are not recoverable from the common debtor.[5] We recognised that such a provision would go somewhat beyond the topic of statutory fees for arrestees. We argued, however, that it would not be politic to provide by statute that only the statutory fee chargeable by arrestees is not recoverable by the creditor from the debtor in the case of an abortive arrestment, lest the implication is raised that the other expenses connected with the service of an abortive arrestment are so recoverable.

4.17 On consultation one consultee, the Committee of Scottish Clearing Bankers, argued that all expenses of abortive diligence should be recoverable. They argued that if a debtor does not pay what is due by him, he should be responsible for paying the expenses of all diligence executed to attempt to recover the sums due, except vexatious diligence. All other consultees agreed with our view that the law should be clarified by a statutory provision declaring that the expenses of an abortive arrestment are not recoverable by the arrester from the common debtor. The Scottish Consumer Council, for example, strongly supported the proposal. The Joint Committee of the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers said that the reform should be made whether or not statutory fees for arrestees were introduced. We therefore adhere to the proposal.

(b) Arrestments under summary warrants

4.18 *The existing law.* As regards arrestments executed in pursuance of summary warrants for the recovery of rates, taxes and community charges (and certain associated penalties[6]) it is expressly provided by statute that:

1. *Ibid*, Proposition 10(1) at para 2.130.
2. Graham Stewart, p 133.
3. In our Discussion Paper No 84, para 2.125, we assumed that this view correctly represented the law. There was no dissent from that view on consultation.
4. The Wages Arrestment Limitation (Scotland) Act 1870, s 2, (now repealed) provided that the expenses of executing an arrestment of wages are not chargeable against the debtor unless the arrestment recovers a sum larger than those expenses. This, however, is not decisive as to the common law rule partly because statutes are not aids to the interpretation of the common law and partly because the mischief struck at by the 1870 Act, s 2, might have been cases where wages were attached but less than the amount of the arrestment expenses.
5. Discussion Paper No 87, para 3.56; Proposition 8(1)(para 3.59).
6. See Abolition of Domestic Rates Etc (Scotland) Act 1987, s 17(10) and (11) (civil penalties for failure to provide information, or for giving false information to a community charge registration officer). Civil penalties incurred in connection with taxes (see eg Taxes Management Act 1970, ss 93, 95 and 98; Finance Act 1985, ss 13 and 15) are not recoverable by way of summary warrant diligence.

"the sheriff officer's fees, together with the outlays necessarily incurred by him, in connection with the execution of a summary warrant shall be chargeable against the debtor".[1]

Clearly, the proposed statutory fee chargeable by an arrestee to the creditor would be an outlay incurred by the sheriff officer. No exception is made from the foregoing provision for the case of arrestments served in pursuance of a summary warrant which have not attached any funds or property belonging to the debtor. There is no doubt that where the sheriff officer uses an arrestment on the instructions of the creditor public authority, the sheriff officer's fees will be chargeable against that authority. The foregoing provision could possibly, but in our view erroneously, be construed as making it competent for the creditor authority to recover from the defaulter the fees and outlays, not only in respect of arrestments which attach some funds or goods but also for arrestments which attach nothing. It might on the other hand be argued that where an arrestment is competently laid, but attaches nothing, the summary warrant is not "executed" within the meaning of the statutory provision: if it attaches nothing, it is ineffectual, imposing no nexus and having no legal effects (other than entitling the arrestee to his new statutory fee) and in that sense arguably the warrant is not "executed". The matter is not however entirely free from doubt.

4.19 *The existing practice.* We were informed by HM Customs and Excise and the Inland Revenue that they do not seek to recover the expenses of abortive arrestments laid under summary warrants. The Convention of Scottish Local Authorities obtained on our behalf information on the practice of the nine regional councils and the three islands councils, all but one of whom said either that they did not attempt to recover the costs of abortive arrestments under summary warrants against rates or community charge defaulters or that they were not aware of any such practice of recovery (though one said that sheriff officers *may* attempt such recovery). The exception was Borders Regional Council who remarked that on a few occasions in the past the Council had attempted to recover the expenses of an abortive arrestment where recovery of the principal debt had subsequently been possible by other means, for example, set-off or poinding and warrant sale.

4.20 *Proposals for clarifying legislation.* In our Discussion Paper No 87, we argued that, whatever the true meaning and effect of the statutory provision, it would not be right as a matter of legal and social policy for a public authority creditor recovering arrears of fiscal debts or associated penalties, which had laid "fishing arrestments" in the hands of a large number of arrestees, to be entitled to recover from the defaulter the sheriff officer's fees and outlays incurred in executing those arrestments which attached nothing.[2] Such an entitlement would be inconsistent with the practice which is followed in the case of arrestments laid in pursuance of warrants for diligence securing ordinary private law debts, and would confer on such public authorities a privilege which appears exorbitant. The provision has its origins in provisions in a draft Bill prepared by us,[3] which was used as a precedent for the community charge provisions. In our Discussion Paper No 87[4], we pointed out that in framing these provisions, we did not intend that they should confer on public authorities a privilege of the kind just described, and that there is no evidence that the Government (or Parliament) in adopting (or enacting) our suggested provisions, had any different intention.

