Scottish Law Commission

DISCUSSION PAPER NO. 79

EQUALISATION OF DILIGENCES

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The Commission would be grateful if comments on this Discussion Paper were submitted by 30 June 1989.
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on

EQUALISATION OF DILIGENCES

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PART I

INTRODUCTION

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

1.2 In this Discussion Paper we are concerned with the law relating to the equalisation of diligences outside the insolvency processes of sequestration and liquidation. Scots law makes provision outside sequestration and liquidation for the pari passu ranking of creditors on the proceeds of the main diligences used to attach property for the enforcement of unsecured debts, namely adjudication for debt (which relates primarily to heritable property), and arrestment and furthcoming or sale, and poinding and warrant sale (which relate to moveable property).

1.3 The "first come, first served" principle. In the ranking of debts secured by competing diligences, the general common law principle is that the first creditor to attach property by adjudication, arrestment or poinding should enjoy the fruits of the diligence which he has used and that creditors using diligences against the property later should rank only on the reversion by priority of the respective times of attachment. This is often referred to as the "first come, first served" or "priority in time" principle.[3] The rules on the equalisation of diligences were introduced by statute to qualify the operation of the "first come, first served" principle.

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

[2] Ibid., p. 6. "Diligence" is the legal term used to denote primarily the methods of enforcing unpaid debts due under decrees of the Scottish courts.

[3] It is traditionally referred to in the older text-books by the Latin tag," prior est tempore, potior est jure".

1.4 Equalisation of adjudications. Equalisation of adjudications for debt was introduced by the Diligence Act 1661[1] (as read with the Adjudications Act 1672[2])long before the introduction of sequestration in bankruptcy in 1772.[3] The purpose of the 1661 Act was, in the words of the Bell Commission, [4] "to prevent advantage from being taken of creditors, who, from ignorance of the debtor's insolvency, or from greater forbearance, might not proceed with diligence as soon as those having better means of information.....". This is reflected in the terms of the 1661 Act itself.[5] The 1661 Act provides that all adjudications for personal debts (i.e. other than debita fundi) [6] before, or within a year and a day after, the first effectual adjudication should come in pari passu together as if one adjudication had been obtained for the whole of the sums in the several adjudications. The first effectual adjudication was declared to be that in which the first

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[1] A.P.S. record edn., c.344; 12mo. edn., c.62.

[2] A.P.S. record edn., c.45; 12mo. edn., c.19. The equalisation rules in the Diligence Act 1661 applied to the ancient diligence of comprising and to adjudications contra haereditatem jacentem, and were extended to all other adjudications for debt by the Adjudications Act 1672 which abolished comprisings and replaced them with adjudications for debt.

[3] Bankruptcy Act 1772.

[4] Second Report (1835) pp. 21-22.

[5] The 1661 Act proceeds on the narrative that "creditors, in regard they live at distance or upon other occasions are prejudged and prevened by the more timeous diligence of other creditors so that, before they can know the condition of the common debtor, his estate is comprised and the posterior comprisers have only right to the legal reversion, which may and often doth prove ineffectual to them, not being able to satisfy and redeem the prior comprisings, (their means and money being in the hands of the common debtor)..." (modernised spelling).

[6] Debita fundi are a class of debts secured over land: see Discussion Paper No. 78, Part VIII.

real right and infeftment was completed.[1] The equalised adjudgers have to indemnify the first effectual adjudger for all of his expenses. When sequestrations and liquidations were introduced, the equalisation rules were not abolished. Rather sequestrations and liquidations were and are deemed by statute to be constructive adjudications[2] with the effect that the general body of creditors rank pari passu on the proceeds of the first effectual adjudication if the date of sequestration or the commencement of winding up occurs within the statutory equalisation period.

1.5 In our Discussion Paper No. 78, we propose reforms of the law on adjudications for debt and those reforms require that the law on equalisation of adjudications should be reviewed. The law is in any event ripe for review since it has not been fully considered by an official advisory body since the Bell Commission's Second Report of 1835 which made recommendations (never implemented) for changes in the law on conjunction of creditors in actions of adjudication[3] but did not suggest any changes in the law on equalisation of adjudications.

1.6 Equalisation of arrestments and poindings. The provisions on the equalisation of the main diligences against moveable

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[1] Or the first exact diligence for obtaining the same, the word "diligence" being in this context a reference to the now obsolete process used by the adjudger to compel the superior to complete the adjudger's title.

[2] Bankruptcy (Scotland) Act 1985, s. 37(1)(a), applied to liquidations by the Insolvency Act 1986, s.185.

[3] Op.cit. pp. 30-31.

property are now set out in the Bankruptcy (Scotland) Act 1985, Sch. 7, para. 24. This provides that all arrestments and poindings which have been executed within 60 days prior to the constitution of the apparent insolvency (formerly, the notour bankruptcy) of the debtor, or within 4 months thereafter, shall be ranked pari passu as if they had all been executed on the same date.[1] Further, any creditor judicially producing, within the statutory period just mentioned, in a process relative to the subject of such an arrestment or poinding liquid grounds of debt or a decree for payment is entitled to rank as if he had executed an arrestment or poinding.[2] Having regard to this latter provision, the label "equalisation of diligences" is to some extent a misnomer, but it is a convenient name well understood in Scots law which we continue to use. The Act applies to the diligences of arrestment and furthcoming and of poinding and warrant sale, and has been construed in the sheriff court as applying also to the hybrid diligence of arrestment and sale of a ship or other vessel.[3]

1.7 This provision differs considerably from equalisation of adjudications. For example, the equalisation period for arrestments and poindings is defined by reference to the constitution of apparent insolvency, unlike equalisation of adjudications where the equalisation period is defined by reference to the first effectual adjudication. Again, whereas only adjudications of the same subjects are equalised and only adjudgers qualify for pari passu ranking, under this provision arrestments and poindings of different subjects are equalised, and debts not secured by diligences can be ranked pari passu on the proceeds of

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[1] 1985 Act, Sch. 7, para. 24(1).

[2] Ibid., para. 24(3).

[3] Harvey v. McAdie (1888) 4 Sh.Ct. Reps. 254; Munro v. Smith 1968 S.L.T. (Sh. Ct.) 26.

arrestments and poindings.[1]

1.8 The provision on equalisation of arrestments and poindings is the product of a long period of experimentation by successive Bankruptcy Acts[2] beginning with the Bankruptcy Acts 1772 and 1783 and it reached more or less its modern form in the Bankruptcy (Scotland) Act 1856.[3] In the period between the Bankruptcy Act 1783 and the 1856 Act, sequestration was confined to mercantile bankruptcies, i.e. against debtors in trade. During that period, equalisation of diligences was the only means of securing equality among the creditors of bankrupts who were not in trade.[4] Since 1856 when sequestration was applied to all bankruptcies, whether mercantile or not, and indeed earlier in relation to mercantile sequestrations, the provisions for equalisation of diligences on the constitution of notour bankruptcy (now "apparent insolvency") have been complemented by provisions rendering ineffectual in a question with the trustee, prior arrestments or poindings used within a period before sequestration.[5] Similar provisions apply on liquidation of companies.[6]

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[1] A fuller analysis of the differences is set out at para. 3.2 below.

[2] See paras. 5.4-5.7 below.

[3] Section 12, re-enacted as the Bankruptcy (Scotland) Act 1913, s.10, and now the Bankruptcy (Scotland) Act 1985, Sch, 7, para. 24.

[4] Bankruptcy Act 1783 (23 Geo. III c.18) ss.2 and 4; Bankruptcy Act 1793 (33 Geo. III c.74) ss.3 and 6; Bankruptcy Act 1814 (54 Geo.III c.137) ss.2 and 5. See paras. 5.4-5.6 below.

[5] See now Bankruptcy (Scotland) Act 1985, s.37(4) and (5).

[6] Insolvency Act 1986, s. 185.

1.9 The general purpose of equalisation of arrestments and poindings is broadly the same mutatis mutandis as the equalisation of adjudications and is perhaps best described by the preamble to the Bankruptcy Act 1783 [1] which narrated that by the common law:

> "....the personal estates of such debtors as became insolvent were generally carried off by the diligence of arrestment and poinding, executed by a few creditors, who, from the nearness of their residence to, and connection with such debtors, got the earliest intelligence of the insolvency, to the great prejudice of creditors more remote and unconnected, and to the disappointment of the equality which ought to take place in the distribution of the estates of insolvent debtors among their creditors".

1.10 The main issues. We have identified three main issues for reform. The first is whether the law on equalisation goes too far in abridging the "first come, first served" principle, or whether it is ineffective complicating the law without corresponding benefit, and should be abolished. We seek views on this matter in Part II where we reach the provisional view that in the case both of adjudications and of arrestments and poindings, the complications outweigh the benefits derived from equalisation and that equalisation should be abolished.

1.11 We have, however, set out in the remainder of the Discussion Paper provisional proposals for reform on which we invite views. This will enable us to recommend reforms in the light of consultation if, contrary to our provisional view, it is thought that equalisation should be retained rather than abolished. It will also enable consultees to compare the legislative options

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[1] Bankruptcy Act 1783 (23 Geo. III c. 18).

before deciding on the prior issues of retention or abolition, and in particular it will demonstrate the very considerable complications of the law which would result from choosing reform rather than abolition.

1.12 The second issue, which arises on the hypothesis that (contrary to our provisional view) the provisions on equalisation of adjudications and of arrestments and poindings should be retained and reformed, is whether those separate sets of provisions should be replaced by one uniform set of provisions applying to all of those forms of diligence. We provisionally reject this approach in Part III.

1.13 The third issue, which arises on the assumption that neither abolition nor fusion would be appropriate, concerns what detailed reforms are necessary or desirable in relation to the separate systems of equalisation of adjudications (considered in Part IV) and of poindings and arrestments (considered in Part V). The effect of the debtor's death on the rules for equalising adjudications, poindings and arrestments is considered in Part VI.

1.14 Confirmation as executor-creditor. The diligence of confirmation as executor-creditor presents special problems. It is coming to be accepted that, as a result of the Succession (Scotland) Act 1964, the proper mode of diligence against a deceased debtor's heritable estate to which an executor has not confirmed and which does not pass under a special destination is confirmation as executor-creditor. In our Discussion Paper No. 78,[1] however, we provisionally propose that this rule should be placed on a secure statutory basis and certain limited reforms made to the diligence. The rules on the pari passu ranking of

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[1] Paras. 7.23 to 7.43.

confirmations as executor-creditor with other claims against the estate of a deceased debtor or his representatives belong to a separate branch of the law, notably the Act of Sederunt anent Executors-creditors of 28 February 1662. This Act of Sederunt as construed by the courts regulates the payment of debts by executors as well as regulating pari passu ranking of certain diligences on death and its reform goes beyond the scope of the present Discussion Paper. In Part VI below, however, we seek views on whether confirmation as executor-creditor attaching heritable property should be brought within the rules on equalisation of adjudications.

1.15 Diligence against earnings excluded: conjoined arrestment orders. The Debtors (Scotland) Act 1987 Part III, which introduced new modes of continuous diligence against earnings known as earnings arrestments and current maintenance arrestments, also introduced a new form of continuous diligence against earnings called a conjoined arrestment order designed to secure the pari passu ranking of several creditors on sums attached and deducted at source from a debtor's earnings or pensions.[1] This is itself a system of equalisation and accordingly the equalisation system for ordinary arrestments will not in future apply to diligences against earnings,[2] and is excluded from the present Discussion Paper.

1.16 Equalisation not applicable to certain forms of diligence. With the possible exception of confirmation as executor-creditor, equalisation is not suited to other forms of diligence.[3] An

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[1] Debtors (Scotland) Act 1987, ss. 60-66 and Sch. 3.

[2] Bankruptcy (Scotland) Act 1985, Sch. 7, para. 24, sub-para. (8) (inserted by Debtors (Scotland) Act 1987, Sch. 6, para. 28(b)).

[3] See our Bankruptcy Report, para. 13.3.

inhibition, the only other form of diligence available to unsecured creditors, is merely a prohibitory or preventive diligence, and though it secures to the inhibiting creditor a preference over posterior debts, it does not itself recover payment from the debtor but is only applied in a process of ranking (such as sequestration, liquidation, trust deed for creditors, or multiplepoinding) on the proceeds of an insolvency process, voluntary security or diligence attaching property. Other forms of diligence attaching property are available only to particular classes of secured creditors so that no question of pari passu ranking with unsecured creditors can arise. Examples of such forms of diligence are sequestration for rent under the landlord's hypothec and the heritably secured creditor's remedies of poinding of the ground[1] and maills and duties.[2]

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[1] In Discussion Paper No. 78, Proposition 8.1(para.8.9), we provisionally propose the abolition of poinding of the ground.

[2] If as we propose in Discussion Paper No. 78, Proposition 5.23(4) (para.5.124) actions of maills and duties cease to be competent at the instance of an adjudger, they will eventually wither away since they are not competent at the instance of a heritable creditor enforcing a standard security.

PART II

PROVISIONAL PROPOSAL FOR ABOLITION OF EQUALISATION OF DILIGENCES

Preliminary

2.1 There has been little overt criticism of the law on equalisation of diligences in modern times at least where there is no sequestration or liquidation. So far as adjudications are concerned, this seems directly attributable to the rarity of the occasions on which adjudications are used in practice, and the consequent rarity of competitions between adjudications. If adjudications are reformed,[1] however, this situation may be expected to change. In the case of equalisation of arrestments and poindings, we received in the context of our Report on Bankruptcy conflicting submissions.[2] On the one hand, it was proposed to us that, in view of the provisions of the bankruptcy Acts on the equalisation or "reduction" of diligences where there is a sequestration, [3] and the corresponding provisions applying on liquidation, [4] the provisions of the Bankruptcy Act on equalisation where there is no sequestration or liquidation are hardly necessary and could with advantage be repealed. It seems to have been assumed that those provisions are most often invoked in sequestrations and liquidations. On the other hand, it was represented to us that those provisions are invoked sufficiently frequently outside sequestration and liquidation to justify their retention, especially in relation to arrestments by commercial creditors.

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[1] See our Discussion Paper No. 78.

[2] See our Report on Bankruptcy, para. 13.5.

[3] See now Bankruptcy (Scotland) Act 1985, s. 37(1), (4) and (5).

[4] See now Insolvency Act 1986, s.185.

diligences is designed to promote "fair sharing" of the fruits of a creditor's diligence among competing creditors of the same debtor. The sharing is said to be "fair" because it involves pari passu ranking, ie. each of the participating creditors receives the same proportion of his debt as the other participating creditors. The concept of "fair sharing" is to some extent a misnomer when used with reference to a system, such as the Scots law on equalisation, which does not achieve sharing among all the unsecured creditors of the debtor but is a convenient label to denote the technical concept of pari passu ranking. There is, however, a competing principle which is also worthy of consideration, namely the "first come, first served" or "priority in time" principle, ie. the principle that the first creditor to attach property by adjudication, arrestment or poinding should enjoy the fruits of the diligence which he has used and that creditors using diligences later should rank only on the reversion by priority of the respective times of attachment. It is not self-evident that the principle of "first come, first served" should yield to the "fair sharing" principle always, or even at all, outside insolvency processes. Accordingly evaluation of the present law and the options for reform involves that each principle should be weighed in the balance and decisions reached on whether or how far one should yield to the other.

2.3 Such an evaluation is hampered in Scotland by the lack of empirical information on the nature and scale of use of the present law on equalisation. There are no official or other records of the cases in which equalisation is actually invoked, and accordingly it would be extremely difficult to undertake systematic empirical research on the topic. We hope that

knowledge of the extent to which, and the types of circumstances in which, equalisation of arrestments and poindings is invoked. Empirical research would in any event be of no real value in relation to adjudications because the reform of adjudications will create a new situation in which the law on equalisation might be quite frequently applied.

2.4 In evaluating the present law and the options for reform, we have had regard to proposals for reform in other jurisdictions. These include proposals made by law reform agencies in certain Canadian provinces for reform of the Creditor's Relief legislation applying in those provinces, which is designed to secure fair sharing among creditors, outside insolvency processes, of the proceeds of the various modes (equivalent to our diligences) of enforcing judgment debts. We note that the Law Reform Commission of British Columbia[1] have recommended the repeal of that province's Creditor's Relief Act, whereas the Ontario Law Reform Commission [2] and the Law Reform Division of the New Brunswick Department of Justice [3] recommended the retention and reform of the Creditor's Relief Acts of those provinces. The Payne Report [4] in England and Wales also recommended fair sharing of the proceeds of enforcement among judgment creditors, although this proposal was made on the assumption that a centralised enforcement office controlling all enforcement of judgment debts would be established. Such a centralised enforcement office has existed in Northern Ireland since 1971, and from its inception has operated on "first come, first served"

[1] Report on Creditors' Relief Legislation: A New Approach (1979).

[2] Report on The Enforcement of Judgment Debts and Related Matters Part V (1983), implemented in part by the Creditors' Relief Amendment Act 1985 (S.O. 1985, c.1).

[3] See New Brunswick Department of Justice, Law Reform Division, Third Report of the Consumer Protection Project, vol. II, Legal Remedies of the Unsecured Creditor After Judgment (1976) pp. 27-35.

[4] Report of the Committee on the Enforcement of Judgment Debts (Chairman: The Hon. Mr. Justice Payne) Cmnd. 3909 (1969) paras. 304, 323, 421 and 1133.

principles.[1] Recently, however, the Northern Ireland Enforcement of Judgments Review Committee have recommended the introduction of a system of fair shares distribution of the proceeds of enforcement.[2]

2.5 So far as the Scots law on equalisation is concerned, the debates in other jurisdictions are helpful in indicating in general terms the kind of arguments which may be adduced in seeking to strike a proper balance between the "fair sharing" and "first come, first served" principles. We refer to some of these arguments below. But these debates relate to systems of debt enforcement which differ significantly from the Scots system of diligence and debt collection, and those differences affect the weight to be given to the conflicting principles. Thus, in a centralised enforcement office system, for example, the power to execute the enforcement of judgment debts is exercised by the enforcement office rather than the creditor. The creditor can only apply to the enforcement office for enforcement of his money judgment. The "first come, first served" principle therefore entails that no other creditor can enforce his debt against any assets of the debtor until the first applicant creditor's debt is satisfied. This is very different from the Scottish system where creditors of the same debtor can pursue diligence simultaneously against different assets of the debtor or against the reversion of assets already attached by another creditor. Arguments favouring "fair sharing" are clearly much stronger in a system which, for so long as one creditor's debt is being enforced by diligence, precludes other

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[1] See now Judgments Enforcement (Northern Ireland) Order 1981 (S.I. 1981/226) article 24(3).

[2] Report of the Enforcement of Judgments Review Committee (Northern Ireland) (Belfast, 1987) pp. 21-26. The recommendation is subject to a feasibility study.

creditors from doing any diligence than in a system, such as Scots law, which allows contemporaneous diligence by such creditors. Moreover, it may be administratively easier to introduce "fair sharing" in a system in which an official enforcement agency or the courts collect or receive debts subject to enforcement than in a system, such as Scots law, where each creditor instructs and controls enforcement and collects his own debts.

2.6 In considering reform, an important limiting factor has to be borne in mind. We start from the premise that the conclusions which we reached, and the recommendations which we made, in our Report on Diligence and Debtor Protection on the main features of the Scottish system of debt enforcement and collection should not be fundamentally changed for the purpose of extending the principle of "fair shares" distribution. These conclusions and recommendations were largely accepted by government and the recommendations largely implemented by the Debtors (Scotland) Act 1987. One of the reasons advanced by the Payne Report for introducing a centralised enforcement system in England and Wales was that it would get rid of the "first come, first served" principle. Under the rubric "Free-for-all or catch-as-catch-can nature of enforcement", the Report observed:[1]

> "Further criticism is made of the present processes of enforcement because of the almost total absence of co-ordination or integration between the different courts or between different processes in the same court. An exception can be found in the magistrates' courts in rate enforcement where committal to prison will not be ordered until distraint against goods has proved abortive. But in general the rule is "first come, first served". Each creditor having obtained his judgment or order may proceed to enforcement by such means as he may choose. He need have no regard to the interests of other creditors. He

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[1] Para. 304.

> may, for example, by execution seize and sell the debtor's available goods and chattels or by garnishee proceedings attach the bank account or other deposit, and leave nothing for other creditors. It is true that, if they move quickly enough, they may defeat such an attempt to secure priority by making the debtor bankrupt but more often than not the more pressing or more ruthless creditor secures and mainains his advantage to the frustration of others and, as one can readily imagine, it is not the most deserving creditors who move quickly. Whilst the considerate creditors hold back to give the debtor a chance to put his affairs in order, the determined and less meritorious move in to seize the assets. In a properly ordered system of enforcement this should not be tolerated".

In referring to this argument in our Consultative Memorandum No. 47,[1] we mentioned that if a centralised enforcement office were introduced:

> "Diligence against multiple debtors would cease to be a 'free-for-all' among competing creditors. The mere fact of the centralisation of all civil debt enforcement in one Office would relieve the multiple debtor from the pressure of concurrent enforcement proceedings by his several creditors. If the Enforcement Office collected debts under decrees lodged with it for enforcement, and if a system of 'fair shares distribution' of collected debts were also instituted, the system would go as far as is possible towards achieving the regular and orderly payment of debts to the several creditors of a multiple debtor".

On consultation, however, there was little criticism of the "free-for-all" nature of the Scottish system of debt enforcement from

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[1] First Memorandum on Diligence: General Issues and Introduction (1980), para. 1.84, head (c).

the standpoint of creditors "shut out" by prior diligence, and virtually no support for the introduction of a centralised enforcement office which we therefore rejected in our Report on Diligence and Debtor Protection for reasons set out there are length.[1]

2.7 It follows that the question of abolition or reform of the equalisation system has to be considered against the background that, for the foreseeable future in Scotland, the several creditors of a debtor will be entitled to pursue the diligences of adjudication, arrestment and furthcoming or sale, and poinding and sale, independently against his assets, though not against his earnings or pensions (where the new system of conjoined arrestment orders under the Debtors (Scotland) Act 1987 [2] will secure pari passu ranking of creditors on earnings and pensions attached and deducted at source).

Relevance of proposals for new diligence of adjudication and sale

2.8 Before summarising the main criticisms of equalisation, it is necessary to mention certain relevant characteristics of the new diligence of adjudication and sale proposed in Discussion Paper No. 78 which would replace the existing diligence of adjudication. The new diligence of adjudication would be transformed from an attachment followed by foreclosure after a "legal" of 10 years, to an attachment followed by the remedy of sale, (which the creditor may exercise relatively quickly), with foreclosure being available as a subsidiary and alternative remedy, authorised by the sheriff only in default of sale.[3] The attachment would be effected, not

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[1] See paras. 2.80 and 2.81, and 2.86 to 2.110.

