

Scottish Law Commission

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REPORT ON DILIGENCE AND DEBTOR PROTECTION

Volume Two

Appendices

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

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Draft
The Debtors (Scotland) Bill

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DRAFT
OF A
BILL
TO

Make new provision with regard to Scotland for an extension of time for payment of debts and to enable debts to be paid under debt arrangement schemes; to amend the law relating to certain diligences; to make provision in respect of messengers-at-arms and sheriff officers; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by A.D. 1985
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:—

PART I

EXTENSION OF TIME TO PAY DEBTS

Extension of time on granting decree

Extension of
time on granting
decree.

1.—(1) Subject to the provisions of this section and sections 12 and 13 of this Act, the court, on granting decree for payment of a principal sum of money may, on an application by the debtor concerned, direct that any sum of money decerned for in the decree (including any interest claimed in pursuance of subsection (5) below) or any expenses in relation to which the decree contains a finding as to liability, or both that sum and those expenses, shall be paid—

- (a) by such instalments, payable at such times; or
- (b) as a lump sum at the end of such period,

after the date of intimation by the creditor to the debtor of an extract of the decree containing the direction, as the court may specify in the direction.

Any direction under this subsection shall be known as a “time to pay direction”.

(2) Where a court grants decree which contains a finding as to liability for expenses, then (whether or not the decree also decerns for payment of the expenses), it shall be incompetent for the court to make a time to pay direction in relation to those expenses later than at the time when it grants decree containing the finding.

(3) Subsection (1) above shall apply to a time to pay direction in so far as it is made in relation to expenses in a case where the decree containing the direction—

- (a) does not decern for payment of the expenses; or
- (b) decerns for payment of the expenses as taxed by the auditor of court but does not specify the amount of those expenses;

as if the reference to intimation of an extract of the decree containing the direction were a reference to intimation of an extract of a decree decerning for payment of the expenses, being a decree or extract specifying their amount.

(4) The court shall not be entitled to make a time to pay direction—

- (a) where the sum of money (exclusive of any interest and expenses) decerned for in the decree exceeds £10,000 or such amount as may be prescribed in regulations made by the Secretary of State; or
- (b) where the decree includes or comprises an award of financial provision payable on divorce or of aliment; or
- (c) in relation to an order under section 80 or 81 of the Social Work (Scotland) Act 1968, section 11(3) of the Guardianship Act 1973 or section 18 or 19 of the Supplementary Benefits Act 1976.

1968 c. 49.
1973 c. 29.
1976 c. 71.

EXPLANATORY NOTES

Part I (clauses 1 to 13) makes provision as to time to pay directions and time to pay orders.

Clauses 1 to 3

Clauses 1 to 3 introduce time to pay directions in Scots law.

Clause 1

This clause, implementing Recommendations 3.1, 3.3 to 3.6, and 3.10(2), enables the court to make a time to pay direction on granting decree for payment of a principal sum of money.

Subsection (1)

This subsection implements in whole or in part Recommendations 3.1 (para. 3.4); 3.3(1) (para. 3.13); 3.5(2) (para. 3.21); and 3.10(1) (para. 3.45).

Subsection (2)

This subsection implements Recommendation 3.5(1) (para. 3.21).

Subsection (3)

This subsection implements Recommendation 3.10(2) (para. 3.45).

Subsection (4)

Paragraph (a) of this subsection implements Recommendation 3.6 (para. 3.25). *Paragraphs (b) and (c)* of the subsection implement Recommendation 3.3(2) (para. 3.13).

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(5) Without prejudice to section 3(7) of this Act, the debtor shall not be liable to pay any interest payable under a decree containing a time to pay direction (from whatever date the interest has accrued) unless the creditor not later than the prescribed date occurring-

- (a) in the case of a direction under subsection (1)(a) above, before the date when the last instalment is due under the direction;
- (b) in the case of a direction under subsection (1)(b) above, before the end of the period specified in the direction,

has served a notice on the debtor stating that he is claiming such interest and specifying the amount of interest claimed:

Provided that this subsection shall not apply in relation to interest accruing before the date of the granting of decree if the interest has been specified in the decree as a sum of money payable thereunder.

(6) Regulations under subsection (4)(a) above shall be made by statutory instrument and shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(7) In this section and sections 2 and 3 of this Act, "the court" means the Court of Session or the sheriff.

Effect of time to pay direction on diligence.

2.—(1) While a time to pay direction is in effect, it shall be incompetent to commence or execute any of the following diligences—

- (a) a poiding and sale;
- (b) an earnings arrestment;
- (c) an arrestment and action of furthcoming or sale;
- (d) an adjudication for debt;
- (e) a charge for payment,

to enforce payment of the debt concerned:

Provided that an arrestment, used on the dependence of the action or in security of the debt, which has not been recalled, or to the extent that it has not been restricted under subsection (2) below, shall remain in effect but, while the direction is in effect, the raising of an action of furthcoming or sale shall be incompetent.

(2) Where an arrestment has been used on the dependence of the action or in security of the debt, the court may, on making a time to pay direction, recall or restrict the arrestment:

Provided that the court may order that the making of the direction and the recall or restriction of the arrestment shall be subject to the fulfilment by the debtor of such conditions within such period as the court thinks fit; and, where the court so orders, it shall postpone granting decree in that action until such fulfilment or the end of that period, whichever is the earlier.

(3) In subsection (1)(a) above "poiding" does not include poiding of the ground.

EXPLANATORY NOTES

Subsection (5)

This subsection implements Recommendation 3.4 (para. 3.16).

Subsection (6)

This subsection implements in part Recommendation 3.6 (para. 3.25).

Subsection (7)

This subsection implements in part Recommendation 3.3(1) (para. 3.13).

Clause 2

This clause, implementing recommendations 3.7 (para. 3.35) and 3.9 (para. 3.42), regulates the effect of time to pay directions on diligence.

Subsection (1)

This subsection implements Recommendation 3.7(1) (para. 3.35).

Subsection (2)

This subsection implements Recommendation 3.7(2) (para. 3.35). The proviso to the subsection implements Recommendation 3.7(3).

Subsection (3)

This subsection implements in part Recommendation 3.9 (para. 3.42).

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Lapse, variation
and recall of
time to pay
direction.

3.—(1) Where, on a day on which an instalment payable under a time to pay direction becomes due, there remain unpaid two instalments payable thereunder on previous days, the direction shall cease to have effect on that day.

(2) Where, immediately after the day on which the last instalment payable under a time to pay direction under section 1(1)(a) of this Act becomes due, there remain unpaid any instalments payable thereunder, the direction shall cease to have effect at the end of the period of 3 weeks immediately following that day if the debt has not been fully paid within that period.

(3) Where, at the end of the period specified in a direction under section 1(1)(b) of this Act, any sum payable under the direction has not been paid, the direction shall cease to have effect 24 hours thereafter if any part of that sum remains unpaid.

(4) Where—

(a) a decree for payment of a principal sum of money contains a finding as to liability for expenses and decree for payment of the expenses is subsequently granted; and

(b) a time to pay direction is made both in relation to the principal sum and the expenses,

then, if the direction ceases to have effect under subsection (1), (2) or (3) above in relation to the sum payable under one of the decrees mentioned in paragraph (a) above, the direction shall also cease to have effect in relation to the sum payable under the other decree.

(5) The court which granted a decree containing a time to pay direction may, on an application by the debtor or the creditor—

(a) vary or recall the direction if it is satisfied that it is reasonable to do so; or

(b) if an arrestment in respect of the debt concerned is in effect, recall or restrict the arrestment:

Provided that, if such an arrestment is in effect, the court may order that any variation or recall or restriction under this subsection shall be subject to the fulfilment by the debtor of such conditions as the court thinks fit.

(6) The clerk of court or sheriff clerk shall forthwith intimate a variation under subsection (5) above to the debtor and the creditor, and the variation shall come into effect on the date of such intimation.

(7) Where a time to pay direction is recalled or ceases to have effect, otherwise than under section 10(2)(a) of this Act or by reason of the debt being satisfied, the debt in so far as it remains unpaid and interest thereon, from whatever date it has accrued, shall, subject to

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Clause 3

This clause, implementing Recommendations 3.10 (para. 3.45) and 3.11 (para. 3.48), makes provision as to the lapse, variation and recall of a time to pay direction and as to the recall or restriction of any arrestment securing the debt to which the time to pay direction relates.

Subsection (1)

This subsection, implementing in part Recommendation 3.10(3) (para. 3.45), provides for the lapse of a time to pay direction made under *clause 1(1)(a)* where, on the due date for payment of an instalment, the debtor is in arrears with 2 prior instalments.

Subsection (2)

This subsection, implementing in part Recommendation 3.10(3) (para. 3.45), provides for the lapse of a time to pay direction made under *clause 1(1)(a)* in a case where, on the date when the last instalment falls due, the debtor is in arrears with only one prior instalment or is not in arrears with any prior instalment but fails to pay the last instalment on the due date. (*Subsection (1)* does not apply to these cases.)

Subsection (3)

This subsection, implementing Recommendation 3.10(4) (para. 3.45), provides for the lapse of a time to pay direction made under *clause 1(1)(b)* relating to a deferred lump sum.

Subsection (4)

This subsection implements Recommendation 3.10(5) (para. 3.45).

Subsection (5)

This subsection implements Recommendation 3.11(1) (para. 3.48).

Subsection (6)

This subsection provides for the intimation, and the date of the coming into effect, of a variation of a time to pay direction.

Subsection (7)

This subsection provides for the revival of the creditor's right to do diligence on the termination of a time to pay direction, other than its termination by an award of sequestration in terms of *clause 10(2)*.

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any enactment or rule of law to the contrary, become enforceable by any of the diligences mentioned in paragraphs (a) to (e) of section 2(1) of this Act.

Order extending time following charge or other diligence or granting of summary warrant

General provision.

4.—(1) Subject to section 12 of this Act, this section applies to a debt due by a debtor in respect of which—

- (a) a decree for payment has been granted and—
 - (i) a charge for payment has been served on the debtor;
 - (ii) an arrestment (other than an arrestment of the debtor's earnings in the hands of his employer) has been executed; or
 - (iii) an action of adjudication for debt has been raised; or
- (b) a summary warrant has been granted.

(2) Subject to the following provisions of this section and section 13 of this Act, the sheriff, on an application by the debtor, may make an order that a debt to which this section applies (including any interest claimed in pursuance of subsection (5) below) shall be paid—

- (a) by such instalments, payable at such times; or
- (b) as a lump sum at the end of such period,

after the date of intimation of the order under section 6(4)(a) of this Act, as the sheriff may specify in the order.

Any order under this subsection shall be known as a "time to pay order".

(3) The sheriff shall not be entitled to make a time to pay order where—

- (a) the amount of the debt outstanding at the date of the making of the application under subsection (2) above (exclusive of any interest) exceeds £10,000 or such amount as may be prescribed in regulations made by the Secretary of State; or
- (b) in relation to the debt, a time to pay direction, or a time to pay order, has previously been made (whether the direction or order is in effect or not).

(4) Where in respect of a debt to which this section applies—

- (a) there has been a pouding of articles belonging to the debtor and a warrant of sale has been granted in respect of them but has not been executed; or
- (b) in pursuance of a summary warrant, articles belonging to the debtor have been pouided and intimation has been made to the debtor under paragraph 12(1) of Schedule 6 to this Act of the date arranged for the removal of the pouided

EXPLANATORY NOTES

Clauses 4 to 9

Clauses 4 to 9 introduce time to pay orders in Scots law.

Clause 4

This clause implements in whole or in part Recommendations 3.12 to 3.16.

Subsection (1)

This subsection, implementing Recommendations 3.13(1) (para. 3.58) and 3.14(1) (para. 3.63), sets out certain conditions which have to be satisfied before the sheriff may make a time to pay order in relation to a debt.

Subsection (2)

This subsection, implementing Recommendations 3.12(1) (para. 3.53) and 3.16(1) (para. 3.71) gives the sheriff an exclusive jurisdiction to make a time to pay order providing for payment by instalments or by deferred lump sum.

Subsection (3)

This subsection implements Recommendation 3.15(1) (para. 3.66).

Subsection (4)

This subsection implements Recommendation 3.14(2) (para. 3.63).

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articles for sale or, if the articles are to be sold in the premises where they are situated, of the date arranged for the holding of the sale; or

- (c) moveable property of the debtor has been arrested and in respect of the arrested property—
 - (i) a decree in an action of furthcoming has been granted but has not been enforced; or
 - (ii) a warrant of sale has been granted but the warrant has not been executed; or
- (d) a decree in an action of adjudication for debt has been granted and the creditor has, with the debtor's consent or acquiescence, entered into possession of any property adjudged by the decree or has obtained a decree of mails and duties, or a decree of removing or ejection, in relation to any such property;

the sheriff shall not be entitled to make a time to pay order in respect of that debt until the diligence has been completed or has otherwise ceased to have effect.

(5) Without prejudice to section 9(7) of this Act, the debtor shall not be liable to pay any interest on the debt (from whatever date the interest has accrued) unless the creditor not later than the prescribed date occurring—

- (a) in the case of an order under subsection (2)(a) above, before the date when the last instalment is due under the order;
- (b) in the case of an order under subsection (2)(b) above, before the end of the period specified in the order,

has served a notice on the debtor stating that he is claiming such interest and specifying the amount of interest claimed:

Provided that this subsection shall not apply in relation to interest accruing on the debt concerned before the date of the granting of—

- (i) decree; or
- (ii) a summary warrant under section 63 of the Taxes Management Act 1970,

if the interest has been specified in the decree, or in the certificate which accompanied the application for the summary warrant, as a sum of money payable under the decree or enforceable under the warrant.

(6) Regulations under subsection (3)(a) above shall be made by statutory instrument and shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(7) For the purposes of this section and the following provisions of this Part of this Act—

“debt” includes any interest accrued thereon, any expenses decerned for and any expenses of diligence used to recover

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Subsection (5)

This subsection makes provision as to interest on debts subject to time to pay orders broadly corresponding to the provisions of *clause 1(5)* on interest on debts subject to time to pay directions. However, interest accrued before decree and specified therein as a quantified sum will be exigible though not claimed by the procedure introduced by this subsection. Section 63 of the Taxes Management Act 1970 is re-enacted with modifications in *Schedule 5, paragraph 2*.

Subsection (7)

This subsection defines certain terms used in *clause 4* and *clauses 5 to 13*.

The definition of "debt" makes it clear that a time to pay order may cover interest (but interest not specified in the decree as a quantified sum must be claimed in the procedure provided for in *subsection (5)*), judicial expenses decreed for in the decree,

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the debt which are chargeable against the debtor, but does not include—

- (a) any sum due under an order of a court in criminal proceedings;
- (b) maintenance, whether due at the date of application for the time to pay order or otherwise, or any capital sum awarded on divorce or any other sum due under a decree awarding maintenance or such a capital sum; or
- (c) any fine imposed—
 - (i) for contempt of court;
 - (ii) for professional misconduct under any enactment; or
 - (iii) under section 91 of the Court of Session Act 1868 (orders for restoration of property or specific performance of statutory duty);

1868 c. 100.

“decree” includes—

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

“poiding” does not include poiding of the ground, and “poided” shall be construed accordingly;

“sheriff”—

- (a) in relation to a debt constituted by decree, or enforceable by a summary warrant, granted by a sheriff, means that sheriff or another sheriff sitting in the same sheriff court, and in this paragraph “decree” does not include an extract of a document which is registered for execution in sheriff court books;
- (b) in any other case, means the sheriff having jurisdiction—
 - (i) over the place where the debtor is domiciled;
 - or
 - (ii) if the debtor is not domiciled in Scotland, over a place in Scotland where he carries on business; or

EXPLANATORY NOTES

and diligence expenses. As to diligence expenses, see further *clause* 118, especially *subsections* (1), (2) and (4)(a). The exclusionary provisions of *paragraphs* (a) to (c) of the definition implement Recommendation 3.13(2) (para. 3.58).

The definition of “decree”, implementing in part Recommendation 3.13(1) (para. 3.58), extends the term to cover other documents of debt enforceable by diligence. At the date of the submission of this report (14 June 1985), the Civil Jurisdiction and Judgments Act 1982, s. 13 had not yet come into force.

The definition of “poining” (which corresponds to *clause* 2(3) on time to pay directions) excludes the heritable creditor’s diligence of poining of the ground from various provisions referring to poinings, notably *clauses* 4(4), 7(1)(a), 8(1)(a), 8(2)(d), 8(3), 8(7), 8(8) and 9(4), and ensures *inter alia* that time to pay orders, and interim sists of diligence pending applications for such orders, will not affect poinings of the ground.

The definition of “sheriff” implements Recommendation 3.16(2) (para. 3.71). At the date of the submission of this report (14 June 1985), the Civil Jurisdiction and Judgments Act 1982, s. 41 had not yet come into force.

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(iii) if the debtor does not carry on business in Scotland, over a place where he has property which is not exempt from diligence;

and, for the purposes of sub-paragraphs (i) and (ii) above, the debtor's domicile shall be determined in accordance with section 41 of the Civil Jurisdiction and Judgments Act 1982.

1982 c. 27.

Application for
time to pay
order.

5.—(1) An application for a time to pay order shall—

(a) include an offer to pay the debt—

(i) by instalments of such amount and frequency; or

(ii) after the expiry of such period,

as shall be specified in the application; and

(b) specify, to the best of the debtor's knowledge, the amount of the debt outstanding as at the date of the making of the application.

(2) The sheriff clerk shall, if requested by the debtor, assist him in the completion of the form of application for a time to pay order in accordance with proposals for payment made by the debtor:

Provided that the sheriff clerk shall not be liable for any failure by him in performing the duty imposed on him by this subsection.

(3) On receipt of such an application, the sheriff shall, if the application is properly made and unless it appears to him that the making of a time to pay order would be incompetent, make an interim order sisting diligence by the creditor to enforce the debt.

(4) The sheriff may, where the debtor is unable to furnish the necessary information to him, make an order requiring the creditor, within such period as may be specified in the order, to furnish to the sheriff—

(a) such particulars of his decree as may be prescribed; or

(b) if the application is made by virtue of the granting of a summary warrant, an excerpt from the certificate which accompanied the application for the summary warrant showing the amount due and unpaid by the debtor;

and, if the creditor fails to comply with this subsection, the sheriff may, after giving the creditor an opportunity to make representations, make an order recalling or extinguishing any existing diligence, and interdicting the creditor from executing diligence, for the recovery of the debt concerned.

(5) Where the sheriff makes an interim order under subsection (3) above, the sheriff clerk shall forthwith—

(a) send a copy of the application for the time to pay order to the creditor informing him that he may object to the granting of the application within a period of 14 days after the date of sending the copy; and

EXPLANATORY NOTES

Clauses 5 and 6

These clauses, implementing Recommendation 3.17(1) (para. 3.76) as read with paras. 3.72 to 3.75, regulate the procedure in applications for time to pay orders and the disposal of such applications.

Clause 5

This clause regulates the initial procedure to be followed in applications for time to pay orders. Further provisions are made in *clauses* 121, 122 and 123.

Subsection (3)

This subsection implements Recommendation 3.18(1) (para. 3.85). The effect of an interim order sisting diligence is regulated by *clause* 7.

Subsection (4)

The need for this subsection is discussed at paragraph 3.73.

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- (b) intimate to the creditor the making of the interim order and any order under subsection (4) above.

Disposal of application.

6.—(1) If no objection is duly made in pursuance of section 5(5)(a) of this Act, the sheriff shall make a time to pay order in accordance with the application.

(2) If such an objection is duly made, the sheriff shall not dispose of the application without first—

- (a) giving the debtor an opportunity to make representations; and
- (b) if agreement is not reached as to whether a time to pay order should be made or as to its terms, giving the parties an opportunity to be heard.

(3) Where the sheriff refuses to make a time to pay order, he shall recall any interim order under section 5(3) of this Act.

(4) The sheriff clerk shall forthwith—

- (a) intimate the decision of the sheriff on an application for a time to pay order (including any recall of an interim order under subsection (3) above) to the debtor and the creditor; and
- (b) if the sheriff has made a time to pay order, inform the creditor of the date when he intimated that fact to the debtor.

Effect of interim
sist of diligence.

7.—(1) While an interim order under section 5(3) of this Act is in force, it shall render incompetent in respect of the debt concerned—

- (a) the granting of an application for warrant of sale of articles which, before or after the making of the interim order, have been poinded, and any such application (other than an application for an order under section 46(2)(b) of, or paragraph 5(2)(b) of Schedule 6 to, this Act) which is pending when the interim order comes into force shall fall ;
- (b) where articles belonging to the debtor have been poinded in pursuance of a summary warrant granted before or after the making of the interim order, the intimation under paragraph 12(1) of Schedule 6 to this Act of the date arranged for the removal of the poinded articles for sale or, if the articles are to be sold in the premises where they are situated, of the date arranged for the holding of the sale;
- (c) the service of an earnings arrestment schedule;
- (d) where an arrestment of property belonging to the debtor (other than an arrestment of earnings in the hands of his employer) has been executed before or after the making of the interim order, the raising of an action of furthcoming

EXPLANATORY NOTES

Clause 6

This clause makes further provision as to the procedure in applications for time to pay orders, and regulates the disposal of the application. Appeals are regulated by *clause 128*.

Subsection (4)

On this provision, see paragraph 3.75.

Clause 7

This clause regulates the effect of an interim order under *clause 5(3)* sisting diligence.

Subsection (1)

This subsection governs the effect of the interim sist in precluding or restricting new diligences or the continuation of existing diligences.

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or sale, or the granting of a decree in any such action which has already been raised, in pursuance of that arrestment;

- (e) the raising of an action of adjudication for debt or, if such an action has already been raised, the taking of any steps other than the registration of a notice of litigiousity in connection with the action, the obtaining and extracting of a decree in the action, the registration of an abbreviate of adjudication and the completion of title to property adjudged by the decree.

(2) Any such interim order shall come into force on its making being intimated to the creditor under section 5(5)(b) of this Act and shall remain in force until intimation is made to the debtor and the creditor under section 6(4)(a) of this Act.

(3) The period during which such an interim order is in force shall be disregarded in calculating the period during which a poiding to which the order applies remains effective.

Effect of time to
pay order on
diligence.

8.—(1) While a time to pay order is in effect, it shall be incompetent to commence or execute any of the following diligences—

- (a) a poiding and sale;
- (b) an earnings arrestment;
- (c) an arrestment and action of furthcoming or sale;
- (d) an adjudication for debt;
- (e) a charge for payment,

to enforce payment of the debt concerned.

(2) On making a time to pay order, the sheriff in respect of the debt concerned—

- (a) shall make an order recalling any existing earnings arrestment;
- (b) where the debt is being enforced by a conjoined arrestment order, shall—
 - (i) if he, or another sheriff sitting in that sheriff court, made the order, vary it so as to exclude the debt or, where neither any other debt nor maintenance is being enforced by the order, recall the order;
 - (ii) if a sheriff sitting in another sheriff court made it, require intimation of the time to pay order to be made to a sheriff sitting in that other sheriff court who on receipt of such intimation shall so vary or, as the case may be, recall the conjoined arrestment order;
- (c) where an action of adjudication for debt has been raised, shall make an order prohibiting the taking of any steps other than the registration of a notice of litigiousity in connection with the action, the obtaining and extracting of a decree in

EXPLANATORY NOTES

Subsection (2)

This subsection regulates the duration of the interim sist.

Subsection (3)

This subsection implements Recommendation 3.18(3) (para. 3.85) so far as relating to poindings; as to the effect of the interim sist on the period of the prescription of arrestments in common form, see *Schedule 7, para. 2*.

Clause 8

This clause, implementing Recommendation 3.19 (para. 3.93), regulates the effect of time to pay orders on diligence.

Subsection (1)

This subsection implements Recommendation 3.19(1) (para. 3.93) and deals with new diligences.

Subsections (2) and (3)

These subsections implement Recommendation 3.19(2) (para. 3.93).

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the action, the registration of an abbeviat of adjudication and the completion of title to property adjudged by the decree;

- (d) may make an order recalling a pouding;
- (e) may make an order recalling or restricting any arrestment (other than an arrestment of the debtor's earnings in the hands of his employer):

Provided that, if a pouding or such an arrestment as is mentioned in paragraph (e) above is in effect, the sheriff may order that the making of a time to pay order or the recall of the pouding or the recall or restriction of the arrestment shall be subject to the fulfilment by the debtor of such conditions as the sheriff thinks fit.

(3) Where the sheriff does not exercise the powers conferred on him by paragraph (d) or (e) of subsection (2) above to recall a diligence, he shall order that no further steps shall be taken by the creditor in the diligence concerned other than, in the case of a pouding, applying for an order under section 46(2) of, or paragraph 5(2) of Schedule 6 to, this Act, or making a report of the execution of the pouding under section 47 of this Act.

(4) Any order made under subsection (2) or (3) above shall specify the diligence or diligences in relation to which it is made.

(5) The sheriff shall not make an order under paragraph (d) or (e) of subsection (2) above without first giving the creditor an opportunity to make representations.

(6) The sheriff clerk shall intimate, at the same time as intimation under section 6(4)(a) of this Act, any order under—

- (a) subsection (2) or (3) above to the debtor and the creditor and the order shall come into effect on such intimation being made to the creditor;
- (b) subsection (2)(a) or (b) above to the employer.

(7) Any order under subsection (3) above shall render incompetent the granting of—

- (a) a warrant (other than an order under section 46(2)(b) of, or paragraph 5(2)(b) of Schedule 6 to, this Act) to sell articles which have been pouded;
- (b) a decree of furthcoming or sale of arrested property.

(8) The period during which an order under subsection (3) above is in force shall be disregarded in calculating the period during which a pouding to which the order applies remains effective.

(9) Where, before the making of a time to pay order in respect of a debt, a charge to pay the debt has been served, then, if the period for payment specified in the charge—

- (a) has not expired, the charge shall lapse on the making of the order;

EXPLANATORY NOTES

Subsections (4) to (7)

These subsections are supplementary to *subsections (2) and (3)*.

Subsection (7)

An order under *clause 46(2)(b)* or *Schedule 6, para. 5(2)(b)* relates to the immediate disposal of articles which are perishable or likely to deteriorate rapidly.

Subsection (8)

This subsection implements Recommendation 3.19(3) (para. 3.93) insofar as it applies to poidings. As to the effect of a time to pay order on the period of the prescription of arrestments in common form, see *Schedule 7, para. 2*.

Subsection (9)

This subsection implements Recommendation 3.19(4) (para. 3.93).

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(b) has expired, nothing in the time to pay order nor in any order under this section shall affect retrospectively the effect of the charge in the constitution of apparent insolvency.

(10) If, when a time to pay order in relation to a debt is made, any diligence enforcing the debt is in effect which is not specified in an order under subsection (2) or (3) above, the diligence shall remain in effect unless and until it is recalled under section 9(6) of this Act.

Lapse, variation
and recall of
order.

9.—(1) Where, on a day on which an instalment payable under a time to pay order becomes due, there remain unpaid two instalments payable thereunder on previous days, the order shall cease to have effect on that day.

(2) Where, immediately after the day on which the last instalment payable under a time to pay order under section 4(2)(a) of this Act becomes due, there remain unpaid any instalments payable thereunder, the order shall cease to have effect at the end of the period of 3 weeks immediately following that day if the debt has not been fully paid within that period.

(3) Where, at the end of the period specified in a time to pay order under section 4(2)(b) of this Act, any sum payable under the order has not been paid, the order shall cease to have effect 24 hours thereafter if any part of that sum remains unpaid.

(4) The sheriff in relation to a time to pay order may, on an application by the debtor or the creditor—

(a) vary or recall it if he is satisfied that it is reasonable to do so; or

(b) if a pouding or an arrestment in respect of the debt concerned is in effect, recall the pouding or recall or restrict the arrestment:

Provided that, if such a pouding or such an arrestment is in effect, the sheriff may order that any variation or recall or restriction under this subsection shall be subject to the fulfilment by the debtor of such conditions as the sheriff thinks fit.

(5) The sheriff clerk shall forthwith intimate a variation under subsection (4) above to the debtor and the creditor, and the variation shall come into effect on the date of such intimation.

(6) Where, after a time to pay order has been made, it comes to the knowledge of the sheriff that the debt to which the order applies is being enforced by any of the diligences mentioned in paragraphs (a) to (d) of section 8(1) of this Act which was in effect when the time to pay order was made, the sheriff, after giving all interested parties an opportunity to be heard, may make—

EXPLANATORY NOTES

Subsection (10)

This subsection implements Recommendation 3.19(5) (para. 3.93).

Clause 9

This clause implements Recommendation 3.20 (para. 3.97) and makes provision on the lapse, variation and recall of time to pay orders similar to the provisions in *clause 3* applying to the lapse, variation and recall of time to pay directions, but with some modifications.

Subsection (1)

This subsection corresponds to *clause 3(1)*.

