Scottish Law Commission

DISCUSSION PAPER NO. 78

ADJUDICATIONS FOR DEBT AND RELATED MATTERS

Volume 1

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This Discussion Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission

The Commission would be grateful if comments on this Discussion Paper were submitted by 30 June 1989. All correspondence should be addressed to:-

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Note: In writing its Report with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Discussion Paper. Any requests from respondents to treat all, or part, of their replies in confidence will, of course, be respected but if no request for confidentiality is made, the Commission will assume that comments on the Discussion Paper can be used in this way.

DILIGENCE

DISCUSSION PAPER NO. 78

ADJUDICATION FOR DEBT AND RELATED MATTERS

Volume 1

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TABLE OF ABBREVIATIONS

Bankruptcy Report or Report on Bankruptcy

Report on Bankruptcy and Related Aspects of Insolvency and Liquidation (Scot. Law Com. No. 68) 1982.

Bell Commission Report

Reports from His Majesty's Law Commissioners, Scotland (Chairman, G.J. Bell).

First Report (1834)

Second Report (1835).

Currie, Confirmation

James G. Currie, The Confirmation of Executors 7th. edn. (Edinburgh, 1973).

Encyclopaedia

Encyclopaedia of the Laws of Scotland (Edinburgh 1926-).

Gloag and Irvine

W.M. Gloag and J. M. Irvine, Law of Rights in Security and Cautionary Obligations (Edinburgh, 1897).

Goudy

Henry Goudy, The Law of Bankruptcy in Scotland, 4th edn. (Edinburgh, 1914).

Graham Stewart

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

Grant Report

Report of the Committee on the Sheriff Court (Chairman: The Rt Hon. Lord Grant) Cmnd. 3248 (1967).

Gretton, Inhibition and Adjudication

G.L. Gretton, The Law of Inhibition and Adjudication (Edinburgh, 1987)

Halliday

John M. Halliday, The Conveyancing and Feudal Reform (Scotland) Act 1970 2nd edn. (Edinburgh, 1977).

McKechnie Report

Report of the Committee on Diligence (Chairman: Sheriff H McKechnie) Cmnd. 456 (1958).

McLaren, Wills

The Hon. John McLaren, The Law of Wills and Succession as Administered in Scotland 3rd edn. (Edinburgh, 1894).

Wilson, Debt

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

Wilson and Duncan

W.A. Wilson and A.G.M. Duncan, Trusts, Trustees and Executors (Edinburgh, 1975).

N.B. References to any Institutional writing are references to the last edition thereof, except that references to Stair are references to the second edition of his Institutions.

PART I

INTRODUCTION

Scope and arrangement of Discussion Paper

1.1 This Discussion Paper is one of a series 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 Adjudication for debt of feudal property and registrable long leases. In this Discussion Paper, we are mainly concerned with the reform of adjudication for debt, a diligence which is used primarily for attaching feudal property and long leases registrable in the property registers (the Sasines and Land Registers).

1.3 In Part II in this volume we describe the main features, and identify the main defects, of the diligence. In Part III in this volume, we set out the main issues as to the form and effect which a diligence attaching heritable property should have in the future. Since its introduction as long ago as 1672,[3] the diligence has taken the form of a Court of Session decree vesting in the adjudging creditor a redeemable security over the adjudged property convertible by a further Court of Session decree[4] into a right of ownership (ie. foreclosure) on the expiry of a period of as long as 10 years (the legal period of redemption[5]). In this form the diligence is archaic and cumbersome and can cause injustice to both creditors and debtors. It is rarely used in modern

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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] Adjudications Act 1672, record edn. c.45; 12mo. edn. c.19.

[4] A decree of declarator of expiry of the legal period of redemption.

[5] The legal period of redemption is commonly called simply "the legal".

practice.[1]

1.4 We propose that the diligence should be transformed from an attachment followed by foreclosure after 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. The attachment would be effected, not by a Court of Session decree, but by a notice of adjudication registered by the creditor in the property registers in pursuance of a warrant to adjudge and sell contained in a court decree for payment or its equivalent. This would be a new diligence which we call adjudication and sale.

1.5 Part IV summarises the specific proposals advanced in this volume for comment and criticism. These proposals deal with such matters as the main features of adjudication and sale, the avoidance of disruption of normal conveyancing transactions, safeguards for debtors eg. where the debt is small or the debtor's home is adjudged, and the position of co-owners where common property is adjudged.