4.21 On consultation, there was general agreement with our provisional view that it should be made clear by statute that where in pursuance of a summary warrant a public authority executes arrestments which attach nothing, the sheriff officer's fees exigible, and outlays incurred, in connection with such an arrestment should not be

1. Local Government (Scotland) Act 1947, s 247A(1) (inserted by the Debtors (Scotland) Act 1987, Sch 4, para 1) (recovery of rates); Taxes Management Act 1970, s 63A(1) (inserted by the 1987 Act, Sch 4 para 2) (Inland Revenue taxes); Car Tax Act 1983 Sch 1, para 3(5) (inserted by the 1987 Act, Sch 4, para 3); Value Added Tax Act 1983 Sch 7, para 6(7) (inserted by the 1987 Act, Sch 4, para 4); Abolition of Domestic Rates Etc (Scotland) Act 1987, Sch 2, para 8(1).
2. Discussion Paper No 87, para 3.58; Proposition 8(2) (para 3.59).
3. Report on *Diligence and Debtor Protection* Scot Law Com No 95 (1985), vol 2, Appendix A, draft Debtors (Scotland) Bill, Sch 5, paras 1 to 7.
4. Para 3.58.

recoverable by the creditor from the defaulter. Three bodies, however, dissented from this view. The Committee of Scottish Clearing Bankers thought that the expenses of abortive arrestments used to enforce both private law debts and summary warrant debts should be recoverable from the debtor. Borders Regional Council said that they saw no good reason why a local authority should be deprived of the right to recover the expenses of an abortive arrestment if subsequent recovery of the principal debt (and expenses) proves possible by another means. Lothian Regional Council said that "in view of the non-payment and non-cooperative problems with regard to community charge collection, it is strongly felt that any expenses incurred should ultimately be repayable by the debtor concerned". We are not persuaded by these comments and adhere to the views which won majority support on consultation. The majority of consultees also agreed that that it would not suffice to limit clarifying legislation to the proposed statutory fees for arrestees since that would raise the implication that fees and other outlays of sheriff officers incurred in executing wholly abortive arrestments were intended to be recoverable from defaulters.

4.22 We recommend:

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

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

(Recommendation 17; Clause 5 and Schedule)

Part V Summary of Recommendations

Recommendation for introducing statutory fees for arrestees

1. Fees for arrestees should be introduced by statute to give them some compensation for the administrative and clerical expenses incurred in tracing whether any funds or other moveables have been attached by the arrestment and, where such funds or other moveables have been so attached, in ensuring that they are not paid or relinquished in breach of the arrestment.

(Paragraph 3.32; Clause 1)

Fixed fees rather than claims for work actually done

2. As a general rule, fees for arrestees in respect of the administrative and clerical expenses incurred by them in tracing any arrested property and in securing its retention should take the form of fees fixed by statute or statutory instrument rather than a fee fixed by the court tailored to the actual work done or expense incurred in so complying.

(Paragraph 3.37; Clause 1)

Fees for abortive as well as successful arrestments

3. The statutory fees due to arrestees recommended above should be chargeable in respect of arrestments which attach nothing as well as arrestments which are wholly or partly successful in attaching funds or goods.

(Paragraph 3.39; Clause 1(1))

Flat rate fees rather than sliding scale fees

4. The statutory fees for arrestees recommended above should take the form of a flat rate fee payable to all types of arrestee whether or not the arrestee is a deposit-taking institution within the meaning of the Banking Act 1987.

(Paragraph 3.48; Clause 1(2))

The level of flat rate fees

5. (1) The flat rate fee for arrestees should be fixed at a level somewhere between a nominal fee and a fee that would indemnify most arrestees for the full economic cost of complying with an arrestment.

(2) While the amount must be arbitrary, a fee of £10 per arrestment is recommended.

(Paragraph 3.67; Clause 1(2))

Tender of fee

6. It should be a prerequisite of the validity of an arrestment that the officer of court has, before serving the schedule of arrestment, tendered the statutory fee to the arrestee.

(Paragraph 3.70; Clause 1(3))

Variation of fee by statutory instrument

7. The Lord Advocate should have power to make from time to time an order by statutory instrument varying the level of the statutory fee for arrestees.

(Paragraph 3.72; Clause 1(2) and (4))

Excess claims relating to corporeal moveables

8. (1) Where the things arrested consist of or include corporeal moveable property (other than a maritime *res*), the arrestee should be entitled to claim, in addition to the flat rate fee paid on or before execution of the arrestment, compensation from the arrester for any expenses necessarily incurred by him in maintaining or preserving that property but only insofar as these expenses would not have been incurred but for the arrestment.

(2) Where corporeal moveables are arrested, the flat rate fee should be treated as compensating the arrestee for administrative and clerical expenses incurred in tracing the moveables and in ensuring that the arrestee or those for whom he is responsible do not part with them while the arrestment is in effect, and

accordingly such expenses should not be included in a claim for maintaining or preserving the moveables.

(3) If the excess claim or its amount is disputed, it should be incumbent on the arrestee to show on a balance of probabilities that the expenses would not have been incurred but for the arrestment.