Subsection (2)

This subsection corresponds to *clause 3(2)*.

Subsection (3)

This subsection corresponds to *clause 3(3)*.

Subsection (4)

This subsection corresponds to *clause 3(5)* but, unlike *clause 3(5)*, extends to pointings since a pointing may have been executed prior to the time to pay order and not recalled under *subsection (2)(d)* of *clause 8*.

Subsection (5)

This subsection corresponds to *clause 3(6)*.

Subsection (6)

This subsection gives the sheriff powers to deal with the situation arising where he ascertains the existence of a diligence of which he was unaware when he made the time to pay order.

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- (a) an order recalling the time to pay order; or
- (b) any of the orders mentioned in subsection (2) or (3) of section 8 of this Act; and the provisions of that section shall, subject to any necessary modifications, apply for the purposes of an order made under this paragraph as they apply for the purposes of an order made under either of those subsections.

(7) Where a time to pay order is recalled or ceases to have effect, otherwise than under section 10(2)(a) of this Act or by reason of the debt being satisfied, the debt in so far as it remains unpaid and interest thereon, from whatever date it has accrued, shall, subject to any enactment or rule of law to the contrary, become enforceable by any of the diligences mentioned in paragraphs (a) to (e) of section 8(1) of this Act; and, notwithstanding section 50 of this Act and paragraph 8 of Schedule 6 to this Act, in this subsection "diligence" includes, where the debt immediately before the time to pay order was made was being enforced by a poinding in any premises, another poinding in those premises.

Provisions applicable to both time to pay directions and orders

Sequestration
and insolvency.

10.—(1) While a time to pay direction or a time to pay order is in effect, the creditor shall not be entitled to found on the debt concerned in presenting, or in concurring in the presentation of, a petition for the sequestration of the debtor's estate.

(2) A time to pay direction or a time to pay order shall cease to have effect—

- (a) on the granting of an award of sequestration of the debtor's estate; or
- (b) on the granting by the debtor of a voluntary trust deed whereby his estate is conveyed to a trustee for the benefit of his creditors generally; or
- (c) on the entering by the debtor into a composition contract with his creditors; or
- (d) if the sheriff has made an order under section 19(2) of this Act appointing an administrator to prepare a draft of a debt arrangement scheme in relation to the debts of the debtor, on the first notice date as defined in section 15(2)(a) of this Act.

Saving of
creditor's other
rights or
remedies.

11.—(1) No right or remedy of a creditor to enforce his debt shall be affected by—

- (a) a time to pay direction; or
 - (b) a time to pay order; or
 - (c) an interim order under section 5(3) of this Act,
- except as provided by any provision of this Part of this Act.

EXPLANATORY NOTES

Subsection (7)

The first part of this subsection, dealing with the revival of the right to do diligence, corresponds to *clause 3(7)*. The second part disappplies restrictions on second pointings on the same premises (set out in *clause 50* and *Schedule 6, para. 8*) in cases where the right to do diligence revives.

Clause 10

Subsection (1)

This subsection implements Recommendation 3.21(1) (para. 3.100).

Subsection (2)

This subsection implements Recommendation 3.21(2) (para. 3.100).

Clause 11

Subsection (1)

This subsection implements Recommendation 3.24 (para. 3.118).

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(2) The recall—

- (a) on the making of a time to pay direction or an order under section 3(5) of this Act, of an arrestment; or
- (b) on the making of a time to pay order or an order under section 9(4) of this Act, of an arrestment or a pouncing,

shall not prevent the creditor in that arrestment or pouncing from being ranked by virtue of that arrestment or pouncing *pari passu* under paragraph 10 of Schedule 7 to the Bankruptcy (Scotland) Act 1985 on the proceeds of any other arrestment or pouncing.

1985 c.

Debtors in relation to whom direction or order may have effect.

12.—(1) It shall be competent to make a time to pay direction or a time to pay order only in relation to a debtor who is an individual and only if, and to the extent that, the debtor—

- (a) is personally liable for payment of the debt concerned;
- (b) is liable for such payment as a tutor of an individual or as a judicial factor *loco tutoris*, curator bonis or judicial factor *loco absentis* on an individual's estate; or
- (c) is liable both as mentioned in paragraph (a) and paragraph (b) above.

(2) A time to pay direction or a time to pay order shall cease to have effect on the death of the debtor or on the transmission of the obligation to pay the debt during his lifetime to another person.

Direction or order incompetent if time order made under Consumer Credit Act. 1974 c. 39.

13. Where a time order for the payment by instalments of a sum owed under a regulated agreement or a security has been made under section 129 of the Consumer Credit Act 1974 (whether the time order is in operation or not), it shall be incompetent to make a time to pay direction or a time to pay order in relation to the payment of that sum.

EXPLANATORY NOTES

Subsection (2)

This subsection implements Recommendation 3.22 (para. 3.102).

Clause 12

Subsection (1)

This subsection implements Recommendations 3.2(1) and (2) (para. 3.9) and 3.12(2) (para. 3.53).

Subsection (2)

This subsection implements Recommendations 3.2(3) (para. 3.9) and 3.12(2) (para. 3.53).

Clause 13

This clause implements Recommendation 3.25(1) (para. 3.127).

PART II
DEBT ARRANGEMENT SCHEMES
Nature, content and effect of schemes

General
provision.

14.—(1) A scheme (to be known as a “debt arrangement scheme”) providing for the orderly and regular payment of the debts of a debtor who is an individual may be made, on application being made therefor to the sheriff, in accordance with the provisions of this Part of this Act.

(2) A debt arrangement scheme may provide—

- (a) for an extension of time for the payment of the debts, whether by instalments or otherwise;
- (b) for discharge of the debts on payment only to the extent of a composition; or
- (c) both for such an extension of time and for discharge on payment only to the extent of a composition.

(3) A scheme which provides for—

- (a) an extension of time for the payment of the debts, shall specify a period within which the payments shall be made, being a period not exceeding 3 years after the date when the scheme comes into force;
- (b) payment only to the extent of a composition shall state—
 - (i) the proportion of the amount of each creditor’s debt; and
 - (ii) the total amount,to be paid under the scheme:

Provided that this paragraph shall have effect in relation to a debt which is included in the scheme on its variation under section 28(1) of this Act as if after the words “under the scheme” there were added the words “and under a decree granted under section 31(6)(a) of this Act.”.

(4) Every scheme shall provide that all sums to be paid thereunder shall be payable to a person appointed under this Part of this Act (to be known as the “administrator”) and, subject to sections 36(6)(a)(i) and 37(2) of this Act, shall thereafter be disbursed by him to the creditors whose debts are included in the scheme; and the scheme shall regulate the method and times for the making of such payments to the administrator and for such disbursement by him.

(5) A scheme may include a provision (subject to such conditions as may be specified in the scheme) that the debtor shall, within a period specified in the scheme—

EXPLANATORY NOTES

Part II (clauses 14 to 42) makes provision introducing and regulating debt arrangement schemes.

Clause 14

This clause makes general provision as to the content and nature of debt arrangement schemes.

Subsection (1)

This subsection introduces debt arrangement schemes in Scots law, implementing Recommendation 4.1 (para. 4.34). The sheriff is to have exclusive jurisdiction in scheme applications in terms of Recommendation 4.7 (para. 4.56) and only debtors who are individuals would have a title to make such applications as proposed by Recommendation 4.9(1) (para. 4.72).

Subsection (2)

This subsection implements Recommendation 4.2(1) (para. 4.41).

Subsection (3)

Paragraph (a) of this subsection implements Recommendation 4.2(2) (para. 4.41).
Paragraph (b) of the subsection implements Recommendation 4.2(4) (para. 4.41).

Subsection (4)

This subsection implements Recommendation 4.3(1) (para. 4.44).

Subsection (5)

This subsection implements Recommendation 4.4(1) (para. 4.47).

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- (a) pay such funds to the administrator as may be so specified;
- (b) dispose of such assets (not being articles of moveable property exempt from diligence) as may be so specified and pay the net proceeds of such disposal to the administrator for disbursement to the creditors in accordance with the scheme.

(6) A scheme may include a condition that the debtor shall not be entitled, while the scheme is in force, to obtain credit exceeding an amount or amounts specified in the condition:

Provided that—

- (a) no condition so included shall restrict the obtaining of credit by the debtor for the purpose of paying—
 - (i) rent; or
 - (ii) debts incurred in obtaining the supply of fuel or energy, for his residence,
- (b) the scheme may exempt from the condition the obtaining of credit for the purposes of paying for such goods or services as may be specified in the condition.

(7) Every scheme shall include a statement that an order may be made under section 25(1) of this Act.

(8) It shall only be competent to include in a scheme debts for the payment of which the debtor is personally liable.

(9) A scheme shall come into force on the date on which an order under section 24 of this Act confirming the scheme takes effect and shall cease to have effect on the death of the debtor or as provided in section 32(1) of this Act.

(10) A scheme may be made only on an application by the debtor and the debtor may withdraw his application at any time before confirmation of the scheme under section 24 of this Act.

Debts to be included in scheme initially.

15.—(1) Subject to the provisions of this section and without prejudice to sections 23(1) and 28(1) of this Act, there shall be included in a debt arrangement scheme all debts which are payable as at—

- (a) the date on which the notice is served under section 19(3) of this Act in connection with the scheme; or
 - (b) if such a notice is served on different creditors on different dates, the earliest date on which such a notice is served.
- (2)(a) The date or, as the case may be, the earliest date mentioned in paragraph (a) or (b) of subsection (1) above is referred to in this Part of this Act as “the first notice date”; and
- (b) in subsection (1) above, where a notice is served by posting, any reference to the date on which a notice is served shall be construed as a reference to the date on which it is posted.

EXPLANATORY NOTES

Subsection (6)

This subsection implements Recommendation 4.5(1) (para. 4.49).

Subsection (7)

This subsection implements Recommendation 4.3(2) (para. 4.44).

Subsection (8)

This subsection implements Recommendation 4.9(2) (para. 4.72).

Subsection (9)

This subsection implements Recommendation 4.2(2) (para. 4.41) in part, and Recommendation 4.45(1) (para. 4.298) as read with paragraph 4.295.

Subsection (10)

This subsection implements Recommendation 4.6 (para. 4.54).

Clause 15

This clause regulates the eligibility of debts for initial inclusion in a scheme. Generally all debts must be included unless an impediment to inclusion provided for in the clause exists at “the first notice date” as defined in *subsection (2)*. Where such an impediment to inclusion of a debt ceases to exist after the first notice date, the inclusion or possible inclusion of the debt before confirmation of the scheme is regulated by *clause 23* and after confirmation by *clause 28*.

Subsections (1) and (2)

Subsection (1) provides for inclusion of debts payable as at the date mentioned in *paragraph (a)* or, as the case may be, *paragraph (b)* of the subsection. *Subsection (2)* defines that date as “the first notice date”. Debts which are future or contingent as at the first notice date are not included under *subsection (1)*: see Recommendations 4.10(2) (para. 4.80) and 4.16(1)(a) (para. 4.138).

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- (3) There shall be excluded from the scheme any debt—
- (a) which at the first notice date has not been constituted by decree and in respect of which the debtor does not admit liability or the amount;
 - (b) which at the first notice date has been so constituted but in respect of which there is a dispute as to whether the debt or any part thereof remains unpaid.

(4) There shall be excluded from the scheme any debt comprising expenses of court proceedings awarded against the debtor unless at the first notice date—

- (a) an extract of a decree decerning for payment of the expenses has been obtained, being a decree or extract specifying their amount; or
- (b) the amount of the expenses has been agreed between the creditor and the debtor.

(5) There shall be excluded from the scheme any debt—

- (a) due under a hire-purchase agreement or conditional sale agreement—
 - (i) which is in force at the first notice date; or
 - (ii) if at the first notice date the debtor is by virtue of section 130(4) of the Consumer Credit Act 1974 treated as a custodian under the terms of the agreement of the goods to which the agreement relates;
- (b) due under a regulated consumer hire agreement, if, at the first notice date in respect of the debt, an application under subsection (1) of section 132 of that Act (financial relief for hirer) is pending or proceedings in which the court may make an order under subsection (2) of that section are pending;
- (c) due under a credit agreement in respect of which, at the first notice date, an application under section 139 of that Act (reopening of extortionate agreements) is pending.

(6) There shall be excluded from the scheme any debt, if at the first notice date there are in force both a time order under section 129(2)(a) of the Consumer Credit Act 1974 for the payment of the debt by instalments and another order relating to the debt, or to the agreement under which the debt is owed, made under section 129(2)(b), 131, 133, 135(1) or 136 of that Act.

(7) There shall be excluded from the scheme any debt in respect of which the creditor—

- (a) holds a security over property of the debtor, unless the creditor, at the first notice date, has discharged his security, or realised the security subjects or acquired them in partial satisfaction of the debt;

EXPLANATORY NOTES

Subsection (3)

This subsection, implementing in part Recommendations 4.10(2) (para. 4.80) and 4.16(1)(b) (para. 4.138), excludes debts which are disputed as at the first notice date.

Subsection (4)

This subsection implements Recommendation 4.10(4) (para. 4.80).

Subsection (5)

Paragraph (a) of this subsection implements Recommendation 4.28(2) (para. 4.205).
Paragraph (b) of the subsection implements Recommendation 4.28(6) (para. 4.205).
Paragraph (c) of the subsection implements Recommendation 4.16(1)(c) (para. 4.138).

Subsection (6)

This subsection implements Recommendation 4.28(3)(a) (para. 4.205).

Subsection (7)

Paragraph (a) of this subsection implements Recommendation 4.23(2) (para. 4.174).
Paragraph (b) of the subsection implements Recommendation 4.25(1) (para. 4.178).

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- (b) has a right of retention or lien over property (other than documents) of the debtor unless the creditor, at the first notice date, has realised the property in partial satisfaction of the debt or the right of retention or lien has otherwise ceased to have effect.

(8) There shall be excluded from the scheme any debt—

- (a) in respect of which the creditor has a right to poind the ground; or
- (b) comprising rent or feuduty for the recovery of which the creditor as landlord or superior has a hypothec;

unless the creditor at the first notice date has entered into an agreement not to enforce the debt by poinding of the ground or (as the case may be) by sequestration for rent or feuduty.

(9) There shall be excluded from the scheme any debt in respect of which the creditor has raised an action of adjudication for debt, unless the creditor at the first notice date has abandoned the action and has discharged any notice of litigiousity which has been registered in connection with the action, any abbreviate of adjudication which has already been registered and any decree in the action which he has already obtained.

Ranking of
creditors whose
debts are
included in
scheme.

16.—(1) Each creditor whose debt is included in a debt arrangement scheme (including any creditor whose debt is included under section 23(1) of this Act or on a variation of the scheme under section 28(1) of this Act) shall be entitled—

- (a) under the scheme to receive payment of his full debt or, where payment is being made under the scheme only to the extent of a composition, the same proportion of his debt;
- (b) in any disbursement made by the administrator under the scheme, to receive the same proportion of his debt.

(2) For the purposes of subsection (1) above, the amount of a creditor's debt shall be, in the case of a creditor whose debt is included—

- (a) in the scheme by virtue of section 15(1) of this Act, the amount payable on the first notice date;
- (b) in the scheme by virtue of section 23(1) of this Act, the amount payable on the date when the administrator became satisfied as to the eligibility of the debt for inclusion in the scheme or, as the case may be, as to the amount of the debt;
- (c) on a variation of the scheme under section 28(1) of this Act, the amount payable on the date when the application was made for the variation.

EXPLANATORY NOTES

Subsection (8)

This subsection implements Recommendation 4.24(2) (para. 4.176).

Subsection (9)

This subsection implements in part Recommendation 4.14(3) (para. 4.118).

Clause 16

Subsection (1)

This subsection implements Recommendations 4.11(1) and (2) (para. 4.96) and 4.12 (para. 4.98).

Subsection (2)

Paragraph (a) of this subsection implements Recommendation 4.10(1) (para. 4.80). *Paragraph (b)* implements Recommendation 4.17(1) (para. 4.143). *Paragraph (c)* implements Recommendation 4.17(2)(a) (para. 4.143).

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Circumstances when scheme application is competent and may be entertained.

17.—(1) An application for a debt arrangement scheme (in this Part of this Act referred to as a “scheme application”) shall be competent only if the debtor is unable to pay his debts as they fall due and he owes not less than 3 debts and at least one of the debts—

- (a) has been constituted by decree and in respect of that debt—
 - (i) a charge for payment has been served on the debtor;
 - (ii) an arrestment (other than an arrestment of the debtor’s earnings in the hands of his employer) has been executed; or
 - (iii) an action of adjudication for debt has been raised; or
- (b) is a debt in respect of which a summary warrant has been granted.

(2) A scheme application shall be incompetent where at the date of the application—

- (a) a petition for the sequestration of the debtor’s estate has been presented (whether by a creditor or the debtor) and proceedings in the petition are continuing or an award of sequestration of the debtor’s estate has been granted and the debtor has not yet obtained a discharge; or
- (b) the debtor has granted a voluntary trust deed whereby his estate has been conveyed to a trustee for the benefit of his creditors generally, and the deed subsists; or
- (c) the debtor has entered into a composition contract with his creditors and the contract subsists; or
- (d) in relation to the debtor a debt arrangement scheme is already in force or another scheme application is pending.

(3) Without prejudice to subsections (1) and (2) above, a scheme application may be entertained only if it appears to the sheriff that—

- (a) the total debts (excluding interest and expenses and any debt secured by a heritable security) do not exceed £10,000 or such amount as may be prescribed in regulations made by the Secretary of State; and
- (b) the debtor’s resources, by way of income or otherwise, would be likely to be sufficient to produce not less than £600, or such sum as may be prescribed in regulations made by the Secretary of State, over a period of 3 years.

(4) For the purposes of subsection (3)(b) above, the resources of the debtor shall be such resources as are left to him after he has met—

- (a) the daily needs of himself and any person whom he is maintaining as a dependant in his household; and
- (b) any sum due under an order of a court in criminal proceedings;

and for the purposes of paragraph (a) above “daily needs” may include periodic payments required to be made by the debtor in respect of a security over his residence.

EXPLANATORY NOTES

Clause 17

Subsection (1)

This subsection implements Recommendation 4.9(4) (para. 4.72).

Subsection (2)

This subsection implements Recommendation 4.46(2)(a) (para. 4.311).

Subsection (3)

This subsection implements Recommendation 4.9(5) (para. 4.72).

Subsection (4)

This subsection is supplementary to *subsection (3)*. As to the reference to persons maintained by the debtor as dependants in his household, see paragraph 4.163. The extension of the meaning of “daily needs” implements Recommendation 4.23(4) (para. 4.174).

The Debtors (Scotland) Bill

(5) Any regulations under subsection (3)(a) or (b) above shall be made by statutory instrument and any such regulations shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Effect of
scheme.

18.—(1) Subject to subsections (2) and (3) below, a debt arrangement scheme, after it has been confirmed under section 24 of this Act and unless and until the decision confirming it is reversed on appeal on the final determination of the case or, if the scheme comes into force, until it has been revoked or has otherwise ceased to have effect, shall render incompetent—

(a) by every creditor of the debtor (whether his debt is included in the scheme or not or was incurred before or after the confirmation of the scheme) the commencement or execution of the following diligences (whether used on the dependence, in security or in execution) in relation to his debt—

- (i) a poinding and sale;
- (ii) an earnings arrestment;
- (iii) a current maintenance arrestment;
- (iv) an arrestment and action of furthcoming or sale;
- (v) an inhibition;
- (vi) an adjudication for debt;
- (vii) a charge for payment;

(b) the making and granting of an application by such a creditor under section 4 of the Civil Imprisonment (Scotland) Act 1882 (wilful failure to obey decree for alimentary debt) for a warrant to commit the debtor to prison;

(c) by every such creditor or by the debtor the presentation of a petition for the sequestration of the debtor's estate.

(2) A creditor shall not be liable in damages to the debtor by reason only of commencing or executing any diligence, making an application or presenting a petition for the sequestration of the debtor's estate, rendered incompetent by subsection (1)(a), (b) or (c) above unless the debtor establishes that the creditor was aware that the scheme had been confirmed.

(3) Where a creditor—

- (a) executes diligence against the debtor; or
- (b) presents, or concurs in, a petition for the sequestration of the debtor's estate,

while such diligence or petition is incompetent by virtue of subsection (1) above but at the time of that execution or presentation the creditor is unaware that the circumstances are such that the diligence or petition is incompetent, then any expenses incurred by him in the execution of the diligence or the presentation of the petition before

1882 c. 42.

EXPLANATORY NOTES

Clause 18

Subsection (1)

Paragraph (a) of this subsection implements Recommendations 4.14(1) (para. 4.118) and 4.18(1) (para. 4.148). *Paragraph (b)* implements in part Recommendation 4.22(5) (para. 4.168). *Paragraph (c)* implements Recommendation 4.46(6) (para. 4.311).

Subsection (2)

This subsection implements Recommendation 4.18(2)(a) (para. 4.148).

Subsections (3) and (4)

These subsections in their application to diligence expenses implement Recommendation 4.18(2)(c) (para. 4.148) and make similar provision in relation to the expenses of sequestration petitions.

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he became so aware and which would be chargeable against the debtor if the diligence or petition were competent shall be so chargeable.

(4) The expenses mentioned in subsection (3) above may, notwithstanding section 118(1) or (2) of this Act, be included as a debt in the debt arrangement scheme concerned upon a variation of the scheme under section 28(1) of this Act.

(5) Subject to subsection (6) below, on the coming into force of a debt arrangement scheme—

- (a) any charge already served by any creditor (whether or not his debt is included in the scheme), where the period for payment specified therein has not expired, shall lapse;
- (b) any diligence mentioned in paragraph (a)(i) to (v) of subsection (1) above, and any conjoined arrestment order, shall become ineffectual; and
- (c) there shall cease to have effect any time order under section 129(2)(a) of the Consumer Credit Act 1974 for the payment of the debt by instalments in a case where there is not in force any other order relating to the debt, or to the agreement under which the debt is owed, made under section 129(2)(b), 131, 133, 135(1) or 136 of that Act.

1974 c. 39.

(6) Subsection (5)(b) above shall not apply to any of the following diligences—

- (a) a poinding in which a warrant of sale has been granted but has not been executed;
- (b) a poinding executed in pursuance of a summary warrant if intimation has been made to the debtor under paragraph 12(1) of Schedule 6 to this Act of the date arranged for the removal of the poinded articles for sale or, if the articles are to be sold in the premises where they are situated, of the date arranged for the holding of the sale;
- (c) an arrestment of moveable property of the debtor if in respect of the arrested property—
 - (i) a decree in an action of furthcoming has been granted but has not been enforced; or
 - (ii) a warrant of sale has been granted but the warrant has not been executed.

(7) Where a poinding of articles belonging to the debtor has been executed by a creditor in any premises—

- (a) which has become ineffectual on the coming into force of a debt arrangement scheme; or
- (b) while a scheme was in force at a time when the creditor was unaware that it was in force,

then, notwithstanding section 50 of this Act and paragraph 8 of Schedule 6 to this Act, after the scheme has ceased to have effect,

EXPLANATORY NOTES

Subsection (5)

Paragraph (a) of the subsection implements Recommendation 4.14(4) (para. 4.118). *Paragraph (b)* implements in part Recommendation 4.14(2) (para. 4.118). *Paragraph (c)* implements Recommendation 4.28(3)(b) (para. 4.205).

Subsection (6)

This subsection implements in part Recommendation 4.14(2)(a) to (c) (para. 4.118).

Subsection (7)

This subsection implements Recommendation 4.18(3) (para. 4.148).

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the creditor may enforce any outstanding part of his debt by a pouncing in the same premises.

(8) In this section "a pouncing" does not include a pouncing of the ground.

Applications for schemes and their disposal

Initial procedure
on application.

19.—(1) A scheme application shall be in the prescribed form and shall be accompanied by a statement of the debtor's affairs containing prescribed particulars.

(2) On receipt of a scheme application, the sheriff shall, subject to section 17(1), (2) and (3) of this Act, make an order appointing an administrator to prepare a draft of a debt arrangement scheme.

(3) The administrator shall, within such period after an order has been made under subsection (2) above as may be prescribed, serve on each creditor whose debt appears to the administrator to be eligible for inclusion in the scheme a notice—

(a) stating to the best of the administrator's knowledge, the amount of the creditor's debt as at the date specified in the notice, being the first notice date, and

(b) requiring the creditor within 10 days after the date of the service of the notice on him to inform the administrator in writing—

(i) whether he accepts that the amount of his debt as at the date specified in the notice is correctly stated in the notice and, if not, to state the amount which he claims; and

(ii) whether he is claiming interest on his debt so far as accrued up to that date and, if so, the amount of interest claimed.

(4) If a creditor fails to comply with a requirement of subsection (3)(b) above, he shall not be entitled, except on cause shown, to object to the scheme on the ground that his debt (including any interest) is not included, or is not correctly stated, in the scheme.

(5) Where it appears to the sheriff that it is likely that the statement of the debtor's affairs does not specify all the debts which would qualify under section 15 of this Act for inclusion in the scheme, he may order such advertisement as he thinks fit inviting creditors to submit claims to the administrator for inclusion of their debts in the scheme.

(6) The debtor shall be liable for the expenses incurred in an advertisement under subsection (5) above.

Interim
measures
pending disposal
of application.

20.—(1) The sheriff shall, on making an order under section 19(2) of this Act appointing an administrator, make an interim order sisting diligence against the debtor to enforce debts.

EXPLANATORY NOTES

Subsection (8)

This subsection implements in part Recommendation 4.24(1) (para. 4.176).

Clause 19

Subsection (1)

This subsection implements Recommendation 4.32(1) (para. 4.238).

Subsection (2)

This subsection implements Recommendation 4.32(2) (para. 4.238).

Subsections (3) and (4)

These subsections implement Recommendation 4.32(3) (para. 4.238).

Subsections (5) and (6)

These subsections implement Recommendation 4.32(4) (para. 4.238).

Clause 20

Subsection (1)

This subsection implements Recommendation 4.13(1) (para. 4.109).

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(2) The administrator shall as soon as is reasonably practicable serve a copy of an interim order under subsection (1) above on each person who he knows is, or has reasonable cause to believe may be, a creditor of the debtor; and the order shall come into force in relation to such a person on such service being made on him.

(3) While an interim order under subsection (1) above is in force, it shall render incompetent—

- (a) the granting of an application for warrant of sale of articles which, before or after the making of the interim order, have been poided, and any such application (other than an application for an order under section 46(2)(b) of, or paragraph 5(2)(b) of Schedule 6 to, this Act) which is pending when the interim order comes into force shall fall;
- (b) where articles belonging to the debtor have been poided in pursuance of a summary warrant granted before or after the making of the interim order, the intimation under paragraph 12(1) of Schedule 6 to this Act of the date arranged for the removal of the poided articles for sale, or, if the articles are to be sold in the premises where they are situated, of the date arranged for the holding of the sale;
- (c) the service of an earnings arrestment schedule;
- (d) where an arrestment of the debtor's property (other than an arrestment of earnings in the hands of his employer) has been executed before or after the making of the interim order, the raising of an action of furthcoming or sale, or the granting of a decree in any such action which has already been raised, in pursuance of that arrestment;
- (e) the raising of an action of adjudication for debt or, if such an action has already been raised, the taking of any steps other than the registration of a notice of ligitiosity in connection with the action, the obtaining and extracting of a decree in the action, the registration of an abbreviate of adjudication and the completion of title to property adjudged by the decree;
- (f) the making and granting of an application under section 4 of the Civil Imprisonment (Scotland) Act 1882 (wilful failure to obey decree for alimentary debt) for a warrant to commit the debtor to prison.

1882 c. 42.

1970 c. 35.

(4) Subject to sub-paragraph (3) of paragraph 9 of Schedule 3 to the Conveyancing and Feudal Reform (Scotland) Act 1970 (circumstances in which debtor in standard security is held to be in default), for the purposes of any provision of any document which confers rights or imposes duties on the constitution of the apparent insolvency of the debtor, the making of an interim order under subsection (1) above shall, unless the contrary intention appears in the document, be deemed to constitute apparent insolvency.

EXPLANATORY NOTES

Subsection (2)

This subsection implements Recommendation 4.13(2) (para. 4.109).

Subsection (3)

This subsection implements Recommendations 4.13(3) (para. 4.109), (in part) 4.22(2), (4) and (5) (para. 4.168) and 4.24(1) (para. 4.176).

Subsection (4)

This subsection implements Recommendation 4.46(1) (para. 4.311). The Conveyancing and Feudal Reform (Scotland) Act 1970, Schedule 3, paragraph 9(3), is set out in *Schedule 7, paragraph 15* with amendments proposed in Recommendation 4.23(3) (para. 4.174).

The Debtors (Scotland) Bill

(5) The period during which such an interim order is in force shall be disregarded in calculating the period during which a poiding to which the order applies remains effective.