1.6 In volume 2, Part V makes further detailed proposals on the future form and effect of the new diligence of adjudication

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[1] A short survey (unpublished) conducted on our behalf in 1986 of actions of adjudication for debt raised in the 5 years from 1981 to 1985 shows that 48 such actions were raised in that period, just under 10(9.6) per annum. A copy of this survey may be made available on request.

and sale. In many cases, there will be a prior heritable security, and in such cases, an adjudication will generally have the effect of requiring the heritable creditor to exercise his remedy of sale, with the adjudger ranking as a postponed creditor on the proceeds of sale.[1] Part VI deals with competitions between adjudications and other rights and makes consequential proposals on the statutory provisions deeming insolvency processes to be equivalent to adjudications for debt. Part VII deals with special problems relating to adjudications used after the debtor's death.

1.7 Confirmation as executor-creditor attaching heritable property. It is coming to be accepted that the Succession (Scotland) Act 1964 has had the effect of making the diligence of confirmation as executor-creditor (which before 1964 could only be used against moveable estate) available as the only diligence competent to attach the heritable estate of a deceased debtor to which his executor has not confirmed. We advance provisional proposals designed to adapt the diligence for use against heritable estate.[2]

1.8 Adjudications for debt of other property to be considered in a future Discussion Paper. The diligence of adjudication may also be used to attach other forms of heritable property, notably personal rights to land (such as short leases, the reversionary interest of a debtor under an ex facie absolute disposition securing a debt, and certain personal rights to demand conveyances) which are not registrable in the property registers. Adjudication may also in theory be used as the "residual" diligence against certain forms of moveable property (eg. copyright and patents) not

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[1] See paras. 5.141 to 5.147.

[2] See paras. 7.19 to 7.30.

competently attachable by poinding or arrestment. In all such cases, the adjudger's title is completed by registration in the personal register (the Register of Inhibitions and Adjudications) rather than the property registers. Adjudications of such property will be considered in a future Discussion Paper. This will also deal with adjudications of debts due to the debtor and secured by heritable securities or adjudications. Adjudications of such debts, though registrable in the property registers, raise special problems.

1.9 Real diligences enforcing debita fundi. In Part VIII in volume 2, we consider reforms of the modes of enforcing debita fundi,[1] of which the typical modes are the diligences of adjudication and of poinding of the ground. We advance provisional proposals for abolishing poinding of the ground. Going beyond the reform of diligence, we also take the opportunity of proposing the abolition of the now obsolescent right to create, by reservation in a conveyance of land, a security by way of a real burden for the payment of money.

1.10 Statutory charging orders. In Part IX in volume 2, we consider the reform of a particular type of debitum fundi, namely a statutory charge on land constituted by charging order made under specific enactments. We provisionally propose a uniform code on charging orders securing annuities charged on land.

1.11 Part X summarises the provisional proposals set out in volume 2.

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[1] ie. debts secured as real burdens on land.

Other Discussion Papers

1.12 Along with this Discussion Paper, we issue Discussion Paper No. 79 on Equalisation of Diligences. This provisionally proposes the repeal of the statutory rules on the equalisation of adjudications[1], arrestments and poindings,[2] outwith sequestration and liquidation. It also sets out, as an alternative legislative option, provisional proposals for reform of these rules which might be made if, contrary to our main proposal, it were decided that these rules should be retained.

1.13 We propose to consider, in future Discussion Papers, the reform of diligence (arrestment and inhibition) on the dependence, inhibition in execution, and, as mentioned above, adjudications of property not registrable in the property registers.

1.14 These topics are all closely connected. Inhibition, for example, is a prohibitory diligence rendering reducible future voluntary deeds affecting the debtor's adjudgeable heritable property, and giving the inhibitor a preference over subsequently contracted debts in any process of ranking on such property. It is the main diligence used against heritable property in modern practice and much more frequently used than adjudications. Its reform should accompany the reform of adjudications. Moreover, the reform of inhibition on the dependence must be considered along with the reform of arrestment on the dependence. Our present intention therefore is that recommendations for reform of all these topics should be made in one Report and draft Bill. This would represent the second phase of the reform of the law

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[1] Diligence Act 1661.

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

of diligence.[1]

1.15 We are concerned in this Discussion Paper with adjudications enforcing debts constituted by decrees or documents of debt registered for execution. These are sometimes called adjudications in execution to distinguish them from another type of adjudication, called adjudication in security, which is in theory available to secure future or contingent debts due by a debtor who is verging on insolvency. Adjudication in security does not appear to be used in modern practice and we shall consider its abolition in a future Discussion Paper.

1.16 We shall issue these other Discussion Papers in due course. Meantime we seek comments on the proposals in this Discussion Paper and Discussion Paper No. 79 on the footing that commentators will be free to change these comments, if so advised, when commenting on the later Discussion Papers.

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[1] The first phase is represented by our Report on Diligence and Debtor Protection (1985) Scot. Law Com. No. 95 which was largely implemented by the Debtors (Scotland) Act 1987. It reformed the diligences of poinding and sale and arrestment of earnings and pensions (but not arrestments of other property).