[2] Ss. 60-66, Sch. 3: see para. 1.15 above.

[3] The main steps in the new procedure are summarised in Discussion Paper No. 78, para. 3.44.

by a Court of Session decree, but by a notice of adjudication registered in the property registers in pursuance of a warrant to adjudge and sell contained in a court decree for payment or its equivalent. The registration of the notice of adjudication would be preceded by a mandatory minimum period of litigiosity prescribed by statute, which we suggest might be 9 months, and certainly not more than that nor less than 6 months. Where the adjudged property comprised the home of the debtor, or a co-owner, or the spouse or former spouse of either, there would be a procedure for delaying sale designed to enable such a person to obtain alternative accommodation. Against this background, we think that, to avoid undue delay, the period following registration of the first adjudication within which a later adjudication must be registered in order to qualify for pari passu ranking (the equalisation period) should be much shorter than the one year allowed by the Diligence Act 1661, which presupposes that an adjudication subsists for 10 years. Thus, an adjudger should be entitled to know what pari passu debts he must satisfy before incurring expense in advertisement and sale or foreclosure. Moreover, under the new procedure, a debtor or co-owner would be entitled to apply for restriction of the adjudication to a part of the property proportionate in value to the amount of prior and pari passu debts, and any postponed debt then subsisting. Such a restriction would be premature and unfair to the adjudger if a subsequently registered adjudication were to rank pari passu with the adjudger's debt. It is difficult to avoid the conclusion that if equalisation of adjudications were to be retained, the equalisation period should be (say) 3 months following registration of the first adjudication and that during that period the procedure should be "frozen", ie. further steps in the procedure such as advertisement for sale or applications for restriction of the diligence could not be competently taken.

2.9 Summary of argument. We have reached the provisional conclusion that the law on equalisation of diligences outside sequestration and liquidation should be abolished. In summary, our reasons are as follows.

(1) In our provisional view, where a debtor is insolvent, fair sharing of his assets among all unsecured creditors is the only way of achieving satisfactory justice for the general body of creditors.

(2) While that can generally be achieved in the insolvency processes of sequestration or liquidation, it can hardly ever be achieved by equalisation, even if it is reformed, in the Scottish system of diligence for a number of practical reasons considered below.

(3) Therefore fair sharing under the Scottish system of equalisation must be limited to a relatively narrow class of unsecured creditors whose debts are instantly verifiable and who get to know about the diligence in time to claim a ranking on the proceeds. This necessarily entails that the haphazard operation of the "first come, first served" principle is replaced by another principle which, while it purports to introduce fair sharing, is in fact just as haphazard in its operation as the "first come, first served" principle.

(4) If equalisation of diligences was invoked frequently, or if it frequently rendered recourse to insolvency processes

unnecessary, there would be a stronger case for retaining equalisation. But neither result seems likely to be achieved even if equalisation is reformed.

(5) Equalisation of diligences does not, and even if reformed would not, in practice prevent a race of diligences precipitating or aggravating the debtor's insolvency, and abolition of equalisation would not take away an effective safeguard for debtors. Equalisation concerns competition among creditors rather than debtor protection.

(6) While the "first come, first served" principle can be justified, the justification does not depend on the view that a creditor who executes diligence first is generally more "meritorious" than a later creditor. Conversely, there is no reason to suppose that creditors executing diligence later are generally more "considerate" or "deserving" than creditors executing diligence first. Neither principle promotes commercial morality more than the other.

(7) The "first come, first served" principle can be justified on the ground that a creditor who takes the trouble of enforcing his debt should enjoy the fruits of it unless the debtor is insolvent and the diligence is superseded by arrangements for fair sharing among all or almost all unsecured creditors. Since equalisation of diligences outside sequestration or liquidation does not achieve that object, and is unlikely to do so even if reformed, we believe that the very considerable complications of the law which equalisation outside insolvency processes entails are

not justified by the benefits. In other words, since considerations of fairness among creditors are evenly balanced, there is insufficient justification for maintaining a complicated system of equalisation rules.

We now turn to explain these considerations in more detail.

2.10 Does not achieve "fair sharing" among all unsecured creditors. We have suggested that where a debtor is insolvent, fair sharing of his assets among all of his unsecured creditors is the only way of achieving satisfactory justice for the general body of creditors. That can generally only be achieved in insolvency processes such as sequestration and liquidation, which are specially designed for distributing the estate of a debtor among his creditors in accordance with their several preferences and entitlements. It cannot be achieved by a system of equalisation outside insolvency processes.

2.11 First, having regard to the widespread criticisms of newspaper advertisements of warrant sales identifying the debtor,[1] and the recent near-universal abolition of such advertisements,[2] it is likely that public opinion would not accept newspaper advertisements of diligences for the purpose of attracting creditors' claims for "fair sharing", because of the embarrassment which they would cause to debtors. Such advertisements would entail extra costs which would also be likely to prove unacceptable.

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[1] Report on Diligence and Debtor Protection, paras 2.68 and 5.162.

[2] Debtors (Scotland) Act 1987, s. 34(5) as read with s.34(2) (restricting sales in debtors' dwellings).

2.12 Second, fair sharing of the fruits of diligences outside insolvency processes can in practice only be achieved in favour of creditors whose debts are instantly verifiable by the creditor executing the diligence. For this reason, in the case of equalisation of arrestments and poindings, it is only creditors who execute poindings or arrestments or who judicially produce decrees or liquid grounds of debt within the statutory period who can claim a share of the proceeds.[1] It would be impracticable to introduce special provisions in diligences for the admission of claims not instantly verifiable, such as exist in sequestrations.[2]

2.13 Third, in the case of equalisation of adjudications, we think that there are sound policy reasons for continuing to limit claims for equalisation to creditors who have already adjudged. In our view, the faith of the registers requires that the existence of debts ranking pari passu with adjudications should be apparent on the face of the registers.[3] This would have the effect that even creditors holding decrees or liquid documents of debt would not qualify for pari passu ranking if they had not adjudged.

2.14 Fourth, in order that finality can be achieved in the execution of diligence, the period allowed for claims for equalisation has to be relatively short. In the case of the adjudications, the period would have to be reduced from about one year (the period specified in the Diligence Act 1661) to about three months in order to fit in with the different time-scale of the reformed diligence.[4] In the case of arrestments and

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[1] Bankruptcy (Scotland) Act 1985, Sch. 7, para. 24.

[2] Bankruptcy (Scotland) Act 1985, s. 49.

[3] See para. 4.15 below.

[4] See para. 2.8 above.

poindings, the existing period of about 6 months (60 days before, and four months after, the constitution of apparent insolvency)[1] might be retained. In order, however, to eliminate what was felt to be injustice to creditors executing arrestments or poindings, the law provides for overlapping periods of equalisation of arrestments and poindings created by renewed constitutions of apparent insolvency.[2] This results in rules of ranking which are so complicated as to be virtually unworkable. If these overlapping periods are eliminated, the result will be to reduce the number of creditors who can invoke equalisation.

2.15 Fifth, if claims for equalisation were to become frequent, the result might be to impose unduly heavy burdens on creditors. It is one thing to impose on a trustee in sequestration a duty of ranking creditors' claims, and quite another to impose such a duty on a creditor instructing a poinding or arrestment.

2.16 Haphazard operation of equalisation rules. As a result of the foregoing factors, the "fair sharing" of the fruits of diligences would be limited to sharing among creditors (1) who hold decrees or liquid grounds of debt, or who have adjudged, and (2) who happen to get to know about the diligence in time to claim a ranking on the proceeds. It must often be a pure accident whether a creditor gets to know of his debtor's apparent insolvency or of a diligence against his assets. No publicity is given to arrestments, and most poindings in future will only be publicised by notice on the walls of the local sheriff court[3] which few creditors are likely to inspect. While adjudications

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[1] Bankruptcy (Scotland) Act 1985, Sch. 7, para. 24(1) and (3).

[2] See para. 5.42 et seq.

[3] Debtors (Scotland) Act 1987, s. 34(3).

would be registered in the property registers, and adjudgers' notices of litigiosity would be registered in the personal register, which are public records, most creditors would be unlikely to search these registers at the appropriate time. In these circumstances, if the rules on equalisation are retained, they would continue to operate haphazardly in favour of some creditors but not others. In other words, the haphazard operation of the "first come, first served" principle would be replaced or qualified by an equalisation principle which, while it purports to introduce fair sharing of the fruits of diligence, in fact is just as haphazard in its operation as the "first come, first served" principle.

2.17 Insufficient use? A criticism made to us in the context of our work on bankruptcy was that the law on equalisation is not invoked sufficiently frequently outside insolvency processes to justify its retention.[1] One likely reason for this may be that it has been held[2] that the equalisation rules only apply if an arrestment is followed by a furthcoming or a poinding is followed by a sale, or transfer of ownership in default of sale. Since arrestments are rarely followed by furthcoming and poindings are rarely followed by sale, the scope of the rules is thus greatly restricted. If as we propose below,[3] the equalisation rules were to apply to funds paid to redeem bare arrestments or poindings, the rules might be much more widely invoked. However, this is problematic and it seems clear that the rules would rarely benefit all unsecured creditors. We concede that if adjudications were to be reformed and to become relatively common, the rules on equalisation of adjudications might

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[1] See our Bankruptcy Report, para. 13.5.

[2] Millar v. Forage Supply Co. Ltd. 1955 S.L.T. (Sh.Ct.) 18.

[3] Proposition 16(para. 5.13) (on the assumption that equalisation is not abolished).

sometimes be invoked in practice. If as mentioned above,[1] however, the equalisation period is limited to three months, this would substantially reduce the number of cases in which equalisation is invoked: the shorter the equalisation period, the fewer the cases of equalisation.

2.18 Availability of insolvency processes. If it could be shown that the rules on equalisation do or will render insolvency processes (such as sequestrations, liquidations or trust deeds for creditors) unnecessary in a significant number of cases, the case for retaining these rules might be stronger. It might for example be argued that an insolvency process should be regarded as a weapon of last resort partly because of the trauma it inflicts on debtors and partly for reasons of cost. On this view, if for example the ranking of creditors on an adjudged dwelling or shop, or an arrested fishing boat or large sum in a bank account, can be effected under equalisation rules without resort to the relatively expensive and cumbersome machinery of bankruptcy proceedings, then that is a result which should be welcomed.

2.19 We entertain considerable doubts, however, whether the law on equalisation, even if reformed, would prevent insolvency processes in a significant number of cases. We suggest that the better view is that the law on equalisation of diligences is unnecessary having regard to the availability of insolvency processes, securing the equalisation or reduction of prior diligences[2] and pari passu ranking among all unsecured creditors. Sequestration and liquidation were not available when equalisation of adjudications was introduced in 1661,[3] and were not available in respect of debtors not in trade when equalisation of

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[1] See para. 2.8.

[2] Bankruptcy (Scotland) Act 1985, s. 37(1), (4) and (5); Insolvency Act 1986, s. 185.

[3] Diligence Act 1661.

arrestments and poindings was introduced by statute in 1783.[1] We suggest that the equalisation rules are an anachronism in modern conditions.

2.20 Ineffective in protecting debtor from race of diligences. Another possible criticism is that the rules on equalisation do not in practice prevent a race of diligences precipitating or aggravating the debtor's insolvency. This criticism is in our view based on a misconception as to the proper objective of the equalisation rules. It presupposes that the protection of the debtor is one of the main objectives of the rules on equalisation. However the original aim of the statutes introducing equalisation - the Diligence Act 1661 and the Bankruptcy Act 1783 - seems to have been mainly directed towards securing greater equality among creditors.[2] It is true that the Bankruptcy Act 1783,[3] in providing that creditors who had not done diligence could claim to rank pari passu on the proceeds of an arrestment, declared that the aim was "to save, as far as possible, the expense of a multiplicity of arrestments". It is, however, extremely doubtful whether the corresponding provision in the modern law (allowing creditors holding decrees or liquid grounds of debt to rank pari passu on the proceeds of arrestments and poindings)[4] does in fact protect debtors from a multiplicity of diligences.

2.21 We suggest that securing equality among competing creditors should be regarded as the main and only important

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1 Bankruptcy Act 1783.

2 See the narrative in the 1661 Act quoted p.2, fn.5, above and the preamble of the 1783 Act quoted at para. 1.9 above.

3 Section 2.

4 Bankruptcy (Scotland) Act 1985, Sch. 7, para. 24(3).

objective of the equalisation rules. . Protection of debtors from a race of diligences can only be achieved, in our view, by other means such as insolvency processes, including debt arrangement schemes such as we recommended in our Report on Diligence and Debtor Protection[1] as well as the existing forms of insolvency processes.[2] Nevertheless if we are right in thinking that the existence of equalisation rules does not in practice deter or prevent creditors from executing diligence against an insolvent debtor, it follows that abolition of these rules would not take away an effective form of debtor protection.

2.22 Considerations of fairnesss to creditors and commercial morality. Another possible criticism is that the law on equalisation is unfair to those creditors who are compelled by it to share the fruits of it with other possibly more idle or otherwise less meritorious creditors. On this view, equalisation insufficiently rewards a creditor who has actively pursued his remedies of court action and diligence, and rewards the idle creditor too much. Thus it has been said of creditor's relief legislation in Canada that it "legitimises parasitic behaviour on the part of some creditors while militating against resort to enforcement proceedings by others".[3] The Law Reform Commission of British Columbia observed: "In effect, the fruits of the labour of creditor A must be yielded up for the benefit of creditors B and C as well... Even if A were adequately compensated for the costs of his enforcement measures... he might be forgiven for regarding B and C as 'parasites'... While the policy of equality may be sound in the abstract, if the pursuit of it encourages, and indeed rewards, parasites, is commercial morality

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[1] Chapter 4.

[2] Sequestration, liquidation, trust deeds for creditors and administration orders for companies under the Insolvency Act 1986.

[3] Ontario Report p. 32 (summarising the British Columbia Report's conclusions). The Ontario Report, however, rejected this criticism.

significantly advanced?"[1]

2.23 So far as Scots law is concerned, we doubt whether the concept of the idle parasite has much relevance. It cannot have much relevance to cases where the creditor claiming equalisation has himself executed diligence, as occurs in all cases of equalisation of adjudications [2] and where arrestments and poindings are equalised with other arrestments and poindings.[3] It is true that in the case of equalisation of arrestments and poindings, creditors who have not arrested or poinded but who judicially produce decrees or liquid grounds of debt, can be ranked pari passu,[4] but the reasons why such a creditor has not arrested or poinded will generally have nothing to do with "idleness".

2.24 Further, we do not think that in Scotland "commercial morality" would be advanced by abolishing the rules on equalisation of diligences. Those rules do not encourage "parasitic behaviour" and indeed the empirical research into creditors' practices and policies in debt recovery [5] conducted in connection with our Report on Diligence and Debtor Protection did not even mention those rules as a factor influencing the decisions of creditors to execute poindings or arrestments. Like the Ontario Law Reform Commission[6], we doubt whether any unfairness arising from the opportunity for parasitic behaviour by creditors is morally any more significant than the unfairness which may arise by reason of the operation of the "first come, first served" principle.

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[1] British Columbia Report, p. 17.

[2] Diligence Act 1661.

[3] Bankruptcy (Scotland) Act 1985, Sch. 7, para. 24(1).

[4] Ibid., para. 24(3).

[5] See B Doig and A Millar Debt Recovery - A Review of Creditors' Practices and Policies, Central Research Unit, Scottish Office; Central Research Unit Papers (1981).

[6] Ontario Report, Part V, p. 32.

2.25 Conversely, we do not agree with the Payne Committee who went to the opposite extreme and observed that it was generally the more "ruthless", more "pressing", and more "undeserving" creditors who moved quickly while "considerate" creditors held back to give the debtor a chance to put his affairs in order.[1] Our own view is that generally a creditor who does diligence against a particular debtor earlier than another creditor is not likely to be more or less "deserving" (ie. considerate to the debtor) than the other creditor. Research shows that most creditors in consumer debts (which cover the bulk of diligence) give the debtor ample opportunity to pay.[2] The fact that one creditor instructs diligence before another against the same debtor is likely to be attributable to purely fortuitous circumstances having no relevance to whether the conduct of either is more "deserving", eg. differencees in the times of default, in the times when default was identified, and in the time-scale of the routine pre-litigation collection practices of the creditors or their agents; whether court actions were defended by the debtor; whether instalment arrangements were made and, if made, when they were broken; differing assessments of the prospects of recovery, and so on.

2.26 Justification for abolishing equalisation rules. For the foregoing reasons, it appears to us that considerations of justice or fairness do not lean wholly to one side or the other. Any unfairness to other creditors resulting from the "first come, first served" principle is likely to be balanced by unfairness resulting from the equalisation rules, that is to say unfairness to creditors

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[1] Payne Report, para. 304 quoted at para. 2.6 above.

[2] See our Report on Diligence and Debtor Protection, Chapter 2, especially at paras. 2.13 to 2.37.

whose diligences are equalised and unfairness to other creditors who are unable to claim equalisation in time. Against this background, there seems no adequate justification for maintaining a very complex set of rules on equalisation outside insolvency processes.

2.27 We suggest that the "first come, first served" principle can be justified on the ground that a creditor who takes the trouble and incurs the expense of enforcing his debt by diligence should enjoy the fruits of it unless it is rendered ineffectual by an insolvency process (such as sequestration or liquidation) designed to secure fair sharing of the proceeds of the diligence among all unsecured creditors, reserving to the creditor the expenses of his diligence. As indicated above,[1] abolition of the equalisation rules would not deprive debtors of an effective form of protection which they presently enjoy. The main object of equalisation rules is not to protect debtors but to promote fair sharing among creditors, and that in our view can only be satisfactorily achieved in insolvency processes. We think that creditors, who are mainly commercial creditors, must be taken to know that the extension of unsecured credit involves the risk that diligence for the recovery of the debt may be postponed to the prior diligences of other creditors. The present equalisation rules do not significantly reduce that risk, and their abolition would greatly simplify the law.

2.28 We concede that retention of rules on equalisation would be consistent with the new provisions in the Debtors (Scotland) Act 1987[2] on conjoined arrestment orders which provide for the pari passu ranking of creditors on earnings and pensions attached and deducted at source. Conjoined arrestment orders

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[1] See para. 2.20.

[2] Ss. 60-66 and Sch. 3.

appear, however, to be better adapted to achieving fair sharing among all unsecured creditors since, for so long as the earnings or pensions are payable, all creditors may acquire a share in the proceeds of the diligence. It seems therefore that different considerations apply to conjoined arrestment orders.

2.29 **Proposals.**

We provisionally propose that:

(a) **the rules on equalisation of adjudications set out in the Diligence Act 1661; and**

(b) **the rules on equalisation of arrestments and poindings set out in the Bankruptcy (Scotland) Act 1985, Sch. 7, para. 24,**

should be abolished.

(Proposition 1).

Effect of sequestration or liquidation on prior adjudications if equalisation of adjudications abolished: consequential provisions

2.30 The Diligence Act 1661 has since 1814 been supplemented by enactments providing that a sequestration or liquidation has effect as a constructive adjudication for the purpose of the rules on the equalisation of diligences.[1] These provisions bring those insolvency processes within the equalisation regime under the 1661 Act, so that if the first effectual adjudication is led within a year and a day before the date of sequestration or the commencement of the winding up, that

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[1] Bankruptcy (Scotland) Act 1985, s. 37(1)(a) applied to liquidations by the Insolvency Act 1986, s. 185: (for previous statutes, see Bankruptcy Act 1814 s. 30; Bankruptcy Act 1839, s. 83; Bankruptcy (Scotland) Act 1856, s. 107; and Bankruptcy (Scotland) Act 1913, s. 103).

adjudication and any prior or subsequent adjudications lose their preference in the sequestration or liquidation. While the Bankruptcy (Scotland) Act 1985 makes provision precluding the execution of an adjudication after the date of sequestration,[1] there is no provision (separate from the rules on equalisation) rendering ineffectual prior adjudications corresponding to the provision rendering ineffectual (independently of equalisation) prior arrestments and poindings executed within 60 days prior to the date of sequestration or commencement of the winding up.[2] We suggest that if equalisation were to be abolished, a similar provision would be needed for the rendering ineffectual of prior adjudications.[3]

2.31 Accordingly we propose:

> **If equalisation of adjudications is abolished, new provision should be made, on the model of section 37(4) and (5) of the Bankruptcy (Scotland) Act 1985 as extended by the Insolvency Act 1986, s. 185 (which relate to the effect of sequestration and liquidation in rendering ineffectual prior arrestments and poindings), enacting that no adjudication registered within 60 days before the date of sequestration, or the commencement of the winding up of a company,**

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[1] Bankruptcy (Scotland) Act 1985, s. 37(8); by an apparent oversight the relevant provision in s. 37(8) was not applied to liquidations by the Insolvency Act 1986, s. 185 but the "common law of insolvency" may preclude thee adjudication: see Discussion Paper No. 78, para.6.37.

[2] Bankruptcy (Scotland) Act 1985, s. 37(4) andd (5).

[3] At Proposition 13(2) (para. 4.43) below, we propose a similar provision even if the rules on equalisation of adjudications are reformed rather than abolished.

should be effectual to create a preference for the adjudger (in a question with the trustee or liquidator).

(Proposition 2)

2.32 Other consequential provisions would include the repeal of section 37(1) of the Bankruptcy (Scotland) Act 1985, (making sequestrations and liquidations constructive adjudications, arrestments and poindings for the purpose of the rules on equalisation of diligences) and of section 13(2) of the Debtors (Scotland) Act 1987, (saving rights to equalisation from the effect of certain orders under Part I of that Act).

PART III

FUSION OR RETENTION OF SEPARATE EQUALISATION PROVISIONS (IF EQUALISATION NOT ABOLISHED)?

3.1 If it were to be decided, contrary to our provisional proposal, that equalisation should be reformed rather than abolished, it is for consideration whether there should be a single set of uniform provisions applying to the equalisation of adjudications (presently governed by the Diligence Act 1661) and arrestments and poindings (presently governed by the Bankruptcy (Scotland) Act 1985[1]). On this view, the existence of two separate sets of provisions is merely a by-product of the haphazard development of the law.

3.2 The equalisation rules on adjudications differ from the equalisation rules on arrestments and poindings in the following main respects.