(6) The administrator at any time after an order has been made under section 19(2) of this Act may require the debtor, pending the disposal of the scheme application under section 21 or 24 of this Act, to give an undertaking not to dispose of, nor to remove from any place in Scotland, any property belonging to the debtor which is specified by the administrator.

(7) In subsection (3)(a) above "poided" does not include poided under a poiding of the ground.

Refusal of
scheme
application at
sheriff's instance
or on
administrator's
application.

21.—(1) The sheriff, at any time between the appointment of the administrator and the confirmation of the debt arrangement scheme, at his own instance or on an application by the administrator—

- (a) shall, if he is satisfied as to any of the matters mentioned in subsection (2) below;
- (b) may, on either of the grounds mentioned in subsection (3) below,

make an order refusing the scheme application and recalling the interim order under section 20(1) of this Act.

(2) The matters referred to in subsection (1)(a) above are—

- (a) that the scheme application was incompetent by virtue of section 17(1) or (2) of this Act;
- (b) that the requirements of paragraph (a) or (b) of section 17(3) of this Act are to a substantial extent not met;
- (c) that the debtor is unlikely to comply with the requirements of a debt arrangement scheme;
- (d) that, since the scheme application was made, an award of the sequestration of the debtor's estate has been granted;
- (e) that, since the scheme application was made, the debtor has granted a voluntary trust deed whereby his estate has been conveyed to a trustee for the benefit of his creditors generally;
- (f) that, since the scheme application was made, the debtor has entered into a composition contract with his creditors.

(3) The grounds referred to in subsection (1)(b) above are—

- (a) that the debtor has failed to disclose information relevant to the preparation of the scheme or has otherwise failed to co-operate with the administrator;
- (b) that the debtor is in breach of an undertaking given under section 20(6) of this Act.

(4) The sheriff shall not make an order under subsection (1) above without first giving the debtor an opportunity to make representations.

EXPLANATORY NOTES

Subsection (5)

This subsection implements Recommendation 4.13(4) (para. 4.109) so far as applicable to poindings. As to the period of prescription of arrestments, see *Schedule 7, paragraph 2*.

Subsection (6)

This subsection implements in part Recommendation 4.34 (para. 4.249) and consequential provision is made in *clause 21(3)(b)*.

Subsection (7)

This subsection implements in part Recommendation 4.24(1) (para. 4.176).

Clause 21

Subsections (1) to (3)

These subsections implement Recommendations 4.33(1) (para. 4.244), the first part of Recommendation 4.33(3) (same para.) and Recommendation 4.46(2)(b) (para. 4.311).

Subsection (4)

This subsection implements Recommendation 4.33(2) (para. 4.244).

The Debtors (Scotland) Bill

(5) The administrator shall intimate an order under subsection (1) above to—

- (a) the debtor;
- (b) any creditor on whom service has been made under section 20 (2) or 22(1) of this Act; and
- (c) any co-obligant on whom service has been made under section 22(1) of this Act.

(6) An order under subsection (1) above in so far as it recalls the interim order under section 20(1) of this Act shall not take effect while the first mentioned order is appealable or subject to an appeal or a further appeal.

Preparation and
intimation of
draft scheme.

22.—(1) Subject to section 21(1) of this Act, the administrator, after carrying out such enquiries as he thinks necessary and in consultation with the debtor, shall, within such period after an order has been made under section 19(2) of this Act as may be prescribed, prepare a draft of the debt arrangement scheme and serve on each person who he knows is, or has reasonable cause to believe may be, a creditor of the debtor and on any co-obligant—

- (a) a copy of the scheme application;
- (b) a copy of a statement of the debtor's affairs as lodged under section 19(1) of this Act, or as prepared by the administrator, accompanied by a declaration by the debtor that to the best of his knowledge and belief the statement is a full and accurate statement of his financial affairs;
- (c) a copy of the draft scheme; and
- (d) a notice stating that objection may be made to the scheme by any creditor or co-obligant by notice in writing to the administrator within 3 weeks, or such other period as may be prescribed, after the date of such service.

(2) The period within which service is required to be made by the administrator by virtue of subsection (1) above may be extended by the sheriff, on cause shown by the administrator, for such further period as the sheriff thinks appropriate.

(3) The sheriff, for the purpose of assisting the administrator to prepare the debt arrangement scheme, may make a remit to a sheriff officer or any other suitable person to make a valuation of any such item, or any such category of items, of the debtor's assets as he shall specify in the remit.

(4) The debtor shall be liable for the expenses incurred in a valuation under subsection (3) above.

EXPLANATORY NOTES

Subsection (5)

This subsection is supplementary to *subsection (1)*.

Subsection (6)

This subsection implements the second part of Recommendation 4.33(3) (para. 4.244).

Clause 22

Subsections (1) and (2)

These subsections implement Recommendation 4.36 (para. 4.256). As to the statement of the debtor's affairs, see paragraph 4.234.

Subsections (3) and (4)

These subsections implement Recommendation 4.35 (para. 4.251).

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Inclusion of
other debts
before
confirmation of
scheme

23.—(1) Without prejudice to section 28(1) of this Act and subject to subsections (2) to (4) below, the administrator shall include in the draft scheme any debt—

- (a) which was payable at the first notice date but which—
 - (i) has only come to the knowledge of the administrator after that date; or
 - (ii) was omitted from the scheme in error;
- (b) which has been incurred since the first notice date and in respect of which the liability and amount are admitted;
- (c) which it was incompetent to include in the scheme by reason of section 15(3)(a) of this Act but, since the first notice date—
 - (i) the debt has become constituted by decree, or
 - (ii) the liability therefor and the amount thereof have been admitted;
- (d) which it was incompetent to include in the scheme by reason of paragraph (b) of section 15(3) of this Act but in respect of which the dispute mentioned in that paragraph has been resolved;
- (e) which was incurred before the first notice date but which has become payable only since that date;
- (f) which it was incompetent to include in the scheme by reason of section 15(6) of this Act but in respect of which the time order under section 129(2)(a) of the Consumer Credit Act 1974 has been revoked or has otherwise ceased to have effect; or
- (g) which, because of the circumstances existing at the first notice date, was excluded from the scheme under section 15(4), (5), (7), (8) or (9) of this Act, if those circumstances no longer exist.

1974 c. 39.

(2) The administrator shall not include a debt mentioned in subsection (1) above in the draft scheme where the sheriff is of the opinion, having regard to all the circumstances including the stage which the proceedings in the scheme application have reached, that it would be more appropriate to consider the question of its inclusion in the scheme on an application being made to him under section 28(1) of this Act for a variation of the scheme.

EXPLANATORY NOTES

Clause 23

This clause regulates the inclusion of debts identified, incurred, or becoming eligible for inclusion, between the first notice date (as defined in *clause 15(2)(a)*) and the confirmation of the scheme. It complements *clauses 15* (initial inclusion) and *28* (inclusion after confirmation of scheme).

Subsection (1)

Paragraph (a) of the subsection, implementing Recommendation 4.16(3)(a)(i) (para. 4.138), relates to debts whose existence is identified after the first notice date or debts omitted from a draft scheme in error.

Paragraph (b), implementing Recommendation 4.16(3)(a)(ii) (para. 4.138) relates to debts incurred since the first notice date.

Paragraphs (c) and *(d)*, implementing in part Recommendation 4.16(3)(a)(iii) (para. 4.138), relates to debts which were disputed at the first notice date.

Paragraph (e), implementing in part Recommendation 4.16(3)(a)(iii) (para. 4.138), relates to debts which were future or contingent at the first notice date but have become payable since that date.

Paragraph (f), implementing Recommendation 4.28(3)(a) (para. 4.205), relates to debts subject at the first notice date to both a time order under the Consumer Credit Act 1974, section 129(2)(a) and to another order under any of the provisions of that Act specified in *clause 15(6)*.

Paragraph (g) relates to the following types of debts which were ineligible for inclusion at the first notice date, namely court expenses ineligible under *clause 15(4)*; hire purchase or conditional sale agreement debts ineligible under *clause 15(5)(a)*; consumer hire agreement debts ineligible under *clause 15(5)(b)*; debts challenged under the Consumer Credit Act 1974, section 139 ineligible under *clause 15(5)(c)*; debts secured by securities, or by liens over goods, ineligible under *clause 15(7)*; debts enforceable by poinding of the ground or sequestration under the hypothecs ineligible under *clause 15(8)*; and debts being enforced by adjudications ineligible under *clause 15(9)* (see the explanatory notes on *clause 15(4)*, (5), (7), (8) and (9) for references to the Recommendations concerned).

Subsection (2)

This subsection implements Recommendation 4.16(3)(b)(i) (para. 4.138).

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(3) There shall not be included in the draft scheme maintenance which has become payable since the first notice date.

(4) If, with the addition of any debt mentioned in subsection (1) above, the total debts (as determined under paragraph (a) of section 17(2) of this Act) exceed to a substantial extent £10,000 or the amount prescribed in regulations made under that paragraph, the administrator shall not include such a debt in the draft scheme but shall instead apply for an order under section 21 of this Act.

(5) If under subsection (1) above the administrator includes a debt in a draft scheme after service under section 22(1) of this Act, he shall serve—

- (a) on the creditor whose debt is so included the documents mentioned in section 22(1)(a) and (b) of this Act; and
- (b) on that creditor and on each other person who he knows is, or has reasonable cause to believe may be, a creditor of the debtor and on any co-obligant—
 - (i) a copy of the draft scheme as adjusted to take account of the inclusion of the debt under subsection (1) above; and
 - (ii) a notice stating that objection may be made to the scheme by any creditor or co-obligant by notice in writing to the administrator within 2 weeks, or such other period as may be prescribed, after the date of such service.

(6) Without prejudice to section 27(1) of this Act, where, before the scheme application has been disposed of, a creditor whose debt is included in the draft scheme has assigned his debt in whole or in part or has died or the debt of such a creditor has been transmitted by or under any enactment, the administrator shall, on an application by the assignee or the person to whom the debt has been transmitted, adjust the draft scheme by subrogating the assignee or the representative or that person (to the extent of the amount assigned or transmitted) for the creditor.

24.—(1) This section applies where no order has been made under section 21 of this Act.

Disposal of
scheme
application
where no order
made under
s.21.

(2) If no objections are made to the scheme—

- (a) in accordance with a notice served under section 22(1)(d), 23(5)(b)(ii) or 33(6)(a)(ii) of this Act, or
- (b) by any creditor, or co-obligant, on whom no such notice was served,

EXPLANATORY NOTES

Subsection (3)

This subsection implements in part Recommendation 4.22(1) (para. 4.168).

Subsection (4)

This subsection implements Recommendation 4.16(3)(b)(ii) (para. 4.138).

Subsection (5)

This subsection implements Recommendation 4.16(3)(c) (para. 4.138).

Subsection (6)

This subsection enables the administrator, before disposal of a scheme application, to subrogate an assignee, or other person to whom an included debt has transmitted, in place of the original creditor and corresponds to *clause 27* (which regulates subrogation after confirmation of a scheme).

Clause 24

This clause primarily implements the proposals on procedure in Recommendation 4.37 (para. 4.265).

Subsection (1)

An order under *clause 21* is an order refusing a scheme application and recalling an interim sist of diligence.

Subsections (2) to (4)

These subsections implement Recommendation 4.37(1) to (4) (para. 4.265).

the sheriff may make an order confirming the scheme or confirming it with such modifications as are necessary to correct any error in it, being modifications which do not materially affect the interests of any creditor.

(3) If any such objection is made to the scheme, the administrator shall intimate it to the debtor and any creditor, and any co-obligant, on whom the scheme application was served, and the sheriff shall not dispose of the scheme application without first giving the persons on whom such intimation has been made—

- (a) an opportunity to make representations; and
- (b) if agreement is not reached as to whether a scheme should be confirmed or as to its terms, an opportunity to be heard.

(4) If any such objection is made to the scheme, the sheriff—

(a) shall refuse the scheme application if he is satisfied, (either by the objection or by representations made to him)—

- (i) that the scheme application was incompetent by virtue of section 17(1) or (2) of this Act;
- (ii) that the requirements of paragraph (a) or (b) of section 17(3) of this Act are to a substantial extent not met;
- (iii) that the debtor is unlikely to comply with the requirements of a debt arrangement scheme;
- (iv) that, since the scheme application was made, an award of the sequestration of the debtor's estate has been granted;
- (v) that, since the scheme application was made, the debtor has granted a voluntary trust deed whereby his estate has been conveyed to a trustee for the benefit of his creditors generally; or
- (vi) that, since the scheme application was made, the debtor has entered into a composition contract with his creditors;

(b) in any other case, may—

- (i) confirm the scheme, with or without modifications; or
- (ii) refuse the scheme application.

(5) The sheriff, in determining whether to make an order confirming the scheme, shall disregard any objection by a creditor (being a creditor who, if the debtor's estate were sequestrated, would be entitled to a preference) on the ground that under the scheme he would not obtain the benefit of that preference; and, without prejudice to section 5A of the Bankruptcy (Scotland) Act 1985 (as set out in section 35 of this Act), it shall be incompetent for any creditor to object to the making of the scheme on the ground that he wishes to present a petition for the sequestration of the debtor's estate.

(6) The modifications which the sheriff shall be entitled to make to a scheme on confirming it under subsection (4)(b) above may

EXPLANATORY NOTES

Subsection (5)

This subsection implements the first part of Recommendation 4.11(3) (para. 4.96) and Recommendation 4.46(5) (para. 4.311).

Subsection (6)

This subsection implements in part Recommendation 4.2(3) (para. 4.41).

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include a provision that the period within which payments under the scheme are required to be made shall be extended to be a period not exceeding 5 years after the date when the scheme comes into force.

(7) Any order under this section shall recall the interim order under section 20(1) of this Act.

(8) The administrator shall—

(a) intimate any order under this section to the following persons—

- (i) the debtor;
- (ii) all the creditors on whom the scheme application was served; and
- (iii) any co-obligant on whom the scheme application was served; and

(b) if an order has been made confirming the scheme (with or without modifications), send a copy of the scheme as confirmed to the aforementioned persons.

(9) The administrator shall intimate the coming into force of a scheme—

(a) to any employer who is operating an earnings arrestment or a current maintenance arrestment against the debtor's earnings; and

(b) if a conjoined arrestment order is being operated by the sheriff clerk of a different sheriff court from the court by which the scheme has been confirmed, to that sheriff clerk.

(10) No order under this section shall take effect while the order is appealable or subject to an appeal or a further appeal:

Provided that an order under this section confirming the scheme (with or without modifications) in so far as it recalls the interim order under section 20(1) of this Act shall have immediate effect.

Operation, variation and termination of schemes

25.—(1) The sheriff on or after making an order confirming a debt arrangement scheme may, for the purpose of facilitating the operation of the scheme, on an application by the administrator, order an employer of the debtor, on each pay day occurring after the scheme comes into force and until whichever happens first of the following events—

- (a) the debtor ceases to be employed by that employer;
- (b) the intimation to the employer by the administrator of an order made by the sheriff, on an application by the administrator, requiring the employer to cease making payments under this subsection;
- (c) the intimation to the employer by the administrator that the scheme has ceased to have effect,

Diversion of
debtor's net
earnings to
administrator.

EXPLANATORY NOTES

Subsections (7) to (10)

These subsections implement Recommendation 4.37(5) to (7) (para. 4.265).

Clause 25

This clause implements Recommendation 4.39 (para. 4.270).

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to pay to the administrator the whole of the debtor's net earnings payable to the debtor on that day or such part thereof as is specified in the order.

(2) The sheriff shall not make an order under subsection (1) above without first giving the debtor an opportunity to make representations.

(3) The administrator shall serve a copy of an order under subsection (1) above on the debtor and the employer; and the employer shall be under no liability for non-compliance with the order until a period of 7 days or such other period as may be prescribed has elapsed since the date of such service on him.

(4) Where the employer fails to comply with an order under subsection (1) above—

(a) the sheriff, on an application by the administrator, may make an order decerning for payment by the employer to the administrator of the sums which appear to the sheriff to be due; and

(b) the employer shall not be entitled to recover from the debtor any sum paid by him to the debtor in contravention of the order.

(5) The administrator shall, from any sum paid to him in pursuance of an order under subsection (1) above, retain for disbursement under the scheme such part as is necessary to satisfy any sum currently due to him by the debtor under the scheme and remit any balance thereof to the debtor.

(6) The sheriff may, on an application by the debtor or any other interested person, by order vary or recall an order under subsection (1) above; and subsections (2) to (5) above shall apply to an order under this subsection as they apply to an order under subsection (1).

(7) The employer shall be entitled, on making payments to the administrator under this section, to charge the debtor the same fee as he would be entitled to charge him under section 97 of this Act if the employer were operating an earnings arrestment; and such fee shall be deductible from the debtor's net earnings.

Other provisions relating to operation of scheme.

26.—(1) While a debt arrangement scheme is in force, the debtor shall disclose to the administrator any material change in his circumstances.

(2) Subject to any direction by the sheriff, the administrator shall, if requested to do so by a creditor whose debt is included in a debt arrangement scheme, report to the creditor on the debtor's performance of his obligations under the scheme.

(3) The sheriff may, on cause shown on an application by the administrator or any creditor or co-obligant, grant an interdict prohibiting the debtor while the scheme is in force from disposing of, or removing from any place in Scotland, any property belonging to the debtor which is specified in the interdict.

EXPLANATORY NOTES

Clause 26

Subsection (1)

This subsection implements the first part of Recommendation 4.40(2) (para. 4.274).

Subsection (2)

This subsection implements the second part of Recommendation 4.40(2) (para. 4.274).

Subsection (3)

This subsection implements Recommendation 4.40(3) (para. 4.274).

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(4) Where a creditor who holds a security for his debt has exercised his right of sale of the security subjects, the sheriff may make an order decerning for payment by the creditor to the administrator, for disbursement in accordance with the scheme to the creditors whose debts are included in the scheme, of any surplus of the proceeds of sale which, but for an order under this subsection, would be payable to the debtor.

Subrogation to
creditor of
assignee or
representative.

27.—(1) Where a creditor whose debt is included in a debt arrangement scheme has assigned his debt (in whole or in part) or has died, or the debt of such a creditor has been transmitted by or under any enactment, the creditor's assignee or the person to whom the debt has been transmitted or representative who has acquired right to the debt may apply to the administrator to vary the scheme by subrogating the assignee or that person (to the extent of the amount assigned or transmitted) or representative for that creditor.

(2) An applicant under subsection (1) above shall submit to the administrator a document or documents showing how he acquired his right; and the applicant shall send a copy of the application to the creditor if he has not died.

(3) The administrator shall grant an application under subsection (1) above if he is satisfied that the applicant's right is established.

(4) An appeal may be taken by the applicant or the creditor against the decision of the administrator under subsection (3) above to the sheriff.

(5) The decision of the sheriff under subsection (4) above shall be final.

(6) This section shall not apply to an assignation of the debt to a co-obligant.

Variation of
scheme.

28.—(1) Subject to subsections (2) to (4) and (8) below, the sheriff, on an application by any creditor, may vary a debt arrangement scheme by including in it any debt of the creditor—

- (a) which was omitted from the scheme in error;
- (b) which has been incurred since the first notice date and in respect of which the liability and amount are admitted;
- (c) which it was incompetent to include in the scheme by reason of section 15(3)(a) of this Act but, since the first notice date—

EXPLANATORY NOTES

Subsection (4)

This subsection implements Recommendation 4.23(5) (para. 4.174).

Clause 27

The main provisions of this clause implement Recommendation 4.41(3) (para. 4.279).

Subsection (6)

This subsection implements in part Recommendation 4.27(2) second sentence (para. 4.193). The inclusion of a debt assigned to a co-obligant is governed by *clause 34*.

Clause 28

Subsections (1) to (5)

These subsections deal with the power of the sheriff to vary a confirmed scheme so as to include a debt in the scheme. The subsections complement *clauses 15* (initial inclusion) and *23* (inclusion before confirmation of scheme).

Subsection (1)

This subsection confers on the sheriff a discretionary power to vary a scheme by including in it debts omitted from it in error, or incurred, or becoming eligible for inclusion, after the first notice date (as defined in *clause 15(2)*).

Paragraph (a) of the subsection, implementing Recommendation 4.16(4)(a) (para. 4.138), relates to debts omitted from the scheme in error.

Paragraph (b), implementing Recommendation 4.16(4)(b) (para. 4.138), relates to newly incurred and undisputed debts.

Paragraphs (c) and (d), implementing in part Recommendation 4.16(4)(c) (para. 4.138), relates to debts which were disputed on the first notice date.

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- (i) the debt has become constituted by decree, or
- (ii) the liability therefor and the amount thereof have been admitted;
- (d) which it was incompetent to include in the scheme by reason of paragraph (b) of section 15(3) of this Act but in respect of which the dispute mentioned in that paragraph has been resolved;
- (e) which was incurred before the first notice date but which has become payable only since that date;
- (f) which it was incompetent to include in the scheme by reason of section 15(6) of this Act but in respect of which the time order under section 129(2)(a) of the Consumer Credit Act 1974 has been revoked or has otherwise ceased to have effect; or
- (g) which, because of the circumstances existing at the first notice date, was excluded from the scheme under section 15(4), (5), (7), (8) or (9) of this Act, if those circumstances no longer exist.

1974 c. 39.

(2) The sheriff shall not vary a scheme under subsection (1) above so as to include maintenance which has become payable since the first notice date.

(3) If the inclusion in the scheme of any debt mentioned in subsection (1) above would result in the total debts (as determined under paragraph (a) of section 17(3) of this Act) so included exceeding to a substantial extent £10,000 or the amount prescribed in regulations made under that paragraph, the sheriff shall not vary the scheme so as to include such a debt.

(4) An application under subsection (1) above to vary a scheme so as to include a debt shall be incompetent if the debt is a debt—

(a) in relation to which it would be competent to apply for variation of the scheme under section 27(1) of this Act; or

(b) which is due by the debtor to a co-obligant to discharge the co-obligant's right of relief.

(5) On the variation of a scheme under subsection (1) above to include a debt, there shall cease to have effect any time order under section 129(2)(a) of the Consumer Credit Act 1974 for the payment of the debt by instalments in a case where there is not in force any other order relating to the debt, or to the agreement under which the

EXPLANATORY NOTES

Paragraph (e), implementing in part Recommendation 4.16(4)(c) (para. 4.138), relates to debts which were future or contingent at the first notice date but have become payable since that date.

Paragraph (f), implementing Recommendation 4.28(3)(a) (para. 4.205), relates to debts subject at the first notice date to both a time order under the Consumer Credit Act 1974, section 129(2)(a) and to another order under any of the provisions of that Act specified in *clause 15(6)*.

Paragraph (g) relates to the following types of debts which were ineligible for inclusion at the first notice date, namely, court expenses ineligible under *clause 15(4)*; hire purchase or conditional sale agreement debts ineligible under *clause 15(5)(a)*; consumer hire agreement debts ineligible under *clause 15(5)(b)*; debts challenged under the Consumer Credit Act 1974, section 139 ineligible under *clause 15(5)(c)*; debts secured by securities, or liens over goods, ineligible under *clause 15(7)*; debts enforceable by pointing of the ground or sequestration under the hypothecs ineligible under *clause 15(8)*; and debts being enforced by adjudications ineligible under *clause 15(9)*: (see explanatory notes on *clause 15(4)*, (5), (7), (8) and (9) for references to the Recommendations concerned).

Subsection (2)

This subsection implements in part Recommendation 4.22(1) (para. 4.168).

Subsection (3)

This subsection implements Recommendation 4.16(4), second sentence (para. 4.138).

Subsection (4)

Paragraph (a) of the subsection precludes an application to the sheriff under this clause where the simple procedure of subrogation under *clause 27* (relating to debts assigned or transmitted from the original included creditor to another person) is competent.

Paragraph (b), implementing Recommendation 4.27(2), last sentence, (para. 4.193), precludes an application under this clause for inclusion of a debt due to a co-obligant, which is regulated by *clause 34*.

Subsection (5)

This subsection implements in part Recommendation 4.28(3)(b) (para. 4.205).

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debt is owed, made under section 129(2)(b), 131, 133, 135(1) or 136 of that Act.

(6) The sheriff, on an application by the debtor, the administrator or any creditor whose debt is included in the scheme, may vary it by directing that the period within which payments under the scheme are required to be made shall be extended to be a period not exceeding 5 years after the date when the scheme came into force.

(7) The sheriff may on cause shown, on an application by any creditor (whether or not his debt is included in the scheme), the debtor or the administrator, vary a debt arrangement scheme:

Provided that an application under this subsection shall be incompetent for the purpose of including a debt in the scheme or subrogating a creditor or a co-obligant for a creditor.

(8) The sheriff shall not vary a scheme under this section where the variation would result in the amount payable under the scheme to any creditor being reduced below the amount which he has already received in disbursements thereunder.

(9) The sheriff shall not vary a scheme under this section without first giving the debtor and the creditors whose debts are included in the scheme an opportunity to make representations.

Interest accruing
after first notice
date.

29. A creditor whose debt is included in a debt arrangement scheme, or was so included but has since been satisfied to the extent of his entitlement under the scheme, shall not be entitled to any interest which has accrued on his debt after the first notice date unless—

(a) the debts included in the scheme are being paid in full, and he has claimed such interest in accordance with a notice served on him under section 31(2)(b) of this Act and the claim has been allowed; or

(b) the scheme has ceased to have effect without a discharge of any of the debts included in the scheme being granted under section 31(1) of this Act.

Revocation of
scheme.

30.—(1) The sheriff may on cause shown make an order revoking a debt arrangement scheme on an application by any creditor (whether or not his debt is included in the scheme), the debtor or the administrator.

(2) The sheriff in determining whether to make an order revoking a scheme shall disregard any contention by the creditor applying for the revocation (being a creditor who, if the debtor's estate were sequestrated, would be entitled to a preference) that under the scheme he is not obtaining, or would not obtain, the benefit of that preference.

EXPLANATORY NOTES

Subsection (6)

This subsection implements in part Recommendation 4.2(3) (para. 4.41).

Subsection (7)

This subsection, implementing Recommendation 4.41(1) (para. 4.279), confers on the sheriff a general discretionary power to vary a scheme subject to the restrictions in the proviso. As to subrogation of a new creditor (e.g. an assignee) for an existing creditor, see *clause 27*; as to subrogation of a co-obligant, see *clause 34*.

Subsection (8)

This subsection implements Recommendation 4.41(2) (para. 4.279).

Subsection (9)

This subsection implements in part Recommendation 4.41(1) (para. 4.279).

Clause 29

This clause implements Recommendations 4.10(3) (para. 4.80) and 4.44(1)(b) (para. 4.294).

Clause 30

Subsection (1)

This subsection implements the main proposal in Recommendation 4.42(1) (para. 4.285). See also Recommendations 4.7 (para. 4.56) and 4.16(5) (para. 4.138).

Subsection (2)

This subsection implements in part Recommendation 4.11(3) (para. 4.96); see also *clause 24(5)*.

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(3) The sheriff shall not make an order under subsection (1) above revoking a scheme without first giving the debtor and the creditors whose debts are included in the scheme an opportunity to make representations.

(4) Where a scheme includes a provision mentioned in section 14(5) of this Act, the administrator shall ascertain whether the debtor has complied with the provision and any condition attaching thereto and shall make a report thereon to the sheriff.

(5) If the sheriff, after considering a report under subsection (4) above and after giving the debtor an opportunity to be heard, is satisfied that the debtor has not complied as aforesaid, he shall make an order revoking the scheme.

(6) On revocation of a debt arrangement scheme, the debts which were included in the scheme shall, without composition and to the extent that they remain unpaid, become enforceable—

(a) by diligence in the case of debts already constituted by decree; or

(b) by obtaining decree and by diligence in the case of debts not so constituted,

and, notwithstanding section 50 of this Act and paragraph 8 of Schedule 6 to this Act, in this subsection “diligence” includes, where the debt immediately before the scheme was confirmed was being enforced by a pouding in any premises, another pouding in those premises.

(7) No order under this section revoking a scheme shall take effect while the order is appealable or subject to an appeal or a further appeal.

Discharge of debts and decrees for undischarged debts or interest.

31.—(1) Without prejudice to subsection (5) below, the sheriff, on an application by the administrator or the debtor, shall grant a discharge of all the debts which were included in the scheme when it was confirmed if it appears to the sheriff that all the sums required to be paid under the scheme to the administrator for disbursement to the creditors in those debts have been so paid.

(2) The administrator shall—

(a) intimate any application under subsection (1) above to the creditors whose debts are included in the scheme, or were so included but have since been satisfied to the extent of their entitlement under the scheme; and

(b) where under the scheme the debts are being paid in full, serve on each creditor as aforesaid along with the intimation a notice inviting him to state within 2 weeks, or such period as may be prescribed, after the date of such service whether he is claiming interest on his debt so far as accrued since the first notice date and, if so, the amount of interest

EXPLANATORY NOTES

Subsection (3)

This subsection implements in part Recommendation 4.42(1) (para. 4.285).