PART II

ADJUDICATIONS FOR DEBT; THE NEED FOR REFORM

Preliminary

2.1 In this Part, we briefly outline the main features of the diligence of adjudication for debt and identify what, in our view, are the main defects.

Outline of existing procedure

2.2 The object and effect of an adjudication for debt is to vest in the adjudging creditor a redeemable security over the adjudged property of the debtor, convertible by a court decree into an absolute right of ownership on the expiry of a period defined by statute. The diligence is primarily, but not exclusively, available against the heritable (ie immoveable) property of the debtor. We are concerned in this Discussion Paper only with adjudications against interests in land (including feudal property and registered long leases but excluding debts secured by heritable securities) which are registrable in the property registers (the General Register of Sasines or, where registration of title is operational, the Land Register). Though extracts (ie authentic official copies) of court decrees for payment, and extracts of documents of debt registered for execution in the books of court, contain a warrant for arrestment and poinding,nevertheless in order to adjudge, it is necessary for the creditor to raise an action of adjudication in the Court of Session, specifying the property which he wishes to adjudge. Once the decree of adjudication has been granted and extracted, the creditor will normally complete title by registration of the extract decree in the property registers. The effect of such registration is that the creditor obtains a right which is in the nature of a judicial heritable security over the adjudged property enforceable not only against the debtor but also having

priority over the rights of third parties such as subsequent purchasers, adjudgers or heritable creditors whose rights are registered later. This security will enable the adjudger to take possession, by action of removing if necessary, and to grant leases, or, if the land is already let, to receive the rents in pursuance of decree in a court action, called an action of maills and duties. But the security will not entitle the creditor to sell the property. If the creditor is paid, whether by receipt of the rents or otherwise, the security is discharged, but if after a period of as long as ten years (a period known as 'the legal' - short for 'the legal period of redemption') the debt is still outstanding in whole or in part, the creditor may raise another action, also in the Court of Session, called an action of declarator of expiry of the legal. Decree in such an action will have the effect of making him full owner of the property. He can then sell it if he wishes to do so.

Defects of the diligence

2.3 Adjudications for debt were introduced in Scots law by the Adjudications Act 1672.[1] The diligence now known as adjudication for debt was originally called a general adjudication and was conceived of as being penal in character.[2] It was an alternative to a special adjudication which was designed to attach heritable property proportionate in value to the amount of the debt and had a 'legal' of only five years. A special adjudication required the co-operation of the debtor but since debtors preferred the longer 'legal' of 10 years, they invariably did not co-operate so that from the outset it appears that special adjudications were

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[1] A.P.S.1672, record edn. c.45; 12mo. edn. c.19 repealed in part by the Statute Law Revision (Scotland) Act 1906.

[2] See Graham Stewart, pp. 577-578.

never used. They have been incompetent for many years.[1] It is a curious and not very creditable fact that, apart from the abolition of special adjudications and some minor statutory changes of a technical character, adjudications for debt have remained unreformed by statute since 1672. So archaic is the procedure that although heritable property is a very valuable asset, creditors very rarely use adjudications in modern practice, preferring to rely on the preventive diligence of inhibition. We have no doubt that radical reform is long overdue for the reasons summarised in the following paragraphs.

2.4 Unduly long legal period for redemption .The legal period of redemption of 10 years ('the legal') is far too long. The creditor has to wait for that period before completing the diligence. It may be that this period was devised with large landed estates in mind so that the possibility existed that the debt could often be satisfied from the rents received by the creditor during the legal. In modern conditions, however, it is likely that the reformed diligence for attaching heritable property would not normally be directed against landed estates but rather against dwellinghouses and commercial property. It may be too that the lengthy duration of the legal sprang from the desire of the Scottish Parliament of the 1670s to prevent landed estates from being involuntarily

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[1] The need to conclude for general adjudication as an alternative to special adjudication was abolished by the Lands Transference (Scotland) Act 1847, s. 18, re-enacted in the Titles to Land (Scotland) Act 1868, s. 59. Special adjudications, long obsolete, were eventually abolished by the Statute Law Revision (Scotland) Act 1906.

alienated for debt. Such an objective is unlikely to commend itself to public opinion today.

2.5 No provision for judicial sale. It is a curious and archaic feature of the diligence of adjudication that no provision is made for holding a compulsory sale under authority of the court as an alternative to transfer of ownership to the creditor. By contrast, diligences over moveable property (poindings and arrestments) take the form of an attachment followed by the relatively speedy realisation of the property to satisfy the debt out of the proceeds of sale. Ownership of poinded goods is transferred to the creditor only if a sale at the appraised value proves impossible. We believe that the transfer of ownership, being at best an indirect method of satisfying debt, is unsatisfactory. What the creditor wants, and what by law he is entitled to, is the payment of money, and accordingly payment of money should be the primary object of the diligence. Transfer of ownership should be merely a subsidiary alternative occurring only in default of sale.