(4) The arrestee should be entitled to make such a claim only at or after the time when he lawfully relinquishes possession of the moveable property.

(5) The arrester and the common debtor (who would bear the ultimate liability for the expenses) should have an opportunity to object to the claim and, on such an objection, the claim should be referred to the auditor of the court which has jurisdiction in respect of the arrestment, for determination subject to an appeal to a judge (sheriff or Lord Ordinary).

(6) Provision should be made by act of sederunt regulating the procedure to be followed in the making and disposal of a claim.

(Paragraph 3.81; Clause 2)

Exclusion of arrestments of ships from system of fees

9. (1) The new system of statutory fees and excess claims recommended above should not apply to:

(a) an arrestment *in rem* of a maritime *res*;

(b) an arrestment of a ship on the dependence of an action *in personam* or in execution of a decree in such an action.

(2) The new system of fees and excess claims should not apply to arrestments of vessels and their equipment under special enactments for the recovery of a charge or fine or penalty imposed by that enactment. However in the case of arrestments under three enactments relating to the arrestment of a fishing boat and its gear and catch and any property of the person convicted, where an arrestment of the property of the person convicted is laid in the hands of an innocent third party, that third party should be entitled to such fees. The three enactments are the Sea Fisheries Act 1968, s. 12(2)(a); the British Fishing Boats Act 1983, s.5 (2)(a); and the Inshore Fishing (Scotland) Act 1984, s. 8(2)(a).

(Paragraph 3.84; Clause 8(1)(c), (d) and (h), (4) and (5))

Arrestment of ship on dependence of unsuccessful action: expenses of third party discharging cargo

10. Where:

(a) a ship belonging to the defender carrying the cargo of a third party is arrested on the dependence of an action which turns out to be unsuccessful; and

(b) in consequence of the arrestment, the cargo-owner, or where the ship is chartered the charterer, discharges the cargo,

the cargo-owner or, as the case may be, the charterer should have a right to claim from the arrester reimbursement of the reasonable expenses incurred by him in discharging the cargo.

(Paragraph 3.93; Clause 4)

Arrestment of ship on dependence of successful action or in execution: third party's expenses

11. (1) Where:

(a) a ship belonging to the debtor carrying the cargo of a third party is arrested on the dependence of a successful action or in execution; and

(b) in consequence of the arrestment the cargo-owner, or if the ship is chartered the charterer, discharges the cargo,

the cargo-owner or, as the case may be, the charterer should not be entitled to claim the expenses of discharging the cargo from the arresting pursuer or creditor.

(2) It is thought that at common law, the debtor's failure to pay the debt or have the arrestment timeously recalled on caution or consignation would be treated as a deemed repudiation of his contract with the cargo-owner or charterer, giving rise to liability in damages for the expenses of discharging the cargo, and accordingly that it is unnecessary for provision to be made by statute giving

the cargo-owner or charterer a remedy against the debtor for reimbursement of those expenses.

(Paragraph 3.98)

Arrestment of cargo on board ship: expenses of arrestee (ship-owner or charterer) discharging cargo

12. (1) Where cargo on board ship is arrested for the debt of the cargo-owner, and the arrestee is not the same person as the cargo-owner, the arrestee should be entitled to claim, in addition to the flat rate fee paid on or before execution of the arrestment, compensation from the arrester for any expenses necessarily incurred by him in discharging the cargo from the ship or in maintaining or preserving the cargo but only insofar as those expenses would not have been incurred but for the arrestment.

(2) The recommendations in paragraphs (2) to (6) of Recommendation 8 (para. 3.81) above should apply in relation to a claim such as is mentioned in the preceding paragraph.

(Paragraph 3.106; Clause 3)

Rejection of certain possible exemptions from statutory fees for arrestees

13. (1) No exemptions from the statutory fees for deposit-taking institutions complying with arrestments should be provided in respect of small debts, or of arrears of taxes, rates or community charge, or of cases where an arrestment is rendered ineffectual by subsequent insolvency proceedings against the common debtor.

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

(Paragraph 3.115)

Arrestees' fees for complying with arrestments under warrants for civil diligence in criminal proceedings

14. Where an arrestment is used in pursuance of a warrant for civil diligence granted by a court in criminal proceedings to enforce the payment of a sum decerned for in those proceedings (including a fine, caution, expenses or a sum due under a compensation order), the arrestee should be entitled to payment of the fee recommended above as if the sum had been decerned for in civil proceedings.

(Paragraph 3.119; Clause 8(3))

Arrestees' fees for complying with arrestments of moveable property affected by statutory restraint orders

15. (1) Where corporeal moveables are arrested in pursuance of a warrant for the arrestment of moveable property affected by a restraint order ancillary to a confiscation order or forfeiture order made under any enactment, the arrestee should be entitled to claim compensation from the arrester for any expenses necessarily incurred by him in maintaining or preserving those moveables but only if or insofar as those expenses would not have been incurred but for the arrestment.

(2) The claim should be made to the Crown Office representing the Lord Advocate as the arrester, and if the claim or its amount is disputed, it should be referred to the Auditor of the Court of Session for determination subject to an appeal to a Lord Ordinary.