Subsections (4) and (5)

These subsections implement Recommendation 4.4(2) (para. 4.47).

Subsection (6)

This subsection implements Recommendation 4.42(2) (para. 4.285).

Subsection (7)

This subsection implements Recommendation 4.42(3) (para. 4.285).

Clause 31

This clause deals with applications for discharge of debts (*subsections (1), (2)(a), (4), (5), (11) and (12)*); claims and decrees for interest (*subsections (2)(b), (3), (9), (10), (12) and (13)*); and decrees for undischarged debts included in a scheme late (*subsections (6) to (8), (10) and (13)*).

Subsection (1)

This subsection implements Recommendation 4.43(1) (para. 4.289).

Subsection (2)

Paragraph (a) of this subsection implements Recommendation 4.43(2) (para. 4.289).

Paragraph (b) of the subsection implements in part Recommendation 4.44(1)(a) (para. 4.294).

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claimed; and the administrator shall notify the debtor of any such claim.

(3) Any dispute as to whether interest claimed in pursuance of subsection (2)(b) above is payable or as to the amount thereof which is payable shall be determined by the sheriff after such enquiry as he thinks fit.

(4) Where—

(a) the scheme (whether as originally confirmed or as varied) provides that the period within which payments thereunder are required to be made shall be 5 years; and

(b) the sheriff refuses to grant a discharge under subsection (1) above but it appears to him to be likely that, if the period mentioned in paragraph (a) above were extended for a period not exceeding 3 months, all the sums required to be paid under the scheme to the administrator would be so paid,

he shall make an order extending the period mentioned in paragraph (a) above for a period specified in the order, being a period not exceeding 3 months:

Provided that the sheriff shall not make an order under this subsection on more than one occasion.

(5) An application under subsection (1) above shall be competent within a period of one month, or such longer period as the sheriff may allow, after the date of expiry of the period within which under section 14(3)(a) of this Act (including that period as extended under section 24(6) or 28(7) of this Act or subsection (4) above) payments under the scheme are required to be made:

Provided that this subsection is without prejudice to the competence of such an application before such expiry.

(6) Where, at the time when the sheriff grants a discharge of debts under subsection (1) above, there has been included in the scheme any other debt under section 28(1) of this Act in relation to which the amount as provided by the scheme has not been fully paid, the sheriff shall, notwithstanding that the debt may previously have been constituted by decree, grant an interlocutor in favour of the creditor comprising—

(a) a decree containing a time to pay direction for the payment of the unpaid balance of the amount to which he is entitled under the scheme and any interest claimed in pursuance of subsection (2)(b) above in so far as it has been allowed; and

(b) if the scheme provided for payment only to the extent of a composition, a decree, in the event of the direction ceasing to have effect under section 3(1), (2) or (3) of this Act, for payment of the unpaid balance of the debt.

EXPLANATORY NOTES

Subsection (3)

This subsection implements in part Recommendation 4.44(1)(a) (para. 4.294).

Subsection (4)

This subsection implements Recommendation 4.43(4) (para. 4.289).

Subsection (5)

This subsection implements Recommendation 4.43(5) (para. 4.289).

Subsections (6) to (8)

These subsections implement the main proposals in Recommendation 4.17(3) (para. 4.143).

(7) Where—

- (a) the scheme provided for payment only to the extent of a composition;
- (b) in relation to a debt a decree is granted under subsection (6)(a) above; and
- (c) the debtor pays the full amount payable by him under that decree,

the unpaid balance of that debt shall be treated as discharged.

(8) No direction under subsection (6)(a) above shall be capable of being recalled under section 3(5) of this Act.

(9) Where all the debts which have been included in the scheme are discharged under subsection (1) above but interest claimed in pursuance of subsection (2)(b) above has been allowed and has not been fully paid, the sheriff on granting such a discharge shall grant a decree in favour of the creditor for payment of that interest and such a decree may contain a time to pay direction.

(10) On the coming into force of a decree under subsection (6)(a) or (9) above in respect of a debt, any previous decree relating thereto shall cease to have effect; and, on the coming into force of a decree mentioned in paragraph (b) of subsection (6), the decree mentioned in paragraph (a) of that subsection shall cease to have effect.

(11) The sheriff shall not dispose of an application under subsection (1) above without first giving the debtor and the creditors whose debts are included in the scheme—

- (a) an opportunity to make representations; and
- (b) if agreement is not reached as to whether discharge of the debts should be granted, an opportunity to be heard.

(12) No discharge under subsection (1) above or no determination under subsection (3) above shall take effect while the discharge or determination is appealable or subject to an appeal or a further appeal.

(13) A decree granted under subsection (6) or (9) above shall not come into force unless and until a discharge under subsection (1) above or a determination under subsection (3) above, as the case may be, takes effect.

Termination of
scheme.

32.—(1) A debt arrangement scheme shall cease to have effect—

- (a) on its revocation under section 30(1) or (5) of this Act;
- (b) on a discharge of debts under section 31(1) of this Act;
- (c) if—
 - (i) it has not ceased to have effect under paragraph (a) or (b) above; and
 - (ii) before the expiry of the period within which under

EXPLANATORY NOTES

Subsection (9)

This subsection implements in part Recommendation 4.44(1)(a) (para. 4.294).

Subsection (10)

This subsection is supplementary to *subsections* (6) and (9).

Subsection (11)

This subsection implements Recommendation 4.43(3) (para. 4.289).

Subsection (12)

This subsection implements Recommendation 4.43(6) (para. 4.289) and in part Recommendation 4.44(2) (para. 4.294).

Subsection (13)

This subsection implements in part Recommendation 4.44(2) (para. 4.294).

Clause 32

Subsection (1)

This subsection implementing Recommendation 4.45(1) (para. 4.298) as read with para. 4.295, regulates the termination of a scheme. See also *clause* 14(9) (termination of scheme on debtor's death).

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section 31(5) of this Act an application for discharge is competent ("the competent period"), no application for discharge or for the variation of the scheme under section 28(6) of this Act has been made or such an application has been refused,

on the expiry of the competent period;

(d) if it has not ceased to have effect under paragraph (a) or (b) above and at the end of the competent period an application for the variation of the scheme under section 28(6) of this Act is pending, on the refusal of the application; or

(e) if it has not ceased to have effect under paragraph (a) or (b) above and at the end of the competent period an application for discharge under section 31(1) of this Act is pending, on the disposal of the application except where the sheriff refuses the application and makes an order under subsection (4) of that section.

(2) On a debt arrangement scheme ceasing to have effect, the administrator shall deposit any unclaimed dividends in an appropriate bank or institution and send a receipt for the deposit of those dividends to the Accountant in Bankruptcy.

(3) Any person, producing evidence of his right, may apply to the Accountant in Bankruptcy to receive a dividend deposited as aforesaid, if the application is made not later than 7 years after the date when the scheme ceased to have effect.

(4) If the Accountant in Bankruptcy is satisfied of the applicant's right to the dividend, he shall authorise the appropriate bank or institution to pay to the applicant the amount of that dividend and any interest which has accrued thereon.

(5) The Accountant in Bankruptcy shall, at the expiry of 7 years from the date when the scheme ceased to have effect, hand over the deposit receipt or other voucher relating to any dividend remaining unclaimed to the Secretary of State, who shall thereupon be entitled to payment of the amount of that dividend and any interest which had accrued thereon from the bank or institution in which the deposit was made.

(6) Any payments received by the Secretary of State by virtue of subsection (5) above shall be paid by him into the Consolidated Fund.

Miscellaneous

33.—(1) The sheriff may, on an application made by the administrator while the scheme application is pending or while the scheme is in force, make an order requiring a creditor to give information to the administrator as to any payments made to the creditor outside the scheme.

Payments to
creditor outside
scheme.

EXPLANATORY NOTES

Subsections (2) to (6)

These subsections implement Recommendation 4.45(2) (para. 4.298).

Clause 33

This clause implements Recommendations 4.19 (para. 4.153) and 4.20 (para. 4.155).

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(2) A creditor—

- (a) whose debt is included in a debt arrangement scheme or a draft scheme; and
- (b) who has received payment of the amount of his debt to which he is entitled under the scheme either wholly from payments made, or sums recovered, outside the scheme or partly from such payments, or sums, and partly from disbursements under the scheme,

shall as soon as reasonably practicable intimate to the administrator of the scheme the fact of the receipt of such payment.

(3) For the purposes of this section, where a creditor's entitlement under the scheme is only to the extent of a composition, then, in calculating whether the creditor has received the amount of his debt to which he is so entitled, there shall be disregarded any payment made to him by, or sum recovered by him from, a co-obligant unless in consequence of such payment or sum the whole debt, or the outstanding amount thereof, due to the creditor (without composition) has been satisfied.

(4) The sheriff, on an application by the administrator, may make an order decerning for payment by a creditor to the administrator of any sum received by the creditor from the administrator after the amount of his debt to which he is entitled under the scheme has been satisfied with interest on that sum at the same rate as that which is applicable, unless otherwise stated, under section 9 of the Sheriff Courts (Scotland) Extracts Act 1892 in respect of interest on a decree.

1892 c. 17.

(5) Where the administrator receives intimation under subsection (2) above, or is otherwise satisfied, that the creditor has received payment of the amount of his debt to which he is entitled under the scheme—

(a) before confirmation of the scheme under section 24 of this Act, the administrator shall, without prejudice to section 21 of this Act, exclude the debt of that creditor from the draft scheme and make any other necessary adjustments to it and, if the adjustments are made after service has been made under section 22 (1) of this Act, serve on the creditor who has received such payment, on each other person who he knows is, or has reasonable cause to believe may be, a creditor of the debtor and on any co-obligant on whom the scheme application was served—

- (i) a copy of the draft scheme as so adjusted; and
- (ii) a notice stating that an objection may be made to the scheme by any creditor or co-obligant by notice in writing to the administrator within 2 weeks, or such other period as may be prescribed, after such service;

(b) after such confirmation—

- (i) the administrator shall cease to make disbursements to that creditor under the scheme; and

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- (ii) subject to subsection (6) below and section 34(6)(b) of this Act, the sheriff, on an application by the administrator, shall vary the scheme by excluding from it the debt of that creditor, increasing the amounts paid in disbursements under the scheme to the remaining creditors and requiring disbursement under the scheme to those creditors of any sums paid to the administrator under subsection (4) above.

(6) Where the administrator has—

- (a) received intimation under subsection (2) above, the sheriff shall not vary the scheme under subsection (5)(b)(ii) above until the expiry of 14 days after the date of such intimation;
- (b) been satisfied otherwise than on intimation under subsection (2) above that the creditor has received payment of the amount of his debt to which he is entitled under the scheme,

the sheriff shall not vary the scheme as aforesaid until a period of at least 14 days has elapsed since the date when the administrator was so satisfied and in any event unless, after giving the creditor an opportunity to be heard, the sheriff is also so satisfied.

(7) Subsection (5)(b) above shall have effect where the administrator has received intimation, or has been otherwise satisfied, as aforesaid after confirmation of the scheme but before it comes into force as if in sub-paragraph (i) for the words “cease to” there were substituted the words “not on the coming into force of the scheme”.

Co-obligants.

34.—(1) A co-obligant for the whole or part of a debt shall not be freed from his liability therefor by virtue of the inclusion of the debt in a debt arrangement scheme or the acceptance by the creditor of a disbursement under the scheme.

(2) A discharge granted under section 31(1) of this Act shall not operate as a discharge of a co-obligant.

(3) Where a co-obligant, after the first notice date, pays the whole amount of the debt for which he is liable and thereby acquires a right of relief, he may, within 14 days after the date when he made, or completed making, that payment, (subject to any agreement to the contrary) apply to the administrator to vary the scheme or draft scheme by subrogating him for the creditor to the extent of the amount to which he is entitled under his right of relief.

(4) An applicant under subsection (3) above shall submit to the administrator a document or documents showing how he acquired his right; and the applicant shall send a copy of the application to the creditor.

(5) The administrator shall grant an application duly made under subsection (3) above if he is satisfied that the applicant's right is established.

EXPLANATORY NOTES

Clause 34

This clause implements Recommendation 4.27 (para. 4.193).

The Debtors (Scotland) Bill

(6) If the administrator grants an application under subsection (3) above—

- (a) before confirmation of the scheme, he shall make any necessary adjustment to the draft scheme and, if the adjustment is made after service has been made under section 22(1) of this Act, shall serve the draft scheme as so adjusted on the co-obligant and the creditor for whom the co-obligant has been subrogated;
- (b) after such confirmation, he shall vary the scheme by subrogating the co-obligant for the creditor to the extent of the amount to which the co-obligant is entitled under his right of relief.

(7) Where the co-obligant has paid the whole amount of the debt for which he is liable but that payment is insufficient to satisfy the whole debt due to the creditor (without composition), any variation under subsection (6)(b) above shall so far as practicable ensure that future disbursements of the creditor's share in the scheme are so apportioned between the creditor and the co-obligant that the amount to which each is entitled under the scheme is satisfied at the same time.

(8) An appeal may be taken by the applicant or the creditor against the decision of the administrator under subsection (5) above to the sheriff.

(9) The decision of the sheriff under subsection (8) above shall be final.

35. After section 5 of the Bankruptcy (Scotland) Act 1985 there shall be inserted the following section—

Petitions for sequestration when scheme application is pending or scheme in force.
1985 c.

“Sequestration when application for debt arrangement scheme is pending or scheme in force.

5A.—(1) Where a debtor has applied to the sheriff for a debt arrangement scheme, it shall be incompetent—

- (a) for the debtor to present a petition for the sequestration of his estate; or
- (b) for a creditor after a copy of an interim order has been served on him under section 20(2) of the Debtors (Scotland) Act 1985 to present a petition for the sequestration of the debtor's estate except with the leave of the sheriff,

during a relevant period.

(2) The sheriff shall grant leave under subsection (1)(b) above only if it appears to him—

EXPLANATORY NOTES

Clause 35

The reference to the Bankruptcy (Scotland) Act 1985 is a reference to the Bankruptcy (Scotland) Bill 1984 (H.C. Bill 48) presently before Parliament, being the Bill as brought from the House of Lords to the House of Commons, and ordered to be printed, on 18 December 1984.

In the *new section 5A* introduced by this clause, *subsections (1) to (3)* implement paragraph (4) of Recommendation 4.46 (para. 4.311) and *subsection (4)* implements paragraph (3) of that Recommendation. *Subsection (5)* contains a definition.

The Debtors (Scotland) Bill

- (a) that an award of sequestration would be in the best interests of the creditors generally; or
- (b) that a debt arrangement scheme would be likely to be unduly prejudicial to a creditor or class of creditors.

(3) Where the sheriff grants leave under subsection (1)(b) above, he shall sist the application for the debt arrangement scheme; and, if for any reason an award of sequestration is not granted, the sheriff may recall such leave and the sist and may make any such order as he considers necessary or expedient (including the retaking of any step in procedure which has already been taken) to enable the said application to proceed.

(4) Where a copy of an interim order has been served on a creditor under section 20(2) of the Debtors (Scotland) Act 1985 in connection with an application for a debt arrangement scheme, it shall be unnecessary for a creditor petitioning during a relevant period for the sequestration of the estate of the debtor concerned to establish that the debtor is apparently insolvent.

(5) In this section "a relevant period" means any of the following periods—

- (a) the period while the application for the debt arrangement scheme is pending;
- (b) any period during which the decision of the sheriff disposing of that application is appealable or subject to an appeal or a further appeal;
- (c) any period while the scheme is in force."

The
administrator.

1927 c. 35.

36.—(1) The administrator appointed by the sheriff under section 19(2) of this Act shall be the sheriff clerk, a sheriff clerk depute or a whole-time clerk or other whole-time assistant to the sheriff clerk appointed under section 5 of the Sheriff Courts and Legal Officers (Scotland) Act 1927 or a person appointed from a list of persons mentioned in subsection (2) below.

(2) The Secretary of State may by order made by statutory instrument require a sheriff principal, after consultation with such persons as the sheriff principal thinks fit, to compile and maintain a list of persons from among whom the sheriff may make an appointment to the office of administrator.

(3) An order may be made under subsection (2) above applying throughout Scotland or only to such sheriff court district or districts as may be specified in the order.

EXPLANATORY NOTES

Clause 36

This clause implements Recommendation 4.31 (para. 4.229).

The Debtors (Scotland) Bill

(4) The sheriff principal may revise the list compiled by virtue of subsection (2) above.

(5) The Secretary of State may, with the consent of the Treasury, by regulations made by statutory instrument, make provision in respect of—

(a) persons appointed to the office of administrator from the list compiled by virtue of subsection (2) above—

(i) for the finding of caution by them; and

(ii) for their remuneration if remuneration is a condition of their acceptance of office; and

(b) all persons appointed to the office of administrator—

(i) relating to their resignation, removal from office and discharge;

(ii) relating to their temporary or permanent replacement in the event of their illness, death or for any other necessary cause; and

(iii) relating to such other matters as are incidental to the discharge of their functions.

(6) Regulations under subsection (5) above may provide that any premium or remuneration paid by virtue of paragraph (a)(i) or (ii) of that subsection shall—

(a) where the scheme is confirmed by an order under section 24 of this Act, be met—

(i) out of sums paid by the debtor to the administrator in priority to the claims of the creditors whose debts are included in the scheme; or

(ii) out of money provided by Parliament;

(b) where the scheme application is refused, be met out of money provided by Parliament.

(7) Regulations under subsection (5) above shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(8) An administrator shall not be liable for any expenses incurred by any other person under any provision of this Part of this Act.

Recovery of
certain sums due
to administrator.

37.—(1) An order under subsection (4)(a) of section 25 (including that provision as applied by subsection (6) of that section), section 26(4) or section 33(4) of this Act shall be enforceable by diligence as if any sums payable under the order were a debt due to the administrator.

(2) The expenses of any diligence used in pursuance of subsection (1) above, in so far as they are not recovered by that diligence, shall be met out of the scheme in priority to the claims of the creditors whose debts are included in the scheme or, if not so met, out of money provided by Parliament.

EXPLANATORY NOTES

Subsection (5)

Paragraph (b)(i), so far as relating to discharge of the administrator, implements Recommendation 4.45(3) (para. 4.298).

Clause 37

This clause makes provision supplementary to *clauses 25(4)(a), 26(4) and 33(4)*.

The Debtors (Scotland) Bill

Registration of particulars of schemes and of their termination.

38.—(1) The sheriff clerk shall—

- (a) keep a register in which he shall enter; and
- (b) send to the Accountant in Bankruptcy for entry in the register of insolvencies;

prescribed particulars of—

- (i) debt arrangement schemes;
- (ii) discharges granted under section 31(1) of this Act; and
- (iii) termination of schemes either on the death of the debtor or under section 32 of this Act.

(2) A creditor shall not be treated as being aware that a scheme is in force by reason only that prescribed particulars of the scheme have been registered under paragraph (a) or (b) of subsection (1) above.

(3) The register kept by the sheriff clerk under subsection (1)(a) above shall be open for inspection at all reasonable hours on payment of such fee as may be prescribed in an order made under section 2 of the Courts of Law Fees (Scotland) Act 1895.

1895 c. 14.

Expenses of action to recover debt.

39.—(1) Notwithstanding anything in the foregoing provisions of this Part of this Act, where a scheme application has been made, any expenses awarded against the debtor of an action for payment of a principal sum raised by a creditor during a relevant period shall be excluded from the scheme if—

- (a) at the time of the raising of the action, the principal sum has been included in the scheme; or
- (b) the principal sum is included in the scheme subsequent to the raising of the action unless—
 - (i) the creditor at the time when he raised the action was unaware that he was raising it during a relevant period; or
 - (ii) it was necessary to raise the action for the purpose of resolving a dispute as to liability for the principal sum or as to the amount of that sum.

(2) The debtor shall, on the discharge of any debts under section 31 of this Act, be discharged of any liability for any expenses which are excluded from the scheme concerned by virtue of subsection (1) above.

(3) In subsection (1) above “a relevant period” means any of the following periods—

- (a) the period while the scheme application is pending;
- (b) any period during which the decision of the sheriff disposing of the scheme application is appealable or subject to an appeal or a further appeal;
- (c) any period while the scheme is in force.

EXPLANATORY NOTES

Clause 38

Subsection (1)

This subsection implements in part Recommendation 4.38 (para. 4.267).

Subsection (2)

This subsection implements Recommendation 4.18(2)(b) (para. 4.148). And see Recommendation 4.26(2) (para. 4.182).

Subsection (3)

This subsection implements in part Recommendation 4.38 (para. 4.267).

Clause 39

This clause implements Recommendation 4.10(5) (para. 4.80).

Debtor's remedies against ineffectual inhibitions and adjudications.

40.—(1) Where an inhibition has become ineffectual by virtue of section 18(5)(b) of this Act on the coming into force of a debt arrangement scheme, a notice in the prescribed form showing that the scheme has been confirmed may be registered by the debtor in the Register of Inhibitions and Adjudications.

(2) The sheriff may, on an application made by the debtor on or after the confirmation of a debt arrangement scheme, make an order declaring ineffectual—

- (a) any inhibition registered in the Register of Inhibitions and Adjudications after the confirmation of the scheme;
- (b) any notice of litigiosity or abbeiate of adjudication registered in that register, or any decree of adjudication for debt registrable in that register or in the Register of Sasines or the Land Register, in connection with an action of adjudication for debt rendered incompetent by virtue of section 18(1)(a)(vi) or 20(3)(e) of this Act;

and a certified copy of an order under this subsection may be registered in the same register as the document to which the order relates was registered or is registrable.

(3) An order under subsection (2) above shall be final.

(4) An order under subsection (2) above shall not take effect while the order confirming the scheme is appealable or subject to an appeal or a further appeal.

(5) Any expense incurred by the debtor under this section shall be borne by him:

Provided that he shall be entitled to recover from the creditor any expense incurred by the debtor in obtaining an order under subsection (2) above and in registering a certified copy thereof relating to—

- (a) any document mentioned in paragraph (b) of that subsection in connection with an action of adjudication for debt rendered incompetent by virtue of section 20(3)(e) of this Act; or
- (b) any inhibition registered in the Register of Inhibitions and Adjudications, or any document mentioned in the said paragraph (b) in connection with an action of adjudication for debt raised, after the confirmation of the scheme, if the creditor—
 - (i) was aware at the time of registration by him in the Register of Inhibitions and Adjudications, the Register of Sasines or the Land Register that the scheme was in force and he refused to discharge, or unduly delayed in discharging, the registration; or
 - (ii) was aware at the time when he raised the action of adjudication for debt that the scheme was in force.

EXPLANATORY NOTES

Clause 40

This clause implements Recommendation 4.15 (para. 4.124).

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Saving of other rights or remedies of creditors.

41.—(1) No right or remedy of a creditor to enforce his debt shall be affected by—

- (a) a debt arrangement scheme; or
- (b) an interim order under section 20(1) of this Act;

except as provided by subsection (2) below and any other provision of this Part of this Act.

(2) A creditor whose debt—

- (a) is included in a debt arrangement scheme; and
- (b) is secured by a right of retention or lien over documents of the debtor,

shall not be entitled in pursuance of that right to retain possession of those documents if, and after, the debt has been discharged in a discharge of debts under subsection (1) of section 31 of this Act or the creditor has received payment of the amount to which he is entitled under a time to pay direction contained in a decree granted under subsection (6)(a) of that section.

Interpretation of Part II.

42.—(1) In this Part of this Act, unless the context otherwise requires—

“co-obligant” means an obligant who is bound to a creditor along with the debtor, being an obligant who if he pays the debt in whole or in part to the creditor will acquire a right of relief against the debtor, and includes a cautioner;

“creditor” includes a creditor whose debt is payable at a future date or depends on a contingency;

“debt” has the same meaning as in section 4(7) of this Act except that it includes maintenance, any capital sum awarded on divorce and any other sum due under a decree awarding maintenance or such a capital sum;

“decree”, subject to subsection (3) below, has the same meaning as in section 4(7) of this Act;

“the first notice date” has the meaning assigned by section 15(2)(a) of this Act;

“scheme application” means an application for a debt arrangement scheme;

“the sheriff” means the sheriff having jurisdiction—

- (a) over the place where the debtor is domiciled; or
- (b) if the debtor is not domiciled in Scotland, over a place in Scotland where he has an established place of business;

and, for the purposes of paragraphs (a) and (b) above, the debtor’s domicile shall be determined in accordance with section 41 of the Civil Jurisdiction and Judgments Act 1982.

EXPLANATORY NOTES

Clause 41

Subsection (1)

This subsection implements Recommendation 4.29(1) (para. 4.213).

Subsection (2)

This subsection implements Recommendation 4.25(2) (para. 4.178).

Clause 42

Subsection (1)

This subsection contains certain definitions used in Part II of the Bill.

The definition of "debt" as read with *clause 4(7)* excludes fines and other sums due under an order of court in criminal proceedings; this implements Recommendation 4.21 (para.4.160). As to maintenance, see Recommendation 4.22 (para. 4.168).

The definition of "sheriff" implements Recommendation 4.8 (para. 4.60). At the time of the submission of this report (14 June 1985), section 41 of the Civil Jurisdiction and Judgments Act 1982 had not yet come into force.

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(2) Where the debtor has two or more residences, any reference in this Part of this Act to his residence shall be construed as a reference to his principal residence.

(3) Any reference in this Part of this Act to a debt being constituted by decree shall be construed as a reference to a debt so constituted where—

- (a) the period within which an appeal may be taken against the decree has expired without an appeal being taken; or
- (b) if such an appeal has been taken, the matter at issue has been finally determined.

(4) Any reference in this Part of this Act to entitlement, or the amount to which a person is entitled, under the scheme, in relation to a debt which is included in the scheme on its variation under section 28(1) of this Act, shall include a reference to entitlement, or the amount to which the person is entitled, under a decree granted under section 31(6)(a) of this Act.

EXPLANATORY NOTES

Subsection (2)

This subsection is relevant to the construction of *clause 14(6), proviso (a) and clause 17(4)*.

Subsection (3)

This subsection is relevant to the construction of *clauses 15(3), 23(1)(c), 28(1)(c) and 31(6)*.

Subsection (4)

This subsection is primarily relevant to the construction of *clauses 16(1), 31(2)(a), 31(6) and 33(2), (3) and (5)*. See also *clause 14(3)*.

PART III

POINDINGS AND WARRANT SALES

Poinding

Exemptions
from poinding.

43.—(1) Articles belonging to a debtor of any of the following descriptions shall be exempt from poinding at the instance of a creditor in respect of a debt due to him by the debtor—

- (a) clothing reasonably required for the use of the debtor or any member of his household;
- (b) implements, tools of trade, books or other equipment reasonably required for the use of the debtor or any member of his household in the practice of the debtor's or such member's profession, trade or business, not exceeding in aggregate value £500 or such other sum as may be prescribed in regulations made by the Secretary of State;
- (c) medical aids or medical equipment reasonably required for the use of the debtor or any member of his household;
- (d) books or other articles reasonably required for the education or training of the debtor or any member of his household not exceeding in aggregate value £500 or such other sum as may be prescribed in regulations made by the Secretary of State;
- (e) toys for the use of any child who is a member of the debtor's household;
- (f) articles reasonably required for the care or upbringing of any child who is a member of the debtor's household.

(2) Articles belonging to a debtor of any of the descriptions set out in the list at the end of this subsection shall be exempt from such poinding if the article at the time of the poinding is in a dwellinghouse in which—

- (a) the debtor is residing; or
- (b) the debtor is not residing, but another person is residing, and the article is reasonably required for the use in the dwellinghouse of the person residing there or any member of that person's household.

LIST

- (i) beds or bedding;
- (ii) household linen;
- (iii) chairs or settees;
- (iv) tables;
- (v) food;
- (vi) lights or light fittings;

EXPLANATORY NOTES

Clause 43

This clause sets out the various categories of articles which are exempt from pointing and provides for applications to the court for release of exempt articles which have been pointed.

Subsection (1)

Paragraphs (a), (e) and (f) implement Recommendation 5.10 (para. 5.51), *paragraph (b)* implements Recommendation 5.11(1) (para. 5.57), *paragraph (c)* implements Recommendation 5.11(4) (para. 5.57), and *paragraph (d)* implements Recommendation 5.11(3) (para. 5.57).

Subsection (2)

This subsection implements Recommendations 5.9(1) (para. 5.48) and 5.51(2) (para. 5.244).

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- (vii) heating appliances;
- (viii) curtains;
- (ix) floor coverings;
- (x) furniture, equipment or utensils used for cooking, storing or eating food;
- (xi) one refrigerator;
- (xii) articles used for cleaning, mending or pressing clothes;
- (xiii) articles used for cleaning the dwellinghouse;
- (xiv) furniture used for storing clothing, bedding or household linen or storing articles used for cleaning the dwellinghouse;
- (xv) articles used for safety in the dwellinghouse.