2.6 Apparent absence of obligation on creditor to account to debtor for value of property on foreclosure. While the present law is over-protective to debtors in allowing far too long a redemption period, it is unduly harsh on debtors in other respects. A striking example, or apparent example, occurs on foreclosure. In an action of declarator of expiry of the legal, the adjudger calls on the debtor to exercise his right of redemption and, if the debtor fails to do so, the court declares his right of redemption to be foreclosed which has the effect that ownership is transferred to the adjudger. Where the adjudger has entered into possession, he must account to the debtor for his intromissions eg. with the rents if any. But there appears to be no rule requiring the

adjudger to account to the debtor for the value of the property. The absence of such a rule is remarkable because it means not only that foreclosure has no effect in diminishing the debt due, but also gives the property to the adjudger for nothing. It is difficult to accept that the law can really be so inequitable and we have traced no modern authority on the point. The absence of a clear obligation to account seems to be a by-product of haphazard historical development.[1] Adjudication inherited many of the characteristics of the old diligence of apprising which it replaced in 1672. An apprising was originally held equivalent to the debt, so that the acquisition of a title by the appriser extinguished the debt, and the appriser could not enforce the debt by other diligence unless he renounced his apprising.[2] Following the Diligence Act 1621,[3] which required apprisers in possession to account to the debtor for the rents, and set off the rents against the interest on the debt, the diligence of apprising and, after 1672, adjudication came to be treated through a series of decisions in the 17th and 18th centuries as a kind of judicial heritable security (or pignus praetorium)[4] rather than a conveyance of property,[5] though some rules based on the old theory were too

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[1] The best account of this development is contained in Baron Hume's Lectures vol. IV, pp. 412-419, and 454-457.

[2] Ibid., pp. 454-455.

[3] A.P.S. record edn. c.6; 12 mo edn. c.6. (still in force).

[4] Stair II, 3, 30.

[5] The 1621 Act was inconsistent with the conveyance on sale theory "for how could a right of property be extinguished by intromission with the rents, which is the natural exercise of that sort of right?": Baron Hume's Lectures, vol. IV p. 455.

deeply embedded in the law to be changed by this revolution.[1] It came to be settled that an adjudger in a general adjudication, like a heritable creditor, could enforce the debt by other diligence while the adjudication subsists without renouncing it.[2] If the diligence were a true heritable security, then on declarator of expiry of the legal, the debtor would be credited with the value of the adjudged subjects, to the effect of reducing or extinguishing the debt and rendering the foreclosing adjudger liable to account to the debtor for any surplus. There is, however, no authority that the law has developed thus far. If the diligence in this context were still regarded as a conveyance on sale, the decree of foreclosure would at least extinguish the debt. This would be better than giving the property to the adjudger for nothing, but it means resurrecting the mediaeval theory relating to apprisings. The law on this matter is at best very uncertain and at worst harsh to the debtor beyond belief.

2.7 Disproportion between value of adjudged subjects and amount of debt. The emergence of general adjudication as the only competent form of adjudication means that the original object of the Diligence Act 1672, namely to restrict adjudications to property of a value broadly proportionate to the amount of the debt, has not been attained. The result is that a very large

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[1] Eg. the form of deed conveying a debt and adjudication securing it is a disposition of lands under burden of the reversion; in a common law process of ranking the adjudger ranks for the whole of the original debt disregarding sums recovered after registration of the adjudication.

[2] See Graham Stewart p. 629.

estate can in theory be adjudged for a disproportionately small debt. While it may be argued that the greater the disproportion, the less excuse for non-payment, diligence should not operate in such an exorbitant and oppressive manner. We consider that the court should have power to restrict an exorbitant adjudication to that part of the adjudged property which adequately secures the amount of the debt, in a case where the property does not form an indivisible unit.