(Paragraph 3.125; Clause 6)

Disclosure by arrestee to arrester of existence or extent of funds or property arrested

16. (1) Where an arrestment in execution has been laid, or an arrestment on the dependence has been followed by extract of the decree for the principal sum or expenses in the depending action, the arrestee, if requested to do so by the arrester or his agents, should be under a duty to disclose to the arrester or his agents whether any funds and other moveable property have been attached by the arrestment and the nature and extent of those funds or property. Such a disclosure should not be treated as a breach of any duty of confidentiality which the arrestee may owe to the common debtor with respect to those funds or property.

(2) The sanction for breach of the duty of disclosure should be liability imposed on the arrestee for the expenses incurred by the arrester in any action of furthcoming in respect of those funds or property.

(3) An arrestee should not be entitled to make any charges to the arrester for implementing the foregoing duty of disclosure.

(4) For the above purposes, an arrestment in execution includes an arrestment in pursuance of an extract decree in court proceedings, a summary warrant, an extract document of debt registered for execution in the books of court, and a document of debt enforceable by diligence as if so registered.

(Paragraph 4.12; Clause 7)

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

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

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

(Paragraph 4.22; Clause 5 and Schedule)

Appendix A

Expenses in Arrestment (Scotland) Bill

ARRANGEMENT OF CLAUSES

DRAFT

OF A

BILL

TO

A.D. 1991. Make provision in the law of Scotland regarding the payment of fees and compensation for expenses to arrestees and other persons in repect of arrestments and regarding disclosure by arrestees; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:–

Fee payable to arrestee.

1.—(1) Where an arrestment is executed, the arrestee shall, in respect of expenses incurred by him in—

(*a*) ascertaining whether or not any obligation to pay, account or deliver is attached by the arrestment, and

(*b*) ensuring that, where such an obligation is so attached, no breach of the arrestment is committed by him,

be entitled to payment by the arrester of a fee even if nothing is attached by the arrestment.

(2) The amount of the fee referred to in subsection (1) above shall be the sum of £10 (or such higher sum as may from time to time be prescribed) in respect of each arrestment.

(3) No arrestment shall be valid unless the fee referred to in subsection (1) above has been tendered to the arrestee by a messenger-at-arms or sheriff officer before the schedule of arrestment has been served.

(4) In this section, "prescribed" means prescribed by an order made by the Lord Advocate by statutory instrument and subject to annulment in pursuance of a resolution of either House of Parliament.

Excess claim relating to arrested corporeal moveables.

2.—(1) Where the property attached by an arrestment consists of or includes an obligation to deliver or account for corporeal moveables (other than cargo on board a ship), the arrestee shall, on or after lawfully relinquishing possession of those moveables, be entitled to claim payment by the arrester of compensation in respect of expenses necessarily incurred by the arrestee in maintaining or preserving those moveables insofar as such expenses would not have been incurred but for the arrestment.

(2) Any compensation payable to the arrestee under this section—

(*a*) shall not include any of the expenses referred to in section 1(1) above; but

(*b*) shall be in addition to any fee payable under section 1 above.

(3) Where a claim for compensation under subsection (1) above is contested by the arrester or the common debtor in the arrestment, the claim shall be determined by the auditor of the court having jurisdiction in respect of the arrestment, subject to an appeal to a Lord Ordinary or to the sheriff, as the case may be.

Clause 1

This clause gives effect to Recommendations 1 to 7 and introduces a system of fees for arrestees (ie. persons on whom arrestments are served). For the definition of "arrestment", see *clause 8.*

Subsection (1)

This subsection gives effect to Recommendations 1(para.3.32), 2 (para. 3.37) and 3 (para. 3.39). *Paragraphs (a) and (b)* of the subsection define the arrestee's expenses covered by the fee. These are "tracing expenses" (*paragraph (a)*) and expenses incurred in ensuring that the arrestee does not in breach of the arrestment part with arrested funds or goods or, in the case of arrestment of shares in a company, register a share transfer (*paragraph (b)*) ie "freezing expenses". The reference to "obligations" reflects the theory of Scots law that (except in the case of ships) the proper subject matter of an arrestment is not strictly speaking money or moveables in the arrestee's hands, but rather an obligation to pay or account for money, or to deliver or account for moveable property, due to the defender or common debtor by the arrestee. In the case of corporeal moveables or ship's cargo, claims for other expenses not covered by the fee may be made by the arrestee under *clause 2 or 4.*

Subsection (2)

This subsection gives effect to Recommendations 4 (para. 3.48), 5 (para. 3.67) and (in part) 7 (para. 3.72) and makes clear that the fee is to be a prescribed flat rate fee. The word "prescribed" is defined in *subsection (4)* of the clause.

Subsection (3)

This subsection gives effect to Recommendation 6 (para. 3.70). The validity of an arrestment will in future depend on the tender of a fee before service of the schedule of arrestment. For this purpose, where a postal copy of the schedule of arrestment is served under rules of court, the critical time is the service of the schedule of arrestment not the service of the postal copy.