(3) The Secretary of State may by regulations add to, delete or vary any of the items contained in the list set out in subsection (2) above.

(4) Subject to subsections (5) and (6) below, the sheriff shall—

- (a) on an application by the debtor (whether or not the pointed article is in a dwellinghouse in which the debtor is residing), make an order releasing such an article from the pointing, if the sheriff is satisfied that the article is exempt therefrom under subsection (1) or (2) above;
- (b) if a pointed article is in a dwellinghouse in which the debtor is not residing, but another person is residing, on an application by that person, make such an order as aforesaid, if the sheriff is satisfied that the article is exempt therefrom under subsection (2) above.

(5) No application under subsection (4) above shall be competent unless it is made within a period of 14 days after the date of the execution of the pointing.

(6) No order under subsection (4) above releasing an article from the pointing shall take effect while the order is appealable or subject to an appeal or a further appeal.

(7) Regulations under subsection (1)(b) or (d) or (3) above shall be made by statutory instrument and shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Restrictions on time when pointing is allowed.

44.—(1) No pointing shall be executed on a Sunday, Christmas Day, New Year's Day or Good Friday nor on such other day as may be prescribed.

(2) The execution of a pointing shall not—

- (a) be commenced before 8 a.m. or after 8 p.m.; or
- (b) be continued after 8 p.m.,

unless prior authority for such commencement or continuation has been obtained from the sheriff; and any rule of law which prohibits pointings outwith the hours of daylight shall cease to have effect.

EXPLANATORY NOTES

Subsections (3) and (7)

These subsections implement Recommendation 5.9(2) (para. 5.48).

Subsections (4) and (5)

These subsections implement Recommendation 5.13(1) (para. 5.65).

Subsection (6)

This subsection implements Recommendation 9.12(5) (para. 9.74).

Clause 44

This clause implements Recommendation 5.17 (para. 5.78). It clarifies the existing law as to the days on which a poinding may be executed and makes new provision for the hours during which a poinding may be executed.

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Powers of entry
in connection
with poinding.

45.—Notwithstanding that an officer of court is in possession of a warrant authorising him to open shut and lockfast places for the purpose of executing a poinding, he shall not enter a dwellinghouse for that purpose where, at the time of his intended entry, there appears to him to be nobody, or only children under the age of 16 years, present in the dwellinghouse unless at least 4 days before the date of his intended entry he has served—

- (a) notice on the debtor specifying that date; and
- (b) in the case where there appears to him to be only children under the age of 16 years present in the dwellinghouse, a copy of that notice on the director of social work of the local authority:

Provided that the sheriff, on an application made to him by the officer of court which shall not require to be intimated to the debtor or to the director of social work, may dispense with service under this section, if it appears to the sheriff that such service would be likely to prejudice the execution of the poinding.

Poinding
procedure.

46.—(1) The procedure relating to a poinding shall be as follows—

- (a) before executing the poinding, the officer of court shall—
 - (i) exhibit the warrant to poind and the certificate of execution of the charge relating thereto;
 - (ii) demand payment, from the debtor or any other person present who is authorised to act for him, of the debt, including any interest due thereon if claimed by the creditor and any expenses which have been incurred and which are chargeable against the debtor in the poinding process;
 - (iii) make enquiry of any person present as to the ownership of the articles proposed to be poinded;

but it shall not be necessary for the officer of court before such execution to make public proclamation of the poinding nor to read publicly the extract decree containing the warrant to poind and the execution of the charge relating thereto;

- (b) the officer of court shall be attended at the poinding by one witness;
- (c) the poinded articles shall be valued by the officer of court according to the price which they would be likely to fetch if sold on the open market, but, if he considers that the articles are such that a valuation by a professional valuator or other suitably skilled person is advisable, he may arrange for such a valuation;
- (d) the officer of court shall be entitled to poind only such number of articles as, if sold at the valuations made under paragraph (c) above, would satisfy the sums recoverable by the creditor out of the proceeds of sale;

EXPLANATORY NOTES

Clause 45

This clause implements Recommendation 5.18 (para. 5.85). It imposes restrictions on an officer of court's power of forcible entry to a dwellinghouse in connection with the execution of a poinding.

Clause 46

This clause sets out the procedure to be followed in executing a poinding and confers on the debtor an entitlement to redeem poinded articles on payment of their appraised value.

Subsection (1)

This subsection implements Recommendations 5.19(1) (para. 5.95) and 5.20 (para. 5.101).

The Debtors (Scotland) Bill

- (e) the officer of court shall prepare a schedule (“the pointing schedule”) in the prescribed form which shall specify—
 - (i) the pointed articles, at whose instance they have been pointed and their respective values; and
 - (ii) the amount of the debt, including any interest due thereon if claimed by the creditor and any expenses which have been incurred and which are chargeable against the debtor in the pointing process;
- (f) on completion of the valuation of the pointed articles, the officer of court shall—
 - (i) inform the debtor (if present) of his right to redeem any of the pointed articles under subsection (5) below; and
 - (ii) along with the witness sign the pointing schedule and deliver it to the person in whose possession the articles were pointed (and, if the possessor is not the debtor and it is reasonably practicable, send a copy of it to the debtor) or leave it on the premises in which the pointing took place;
- (g) the officer of court shall leave the pointed articles at the place where they were pointed.

(2) The sheriff, on an application by the creditor, an officer of court or the debtor, may at any time after the execution of a pointing make an order—

- (a) for the security of any of the pointed articles; or
- (b) in relation to any of the articles which are of a perishable nature or which are likely to deteriorate substantially and rapidly in condition or value, for their immediate disposal and, in the event of their disposal by sale, for payment of the proceeds of sale to the creditor or for consignment of the proceeds in court until the diligence is completed or otherwise ceases to have effect;

and a decision of the sheriff under paragraph (b) above for the immediate disposal of articles shall be final.

(3) It shall not be competent for an officer of court in executing a pointing to examine a person on oath as to the ownership of any article.

(4) An officer of court in executing a pointing shall be entitled to proceed on the assumption that any article in the possession of the debtor is owned by him unless the officer of court knows or ought to know that the contrary is the case:

Provided that the officer of court shall not be precluded from relying on that assumption by reason only—

- (a) that the article belongs to a class which is commonly held under a hire, hire-purchase or conditional sale agreement or on some other limited title of possession; or

EXPLANATORY NOTES

Subsection (2)

This subsection implements Recommendation 5.24 (para. 5.115).

Subsections (3) and (4)

These subsections implement Recommendation 5.47(1) (para. 5.223).

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(b) that an assertion has been made that the article is not owned by the debtor.

(5) The debtor shall be entitled, within 14 days after the date of execution of the pinding, to redeem any of the pointed articles at the valuations made under subsection (1)(c) above; and the officer of court shall mention any such redemption in his report under section 47 of this Act or, if he has already made that report, shall report the redemption forthwith to the sheriff.

(6) The officer of court shall, on receiving payment from the debtor for the redemption under subsection (5) above of a pointed article, grant a receipt in the prescribed form to the debtor; and the receipt shall operate as a release of the article from the pinding.

(7) Subject to section 65(2)(b) of this Act, the revaluation in the same pinding of an article which has been valued under subsection (1)(c) above shall be incompetent.

(8) For the purposes of this Act or any other enactment or any rule of law, a pinding shall be deemed to have been executed on the date when the pinding schedule has been delivered to the possessor of the pointed articles, or left on the premises in which the pinding took place, in pursuance of subsection (1)(f)(ii) above.

(9) At any time before an officer of court has executed a pinding on behalf of a creditor, he shall, if requested to do so by any other creditor who has delivered to him a warrant to pind, conjoin that creditor in the pinding:

Provided that it shall be incompetent for any officer of court to conjoin in a pinding a creditor holding a summary warrant in respect of the debt for which he holds that warrant.

Report of
execution of
pinding.

47.—(1) The officer of court shall, within a period of 14 days after the date of execution of the pinding (or such longer period after the date of execution as the sheriff on cause shown may allow on an application by the officer of court) make a report in the prescribed form of the execution of the pinding to the sheriff; and the report shall be signed by the officer of court and the witness who attended at the pinding.

(2) The officer of court shall note in the report under this section any assertion made before the submission of the report that any of the pointed articles does not belong to the debtor.

(3) The sheriff may refuse to receive a report on the ground that it has not been made within the period, or has not been signed, as required by subsection (1) above and the sheriff clerk shall intimate any such refusal to the debtor and, if he is a different person from the debtor, the possessor of the pointed articles.

(4) If the sheriff refuses under subsection (3) above to receive a report, the pinding shall cease to have effect.

EXPLANATORY NOTES

Subsections (5) and (6)

These subsections implement Recommendation 5.19(2) (para. 5.95).

Subsection (7)

This subsection implements Recommendation 5.21 (para. 5.104).

Subsection (8)

This subsection implements Recommendation 5.19(1)(h) (para. 5.95).

Subsection (9)

This subsection implements Recommendation 5.22 (para. 5.109).

Clause 47

This clause restates with some modifications the existing law on reporting the execution of a pointing to the sheriff within whose court district it was executed. It implements Recommendations 5.23 (para. 5.113) and 5.47(1)(b) (para. 5.223).

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(5) Any rule of law whereby the sheriff may refuse to receive a report of the execution of a poinding on a ground other than one specified in subsection (3) above shall cease to have effect.

Release of
poinded article
on ground of
undue
harshness.

48.—(1) The sheriff may, on an application by the debtor made within 14 days after the date of execution of a poinding, make an order releasing an article from the poinding if it appears to the sheriff that the continuation of the poinding of that article or its sale under warrant of sale would be unduly harsh in the circumstances.

(2) Where the sheriff has made an order under this section releasing an article from a poinding, then, notwithstanding section 50 of this Act, he may, on an application by the creditor, authorise the poinding of other articles belonging to the debtor in the same premises.

(3) An order under this section releasing an article from a poinding shall not take effect while the order is appealable or subject to an appeal or a further appeal.

Recall of
poinding.

49.—(1) The sheriff shall recall a poinding at any time before the sale of the poinded articles, at his own instance or on an application by the debtor, if he is satisfied that the poinding is invalid or has ceased to have effect:

Provided that, without prejudice to subsection (4) of section 43 of this Act, it shall be incompetent for the sheriff to recall a poinding on the ground that the poinded articles are, or any of them is, exempt from the poinding under that section.

(2) The sheriff may recall a poinding at any time before the creditor applies for a warrant of sale under section 52 of this Act, on an application by the debtor, on any of the following grounds—

- (a) that it would be unduly harsh in the circumstances for a warrant of sale of the poinded articles to be granted;
- (b) that the aggregate of the valuations of the poinded articles made under section 46(1)(c) of this Act were substantially below the aggregate of the prices which they would have been likely to fetch if sold on the open market; or
- (c) that the likely proceeds of sale of the articles would not exceed the expenses likely to be incurred in the application for warrant of sale and in any steps required to be taken under this Part of this Act in execution of the warrant on the assumption that that application and such steps are unopposed.

(3) The sheriff shall not grant an application for recall of a poinding of articles belonging to the debtor on the ground mentioned in subsection (2)(c) above if, at the time when he is considering the making of an order for such recall, a further poinding of articles belonging to that debtor has been authorised under section 48(2),

EXPLANATORY NOTES

Clause 48

This clause confers upon the sheriff a new power to release goods from a poinding where to continue to subject them to diligence would be unduly harsh.

Subsections (1) and (2)

These subsections implement Recommendation 5.13 (para. 5.65).

Subsection (3)

This subsection implements Recommendation 9.12(5) (para. 9.74).

Clause 49

This clause confers new powers on the sheriff to recall a poinding in certain circumstances.

Subsections (1), (2) and (4)

These subsections implement Recommendation 5.29 (para. 5.137).

Subsection (3)

This subsection prevents recall where a second poinding by the same creditor is pending so as to give the creditor an opportunity to have the poindings conjoined (see *clause 69*).

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64(5) or 65(2), or has become competent by reason of section 9(7), 18(7), 30(6), 63(3), 66(6) or 67(7), of this Act.

(4) The sheriff shall not recall a poinding under this section at his own instance or dispose of an application thereunder without first giving the parties—

- (a) an opportunity to make representations; and
- (b) if either party wishes to be heard, an opportunity to be heard.

(5) The sheriff clerk shall intimate to the debtor the recall at the instance of the sheriff of a poinding under subsection (1) above.

(6) An order under this section recalling a poinding shall not take effect while the order is appealable or subject to an appeal or a further appeal.

Second poinding
in same
premises.

50. Subject to sections 9(7), 18(7), 30(6), 48(2), 63(3), 64(5), 65(2), 66(6) and 67(7) of this Act, where articles are poinded in any premises (whether or not the poinding is valid), another poinding in those premises to enforce the same debt shall be incompetent except in relation to poindable articles which have been brought on to the premises since the execution of the first poinding.

Sist of
proceedings in
poinding of
mobile homes.

51.—(1) Where a caravan, houseboat or other moveable structure is the only or principal residence of a debtor or another person and it has been poinded, the sheriff, on an application by the debtor or that other person made at any time after the execution of the poinding and before the granting of a warrant of sale, may order that for such period as he may determine no further steps shall be taken in the poinding.

(2) In calculating under section 62(1) or (2) of this Act the period during which a poinding under subsection (1) above shall remain effective, there shall be disregarded any such period as is mentioned in that subsection.

Provisions relating to sale

Application for
warrant of sale.

52.—(1) A creditor shall not be entitled to sell articles poinded by him unless, on an application by him or an officer of court, the sheriff has granted a warrant of sale.

(2) The sheriff may refuse to grant a warrant of sale under subsection (1) above—

- (a) at his own instance or on an objection by the debtor—

EXPLANATORY NOTES

Subsection (6)

This subsection implements Recommendation 9.12(5) (para. 9.74).

Clause 50

This clause deals with the restrictions on a second pouncing in the same premises to enforce the same debt. It implements Recommendation 5.28(1) (para. 5.134).

Clause 51

This clause confers upon the sheriff a new power to sist a pouncing of a caravan or other mobile home so as to give the debtor time to find alternative accommodation.

Subsection (1)

This subsection implements Recommendation 5.12 (para. 5.60).

Subsection (2)

This subsection provides that any period of sist does not count for the purposes of the rule (see *clause 62*) that a pouncing lapses at the end of a year after execution or such extension as the sheriff may grant.

Clause 52

This clause deals with the application to the sheriff for a warrant to sell the pounced goods.

Subsection (1)

This subsection restates the existing law.

Subsections (2), (3) and (5)

These subsections implement Recommendation 5.30 (para. 5.146).

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- (i) on the ground that the poinding is invalid or has ceased to have effect; or
 - (ii) on either of the grounds mentioned in paragraphs (b) and (c) of section 49(2) of this Act;
- (b) on an objection by the debtor, on the grounds that the granting of the application would be unduly harsh in the circumstances:

Provided that, without prejudice to subsection (4) of section 43 of this Act, it shall be incompetent for the sheriff to refuse to grant a warrant of sale under subsection (1) above on the ground that any of the poinded articles is exempt from the poinding under that section.

(3) The creditor, when making an application under subsection (1) above, shall serve a copy thereof on the debtor together with a notice in the prescribed form informing the debtor—

- (a) of his right to redeem any or all of the poinded articles under section 53 of this Act; and
- (b) that he may object to the granting of the application within 14 days after the date when the application was made.

(4) The sheriff shall not—

- (a) refuse at his own instance to grant a warrant of sale under subsection (1) above; or
- (b) dispose of an application under that subsection where the debtor has objected to its granting in accordance with subsection (3)(b) above,

without first giving the parties an opportunity to be heard.

(5) Where the sheriff refuses to grant a warrant of sale under subsection (1) above, the sheriff clerk shall intimate that refusal to the debtor and, if he is a different person from the debtor, the possessor of the poinded articles.

(6) An order under this section granting a warrant of sale shall not take effect while the order is appealable or subject to an appeal or a further appeal.

Certain circumstances in which poinded articles belonging to debtor may be released or redeemed.

53.—(1) Where a sale of poinded articles is to be held in premises other than where they are situated, the officer of court shall in pursuance of section 55(3) of this Act—

- (a) be entitled to remove to those premises only such number of the poinded articles as, if sold at the valuations made under section 46(1)(c) of this Act, would satisfy the sums recoverable by the creditor out of the proceeds of sale; and
- (b) release the remaining poinded articles from the poinding.

(2) Subject to subsection (3) below, the debtor may, within 7 days after the date when a copy of an application for warrant of sale has been served on him, redeem any poinded article by paying to the

EXPLANATORY NOTES

Subsection (6)

This subsection implements Recommendation 9.12(5) (para. 9.74).

Clause 53

This clause deals with the release of goods from a pouncing by redemption, agreement or otherwise.

Subsection (1)

This subsection implements Recommendation 5.39 (para. 5.187).

Subsections (2), (3) and (5)

These subsections implement Recommendation 5.31 (para. 5.150).

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officer of court a sum equal to the valuation of the article made under section 46(1)(c) of this Act.

(3) The officer of court shall, on receiving payment from the debtor under subsection (2) above, grant a receipt in the prescribed form to the debtor; and the receipt shall operate as a release of the article from the poiding.

(4) The creditor and the debtor may by agreement release articles from a poiding.

(5) Any release or redemption of poided articles under this section or as a result of an agreement between the creditor and the debtor—

- (a) before the making of an application for warrant of sale, shall be mentioned in that application;
- (b) after the application has been made but before it has been disposed of, shall be reported forthwith by the officer of court to the sheriff;
- (c) after the application has been granted in a case where some articles remain poided, shall be specified in the report under section 61 of this Act.

Location of sale.

54.—(1) Subject to the following provisions of this section, the location for the sale of poided articles shall be as ordered by the sheriff in the warrant of sale.

(2) The warrant of sale shall not provide for the sale to be held in a dwellinghouse except with the consent in writing of the occupier thereof and, if he is not the occupier, the debtor.

(3) Subject to subsection (4) below, where articles are poided in a dwellinghouse and any consent required under subsection (2) above is not given, the warrant of sale shall provide for the sale of the poided articles to be held in an auction room specified in the warrant.

(4) Where—

- (a) articles are poided in a dwellinghouse and any consent required under subsection (2) above is not given; and
- (b) it appears to the sheriff that, if the sale were to be held in an auction room, the likely proceeds of sale of the articles would not exceed the expenses of the application for warrant of sale and the expenses likely to be incurred in any steps required to be taken under this Part of this Act in the execution of the warrant on the assumption that that application and such steps are unopposed,

then, subject to subsection (5) below, if the creditor is able to offer suitable premises in which the sale could be held, the warrant of sale shall provide for the sale to be held in those premises, but otherwise the sheriff shall refuse to grant a warrant of sale.

EXPLANATORY NOTES

Subsection (4)

This subsection restates the existing law.

Clause 54

This clause regulates the place where sales of pointed goods are to be held.

Subsection (1)

This subsection restates the existing law.

Subsection (2)

This subsection implements Recommendation 5.32(1) (para. 5.161).

Subsections (3) and (4)

These subsections implement Recommendation 5.32(2) (para. 5.161).

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(5) The warrant of sale shall not provide for the sale to be held in premises (not being a dwellinghouse or an auction room) which are occupied by a person other than the debtor or the creditor except with the consent in writing of the occupier thereof:

Provided that, where the poided articles are situated in the premises of the occupier and the occupier does not give his consent under this subsection to the holding of the sale in those premises, the warrant of sale, where the sheriff considers that it would be unduly costly to require the removal of the poided articles to other premises for sale, may provide that the sale shall be held in the premises where they are situated.

(6) In this section "occupier", in relation to a dwellinghouse or other premises, means the person named in the valuation roll as the occupier of the dwellinghouse or premises; and, if there are two or more such occupiers, means any one of them.

Other
arrangements
for sale made in
warrant of sale.

55.—(1) Every warrant of sale shall provide that the sale shall be by public auction.

(2) Every warrant of sale shall empower officers of court to open shut and lockfast places for the purpose of executing the warrant.

(3) A warrant of sale, which provides for the sale of poided articles to be held in premises other than where they are situated, shall also empower the officer of court authorised to execute the warrant to remove those articles to such premises for the sale.

(4) Every warrant of sale shall specify a period within which the sale of the poided articles shall take place.

(5) Every warrant of sale shall appoint an officer of court to make arrangements for the sale in accordance with the warrant, and that officer of court may be the officer of court who executed the poiding or another officer of court.

(6) Where the warrant of sale provides for the sale to be held in premises other than an auction room, then, if the valuations under section 46(1)(c) of this Act of the poided articles to be sold—

(a) exceed in aggregate £1,000 or such other sum as may be prescribed, it shall appoint to conduct the sale a person who carries on business as an auctioneer or, if no such person is available, the officer of court appointed under subsection (5) above or another suitable person;

(b) do not exceed in aggregate that sum, it may appoint that officer of court or another suitable person to conduct the sale.

EXPLANATORY NOTES

Subsection (5)

This subsection implements Recommendation 5.32(4) (para. 5.161).

Clause 55

This clause restates with some modifications the existing law and practice regarding the form and effect of warrants of sale.

Subsection (1)

This subsection restates the existing law.

Subsections (2) and (3)

These subsections implement Recommendation 5.38 (para. 5.185).

Subsection (4)

This subsection implements Recommendation 5.34 (para. 5.169).

Subsection (5)

This subsection implements Recommendation 5.35 (para. 5.172).

Subsection (6)

This subsection implements Recommendation 5.36 (para. 5.178).

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Intimation and
publication of
forthcoming
sale.

56.—(1) The officer of court appointed under section 55(5) of this Act to make arrangements for the sale shall—

- (a) as soon as possible intimate to the debtor and, if he is a different person from the debtor, the possessor of the pointed articles, the date arranged for the holding of the sale; and
- (b) not later than the date of intimation under paragraph (a) above, serve a copy of the warrant of sale on the debtor and possessor.

(2) Where the sale of the pointed articles is to be held in premises other than where they are situated, the said officer shall intimate to the debtor and, if he is a different person from the debtor, the possessor of the pointed articles—

- (a) the place where the sale is to be held; and
- (b) the date arranged for the removal of the articles from the premises in which they are situated,

and any intimation under this subsection shall be given not less than 7 days before the date fixed for the removal.

(3) In whatever premises the sale is to be held, the sheriff clerk shall arrange for prescribed particulars of the warrant of sale to be displayed on a public notice board within the court which granted the warrant.

(4) All sales shall be advertised by public notice, and, where the sale is to be held otherwise than in an auction room, the public notice shall be as directed by the warrant of sale.

(5) No public notice under subsection (4) above of a sale of pointed articles to be held in premises other than the debtor's premises shall name him or disclose that the articles for sale are pointed articles.

(6) Where the sale is to be held in premises other than the debtor's premises or an auction room, any public notice of the sale shall state that the articles to be sold do not belong to the occupier of those premises.

Alteration of
arrangements
for sale.

57.—(1) Where, for any reason for which the creditor or officer of court cannot be held responsible, the arrangements made for the sale of pointed articles cannot be implemented in accordance with the provisions of the warrant of sale, the sheriff may, on an application by the creditor or officer of court, grant a variation of the warrant of sale.

(2) The sheriff may, at his own instance or on an objection by the debtor, refuse to grant a variation of the warrant of sale under subsection (1) above on the ground that the pointing is invalid or has ceased to have effect:

Provided that, without prejudice to subsection (4) of section 43 of this Act, it shall be incompetent for the sheriff to refuse to grant such

EXPLANATORY NOTES

Clause 56

This clause deals with intimation of the arrangements made for sale of the pointed goods to the debtor and public advertisement of the sale.

Subsection (1)

This subsection implements Recommendation 5.37(1) (para. 5.183).

Subsection (2)

This subsection implements Recommendation 5.37(2) (para. 5.183).

Subsection (3)

This subsection implements Recommendation 5.33(4) (para. 5.166).

Subsections (4) and (5)

These subsections implement Recommendation 5.33(1) and (3) (para. 5.166).

Subsection (6)

This subsection implements Recommendation 5.33(2) (para. 5.166).

Clause 57

This clause provides for the variation of a warrant of sale where the original warrant of sale cannot be implemented due to subsequent events.

Subsection (1)

This subsection implements Recommendation 5.40(2) (para. 5.193).

Subsection (2)

This subsection implements Recommendation 5.40(3) (para. 5.193).

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a variation on the ground that any of the poinded articles is exempt from the poinding under that section.

(3) The provisions of section 54 of this Act relating to consent shall apply in relation to a warrant of sale varied under this section as they apply to the original warrant of sale.

(4) The creditor, when making an application under subsection (1) above, shall serve a copy thereof on the debtor together with a notice in the prescribed form informing the debtor that he may object to the granting of the application within 7 days after the date when the application was made.

(5) The sheriff shall not—

- (a) refuse at his own instance to grant a variation under subsection (1) above; or
- (b) dispose of an application under that subsection where the debtor has objected to its granting under subsection (4) above,

without first giving the parties an opportunity to be heard.

(6) On granting a variation under subsection (1) above, the sheriff may make such consequential orders as he thinks fit, including, where appropriate, an order requiring the intimation to the debtor of the warrant of sale as varied or the retaking of any steps in the diligence which have already been taken.

(7) Where the sheriff refuses to grant a variation under subsection (1) above, the sheriff clerk shall intimate that refusal to the debtor and, if he is a different person from the debtor, the possessor of the poinded articles.

(8) Subject to subsection (9) below and without prejudice to section 58(4) of this Act, after intimation has been given under section 56 of this Act to the debtor of the date arranged for the holding of the sale or for the removal of the articles for sale, the creditor or officer of court shall not be entitled to arrange a new date for the holding of the sale or for such removal.

(9) The creditor shall be entitled to instruct an officer of court to arrange such a new date as is mentioned in subsection (8) above where, for any reason for which the creditor or officer of court cannot be held responsible, it is not possible to adhere to the date which has been arranged, and the officer of court shall intimate that new date to the debtor:

Provided that no date—

- (a) arranged under this subsection shall be less than 7 days after the date of such intimation;
- (b) so arranged for the holding of the sale shall be a date occurring after the end of the period specified in the warrant of sale, being the period within which the sale is required to be held.

EXPLANATORY NOTES

Subsection (4)

This subsection implements Recommendation 5.40(3) (para. 5.193).

Subsection (6)

This subsection implements Recommendation 5.40(2) (para. 5.193).

Subsection (7)

This subsection implements Recommendation 5.40(4) (para. 5.193).

Subsections (8) and (9)

These subsections implement Recommendation 5.40(1) (para. 5.193).

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(10) An order under this section granting a variation of a warrant of sale shall not take effect while the order is appealable or subject to an appeal or a further appeal.

Payment
agreements after
warrant of sale.

58.—(1) Without prejudice to section 57(1) and (9) of this Act, in order to enable the debt to be paid by instalments or otherwise in accordance with an agreement between the creditor and the debtor, the creditor may, subject to subsection (2) below, on one occasion only after the granting of a warrant of sale, cancel any arrangements made for the sale of the poided articles in pursuance of that warrant.

(2) Where the warrant of sale provides for the sale of poided articles to be held in premises other than where they are situated, the creditor shall not for the purposes of subsection (1) above be entitled to cancel the arrangements made for the sale after the poided articles have been removed for sale from the premises where they are situated.

(3) The creditor or an officer of court shall forthwith after an agreement mentioned in subsection (1) above has been entered into make a report of the agreement to the sheriff.

(4) Where the debtor is in breach of an agreement mentioned in subsection (1) above, then—

(a) if the provisions of the original warrant still allow, the creditor may instruct an officer of court to make arrangements for the sale of the poided articles in accordance with those provisions; or

(b) if, for any reason for which the creditor or officer of court cannot be held responsible, the arrangements made for the sale of the poided articles cannot be implemented in accordance with the provisions of the original warrant of sale, the sheriff may, on an application by the creditor or officer of court made within a period of 6 months after the date when the report was made under subsection (3) above, grant a variation of the warrant of sale under section 57 of this Act.

(5) For the purposes of paragraphs (a) and (b) of subsection (4) above, the original warrant of sale shall be deemed to have specified that the sale shall be held within the period of 6 months after the date when the report was made under subsection (3) above.

The sale.

59.—(1) Where the warrant of sale does not appoint as auctioneer to conduct the sale the officer of court appointed under section 55(5) of this Act to make arrangements for the sale, that officer—

(a) shall attend the sale and keep a record of any articles which are sold and the amount for which they are sold and of any articles whose ownership passes to the creditor in default of sale; and

EXPLANATORY NOTES

Subsection (10)

This subsection implements Recommendation 9.12(5) (para. 9.74).

Clause 58

This clause permits the creditor to cancel a sale of the pointed goods in order to allow the debtor time to pay the debt by instalments or otherwise.