2.8 No provision for protecting debtor's interim possession or home of debtor or his family. Another way in which the present law on adjudications is unduly harsh on debtors is that it allows the adjudger, immediately after obtaining his decree of adjudication, to proceed (by action if necessary) to eject the debtor from the adjudged property. If the debtor is an individual with dependants, they too will be ejected. There is no minimum sum: a debtor may be immediately ejected for a trifling debt. Nor is there any period of grace: the creditor may raise his action of removing or ejection as soon as he has obtained his decree of adjudication. All this seems unacceptable in modern conditions. It is for example out of step with the protection accorded to the home of a bankrupt's family under the Bankruptcy (Scotland) Act 1985, s.40. We think that if as we propose the adjudger can complete the diligence by sale or foreclosure within a moderate and reasonable period, then a debtor, whether a corporate body or an individual, should normally be protected from ejection for so long as he has the right to redeem, which we envisage would be until the contract of sale has been concluded or decree of foreclosure is granted. In addition, we believe that the home of a debtor's family and probably the home of the debtor himself should have a degree of protection not accorded to other types of heritable

property. The shelter for the debtor or his family afforded by their dwelling is one of the basic necessities of life and should be recognised as such by the law of diligence: a reasonable time should be permitted to allow the debtor or his family to obtain alternative accommodation. We revert to these matters later.

2.9 Unnecessarily cumbersome and expensive procedure. Apart from the over-long period of the legal, the procedure may be, and has been, criticised as unnecessarily cumbersome in other respects and as too expensive. In particular:

(1) the only competent forum for an action of adjudication is the Court of Session (with one minor exception[1]).

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

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

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[1] Actions of adjudication contra haereditatem jacentem (ie against a deceased debtor's estate to which an heir, - now an heir of provision or disponee under a special destination - has not a completed title) were always competent in the sheriff court: see now Sheriff Courts (Scotland) Act 1907 s.6(4). There is some doubt whether adjudication contra haereditatem jacentem is still competent: see vol.2, paras. 7.6 to 7.10

The requirement that the diligence should proceed by way of a Court of Session action stems from the Adjudications Act 1672[1] and thus derives from a period when all actions relating to heritable property were treated as falling within the exclusive jurisdiction of the Court of Sesssion. Such a view has long been out-of-date.[2] The Grant Report of 1967[3] recommended that the sheriff court should have concurrent jurisdiction with the Court of Session in actions of adjudication. The McKechnie Report in 1958 recommended a procedure whereby a creditor holding a decree for payment could adjudge without resort to the courts at all[4].These recommendations were never implemented. In our view, it should be possible for a creditor holding a court decree for payment to follow through the procedure in adjudications without having to raise a further court action. Applications to the court in the context of diligence should not be required as a routine matter but only where there is an issue for the courts to determine. We do not suggest that the reformed procedures proposed in this Discussion Paper will be less complicated than the present law. The difference is however that whereas the complications in the proposed new procedure are necessary because they are designed to provide safeguards for debtors, or stem from complicating factors (like common ownership, and concurrent adjudications and heritable securities) which have to be catered for, the complications of the present law generally appear to serve no useful purpose.

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[1] Dobie, Sheriff Court Practice (1946) p.27 states that originally all adjudications were competent in the sheriff court but that in 1672 the jurisdiction of the sheriff was excluded (except as regards adjudication contra haereditatem jacentem). This is incorrect. Adjudications for debt (other than adjudication contra haereditatem jacentem) were introduced for the first time by the 1672 Act which expressly gave jurisdiction only to the Court of Session. See Mackay, Practice of the Court of Session (1877), vol.1, p.207, fn.(d).

[2] See Sheriff Courts (Scotland) Act 1907, s.6(4). As long ago as 1834, the Bell Commission's First Report, pp.83-84 recommended the introduction of a sheriff court process for the judicial sale of heritable subjects of relatively small value.

[3] Para.123.

[4] Para.184.

2.10 Obscurity of the law. Although the diligence of adjudication is centuries old, it is obscure and uncertain in several important areas. Let one example suffice. It is well established that after the expiry of the legal the adjudger may acquire a full right of ownership under the doctrine of prescription. It is, however, very unclear whether the relevant prescription is the long negative prescription of 20 years or the positive prescription of 10 years.[1]

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

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

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

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

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[1] See Gretton, "Prescription at the Foreclosure of Adjudications" [1983] Judicial Review 177; see also, volume 2, paras. 5.174 ff.

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

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

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

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

PART III

REFORM OF ADJUDICATIONS FOR DEBT; THE MAIN ISSUES

3.1 The discussion in Part II above has, we hope, demonstrated that a radical reform of the diligence of adjudication is long overdue. In this Part, we attempt to set out the main issues as to the form and effect which a diligence attaching heritable property should have in the future, having regard especially to the need to balance fairly the interests of creditors and debtors. This Part is complemented by Parts V-VII in volume 2 which discuss more detailed issues likely to be of interest to lawyers and others having expertise in this area of the law.

A. A new diligence of adjudication and sale

(1) Need for new diligence for attaching heritable property.