(1) In the case of arrestments and poindings, the equalisation period depends on the constitution of apparent insolvency[2] whereas in the case of adjudications, the equalisation period is defined by reference to the "first effectual" adjudication.[3]

(2) In the case of arrestments and poindings, the equalisation period is about 6 months (60 days before and 4 calendar months after the constitution of apparent insolvency).[4] In the case of adjudications, the equalisation period is a year and a day after the first effectual adjudication, but

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[1] Schedule 7, para. 24.

[2] Bankruptcy (Scotland) 1985, Sch. 7, para. 24(1) and (3).

[3] Diligence Act 1661.

[4] 1985 Act, Sch. 7, para. 24(1) and (3).

without limit of time before that adjudication.[1]

(3) In the case of arrestments and poindings, the better view is that there are as many equalisation periods as there are constitutions of apparent insolvency against the same debtor with the effect that there can be a series of overlapping equalisation periods.[2] In the case of adjudications, overlapping equalisation periods cannot arise.

(4) In the case of adjudications, only adjudications which attach the same subjects as did the first effectual adjudication qualify for pari passu ranking.[3] In the case of arrestments and poindings, the diligences may qualify for pari passu ranking though they attach different subjects.[4]

(5) Creditors holding decrees for payment or liquid documents of debt who have not executed an arrestment or poinding may nevertheless claim a pari passu ranking on the proceeds of arrestments and poindings.[5] In the case of adjudications, only creditors who have actually adjudged rank pari passu.[6]

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[1] Diligence Act 1661; Forbes v Buchan (1680) Mor. 265.

[2] See para. 5.42 below et seq.

[3] Ranking of Creditors of Skelbo (1753) 5 B.S. 804.

[4] 1985 Act, Sch. 7, para. 24(1).

[5] 1985 Act, Sch. 7, para. 24(3).

[6] Diligence Act 1661.

(6) A creditor who executes the first effectual adjudication is entitled to recover the whole of the expenses of his action of adjudication, completing title and taking possession, from pari passu creditors.[1] In the case of arrestments and poindings, a creditor whose diligence is subject to pari passu ranking can deduct the expenses of the diligence in a question with creditors founding on liquid grounds of debt [2] but not in a question with creditors founding on other arrestments or poindings.[3]

(7) Sequestrations and liquidations operate as constructive arrestments, poindings and adjudications for the purpose of the rules on equalisation of diligences.[4] In the case of arrestments and poindings, the rules on equalisation are supplemented by statutory provisions rendering ineffectual any of those diligences executed within 60 days before the date of sequestration or commencement of the winding up.[5] There is no corresponding provision rendering ineffectual adjudications led prior to a sequestration or liquidation.

(8) There are significant differences as to the effect of the debtor's death on equalisation of diligences.[6] For example, in the case of arrestments and poindings, a new equalisation period cannot be created after the debtor's death since the constitution of apparent insolvency is

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1 Graham Stewart, p. 644.

2 1985 Act, Sch. 7, para. 24(3).

3 Ibid., para. 24(1).

4 Bankruptcy (Scotland) Act 1985, s. 37(1); Insolvency Act 1986, s. 185.

5 1985 Act, s. 37(4) and (5); Insolvency Act 1985, s. 185.

6 See generally Part VI below.

incompetent against a deceased debtor.[1] An adjudication after the debtor's death against his estate does create a new period for equalisation of adjudications.[2]

3.3 It would in theory be possible to enact a single code on equalisation which eliminated all or most of the foregoing differences. For example, following the precedent of the 1985 Act, it could be provided that all adjudications registered, and all arrestments and poindings executed, within a statutory period defined by reference to the debtor's apparent insolvency, should rank pari passu and that claims by creditors judicially producing decrees or liquid grounds of debt within that period should be entitled to a pari passu ranking on the proceeds of the adjudications as well as of the arrestments and poindings. Alternatively, following the precedent of the 1661 Act, it might be provided that later diligences would rank pari passu with earlier diligences of the same type,[3] if used within a specified period after the first diligence, and possibly if attaching the reversion of the subjects attached by the earlier diligence.

3.4 It is clearly important that law reform should eliminate anomalous and unnecessary differences wherever possible. On the whole, however, we think that the distinction drawn by the present law between adjudications on the one hand, and arrestments and poindings on the other, is convenient and justifiable. The rule that adjudications rank pari passu only if used on the same subjects within a specified period of the first adjudication seems to us convenient. The proceeds of the first adjudication are likely to be sufficiently great to make pari passu

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1 See para. 6.27 below.

2 See para. 6.18 below.

3 Ie. adjudications with adjudications, poindings with poindings, and arrestments with arrestments.

ranking on those proceeds alone worthwhile. The rule avoids the considerable complications involved in overlapping equalisation periods. Moreover it should continue to be possible to identify all the creditors who are or may be entitled to a pari passu ranking on adjudged property by searching the property and personal registers.[1] This advantage would be lost if the adjudication were to be equalised with arrestments and poindings, which do not enter those registers. Conversely we do not favour a rule whereby arrestments are equalised only with arrestments and poindings only with poindings. Such a rule seems unduly narrow. It was once the law in terms of the Bankruptcy Act 1814, [2] and was abandoned by the draftsman of the Bankruptcy (Scotland) Act 1856, s. 12. There does not seem to us to be any good reason why the approach of the 1814 Act should be reinstated.

3.5 We provisionally propose therefore:

On the assumption that, contrary to our provisional view in Proposition 1, equalisation of diligences outside insolvency processes should be retained and reformed rather than abolished, the rules on the equalisation of adjudications should continue to be separate and distinct from the rules on the equalisation of poindings and arrestments.

(Proposition 3)

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[1] For the relevance of the personal register, see Discussion Paper No. 78, paras. 3.18 to 3.43. A search in the personal register would identify an adjudger's notice of litigiosity affecting particular property and enable conveyancers to ascertain whether a notice of adjudication may have been registered after the date of search in the Minute Book of the Sasines Register.

[2] Ss. 2 and 5.

PART IV

REFORM OF EQUALISATION OF ADJUDICATIONS (IF EQUALISATION NOT ABOLISHED)

Preliminary

4.1 In this Part we consider what reforms of the rules on equalisation of adjudications are necessary or desirable on the hypothesis that, contrary to our provisional view, the equalisation rules will not be abolished and that the rules on equalisation or adjudications will continue to be distinct from the rules on equalisation of arrestments and poindings.

4.2 We think that the Diligence Act 1661 should be repealed and replaced by a statutory provision in modern form. We assume that the new statutory provision would be enacted at the same time as the reforms of adjudications outlined in our Discussion Paper on that subject [1] which would transform the diligence from an attachment followed by decree of expiry of the legal (foreclosing the debtor's right of redemption) into an attachment followed by sale with foreclosure being a subsidiary remedy available only in default of sale.

The general principle of equalisation

4.3 The concept of the "first effectual adjudication". The Diligence Act 1661 provides that:

> "all comprisings [scil. adjudications] "deduced.....before the first effectual comprising or after but within year and day of the same shall come in pari passu together as if one comprising had been deduced and obtained for the whole respective sums contained in the foresaid comprisings" (modernised spelling).

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[1] Discussion Paper No. 78.

In the common case of adjudications for debt affecting subjects registrable in the property registers, the stage at which the adjudication becomes effectual for the purposes of inter alia the equalisation rules is largely governed by the conveyancing statutes.[1]

(a) An adjudication of "lands" becomes effectual on registration of the decree of adjudication or a notarial instrument or notice of title following thereon in the property registers: Titles to Land Consolidation (Scotland) Act 1868, s. 62.[2]

(b) An adjudication of a heritable security becomes effectual on registration of the decree of adjudication or an abbreviate thereof or a notarial instrument or notice of title in the property registers: ibid, s. 129.

(c) An adjudication of a registered long lease or of an assignation thereof in security becomes effectual on registration of an abbreviate of the adjudication of the lease or assignation in the property registers: Registration of Leases (Scotland) Act 1857, s. 10.

An earlier provision of 1856 remains unrepealed but is in practice

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[1] See Graham Stewart, pp. 638-640.

[2] As to notices of title, see Conveyancing (Scotland) Act 1924, ss. 4-6.

superseded by the foregoing provisions.[1]

4.4 Accordingly in the case of feudal subjects and registrable leases, the concept of the first effectual adjudication now has reference to the decree of adjudication affecting the subjects in question on which the adjudger's title is the first to be completed by registration of a decree or abbreviate thereof. An earlier decree of adjudication granted before, but not registered till after, the registration of the "first effectual" ranks pari passu with the first effectual and with other adjudications granted within a year and a day after the registration of the first effectual.[2] The earlier decree of adjudication is thus effectual to secure a pari passu preference but is not the "first effectual" within the meaning of the Act.

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[1] See the Debts Securities (Scotland) Act 1856, s. 6 which made provision "to fix more clearly in time coming what diligence is necessary to make an adjudication effectual". This provides that in the case of adjudged subjects held of the Crown as superior, certain procedure under provisions of the Crown Charters (Scotland) Act 1847, s. 53 followed by registration in the personal registers made the adjudication effectual but those provisions of the 1847 Act are now repealed. It also provides that in the case of adjudged subjects held of a subject superior, registration of an abstract of a charge of horning against the superior in the personal register sufficed. Under the Debtors (Scotland) Act 1987, s. 89, however, letters of horning are abolished.

[2] Forbes v. Buchan (1630) Mor. 256; Bell, Commentaries vol. 1, p. 758.

4.5 In our Discussion Paper No. 78, we propose that in the case of interests registrable in the property registers,[1] the adjudger's title will be both created and completed by registration of a new statutory notice of adjudication in those registers. Decrees and abbreviates of adjudication would be abolished. The concept of the "first effectual" adjudication as presently understood would therefore be inappropriate.

4.6 In the case of adjudged property not registrable in the property registers, the first effectual adjudication is generally that whose decree is first in date, if an abbreviate is duly recorded in the personal register within 60 days.[2] We propose to deal in a future Discussion Paper with the question whether non-registrable interests in land should be attachable by adjudication or some other form of diligence and accordingly we exclude equalisation of adjudications of non-registrable interests from the present Discussion Paper.

4.7 There is another difficulty concerning the concept of the "first effectual" adjudication. The effect of the 1661 Act is that adjudications used after the statutory year and a day rank on the reversion by priority of time. If the debts secured by the first effectual adjudication and adjudications ranking pari passu

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[1] We exclude from this proposal adjudication of debts secured by heritable securities which will be considered in the Discussion Paper mentioned in para. 4.6.

[2] Diligence Act 1661; Graham Stewart p. 640. See however Allisons v. Ballantine (1805) Mor. s.v. "Adjudication", App'x No. 14 (where the first summons of adjudication was intimated, and the first decree was obtained in an action raised later because of dispensation with the induciae, the former was treated as the first effectual).

therewith are all paid, and the disburdened subjects continue to belong to the debtor, it seems to be doubtful whether a new adjudication would be treated as "the first effectual" so as to bring into operation a new equalisation of that adjudication with competing adjudications. In other words, the 1661 Act does not seem to admit of a second "first effectual" adjudication and indeed there are dicta that the first effectual adjudication fixes the criterion of preference for all later adjudgers of the adjudged property.[1] Such a result seems inappropriate. It would appear to mean that the first effectual adjudication fixed one single equalisation period of a year and a day and that no other equalisation period could arise at any later time for so long as the debtor owned the property in question.

4.8 We therefore propose that the concept of the first effectual adjudication should be abandoned and that the general rule should be that whenever property is attached by an adjudication at a time when no other adjudication attaching the property is in effect, a new equalisation period should arise commencing on the date of registration of the adjudication. (The rule might be subject to one exception mentioned below[2] applicable only in special circumstances).

4.9 Criterion for ranking later adjudications. In order to qualify for pari passu ranking, the later adjudications do not require to be followed by registration in the property or personal registers but, if not so registered, an abbreviate of the later decree must be registered in the personal register.[3] Since the proposed new notices of adjudication replacing decrees and

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[1] Bell, Commentaries vol. 1, p. 758.

[2] See para. 4.24, and Proposition 8(1) (para.4.25).

[3] Graham Stewart, p. 642.

abbreviates would have legal effect only on registration, registration of such a notice should in future be necesssary as the criterion of pari passu ranking of the later adjudications.

4.10 Duration of equalisation period. As we indicated at para. 2.8 above, the equalisation period should be much shorter than the year and a day prescribed by the Diligence Act 1661 and we suggest that the period should be 3 months commencing on the date of registration of the notice of adjudication. During that period, further steps in the diligence, and applications for restriction of the adjudication, would be incompetent.

4.11 Proposals. We propose:

(1) **If it is decided (contrary to our provisional view) that equalisation of adjudications should not be abolished, the rules on equalisation of adjudications in the Diligence Act 1661 should be repealed and replaced by a modern statute.**

(2) **The general rule should be that where:**

(a) **property belonging to a debtor is attached by registration of an adjudication ("the first adjudication") at a time when no other adjudication attaching the property is in effect; and**

(b) **within a period of 3 months after the date of registration of the first adjudication, another adjudication is registered or other adjudications are registered,**

then, in all competitions of creditors affecting the adjudged property, the debts enforced by all of those adjudications should rank pari passu as if all the adjudications had been registered on the date of registration of the first adjudication.

(3) During the 3 months equalisation period, further steps in the diligence (such as advertisements for sale and the sale itself) and applications for restriction of the adjudication should as a general rule be incompetent.

(Proposition 4).

Creditors' claims qualifying for pari passu ranking

4.12 Adjudications for personal debts. All adjudications for payment of personal debts should qualify for equalisation. We shall discuss elsewhere[1] whether adjudications in security should be retained or abolished. If retained, we suggest that they should qualify for equalisation subject to the proviso (already applicable to equalisation of arrestments on the dependence[2]) that they should be followed up without undue delay. As under the present law, adjudications in implement and declaratory adjudications would be excluded from equalisation since they do not secure debts. Likewise, as under the present law, adjudications on debita fundi and adjudications under s. 23(5) of the Conveyancing (Scotland) Act 1924 (for non-payment of ground annuals for 2 years together) should be excluded from equalisation since they are special forms of diligence enforcing secured debts and their criteria of preference depend on the date of infeftment in the security right. The principle is, as it ought to be, that only

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[1] Viz. in a future discussion paper on diligence on the dependence.

[2] Cf. Bankruptcy (Scotland) Act 1985, Sch. 7, para. 24(2); see para. 5.8 below.

adjudications which would rank pari passu if registered on the same date should rank pari passu under the equalisation rules. We revert at Part VI below to adjudications and diligences against heritable property following the debtor's death.

4.13 Creditors holding warrants for diligence or liquid documents of debt? It is for consideration whether, on the model of the present law on equalisation of adjudications, only creditors who have registered an adjudication should rank pari passu or whether other classes of creditor who have not done diligence against the adjudged subjects should also qualify for such a ranking. Thus we propose below[1] that in the case of arrestments and poindings, creditors holding a warrant for diligence who judicially produce their decree or document of debt or who intimate their claim in the prescribed manner within the statutory equalisation period should be entitled to rank pari passu on the proceeds of equalised arrestments and poindings. This is a modified version of the existing law.[2]

4.14 The advantages of such a rule would be that in some cases it might save the expense of a charge, notice of litigiosity and adjudication by a creditor seeking a pari passu ranking, and that it would be consistent with the rules on arrestments and poindings, and on title to apply for, or for inclusion in, a conjoined arrestment order (pari passu ranking of creditors on earnings and pensions).[3]

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[1] See Proposition 19(para. 5.24).

[2] Bankruptcy (Scotland) Act 1985, Sch. 7, para. 24(3).

[3] Debtors (Scotland) Act 1987, s. 60(1)(b) and (5) conferring title to apply on a creditor holding a warrant for diligence who has not used an earnings arrestment or current maintenance arrestment.

4.15 On the other hand, an extension of eligibility for pari passu ranking to creditors who had not registered an adjudication would have the serious disadvantage that the existence of debts ranking pari passu with adjudications would no longer always be apparent from a search of the registers.[1] Thus if on the expiry of the statutory equalisation period, the debtor had redeemed the first adjudication and any adjudications ranking pari passu with it, and then sought to obtain a loan on the security of the redeemed property, the lender should be able to satisfy himself that no other pari passu claims exist by searching the registers for the statutory equalisation period. The proposed extension to unregistered pari passu claims would make this impossible. This seems unacceptable.

4.16 Only adjudications attaching same subjects. We see advantage in retaining the existing rule whereby an adjudication is equalised only with another adjudication attaching the same subjects. It would seem to be convenient for all concerned that a competition between adjudgers and voluntary heritable creditors on the proceeds of sale of heritable subjects should not be complicated by other competitions on the proceeds of sale of different heritable subjects. We concede that this contrasts with the rule on equalisation of arrestments and poindings against moveables under which an arrestment or poinding may be equalised with a diligence of the same type or of a different type and on the same property or on different property, but there the funds for division may often be relatively small compared with the proceeds of sale of heritable property, so that there is greater advantage in aggregating the funds for division among the pari passu claimants.

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[1] The personal register is relevant here. See para. 3.4, fn. 1.

4.17 Proposals. We propose:

(1) The rules on equalisation of adjudications should apply to:

(a) adjudications for payment of personal debts;

(b) if adjudications on the dependence of court actions are to be competent, such an adjudication provided that it is followed up without undue delay.

This proposal is without prejudice to the proposals in Part VI below on equalisation of adjudications against a debtor's estate after his death.

(2) The rules on equalisation of adjudications or pari passu ranking should not be extended to the claims of creditors holding warrants for diligence or liquid documents of debt.

(3) An adjudication should only be equalised with another adjudication attaching the same subjects.

(Proposition 5).

Period during which adjudger's claim for pari passu ranking competent

4.18 Under the existing law, on the theory that the right to a pari passu preference is in the nature of a security right, a claim to such a preference may be made at any time during the period of the negative prescription,[1] ie. the long negative prescription of 20 years.[2] The claim for a pari passu preference

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[1] Graham Stewart pp. 642-643.

[2] Prescription and Limitation (Scotland) Act 1973, s.7.

may be made effectual against a singular successor of the first effectual adjudger even though the 10 year period of the positive prescription has run in his favour.[1] Under the new procedure of adjudication and sale,[2] if on the analogy of the law on standard securities[3] it were enacted that the proceeds of sale should be held by the selling adjudger "in trust" to be applied by him in payment of inter alia pari passu debts, it may be that the adjudger's obligation to pay pari passu debts would be treated as imprescriptible.[4] The same result may in any event follow under the common law doctrine of constructive trusts.[5] We think that this obligation should be subject to negative prescription and seek views on whether it should be the short negative prescription of 5 years rather than the long negative prescription of 20 years.

4.19 We propose:

The period during which an adjudger's claim for pari passu ranking on the proceeds of sale of adjudged property is competent should be regulated by the short negative prescription of five years.

(Proposition 6).

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[1] Graham Stewart, p. 643.

[2] Cf. Discussion Paper No. 78, Proposition 5.18 (para. 5.92).

[3] Conveyancing and Feudal Reform (Scotland) Act 1970, s.27(1).

[4] Prescription and Limitation (Scotland) Act 1973, Sch. 3, para. (e)(iii).

[5] At common law, a heritable creditor exercising a power of sale is a trustee for the debtor and any postponed creditors: Wilson and Duncan, p. 80. An arresting or poinding creditor is a constructive trustee for a creditor claiming a pari passu ranking on the proceeds of the arrestment or poinding: see Gallacher v. Ballantine (1876) 13 S.L.R. 496 (discussed at para. 5.38 below.)

Title to exercise adjudger's remedies

4.20 In our Discussion Paper No. 78[1] we propose that an adjudger should have a title to exercise certain remedies, such as power of sale, application to the sheriff for decree of foreclosure in default of sale, or for authority to enter into possession, powers to inspect the adjudged property and the like. We further propose there[2] rules determining, in cases where two or more adjudications registered at different times are in effect against the same subjects, which adjudger should possess the exclusive title to exercise those remedies. We now suggest that these rules should apply notwithstanding that the co-adjudgers are entitled to rank pari passu .

4.21 We propose:

> **In the case of concurrent adjudications attaching the same property, the fact that co-adjudgers have a right to rank pari passu should not affect the rules proposed in Discussion Paper No. 78 determining which co-adjudger should have the sole right to exercise the remedies of sale and foreclosure.**

(Proposition 7).

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[1] Paras. 3.5 to 3.7; 5.46 to 5.130.

[2] Paras. 5.133 to 5.140. This changes the existing law: see Graham Stewart, p. 646.

Effect of extinction of first adjudication otherwise than by sale or foreclosure

4.22 Under the present law, the first effectual adjudication fixes the period of pari passu ranking though it may later be abandoned, or extinguished by payment of the debt which it secures, or though it may later become null by reason of a procedural defect occurring after its character of the first effectual was established.[1] Thus, where a second adjudication ranks pari passu with the first effectual adjudication, a third adjudication registered after the expiry of the statutory equalisation period of a year and a day from the first effectual but within a year and a day of the second adjudication, does not rank pari passu with the second adjudication on the extinction of the first adjudication as if the second adjudication had thereby become the first effectual.[2]

4.23 This seems a satisfactory rule. It would be inappropriate if a debtor could change the vested rights of later adjudgers to a pari passu preference by paying the debt secured by the first effectual adjudication. We think therefore that this rule should apply to a case where an adjudication establishing an equalisation period is extinguished otherwise than by completion of the diligence by sale or decree of foreclosure.

4.24 There may be cases where the first adjudication establishing an equalisation period is extinguished by payment of the debt before a second adjudication is registered within the

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[1] Graham Stewart, pp. 641-642.

[2] Streit v. Earl of Northesk (1672) Mor. 248.

statutory equalisation period. We suggest that the equalisation period established by the first adjudication should nevertheless remain in effect. This would require a modification of the general rule in Proposition 3(2) (para. 4.11) above. The advantage of this suggestion would be that it would be evident on the face of the registers what the equalisation period was and that period could not be affected by payment of the debt secured by the first adjudication, which payment would not necessarily be disclosed in the property registers.

4.25 We propose:

(1) Where during or after the proposed three months period for equalisation, the first adjudication is extinguished otherwise than by sale or foreclosure, then any debt or debts, secured by other adjudications registered later in that period, remaining payable should retain the privilege of ranking (pari passu among themselves if more than one) as if registered on the date of registration of the first adjudication.

(2) Where -

(a) the first adjudication is extinguished otherwise than by sale or decree of foreclosure; and

(b) within the statutory equalisation period of 3 months following the first adjudication, another adjudication ("the second adjudication") is registered whether before or after extinction of the first adjudication,

then a debt secured by a third adjudication registered after the expiry of the 3 months period following the first adjudication should not rank pari passu with the debt secured by the second adjudication, notwithstanding that the third adjudication may have been registered within 3 months after the second adjudication.