Subsection (1)

This subsection implements Recommendation 5.41(1) (para. 5.197).

Subsection (2)

This subsection implements Recommendation 5.41(2) (para. 5.197).

Subsections (3) and (5)

These subsections implement Recommendation 5.41(3) (para. 5.197).

Subsection (4)

This subsection implements Recommendation 5.41(4) (para. 5.197).

Clause 59

This clause is concerned with the execution of the sale of pointed goods and the ownership of goods that are not sold.

Subsection (1)

This subsection restates the existing law and practice.

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(b) if the sale is to be held in premises other than an auction room, shall supervise the sale.

(2) Where the officer of court appointed under section 55(5) of this Act to make arrangements for the sale is appointed as auctioneer to conduct the sale, he shall be attended at the sale by one witness.

(3) No bid for the purchase of a pointed article at the auction shall be accepted unless it is at least equal to—

(a) the valuation of the article made under section 46(1)(c) of this Act; or

(b) such smaller amount as the creditor may have authorised as acceptable:

Provided that the valuation and amount mentioned in paragraphs (a) and (b) above need not be disclosed to anyone bidding for such purchase.

(4) Any pointed article exposed for sale may be purchased by—

(a) any creditor, including the creditor on whose behalf the pointing was executed; or

(b) a person who owns the article in common with the debtor.

(5) Without prejudice to subsection (6) below, ownership of a pointed article which remains unsold after being exposed for sale shall pass to the creditor after it ceases to be exposed for sale.

(6) The ownership of a pointed article which has passed to the creditor under subsection (5) above, in a case where the sale is held in premises of the debtor, shall revert to the debtor unless—

(a) if the sale is held in a dwellinghouse in which the debtor is residing, the creditor uplifts the article by 8 p.m., or such time as may be prescribed, on the same day as the sale was completed;

(b) if the sale is held in other premises of the debtor, the creditor uplifts the article before 8 p.m., or such time as may be prescribed, on the third day following the date of the completion of the sale;

and an officer of court may remain on or re-enter any premises for the purpose of enabling the creditor to uplift any article under paragraph (a) or (b) above.

(7) Subsections (5) and (6) above are without prejudice to the rights of any third party in any of the pointed articles.

(8) Where at the sale any article is unsold or is sold at a price below the valuation made under section 46(1)(c) of this Act, the debtor shall be credited with an amount equal to that valuation.

EXPLANATORY NOTES

Subsection (2)

This subsection implements Recommendation 5.36(2) (para. 5.178).

Subsection (3)

This subsection implements Recommendations 5.42 (para. 5.199) and 5.43(1) (para. 5.203).

Subsection (4)

Paragraph (a) restates the existing law while *paragraph (b)* makes it clear that a third party co-owner is entitled to bid.

Subsection (5)

This subsection restates the existing law.

Subsection (6)

This subsection implements Recommendation 5.43(2) and (3) (para. 5.203).

Subsection (8)

This subsection implements Recommendation 5.43(1) (para. 5.203).

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Disposal of
proceeds of sale.

60.—The officer of court appointed under section 55(5) of this Act to make arrangements for the sale shall dispose of the proceeds of the sale—

- (a) by handing over to the creditor or his agent the proceeds so far as necessary to meet the debt and any interest and expenses chargeable against the debtor (subject to any agreement between the officer of court and the creditor or his agent relating to the fees or outlays of the officer of court) or, if the sheriff so directs, by consigning such proceeds in court; and
- (b) by handing over to the debtor or his agent any surplus remaining after the debt and any interest and expenses chargeable against the debtor have been met or, if the debtor or agent cannot be found, by consigning that sum in court.

Report of sale.

61.—(1) In all sales of poided articles, the officer of court appointed under section 55(5) of this Act to make arrangements for the sale shall within a period of 14 days after the date of completion of the sale make to the sheriff a report in the prescribed form (“the report of sale”) setting out—

- (a) any articles which have been sold and the amount for which they have been sold;
- (b) any articles which remain unsold;
- (c) the expenses of the diligence; and
- (d) any balance due by, or surplus handed over or due to, the debtor.

(2) If an officer of court—

- (a) without reasonable excuse makes a report of sale to the sheriff after the expiry of the period of 14 days mentioned in subsection (1) above; or
- (b) wilfully refuses or delays to make a report of sale after the expiry of that period,

the sheriff may, without prejudice to his right to report the matter to the Court of Session or the sheriff principal as mentioned in section 105(1)(b) of this Act, make an order that the officer of court shall be liable for the expenses of the diligence, either in whole or in part.

(3) The report of sale shall be signed by the officer of court appointed as aforesaid and, if a witness was required to attend at the sale under section 59(2) of this Act, by that witness.

(4) The report of sale shall be remitted by the sheriff to the auditor of court who shall—

- (a) tax the expenses of the diligence;

EXPLANATORY NOTES

Clause 60

This clause by and large restates the existing law and practice regarding the disposal of the proceeds of sale. *Paragraph (b)* implementing Recommendation 5.46 (para. 5.214) clarifies the procedure to be followed where a sale produces a surplus.

Clause 61

This clause deals with the report of the sale which the officer of court is required to submit to the sheriff.

Subsection (1)

This subsection re-enacts the existing law with the modifications contained in Recommendation 5.44 (para. 5.207).

Subsection (2)

This subsection implements Recommendation 5.45(2) (para. 5.210).

Subsection (4)

This subsection implements Recommendation 5.45(1) (para. 5.210) by embodying in statute the present procedure for auditing reports contained in the Practice Notes of the sheriffs principal.

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

(c) make a report to the sheriff:

Provided that the auditor of court shall not alter the expenses of the diligence or the aforesaid balance without first giving all interested persons an opportunity to make representations.

(5) On receipt of the auditor's report on the report of sale, the sheriff may make an order—

(a) declaring the balance due by or to the debtor, as certified by the auditor in his report;

(b) declaring such a balance after making modifications to the auditor's balance as so certified; or

(c) if he is satisfied that there has been a substantial irregularity in the diligence (other than the making of the report of sale to the sheriff after the expiry of the period of 14 days mentioned in subsection (1) above), declaring the diligence to be null and may make any such consequential order as appears to him to be necessary in the circumstances,

and the sheriff clerk shall intimate the sheriff's decision under this subsection to the debtor.

(6) The sheriff shall not make an order under subsection (5)(b) or (c) above without first giving all interested persons an opportunity to be heard, and no such order shall take effect while the order is appealable or subject to an appeal or a further appeal.

(7) The auditor of court shall not be entitled to charge a fee in respect of his report on the report of sale.

(8) The report of sale and the auditor's report on it shall be retained by the sheriff clerk for the prescribed period and during that period they shall be open for inspection in the sheriff clerk's office by any interested person on payment of such fee as may be prescribed in an order made under section 2 of the Courts of Law Fees (Scotland) Act 1895.

(9) The making of an order under subsection (5)(c) above shall not affect the title of a person to any article acquired by him at the sale, or subsequently, in good faith and for value.

(10) Any rule of law whereby the sheriff may refuse to receive a report of sale shall cease to have effect.

Duration of poinding

62.—(1) Subject to subsections (2) and (3)(a) below, a poinding shall cease to have effect on the expiry of a period of one year after the date of execution of the poinding, unless before that expiry an application has been made under section 52(1) of this Act for a warrant of sale in relation to the poinded articles.

Period for which
poinding
remains
effective.

EXPLANATORY NOTES

Subsection (5)

This subsection implements Recommendation 5.45(3) and (4) (para. 5.210).

Subsection (6)

This subsection implements Recommendation 9.12(5) (para. 9.74).

Subsection (7)

This subsection implements Recommendation 8.11(2) (para. 8.73).

Subsection (9)

This subsection implements Recommendation 5.45(3) (para. 5.210).

Subsection (10)

This subsection implements Recommendation 5.45(2) (para. 5.210).

Clause 62

This clause regulates the duration of a pointing.

Subsection (1)

This subsection implements Recommendation 5.27(1) (para. 5.130).

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(2) The sheriff, on an application by the creditor or an officer of court made before the expiry of the said period and before an application has been made under section 52(1) of this Act for a warrant of sale in relation to the poided articles—

- (a) may, where he thinks that, by extending the period during which the poiding shall remain effective, the debtor is likely to comply with an agreement between the creditor and the debtor for the payment of the debt by instalments or otherwise, extend the period for such further period as he considers may reasonably be required to give effect to the agreement; or
- (b) may extend the period to enable further proceedings to be taken in the diligence where the termination of the poiding would prejudice the creditor and the creditor cannot be held responsible for the circumstances giving rise to the need for the extension,

and the sheriff may grant a further extension or further extensions under this subsection on an application made to him before the expiry of the previously extended period.

(3) Where, within the period of one year mentioned in subsection (1) above or within that period as extended under subsection (2) above, an application is made—

- (a) under the said subsection (2), the poiding shall continue to have effect until the disposal of the application; or
- (b) under section 52(1) of this Act for a warrant of sale in relation to the poided articles, the poiding shall continue to have effect—
 - (i) if the sheriff decides to refuse to grant a warrant of sale, until the date when that decision ceases to be appealable or subject to an appeal or a further appeal;
 - (ii) if the sheriff grants a warrant of sale and the articles are sold, or ownership passes to the creditor in default of sale, within the period specified for the sale of the articles in the warrant of sale, until the date of such sale or such ownership passing; or
 - (iii) if the sheriff grants a warrant of sale and the articles are not sold, or ownership does not pass to the creditor, within the aforesaid period, until the expiry of that period.

(4) Without prejudice to subsection (5) below, if a report has been made to the sheriff under section 58(3) of this Act, the poiding shall continue to have effect for a period of 6 months after the date when the report was made.

(5) Where, within the period specified in the warrant of sale, being the period within which the sale is required to be held, or within the period of 6 months mentioned in subsection (4) above, an application

EXPLANATORY NOTES

Subsection (2)

Paragraph (a) implements Recommendation 5.27(1) and (2) (para. 5.130). *Paragraph (b)* provides the creditor with a remedy where the poiding lapses due to unforeseen or unavoidable circumstances.

Subsection (3)

Paragraph (a) implements Recommendation 5.27(2) (para. 5.130). *Paragraph (b)* implements Recommendations 5.30(4) (para. 5.146) and 5.34 (para. 5.169).

Subsection (4)

This subsection implements Recommendation 5.41(3) (para. 5.197).

Subsection (5)

This subsection implements Recommendation 5.40(4) (para. 5.193).

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is made under section 57 of this Act for a variation of the warrant of sale, the pouncing shall cease to have effect—

- (a) if the sheriff decides to refuse to grant such a variation, on the date when that decision ceases to be appealable or subject to an appeal or a further appeal or on such later date as the sheriff may direct;
 - (b) if the sheriff grants such a variation and the articles are sold, or ownership passes to the creditor in default of sale, within the period specified for the sale of the articles in the warrant of sale as so varied, on the date of such sale or such ownership passing; or
 - (c) if the sheriff grants such a variation and the articles are not sold, or ownership does not pass to the creditor, within the aforesaid period, on the expiry of that period.
- (6) The decision of the sheriff under subsection (2) above shall be final and shall be intimated to the debtor by the sheriff clerk.

Removal, damage or destruction of pounded articles

Authorised
removal of
pounded articles.

63.—(1) The debtor or the possessor of pounded articles may remove them to another location if—

- (a) the creditor or officer of court has consented to their removal; or
- (b) the sheriff, on an application by the debtor or the possessor, has authorised their removal.

(2) The removal of pounded articles to another location in accordance with subsection (1) above shall not by itself have the effect of releasing the articles from the pouncing.

(3) Where pounded articles have been removed from the debtor's premises to another location under subsection (1) above, the creditor may, under the same warrant to pound, again pound any of the articles so removed and, notwithstanding section 50 of this Act, any articles which were not so removed, whether or not they were previously pounded; and, on the execution of any such further pouncing, the original pouncing shall be deemed to have been abandoned.

Removal of
pounded articles
in breach of
pouncing.

64.—(1) The removal from premises of pounded articles by the debtor or a third party, without consent or authority under section 63(1)(a) or (b) of this Act, shall be a breach of the pouncing and, if the debtor or third party at the time of such removal knew that the articles had been pounded, the removal may be dealt with as a contempt of court.

(2) The removal of pounded articles to another location in breach of the pouncing shall not by itself have the effect of releasing the articles from the pouncing.

EXPLANATORY NOTES

Subsection (6)

This subsection implements Recommendation 9.11(4) (para. 9.70).

Clause 63

This clause provides for the sheriff or the creditor to authorise the debtor to remove some or all of the poided goods to another location.

Subsection (1)

This subsection implements Recommendation 5.25(1) (para. 5.120).

Subsection (2)

This subsection makes it clear that articles which are moved to another location remain subject to the poiding.

Subsection (3)

This subsection implements Recommendation 5.25(2) (para. 5.120).

Clause 64

This clause sets out the various orders the court may make following unauthorised removal of poided goods.

Subsection (1)

This subsection implements Recommendation 5.26(5) (para. 5.125).

Subsection (2)

This subsection makes it clear that articles which are removed to another location remain subject to the poiding.

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(3) Subject to subsection (4) below, where in breach of a pinding articles have been removed from premises by the debtor or by a third party, the sheriff, on an application in the pinding process by the creditor or the officer of court,—

- (a) may make an order requiring the debtor or third party or such other person as is in possession of those articles to restore them to the premises from which they have been removed within a period specified in the order; and
- (b) if a requirement under paragraph (a) above is not complied with and it appears to the sheriff that the articles are likely to be found in premises specified in the application, may grant a warrant to officers of court—
 - (i) to search for the articles in the premises so specified; and
 - (ii) to restore the articles to the premises from which they have been removed or to make such other arrangements for their security as the sheriff may direct,

and any such warrant shall be deemed to include authority to open shut and lockfast places for the purpose of its execution.

(4) Where it appears to the sheriff, on an application made to him in the pinding process, that any article which has been removed as mentioned in subsection (3) above has been acquired for value and without knowledge of the pinding, he shall not make an order under paragraph (a) of that subsection relating to that article and shall recall any such order which he has already made.

(5) Where in breach of a pinding pinded articles have been removed from premises in circumstances in which the debtor is at fault, the sheriff, on an application in the pinding process by the creditor, may, notwithstanding section 50 of this Act, authorise the pinding of other articles belonging to the debtor in the same premises.

(6) Where a third party knowing that an article has been pinded removes it from premises in breach of the pinding and the article—

- (a) in the course of the removal or subsequently, is damaged or destroyed;
- (b) is subsequently lost or stolen; or
- (c) is acquired from or through that third party by another person without knowledge of the pinding and for value,

the sheriff may order the third party to consign in court until the completion of the sale or until the pinding otherwise ceases to have effect—

- (i) where the article has been damaged but not so damaged as to make it worthless, a sum equal to the difference between the valuation of the article made under section 46(1)(c) of this Act and the value of the article as damaged;
- (ii) in any other case, a sum equal to the valuation made under that section.

EXPLANATORY NOTES

Subsection (3)

This subsection implements Recommendation 5.26(1) (para. 5.125).

Subsection (4)

This subsection implements Recommendation 5.26(2) (para. 5.125).

Subsection (5)

This subsection implements Recommendation 5.26(3) (para. 5.125).

Subsections (6) and (7)

These subsections implement Recommendation 5.26(4) (para. 5.125).

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(7) Any sum consigned in court under subsection (6) above shall, on completion of the sale or on the pouncing otherwise ceasing to have effect, be paid to the creditor to the extent that may be necessary to satisfy his debt, any surplus thereof being paid to the debtor.

Damage or
destruction of
pounded articles.

65.—(1) The wilful damage or destruction of pounded articles by the debtor or a third party who knows that the articles have been pounded shall be a breach of the pouncing and may be dealt with as a contempt of court.

(2) Where pounded articles have been damaged or destroyed in circumstances in which the debtor is at fault, the sheriff, on an application by the creditor or officer of court in the pouncing process, may—

- (a) authorise, notwithstanding section 50 of this Act, the pouncing of other articles belonging to the debtor in the premises in which the original pouncing took place; or
- (b) authorise the revaluation of any damaged article in accordance with section 46(1)(c) of this Act.

(3) Where a third party knowing that an article has been pounded wilfully damages or destroys it, the sheriff may order the third party to consign in court until the completion of the sale or until the pouncing otherwise ceases to have effect—

- (a) where the article has been damaged but not so damaged as to make it worthless, a sum equal to the difference between the valuation of the article made under section 46(1)(c) of this Act and the value of the article as damaged;
- (b) where the article has been destroyed or so damaged as to make it worthless, a sum equal to the valuation made under that section.

(4) Any sum consigned in court under subsection (3) above shall, on the completion of the sale or on the pouncing otherwise ceasing to have effect, be paid to the creditor to the extent that may be necessary to satisfy his debt, any surplus thereof being paid to the debtor.

Articles belonging to third party or in common ownership

Release from
pouncing of
articles
belonging to
third party.

66.—(1) An officer of court may, at any time after the execution of a pouncing and before the sale of the pounded articles, release an article from the pouncing if a third party or a person acting on his behalf claims that it belongs to the third party, unless the debtor or the possessor of the article, if different from the debtor, denies the claim.

EXPLANATORY NOTES

Clause 65

This clause deals with the situation where pointed goods are damaged or destroyed through unauthorised interference.

Subsection (1)

This subsection implements Recommendation 5.26(5) (para. 5.125).

Subsection (2)

This subsection implements Recommendation 5.26(3) (para. 5.125).

Subsections (3) and (4)

These subsections implement Recommendation 5.26(4) (para. 5.125).

Clause 66

This clause sets out the procedures whereby a third party can obtain release of his or her goods which have been pointed.

Subsection (1)

This subsection implements Recommendation 5.48(1) (para. 5.229).

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(2) The sheriff shall, at any time after the execution of a pouncing and before the sale of the pounced articles, on an application made to him by a third party, make an order releasing an article from a pouncing where he is satisfied that the article belongs to that third party.

(3) The making of an application under subsection (2) above is without prejudice to the taking of other proceedings by the third party for the recovery of pounced articles belonging to him, and a determination of the sheriff under that subsection shall not be binding in any other proceedings.

(4) An order under subsection (2) above releasing articles from a pouncing shall not take effect while the order is appealable or subject to an appeal or a further appeal.

(5) Any release of a pounced article under subsection (1) above—

- (a) before the making of an application for warrant of sale, shall be mentioned in that application;
- (b) after the application has been made but before it has been disposed of, shall be reported forthwith by the officer of court to the sheriff;
- (c) after the application has been granted in a case where some articles remain pounced, shall be specified in the report under section 61 of this Act.

(6) Where any article has been released under subsection (1) or (2) above from a pouncing, the creditor may, notwithstanding section 50 of this Act, pounce other articles belonging to the debtor in the same premises.

Pouncing and
sale of articles in
common
ownership.

67.—(1) Articles which are owned in common by a debtor and a third party may be pounced and disposed of in accordance with the provisions of this Part of this Act in satisfaction of the debts of that debtor.

(2) Where a third party or a person acting on his behalf, at any time after the execution of a pouncing and before the sale of the pounced articles—

- (a) claims that any such article is owned in common by the debtor and the third party; and
- (b) pays to the officer of court a sum equal to the value of the debtor's interest in the article,

the officer of court may, unless the debtor or the possessor of the article, if different from the debtor, denies the claim, release the article from the pouncing.

(3) The sheriff shall, at any time after the execution of a pouncing and before the sale of the pounced articles, on an application made

EXPLANATORY NOTES

Subsections (2) and (3)

These subsections implement Recommendation 5.48(3) (para. 5.229).

Subsection (4)

This subsection implements Recommendation 9.12(5) (para. 9.74).

Subsection (5)

This subsection implements Recommendation 5.48(2) (para. 5.229).

Subsection (6)

This subsection implements Recommendation 5.48(4) (para. 5.229).

Clause 67

This clause makes it competent to point goods owned in common by the debtor and a third party, and sets out procedures whereby the third party can obtain release of the pointed goods or be credited with the value of his or her interest.

Subsection (1)

This subsection implements Recommendation 5.49(1) (para. 5.235).

Subsection (2)

This subsection implements Recommendation 5.49(2) (para. 5.235).

Subsection (3)

This subsection implements Recommendation 5.49(3) and (4) (para. 5.235).

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to him by a third party, make an order releasing any article from a pouncing where he is satisfied that the article is owned in common by the debtor and that third party and either—

- (a) the third party pays to the officer of court a sum equal to the value of the debtor's interest in the article; or
- (b) the sheriff is satisfied that the continuation of the pouncing of that article or its sale under warrant of sale would be unduly harsh to the third party in the circumstances.

(4) A release under subsection (2) above or, where payment is made under paragraph (a) of subsection (3) above, a release under that subsection, shall become effective on the granting of a receipt for payment thereunder; and, on such a receipt being granted, the debtor's interest in the released article shall be deemed to be transferred to the third party.

(5) An order under subsection (3) above releasing articles from a pouncing shall not take effect while the order is appealable or subject to an appeal or a further appeal.

(6) Any release of a pounced article under subsection (2) above—

- (a) before the making of an application for warrant of sale, shall be mentioned in that application;
- (b) after the application has been made but before it has been disposed of, shall be reported forthwith by the officer of court to the sheriff;
- (c) after the application has been granted in a case where some articles remain pounced, shall be specified in the report under section 61 of this Act.

(7) Where any article is released in pursuance of subsection (3)(b) above from a pouncing, the creditor may, notwithstanding section 50 of this Act, pounce other articles belonging to the debtor in the same premises.

(8) This subsection applies where—

- (a) at any time after the execution of a pouncing, a third party claims that any of the pounced articles is owned in common by the debtor and himself but does not seek release of the article from the pouncing, and either
- (b) the claim is admitted by the creditor and the debtor; or
- (c) the claim is not admitted by the creditor or the debtor, but the sheriff, on an application made to him, is satisfied that the claim is valid.

(9) Where subsection (8) above applies, then the creditor shall pay to the third party—

- (a) if the article is or has been sold, a sum out of the proceeds of sale or out of the valuation of that article under section 46(1)(c) of this Act (whichever is the greater) which bears the same relation to those proceeds or that valuation as the

EXPLANATORY NOTES

Subsection (5)

This subsection implements Recommendation 9.12(5) (para. 9.74).

Subsection (7)

This subsection implements Recommendation 5.49(5) (para. 5.23).

Subsections (8) and (9)

These subsections implement Recommendation 5.49(6) (para. 5.25).

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value of the third party's interest in the article bears to the value of the total interest of all those who own the article in common;

- (b) if ownership of the article passes or has passed to the creditor in default of sale, a sum which bears the same relation to the valuation of the article under section 46(1)(c) of this Act as the value of the third party's interest in the article bears to the value of the total interest of all those who own the article in common.

Supplementary

Certain proceedings under Part III to assist further steps in the diligence.

68. Where, in relation to a pouncing, an application under this Part of this Act mentioned in subsection (2) below has been made, then—

- (a) during a relevant period it shall be incompetent—
- (i) to grant a warrant of sale of the pounced articles; or
 - (ii) to remove the pounced articles for sale, or to hold a sale of them, in pursuance of a warrant of sale; and
- (b) a relevant period shall be disregarded in calculating the period—
- (i) within which a sale of the pounced articles is required to be held by virtue of section 55 of this Act; or
 - (ii) during which the pouncing remains effective by virtue of section 62 of this Act.

(2) The applications referred to in subsection (1) above are an application under—

- (a) section 43(4), 48(1), 66(2) or 67(3) (release of pounced articles);
- (b) section 49(1) or (2) (recall of pouncing);
- (c) section 51(1) (sist of proceedings in pouncing of mobile homes);
- (d) section 64(3) (restoration of articles removed in breach of a pouncing);
- (e) section 64(4) (recall of order under section 64(3)).

(3) In this section “a relevant period” means any of the following periods—

- (a) the period while the application concerned is pending;
- (b) any period during which the decision of the sheriff disposing of that application is appealable or subject to an appeal or a further appeal.

Conjoining of further pouncing with original pouncing.

69.—(1) Subject to subsection (2) below, where a report of a pouncing executed in pursuance of section 48(2), 64(5) or 65(2), or under section 9(7), 18(7), 30(6), 63(3), 66(6) or 67(7), of this Act (“the further pouncing”) has been received under section 47 of this

EXPLANATORY NOTES

Clause 68

This clause implements Recommendation 9.12(3) (para. 9.74). It prevents a warrant of sale being granted or goods being removed for sale pending the determination of certain applications relating to the poinded goods.

Clause 69

This clause implements Recommendation 5.28(2) (para. 5.134). It provides for the sheriff to conjoin into a single poinding two or more poindings by the same creditor to enforce the same debt.

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Act before an application for warrant of sale has been granted in the original pouding, then the sheriff, on an application being made to him by the creditor, shall, at any time before granting a warrant of sale of the articles pouded by the original pouding or the further pouding, make an order conjoining the further pouding with the original pouding.

(2) The making of an order under subsection (1) above shall be competent if and only if—

- (a) at least 14 days have elapsed since the date of execution of the further pouding; and
- (b) at the time when the sheriff is considering the making of the order, an application under this Part of this Act in relation to the further pouding is not pending or, if such an application has been duly made and disposed of by the sheriff, his decision in that disposal is no longer appealable or is not subject to an appeal or a further appeal.

(3) Where the sheriff makes an order under subsection (1) above, it shall be incompetent for him to grant an application for warrant of sale made in pursuance of the original pouding which is pending when the order is made.

(4) The effect of an order under subsection (1) above shall be that thereafter the further pouding shall be treated for all purposes as if it were part of the original pouding:

Provided that where such an order has been made—

- (a) the references to the pouding in sections 49(1) and 52(2)(a)(i) of this Act shall be construed as references to the original pouding or the further pouding; and
- (b) the reference to the pouded articles in section 52(3)(a) of this Act shall be construed as a reference to the articles pouded under the original pouding and the further pouding.

(5) The decision of the sheriff under subsection (1) above shall be final.

Expenses of
pouding and
sale.

70.—Schedule 1 to this Act shall have effect for the purpose of determining the liability for expenses between the creditor and the debtor incurred in a process of pouding and sale.

Interpretation of
“dwelling-
house” in Part
III.

71.—In this Part of this Act “dwellinghouse” includes a caravan or a houseboat or any structure adapted for use as a residence.

EXPLANATORY NOTES

Clause 71

This clause makes it clear that the provisions relating to the exemptions from poinding of goods contained in a dwellinghouse apply to a caravan or other mobile home in which the debtor resides.

PART IV

ARRESTMENT OF EARNINGS

General provisions

New diligences
against earnings.

72.—(1) The diligences against earnings of a debtor in the hands of his employer mentioned in subsection (2) below shall replace the diligence of arrestment and action of furthcoming against such earnings.

(2) The diligences against earnings referred to in subsection (1) above are—

- (a) a diligence to be known as an “earnings arrestment”, to enforce the payment of any debt (including maintenance) which is due as at the date of the execution of the diligence;
- (b) a diligence to be known as a “current maintenance arrestment”, the purpose of which is (as nearly as may be) to enforce the payment of maintenance as it falls due;
- (c) an order to be known as a “conjoined arrestment order”, to enforce the payment of two or more debts at the same time against the same earnings.

(3) The provisions of this Part of this Act shall replace any rule of law whereby there is exempted from arrestment a reasonable amount for the subsistence of the debtor and his dependants in relation to the arrestment of the debtor’s earnings in the hands of his employer.

Meaning of
“earnings”, “net
earnings” and
“employer” in
Part IV.

73.—(1) Subject to subsection (2) below, in this Part of this Act “earnings” means any sums payable to the debtor—

- (a) by way of wages or salary (including any overtime pay);
- (b) by way of fees, bonus, commission or other emoluments payable—
 - (i) in addition to wages or salary by the person paying the wages or salary; or
 - (ii) under a contract of service; or
- (c) by way of pension (including a pension declared to be alimentary, an annuity in respect of past services, whether or not the services were rendered to the person paying the annuity, and any periodical payments by way of compensation for the loss, abolition or relinquishment, or diminution in the emoluments, of any office or employment).

EXPLANATORY NOTES

Clause 72

This clause introduces the three new diligences against earnings which are to replace the existing diligence of arrestment and furthcoming of wages.

Subsection (1)

This subsection implements Recommendation 6.1(1) (para. 6.30).

Subsection (2)

Paragraph (a) implements Recommendations 6.1(1) (para. 6.30) and 6.5 (para. 6.51).

Paragraph (b) implements Recommendation 6.23 (para. 6.148).

Paragraph (c) implements Recommendations 6.41(1) (para. 6.228) and 6.46(1) (para. 6.252).

Subsection (3)

This subsection implements Recommendation 6.10 (para. 6.79).

Clause 73

This clause defines certain terms used in this Part of the Bill.

Subsection (1)

Paragraphs (a) and *(b)* implement Recommendation 6.2(2) (para. 6.39). *Paragraph (c)* implements Recommendation 6.3(1) and (3) (para. 6.45).