3.2 Before discussing the main policy issues as to the form which a new or reformed diligence against heritable property should take, the preliminary point should be made that, in our provisional view, the diligence of adjudication should not simply be abolished without being replaced by a reformed mode of diligence for attaching heritable property. We do not think that the role of adjudications can adequately be filled by resort to sequestrations under bankruptcy legislation or to liquidations. Sequestration (and in the case of companies, liquidation) is a combination of all the diligences and the most extreme of the remedies available to unsecured creditors for enforcing debts. Sequestration or liquidation should be treated as a weapon of last resort. To put the point another way, we believe that, in principle, and subject to few exceptions[1] the law of diligence should provide procedures capable of reaching out to attach any

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[1] e.g. exemptions from diligence designed to avoid the infliction of undue hardship on debtors.

part of a debtor's property, including his heritable property, without the need for attaching all of his property. We acknowledge that some consultees may take a different view and invite comments on this provisional conclusion.

3.3 We do not think that inhibitions are or can ever be an adequate substitute for adjudications. An inhibition is primarily a preventive diligence rendering heritable property litigious[1] and giving a preference over posterior creditors.[2] Moreover, while an inhibition is an independent diligence in the sense that heritable property can be adjudged without a prior inhibition against the owner, it would be unsatisfactory to have a system whereby heritable property could be "frozen" in the owner's hands but no remedy existed to have the property attached and either sold, or made over to the creditor, to satisfy the debt. We concede that some qualification of this conclusion may be necessary. If for example there were to be a threshold or minimum limit on the amount of a debt enforceable by adjudication, inhibition would then be the only diligence (outside sequestration) competent against heritable property to enforce a debt below that limit.

3.4 We invite views on the following.

(1) The diligence of adjudication for debt requires reform.

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[1] ie prohibiting the debtor from voluntarily disposing of his heritable property or burdening it by a security to the prejudice of the inhibiting creditor.

[2] An inhibition gives the inhibiting creditor a preference, in any process of ranking creditors on the debtor's heritable property, over any deeds voluntarily granted or debts contracted after the date of registration of the inhibition.

(2) **The role of adjudications for debt cannot adequately be filled by resort to inhibitions, or insolvency processes such as sequestration or liquidation.Accordingly some mode of diligence for attaching heritable property should continue to be available to creditors.**

(Proposition 3.1)

(2) Attachment and sale, with foreclosure in default of sale

3.5 If the main criticisms of adjudications set out in Part II above are valid, then it seems necessarily to follow that the diligence of adjudication should be transformed from an attachment followed by foreclosure (after a long legal period of redemption of 10 years) to an attachment followed by the remedy of sale, which may be used within a relatively short period, with foreclosure being available as a subsidiary and alternative remedy only in those cases where sale at a reasonable price proves unsuccessful. Redemption by the debtor should be possible at any time before the sale by the adjudger or decree of foreclosure and "the legal" should be abolished.

3.6 We think that the diligence of adjudication should not simply be reformed with the risk that old, inaccessible and out-of-date rules of law might continue to be relevant. We propose instead that the diligence should be replaced by a new form of diligence, of which the main incidents and effects would be fully and clearly set out in a modern statute.

3.7 We propose:

(1) The existing diligence of adjudication should be abolished and the Adjudications Act 1672 should be repealed.

(2) In place of the old diligence of adjudication, a new diligence should be established which should take the form of an attachment of heritable property belonging to the debtor followed by a procedure for its sale and payment of the debt due to the creditor out of the proceeds of sale. Foreclosure should be a subsidiary remedy available only if the primary remedy of sale is unsuccessful.

(3) The legal period of redemption in its present form (ie. imposing a minimum limit of 10 years on the duration of an adjudication) should be abolished. The debtor should have a right to redeem the adjudged property, by paying the debt, at any time until the date of conclusion of the contract of sale entered into by the adjudger in implement of his power of sale, or as the case may be until the adjudger obtains decree of foreclosure.

(4) The foregoing proposals for a new diligence would replace adjudications of interests in land registrable in the property registers. (Adjudications of interests not so registrable, and of debts due to the debtor secured by heritable securities or adjudications, will be considered in a later Discussion Paper).

(Proposition 3.2)

(3) **Terminology**

3.8 We have considered whether it would be appropriate to mark the reform of the law by replacing the name "adjudication" by some other name such as "judicial heritable security", or "charging order", or "statutory charge", or "attachment and sale of heritable property". We see difficulties in such other names. The term "judicial heritable security" is cumbersome. A "charging order" is an English legal term of art which is in any event inappropriate since the diligence is not an order and "charging order" is already used in Scots law to denote a special kind of statutory security[1]. The word "charge" already has reference to the institution of a charge to pay and it would be confusing to use the same label for a different institution in the law of diligence. The expression "attachment and sale of heritable property" while cumbersome is a possibility. "Attachment" however is a convenient term to use for the effect of all inchoate diligences, namely arrestment, poinding and adjudication and this advantage might be lost if it were to become by statute a legal term of art confined to a particular form of diligence against heritable property. Another possibility is "adjudication and sale" which is less cumbersome. The noun "adjudication" has its adjective "adjudgeable", its verb "to adjudge" and its cognate noun "adjudger". While "adjudication" may imply to the layman a determination by a court, the noun "attachment" is not likely to be much better understood by a layman. Though "adjudication" normally implies a court decree vesting a right in someone (adjudication in implement or for debt) or declaring a right to belong to someone (declaratory adjudication), it is but a small extension of the term to apply it to a diligence carried out in pursuance of a warrant in a court decree. If the term

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[1] See vol. 2, Part IX.