(Proposition 8).

Liability for expenses

4.26 In many competitions between co-adjudgers liability for expenses is likely to be regarded as an important matter. Under the present law, in a question with co-adjudgers ranking pari passu, the first effectual adjudger is entitled to reimbursement from the co-adjudgers of the expenses of his diligence, and interest thereon, but not to the expenses of a prior bond or a charge to pay.[1] The first effectual adjudger is entitled to reimbursement of the whole of the expenses incurred by him and not merely such a rateable proportion as corresponds to the amounts of the co-adjudgers' several debts. The reason is that this is the only compensation which the first adjudger gets for bringing in co-adjudgers to a pari passu ranking.[2] Further all the other co-adjudgers bear the expenses of their own adjudications. The foregoing rules operate against the background that the expenses of an adjudication are not chargeable against the debtor.[3] In our Discussion Paper No. 78[4] however, we propose that the expenses of an adjudication should be chargeable against the debtor and recoverable out of the proceeds of sale. We also

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[1] Graham Stewart, p. 644.

[2] Erskine Institute II, 12, 33; Grahame v. Ross (1663) Mor. 245.

[3] See eg. Riley v. Cameron 1940 S.L.T. (Sh. Ct.) 42.

[4] Proposition 3.16(para.3.107).

propose there[1] that the adjudger's expenses chargeable against the debtor incurred in connection with the sale and any attempted sale should be a first charge on the proceeds of sale, but the other expenses so chargeable incurred in executing the diligence and the charge preceding it would be treated for ranking purposes in the same way as the debt due to the adjudger. This solution would apply to pari passu ranking under the equalisation rules. The expenses of sale or attempted sale would be retained by the first adjudger and excluded from the fund for division, but the pari passu co-adjudgers would rank pari passu in respect of their other expenses.

4.27 We propose:

(1) **The adjudger's expenses chargeable against the debtor incurred in connection with the sale and any attempted sale should be a first charge on the proceeds of sale and deducted from the fund for division among pari passu adjudgers and other creditors as mentioned in Proposition 5.18 (para. 5.92) in Discussion Paper No. 78.**

(2) **Other adjudication expenses due to pari passu co-adjudgers should be treated for ranking purposes in the same way as the debts due to those co-adjudgers.**

(Proposition 9).

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[1] Discussion Paper No. 78, Proposition 5.18 (para. 5.92).

Pari passu claims on assignation of debt and adjudication; on sale; and on foreclosure .

4.28 Under the present law, there is authority that where the first adjudger "sells his diligence" (ie. assigns the debt and the adjudication securing it) to a third party purchaser, the co-adjudgers claiming a pari passu ranking will rank on the price, and that the claims of pari passu co-adjudgers may be enforced against the first adjudger who has received the price or the third party purchaser who has paid it.[1] One authority states that the price obtained from a sale of an adjudication is imputed in extinction of the first adjudger's debt.[2] In our Discussion Paper No. 78 we make it clear that the sum paid by the assignee-purchaser to the cedent would be purely a matter between the assignee and the cedent and would have no effect on the amount of the debt,[3] nor should the assignation enable the co-adjudgers to rank on the price paid as consideration for the assignation. The same rule should apply where the co-adjudger claimants are entitled to rank pari passu with the first adjudger (the cedent) under the equalisation rules. The assignee should simply stand in the cedent's shoes, and exercise the remedies of sale, foreclosure etc. competent to the cedent.

4.29 Under the present law, if after obtaining decree of declarator of expiry of the legal, the adjudged property is sold, the pari passu co-adjudgers rank on the price.[4] If the adjudged property is not sold, the adjudger who first obtains decree of

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[1] Graham Stewart, p. 647.

[2] Parker on Adjudications (2nd edn.; 1850) p. 57.

[3] Discussion Paper No. 78, para. 5.159, and see Proposition 5.27 (para. 5.160).

[4] Graham Stewart, p. 647.

declarator of expiry of the legal alone acquires a right of property (whether or not his adjudication was the "first effectual"), but his right of property will remain burdened by the debts of the adjudgers entitled to rank on the price.[1]

4.30 Under the proposals in our Discussion Paper No.78, the first adjudger has power to sell the property in a prescribed manner and may apply for decree of foreclosure only in default of sale. In the event of sale, he must hold the proceeds of sale for those, including pari passu adjudgers, entitled to rank thereon.[2] On the registration of an extract decree of foreclosure, the property would be disburdened of the selling adjudger's adjudication but would remain burdened by inter alia any adjudication ranking pari passu with it.[3]

4.31 We propose:

(1) **Where the debt secured by an adjudication and the adjudication itself are assigned for a price to a third party purchaser, any co-adjudgers entitled to rank pari passu with the selling adjudger should not be entitled to rank (pari passu or otherwise) on the price. The assignee-purchaser should be in the same position with respect to pari passu adjudgers as the cedent would have been if the assignation had not been made.**

(2) **Where an adjudger exercises his power of sale or obtains decree of foreclosure, the rules should be as proposed in our Discussion Paper No. 78, that is to say -**

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[1] Idem.

[2] Discussion Paper No. 78, Proposition 5.18, para. 5.92.

[3] Ibid., para.5.109, head (d).

(a) in the event of sale, the selling adjudger must hold the proceeds of sale for the benefit of those entitled to rank thereon, including pari passu adjudgers; and

(b) in the event of foreclosure, the registration of the extract decree of foreclosure should disburden the subjects of the foreclosing adjudger's adjudication but the subjects should remain burdened to a proportionate extent by any adjudications ranking pari passu with that adjudication.

(Proposition 10).

Dispensation with procedure to facilitate pari passu ranking?

4.32 Under the present law, the court entertaining an action of adjudication may dispense with various steps in the adjudication procedure (reserving objections contra executionem) if the creditor shows that, by reason of the imminent expiry of the statutory equalisation period, he may fail to obtain a pari passu preference unless those steps are dispensed with.[1] Under the new procedure of adjudication and sale, it may be for consideration whether the court should be empowered to shorten the period of litigiosity preceding the registration of an adjudication[2] (which may be as long as 9 months) to facilitate pari passu ranking. The main purpose of that period is to give potential purchasers and lenders on security transacting with the debtor warning of the possible registration of a notice of adjudication. The shortening of the period could only occur where an adjudication had already been registered and where therefore potential purchasers and lenders on security were, or ought to be, already aware of an incumbrance on the title. On the other hand, the proposed power would be an added complication. We invite views.

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[1] Graham Stewart, pp. 644-646.

[2] See Discussion Paper No. 78, Proposition 3.5 (para. 3.43).

4.33

Should the court be empowered to shorten the period of litigiosity preceding registration of a notice of adjudication proposed in Discussion Paper No. 78, on the application of a creditor seeking to adjudge in order to enable the creditor to qualify for pari passu ranking by registering an adjudication before the expiry of the equalisation period?

(Proposition 11).

Competitions involving adjudgers claiming pari passu ranking and other rights

4.34 There is a highly developed and complicated series of rules on the ranking of adjudgers claiming a pari passu preference in competitions with other rights. These rules had been largely developed in cases on ranking in the late seventeenth and eighteenth centuries and had reached their present form by the last personal edition[1] and subsequent editions of Bell's Commentaries,[2] on which the discussion in Graham Stewart[3] is closely modelled. The rules are relevant in modern practice mainly in sequestrations and liquidations having an equalising effect as constructive adjudications in competitions with inhibitions.[4] But if adjudications are reformed, the rules may also be relevant in multiple-poindings and other competitions outside insolvency processes.

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[1] (5th edn.; 1826); see also Erskine, Institute II, 12, 32.

[2] See now 7th edn., vol. 2, pp. 403-405; 407 et seq.

[3] p.407 et seq.

[4] eg. Baird and Brown v. Stirrat's Tr. (1872) 10 M. 414.

4.35 The authorities discuss the rules applicable to the following situations:

(1) first effectual adjudication for debt followed by voluntary heritable security followed by other adjudications for debt within statutory equalisation period;

(2) first effectual adjudication for debt, followed by adjudication in implement, followed by other adjudications for debt within statutory equalisation period;

(3) inhibition followed by voluntary heritable security followed by adjudications for debt within statutory equalisation period enforcing debts contracted prior to the inhibition;

(4) inhibition followed by adjudications for debt within statutory equalisation period.

We discuss categories (1) and (2) in the following paragraphs. Categories (3) and (4) may be discussed in the context of inhibitions in a future Discussion Paper on that topic.

4.36 Adjudication followed by voluntary heritable security followed by adjudication in equalisation period. A competition may arise where an adjudication is registered which is then followed by the registration of a standard security (or a statutory charging order) and thereafter by registration of a second adjudication in the equalisation period constituted by the first

adjudication.[1] It might be thought that since the second adjudication ranks pari passu with the first adjudication, the second adjudication will be preferred to the standard security though registered later in date than that security's registration. But the rule is that the Diligence Act 1661 only equalises adjudications among themselves and that an intervening voluntary heritable security is neither hurt nor benefited by the pari passu preference of a subsequent adjudication. Bell[2] describes the applicable principles as follows:

> "(1) That the statute 1661 subjected the first effectual adjudger to the necessity of communicating to succeeding adjudgers within year and day the benefit of his diligence as if one adjudication had been led for all.
>
> (2) That this benefit was not to be communicated to the holders of voluntary securities; the consequence of which is, that the holder of an heritable bond cannot infringe upon or hurt a prior adjudger's right, if secured by infeftment.
>
> (3) That an adjudger, posterior to the heritable bond, must be postponed to that heritable bond, having by his delay forfeited the benefit of the statute, so far as it may be injurious to the heritable creditor.
>
> (4) That the posterior adjudger's interest under the statute is no further injured than as it interferes with the heritable bond."

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[1] A competition involving an adjudication followed by a voluntary heritable security is unlikely to arise very often because normally a heritable creditor in a voluntary security will not settle a loan transaction if an interim search for incumbrances discloses a prior adjudication.

[2] Commentaries, vol. 2, p. 404.

These principles are given effect by the following rules of double-round, draw-back ranking, (which is analogous to the rules applicable to the ranking of inhibiting creditors):

> "first, to rank the preferable adjudgers primo loco, the holder of the voluntary security secondo loco; and the posterior adjudgers ultimo loco; and
>
> [second], to allow the postponed adjudgers to draw back from the preferable adjudgers all that the preferable adjudgers would have been obliged to yield to the posterior adjudgers, had the heritable bond been out of the field, and the adjudgers the only competitor."[1]
>
> "In other words, the adjudgers are hypothetically ranked pari passu on the fund as if there were no heritable bond, and the postponed adjudger then draws back from the preferable adjudger the difference between the preferable adjudger's dividend in the first round of ranking and his dividend in the second round."[2]

4.37 The following four examples taken from Bell's Commentaries[3] illustrate the operation of these rules.

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[1] Idem.

[2] Ibid., p. 404 fn. 2 at pp. 404-405. An alternative method of achieving the same result given by Bell at p. 404 is "first, to rank the whole adjudgers pari passu; then hypothetically to rank the first adjudication primo loco, and the voluntary security secundo loco; and to form the final result by giving to the holder of the voluntary security, by way of drawback from the postponed adjudgers, all that he would be entitled to draw in ranking only with the first adjudger, while the first adjudger retains his full dividend."

[3] Vol. 2, p. 404 fn. 2 at p. 405. See also Graham Stewart, p. 648.

FUND FOR DIVISION £10,000

		Debts	Draws
1.	First adjudger	£4000	£4000
	Heritable bond	6000	6000
	Second adjudger	2000	
2.	First adjudger	£3000	£3000
	Heritable bond	6000	6000
	Second adjudger	3000	1000
3.	First adjudger	£6000	£5000
	Heritable bond	6000	4000
	Second adjudger	6000	1000
4.	First adjudger	£10000	£6666 2/3
	Heritable bond	5000	
	Second adjudger	5000	3333 1/3

4.38 On the assumption that the intervening standard security is to be neither hurt nor benefited by the pari passu preference of a subsequently registered adjudication, these rules of ranking may be acceptable. Nevertheless, these rules do complicate the law, and the complications would be eliminated if the rule was that all adjudications registered in the equalisation period rank pari passu in preference to a standard security registered in that period. It could be argued that the heritable creditor must be taken to know of the existence of an adjudication when the loan transaction is settled, and accordingly that subsequent adjudications may be preferred. While we think that such a rule would unduly abridge the heritable creditor's rights, we invite views on this possible simplification of the law.

4.39

Where the registration of an adjudication is followed by the registration of a heritable security and thereafter by the registration of a second adjudication in the equalisation period constituted by the first adjudication, should the law on ranking be simplified by allowing the second adjudication to rank pari passu with the first adjudication in priority to the standard security?

(Proposition 12).

4.40 Adjudication for debt followed by adjudication in implement followed by adjudication for debt in equalisation period. In a competition involving an adjudication for debt followed by an adjudication in implement followed thereafter by a second adjudication for debt in the equalisation period, it appears that the rule is the same, the intervening adjudication in implement

being in the same position as an intervening standard security.[1] Whatever solution is adopted for competitions involving standard securities should apply also to competitions involving adjudications in implement.

Sequestration and liquidation as constructive adjudications for debt

4.41. We referred at para. 2.30 above to the enactments providing that a sequestration or liquidation has effect as a constructive adjudication for the purpose of the rules on the equalisation of diligences.[2] We think that, if equalisation of adjudications is to be retained rather than abolished, the effect of these provisions should be preserved. This would require a technical amendment of section 37(1)(a) of the Bankruptcy (Scotland) Act 1985, which makes sequestration equivalent to a decree of adjudication for debt duly recorded in the personal register on the date of sequestration. As a consequential of the reform of adjudications for debt, sequestration should be made equivalent to a notice of adjudication duly registered in whatever register (the property registers or personal registers) is appropriate

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[1] Bell, Commentaries vol. 2; p. 404; Graham Stewart, p. 648: "The first adjudger is preferred to the adjudger in implement, and the latter to the posterior adjudgers. The posterior adjudgers, therefore, receive only what the adjudger in implement leaves, added to the surplus which the first adjudger draws over what he would have drawn if there had been no adjudication in implement".

[2] Bankruptcy (Scotland) Act 1985, s. 37(1)(a) applied to liquidations by the Insolvency Act 1986, s. 185.

to the nature of the adjudged subjects.[1]

4.42 We also noted at para. 2.30 above that, while the Bankruptcy (Scotland) Act 1985 makes provision precluding the execution of an adjudication after the date of sequestration,[2] there is no provision (separate from the rules on equalisation) rendering ineffectual prior adjudications within the 60-days period before sequestration or liquidation corresponding to the provision rendering ineffectual prior arrestments and poindings independently of equalisation.[3] Since the proposed 3-months period for equalisation is longer than the 60-days period under section 37(4) of the 1985 Act, it might be thought unnecessary to apply the 60-days period to adjudications executed prior to sequestration. However the 3-months period and the 60- days period would not necessarily overlap, since the former is reckoned forward from the first adjudication and the latter is reckoned back from the date of sequestration or commencement of the winding up. For consistency with section 37(4) and (5) of the 1985 Act, it would seem desirable to provide that an adjudication registered within 60 days prior to the date of sequestration or commencement of the winding up is ineffectual in a question with the trustee or liquidator. The effect would be that in a case where an adjudication is registered both within 3 months after the first

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[1] Ie. in the case of feudal subjects and registrable long leases, the property registers or, if adjudications for debt are to continue to be competent in relation to interests not registrable in the property registers, the personal register. We shall consider adjudications of the latter type and adjudications of heritable securities in a later Discussion Paper.

[2] Bankruptcy (Scotland) Act 1985, s. 37(8).

[3] Bankruptcy (Scotland) Act 1985, s. 37(4) and (5), applied to liquidations by s. 185 of the Insolvency Act 1986.

adjudication and within 60 days before the sequestration or commencement of the winding up, the trustee or liquidator would succeed to the benefit of the adjudication in applying the rules on equalisation of adjudications registered in the 3- months period.

4.43 We propose:

(1) **For the purpose of the rules on equalisation of adjudications with the constructive adjudication effected by sequestrations and liquidations, a sequestration and a liquidation should have effect as if the award of sequestration or the winding up order were a notice of adjudication registered in the property registers on the date of sequestration or commencement of the winding up.**

(2) **If the rules on equalisation of adjudications are retained, provision should be made, on the analogy of section 37(4) and (5) of the Bankruptcy (Scotland) Act 1985, as extended by the Insolvency Act 1986, s. 185,for rendering ineffectual in a question with the trustee or liquidator adjudications registered within 60 days before the date of sequestration or commencement of the winding up.**

(Proposition 13).

Trust deeds for creditors

4.44 A trust deed for creditors may contain a clause to the effect that creditors acceding to the deed will surrender preferences acquired by adjudications registered during a period prior to the granting of the trust deed.[1] The Bankruptcy (Scotland) Act 1985[2] provides that, where a trust deed for

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[1] Cf. our Bankruptcy Report, para. 13.6.

[2] Sch. 5, para. 6(a).

creditors becomes a "protected trust deed", a non-acceding creditor will have no higher right to recover his debt than a creditor who has acceded. The effect seems to be that where any trust deed becomes a protected trust deed, all creditors will be put on an equal footing with any creditor who has registered an adjudication during the stipulated period, whether or not that creditor has in fact acceded to it. A trust deed may therefore provide for equalisation of adjudications for such a period as is specified in the trust deed. As at present advised, however, we see no reason to change this provision.

4.45

It should continue to be competent for protected trust deeds for creditors to make provision for equalisation of adjudications which binds non-acceding as well as acceding creditors.

(Proposition 14).

PART V

REFORM OF EQUALISATION OF ARRESTMENTS AND POINDINGS (IF EQUALISATION NOT ABOLISHED)

Preliminary

5.1 In this Part, we consider what reforms of the rules on equalisation of arrestments and poindings are necessary or desirable on the hypotheses that contrary to our provisional view[1] the equalisation rules will not be abolished and that the rules on equalisation of arrestments and poindings will continue to be distinct from the rules on equalisation of adjudications.[2]

5.2 The main issue which we have identified concerns the need to eliminate or reduce the complexity and uncertainty stemming from the present rules allowing overlapping equalisation periods created by repeated constitutions of the debtor's apparent insolvency. We also take the opportunity of provisionally proposing a number of detailed amendments of the law.

5.3 Whereas the system of equalisation of adjudications has remained virtually unchanged since it was established by the Diligence Act 1661, the system of equalisation of arrestments and poindings is the product of a long period of experimentation by Scottish statutes on bankruptcy beginning with the Bankruptcy Act 1772 and culminating in the Bankruptcy (Scotland) Act 1913, s. 10. This was re-enacted with only technical amendments by the Bankruptcy (Scotland) Act 1985, Schedule 7, para. 24 which now governs the equalisation of arrestments and poindings. A brief survey of the development of the law is necessary to an understanding of the provisions of the 1985 Act on this topic.

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[1] Proposition 1 at para. 2.29 above.

[2] See Part III above (Proposition 3 at para. 3.5).

Development of the law on equalisation of arrestments and poindings

5.4 The Bankruptcy Act 1772 established sequestration in bankruptcy in Scotland and provided that no arrestment used, and no poinding not completely executed, within 30 days before the application for sequestration would give a preference to the arrester or poinder.[1] The Act applied to all bankrupt debtors whether traders or not. The 1772 Act was replaced by the Bankruptcy Act 1783 under which sequestration was confined to mercantile bankruptcies.

5.5 The 1783 Act introduced what is commonly called equalisation of diligences as a system of pari passu ranking on the fruits of arrestments and poindings applying outside sequestration. Though the distinctive role of the provisions on equalisation outside sequestration was to provide for pari passu ranking in non-mercantile bankruptcies, the provisions applied to all debtors rendered notour bankrupt under the Bankruptcy Act 1696, whether in trade or not. It was provided that arrestments used within a period of 30 days before and four months after notour bankruptcy should rank pari passu.[2] Further "in order to save, as far as possible, a multiplicity of arrestments", other non-arresting creditors could lodge a claim in a furthcoming or multiple-poinding to be ranked on the proceeds of the arrestment.[3] The 1783 Act made separate provision for poindings.[4] It did not provide that poindings should rank pari passu but did provide that no poinding within the same statutory period gave any preference over creditors holding decrees or liquid grounds of debt provided they

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1 1772 Act (12 Geo. III c.72) ss. 17 and 18.

2 Bankruptcy Act 1783 (23 Geo. III, c. 18) s. 2.

3 Idem.

4 Ibid., s. 4.

"summoned" the poinder within the statutory period.[1] The Bankruptcy Act 1793 renewed these provisions but altered the equalisation period before notour bankruptcy from 30 to 60 days.[2] The statutory period has remained the same (60 days before and 4 months after the constitution of notour bankruptcy) ever since.

5.6 The 1793 Act provisions were renewed by the Bankruptcy Act 1814 with modifications.[3] The 1814 Act, s. 2 provided that all arrestments within the statutory period "shall be ranked pari passu as if such arrestments had been used of the same date". Similar provision was made for poindings (s. 5.). The 1814 Act thus displayed the following features:

(a) Unlike the 1783 and 1793 Acts, the 1814 Act required that each creditor should have used an arrestment or as the case may be a poinding before he could benefit from pari passu ranking. Other creditors holding liquid grounds of debt were excluded.

(b) Arrestments were equalised only with arrestments and poindings only with poindings: ie. the diligences had to be of the same type.

(c) After the expiry of the statutory period, the common law rule of ranking by temporal priority generally applied because it was not then competent to make a debtor notour bankrupt a second time if he had continued

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[1] Idem.

[2] Bankruptcy Act 1793 (33 Geo. III, c. 74) ss. 3 and 6.

[3] The 1793 Act, s. 6 provided that the poinder should have his expenses and a preference of 10 per cent of the poinded goods. Section 5 of the 1814 Act repealed the 10 per cent preference.

insolvent during the interval.[1]

Partly as a result of recommendations of the Bell Commission,[2] the first two of these aspects of the system were changed by the Bankruptcy (Scotland) Act 1856, s. 12 in which the main rules on pari passu ranking reached more or less their modern form. Thus -

(i) all arrestments and poindings used within the statutory period ranked pari passu as if they had all been used of the same date (ie. the diligences did not require to be of the same type); and

(ii) creditors judicially producing decrees or other liquid grounds of debt within the statutory period in any process relative to the subject of an arrestment or poinding also ranked pari passu on the proceeds.

Sequestration was itself made an equalising arrestment and poinding.[3] It should be noted that the 1856 Act extended sequestration to non-mercantile bankruptcies as well as mercantile bankruptcies but the need to retain pari passu ranking outside sequestration does not seem to have been questioned.