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(2) The following shall not be treated as earnings—

- (a) a pension or allowance payable in respect of disablement or disability;
- 1955 c. 18.
1955 c. 19. (b) any sum the assignation of which is precluded by virtue of section 203 of the Army Act 1955 or of section 203 of the Air Force Act 1955, or any like sum payable to a member of the naval forces of the Crown, or to a member of any women's service administered by the Defence Council;
- (c) in relation to the enforcement by an earnings arrestment of a debt, not being maintenance, the wages of a seaman other than a seaman of a fishing boat;
- (d) any occupational pension payable under any enactment if the enactment precludes the assignation of the pension or exempts it from diligence;
- (e) a pension, allowance or benefit payable under any of the enactments specified in Schedule 2 to this Act (being enactments relating to social security);
- 1975 c. 60. (f) a guaranteed minimum pension within the meaning of the Social Security Pensions Act 1975;
- 1978 c. 44. (g) a redundancy payment within the meaning of section 81(1) of the Employment Protection (Consolidation) Act 1978.

(3) In this Act "net earnings" means the earnings which remain payable to the debtor after the employer has deducted any sum which he is required to deduct in respect of—

- (a) income tax,
- 1975 c. 14. (b) primary class 1 contributions under Part I of the Social Security Act 1975, and
- 1979 c. 12. (c) amounts deductible under any enactment, or in pursuance of a request in writing by the debtor, for the purposes of a superannuation scheme within the meaning of the Wages Councils Act 1979.

(4) In this Act "employer", in relation to any sum payable by way of pension, means the person paying that sum and, where the employee is an officer of the Crown, means such person as may be prescribed in regulations made by the Secretary of State by statutory instrument, and "employee", "employed" and "employment" shall be construed accordingly.

1894 c. 60. (5) In subsection (2)(c) above, expressions used in the Merchant Shipping Act 1894 have the same meanings as in that Act.

EXPLANATORY NOTES

Subsection (2)

Paragraph (a) implements Recommendation 6.3(2) (para. 6.45), *paragraphs (b) and (c)* implement Recommendation 6.4 (para. 6.48), *paragraph (d)* implements Recommendation 6.3(4) (para. 6.45) and *paragraphs (e) and (f)* implement Recommendation 6.3(5) (para. 6.45).

Subsection (3)

This subsection implements Recommendations 6.9(2) (para. 6.76) and 6.27(1) (para. 6.166).

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Meaning of
"maintenance"
and
"maintenance
order".

74. In this Act—

"maintenance" means periodical sums payable under a maintenance order;

"maintenance order" means—

- (a) an order granted by a court in Scotland for payment of a periodical allowance on divorce or aliment;
- (b) an order under section 80 or 81 of the Social Work (Scotland) Act 1968, section 11(3) of the Guardianship Act 1973 or section 18 or 19 of the Supplementary Benefits Act 1976;
- (c) an order of a court in England and Wales or Northern Ireland registered in Scotland under Part II of the Maintenance Orders Act 1950;
- (d) a provisional order of a reciprocating country which is confirmed by a court in Scotland under Part I of the Maintenance Orders (Reciprocal Enforcement) Act 1972;
- (e) an order of a reciprocating country which is registered in Scotland under the said Part I;
- (f) an order registered in Scotland under Part II, or under an Order in Council made in pursuance of Part III, of the said Act of 1972;
- (g) an order registered in Scotland under section 5 of the Civil Jurisdiction and Judgments Act 1982; or
- (h) an alimentary bond or agreement (including a document providing for the maintenance of one party to a marriage by the other after the marriage has been dissolved or annulled)—
 - (i) registered for execution in the Books of Council and Session or sheriff court books, or
 - (ii) registered in Scotland under an Order in Council made under section 13 of the Civil Jurisdiction and Judgments Act 1982.

1968 c. 49.

1973 c. 29.

1976 c. 71.

1950 c. 37.

1972 c. 18.

1982 c. 27.

Earnings arrestments

General effect
of earnings
arrestment.

75.—(1) An earnings arrestment shall have the effect of requiring the employer of the debtor while the arrestment is in operation to deduct a sum calculated in accordance with section 76 of this Act from the debtor's net earnings on any day (in this Part of this Act referred to as a "pay-day") on which he pays earnings to the debtor and forthwith to pay any sum so deducted to the creditor.

(2) Subject to section 86 of this Act, an earnings arrestment—

- (a) shall come into operation on the date of its execution, being the date on which a schedule in the prescribed form (to be

EXPLANATORY NOTES

Clause 74

This clause implements Recommendations 6.24 (para. 6.151) and 6.35 (para. 6.207).

Clause 75

This clause sets out the effect of an earnings arrestment and deals with the situation where payments are made under the arrestment after the debt that it enforces has been satisfied.

Subsection (1)

This subsection implements Recommendations 6.1(2) and (3) (para. 6.30), 6.12(1) (para. 6.91) and 6.22(1) (para. 6.130).

Subsection (2)

This subsection implements Recommendations 6.2(1) (para. 6.39), 6.8 (para. 6.66), 6.13(1) and (2) (para. 6.97) and 6.16(1) (para. 6.110).

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known as an "earnings arrestment schedule") is served on the employer of the debtor; and

- (b) shall remain in operation until the debt recoverable by the arrestment has been fully recovered, the debtor has ceased to be employed by the employer concerned, or the arrestment has been recalled or has for any other reason ceased to have effect.

(3) Subject to section 95 of this Act, where an employer fails to comply with an earnings arrestment, he—

- (a) shall be liable to pay to the creditor any sum which would have been paid by the employer if he had so complied;
- (b) shall not be entitled to recover from the debtor any sum paid by him to the debtor in contravention of the arrestment.

(4) The creditor shall not be entitled to refuse to accept payment under subsection (1) above which is tendered by cheque or by such other method (apart from payment in cash) as may be prescribed:

Provided that, if any such cheque is dishonoured, the creditor may insist that the payment in relation to which the cheque was dishonoured and any future payment under that subsection shall be tendered in cash.

(5) A creditor whose debt is being enforced by an earnings arrestment shall, as soon as is reasonably practicable after he has received payment of the full amount of his debt, whether by payments under the arrestment or otherwise, or his debt has ceased to be enforceable by diligence, intimate that fact to the employer.

(6) Any sum paid by an employer under an earnings arrestment after the debt has been satisfied or has ceased to be enforceable by diligence shall be recoverable by the debtor from the creditor with interest on that sum at the prescribed rate.

(7) Without prejudice to subsection (6) above, where the creditor has failed to comply with subsection (5) above, the sheriff, on an application by the debtor, may make an order requiring the creditor to pay to the debtor an amount not exceeding twice the amount recoverable by the debtor under the said subsection (6).

Deductions from net earnings to be made by employer.

76.—(1) Where the debtor's earnings are payable at regular intervals, the sum to be deducted from his net earnings on a pay day under section 75 of this Act shall be the sum specified in column 2 of—

- (a) Table A in Schedule 3 to this Act, if the earnings are payable weekly; or
- (b) Table B in that Schedule, if the earnings are payable monthly,

being the sum which is applicable to the bracket specified in column 1 of the Table within which his net earnings on that pay day fall.

EXPLANATORY NOTES

Subsection (3)

This subsection implements Recommendation 6.14 (para. 6.100).

Subsection (4)

This subsection implements Recommendations 6.22(2) and (3) (para. 6.130).

Subsections (5), (6) and (7)

These subsections implement Recommendation 6.16(1), (3) and (5) (para. 6.110).

Clause 76

This clause sets out the rules for calculating the deductions to be made in pursuance of an earnings arrestment by the employer from the debtor's net earnings. It implements Recommendation 6.9 (para. 6.76).

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(2) Where the debtor's earnings are payable at regular intervals, being intervals of a whole number of weeks or months, the sum to be deducted as aforesaid shall be the sum arrived at by—

- (a) calculating what would be his weekly or monthly net earnings by dividing the net earnings payable to him on the pay day by the number of weeks or months in the regular interval;
- (b) ascertaining by reference to column 2 of the said Table A or B the sum which is applicable to the bracket specified in column 1 of the Table within which his net earnings calculated as aforesaid fall; and
- (c) multiplying the sum ascertained under paragraph (b) above by the number of weeks or months in the regular interval.

(3) Where the debtor's earnings are payable at regular intervals other than at intervals to which subsection (1) or (2) above applies, the sum to be deducted as aforesaid shall be arrived at by—

- (a) calculating the daily rate of his net earnings by dividing the net earnings payable to him on the pay day by the number of days in the regular interval;
- (b) ascertaining by reference to column 2 of Table C in the said Schedule the sum which is applicable to the bracket specified in column 1 of that Table within which his net daily earnings calculated as aforesaid fall; and
- (c) multiplying the sum ascertained under paragraph (b) above by the number of days in the regular interval.

(4) Where the debtor's earnings are payable only at irregular intervals, the sum to be deducted as aforesaid shall be arrived at by—

- (a) calculating the daily rate of his net earnings by dividing the net earnings payable to him on the pay day—
 - (i) by the number of days since earnings were last paid to him; or
 - (ii) if the earnings are the first earnings to be paid to him by the employer, by the number of days since he commenced such employment;
- (b) ascertaining by reference to column 2 of Table C in the said Schedule the sum which is applicable to the bracket specified in column 1 of the Table within which his net daily earnings calculated as aforesaid fall; and
- (c) multiplying the sum ascertained under paragraph (b) above by the number of days mentioned in paragraph (a)(i) or (ii) above.

(5) Where on the same day there are paid to the debtor both earnings payable at regular intervals and other earnings which are not payable at regular intervals, then, for the purpose of arriving at the sum to be deducted as aforesaid, all those earnings shall be aggregated and treated as the amount of the earnings payable at that regular interval.

EXPLANATORY NOTES

The Debtors (Scotland) Bill

(6) Where earnings payable to a debtor at regular intervals are paid to him on one day and other earnings which are not payable at regular intervals are paid to him on a different day, the sum to be deducted as aforesaid in respect of those other earnings shall be 20 per cent of the net earnings.

(7) Notwithstanding subsections (1) to (3) above, where earnings are paid to a debtor by two or more series of payments—

(a) at regular intervals of different lengths, then—

(i) for the purpose of arriving at the sum to be deducted as aforesaid, subsection (1), (2) or (3) above shall apply to the series with the shorter or shortest interval; and

(ii) in relation to the earnings paid in any other series, the said sum shall be 20 per cent of the net earnings;

(b) at regular intervals of the same length, sub-paragraph (i) of paragraph (a) above shall apply to such series as the employer may choose, and sub-paragraph (ii) thereof shall apply to any other series:

Provided that, if payments in more than one series fall on the same day, the payments in those series shall be aggregated and treated as falling under subsection (1), (2) or (3) above, as the case may be.

(8) There may be varied by regulations—

(a) in order to take account of changes in the value of money, Tables A, B and C in Schedule 3 to this Act; or

(b) the percentage specified in subsections (6) and (7)(a)(ii) above;

and regulations under this subsection shall be made by the Secretary of State by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(9) Regulations under subsection (8) above shall not come into force in relation to an existing earnings arrestment unless and until the creditor or the debtor intimates in the prescribed form the making of the regulations to the employer.

(10) This section is subject to section 95 of this Act.

Debt
recoverable by
earnings
arrestment.

77.—(1) Subject to subsection (2) below, the debt recoverable by an earnings arrestment shall, in so far as not otherwise paid, consist of the following sums—

(a) any sum (including any expenses) due under the decree or other document on which the earnings arrestment proceeds;

(b) any interest on the sum and on the expenses mentioned in paragraph (a) above which has accrued at the date of service of the earnings arrestment schedule;

(c) the expenses incurred in executing the earnings arrestment and the charge which preceded it; and

EXPLANATORY NOTES

Clause 77

This clause specifies the component parts of a debt or debts which an earnings arrestment can competently enforce.

Subsection (1)

This subsection implements Recommendations 6.6 (para. 6.54), and 9.9(1) and (3) (para. 9.58).

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(d) the expenses incurred in executing a current maintenance arrestment.

(2) Any sum mentioned in subsection (1) above shall be recoverable by an earnings arrestment only if, and to the extent that, it is specified in the earnings arrestment schedule.

(3) Notwithstanding section 72(2)(c) of this Act, it shall be competent for a creditor to enforce payment of more than one debt payable to him by the same debtor by means of one earnings arrestment, whether the arrestment is executed in pursuance of the same warrant, or two or more different warrants, authorising diligence.

Review of
earnings
arrestment.

78.—(1) The sheriff, on an application by the debtor or the person on whom the earnings arrestment schedule was served (“the arrestee”), may make an order recalling an earnings arrestment on the ground that the arrestment is invalid or has ceased to have effect; and the sheriff clerk shall intimate any such order to the arrestee, the debtor and the creditor in the arrestment.

(2) The sheriff, on an application by the debtor, the creditor or the arrestee, may make an order determining any dispute as to the operation of an earnings arrestment.

(3) Without prejudice to section 75(6) of this Act, the sheriff, in making an order under subsection (2) above, may order—

- (a) the reimbursement of any payment made in the operation of the arrestment which ought not to have been made; or
- (b) the payment of any sum which ought to have been paid in the operation of the arrestment but which has not been paid.

(4) Any order under subsection (3) above shall require the person against whom the order is made to pay interest on the sum to be paid by him under the order at the prescribed rate and such interest shall be payable as from such date as the sheriff shall specify in the order.

(5) An order under subsection (1) above recalling an earnings arrestment shall be final.

(6) No order under subsection (3) above for payment shall take effect while the order is appealable or subject to an appeal or a further appeal.

Current maintenance arrestments

General effect
of current
maintenance
arrestment.

79.—(1) Subject to section 85(2) of this Act, a current maintenance arrestment shall have the effect of requiring the employer of the debtor while the arrestment is in operation to deduct a sum calculated in accordance with section 81 of this Act from the debtor’s net earnings on any pay day and forthwith to pay any sum so deducted to the creditor.

EXPLANATORY NOTES

Subsection (2)

This subsection implements Recommendation 6.6 (para. 6.54).

Subsection (3)

This subsection implements Recommendation 6.7(3) (para. 6.59).

Clause 78

This clause makes provision for challenging the validity of an earnings arrestment or the way in which it is being operated.

Subsection (1)

This subsection implements Recommendations 6.1(3) (para. 6.30) and 6.12(2) (para. 6.91).

Subsections (2), (3) and (4)

These subsections implement Recommendation 6.12(2) (para. 6.91).

Subsection (5)

This subsection implements Recommendation 9.11(4) (para. 9.70).

Subsection (6)

This subsection implements Recommendation 9.12(5) (para. 9.74).

Clause 79

This clause deals with the form and effect of a current maintenance arrestment.

Subsections (1) and (2)

These subsections implement Recommendation 6.23 (para. 6.148).

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(2) Subject to section 86 of this Act, a current maintenance arrestment—

- (a) shall come into operation on the date of its execution, being the date on which a schedule in the prescribed form (to be known as a “current maintenance arrestment schedule”) is served on the employer of the debtor; and
- (b) shall remain in operation until the debtor has ceased to be employed by the employer concerned or the arrestment has been recalled or for any other reason has ceased to have effect.

(3) The expenses incurred in the service of a current maintenance arrestment schedule shall be chargeable against the debtor.

(4) The current maintenance arrestment schedule shall specify the maintenance payable by the debtor expressed as a daily rate.

(5) For the purposes of subsection (4) above—

- (a) the maintenance payable by the debtor shall be the gross amount payable under a maintenance order before deduction of tax; and
- (b) the daily rate of maintenance shall be arrived at where the maintenance is paid—
 - (i) monthly, by multiplying the monthly rate by 12 and dividing it by 365;
 - (ii) quarterly, by multiplying the quarterly rate by 4 and dividing it by 365.

(6) Subsections (3) and (4) of section 75 of this Act shall apply in relation to a current maintenance arrestment as they apply in relation to an earnings arrestment.

(7) Where an obligation to pay maintenance is enforced by a current maintenance arrestment, no interest shall accrue on any arrears of maintenance which arise while the arrestment is in operation.

Enforcement of two or more obligations to pay maintenance.

80.—(1) This section applies where—

- (a) there is in effect a maintenance order which provides; or
- (b) there are in effect two or more maintenance orders which provide;

for the payment by one debtor of maintenance—

- (i) to an individual, whether the maintenance is payable to that individual for the individual’s own benefit or in a fiduciary capacity for the benefit of another individual or other individuals; or
- (ii) where the payee is the Secretary of State or a local authority or any other authority or official.

(2) Where this section applies—

- (a) all or any of the obligations to pay maintenance may be

EXPLANATORY NOTES

Subsection (3)

This subsection implements Recommendation 9.7(1) (para. 9.36).

Subsections (4) and (5)

These subsections implement Recommendation 6.26(1) (para. 6.161).

Subsection (6)

This subsection implements Recommendation 6.34 (para. 6.202).

Subsection (7)

This subsection implements Recommendation 6.28(2) (para. 6.176).

Clause 80

This clause allows a person to enforce two or more maintenance obligations in which he or she is the payee by means of a single current maintenance arrestment and prohibits their enforcement by several current maintenance arrestments concurrently. It implements Recommendations 6.46(3) (para. 6.252) and 6.48 (para. 6.259).

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enforced by one current maintenance arrestment against the same earnings;

- (b) it shall be incompetent to enforce the obligations by two or more current maintenance arrestments simultaneously against the same earnings; and
- (c) if more than one of the obligations is being enforced by one current maintenance arrestment, the current maintenance arrestment schedule shall specify one daily rate of maintenance, being the aggregate of the daily rates at which the obligations being so enforced are payable.

(3) In this Part of this Act "creditor", in relation to maintenance, means the payee specified in the maintenance order or orders or anyone deriving title from the payee.

Deductions from net earnings to be made by employer.

81.—(1) The sum to be deducted from a debtor's net earnings on a pay day under section 79 of this Act shall be whichever is the lesser of the following amounts—

- (a) subject to subsection (2) below, a sum arrived at by multiplying the daily rate of maintenance (as specified in the current maintenance arrestment schedule) by the number of days—
 - (i) since the date when earnings were last paid to the debtor by the employer concerned; or
 - (ii) if there were no such previous earnings, since the date when the schedule was served on that employer; or
- (b) any net earnings in so far as they exceed the sum of £5 per day for the number of days mentioned in sub-paragraph (i) or (ii) of paragraph (a) above.

(2) In order to take account of changes in the value of money, the sum specified in subsection (1)(b) above may be varied by regulations made by the Secretary of State by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(3) Regulations under subsection (2) above shall not come into force in relation to an existing current maintenance arrestment unless and until the creditor or the debtor intimates in the prescribed form the making of the regulations to the employer.

(4) This section is subject to section 95 of this Act.

Current maintenance arrestment to be preceded by default.

82.—(1) Subject to subsections (2) and (3) below, a current maintenance arrestment schedule may be served in pursuance of a maintenance order only if—

- (a) the creditor has in the prescribed manner intimated to the debtor—
 - (i) in the case of an order mentioned in paragraph (a) or

EXPLANATORY NOTES

Clause 81

This clause sets out the rules for calculating the deductions to be made in pursuance of a current maintenance arrestment by the employer from the debtor's net earnings.

Subsection (1)

This subsection implements Recommendations 6.26(2) (para. 6.161) and 6.27(1) (para. 6.166).

Subsections (2) and (3)

These subsections implement Recommendation 6.27(2) (para. 6.166).

Clause 82

This clause provides that the terms of the maintenance order sought to be enforced must be intimated to the maintenance debtor and default must thereafter occur in the payment of maintenance before a current maintenance arrestment can competently be served.

Subsection (1)

This subsection implements Recommendation 6.25 (para. 6.155).

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- (b) of the definition of "maintenance order" in section 74 of this Act, the making of the order;
 - (ii) in the case of an order mentioned in paragraph (c), (e), (f), (g) or (h) of that definition, the registration as mentioned in the paragraph concerned;
 - (iii) in the case of an order mentioned in paragraph (d) of that definition, the confirmation of the order as mentioned in that paragraph;
- (b) at least 4 weeks have elapsed since the date of intimation under paragraph (a) above; and
 - (c) at the time when it is proposed to serve the schedule, 3 or more instalments of maintenance remain unpaid.
- (2) Subsection (1) above shall not apply where—
- (a) the maintenance order is one that has been registered in Scotland as mentioned in paragraph (c), (e), (f) or (g) of the said definition; and
 - (b) a certificate by an official of another court was produced to the court in Scotland which registered the order that at the time at which the certificate was issued the debtor was in arrears in his payment of instalments under the order.
- (3) Where a current maintenance arrestment which has been validly executed has ceased to have effect otherwise than by virtue of its recall under section 83(1)(b) of this Act, the creditor may within 3 months after the date when the arrestment ceased to have effect execute another current maintenance arrestment without first complying with paragraphs (a), (b) and (c) of subsection (1) above.

Review and
termination of
current
maintenance
arrestment.

83.—(1) The sheriff may make an order recalling a current maintenance arrestment where he is satisfied—

- (a) on an application by the debtor or the person on whom the current maintenance arrestment schedule was served ("the arrestee"), that the arrestment is invalid or has ceased to have effect;
- (b) on an application by the debtor, that the debtor is unlikely to default again in paying maintenance;

and the sheriff clerk shall intimate any such order to the arrestee, the debtor and the creditor in the arrestment.

(2) The sheriff, on an application by the debtor, the creditor or the arrestee, may make an order determining any dispute as to the operation of a current maintenance arrestment.

(3) Subsections (3) to (6) of section 78 of this Act shall, subject to any necessary modifications, apply to a current maintenance arrestment as they apply to an earnings arrestment.

(4) A current maintenance arrestment shall cease to have effect—

- (a) on the coming into operation of an order or decree which

EXPLANATORY NOTES

Subsection (2)

This subsection implements Recommendation 6.36 (para. 6.209).

Subsection (3)

This subsection implements Recommendation 6.32(2) and (3) (para. 6.198).

Clause 83

This clause sets out the circumstances in which a current maintenance arrestment is to cease to have effect and empowers the sheriff to recall a current maintenance arrestment on the ground of its invalidity and to determine any disputes about the manner in which it is being operated.

Subsections (1), (2) and (3)

These subsections implement Recommendation 6.30 (para. 6.183).

Subsections (4) and (5)

These subsections implement Recommendation 6.31(1) (para. 6.189).

varies, supersedes or recalls the maintenance order which is being enforced by the arrestment;

- (b) on the obligation to pay maintenance under the maintenance order being so enforced ceasing otherwise than by virtue of paragraph (a) above;
- (c) in the case of two or more such obligations being so enforced, on any such obligation ceasing;
- (d) in the case of one or more such obligations being so enforced, on any of the obligations ceasing to be enforceable in Scotland.

(5) In the case of an order mentioned in paragraph (c), (e), (f) or (g) of the definition of "maintenance order" in section 74 of this Act, the reference in subsection (4)(a) above to the coming into operation of an order or decree shall be construed as a reference to the registration of the order in Scotland.

(6) A creditor whose debt is being enforced by a current maintenance arrestment shall, as soon as is reasonably practicable after the arrestment has ceased to have effect by virtue of subsection (4) above, intimate that fact to the arrestee.

(7) Any sum paid by an employer under a current maintenance arrestment after it has ceased to have effect by virtue of subsection (4) above shall be recoverable by the debtor from the creditor with interest on that sum at the prescribed rate.

(8) Without prejudice to subsection (7) above, where the creditor has failed to comply with subsection (6) above, the sheriff, on an application by the debtor, may make an order requiring the creditor to pay to the debtor an amount not exceeding twice the amount recoverable by the debtor under the said subsection (7).

Effect of new
maintenance
order on existing
current
maintenance
arrestment.

84. Where a maintenance order which is being enforced by a current maintenance arrestment ("the earlier order") is varied or superseded by an order or decree granted by a court in Scotland ("the subsequent order"), the subsequent order may include a condition that the provisions thereof (other than the warrant for diligence in so far as it authorises the service of a current maintenance arrestment schedule) shall not come into operation until the expiry of such period specified in the order as it considers necessary to inform the employer that the earlier order has been varied or superseded and to serve such a schedule in pursuance of the subsequent order:

Provided that this section shall not apply where the earlier order consists of or includes an order for the payment of aliment for the benefit of a spouse and the subsequent order consists of or includes an order for the payment of a periodical allowance on divorce for the benefit of that spouse.

EXPLANATORY NOTES

Subsections (6), (7) and (8)

These subsections implement Recommendations 6.31(3), (4) and (5) (para. 6.189) and 6.39(2) (para. 6.217).

Clause 84

This clause, implementing Recommendations 6.32(2) (para. 6.198) and 6.38 (para. 6.214), empowers a Scottish court on varying a maintenance order to delay the coming into force of the variation so as to allow the creditor to serve a fresh current maintenance arrestment in respect of the varied order at the same time as intimating the cessation of the subsisting current maintenance arrestment.

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Simultaneous operation of arrestments of earnings and priority among them

Simultaneous operation of earnings and current maintenance arrestment.

85.—(1) Subject to subsection (2) below, one earnings arrestment and one current maintenance arrestment may be operated simultaneously against earnings payable to the same debtor by the same employer.

(2) If an employer in operating an earnings arrestment and a current maintenance arrestment on any pay day is unable to meet the sum required to be deducted both under section 75 and section 79 of this Act, he shall first operate the earnings arrestment and shall then operate the current maintenance arrestment in accordance with section 81 of this Act out of any remaining net earnings of the debtor.

Priority among arrestments.

86.—(1) While an earnings arrestment against a debtor's earnings payable by an employer is in operation, any other earnings arrestment against his earnings payable by that employer shall be incompetent.

(2) While a current maintenance arrestment against a debtor's earnings payable by an employer is in operation, any other current maintenance arrestment against his earnings payable by that employer shall be incompetent.

(3) Without prejudice to section 85 of this Act, where an employer receives on the same day two or more earnings arrestment schedules or two or more current maintenance arrestment schedules relating to earnings payable by him to the same debtor, then the employer shall—

(a) if he receives the schedules at different times and he is aware of the respective times of receipt, give effect only to the arrestment of which the schedule was the first to be received by him;

(b) in any other case, give effect only to such one of the arrestments as he shall choose.

(4) Where—

(a) an employer is operating, or has under subsection (3) above given effect to, an arrestment or arrestments of earnings against a debtor's earnings ("the existing arrestment or arrestments"); and

(b) another creditor serves or has served an arrestment schedule on the employer relating to earnings payable by him to the same debtor which by virtue of subsection (1), (2) or (3) above he cannot operate,

the employer shall as soon as is reasonably practicable give the following information to that other creditor—

(i) the name and address of the creditor in the existing arrestment or arrestments;

EXPLANATORY NOTES

Clause 85

This clause allows for the concurrent operation of an earnings arrestment and a current maintenance arrestment; the former having priority in the event of the debtor's net earnings being insufficient to satisfy both. It implements Recommendation 6.45 (para. 6.249).

Clause 86

This clause deals with the situations arising where the employer is served with more than one schedule of arrestment.

Subsection (1)

This subsection implements Recommendation 6.40 (para. 6.222).

Subsection (2)

This subsection implements Recommendation 6.46(1) (para. 6.252).

Subsection (3)

This subsection implements Recommendations 6.18(5) (para. 6.117) and 6.34 (para. 6.202).

Subsection (4)

This subsection implements Recommendations 6.42(1) (para. 6.236) and 6.46(1) (para. 6.252).

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- (ii) the date and place of execution of the existing arrestment or arrestments;
- (iii) in relation to an existing earnings arrestment, the total amount specified as being recoverable in the earnings arrestment schedule when the schedule was served; and
- (iv) in relation to an existing current maintenance arrestment, the daily rate of maintenance specified in the current maintenance arrestment schedule.

(5) If the employer fails without reasonable excuse to give information to a creditor under subsection (4) above, the sheriff, on an application by the creditor, may order the employer to give the required information to the creditor.

Conjoined arrestment orders

Conjoined
arrestment
order: general
provision.

87.—(1) Subject to subsections (4) and (5) below, where, against the earnings of a debtor—

- (a) either an earnings arrestment or a current maintenance arrestment is in operation; or
- (b) both an earnings arrestment and a current maintenance arrestment are being operated by one employer;

the sheriff, on an application properly made by any creditor (including any creditor already enforcing his debt by one of the arrestments mentioned in paragraph (a) or (b) above) who is qualified, shall make a conjoined arrestment order requiring the employer concerned—

- (i) on the coming into operation of the order, to cease making payments under any subsisting earnings arrestment or current maintenance arrestment; and
- (ii) while the order is in operation, to deduct a sum calculated in accordance with section 89 of this Act from the debtor's net earnings on any pay day and forthwith to pay any sum so deducted to the sheriff clerk.