"adjudication and sale" is to be used, the legislation would require to make it clear that the term denotes a new diligence replacing the old diligence of adjudication.

3.9

Views are invited on whether the new form of diligence should be called "adjudication and sale" or "attachment and sale of heritable property" or by some other name.

(Proposition 3.3)

3.10 In this Discussion Paper, we use the term adjudication and sale pending the results of consultation.

(4) Warrant for charge, adjudication and sale

3.11 One of the most important issues concerns the somewhat technical question of what procedure should be laid down to

enable a creditor to obtain an effectual adjudication.[1] The form of procedure has been considered by previous advisory bodies though no consensus has emerged as to the precise reforms required. We have identified four main options, namely:

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[1] Originally it was competent to raise an action of adjudication for payment of a debt (as distinct from adjudication in security of a future or contingent debt) if the debt was quantified in a liquid document of debt (such as a bond, bill of exchange or promissory note), even though the debt had not been constituted by decree or the document of debt or a protest of the bill of exchange or promissory note had not been registered in the books of court: see Graham Stewart, p.580. To obviate problems arising from the relationship between time to pay decrees and adjudications, and to simplify the law, the Debtors (Scotland) Act 1987, s.101 provides that generally actions of adjudication for debt will be competent only in cases where the debt has already been constituted by a decree or an extract registered document of debt. An exception is made in the case of adjudications on debita fundi and adjudications under s.23(5) of the Conveyancing (Scotland) Act 1924 (non-payment of ground annuals for 2 years together). In these cases there may be no personal obligation to pay the debt owed by the owner of the burdened land. Adjudications on debita fundi are considered in Part VIII in volume 2.

(a) following a decree for payment, a separate court application or action for a decree of adjudication relating to property specified in that decree;

(b) following a decree for payment,a purely extra-judicial procedure whereby adjudication would be obtained by registration of a notice of adjudication without a court decree specifying the adjudged property and without a judicial warrant for adjudication;

(c) the grant by the court of a general warrant of adjudication not specifying the adjudged property on application being made in an action for payment or in a separate application thereafter; and

(d) a provision whereby the warrant for diligence in a court decree for payment would include automatically a general warrant to charge the debtor to pay and, failing payment within a specified period, to adjudge property not specified in the decree.

The first three options were considered by previous advisory bodies, and the fourth has been devised by us.

3.12 First possible option: separate court application for decree adjudging specified property. Under the first option, the approach of the present law would be maintained whereby an adjudication is not among the diligences authorised by a warrant in a decree for payment and a creditor seeking to attach heritable property must raise a separate court action of adjudication, the decree in which specifies the property to be adjudged. This

approach was supported by the Grant Report in 1967 which remarked that it was "undesirable that a court should give a blank authorisation to adjudge unspecified property. If heritable property, as a result of the adjudication, is to vest in the debtor, we think the court should give a specific authority to adjudge the property in question".[1] Unfortunately no reasons were given for this conclusion.

3.13 We provisionally reject this option. In general, we think that separate court proceedings are an unnecessarily cumbersome and expensive procedure for adjudications in execution of court decrees for payment. This seems to have been the view of the McKechnie Committee with whom we agree. The need for an application to the court in every case prior to the grant of warrant would only be necessary if the grant of the warrant were to be either (a) within the discretionary powers of the court rather than available to the creditor as of right, or (b) likely to be opposed on good legal grounds in a significant number of cases in which the objections were disposed of before decree of adjudication was granted. We reject judicial discretion below.[2] The possible grounds of challenge of an adjudication would be few and rarely established and the number of cases in which an adjudication was challenged would be insufficient to justify the extra trouble and expense involved in a requirement that every adjudication should involve a preliminary application to the court for a decree to adjudge specified property.

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[1] Para.124 This approach is also supported by the Bell Commission's First Report of 1834, p.84, which in recommending a new sheriff court process or diligence for the sale of heritable property, proposed that it should be competent for the creditor to apply to the sheriff of the county where the property to be sold lies praying for authority to sell the property which would be specified in the petition.