Subsection (4)

This subsection defines "prescribed" occurring in *subsection (2)* and implements Recommendation 7 (para. 3.72).

Clause 2

This clause implements Recommendation 8 (para. 3.81).

Subsection (1)

This subsection enables an arrestee to claim compensation for expenses incurred in maintaining or preserving corporeal moveables (other than cargo on board a ship) attached by the arrestment. Similar claims relating to arrested cargo are provided for in *clause 3.* Compensation under *clause 2* differs from the fee under *clause 1.* First, it is exigible in respect of expenses actually incurred whereas a fee under *clause 1* is a flat rate fee. Second, it must be claimed by the arrestee on or after lawfully relinquishing possession of the arrested moveables whereas a fee under *clause 1* must be automatically tendered by the officer of court before service of the arrestment, on the principle "no flat rate fee, no arrestment".

Subsection (2)

A claim under *clause 2* is intended to cover maintenance and preservation expenses only. *Paragraph (a)* of this subsection, therefore, makes it clear that such a claim does not cover the "tracing" and "freezing" expenses defined in *subsection (1)* of *clause 1* and covered by the flat rate fee under that clause. *Paragraph (b)* of the subsection makes it clear that compensation under *clause 2* is exigible as an "excess claim" in addition to the flat rate fee under *clause 1.*

Subsection (3)

This subsection provides for objections to claims under *clause 2.* Disputed claims are referred to the auditor of court subject to an appeal to a judge. The objection may be made by the arrester (to whom the claim is made) or the common debtor (who may bear the ultimate liability for the expenses of the arrestment where the arrester has a right to recover those expenses from him).

Excess claim relating to arrested cargo.

3.—(1) Where an obligation to deliver or account for cargo on board a ship has been arrested in respect of a debt of the owner of the cargo (such owner not being the arrestee), the arrestee shall, on or after lawfully relinquishing possession of the cargo, be entitled to claim payment by the arrester of compensation in respect of expenses necessarily incurred by the arrestee in discharging the cargo from the ship or in maintaining or preserving it insofar as such expenses would not have been incurred but for the arrestment.

(2) Subsections (2) and (3) of section 2 above shall apply to a claim under this section in respect of cargo as they apply to a claim under that section in respect of corporeal moveables.

Expenses of discharge of cargo where ship arrested.

4.—(1) Where—

(*a*) a ship belonging to the defender in an action has been arrested on the dependence of the action,

(*b*) by reason of the existence of the arrestment, cargo has been discharged from the ship by the owner of the cargo or, where the ship was chartered, by the charterer, and

(*c*) the action has been determined otherwise than by decree in favour of the pursuer,

the owner of the cargo or, as the case may be, the charterer shall be entitled to claim payment by the pursuer of compensation in respect of expenses reasonably incurred by him in discharging the cargo.

(2) In this section, references to an action, a pursuer and a defender include respectively—

(*a*) references to a counter-claim, the person making a counter-claim and the person against whom a counter-claim is made; and

(*b*) in relation to a third party notice process, references to that process, the person serving the third party notice and the person on whom the third party notice is served.

Expenses of arrestment which attaches nothing.

5.—(1) For the avoidance of doubt, the expenses of an arrestment executed in pursuance of a warrant or precept for diligence in common form which attaches nothing shall not be recoverable by the arrester from the common debtor.

(2) For the avoidance of doubt, sheriff officers' fees and outlays and other expenses incurred in the execution of a summary warrant granted in favour of a public authority in pursuance of an arrestment which attaches nothing shall not be recoverable by the authority from the common debtor.

Clause 3

This clause implements Recommendation 12 (para. 3.106).

Subsection (1)

This subsection provides for the case where cargo on board ship is arrested in respect of a debt of the cargo-owner and enables the arrestee to make an excess claim similar to a claim under *clause 2(1)*relating to corporeal moveables other than cargo. *Subsection (1)* does not apply where the cargo-owner is the arrestee, as where the cargo-owner is also owner of the ship and the cargo is arrested on board his ship. In such a case, the arrestee (unlike other arrestees) will be the defender or common debtor and so (also unlike other arrestees) is not an innocent third party dragged by the arrestment into someone else's dispute.

Subsection (2)

This subsection is ancillary to *subsection (1)* and applies the provisions of *clause 2(2) and (3)* to claims under that subsection.

Clause 4

This clause gives effect to Recommendation 10 (para. 3.93). It enables a ship's cargo-owner or charterer, who by reason of the arrestment of the ship (not the cargo) on the dependence of an action discharges the cargo, to claim compensation from the arrester for the expenses of discharge, where the action turns out to be unsuccessful. Unlike *clauses 1 to 3*, *clause 4* does not confer rights on arrestees. But in the case regulated by *clause 4*, the cargo-owner or charterer is an innocent third party put to expense by reason of an arrestment, for which expense he has no common law remedy against the arrester. He is thus in a similar position to an arrestee discharging arrested cargo: see *clause 3*.

Subsection (1)

This subsection is the operative provision of the clause.