(2) For the purposes of subsection (1) above, a creditor is qualified if at the date when he applies under that subsection he would, but for section 86(1) or (2) of this Act, be entitled to enforce his debt by executing an earnings arrestment or, as the case may be, a current maintenance arrestment.

(3) A conjoined arrestment order shall recall any subsisting earnings arrestment or current maintenance arrestment and such recall shall take effect as from the date of the coming into operation of the order.

(4) It shall be incompetent to make a conjoined arrestment order to enforce two debts where the one debt is a debt enforceable by an earnings arrestment and the other debt is maintenance enforceable by a current maintenance arrestment.

EXPLANATORY NOTES

Subsection (5)

This subsection implements Recommendations 6.42(9) (para. 6.236) and 6.46(1) (para. 6.252).

Clause 87

This clause deals with the making and effect of conjoined arrestment orders.

Subsection (1)

This subsection implements Recommendations 6.41(1) (para. 6.228), 6.42(3) (para. 6.236) and 6.43(1) and (3) (para. 6.241).

Subsection (2)

This subsection implements Recommendations 6.42(2) (para. 6.236) and 6.46(1) (para. 6.252).

Subsection (3)

This subsection implements Recommendation 6.43(3) (para. 6.241).

Subsection (4)

This subsection implements Recommendation 6.45 (para. 6.249).

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(5) While a creditor is enforcing by a current maintenance arrestment one or more obligations by a debtor to pay maintenance, it shall be incompetent for the creditor to make an application under subsection (1) above in relation to any other obligation by the debtor to pay maintenance which along with any obligation being already enforced by a current maintenance arrestment would be enforceable by one current maintenance arrestment if the existing arrestment were abandoned.

(6) There shall be recoverable under a conjoined arrestment order by the applicant for the order the expenses incurred by him in the application:

Provided that—

- (a) the expenses shall be so recoverable only if, and to the extent that, they are specified in the application; and
- (b) there shall not be so recoverable by an applicant, who at the date of the application—
 - (i) was already enforcing a debt against the debtor by an earnings arrestment or a current maintenance arrestment, any expenses incurred by him in executing a further earnings arrestment or a further current maintenance arrestment; or
 - (ii) was not already enforcing a debt as mentioned in paragraph (i) above, any expenses incurred by him in executing an earnings arrestment or a current maintenance arrestment to enforce his debt against the debtor.

(7) Where a debt in respect of which an application is made under this section is a debt enforceable by an earnings arrestment, any sum mentioned in paragraph (a) or (b) of section 77(1) of this Act shall be recoverable by the conjoined arrestment order only if, and to the extent that, it is specified in that application.

(8) Where an obligation to pay maintenance is enforced by a conjoined arrestment order, no interest shall accrue on any arrears of that maintenance which arise while the order is in operation.

(9) The sheriff clerk shall as soon as is reasonably practicable serve a copy of the conjoined arrestment order on the employer, the debtor and the creditor or creditors in the arrestment or arrestments mentioned in subsection (1) above.

(10) A conjoined arrestment order—

- (a) shall come into operation as soon as a copy of it has been served on the employer under subsection (9) above; and
- (b) shall remain in operation until a copy of an order recalling the conjoined arrestment order has been served on the employer under section 92(5) of this Act or the debtor ceases to be employed by him.

EXPLANATORY NOTES

Subsection (5)

This subsection implements Recommendation 6.46(3) (para. 6.252).

Subsection (6)

This subsection implements Recommendations 9.8(5) (para. 9.44) and 9.9(1) (para. 9.58).

Subsection (7)

This subsection implements Recommendation 6.42(4) (para. 6.236).

Subsection (8)

This subsection implements Recommendation 6.49(2) (para. 6.262).

Subsection (9)

This subsection implements Recommendations 6.42(7) (para. 6.236) and 6.46(1) (para. 6.252).

Subsection (10)

This subsection implements Recommendations 6.43(1) and (2) (para. 6.241) and 6.50(1) (para. 6.270).

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(11) A conjoined arrestment order shall be in the prescribed form and, if one or more of the debts being enforced by the order is—

- (a) an ordinary debt, the order shall specify the amount of the debt or debts recoverable under the order; or
- (b) current maintenance, the order shall specify the maintenance payable by the debtor which is being so enforced expressed as a daily rate or, as the case may be, as an aggregate daily rate; and subsection (5) of section 79 of this Act shall apply for the purposes of this paragraph as it applies for the purposes of subsection (4) of that section.

(12) Without prejudice to section 92(1) of this Act, a decision of the sheriff making a conjoined arrestment order shall be final.

(13) Subject to section 95 of this Act, where an employer fails to comply with a conjoined arrestment order—

- (a) the employer shall be liable to pay to the sheriff clerk any sum which would have been paid by him if he had so complied;
- (b) the employer shall not be entitled to recover from the debtor any sum paid by him to the debtor in contravention of the order; and
- (c) the sheriff, on an application by the sheriff clerk, may grant warrant for diligence against the employer for recovery of the sums which appear to the sheriff to be due.

Relationship of conjoined arrestment order with earnings and current maintenance arrestments.

88.—(1) While a conjoined arrestment order against a debtor's earnings payable by an employer is in operation, any earnings arrestment, current maintenance arrestment or other conjoined arrestment order against his earnings payable by that employer shall be incompetent.

(2) If, while a conjoined arrestment order against a debtor's earnings payable by an employer is in operation, a creditor whose debt is not being enforced by the conjoined arrestment order serves an earnings arrestment schedule or a current maintenance arrestment schedule on the employer against earnings payable to the same debtor, the employer shall as soon as is reasonably practicable inform that creditor of the court which made the order.

(3) If, after an application is made under section 87 of this Act for a conjoined arrestment order against any earnings payable by an employer to a debtor and before that order comes into operation, an arrestment against earnings payable by the employer to the same debtor comes into operation by virtue of section 85(1) of this Act, then—

- (a) as soon as a copy of the conjoined arrestment order is served on the employer by the sheriff clerk, the arrestment shall cease to have effect; and

EXPLANATORY NOTES

Subsection (11)

This subsection implements Recommendations 6.42(4) (para. 6.236) and 6.46(2) (para. 6.252).

Subsection (12)

This subsection implements Recommendation 9.11(4) (para. 9.70).

Subsection (13)

This subsection implements Recommendation 6.43(6) (para. 6.241).

Clause 88

This clause is concerned with the situations that arise where an earnings arrestment or a current maintenance arrestment is served during the currency of a conjoined arrestment order.

Subsections (1) and (2)

These subsections implement Recommendations 6.42(8) (para. 6.236) and 6.46(1) (para. 6.252).

Subsection (3)

This subsection deals with the unusual case where an arrestment is served and is put into operation in the interval between another creditor's application for a conjoined arrestment order and the service of that order on the employer. The conjoined arrestment order is put into operation instead and the subsisting arrestment recalled.

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(b) the employer shall, as soon as is reasonably practicable after such service, inform the creditor in the aforesaid arrestment of the court which made the order.

(4) If the employer fails without reasonable excuse to give information to a creditor under subsection (2) or (3) above, the sheriff, on an application by the creditor, may order the employer to give the required information to the creditor.

(5) Where a conjoined arrestment order against a debtor's earnings is in operation, the sheriff, on an application properly made by a creditor whose debt is not being enforced by the conjoined arrestment order and who, but for the conjoined arrestment order, would be entitled to enforce his debt by executing an earnings arrestment or, as the case may be, a current maintenance arrestment, shall make an order so varying the conjoined arrestment order that the creditor's debt shall be included among the debts enforced by the conjoined arrestment order; and subsections (6) and (7) of section 87 of this Act shall apply in relation to an application under this subsection as they apply in relation to an application under that section.

(6) The sheriff clerk shall as soon as is reasonably practicable serve a copy of an order under subsection (5) above on the employer, the debtor and the other creditors whose debts are being enforced by the conjoined arrestment order.

(7) An order under subsection (5) above shall come into operation as soon as a copy has been served on the employer under subsection (6) above.

(8) Subsection (11) of section 87 of this Act shall apply to a conjoined arrestment order as varied under subsection (5) above as it applies to a conjoined arrestment order mentioned in that section.

(9) A decision of the sheriff under subsection (5) above varying a conjoined arrestment order shall be final.

Sum payable by employer under conjoined arrestment order.

89.—(1) Subject to section 95(3) of this Act, this section shall have effect for the purpose of determining the sum to be deducted on a pay day and paid to the sheriff clerk under a conjoined arrestment order.

(2) Where all the debts are ordinary debts, the said sum shall be the sum which the employer would pay under section 75(1) of this Act if the debts were one debt being enforced on the pay day by an earnings arrestment.

(3) Where all the debts are current maintenance, the sum shall be whichever is the lesser of the following amounts—

(a) a sum arrived at by multiplying the aggregate daily rate of maintenance (as specified in the conjoined arrestment order or order under section 88(5) of this Act, as the case may be) by the number of days—

EXPLANATORY NOTES

Subsection (4)

This subsection implements Recommendations 6.42(9) (para. 6.236) and 6.46(1) (para. 6.252).

Subsection (5)

This subsection implements Recommendations 6.42(8) (para. 6.236) and 6.46(1) (para. 6.252).

Subsection (9)

This subsection implements Recommendation 9.11(4) (para. 9.70).

Clause 89

This clause regulates the amount deductible by the employer from the debtor's net earnings in pursuance of a conjoined arrestment order and payable by the employer to the sheriff clerk.

Subsection (2)

This subsection implements Recommendation 6.43(3) (para. 6.241).

Subsection (3)

This subsection implements Recommendation 6.46(2) (para. 6.252).

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- (i) since the date when earnings were last paid to the debtor by the employer concerned; or
 - (ii) if there were no such previous earnings, since the date when the sheriff clerk served a copy of the conjoined arrestment order or order under section 88(5) of this Act on the employer; or
- (b) any net earnings in so far as they exceed the sum of £5 per day for the number of days mentioned in sub-paragraph (i) or (ii) of paragraph (a) above.
- (4) Where one or more of the debts are ordinary debts, and one or more are current maintenance, the sum shall be the aggregate of the following—

- (a) the sum which the employer would pay under section 75(1) of this Act if the ordinary debt or ordinary debts were one debt being enforced on the pay day by such an arrestment; and
- (b) in respect of the sum remaining after making payment under paragraph (a) above and in so far as the debts are current maintenance, the lesser of the amounts specified in paragraphs (a) and (b) of subsection (3) above.

(5) In order to take account of changes in the value of money, the sum specified in subsection (3)(b) above may be varied by an order made by the Secretary of State by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(6) The sheriff clerk operating a conjoined arrestment order shall intimate in the prescribed form to the employer concerned the making of regulations under section 76(8) of this Act or subsection (5) above; and, without prejudice to section 95 of this Act, no such regulations shall come into force in relation to the conjoined arrestment order before such intimation.

(7) The sheriff clerk shall not be entitled to refuse to accept payment by the employer under the conjoined arrestment order which is tendered by cheque or by such other method (apart from payment in cash) as may be prescribed:

Provided that, if any such cheque is dishonoured, the sheriff clerk may insist that the payment in relation to which the cheque was dishonoured and any future payment by the employer under the conjoined arrestment order shall be tendered in cash.

Disbursement by
sheriff clerk of
sums received
from employer.

90. Sums paid to the sheriff clerk under section 89 of this Act shall be disbursed by him to the creditors whose debts are being enforced by the conjoined arrestment order in accordance with Schedule 4 to this Act.

EXPLANATORY NOTES

Subsection (4)

This subsection implements Recommendation 6.47 (para. 6.255).

Subsection (6)

This subsection implements Recommendation 6.53 (para. 6.280).

Subsection (7)

This subsection contains provisions equivalent to clause 75(4).

Clause 90

This clause and *Schedule 4* make provision for the amounts receivable by the conjoined creditors from amounts collected under a conjoined arrestment order by the sheriff clerk. It implements Recommendation 6.47 (para. 6.255).

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Operation of
conjoined
arrestment
order.

91.—(1) The sheriff, on an application by—

- (a) the debtor;
- (b) a creditor whose debt is being enforced by the conjoined arrestment order;
- (c) the person on whom a copy of the order or an order varying that order was served under section 87(9) or 88(5) of this Act as employer (“the arrestee”); or
- (d) the sheriff clerk,

may make an order determining any dispute as to the operation by the arrestee or the sheriff clerk of the conjoined arrestment order.

(2) Without prejudice to subsection (6) below, the sheriff, in making an order under subsection (1) above, may order—

- (a) the reimbursement of any payment made in the operation of the conjoined arrestment order which ought not to have been made; or
- (b) the payment of any sum which ought to have been paid in the operation of the conjoined arrestment order but which has not been paid;

and subsection (4) of section 78 of this Act shall apply to any order under this subsection as it applies to any order under subsection (3) of that section.

(3) No order under subsection (2) above for payment shall take effect while the order is appealable or subject to an appeal or a further appeal.

(4) Where an ordinary debt is being enforced by a conjoined arrestment order, the creditor in that debt shall, as soon as is reasonably practicable after he has received payment of the full amount of the debt, whether by payments under the order or otherwise, or the debt has ceased to be enforceable by diligence, intimate that fact to the sheriff clerk.

(5) Where current maintenance is being enforced by a conjoined arrestment order, the creditor in that debt shall, as soon as is reasonably practicable after any obligation to pay such maintenance has ceased or has ceased to be enforceable by diligence, intimate that fact to the sheriff clerk.

(6) Any sum received by a creditor under a conjoined arrestment order in respect of—

- (a) an ordinary debt after the debt has been satisfied or has ceased to be enforceable by diligence; or
- (b) current maintenance after the obligation to pay such maintenance has ceased or has ceased to be enforceable by diligence;

shall be recoverable by the sheriff clerk from the creditor with interest on that sum at the prescribed rate.

EXPLANATORY NOTES

Clause 91

This clause empowers the sheriff to determine a dispute as to the mode of operation of a conjoined arrestment order and requires creditors whose debts have been satisfied to inform the sheriff clerk of this fact.

Subsections (1) and (2)

These subsections implement Recommendation 6.52 (para. 6.278).

Subsection (3)

This subsection implements Recommendation 9.12(5) (para. 9.74).

Subsections (4) to (8)

These subsections implement Recommendation 6.51(1) and (2) (para. 6.276).

(7) Without prejudice to subsection (6) above, where the creditor has failed to comply with subsection (4) or (5) above, the sheriff, on an application by the debtor, may make an order requiring the creditor to pay to the debtor an amount not exceeding twice the amount recoverable by the sheriff clerk under the said subsection (6).

(8) Any amount recovered from a creditor by the sheriff clerk in pursuance of subsection (6) above shall be disbursed by him in accordance with Schedule 4 to this Act as if, at the time when the creditor received a sum as mentioned in that subsection, the creditor's debt was not being enforced by the conjoined arrestment order concerned.

Recall and
variation of
conjoined
arrestment
order.

92.—(1) The sheriff shall make an order recalling a conjoined arrestment order—

- (a) on an application by any of the persons mentioned in subsection (2) below, if he is satisfied—
 - (i) that the conjoined arrestment order is invalid;
 - (ii) that all the debts being enforced by the order have been satisfied or have become unenforceable by diligence and that all obligations to pay maintenance being enforced by the order have ceased or have become unenforceable by diligence;
 - (iii) that the debtor's estate has been sequestrated; or
 - (iv) that the coming into force of a debt arrangement scheme has rendered the order ineffectual; or
- (b) if recall of the order is requested by all the creditors whose debts are being enforced by the order or by the only creditor whose debt is being so enforced.

(2) The persons referred to in subsection (1)(a) above are—

- (a) the debtor;
- (b) any creditor;
- (c) the person on whom a copy of the order or an order varying that order was served under section 87(9) or 88(5) of this Act as employer ("the arrestee");
- (d) the sheriff clerk;
- (e) if the debtor's estate has been sequestrated, the interim trustee appointed under section 13 of the Bankruptcy (Scotland) Act 1985 or the permanent trustee in the sequestration;
- (f) if a debt arrangement scheme has come into force in respect of the debtor's debts, the administrator of the scheme.

1985 c.

EXPLANATORY NOTES

Clause 92

This clause deals with the recall or variation of a conjoined arrestment order.

Subsections (1) and (2)

These subsections implement Recommendations 6.50(2) and (3) (para. 6.270) and 6.51(3) (para. 6.276).

The reference to the Bankruptcy (Scotland) Act 1985 is a reference to the Bankruptcy (Scotland) Bill 1984 (H.C. Bill 48) as brought from the House of Lords to the House of Commons, and ordered to be printed, on 18 December 1984.

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(3) Where any of the following events occurs—

- (a) the satisfaction, or the cessation of enforceability, of a debt being enforced by a conjoined arrestment order; or
- (b) the variation, cessation, supersession or recall of a maintenance obligation being so enforced;

the sheriff, on an application by the debtor, any creditor whose debt is being enforced by the order, the arrestee or the sheriff clerk, may make an order varying the conjoined arrestment order to give effect to that event.

(4) The sheriff may vary a conjoined arrestment order to give effect to a request by a creditor whose debt is being enforced by the order that it should cease to be so enforced.

(5) The sheriff clerk shall as soon as is reasonably practicable serve a copy of any order under subsection (1), (3) or (4) above on the debtor, the arrestee, any creditor whose debt is being enforced by the conjoined arrestment order and, if that order has been recalled on the ground of the sequestration of the debtor's estate, the interim trustee or the permanent trustee in the sequestration, if known to the sheriff clerk.

(6) An order under subsection (1), (3) or (4) above shall come into operation as soon as a copy of the order has been served on the arrestee under subsection (5) above.

(7) An order under subsection (1) above recalling a conjoined arrestment order shall be final.

Supplementary provisions for Part IV

93. Paragraph 10 of Schedule 7 to the Bankruptcy (Scotland) Act 1985 (equalisation of arrestments and poindings used within 60 days before, and 4 months after, apparent insolvency) shall not apply in relation to the arrestment of earnings of a debtor in the hands of his employer.

94. After section 19 of the Supplementary Benefits Act 1976 there shall be inserted the following section—

“Diversion of arrested earnings to Secretary of State.

19A.—(1) Where in Scotland a creditor who is enforcing a maintenance order or an alimentary bond or agreement by a current maintenance arrestment or a conjoined arrestment order is in receipt of supplementary benefit, the creditor may in writing authorise the Secretary of State to receive any sums payable under the arrestment or order until the creditor ceases to be in receipt of supplementary benefit or in writing withdraws the authorisation, whichever occurs first.

Disapplication of para. 10 of Sch. 7 to Bankruptcy (Scotland) Act 1985 from diligence against earnings.
1985 c.

Diversion of arrested earnings to Secretary of State.
1976 c. 71

EXPLANATORY NOTES

Subsections (3) and (4)

These subsections implement Recommendations 6.50(4) (para. 6.270) and 6.51(3) (para. 6.276).

Subsection (5)

This subsection implements Recommendation 6.51(4) (para. 6.276).

Subsection (7)

This subsection implements Recommendation 9.11(4) (para. 9.70).

Clause 93

This clause prevents earnings arrestments and current maintenance arrestments from being equalised with other arrestments or poindings on the debtor's apparent insolvency. It implements Recommendations 6.41(2) (para. 6.228) and 6.46(1) (para. 6.252). The reference to the Bankruptcy (Scotland) Act 1985 is a reference to the Bankruptcy (Scotland) Bill 1984 (H.C. Bill 48), as brought from the House of Lords to the House of Commons, and ordered to be printed, on 18 December 1984.

Clause 94

This clause allows a maintenance creditor in a current maintenance arrestment or conjoined in a conjoined arrestment order who is in receipt of supplementary benefit to divert sums receivable by him or her to the Department of Health and Social Security. It implements Recommendation 6.33 (para. 6.200).

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(2) On intimation by the Secretary of State—

- (a) to the employer operating the current maintenance arrestment; or
- (b) to the sheriff clerk operating the conjoined arrestment order;

of an authorisation under subsection (1) above, the employer or sheriff clerk shall, until notified by the Secretary of State that the authorisation has ceased to have effect, pay to the Secretary of State any sums which would otherwise be payable under the arrestment or order to the creditor.”.

Restriction on liability of employer in operating diligence against earnings.

95.—(1) An employer operating an earnings arrestment or a current maintenance arrestment shall be entitled to give effect to regulations made under section 76(8) or 81(2) of this Act before receiving intimation under section 76(9) or 81(3) of this Act of the making of the regulations.

(2) Where a pay day occurs within a period of 7 days after the date of—

- (a) service on the employer of an earnings arrestment schedule or a current maintenance arrestment schedule or a copy of a conjoined arrestment order; or
- (b) intimation under section 76(9), 81(3) or 89(6) of this Act to the employer operating an earnings arrestment, a current maintenance arrestment or a conjoined arrestment order of the making of regulations;

the employer shall be entitled, but shall not be required, on that day to operate the arrestment or order or, as the case may be, to give effect to the regulations.

(3) Where the employer does not operate an arrestment or a conjoined arrestment order, or give effect to regulations, on a pay day occurring within the period mentioned in subsection (2) above (“the earliest pay day”), he shall not, in calculating any amount to be deducted from the net earnings of the debtor on any subsequent pay day and to be paid under the arrestment or order, take account of any amount which would have been so deductible and payable by him on the earliest pay day if he had been operating the arrestment or order, or had given effect to the regulations, on that day.

(4) No claim may be made by—

- (a) the debtor or the creditor against the employer in respect of any deduction which has, or ought to have, been made by the employer from the debtor’s net earnings, or any payment which has, or ought to have, been made by him,

EXPLANATORY NOTES

Clause 95

This clause deals with the duties of employers on receiving schedules of arrestment or orders varying or recalling them.

Subsection (1)

This subsection implements Recommendations 6.9(4) (para. 6.76) and 6.27 (para. 6.166).

Subsection (2)

This subsection implements Recommendations 6.13(2) (para. 6.97), 6.34 (para. 6.202), 6.43(2) (para. 6.241) and 6.53 (para. 6.280).

Subsection (3)

This subsection implements Recommendations 6.13(3) (para. 6.97) and 6.34 (para. 6.202).

Subsection (4)

This subsection implements Recommendations 6.12(3) (para. 6.91) and 6.34 (para. 6.202).

under an earnings arrestment or a current maintenance arrestment; or

- (b) the debtor, the sheriff clerk or any creditor against the employer in respect of any such deduction or payment which has, or ought to have, been made under a conjoined arrestment order,

more than one year after the date when the deduction or payment has, or ought to have, been made.

(5) The employer shall not be liable to the debtor for any deduction made by him from the debtor's net earnings—

- (a) under an earnings arrestment unless and until he receives intimation—

- (i) from the creditor under section 75(5) of this Act that he has received payment of the full amount of his debt or that his debt has ceased to be enforceable by diligence;

- (ii) from the sheriff clerk under section 8(6)(b) or 78(1) of this Act that an order has been made recalling the arrestment;

- (iii) from the administrator under section 24(9)(a) of this Act that a debt arrangement scheme has come into force in respect of the debts of the debtor;

- (iv) that the debtor's estate has been sequestrated; or

- (v) from the creditor that he has abandoned the arrestment;

- (b) under a current maintenance arrestment unless and until he receives intimation—

- (i) from the creditor under section 83(6) of this Act that the arrestment has ceased to have effect;

- (ii) from the sheriff clerk under section 83(1) of this Act that an order has been made recalling the arrestment;

- (iii) from the administrator as mentioned in paragraph (a)(iii) above;

- (iv) that the debtor's estate has been sequestrated; or

- (v) from the creditor that he has abandoned the arrestment.

Provisions relating to execution of diligence against earnings.

96.—(1) When an officer of court serves an earnings arrestment schedule or a current maintenance arrestment schedule on the employer of the debtor, he shall, if practicable, serve a copy of the schedule on the debtor:

Provided that failure to serve a copy of the schedule on the debtor shall not by itself render the arrestment invalid.

(2) Service of any such schedule or copy thereof shall be by registered or recorded delivery letter or, if such a letter cannot be delivered, by any other competent mode of service and such service need not be attested by a witness.

EXPLANATORY NOTES

Subsection (5)

Paragraph (a) implements Recommendation 6.16(4) (para. 6.110) and *paragraph (b)* implements Recommendation 6.31(4) (para. 6.189).

Clause 96

This clause makes provision for the service by an officer of court of a schedule of arrestment on the employer.

Subsection (1)

This subsection implements Recommendations 6.19 (para. 6.119) and 6.34 (para. 6.202).

Subsection (2)

This subsection implements Recommendations 6.18(1), (3) and (4) (para. 6.117), 6.19 (para. 6.119) and 6.34 (para. 6.202).

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(3) The certificate of execution of an earnings arrestment or a current maintenance arrestment shall be signed by the officer of court who effected the service.

(4) Section 44(1) of this Act shall apply to the execution of an earnings arrestment or a current maintenance arrestment or the service of a conjoined arrestment order as it applies to the execution of a poinding except where such execution or service is by post.

Employer's fee
for operating
diligence against
earnings.

97.—(1) On any occasion on which an employer makes a payment to a creditor under an earnings arrestment or a current maintenance arrestment or to the sheriff clerk under a conjoined arrestment order, he may charge the debtor a fee of 50 pence or such other sum as may be prescribed in regulations made by the Secretary of State which shall be deductible from the amount of the debtor's net earnings after any deduction has been made from them under section 75, 79 or 87 of this Act.

(2) Regulations under subsection (1) above shall be made by statutory instrument and shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Effect of
sequestration on
diligence against
earnings.

98.—(1) The following provisions of this section shall have effect where a debtor's estate is sequestrated.

(2) Any existing earnings arrestment, current maintenance arrestment or, subject to subsection (3) below, conjoined arrestment order shall cease to have effect on the date of sequestration.

(3) Any sum paid by the employer to the sheriff clerk under a conjoined arrestment order on a pay day occurring before the date of sequestration shall be disbursed by the sheriff clerk under section 90 of this Act notwithstanding that the date of disbursement is after the date of sequestration.

(4) The execution of an earnings arrestment or the making of a conjoined arrestment order shall be incompetent after the date of sequestration to enforce a debt in respect of which the creditor is entitled to make a claim in the sequestration.

(5) In this section "date of sequestration" has the same meaning as in section 12(4) of the Bankruptcy (Scotland) Act 1985.

1985 c.

EXPLANATORY NOTES

Subsection (4)

This subsection provides that no service (other than postal service) of the specified documents is competent on a Sunday, Christmas Day, New Year's Day, Good Friday or on such other day as may be specified by act of sederunt.

Clause 97

This clause entitles an employer to charge a fee every time a deduction is made from the debtor's earnings in pursuance of an arrestment of earnings. It implements Recommendations 6.21 (para. 6.125), 6.34 (para. 6.202) and 6.43(5) (para. 6.241).

Clause 98

This clause deals with the situation where a debtor whose earnings are subject to an arrestment of earnings is sequestrated. The reference to the Bankruptcy (Scotland) Act 1985 is a reference to the Bankruptcy (Scotland) Bill 1984 (Bill 48) as brought from the House of Lords to the House of Commons, and ordered to be printed, on 18 December 1984.

Subsection (2)

This subsection implements Recommendations 6.15 (para. 6.103), 6.31(1) (para. 6.189) and 6.50(3) (para. 6.270).

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Interpretation of
Part IV.

- 99.** In this Part of this Act, unless the context otherwise requires—
- “creditor”, in relation to maintenance, has the meaning assigned by section 80(3) of this Act;
 - “current maintenance”, in relation to a conjoined arrestment order, means maintenance which, but for the order, would be enforceable by a current maintenance arrestment;
 - “ordinary debt”, in relation to a conjoined arrestment order, means, subject to subsection (6) of section 87 of this Act (including that subsection as applied by section 88(5) of this Act) a debt which, but for the order, would be enforceable by an earnings arrestment;
 - “the prescribed rate”, in relation to interest, means the rate of interest prescribed for the purposes of section 9 of the Sheriff Courts (Scotland) Extracts Act 1892;
 - “sheriff”, in relation to an application—
 - (a) under section 75(7), 78(1) or (2) or 83(1), (2) or (8), means the sheriff having jurisdiction—
 - (i) over the place where the earnings arrestment or the current maintenance arrestment to which the application relates was executed; or
 - (ii) if that place is unknown to the applicant, over an established place of business of the debtor’s employer;
 - (b) under section 86(5) or 88(4), means the sheriff having jurisdiction over the place where the creditor mentioned in the provision concerned executed an earnings arrestment or a current maintenance arrestment;
 - (c) under section 87(1), means the sheriff having jurisdiction over a place where an existing earnings arrestment or current maintenance arrestment of the debtor’s earnings in the hands of the employer concerned was executed;
 - (d) under section 87(13)(c), 88(5), 91 or 92, means the sheriff who made the conjoined arrestment order.

1892 c. 17.

EXPLANATORY NOTES

Clause 99

“sheriff”. This definition implements Recommendation 6.54 (para. 6.291).