5.7 As regards the third feature of the 1814 Act mentioned at head (c) of the foregoing paragraph, section 9 of the 1856 Act made it competent to constitute notour bankruptcy anew against a

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[1] Strang v. McIntosh 12 May 1821, F.C.; (1821) 1 S. 1.

[2] Second Report (1835), pp. 24; 33 and 34 contained recommendations for amending the rules in (a) and (c).

[3] 1856 Act, s. 108: see para. 5.30 below.

debtor even though he had not recovered solvency.[1] In Wood v. Cranston & Elliot,[2] however, it was held that section 9 referred solely to the founding of an application for sequestration and that, for the purpose of pari passu ranking under s. 12, one single constitution of notour bankruptcy alone was contemplated by the Act. This rule was reversed by the Bankruptcy (Scotland) Act 1913, section 10 of which re-enacted section 12, and section 7 of which expressly provided that any second or subsequent constitution of notour bankruptcy should be available for all the purposes of section 10 of the 1913 Act as well as for the purposes of applying for sequestration. In cases involving multiple overlapping equalisation periods, this has created problems as to

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[1] The Bell Commission's Second Report (1835) recommended (at p. 34): "if after the expiration of four months subsequent to the notour bankruptcy of a debtor, such debtor shall again be declared notour bankrupt by denunciation, imprisonment etc. all arrestments used by other creditors sixty days before, or four months after such notour bankruptcy shall be ranked pari passu, and the like proceedings for establishing a pari passu preference, shall be competent to any creditor of such debtor within sixty days before or four months after such bankruptcy; provided always that such bankruptcy shall not entitle such subsequent arresting creditor to compete with any arrestment used within the said space of sixty days before, or four months after the previous bankruptcy". A similar recommendation was made for poindings (idem.). These recommendations do not seem to have faced up to the extremely difficult problem of arrestments or poindings which fall within each of two or more overlapping statutory equalisation periods.

[2] (1891) 18R. 382.

ranking which remain unclear.[1]

The modern law on equalisation of arrestments and poindings

5.8 The modern law on equalisation or pari passu ranking is now set out in paragraph 24 of Schedule 7 to the Bankruptcy (Scotland) Act 1985 (re-enacting the 1913 Act s. 10 with minor, mainly drafting, changes) the main provisions of which are as follows.

> "(1)Subject to sub-paragraph (2) below, all arrestments and poindings which have been executed within 60 days prior to the constitution of the apparent insolvency of the debtor, or within four months thereafter, shall be ranked pari passu as if they had all been executed on the same date.
>
> (2)Any such arrestment which is executed on the dependence of an action shall be followed up without undue delay.
>
> (3)Any creditor judicially producing in a process relative to the subject of such arrestment or poinding liquid grounds of debt or decree of payment within the 60 days or four months referred to in sub-paragraph (1) above shall be entitled to rank as if he had executed an arrestment or a poinding; and if the first or any subsequent arrester obtains in the meantime a decree of furthcoming, and recovers payment, or a poinding creditor carries through a sale, he shall be accountable for the sum recovered to those who, by virtue of this Act, may be eventually found to have a right to a ranking pari passu thereon, and shall be liable in an action at their instance for payment to them proportionately, after allowing out of the fund the expense of such recovery.
>
> (4)Arrestments executed for attaching the same effects of the debtor after the period of four months subsequent to the constitution of his apparent insolvency shall not compete with those within the said periods prior or subsequent thereto, but may rank with each other on any reversion of the fund attached in accordance with any

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[1] See para. 5.42 below.

enactment or rule of law relating thereto."[1]

The general principle

5.9 It will be seen that the equalisation rules apply on the constitution of the apparent insolvency of the debtor.[2] Further all arrestments and poindings executed within the statutory equalisation period are equalised. We suggest that these two provisions should remain, subject to proposals made later concerning overlapping equalisation periods. The relevance of apparent insolvency is that equalisation may well be unnecessary if the debtor is solvent and can pay all his debts as they fall due. There seems no good reason to revert to the old rule whereby arrestments were only equalised with arrestments and poindings only with poindings.[3]

5.10 The duration of the equalisation period is 60 days before the constitution of apparent insolvency and four months thereafter. This has remained unchanged since 1793.[4] The duration is bound to be somewhat arbitrary and we see no need for change. The 60 days before apparent insolvency is the same

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[1] Sub-paragraphs (5) to (7) contain technical or transitional provisions and sub-para. (8) excludes the new diligences against earnings from the equalisation regime.

[2] The debtor may be a company registered under the Companies Acts: Clarke v. Hinde Milne and Co. (1884) 12 R. 347; Bankruptcy (Scotland) Act 1985, Sch. 7, para. 24, sub-para. (5). NB. the reference in sub-para. (5) to s. 7(5) of the Act should be a reference to s. 7(4).

[3] Bankruptcy Act 1814, ss. 2 and 5: see para. 5.6 above.

[4] Bankruptcy Act 1793, ss. 3 and 6: see para. 5.5. above.

as the "suspect period" prior to sequestration and liquidation for the rendering ineffectual of arrestments and poindings.[1]

5.11 We propose:

(1) **If equalisation of arrestments and poindings is not to be abolished, the main provisions on equalisation of arrestments and poindings should continue to be that all arrestments and poindings executed within a statutory period defined by reference to the constitution of the debtor's apparent insolvency should rank pari passu, subject to proposals made below on overlapping equalisation periods, and on the period within which claims for equalisation must be made.**

(2) **The foregoing period should continue to be 60 days before, and 4 months after, apparent insolvency.**

(Proposition 15).

Equalisation to apply to bare arrestments and poindings

5.12 The 1985 Act, Sch. 7, para. 24(1) provides that all arrestments and poindings which shall have been "executed" within the statutory period rank pari passu. The Bankruptcy (Scotland) Act 1913, s. 10 was in slightly different terms and referred to arrestments and poindings which shall have been "used" within the statutory period. Section 10 and para. 24(3) both require the arresting or poinding creditor to account to a claimant for equalisation if the creditor obtains a decree of furthcoming and recovers payment or the poinding creditor carries through a sale.

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[1] Bankruptcy (Scotland) Act 1985, s. 37(4) and (5); Insolvency Act 1986, s. 185.

In a sheriff court case,[1] it was held that an arrestment is "used" within the meaning of section 10 only when it is completed by decree of furthcoming. Accordingly, where the common debtor granted a mandate to the arrestee to pay the arrested funds to the arresting creditor, section 10 did not apply to the funds so paid.[2] Likewise, it would follow from this case that if the common debtor pays the arresting creditor all or part of the debt as a condition of the creditor abandoning his arrestment, the equalisation enactment would not apply to the funds so paid. By parity of reasoning, the same principle would appear to apply to a poinding creditor where the creditor obtains payment in consideration of abandoning the poinding before the sale or transfer of ownership in default of sale. This reasoning, however, may not apply now to poindings because the Debtors (Scotland) Act 1987, s. 21(7) provides that a poinding is deemed to have been "executed" on the date when the poinding schedule has been delivered or left on the premises under that Act. Given that arrestments are rarely followed by furthcoming and poindings are rarely followed by sale, the old rule restricts the operation of the equalisation rules unduly. Moreover, it seems inappropriate that the debtor should be able to change creditors' rights of pari passu ranking by a mandate releasing arrested funds, or arranging to pay all or part of the debt to the poinding or arresting creditor on condition of terminating the diligence.

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[1] Millar v. Forage Supply Co. Ltd. 1955 S.L.T. (Sh.Ct.) 18; approved Robertson's Tr. v. P & W MacLellan Ltd. 1957 S.L.T. (Sh. Ct.) 65.

[2] The mandate was held reducible as an unfair preference but that ground of challenge would not now apply because of the provisions of the Bankruptcy (Scotland) Act 1985, s. 36(2)(d).

5.13 We propose

It should be competent to claim equalisation on

(a) arrested funds paid to an arresting creditor by the arrestee in pursuance of a mandate by the common debtor; and

(b) an amount paid to the arresting or poinding creditor as consideration for abandoning or restricting the arrestment or poinding, insofar as that amount does not exceed the amount of the arrested funds or, as the case may be, the value of the arrested or poinded goods.

(Proposition 16).

Arrestment and sale of vessels

5.14 The equalisation provisions made no express reference to the hybrid diligence of arrestment and sale of a ship or other vessel. The Bell Commission recommended that "in the arrestment of vessels (which is analogous to poinding rather than arrestment) the same rules of pari passu preference in relation to the notour bankruptcy of the owner shall be observed, as in the case of arrestments and poindings".[1] This recommendation has never been implemented but in two later sheriff court cases, the equalisation provision was construed as applying to arrestment and sale of vessels.[2] We suggest that any residual doubt should be removed by statute.

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[1] Second Report (1835) p. 34.

[2] Harvey v. McAdie (1888) 4 Sh. Ct. Reps. 254 (construing s.12 of the 1856 Act); Munro v. Smith 1968 S.L.T. (Sh. Ct.) 26 (construing s.10 of the 1913 Act).

5.15 We propose:

For avoidance of doubt, it should be expressly provided by statute that the rules on equalisation of arrestments and poindings apply to arrestment and sale of vessels.

(Proposition 17).

Arrestments on the dependence

5.16 Sub-paragraph (1) of the equalisation provision is made subject to sub-paragraph (2) which provides that "any such arrestment which is executed on the dependence of an action shall be followed up without undue delay". This is merely a proviso to sub-paragraph (1) and in earlier enactments was framed as such. It is generally accepted that what amounts to undue delay is a question of circumstances.[1] This rule should be retained.

5.17

The equalisation rules should continue to apply to an arrestment on the dependence if it is followed up without undue delay.

(Proposition 18).

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[1] Graham Stewart, p. 180; Wallace Law of Bankruptcy (2nd edn.) p. 34. In Mitchell v. Scott (1881) 8 R. 875, an arrestment on the dependence of a Court of Session action on 5 November 1879 was followed by decree on 18 December 1880; held no undue delay. See also Liquidators of Benhar Coal Co. v. Turnbull (1883) 10 R. 558.

Claims by creditors holding liquid grounds of debt or decrees of payment

5.18 Sub-paragraph (3) of the equalisation provision enacts that "any creditor judicially producing in a process relative to the subject of such arrestment or poinding liquid grounds of debt within the [statutory period] shall be entitled to rank as if he had executed an arrestment or a poinding". Graham Stewart observes that liquid grounds of debt refer to a probative writ such as a bond, bill, promissory note or I.O.U.[1] If the debt is illiquid, the creditor must raise an action for payment and lay an arrestment on the dependence within the statutory period.

5.19 The production has to be made judicially in a process relative to the arrested or poinded property. The general rule is:[2] "It is of no consequence what the nature of the process is in which the claims are made. It is sufficient if it involves a competition".Production is competent in a process of poinding[3]

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[1] p. 182. This statement is open to the criticisms that (a) a bill, promissory note, or IOU would not normally be probative and (b) an IOU would not normally be regarded as a liquid document of debt as distinct from mere evidence of debt.

[2] McGlashan, Practice in the Sheriff Courts (4th edn.; 1868) p. 360: same statement in earlier edition approved in Sangster v. Burness (1857) 20 D. 355 at p. 361 (construing the Bankruptcy Act 1814 s. 5 which referred to production judicially of the liquid grounds of debt "in any process or competition relative to the goods or price thereof"); Graham Stewart, pp. 182-3.

[3] Clark v. Hinde, Milne & Co (1884) 12 R. 347 at pp. 353-4 (claim lodged after warrant of sale granted and before sale); Sangster v. Burness (1857) 20D. 355 (production of grounds of debt to clerk of court in a poinding later set aside held sufficient to found a pari passu ranking on the proceeds of another poinding of the same goods); Hog v. McLellan (1797) Mor. 8346 ; Gillon & Co. Ltd. v. Christison (1909) 25 Sh. Ct. Reps. 283; Campbell v. McKellar 1924 S.L.T. (Sh.Ct.) 82.

(which normally begins when the report of the poinding is lodged[1]), or in an action of furthcoming,[2] or in an application for warrant of sale of an arrested boat,[3] or in an action of multiplepoinding.[4] It would appear that an ordinary action for payment by the creditor claiming the pari passu preference against the poinding or arresting creditor after termination of the diligence is competent.[5]

5.20 In the case of poindings the net proceeds of sale (if any) are usually paid to the poinding creditor after the report of sale has been taxed and are consigned in court only if the sheriff so orders.[6] In a sheriff court case,[7] it was held that an order to consign the proceeds of sale of the pointed goods is competent at any time until (1) there has been an order authorising the sheriff officer (or messenger) to pay, or (2) by lapse of time the poinder's sole right to the proceeds of his poinding has ceased to be challengeable under the provisions of the Bankruptcy Acts. It was observed that if the sheriff officer parts with the proceeds of sale without an order of court, he does so on his own responsibility and in reliance that it will be made forthcoming by the poinder if and when competing claims lead to an order to consign. Consignation should be ordered as soon as a claim is made. Where claims for a pari passu ranking are lodged in a

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[1] Debtors (Scotland) Act 1987, s. 22; Lamb v. Wood (1904) 6 F. 1091.

[2] Bell Commentaries, vol. 2, p. 280.

[3] Harvey v. McAdie (1888) 4 Sh. Ct. Reps. 254; Munro v. Smith 1968 S.L.T. (Sh. Ct.) 26.

[4] Dobbie & Co. v. Nisbet (1854) 16 D. 881; Wood v. Cranston and Elliot (1891) 18R. 382.

[5] See para. 5.21 below.

[6] See now Debtors (Scotland) Act 1987, s. 38(a).

[7] Gillon & Co Ltd. v. Christison (1909) 25 Sh. Ct. Reps. 283; cf. however Murray's Tr. v. Garvie's Trs. (1899) 15 Sh. Ct. Reps. 288, and Laird & Sinclair's Poinding (1904) 20 Sh. Ct. Reps. 307, which seem to have been wrongly decided.

poinding, the procedure is the same as in a multiple-poinding.[1]

5.21 Sub-paragraph (3) of the equalisation enactment further provides that if an arrester has obtained decree of furthcoming or a poinder has carried through a sale, he is still bound to account to those entitled to a pari passu ranking under the enactment. Where a process of poinding and sale, arrestment and furthcoming or arrestment and sale is complete and the funds are no longer in manibus curiae, the creditor claiming a pari passu ranking must raise an ordinary action for payment against the poinding or arresting creditor.[2] This is probably the safest course for the claimant to adopt though the sheriff court case cited[3] suggests that at least in a poinding, the poinding process remains in dependence until the period for equalisation has expired so that a minute in the process suffices.

5.22 Under the present law it is competent for creditors holding decrees or liquid grounds of debt to rank pari passu on the proceeds of arrestments and poindings. The provision was introduced in order to avoid a multiplicity of diligences,[4] and we suggest that that object is still relevant and worthwhile. However, on the analogy of the new statutory rules on conjoined arrestment orders (which have the effect that only a creditor holding a warrant for diligence may apply for, or for inclusion in, such an order[5]), it is for consideration whether only a creditor holding a decree or extract registered document of debt, ie a warrant for diligence, should be entitled to claim equalisation. In

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[1] Graham Stewart, p. 361.

[2] McGlashan op cit. pp. 360-361; Graham Stewart, p. 362; McFarlane v. Greig (1831) 9 S. 529; Stewart v. Stewart's Trs. (1916) 32 Sh. Ct. Reps. 43.

[3] Gillon & Co v. Christison (1909) 25 Sh. Ct. Reps. 283: see para. 5.20.

[4] Bankruptcy Act 1783, s. 2: see paras. 2.20 and 5.5 above.

[5] Debtors (Scotland) Act 1987, ss. 60(1) and 62(5).

this context, considerations of fairness are somewhat evenly balanced and the question is whether equalisation should be as widely available as possible, ie. available to creditors whose debts are instantly verifiable, or whether equalisation should be confined to creditors who could themselves execute diligence. We invite views.

5.23 We think that, as under the present law, "judicial production" in a process involving a competition should suffice. Where the process of arrestment and furthcoming or sale or of poinding and warrant sale has been completed in all other respects, there is as we have seen[1] some doubt whether the process remains in dependence so that claims for pari passu ranking may be made by lodging a minute in that process or whether it is necessary for the claimant to raise an action for payment of his pari passu share against the arresting or poinding creditor. We suggest that it should be made clear that the process does remain in dependence for this purpose. We further suggest that in some cases the requirement of judicial production within the statutory period may be unduly onerous and may lead to unnecessary court proceedings. If that is right, it should be competent for the claimant to elect to intimate his claim for a pari passu ranking by service of a prescribed notice by any competent mode of service, including postal service, within the statutory period, as an alternative to judicial production of the decree or liquid document of debt. Court procedure would then only be necessary if the claim were not accepted.

5.24 We propose:

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[1] See para. 5.21 above.

(1) A creditor holding a warrant for diligence in an extract decree or extract document of debt registered for execution should be entitled to claim a pari passu ranking on the proceeds of arrestments and poindings.

(2) Should a creditor holding a liquid document of debt not registered for execution continue to be entitled to make such a claim?

(3) As under the present law, it should be competent for the creditor to claim a pari passu ranking by judicially producing the decree or document of debt in a process relative to the subject of the arrested or poinded property.

(4) It should be made clear by statute that a process of furthcoming of moveable property, of sale of a vessel, or of poinding and warrant sale remains in dependence until at least the expiry of the equalisation period to enable a claim for pari passu ranking to be made by lodging a minute and judicial production in that process within that period, without prejudice to our proposal in Proposition 20 below for a further extension of the period during which the process remains in dependence.

(5) As an alternative to judicial production, it should be competent for a creditor to make a claim for a pari passu ranking by intimating his claim in a prescribed manner by postal service or any other competent legal mode of service within the statutory equalisation period.

(Proposition 19).

Period within which claim by arresting or poinding creditor may be made

5.25 Where a claim for equalisation is made by an arresting or poinding creditor it is clear that the arrestment or poinding must be executed within the statutory equalisation period but there is nothing in the equalisation enactment to suggest that the claim itself must be made within that period. Since the claim to a pari passu preference is of the nature of a security right, it is possible that the claim may be made at any time within the period of the long negative prescription of 20 years. This has sometimes been overlooked. Thus McGlashan [1] remarked: "Where claims are lodged in the poinding, it may be expedient to delay the division until four months after the poinding, to prevent the division being opened up by new claimants. Where the division has been carried out, all having received a share would require to be summoned to repeat [scil. repay] their proportional share to the new claimants which would be attended with trouble risk and expense". If we are right, on this reasoning no division should be made for 20 years, which is clearly unacceptable. There is also authority that the arresting or poinding creditor obtaining payment is a constructive trustee for any creditor claiming a pari passu ranking[2], and it is possible therefore that the claim would be treated as imprescriptible.[3] The law requires to be clarified and we suggest that the claim should be competent before the expiry of 2 months after the end of the equalisation period, ie. 6 months after the relevant constitution of apparent insolvency, that the process of furthcoming or sale should remain in dependence till at least that time, and that intimation in a prescribed manner should be competent. Where an arresting or poinding creditor makes such a claim, a cross-claim by the recipient of the claim should be competent within one month of his receipt of the claim.

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[1] Sheriff Court Practice (4th edn.) pp. 360-361.

[2] Gallacher v. Ballantine (1876) 13 S.L.R. 496 (discussed at para. 5.38 below).

[3] Prescription and Limitation (Scotland) Act 1973, Sch. 3, para. (e)(ii).

5.26 We propose:

(1) Where a creditor claims a pari passu ranking founding on an arrestment or poinding executed within the statutory equalisation period, the claim should be competent only if made within two months after the end of that period.

(2) A process of furthcoming of arrested moveable property, or sale of an arrested vessel or poinding and warrant sale should remain in dependence until the expiry of 6 months after the constitution of apparent insolvency to enable such a claim to be made by lodging a minute in the process.

(3) It should be competent for an arresting or poinding creditor to make his claim by service in the same manner as a creditor holding a decree.

(4) The recipient of such a claim should be entitled to make a cross-claim for a pari passu ranking on the proceeds of the claimant's diligence within one month after receiving intimation of the claim, and the cross-claim should be competent if made by minute in the claimant's diligence or by intimation in the prescribed manner to the claimant.

(Proposition 20).

Ranking where poinded or arrested goods transferred to creditor in default of sale

5.27 If poinded goods are not sold but their ownership is transferred to the poinding creditor in default of sale, [1] it would appear from sub-paragraph (1) of the equalisation provision that a pari passu preference can still be claimed by other arresters or poinders. Further sub-paragraph (3) provides that claimants holding decrees or liquid grounds of debt can rank as if they had executed an arrestment or poinding. On the other hand, while sub-paragraph (3) provides that the poinding or arresting creditor must account to claimants where the arrester has obtained decree of furthcoming and recovered payment or a poinder has carried through a sale, no provision is made for the case (which is very common) where the ownership of poinded goods passes to the poinder in default of sale, or where arrested goods are declared to belong to the arrester in default of sale.[2] This omission is probably inadvertent.

5.28 Bell [3] suggests that where goods are not sold the pari passu preference should be given effect as follows:

> "1. That if the goods are still extant, they must be taken as of their actual value, to be disposed of for the common behoof.
>
> 2. That if they have been bona fide disposed of, either at a less or greater value than the appraised value, the concurring creditor shall have part of the benefit and suffer part of the loss.

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[1] Debtors (Scotland) Act 1987, s. 37(6); see Graham Stewart, p. 180, fn. 8.

[2] Graham Stewart p. 241. In this case, since there is no appraised value as in poinding, Graham Stewart observes that the auctioneer would require to put a value on the goods to show how far the arrester's debt was extinguished. (idem).

[3] Commentaries, vol. 2, p. 59, fn. 3 (accepted by Graham Stewart, p. 362).

3. That if kept and used by the creditor, they must be taken ex necessitate as of the appraised value."

5.29 We propose:

It should be made clear by statute that a poinding or arresting creditor must account to creditors claiming a pari passu preference where the ownership of poinded or arrested goods passes to the poinder or arrester in default of sale.

(Proposition 21).

Sequestration and liquidation as equalising arrestments or poindings

5.30 Section 37(1)(b) of the Bankruptcy (Scotland) Act 1985 provides:

> "The order of the court awarding sequestration shall as from the date of sequestration have the effect, in relation to diligence done (whether before or after the date of sequestration) in respect of any part of the debtor's estate, of -
>
> (b) an arrestment in execution and decree of furthcoming, an arrestment in execution and warrant of sale, and a completed poinding,
>
> in favour of the creditors according to their respective entitlements."