Subsection (2)

This *subsection* adapts *subsection (1)* so that it will apply in counter-claims and third party notice processes in which arrestments of ships may be executed. A counter-claim is a cross-action brought by the defender against the pursuer in an action and dealt with by the court in the same process as the pursuer's action. A third party notice process is a procedure in an action by which the defender or other litigant (eg. a pursuer defending a counter-claim) claiming a right of relief, contribution or indemnity against a third party, may bring the third party into the action so that the court can decide on the third party's liability.

Clause 5

This clause and the Schedule which it introduces implement Recommendation 17 (para. 4.22). It clarifies the existing law by making it clear that the expenses of an arrestment which attaches nothing are not recoverable by the arrester from the common debtor. For the meaning of "common debtor", see para. 2.2 of this Report.

Subsection (1)

This subsection makes it clear that the expenses of an abortive arrestment under a warrant or precept for diligence in common form are not recoverable by the arrester from the common debtor. This brings the law which is unclear (see paras. 4.14 and 4.15 of this Report) into line with what is thought to be common practice. This subsection is intended to cover all arrestments other than those executed under summary warrants in relation to which separate provision is made in *subsection (2)*.

Subsection (2)

This subsection makes similar provision in relation to arrestments in pursuance of summary warrants for the recovery of arrears of taxes, rates and community charge. The recovery of sheriff officers' fees, outlays and expenses is governed by the enactments mentioned in the Schedule to the Bill introduced by *subsection (3)*. These enactments as presently drafted do not make clear whether those fees, outlays and expenses are recoverable from the common debtor if the arrestment is abortive (see para. 4.18 of this Report). *Subsection (2)* makes it clear that they are not.

(3) The enactments mentioned in the Schedule to this Act shall have effect subject to the amendments there specified

Arrestment to enforce restraint order.

6.—(1) Where either an obligation to deliver or account for corporeal moveable property or a ship has been arrested in pursuance of a warrant for the arrestment of such property in order to enforce a restraint order ancillary to a confiscation order or forfeiture order made under any enactment, the arrestee—

(*a*) shall, on or after lawfully relinquishing possession of that property, be entitled to claim payment by the arrester of compensation in respect of expenses necessarily incurred by the arrestee in maintaining or preserving that property insofar as such expenses would not have been incurred but for the arrestment; but

(*b*) shall not be entitled to payment of the fee referred to in section 1 above.

(2) Any compensation payable to the arrestee under this section shall not include any of the expenses referred to in section 1(1) above.

(3) Where a claim for compensation under subsection (1) above is contested by the Lord Advocate as arrester, the claim shall be determined by the Auditor of the Court of Session, subject to an appeal to a Lord Ordinary.

Disclosure by arrestee of arrested subjects.

7.—(1) Where an arrestment in execution has been laid, or an arrestment on the dependence of an action has been followed by extract of the decree for payment of the whole or part of the principal sum or expenses in the action, the arrestee, if required to do so by the arrester, shall free of charge disclose to the arrester—

(*a*) whether any obligation to pay, account for or deliver funds or other moveable property has been attached by the arrestment; and

(*b*) where such an obligation has been attached, the extent of the funds or, as the case may be, the nature and extent of the other property to which the obligation relates.

(2) Such disclosure shall not be treated as a breach of any duty of confidentiality owed by the arrestee to the common debtor.

(3) Where the arrestee fails to make such disclosure when required to do so by the arrester, he shall be liable for the expenses incurred by the arrester in any action of furthcoming in respect of such funds or property.

Subsection (3)

This subsection is ancillary to *subsection (2)*. It introduces *Schedule 3* which makes textual amendments of enactments relating to the recovery of the expenses of diligence under summary warrants. These amendments make it clear that those enactments are subject to *subsection (2)* of this clause.

Clause 6

This clause implements Recommendation 15 (para. 3.125). It enables an arrestee in an arrestment enforcing a statutory restraint order to claim compensation for expenses incurred in maintaining or preserving arrested corporeal moveable property or a ship, but not for tracing or freezing expenses nor for expenses relating to arrested pecuniary debts.

Subsection (1)

This subsection is the main provision. It applies to an arrestment enforcing a restraint order ancillary to a confiscation order or a forfeiture order made under any enactment. For examples of a restraint order ancillary to a confiscation order, see Criminal Justice (Scotland) Act 1987, Part I, and Criminal Justice Act 1988, Part VI, described in para. 3.120 of this Report. For an example of a restraint order ancillary to a forfeiture order, see Prevention of Terrorism (Temporary Provisions) Act 1989, s. 13(2)–(4); Sch. 4 paras. 13 and 16(1)(b), described in para. 3.121 of this Report.

Paragraph (a) enables the arrestee in such an arrestment to make a claim for compensation for expenses incurred in maintaining or preserving arrested corporeal moveable property or a ship.

Paragraph (b) provides that the arrestee is not entitled to the flat rate fee introduced by *clause 1(1)*.

Subsection (2)

This subsection makes it clear that compensation under the clause does not include the "tracing" and "freezing" expenses covered by the flat rate fee introduced by *clause 1(1)*.

Subsection (3)

This subsection provides for a disputed claim for expenses under the clause to be determined by the Auditor of the Court of Session subject to an appeal to a Lord Ordinary.