This provision is applied with modifications to insolvent companies on liquidation so that the winding up order has as from the commencement of the winding up the same equalising effect in relation to diligence.[1] The result is that any arrestment or

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[1] Insolvency Act 1986, s. 185.

poinding executed before the 60 day period for the rendering ineffectual of arrestments or poindings by sequestration or liquidation[1] but within the statutory equalisation period (60 days before and 4 months after the constitution of apparent insolvency) will be equalised with the claims of the general body of creditors. By judicial interpretation,[2] the same result was achieved by the opening words of section 104 of the 1913 Act[3] and s. 37(1)(b) of the 1985 Act is a new version of s. 104 with amendments which give effect to the judicial interpretation.[4]

5.31 We do not propose any change to this provision. We think that the proposed time-limit of 6 months after the debtor's apparent insolvency on arresters' and poinders' claims for equalisation[5] would not apply to trustees in sequestration and liquidators of the debtor. The only requirement for pari passu

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[1] Bankruptcy (Scotland) Act 1985, s. 37(4) and (5).

[2] Stewart v. Jarvie 1938 S.C. 309.

[3] This provided: "The sequestration shall, at the date thereof, be equivalent to an arrestment in execution and decree of furthcoming, and to an executed and completed poinding;.....".

[4] In Stewart v. Jarvie 1938 S.C. 309, it was argued that the sequestration was equivalent to an arrestment by the trustee as an individual but the court held that it was equivalent to an arrestment by all the creditors claiming against the estate. This decision is now embodied in the words "in favour of the creditors according to their respective entitlements". The provision in section 104 of the 1913 Act that the sequestration was equivalent to an arrestment or poinding was in absolute and unqualified terms and thus appeared to apply for all purposes: Galbraith v. Campbell's Trs. (1885) 22 S.L.R. 602 at p. 604 per Lord Kinnear; approved Stewart v. Jarvie supra at p. 315. This went too far and section 37(1)(a) of the 1985 Act now makes sequestration a constructive diligence only "in relation to diligence done.... in respect of any part of the debtor's estate", ie. for the purpose of competitions with diligences.

[5] See Proposition 20(1), (para. 5.26).

ranking by the trustee or liquidator would be that the date of sequestration or commencement of winding up occurred within the statutory equalisation period (4 months after apparent insolvency is constituted).

5.32 We propose:

For the purpose of equalisation of arrestments and poindings, a sequestration or liquidation should continue to have effect as a constructive arrestment and poinding where the date of sequestration or commencement of the winding up occurs within the statutory equalisation period.

(Proposition 22).

Trust deeds for creditors

5.33 A trust deed for creditors may contain a clause to the effect that creditors acceding to the deed will surrender preferences acquired by arrestments and poindings executed during a period (usually 60 days) prior to the granting of the trust deed.[1] Where a trust deed becomes a protected trust deed, the clause will bind non-acceding as well as acceding creditors,[2] and as in the case of adjudications [3] we see no reason to change this result.

5.34 We propose:

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[1] See our Bankruptcy Report, para. 13.6.

[2] Bankruptcy (Scotland) Act 1985, Sch. 5, para. 6(a).

[3] See paras. 4.44 and 4.45 above.

It should continue to be competent for protected trust deeds for creditors to make provision for equalisation of arrestments and poindings which binds non-acceding as well as acceding creditors.

(Proposition 23).

Expenses of equalised diligence

5.35 Under the equalisation provisions where a creditor holding a decree or liquid grounds of debt claims a pari passu ranking within the statutory period, on sums recovered by a poinding or arresting creditor, the latter is allowed out of the fund for division "the expense of such recovery".[1] It is not entirely clear what expenses are covered by this expression. The general opinion is that the expense is limited to the cost of the particular diligence, and does not extend to prior steps for making the debt liquid or constituting the debtor notour bankrupt.[2] Where on the other hand, arrestments and poindings are equalised, no allowance is expressly made for excluding expenses from the funds of division.[3] Yet the expenses of poindings normally exceed greatly the expenses of arrestments and the expenses of poindings can vary greatly as between themselves, eg. because of differences in the mileage fees of sheriff officers. This contrasts with pre-1856 Act legislation which excluded diligence expenses from the equalisation funds.[4] We think that the pre-1856 Act solution is preferable.

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[1] 1985 Act, Sch. 7, para. 24(3).

[2] Graham Stewart, p. 184; Goudy, p.109.

[3] 1985 Act, Sch. 7, para. 24(1).

[4] See eg. Bankruptcy Act 1814 (c. 137) ss. 2 and 5.

5.36 Where the equalisation was between an arrestment or poinding and a sequestration under the 1913 Act s. 10 combined with s. 104, advantage could be taken of the following proviso to s.104: "provided that any arrester or poinder before the date of the sequestration who shall be thus deprived of the benefit of his diligence shall have preference out of such funds and effects for the expense bona fide incurred by him in procuring the warrant for and executing such diligence". In Stewart v. Jarvie [1] it was held that the proviso qualified both parts of s. 104 viz. that making sequestration a constructive arrestment or poinding for the purpose of equalisation, and that rendering prior arrestments and poindings within 60 days ineffectual. Under s. 37 of the 1985 Act, however, the provision on the preference for expenses (s. 37(5)) only qualifies the provision rendering prior arrestments and poindings ineffectual (s. 34(4)) and not the provision making sequestration a constructive arrestment or poinding for the purposes of equalisation (s. 37(1)). This change in the law seems to have been inadvertent, and we suggest that the old law should be restored.

5.37 We propose:

(1) **A creditor whose poinding or arrestment is made subject to a pari passu preference under the equalisation rules should be allowed the expenses of his diligence out of the fund for division not only (as under existing law) where the preference is claimed by a creditor founding on a decree or liquid document of debt but also where it is claimed by an arrester or poinder.**

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[1] 1938 S. C. 309 at pp. 314, 316.

(2) Where an arrestment or poinding is equalised with a sequestration or liquidation, the arrester or poinder should be allowed a preference out of the arrested or poinded property for the expenses bona fide incurred by him in procuring the warrant for and executing the arrestment or poinding.

(Proposition 24).

Further diligence by creditor whose diligence equalised

5.38 Where a creditor has satisfied his debt out of the proceeds of an arrestment or poinding, but is then obliged to share it with creditors claiming a pari passu ranking, he is generally entitled to use further diligence to recover the unpaid balance of his own debt in the sense that the court will not listen to a plea that the creditor has already realised the full amount of his debt.[1] The creditor is regarded as having obtained payment as trustee for any creditor who made a claim for a pari passu ranking.[2] Difficulty may however arise as a result of section 25 of the Debtors (Scotland) Act 1987 which restricts second poindings of goods on the same premises for the same debt except in relation to articles brought on to the premises since the first poinding. While exceptions to that restriction are enumerated, there is no exception safeguarding the creditor who has been compelled to share the fruits of a poinding under the rules on equalisation. We think that this omission should be rectified.

5.39 We propose:

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[1] Gallacher v. Ballantine (1876) 13 S. L. R. 496.
[2] Idem.

Where a creditor executing a poinding is obliged to share the proceeds of the poinding with pari passu claimants under the equalisation rules, the creditor should be entitled to execute a second poinding of goods on the same premises for the same debt notwithstanding the restriction on such poindings imposed by the Debtors (Scotland) Act 1987, s. 25.

(Proposition 25).

Arrestments and poindings after the equalisation period

5.40 Sub-paragraph (4) of the equalisation enactment provides in effect that arrestments used after the equalisation period shall not compete with those within that period but may rank with each other on any reversion of the fund attached in accordance with any enactment or rule of law relating thereto. The provision does not refer to poindings, and while commentators seem to agree that poindings are included by implication, [1] we think that they should be expressly included. Apparently sub-paragraph (4) was not primarily designed to regulate overlapping equalisation periods (discussed in para. 5.42) because a provision on these lines was enacted in 1814[2] before multiple notour bankruptcies triggering equalisation periods were first sought to be introduced (unsuccessfully) by the 1856 Act, ss. 9 and 12 and (successfully) by the 1913 Act, ss. 7 and 10.[3]

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[1] Graham Stewart, p. 181; Goudy, p. 110, fn. (a).

[2] See Bankruptcy Act 1814 s. 2; cf. s.6.

[3] See para. 5.7 above.

5.41 We propose:

Sub-paragraph (4) of para. 24 of Schedule 7 to the Bankruptcy (Scotland) Act 1985 (which provides that arrestments used after the equalisation period shall not compete with those within that period but rank on the reversion) should be expressly extended to poindings.

(Proposition 26).

Multiple overlapping equalisation periods

5.42 At common law, once a debtor has been rendered notour bankrupt, it was not competent to constitute his notour bankruptcy a second time unless he had recovered solvency in the interval.[1] The result was that after the expiry of the statutory equalisation period created by the first constitution of notour bankruptcy, no further equalisation period could be created for so long as the debtor continued to be insolvent. This was criticised as "productive of great injustice".[2] The law was changed by a series of enactments (described at paras. 5.6 and 5.7 above) and is now set out in the Bankruptcy (Scotland) Act 1985, s. 7 which provides that where a debtor is already apparently insolvent, his apparent insolvency may be constituted anew whenever the requirements for such constitution are satisfied. The 1985 Act does not expressly provide (as did the 1913 Act s. 7) that such constitution anew applies for all the purposes of the enactment on equalisation of arrestments and poindings, but it is thought that this was the intention and is the more likely interpretation, though the matter

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[1] Strang v. McIntosh 12 May 1821 F.C.; (1821) 1 S. 1.

[2] Bell, Commentaries, vol. 2, p. 76.

is perhaps not free from doubt.[1] In this discussion, we assume that multiple, overlapping equalisation periods are still competent.

5.43 The possibility of two or more overlapping equalisation periods raises the question of what is the proper method of ranking where an arrestment or poinding falls within the period of overlap, ie. falls within more than one equalisation period. The problems and possible methods of ranking are discussed by Mr G L Gretton in a recent article[2] which contains the first full analysis of the problem. The article demonstrates that the law is very uncertain, complicated and difficult to apply depending on such variables as the number of diligences, claims for ranking and overlapping equalisation periods. We begin by outlining the solutions identified by Mr Gretton, which involve multiple arrestments against a single fund, concentrating on an example with simple facts to focus the issues.[3]

5.44 Ranking in the case of multiple arrestments of a single fund. Assume that creditors X, Y and Z arrest a single bank account containing £30,000. Each creditor claims £18,000. The arrestments of X and Y fall within the equalisation period created by the first constitution of apparent insolvency, and the arrestments of Y and Z fall within the overlapping equalisation period created by the second constitution of apparent insolvency, so that Y's arrestment falls within the period of overlap. Mr Gretton identifies 5 possible methods of ranking.

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[1] See Wood v. Cranston & Elliot (1891) 18 R. 382 discussed at para. 5.7 above.

[2] "Multiple Notour Bankruptcy" (1983) 28 J.L.S.S. 18.

[3] The above article has a helpful discussion of both simple and more complex cases: ibid., pp. 20-21.

5.45 Method 1. Under Method 1, only the first constitution of apparent insolvency brings about equalisation. Accordingly:

X obtains £15,000

Y obtains £15,000

Z obtains nothing.

This was the solution adopted by Wardhaugh[1] relying on the provision in the equalisation enactment to the effect that diligences executed after an equalisation period are not to compete with diligences executed in that period.[2] Assuming, however, that the Bankruptcy (Scotland) Act 1985 has not inadvertently changed the law, and that second constitutions of apparent insolvency are available for the purposes of equalisation, that interpretation is not tenable.

5.46 Method 2. Under this method, all three arrestments rank pari passu on the ground that if X ranks pari passu with Y and Y ranks pari passu with Z, then X must rank pari passu with Z. In other words:

X obtains £10,000

Y obtains £10,000

Z obtains £10,000.

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[1] Scottish Bankruptcy Manual (5th edn.) p. 9.

[2] Bankruptcy (Scotland) Act 1985, Sch. 7, para. 24(4).

This solution was rejected by Lord Trayner in Wood v. Cranston and Elliot.[1] Moreover as Mr Gretton indicates,[2] it appears to be struck at by the provision in the equalisation enactment[3] to the effect that diligences executed after an equalisation period are not to compete with diligences of the same funds executed in that period, for under Method 2, X is prejudiced by Z's arrestment.

5.47 Method 3. The third method seeks to avoid this result by reference to the principle that X is to rank as if the second apparent insolvency had not occurred, ie. as if Z's arrestment was not in the field. This result is achieved by using the technique of double round, drawback ranking employed in competitions involving inhibitions under Bell's canons of ranking.[4] Thus X, Y and Z are first ranked pari passu on the whole fund: ie X, Y and Z each receive £10,000. Then there is ascertained the sum which X would have received if Z's arrestment had not been in the field: ie £15,000. Then X draws back from Z the difference between these 2 sums, ie. £15,000 less £10,000 equals £5,000. So:

X receives £15,000

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[1] (1891) 18 R. 382 at p. 385: "creditors who did diligence within four months after the second or third or fourth constitution of notour bankruptcy would all be entitled to rank pari passu with those who had done diligence within four months of the first constitution, which would result in this, that creditors would rank pari passu who had done diligence within sixteen months after constitution of notour bankruptcy, a result not provided for by the statute".

[2] Op. cit., at p. 19.

[3] Bankruptcy (Scotland) Act 1985, Sch. 7, para. 24(4).

[4] Bell, Commentaries, vol. 2, pp. 407-413; Baird and Brown v. Stirrat's Tr. (1872) 10 M. 414; Gretton, Inhibition and Adjudication Chapter 7.

Y receives £10,000

Z receives £ 5,000.

This method protects X's arrestment from the effect of a subsequent constitution of apparent insolvency in whose equalisation period X's arrestment does not fall. Mr Gretton [1] argues, however, that it fails to regulate correctly the relationship between the arrestments of Y and Z. As appears from para. 5.49 below, Z is unduly prejudiced by this method.

5.48 Method 4. The fourth method involves 2 steps. First X and Y rank pari passu so that X receives £15,000 and Y £15,000. Then the £15,000 allocated to Y is treated as a fund available for pari passu ranking among the creditors in the second equalisation period, so that Y and Z each receive £7,500. Thus:

X receives £15,000

Y receives £ 7,500

Z receives £ 7,500.

Mr Gretton argues that while this method correctly ensures that X is not prejudiced, it fails to regulate correctly the relationship between the arrestments of Y and Z. [2] In his view, Z must be ranked as if the first equalisation period did not exist, the general principle being that a creditor must be neither prejudiced nor benefited by equalisation periods of which is own arrestment is not a member.

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[1] Op. cit. at p. 19.
[2] Idem.

5.49 Method 5. Mr Gretton argues that "just as X's arrestment, since it does not fall within the second equalisation period, should not be prejudiced by that period, so Z's arrestment since it does not fall within the first equalisation period, should not be benefited by that period".[1] In other words, Z must receive only what he would have received if the first constitution of apparent insolvency had not occurred. On that view, X is ranked pari passu with Y as if the second equalisation period did not exist and thus receives £15,000 which is treated as his dividend. Then to ascertain Z's ranking, there is ascertained what X would have received if the first equalisation period had not occurred, viz. £18,000 leaving a balance of £12,000. Y and Z are ranked pari passu on that fund to ascertain Z's share which is £6,000. Subtraction yields the sum due to Y, namely £9,000. Thus:

X receives £15,000

Y receives £ 9,000

Z receives £ 6,000.

5.50 Comments on foregoing analysis. The foregoing analysis goes far towards clarifying the issues involved. The suggested solution (method 5) does however present some difficulties. First, in the foregoing example, all the diligences in the field are arrestments used against the same fund, and the argument proceeded as if the equalisation periods relate to the same fund. But the equalisation enactment applies also to diligences used against different funds. It follows that the fund for division may

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[1] Ibid., pp. 19-20.

fluctuate considerably according to the property or funds attached by the different diligences in each equalisation period. Second, the solution adopts the principle that at a certain stage in the double-round ranking a creditor is not to be prejudiced nor benefited by any constitution of apparent insolvency in whose equalisation period his diligence does not fall. This principle derives from Bell's canons of ranking of inhibitions and other rights[1] but it is not self-evident that these canons are relevant to pari passu ranking under the equalisation enactment.

5.51 Third, a further difficulty which any solution confronts is presented by sub-paragraph (4) of the equalisation enactment[2] which provides that arrestments executed for attaching the same effects of the debtor after an equalisation period shall not compete with those within that period but rank with each other on any reversion of the fund in accordance with any enactment or rule of law relating thereto, ie. in the normal case "first come, first served". The difficulty here is that sub-paragraph (4) seems to overlook the possibility of a second overlapping equalisation period involving diligences against the same fund. Such a possibility seems to involve that diligences used after the first equalisation period in a second overlapping equalisation period compete with diligences used within the first period if the latter diligences fall also within the second period, ie. are within the period of overlap. It may be that sub-paragraph (4) should be construed as applying only where there is no overlapping equalisation period but this seems inconsistent with the literal interpretation of sub-paragraph (4) which is that diligence and claims within the first period rank pari passu, and diligences and claims on the same fund within the second period outside the period of overlap rank only on the reversion. It should be noted

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[1] See para. 5.47, fn. 4.

[2] Bankruptcy (Scotland) Act 1985, Sch. 7, para. 24.

that sub-paragraph (4) does not apply, or applies only in part, in any case where the diligences in the second equalisation period include diligences affecting different funds from those in the first period.

5.52 Another possible interpretation. If the foregoing comments are correct, it may be that rules on the following lines accord better with the equalisation enactment.

(1) Where two or more equalisation periods overlap, the creditors whose diligences or claims fall within the first equalisation period are to be ranked pari passu on the proceeds of the diligences executed in that period, and the dividend thereby arising is treated as the dividend payable to the creditors whose diligences or claims fall within that period and not within any subsequent overlapping period.

(2) For the purpose of ascertaining the dividend payable to the other creditors whose diligences or claims fall within a second or subsequent overlapping equalisation period (the instant period):

(a) subject to para. (3) below, the fund for division is the proceeds of the diligences executed within the instant equalisation period less the dividend payable out of any of these diligences to any creditor whose diligence falls within a prior equalisation period but not the instant period;

(b) on that fund all the creditors whose diligences or claims fall in the instant period rank pari passu and

the dividend thereby arising is treated as the dividend payable to the creditors whose diligences or claims fall only in that period;

(c) creditors whose diligences or claims fall both in the instant equalisation period and any earlier overlapping period receive both the dividend arising on the ranking for the instant period and the dividend payable to them out of diligences which fall in an earlier equalisation period but not in the instant period.

(3) These rules are subject to modification on a literal construction of sub-para. (4) of the equalisation enactment[1] in a case where there is an arrestment in the equalisation period and after the period another arrestment in a later equalisation period attaches the same funds. In that case it seems that there is a separate ranking whereby the fund for division is the reversion remaining after the earlier arrestment, and the creditors whose diligences or claims fall within the later period but not the earlier period rank pari passu thereon.

5.53 Example: diligences against different funds. The following example may show how in our view the equalisation enactment is likely to operate in a case involving diligences attaching different funds, ie. where sub-para. (4) of the equalisation enactment does not apply.

A claiming £20,000 attaches £16,000

B claiming £20,000 attaches £16,000

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[1] Bankruptcy (Scotland) Act 1985, Sch. 7, para. 24.

C claiming £20,000 attaches £12,000

D claiming £20,000 attaches £12,000

Total sums attached £56, 000

There are 3 overlapping equalisation periods, with the diligences of A and B in the first: of B and C in the second; and C and D in the third. For the sake of simplicity, the expenses of each creditor's diligence are ignored.

First equalisation period

A gets from A's diligence a half share	£8,000
A gets from B's diligence a half share	£8,000
	£16,000
B gets from A's diligence a half share	£8,000
B gets from B's diligence a half share (£8,000) which however falls to be ranked in the second equalisation period.	

Second equalisation period

B gets from balance (£8,000) of B's diligence (£16,000) after deducting A's dividend (£8,000) a half share	£4,000
B gets from C's diligence (£12,000) a half share	£6,000
	£10,000
C gets from said balance of B's diligence a half share	£4,000
C gets from C's diligence a half share (£6,000) which falls to be ranked in the third equalisation period.	

Third equalisation period

C gets from balance (£6,000) of C's diligence (£12,000) after deducting B's share (£6,000) a half share	£3,000
C gets from D's diligence (£12,000) a half share	£6,000
	£9,000
D gets from said balance (£6,000) of C's diligence a half share	£3,000
D gets from D's diligence a half share	£6,000
	£9,000

Final division

A gets from first equalisation period		£16,000
B gets from first equalisation period	£8,000	
B gets from second equalisation period	£10,000	£18,000
C gets from second equalisation period	£4,000	
C gets from third equalisation period	£9,000	
		£13,000
D gets from third equalisation period		£9,000
Total sums distributed		£56,000

5.54 Proposals for reform. It seems to us that the complications created by overlapping equalisation periods are not justified by the benefits. Thus in the example set out in the foregoing paragraph, it does not seem to us that the final result of the extremely complicated processes of ranking is any more just and equitable to the creditors concerned than the result which would be achieved if each creditor were simply allowed to keep the fruits of his own diligence.

5.55 We conclude therefore that if, contrary to our provisional view, equalisation of diligences is not to be abolished, overlapping equalisation periods should be eliminated. Thus it could be provided that after the expiry of the first statutory equalisation period created by the first constitution of apparent insolvency against a debtor, no further equalisation period could be created for so long as the debtor remained insolvent. This would reinstate the law in force before the Bankruptcy (Scotland) Act

1913.[1] A second constitution of apparent insolvency while the debtor remained insolvent would continue to have effect for other purposes, such as applications for sequestration or liquidation, or irritant clauses in legal instruments. The possibility of sequestration or liquidation would remove some of the injustice noted by Bell.[2] Another possibility would be to provide that where apparent insolvency creating an equalisation period was constituted, no subsequent constitution of apparent insolvency would create an equalisation period unless it occurred more than 60 days plus 4 months after the earlier constitution of apparent insolvency. This might create great uncertainty as to whether a particular constitution of apparent insolvency had occurred within the period prohibiting equalisation. How would creditors know whether apparent insolvency had already been constituted and with what effect? This, however, is an inherent difficulty in the whole concept of equalisation of diligences.

5.56 We propose:

(1) **The rules on equalisation of arrestments and poindings should be amended so as to eliminate overlapping equalisation periods.**

(2) **Views are invited on which of the following provisions to achieve that purpose would be preferable, namely:**

(a) **a rule that after the expiry of the first equalisation period created by the first constitution of apparent**

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[1] Wood v. Cranston and Elliot (1891) 18R. 382; see para. 5.7 above.

[2] Commentaries, vol. 2, p. 76 quoted at para. 5.42 above.

insolvency against a debtor, no further equalisation period could be created for so long as the debtor remains insolvent; or

(b) a rule that where apparent insolvency creating an equalisation period is constituted, no subsequent constitution of apparent insolvency should create an equalisation period unless it occurs more than 4 months plus 60 days after the earlier constitution of apparent insolvency?

(Proposition 27).

5.57 Effect of time to pay decrees and orders. Part I of the Debtors (Scotland) Act 1987 introduces in Scots law time to pay directions in decrees for payment and time to pay orders providing for payment of debts by instalments or deferred lump sums. The court may recall an arrestment on the dependence when making or varying a time to pay direction in a decree, [1] and may recall an arrestment in execution or poinding when making or varying a time to pay order.[2] It is expressly provided,[3] however, that such a recall shall not prevent the creditor from being ranked by virtue of the recalled arrestment or poinding pari passu under the equalisation enactment on the proceeds of any other arrestment or poinding. This provision seems necessary for so long as equalisation of arrestments and poindings is competent.

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[1] 1987 Act, ss. 2(2) and 3(1)(b).

[2] Ibid., ss. 9(2)(d) and (e); 10(1)(b).

[3] Ibid., s. 13(2).

PART VI

EQUALISATION OF DILIGENCES AGAINST DECEASED DEBTOR'S ESTATE (IF EQUALISATION NOT ABOLISHED)

(1) Preliminary

6.1 The law on the effect of the debtor's death on equalisation of diligences presents special problems which we consider in this Part upon the assumption that, contrary to our provisional view that equalisation should be abolished [1], separate rules on the equalisation of adjudications and of arrestments and poindings will be retained and reformed along the lines indicated in Parts IV and V.

(2) The background law on passive transmission of debts on death and their enforcement

6.2 The law on the effect of the debtor's death on equalisation of adjudications has to be considered against the background of the law on three topics, namely:

(a) the passive transmission of liability for debts on the debtor's death;

(b) the remedies and diligences for enforcing debts against the estate of the deceased debtor or his successors at the instance of:

(i) the creditors of the deceased debtor; and

(ii) the creditors of the deceased debtor's successors; and

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[1] Proposition 1 at para. 2.29.

(c) the preferences of the deceased debtor's creditors over the creditors of his successors.

In our Discussion Paper No. 78, we propose certain reforms to this branch of law.[1] As we state there,[2] these reforms are confined to the minimum necessary to ensure that diligence against heritable property is workable and to rectify certain obvious defects in the law. In due course, we hope to issue a further Discussion Paper comprehensively reviewing the transmission of debts on death and related matters.[3] In this Part, we assume that the limited reforms referred to in Discussion Paper No. 78 will be made. The main features of the law as so reformed may be noted.

6.3 First, by judicial interpretation of the Succession (Scotland) Act 1964, it was held in Barclay's Bank Ltd v. McGreish[4] that a debtor's property passing on his death under a special destination ceases to be attachable for his debts. In our forthcoming Report on Succession we intend to recommend a reversion to the old law under which an heir of provision or disponee succeeding to heritable property under a special destination becomes liable for the debts of the deceased, but only to the value of that property. We intend also to recommend in that Report that the remedy of a creditor of the deceased should be a decree constituting the debt against the person succeeding under the special destination, which decree would authorise all the usual modes of diligence against moveables, and which could also be followed by an action of adjudication of heritable property, including property passing under the special destination.

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[1] Discussion Paper No. 78 on Adjudications for Debt and Related Matters, Part VII.

[2] Ibid., para. 7.2.

[3] Idem.

[4] 1983 S.L.T. 344 (O.H.).

6.4 Second, in our Discussion Paper No. 78 ,[1] we propose that heritable property passing under a special destination or other heritable property owned by the heir of provision or disponee succeeding under the destination should be liable to be attached by the creditors of the deceased by the new diligence of adjudication and sale executed in pursuance of the decree of constitution against the heir of provision or disponee. We do not propose any restriction preventing adjudication for a period after the debtor's death analogous to previous statutory restrictions.[2]

6.5 Third, where property of a debtor passing on his death is not subject to a special destination and no executor has confirmed to it, it is probably the law that as a result of the 1964 Act, s. 14(1) the appropriate diligence for attaching it is confirmation as executor-creditor.[3] In our Discussion Paper No. 78, we suggest that this rule should be affirmed and clarified by statute and the criterion of preference in competitions relating to heritable property should be the registration of the executor-creditor's title rather than the grant of decree of confirmation.[4]

6.6 Fourth, the Succession (Scotland) Act 1964 made new provision which affects the preferences of creditors of a deceased debtor over creditors of his successors.[5] The rules on the preferences of diligences attaching heritable estate were abolished, and the rules on the preferences of diligences attaching

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1 Adjudications for Debt and Related Matters Proposition 7.2 (para. 7.17).

2 Titles to Land Consolidation (Scotland) Act 1868, s. 61 repealed by the 1964 Act, Sch. 3.

3 Discussion Paper No. 78, para. 7.23.

4 Ibid., Proposition 7.5 (para. 7.34).

5 See Discussion Paper No. 78, para. 7.44 et seq.

the moveable estate were extended to heritable estate, though incompletely. There are three categories of case. (a) Where an executor has confirmed to heritable estate of a deceased debtor, then in competitions between adjudications by creditors of the deceased and adjudications by creditors of his successors, the former have a preference at common law for so long as the debtor's estate can be distinguished and separately identified.[1] In our Discussion Paper No. 78, we propose that this preference should only apply where the creditor of the deceased debtor adjudges within one year after the debtor's death.[2] (b) Where heritable estate has passed under a special destination, it appears that by an accident of statutory drafting, an adjudication of that estate by a creditor of the deceased does not have priority over an adjudication of that estate by a creditor of the person succeeding under the special destination.[3] In our Discussion Paper No. 78,, we propose that an adjudication by a creditor of the deceased attaching the specially destined property should have a preference over a prior adjudication of that property by a creditor of the person succeeding under the special destination, but only if the former adjudication is registered before the lapse of a year after the debtor's death.[4] (c) In the case of unconfirmed heritable estate not passing under a special destination, the Confirmation Act 1695 as amended[5] provides that a creditor of the deceased confirming as executor-creditor should have a preference over a creditor of the nearest-of-kin doing diligence within a year and a day after the deceased debtor's death. We do not propose any change to this provision of the

[1] Ibid. para. 7.46.

[2] Ibid. Proposition 7.8(1) (para. 7.49).

[3] Ibid. para. 7.47.

[4] Ibid. Proposition 7.8(2) (para. 7.49).

[5] By the 1964 Act, s. 14(1); Sch. 2, para. 3.

1695 Act at the present time.[1]

6.7 Fifth, it should be noted that the "first come, first served" principle is qualified not only by the Diligence Act 1661 and the Bankruptcy (Scotland) Act 1985, Sch. 7, para. 24, which generally apply to diligences against living debtors, but also on the debtor's death by the Act of Sederunt anent Executors-creditors of 28 February 1662, a provision on substantive law. The Act of Sederunt provides that all creditors using legal "diligence" within 6 months of the debtor's death by one of three methods, namely -

(i) by citing executors or intromitters;

(ii) by confirming as executor-creditor; or

(iii) by citing an executor-creditor,

should rank pari passu with other creditors using "more timely" diligence "by obtaining themselves decerned or confirmed executors-creditors or otherwise", the former bearing a share of the expense. The word "diligence" is used in the Act of Sederunt in a special sense so as to refer inter alia to citation of an executor or executor-creditor. This reflects an old rule of the common law under which an executor could not pay to a creditor money out of funds in the executor's possession or control if another creditor interpelled him from payment by a citation in an action against the executor.[2] The Act of Sederunt originally applied to diligences against moveable property, and consequently the list of "diligences" equalised with " more timely" diligences does not expressly refer to an adjudication eg. against heritable property forming part of the executry estate. The Act of

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[1] Discussion Paper, para. 7.48.

[2] Baron Hume's Lectures, vol. V, p. 210; Bell, Commentaries vol. 2, p. 84; Russell v. Simes (1791) Bell's Octavo Cases 217.

Sederunt does however presumably now apply to confirmation as executor-creditor attaching heritable estate.

6.8 The Act of Sederunt resembles the enactments on equalisation of diligences to some extent, but there are important differences. (i) It forms the basis of the rule that an executor is neither entitled nor bound to pay the deceased's debts till the expiry of 6 months after the death.[1] Until that time, he does not know which diligences or claims will require to be ranked pari passu.[2] (ii) There is a view that diligence against the executry estate is incompetent for 6 months after the debtor's death, except for the purpose of equalisation under the Bankruptcy Acts with diligences against moveables executed during the debtor's lifetime.[3] There is a contrary view that the Act of Sederunt does not prohibit diligence within the 6 months after death but presumes that such diligence can be used and merely provides that anyone else using it within the 6 months ranks pari passu.[4] (iii) Bell distinguishes the Act of Sederunt of 1662 so far as applying to claims against an executry from the Diligence Act 1661 in the following terms:[5]

> "This pari passu preference resembles the pari passu preference established for adjudications within year and day of the first effectual; it equalizes all claims against the executry of a deceased debtor, legally notified by citation, within six months after death. But there is one

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[1] Wilson and Duncan, pp. 453-4.

[2] Erskine, Institute II, 9. 45; Baron Hume's Lectures, vol. V pp. 211-212; McPherson v. Cameron (1941) 57 Sh. Ct. Reps. 64 at p. 67.

[3] Graham Stewart, pp. 65, 670 and 671.

[4] Globe Insurance Co. v. Scott's Trs. (1849) 11 D. 618 at p. 638 per Lord Fullerton; McPherson v. Cameron, supra, at pp. 66-67.

[5] Bell, Commentaries vol. 2, p. 83.

> marked distinction between the two rules. That which is established for adjudications is absolutely exclusive to all creditors who have not obtained decree within year and day; that which is provided for claims upon the executry is not exclusive, but leaves room for creditors to apply even after the appointed term has arrived. The distinction arises from the very constitution of the two rules. The one is a statutory rule, and the point from which the term runs is intimated to the public by the record; the other is a point of common law, moulded into shape .... by the Act of Sederunt..... which [is] intended only to secure at all events a delay of the division long enough to allow creditors to make their claims, but without having any penal consequence should the funds by accident remain undivided after the elapse of the appointed term".

Accordingly, a citation of a universal executor (ie. an executor-nominate, or executor-dative qua next-of-kin or surviving spouse) or a decree against him does not of itself give a preference over creditors claiming a share in the estate after the 6 months while the estate is undivided.[1] The object of the Act of Sederunt was to give a citation the benefit of an equalising dividend in a competition with "more timely diligences" completed within the 6 months and not to give it a preference over claims made after the 6 months while the estate is undistributed.[2](iv) It appears, however, that an executor-creditor obtaining confirmation, and any creditor citing him, within the 6 months obtains a preference over any creditor claiming after the 6 months.[3] (v) The Act of Sederunt only regulates the ranking of citations or diligences used within the 6 months. Competitions between creditors using diligence against confirmed or unconfirmed estate after the 6 months are regulated by the ordinary rules of ranking as if the

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[1] Russell v. Simes (1791) Bell's Octavo Cases 217; Bell Commentaries, vol. 2. p. 84.

[2] Globe Insurance Co. v. Scott's Trs. (1849) 11D. 618 at p. 638 per Lord Fullerton.

[3] Bell, Commentaries, vol. 2, pp. 84-85.

Act of Sederunt had not been enacted.[1] There is a special rule under which confirmation of a universal executor to estate of which he is a creditor has effect as a constructive diligence for ranking purposes. Thus where a universal executor confirms in that character within the 6 months, he has a right of retention in respect of a debt due to him by the estate. This right enables him to rank pari passu with all creditors who have used citation or diligence within the 6 months and preferably to those who have not all as if he had confirmed as executor-creditor.[2] Moreover confirmation of a universal executor after the 6 months also gives the executor a right of retention in respect of a debt due to him by the estate, equivalent to diligence for ranking purposes, so that he thereby has a preference over creditors using diligence against the executry estate later.[3] In our Discussion Paper No. 78,[4] we seek views on whether in a competition with diligences attaching heritable property, the executor's right of retention should have effect only if his title to that right is registered in the property registers in the prescribed manner, registration of his title rather than confirmation being the criterion of preference. (vii) The Act of Sederunt is extremely difficult to construe. It seems to have the effect that citations of the executor, the universal executor's right of retention, confirmations as executor-creditor and citations of an executor-creditor, within the 6 months all rank pari passu. How this would work in practice is not clear, eg. in a case where a creditor cites an executor within the 6 months, how is an executor-creditor confirming within the 6 months supposed to know about the citation?

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[1] Erskine, Institute III, 9, 46; Bell, Commentaries vol.2, p. 84; Graham Stewart, pp. 65-66; Atkinson, Mure and Bogle v. Learmonth and Lindsay (1808) Mor. "Service and Confirmation". App'x No. 3; Globe Insurance Co. v. Scott's Trs. (1849) IID. 618.

[2] Bell, Commentaries vol. 2, pp. 80-81; Napier v. Menzies (1740) Mor. 3849; Erskine Institute III, 9, 45 note (a); Graham Stewart p. 444.

[3] Idem; McDowal's Creditors v. McDowal (1742) Mor.3936; McLeod v. Wilson (1832) 15 S. 1043.

[4] Proposition 7.9 (para. 7.53).

(3) Equalisation of adjudications against deceased debtor's estate and related matters

6.9 The law on the equalisation of adjudications against a deceased debtor's estate is complicated by a number of variable factors, including whether the diligences in the field are all begun after the debtor's death or include a diligence begun during his life; and whether they are used by the creditors of the deceased debtor or by creditors of his successors. In summary, the following cases have to be considered:

(a) where the debtor dies during an equalisation period created by an adjudication registered during his life, and the competition arises between adjudications used by creditors of the deceased;

(b) where the debtor dies during an equalisation period created by an adjudication registered during his life and the competition arises between (i) adjudications by creditors of the deceased and (ii) diligences by creditors of his successors;

(c) where after the debtor's death a competition arises between diligences by creditors of the deceased, all begun after his death;

(d) where after the debtor's death a competition arises between diligences by creditors of the deceased and by creditors of his successors, all begun after his death; and

(e) where after the debtor's death a competition arises between diligences by creditors of the deceased debtor's successors all begun after his death.

We now turn to examine these cases in that sequence.

6.10 Debtor dies during equalisation period; competition between creditors of deceased. Where a debtor dies during an equalisation period created by the registration of an adjudication during his life, a competition may arise between that adjudication and adjudications of the same subjects by creditors of the deceased begun after his death but within the equalisation period. Such a competition is possible because of the rule that an adjudication begun during the debtor's life can be continued against his estate after his death.[1] Before the Succession (Scotland) Act 1964 came into force, it was well established that if the debtor had died after the first effectual adjudication had been used, his other creditors could claim a pari passu ranking under the Diligence Act 1661 if they adjudged against the heir, or against property which the heir had renounced (adjudication contra haereditatem jacentem), within the statutory year and a day after the first effectual adjudication.[2] If the later adjudgers might be deprived of their pari passu ranking by the statutory 6 months period after death during which adjudications were not competent,[3] (which period had replaced the heir's common law annus deliberandi), the Court would allow the creditor to adjudge as if the heir had renounced the property (and as if therefore the 6 months restriction did not apply), reserving all objections contra

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[1] See also Discussion Paper No. 78, Proposition 7.1 (para. 7.10).

[2] Graham Stewart, pp. 642 and 672; Bell, Commentaries vol. 1, p. 763; Sinclair v. Earl of Caithness (1781) Mor. 268; Hailes 894.

[3] Titles to Land Consolidation (Scotland) Act 1868, s. 61; see Discussion Paper No. 78, para. 7.14.

executionem.[1]

6.11 In future, if the proposals in Discussion Paper No. 78 referred to above are implemented, the diligences which may be begun by the deceased's creditors after his death might include -

(a) where the adjudged property passes under a special destination, a second adjudication of that property in pursuance of a decree constituting the debt against the heir of provision or disponee;[2]

(b) where the adjudged property does not pass under a special destination but an executor has not confirmed to it, a confirmation as executor-creditor;[3] and

(c) where an executor has confirmed to the adjudged property, a second adjudication against the property in pursuance of a decree against the executor.[4]

In case (a) there seems no reason to depart from the rule whereby the second adjudication ranks pari passu with the first adjudication if registered within the equalisation period.

6.12 In case (b), we assume that, as proposed in Discussion Paper No. 78,[5] a confirmation as executor-creditor of the unconfirmed heritable estate rather than adjudication will be the appropriate form of diligence. We propose that a confirmation as

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[1] See fn. 2 above; Erskine, Institute, III, 8, 55.
[2] See Graham Stewart, pp. 644-646.
[3] Ibid., paras. 7.18 to 7.22.
[4] Ibid., paras. 7.18 to 7.22.
[5] Proposition 7.5 (para. 7.34).

executor-creditor, should be equalised with the prior adjudication if the confirmation is registered in the property registers within the statutory equalisation period.If the appropriate form of diligence had been adjudication, there would be little doubt that that adjudication should rank pari passu and it should make no difference that the appropriate form of diligence happens to be confirmation as executor-creditor. The executor-creditor's share might have itself to be shared among creditors ranking pari passu on the proceeds of the confirmation,[1] but such ranking would not affect the ranking under the equalisation rules.

6.13 In case (c) where an executor has confirmed to adjudged property, different questions arise. We have proposed in Discussion Paper No. 78[2] that it should be competent for a creditor of a deceased debtor seeking to adjudge to commence his diligence within the 6 months after the debtor's death specified by the Act of Sederunt of 28 February 1662 by serving a notice of entitlement to adjudge and registering a notice of litigiosity. However, an adjudication following thereon would not be registrable till after the expiry of a 3-months equalisation period begun by an adjudication during the debtor's life because of the duration of the mandatory period of delay and litigiosity (which we propose might be 9 months) prior to such registration. There is, however, good authority that where an arrestment against executry estate is necessary to equalise under the Bankruptcy Acts a preference acquired by another diligence during the debtor's life, it can be competently executed to this effect, this rule being based on the analogy of the old law on the equalisation of an adjudication against an heir-at-law with an adjudication during the

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[1] ie. under the Act of Sederunt anent Executors-creditors of 28 February 1662.

[2] Proposition 7.3 (para. 7.19).

ancestor's life.[1] It is for consideration whether a similar rule should apply so as to allow an adjudication against the executry estate during the equalisation period. We invite views.

6.14 In cases where the creditor must first constitute his debt by decree against the executor or successor of the debtor, or against his estate by decree cognitionis causa tantum, there is good authority that the court may dispense with procedure in the creditor's action of constitution of the debt eg. by refusing to hear defences or allowing immediate extract of the decree of constitution of the debt, "in order to avoid the injustice of throwing such a creditor beyond the appointed term", but under reservation of all objections contra executionem.[2] It is for consideration whether such a rule should apply to the new system of equalisation of adjudications. It might be thought that the rule would unduly complicate the law, but in the absence of such a rule most adjudications would not be registered till after the equalisation period. We invite views.

6.15 We propose:

(1) **Where a debtor dies during an equalisation period created by the registration of an adjudication during his life, its preference should be equalised with debts due by the deceased secured by an adjudication or confirmation as executor-creditor registered after his death within the equalisation period.**

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[1] Bell, Commentaries, vol. 2, p. 84; Graham Stewart, p. 65.
[2] Bell, Commentaries, vol. 2, p. 84.

(2) **Should the court be empowered to facilitate equalisation of adjudications where expiry of an equalisation period begun during the debtor's life is imminent by:**

(a) **dispensing with steps in procedure in a creditor's action to constitute the debt raised after the debtor's death, and**

(b) **shortening or dispensing with the mandatory period of litigiosity required before an adjudication is registered,**

under reservation of all objections against diligence?

(Proposition 28).

6.16 Debtor dies during equalisation period; competition between his creditors and creditors of his successors. Where the debtor dies during an equalisation period created by the registration of an adjudication during his life, and a competition arises between the deceased's creditors and the creditors of his successors, we see no reason to depart from the general principle that diligences of the creditors of the deceased should be preferred to diligences of the creditors of his successors. The equalisation rules should apply only to diligences which would rank pari passu if registered on the same date.

6.17 We propose:

Where a debtor dies during an equalisation period created by the registration of an adjudication during his life, a creditor of the deceased's successors registering an

adjudication or a confirmation as executor-creditor attaching the adjudged property within the equalisation period should not be eligible to rank pari passu with the first adjudger under the equalisation rules but should rank only on the reversion.

(Proposition 29).

6.18 Competitions between deceased's creditors' diligences begun after his death against his heritable estate. Under the Diligence Act 1661, there is no doubt that the first effectual adjudication establishing an equalisation period could be an adjudication against the estate of a deceased debtor used after his death by a creditor of the deceased.[1] We suggest that this rule should apply where competing adjudications are used by creditors of the deceased against property passing under a special destination or against other heritable property belonging to the person succeeding under the special destination.

6.19 The cases will probably be rare where competing adjudications are registered against heritable property forming part of an executry estate. It is established however that any creditor of the deceased debtor may acquire a preference by arresting in the hands of debtors to the deceased's executry estate.[2] By analogy, we think that an adjudication of executry

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[1] The Diligence Act 1661 provided that its provisions extended to "adjudications for debt" as if they were comprisings. The quoted words had reference to adjudications contra haereditatem jacentem which were the only type of adjudications for debt competent before the Adjudications Act 1672. In Marshall's Creditors v. Hamilton (1709) Mor. 47, a decree of adjudication contra haereditatem jacentem granted in the sheriff court was held to have established an equalisation period.

[2] Graham Stewart, pp. 65-66; Atkinson, Mure and Bogle v. Learmonth and Lindsay (1808) Mor. s.v. "Services and Confirmation", Appendix., No. 3.

estate registered after the 6 months period should give the adjudger a preference, and that the statutory equalisation rules should apply to that preference if the same subjects are adjudged by another creditor within the equalisation period created by that adjudication.

6.20 We referred above[1] to the common law rule under which a "universal" executor who is himself a creditor of the deceased acquires by his confirmation the same preference for the debt due to himself as if he had confirmed executor-creditor so that he can pay the debt by retention. In our Discussion Paper No. 78[2] we seek views on whether this right of retention and preference should apply to heritable property, and we propose there that if it should so apply, the criterion of preference should be the registration of the executor's title to the right of retention in the property registers. We now propose that if such a right of retention and preference is applied to heritable property by virtue of registration of the executor's title, the registration of his title to that right should have the same effect as the registration of an adjudication in the executor's favour for the purposes of the rules on equalisation of adjudications.