Clause 7

This clause implements Recommendation 16 (para. 4.12). It provides that in the case of an arrestment in execution or its equivalent (an arrestment on the dependence converted by extract decree into an arrestment in execution), the arrestee must disclose to the arrester the existence or extent of funds or moveables attached by the arrestment.

Subsection (1)

This subsection imposes the duty of disclosure. It applies only in the case of an "arrestment in execution" (which expression is defined by *subsection (4)*) or an arrestment on the dependence followed by extract decree for the reasons given at para. 4.9 of this Report.

Subsection (2)

This subsection is consequential on *subsection (1)* and provides that disclosure under that subsection is not to be treated as breach of a duty of confidentiality which may be owed by the arrestee to the common debtor. For an explanation of "common debtor", see para. 2.2 of this Report.

Subsection (3)

This subsection provides that the sanction for failure to disclose in breach of the duty imposed by the clause is liability for the arrester's expenses in a subsequent action of furthcoming. For an explanation of "action of furthcoming", see para. 2.2 of this Report.

(4) For the purposes of this section, an arrestment in execution includes an arrestment in pursuance of—

(*a*) a decree of the Court of Session or the sheriff;

(*b*) an extract of a document which is registered for execution in the Books of Council and Session or the sheriff court books;

(*c*) 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 issued by the sheriff;

(*d*) a civil judgment granted outside Scotland by a court, tribunal or arbiter which by virtue of any enactment or rule of law is enforceable in Scotland;

(*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*) a summary warrant.

Interpretation.

8.—(1) Any reference in this Act to an arrestment shall, unless the context otherwise requires, be construed as a reference to an arrestment to which this Act applies, and for the purposes of this Act an arrestment to which this Act applies shall be an arrestment other than—

(*a*) an arrestment in respect of which the schedule of arrestment has been served before the commencement of this Act;

(*b*) an arrestment to found jurisdiction;

(*c*) except in relation to section 4 or 6 of this Act, an arrestment of a ship or her equipment;

(*d*) an arrestment *in rem* of a maritime *res*;

(*e*) an earnings arrestment;

(*f*) a current maintenance arrestment;

(*g*) a conjoined arrestment order; or

(*h*) an arrestment to which any of the enactments referred to in subsection (4) or (5) below applies.

(2) Any reference in this Act to a ship shall include a reference to any description of vessel used in navigation not propelled by oars.

(3) The provisions of this Act shall apply in respect of an arrestment in pursuance of a warrant for civil diligence granted by a court in criminal proceedings as they apply in respect of an arrestment in pursuance of a warrant obtained in civil proceedings.

(4) The enactments referred to in this subsection are as follows, that is to say—

1847 c.27. (*a*) section 57 of the Harbours, Docks, and Piers Clauses Act 1847;

1882 c.22. (*b*) section 20(2) of the Sea Fisheries Act 1882;

1894 c.60. (*c*) section 693 of the Merchant Shipping Act 1894;

1971 c.60. (*d*) section 20(1) of the Prevention of Oil Pollution Act 1971.

Subsection (4)

This subsection defines "arrestment in execution" so as to cover arrestments in pursuance not only of decrees of the Court of Session or sheriff court but also of various categories of document of debt equivalent to such decrees. In such arrestments, the arrester has an immediate title to sue an action of furthcoming, and so the arrestee should be under the duty of disclosure imposed by this clause.

Clause 8

This clause among other things implements Recommendations 9 (para. 3.84) and 14 (para. 3.119).

Subsection (1)

This subsection defines "arrestment" for the purposes of the Bill.

Paragraph (a) is transitional and ensures that the Bill does not apply to arrestments where the schedule of arrestment is served before the Bill comes into operation.

Paragraph (b) excludes arrestments to found jurisdiction from the definition for the reasons mentioned in paras. 3.1 and 4.9 of this Report.

Paragraphs (c) and (d) implement Recommendation 9(1) (para. 3.84).

Paragraphs (e), (f) and (g) exclude respectively earnings arrestments, current maintenance arrestments and conjoined arrestment orders from the Bill: see paragraph 1.1 of this Report. Separate provision is made by the Debtors (Scotland) Act 1987, s. 71, for the payment of fees to employers operating these forms of diligence.

Paragraph (h) as read with *subsections (4) and (5)* implements Recommendation 9(2)(para 3.84).

Subsection (2)

This subsection defines the word "ship". The definition derives from the Administration of Justice Act 1956 (c. 46) section 48(f) which defines "ship" for the purposes of arrestments of ships under Part V of that Act.

Subsection (3)

This subsection implements Recommendation 14 (para. 3.119) and applies the provisions of the Bill to arrestments under warrants granted in criminal proceedings.

Subsections (4) and (5)

These subsections, as read with *paragraph (h) of subsection (1)*, implement Recommendation 9(2) (para. 3.84). Arrestments under the enactments specified in *subsection (4)* are excluded from the Bill. Arrestments under the enactments specified in *subsection (5)* are also excluded from the Bill, except that where such an arrestment attaches property of a person convicted under such an enactment, but is laid in the hands of a third party, the arrestment will be included in the Bill. The third party will therefore be entitled to a flat rate fee under *clause 1* and, where appropriate, to make an excess claim under *clause 2*.