6.21 In the case of unconfirmed heritable property not passing under a special destination, we propose elsewhere that the appropriate form of diligence would continue to be confirmation as executor-creditor.[3] The Act of Sederunt anent Executors-creditors of 28 February 1662 makes provision for pari passu ranking on the proceeds of a confirmation as executor-creditor by creditors citing him[4] and, while this Act of Sederunt may require review in due

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[1] See para. 6.8, head (vi).

[2] Proposition 7.9 (para. 7.53).

[3] See Discussion Paper No. 78, Proposition 7.5 (para. 7.34).

[4] See para. 6.7 above.

course, we make no proposals for changing these rules at the present time.

6.22 We propose:

(1) **In a competition between adjudications registered by creditors of a deceased debtor after his death, the rules on equalisation of adjudications should apply.**

(2) **If it is decided following consultation on our Discussion Paper No. 78, Proposition 7.9 (para. 7.53), that the right of an executor-nominate, or executor-dative qua next-of-kin or surviving spouse, to retain confirmed estate for payment of a debt due by the deceased to himself should apply to heritable property forming part of the confirmed estate, and that the registration of the executor's title to that right in the property registers should be the criterion of his preference, then we propose that the registration of the executor's title should have the same effect as the registration of an adjudication in his favour for the purposes of the rules on the equalisation of adjudications.**

(Proposition 30).

6.23 Competitions between adjudications by creditors of deceased debtor and adjudications by creditors of his successors, begun after his death. A competition could arise between adjudications by creditors of a deceased and adjudications by creditors of his successors all registered after his death. At para. 6.6 above, we referred to the rules on preferences which creditors of a deceased have and will have, over creditors of the

successors of the deceased, where the creditors of the deceased register an adjudication within a year after the debtor's death. [1] It is only when the creditor of the deceased registers an adjudication after the expiry of that year that the rules on equalisation should apply.

6.24 Accordingly we propose:

> **In a competition between an adjudication by a creditor of a deceased debtor and an adjudication by a creditor of his successor, both registered after the deceased debtor's death, the rules on equalisation of adjudications should not apply where the creditor of the deceased debtor has acquired a preference over the other creditor by registering his adjudication within a year after that death in accordance with proposals in Discussion Paper No. 78, Proposition 7.8 (para. 7.49).**

(Proposition 31).

6.25 Competitions between diligences by creditors of deceased debtor's successors begun after his death. Where adjudications are used by the creditors of a deceased debtor's successors begun after his death, and there is no adjudication by a creditor of the deceased entitled to a preference which would complicate the ranking, there seems no reason why the equalisation rules should not apply.

6.26 Accordingly we propose:

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[1] And see Discussion Paper No. 78, Proposition 7.8 (para. 7.49).

The rules on equalisation of adjudications should apply in a competition between adjudications registered by creditors of a deceased debtor's successors.

(Proposition 32).

(4) Equalisation of arrestments and poindings against deceased debtor's estate

6.27 Whereas an adjudication registered against a deceased debtor's estate after his death can establish an equalisation period, it is thought that apparent insolvency (on which the equalisation of arrestments and poindings depends) cannot be constituted against a debtor after his death.[1] For this and other reasons, the policy issues are simpler than in equalisation of adjudications.

6.28 A poinding or arrestment executed during the debtor's life may be completed by sale or furthcoming notwithstanding his death.[2] If apparent insolvency has been constituted against the debtor during his life, a poinding or arrestment within the statutory equalisation period may be equalised after the debtor's death by a creditor's judicial production within that period of a liquid document of debt or decree against the deceased, or of a decree in an action against the executor, or by an arrestment on the dependence of an action against the executor.[3] While under the Act of Sederunt of 28 February 1662, diligence against the estate during the 6 months after the debtor's death is generally

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[1] Bell, Commentaries vol. 2, p. 84 "no man can be declared a bankrupt after he is dead...". The same rule appears to apply to "apparent insolvency", Bankruptcy (Scotland) Act 1985, s. 7(1), except possibly where the debtor is sequestrated after his death though this is very doubtful and not material to equalisation outside sequestration.

[2] Graham Stewart, pp. 134, 363, 670.

[3] Ibid. pp. 671-672.

ineffectual to secure a preference for the creditor or to prevent the executor ingathering the estate, nevertheless a diligence (such as an arrestment on the dependence of an action against the executor) may be executed for the purpose of equalising a diligence executed before the debtor's death.[1]

6.29 There is good authority that where expiry of the equalisation period is imminent, decree in an action of constitution of the debt against the executor would be allowed to pass, reserving objections contra executionem, if that were necessary to let in the creditor's claim within that period.[2] Nowadays recourse to this rule must almost always be unnecessary because the creditor holding a liquid document of debt or arresting on the dependence of an action against the executor may claim a pari passu ranking on the fruits of equalised arrestments or poindings. But, if warrant for arrestment on the dependence were to be a matter for the court's discretion and no longer obtainable as of right,[3] this rule may become of more practical relevance. Meantime we make no proposals concerning it.

6.30 We considered whether it should be provided that a confirmation as executor-creditor over moveable property within the statutory period for the equalisation of arrestments and poindings should rank pari passu with these diligences. We think that such a rule is unnecessary. The executor-creditor, at least if he is a creditor of the deceased (as distinct from a creditor of the deceased's executors or beneficiaries), may claim a pari passu ranking on the proceeds of arrestments and poindings on the

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[1] Bell, Commentaries, vol. 2, p. 84.

[2] Idem.

[3] This matter will be considered in a future Discussion Paper on diligence on the dependence.

deceased's estate by founding on a decree or liquid document of debt.[1] Conversely, the arresting or poinding creditor can claim a pari passu ranking on the executor-creditor's diligence by the simple expedient of citing him within 6 months of the debtor's death.[2] In these circumstances, there is no need to subsume confirmations as executor-creditor within the rules on equalisation of arrestments and poindings.

6.31 In general, the common law rules on preferences of a debtor's creditors over the creditors of the debtor's successors would seem to preclude a creditor of the successors from claiming a pari passu ranking on the proceeds of arrestments and poindings executed at the instance of the creditors of the deceased.[3] The principle is that only claims by creditors whose diligence would rank pari passu with poindings and arrestments if executed on the same date should be entitled to rank pari passu on the proceeds of those poindings and arrestments.

6.32 We propose:

> **No change should be made to the rules on equalisation of arrestments and poindings against the estate of a debtor to cater for the case where the debtor dies during an equalisation period.**

(Proposition 33).

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[1] Bankruptcy (Scotland) Act 1985, Sch.7, para. 24(3). If the poinded or arrested property were comprised in the estate to which the executor-creditor had confirmed, the confirmation would have priority over a bare arrestment or bare poinding. This anomalous rule may require to be reviewed in due course.

[2] Act of Sederunt of 28 February 1662.

[3] Cf. paras. 6.18 - 6.20 above.

PART VII

SUMMARY OF PROVISIONAL PROPOSALS

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

PROVISIONAL PROPOSAL FOR ABOLITION OF EQUALISATION OF DILIGENCES

1. We provisionally propose that:

   (a) the rules on equalisation of adjudications set out in the Diligence Act 1661; and

   (b) the rules on equalisation of arrestments and poindings set out in the Bankruptcy (Scotland) Act 1985, Schedule 7, para. 24,

should be abolished.

(Para 2.29)

2. If equalisation of adjudications is abolished, new provision should be made, on the model of section 37(4) and (5) of the Bankruptcy (Scotland) Act 1985 as extended by the Insolvency Act 1986, s. 185(which relate to the effect of sequestration and liquidation in rendering ineffectual prior arrestments and poindings), enacting that no adjudication

registered within 60 days before the date of sequestration, or the commencement of the winding up of a company, should be effectual to create a preference for the adjudger (in a question with the trustee or liquidator).

(Para. 2.31).

FUSION OR RETENTION OF SEPARATE EQUALISATION PROVISIONS (IF EQUALISATION NOT ABOLISHED)?

3.

On the assumption that, contrary to our provisional view in Proposition 1, equalisation of diligences outside insolvency processes should be retained and reformed rather than abolished, the rules on the equalisation of adjudications should continue to be separate and distinct from the rules on the equalisation of poindings and arrestments.

(Para. 3.5).

REFORM OF EQUALISATION OF ADJUDICATIONS (IF EQUALISATION NOT ABOLISHED)

4.

(1) If it is decided (contrary to our provisional view) that equalisation of adjudications should not be abolished, the rules on equalisation of adjudications in the Diligence Act 1661 should be repealed and replaced by a modern statute.

(2) The general rule should be that where:

(a) property belonging to a debtor is attached by registration of an adjudication ("the first adjudication") at a time when no other adjudication attaching the property is in effect; and

(b) within a period of 3 months after the date of registration of the first adjudication, another adjudication is registered or other adjudications are registered

then, in all competitions of creditors affecting the adjudged property, the debts enforced by all of those adjudications should rank pari passu as if all the adjudications had been registered on the date of registration of the first adjudication.

(3) During the 3 months equalisation period, further steps in the diligence (such as advertisements for sale and the sale itself) and applications for restriction of the adjudication should as a general rule be incompetent.

(Para. 4.11).

Creditors' claims qualifying for pari passu ranking

5.

(1) The rules on equalisation of adjudications should apply to:

(a) adjudications for payment of personal debts;

(b) if adjudications on the dependence of court actions are to be competent, such an adjudication provided that it is followed up without undue delay.

This proposal is without prejudice to the proposals in Part VI on equalisation of adjudications against a debtor's estate after his death.

(2) The rules on equalisation of adjudications or pari passu ranking should not be extended to the claims of creditors holding warrants for diligence or liquid documents of debt.

(3) An adjudication should only be equalised with another adjudication attaching the same subjects.

(Para. 4.17).

Period during which adjudger's claim for pari passu ranking competent

6.

The period during which an adjudger's claim for pari passu ranking on the proceeds of sale of adjudged property is competent should be regulated by the short negative prescription of five years.

(Para. 4.19).

Title to exercise adjudger's remedies

7.

In the case of concurrent adjudications attaching the same property, the fact that the co-adjudgers have a right to rank pari passu should not affect the rules proposed in Discussion Paper No. 78 determining which co-adjudger should normally have the sole right to exercise the remedies of sale and foreclosure.

(Para. 4.21).

Effect of extinction of first adjudication otherwise than by sale or foreclosure

8.

(1) Where during or after the proposed two months period for equalisation, the first adjudication is extinguished otherwise than by sale or foreclosure, then any debt or debts, secured by other adjudications registered later in that period, remaining payable should retain the privilege of ranking (pari passu among themselves if more than one) as if registered on the date of registration of the first adjudication.

(2) Where -

(a) the first adjudication is extinguished otherwise than by sale or decree of foreclosure; and

(b) within the statutory equalisation period of 3 months following the first adjudication, another adjudication ("the second adjudication") is registered whether before or after extinction of the first adjudication,

then a debt secured by a third adjudication registered after the expiry of the 3 months period following the first adjudication should not rank pari passu with the debt secured by the second adjudication, notwithstanding that the third adjudication may have been registered within 3 months after the second adjudication.

(Para. 4.25).

Liability for expenses

9.

(1) The adjudger's expenses chargeable against the debtor incurred in connection with the sale and any attempted sale should be a first charge on the proceeds of sale and deducted from the fund for division among pari passu adjudgers and other creditors as mentioned in Proposition 5.18 (para. 5.92) in Discussion Paper No. 78.

(2) Other adjudication expenses due to pari passu co-adjudgers should be treated for ranking purposes in the same way as the debts due to those co-adjudgers.

(Para. 4.27).

Pari passu claims on assignation of debt and adjudication; on sale; and on foreclosure

10.

(1) Where the debt secured by an adjudication and the adjudication itself are assigned for a price to a third party purchaser, any co-adjudgers entitled to rank pari passu with the selling adjudger should not be entitled to rank (pari passu or otherwise) on the price. The assignee-purchaser should be in the same position with respect to pari passu adjudgers as the cedent would have been if the assignation has not been made.

(2) Where an adjudger exercises his power of sale or obtains decree of foreclosure, the rules should be as proposed in our Discussion Paper No. 78, that is to say -

(a) in the event of sale, the selling adjudger must hold the proceeds of sale for the benefit of those entitled to rank thereon, including pari passu adjudgers; and

(b) in the event of foreclosure, the registration of the extract decree of foreclosure should disburden the subjects of the foreclosing adjudger's adjudication but the subjects should remain burdened to a proportionate extent by any adjudications ranking prior to or pari passu with that adjudication.

(Para. 4.31).

Dispensation with procedure to facilitate pari passu ranking

11.

Should the court be empowered to shorten the period of litigiosity preceding a notice of adjudication proposed in Discussion Paper No. 78, on the application of a creditor seeking to adjudge, in order to enable the creditor to qualify for pari passu ranking by registering an adjudication before the expiry of the equalisation period?

(Para. 4.33).

Competitions with voluntary heritable securities

12.

Where the registration of an adjudication is followed by the registration of a heritable security and thereafter by the registration of a second adjudication in the equalisation period constituted by the first adjudication, should the law on ranking be simplified by allowing the second adjudication to rank pari passu with the first adjudication in priority to the standard security?

(Para. 4.39).

Sequestration and liquidation as constructive adjudications for debt

13.

(1) For the purpose of the rules on equalisation of adjudications with the constructive adjudication effected by sequestrations and liquidations, a sequestration and a liquidation should have effect as if the award of sequestration or the winding up order were a notice of adjudication registered in the property registers on the date of sequestration or commencement of the winding up.

(2) If the rules on equalisation are retained, provision should be made, on the analogy of section 37(4) and (5) of the Bankruptcy (Scotland) Act 1985, as extended by the Insolvency Act 1986, s. 185, for rendering ineffectual in a question with the trustee or liquidator adjudications registered within 60 days before the date of sequestration or commencement of the winding up.

(Para. 4.43).

Trust deeds for creditors

14.

It should continue to be competent for protected trust deeds for creditors to make provision for equalisation of adjudications which binds non-acceding as well as acceding creditors.

(Para. 4.45).

REFORM OF EQUALISATION OF ARRESTMENTS AND POINDINGS (IF EQUALISATION NOT ABOLISHED)

The general principle

15.

(1) If equalisation of arrestments and poindings is not to be abolished, the main provisions on equalisation of arrestments and poindings should continue to be that all arrestments and poindings executed within a statutory period defined by reference to the constitution of the debtor's apparent insolvency should rank pari passu, subject to proposals made below on overlapping equalisation periods, and on the period within which claims for equalisation must be made.

(2) The foregoing period should continue to be 60 days before, and 4 months after, apparent insolvency.

(Para. 5.11).

Equalisation to apply to bare arrestments and poindings

16.

It should be competent to claim equalisation on

(a) arrested funds paid to an arresting creditor by the arrestee in pursuance of a mandate by the common debtor; and

(b) an amount paid to the arresting or poinding creditor as consideration for abandoning or restricting the arrestment or poinding, insofar as that amount does not exceed the amount of the arrested funds or, as the case may be, the value of the arrested or poinded goods.

(Para. 5.13).

Arrestment and sale of vessels

17.

For avoidance of doubt, it should be expressly provided by statute that the rules on equalisation of arrestments and poindings apply to arrestment and sale of vessels.

(Para. 5.15).

Arrestment on the dependence

18.

The equalisation rules should continue to apply to an arrestment on the dependence if it is followed up without undue delay.

(Para. 5.17).

Claims by creditors holding liquid grounds of debt or decrees for payment

19.

(1) A creditor holding a warrant for diligence in an extract decree or extract document of debt registered for execution, should be entitled to claim a pari passu ranking on the proceeds of arrestments and poindings.

(2) Should a creditor holding a liquid document of debt not registered for execution continue to be entitled to make such a claim?

(3) As under the present law, it should be competent for the creditor to claim a pari passu ranking by judicially producing the decree or document of debt in a process relative to the subject of the arrested or poinded property.

(4) It should be made clear by statute that a process of furthcoming of moveable property, of sale of a vessel, or

of poinding and warrant sale remains in dependence until at least the expiry of the equalisation period to enable a claim for pari passu ranking to be made by lodging a minute and judicial production in that process within that period, without prejudice to our proposal in Proposition 20 below for a further extension of the period during which the process remains in dependence.

(5) As an alternative to judicial production, it should be competent for a creditor to make a claim for a pari passu ranking by intimating his claim in a prescribed manner by postal service or any other competent legal mode of service within the statutory equalisation period.

(Para. 5.24).

Period within which claim by arresting or poinding creditor may be made

20.

(1) Where a creditor claims a pari passu ranking founding on an arrestment or poinding executed within the statutory equalisation period, the claim should be competent only if made within two months after the end of that period.

(2) A process of furthcoming of arrested moveable property, or sale of an arrested vessel or poinding and warrant sale should remain in dependence until the expiry of 6 months after the constitution of apparent insolvency to enable such a claim to be made by lodging a minute in the process.

(3) It should be competent for an arresting or poinding creditor to make his claim by service in the same manner as a creditor holding a decree.

(4) The recipient of such a claim should be entitled to make a cross-claim for a pari passu ranking on the proceeds of the claimant's diligence within one month after receiving intimation of the claim, and the cross-claim should be competent if made by minute in the claimant's diligence or by intimation in the prescribed manner to the claimant.

(Para. 5.26).

Ranking where poinded or arrested goods transferred to creditor in default of sale

21.

It should be made clear by statute that a poinding or arresting creditor must account to creditors claiming a pari passu preference where the ownership of poinded or arrested goods passes to the poinder or arrester in default of sale.

(Para. 5.29).

Sequestration and liquidation as equalising arrestments or poindings

22.

For the purpose of equalisation of arrestments and poindings, a sequestration or liquidation should continue to

have effect as a constructive arrestment and poinding where the date of sequestration or commencement of the winding up occurs within the statutory equalisation period.

(Para. 5.32).

Trust deeds for creditors

23.

It should continue to be competent for protected trust deeds for creditors to make provision for equalisation of arrestments and poindings which binds non-acceding as well as acceding creditors.

(Para. 5.34).

Expenses of equalised diligence

24.

(1) A creditor whose poinding or arrestment is made subject to a pari passu preference under the equalisation rules should be allowed the expenses of his diligence out of the fund for division not only (as under existing law) where the preference is claimed by a creditor founding on a decree or liquid document of debt but also where it is claimed by an arrester or poinder.

(2) Where an arrestment or poinding is equalised with a sequestration or liquidation, the arrester or poinder should

be allowed a preference out of the arrested or poinded property for the expenses bona fide incurred by him in procuring the warrant for and executing the arrestment or poinding.

(Para. 5.37).

Further diligence by creditor whose diligence equalised

25.

Where a creditor executing a poinding is obliged to share the proceeds of the poinding with pari passu claimants under the equalisation rules, the creditor should be entitled to execute a second poinding of goods on the same premises for the same debt notwithstanding the restriction on such poindings imposed by the Debtors (Scotland) Act 1987, s. 25.

(Para. 5.39).

Arrestments and poindings after equalisation period

26.

Sub-paragraph (4) of paragraph 24 of Schedule 7 to the Bankruptcy (Scotland) Act 1985 (which provides that arrestments used after the equalisation period shall not compete with those within that period but rank on the reversion) should be expressly extended to poindings.

(Para. 5.41).

Multiple overlapping equalisation periods

27.

(1) The rules on equalisation of arrestments and poindings should be amended so as to eliminate overlapping equalisation periods.

(2) Views are invited onwhich of the following provisions to achieve that purpose would be preferable, namely:

(a) a rule that after the expiry of the first equalisation period created by the first constitution of apparent insolvency against a debtor, no further equalisation period could be created for so long as the debtor remains insolvent; or

(b) a rule that where apparent insolvency creating an equalisation period is constituted, no subsequent constitution of apparent insolvency should create an equalisation period unlesss it occurs more than 4 months plus 60 days after the earlier constitution of apparent insolvency?

(Para. 5.56).

EQUALISATION OF DILIGENCES AGAINST DECEASED DEBTOR'S ESTATE

Equalisation of adjudications against deceased debtor's estate (if equalisation not abolished)

28.

(1) Where a debtor dies during an equalisation period created by the registration of an adjudication during his life, its preference should be equalised with debts due by the deceased secured by an adjudication or confirmation as executor-creditor registered after his death within the equalisation period.

(2) Should the court be empowered to facilitate equalisation of adjudications where expiry of an equalisation period begun during the debtor's life is imminent by:

(a) dispensing with steps in procedure in a creditor's action to constitute the debt raised after the debtor's death, and

(b) shortening or dispensing with the mandatory period of litigiosity required before an adjudication is registered,

under reservation of all objections against diligence?

(Para. 6.15).

29.

Where a debtor dies during an equalisation period created by the registration of an adjudication during his life, a

creditor of the deceased's successors registering an adjudication or a confirmation as executor-creditor attaching the adjudged property within the equalisation period should not be eligible to rank pari passu with the first adjudger under the equalisation rules but should rank only on the reversion.

(Para. 6.17).

30.

(1) In a competition between adjudications registered by creditors of a deceased debtor after his death, the rules on equalisation of adjudications should apply.

(2) If it is decided following consultation on our Discussion Paper No. 78 Proposition 7.9 (para. 7.53), that the right of an executor-nominate, or executor-dative qua next-of-kin or surviving spouse, to retain confirmed estate for payment of a debt due by the deceased to himself should apply to heritable property forming part of the confirmed estate, and that the registration of the executor's title to that right in the property registers should be the criterion of his preference, then we propose that the registration of the executor's title should have the same effect as the registration of an adjudication in his favour for the purposes of the rules on the equalisation of adjudications.

(Para. 6.22).

31.

In a competition between an adjudication by a creditor of a deceased debtor and an adjudication by a creditor of his successor, both registered after the deceased debtor's death, the rules on equalisation of adjudications should not apply where the creditor of the deceased debtor has acquired a preference over the other creditor by registering his adjudication within a year after that death in accordance with proposals in Discussion Paper Proposition 7.8 (para. 7.49).

(Para. 6.24).

32.

The rules on equalisation of adjudications should apply in a competition between adjudications registered by creditors of a deceased debtor's representatives or successors.

(Para. 6.26).

Equalisation of arrestments and poindings against deceased debtor's estate

33.

No change should be made to the rules on equalisation of arrestments and poindings against the estate of a debtor to cater for the case where the debtor dies during an equalisation period.

(Para. 6.32).

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