(5) The enactments referred to in this subsection are as follows, except insofar as any such enactment relates to the arrestment of any property of a person (other than the arrestee) who is convicted in terms of that enactment, that is to say—

1968 c.77. (*a*) section 12(2)(a) of the Sea Fisheries Act 1968;

1983 c.8. (*b*) section 5(2)(a) of the British Fishing Boats Act 1983;

1984 c.26. (*c*) section 8(2)(a) of the Inshore Fishing (Scotland) Act 1984.

Citation, commencement and extent.

9.—(1) This Act may be cited as the Expenses in Arrestments (Scotland) Act 1991.

(2) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed.

(3) This Act extends to Scotland only.

Section 5(3)

SCHEDULE

AMENDMENT OF ENACTMENTS

The Local Government (Scotland) Act 1947 (c.43)

1. In section 247A(1) (sheriff officer's fees and outlays), after the words "and sale)" there shall be inserted the words "and section 5(2) of the Expenses in Arrestments (Scotland) Act 1991 (expenses of arrestment which attaches nothing)".

The Taxes Management Act 1970 (c.9)

2. In section 63A (sheriff officer's fees and outlays), after the words "and sale)" there shall be inserted the words "and section 5(2) of the Expenses in Arrestments (Scotland) Act 1991 (expenses of arrestment which attaches nothing)".

The Car Tax Act 1983 (c.53)

3. In paragraph 3(5) of Schedule 1 (recovery of car tax), after the words "and sale)" there shall be inserted the words "and section 5(2) of the Expenses in Arrestments (Scotland) Act 1991 (expenses of arrestment which attaches nothing)".

The Value Added Tax Act 1983 (c.55)

4. In paragraph 6(7) of Schedule 7 (recovery of value added tax), after the words "and sale)" there shall be inserted the words "and section 5(2) of the Expenses in Arrestments (Scotland) Act 1991 (expenses of arrestment which attaches nothing)".

The Abolition of Domestic Rates Etc. (Scotland) Act 1987 (c.47)

5. In paragraph 8(1) (recovery of community charges), after the words "Act 1987" there shall be inserted the words "and section 5(2) of the Expenses in Arrestments (Scotland) Act 1991 (expenses of arrestment which attaches nothing)".

Appendix B

List of those who submitted written comments on Discussion Paper No. 87

Association of British Insurers
Building Societies' Association
Court of Session Judges
Crown Office
HM Customs and Excise, VAT Control Division
Faculty of Advocates
Professor W M Gordon, University of Glasgow
Joint Committee of Law Society of Scotland and Society of Messengers-at-Arms and Sheriff Officers
Legal Services Agency Ltd
Messrs Mackinnons, Solicitors and Advocates in Aberdeen
Sheriff Principal Norman D Macleod QC
Committee of Scottish Clearing Bankers
Mr T H Scott, Solicitor, Inland Revenue, Scotland
Scottish Consumer Council
Scottish Homes, Principal Solicitor, (Corporate Services)
Sheriffs Principal
Strathclyde Regional Council, Solicitor to

Appendix C

SLIDING SCALE FEES AS PROPOSED IN DISCUSSION PAPER NO. 87 PARAGRAPHS 3.38 TO 3.42

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

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

3.40 We have seen that the average cost per arrestment incurred by the head office of a clearing bank is within the range of £4.50p to £6 and that the average cost per arrestment of a branch office of a clearing bank is within the range of 7p to 10p, or £1.40p to £2 for 20 branch offices. On the basis of economic cost, the first band of the sliding scale might be within the range of £5.90p to £8. This might however be regarded as too low for a small arrestee unused to receiving arrestments. We suggest therefore that the basic fee might be about £10. The clearing banks' overall fee would not be excessive since we suggest that the fee for additional branches would be below the economic cost.

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

Table C (in Discussion Paper No. 87): Example of Possible Sliding Scale Fees for Arrestees as Applied to the Four Scottish Clearing Banks (Including Branches Furth of Scotland)

	(1) Basic fee (for first 20 offices) (£)	*(2) Number of offices*	*(3) Number of reckonable offices after first 20 offices*	*(4) Additional fee (£1 per 20 reckonable offices)*[1] (£)	*(5) Total fee [(1) plus (4)]* (£)
Bank of Scotland	10	515	480	24	34
Clydesdale Bank plc	10	342	320	16	26
Royal Bank of Scotland plc	10	826	800	40	50
TSB Scotland plc	10	268	240	12	22
		1,951	1,840		132

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

3.42 On the basis that the sliding scale should provide a basic fee of £10 for the first band of 20 branches, and an additional one pound for each additional band of 20 branches or part thereof, the fees which would be chargeable by the four clearing banks are shown in Table C, on the assumption that an arrestment would attach credit balances and moveable property in offices furth of Scotland as well as within Scotland. It will be seen that the aggregate of arrestees' fees for "global" arrestments served on all four clearing banks affecting all branches, including those furth of Scotland, would be £132 ...".

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