[2] See Proposition 3.13(1) (para. 3.93).

3.14 Second possible option: extra-judicial procedure. The second option consists of proposals made to the McKechnie Committee.[1] The effect of these proposals would have been to enable a creditor to obtain an adjudication without going to court and without the consent of his debtor. We agree with the McKechnie Committee that this option should be rejected. In principle diligence should not be executed without a judicial warrant contained in a court decree or extract registered document of debt containing a consent to registration for execution.

3.15 Third possible option: court application for general warrant to adjudge. The third possible option consists of the recommendations of the McKechnie Report, namely, an application to the court for a general warrant to adjudge which does not

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[1] McKechnie Report, Appendix 6, para. 1(p.97) which describes the proposals in the following terms: (a) Service of a Notice of Adjudication on the debtor or the Extractor of the Court of Session; (b) Recording of an Abbreviate of the Notice in the Register of Inhibitions and Adjudications with appropriate induciae; (c) On expiry of induciae without payment, or upon payment, recording of a Certificate by the creditor's solicitor in the Register of Sasines and Register of Inhibitions and Adjudications; (d) Intimation of the recording of the Certificate to all interested parties.

specify the property which is to be adjudged. [1] While we think that this option has much to commend it, we see no compelling need to require a creditor specifically to conclude for or to crave warrant to adjudge in an action for payment of the debt. The third option presupposes that a warrant to adjudge not specifying the property is to be available as of right rather than as a matter of judicial discretion. It is difficult to see therefore what the role of the court is to be in determining an application for the warrant. The requirement seems unnecessarily to entail purely formal applications in actions for payment. Moreover, if (as the McKechnie Committee rightly proposed) the warrant for diligence inserted in an extract registered document of debt is automatically to contain warrant to carry out an adjudication

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[1] McKechnie Report, para.184; Appendix 6, passim. The Report describes this option in the following terms:"(1) in an action with pecuniary conclusions it should be made competent for the creditor to crave warrant to adjudge the defender's heritable subjects, including leases and heritable securities, without the necessity of raising a separate action of adjudication; (2) the decree should contain a general warrant to adjudge in similar terms; (3) the same warrant should be deemed to be included in all extracts of deeds dated and registered for execution after the date on which the legislation effecting these changes comes into force; (4) a notice of adjudication should then be served on the debtor (or the Extractor of the Court of Session), this notice containing a description of the subjects concerned; (5) an abbreviate of the notice should be recorded in the Register of Inhibitions and Adjudications with an induciae of fourteen days; (6) on the expiry of the induciae without payment or upon payment, a certificate of non-payment or payment should be recorded by the creditor's solicitor in the Register of Sasines or in the Register of Inhibitions and Adjudications or in both Registers, as appropriate; (7) the recording of a certificate of non-payment should be intimated by the creditor's solicitor to all interested parties; (8) the recorded certificate of non-payment should be equivalent to a decree of adjudication according to the existing law and practice."

procedure, it appears somewhat inconsistent to require a special court application for a separate warrant to adjudge where the warrant for diligence is to be contained in a court decree. Furthermore, in cases where the creditor omitted to apply for a warrant to adjudge in the action for payment, but sought adjudication at a later date, a separate court application would be required. This seems unnecessarily expensive and cumbersome.

3.16 Preferred option: general warrant to adjudge in court decree for payment. We therefore provisionally favour the fourth option in terms of which the warrant for diligence in a court decree or an extract document of debt registered for execution would include automatically a general warrant to charge the debtor to pay, and failing payment within a specified period, to adjudge and thereafter sell heritable property not specified in the decree. (In addition to a charge the creditor would serve a notice of entitlement to adjudge as proposed later[1]). The fourth option avoids on the one hand the trouble and expense involved in separate court applications (contrast the first and third options) and, on the other hand, it preserves the principle that diligence should not be executed without a warrant in a court decree or its equivalent, an extract of a document of debt registered for execution in the books of court(contrast the second option). It represents a reasonable compromise between these two extremes and brings the law on warrants for adjudication into line with the law on warrants for poinding, arrestment and earnings arrestment[2]. We consider that the attachment of the debtor's heritable property should be effected by registering a document in a form prescribed by statute in the property registers, and the warrant would also authorise sale.[3]

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[1] See Proposition 5.3 (para. 5.15).

[2] See Debtors (Scotland) Act 1987, s.87.

[3] More detailed technical proposals on this matter are advanced in volume 2, para.5.7 ff.

3.17 We propose:

The warrant for diligence in an extract court decree for payment or in an extract registered document of debt should automatically have effect as if it contained:

(a) a warrant to charge the debtor to pay the debt together with a notice of entitlement to adjudge as proposed in Proposition 5.3 at para. 5.15;

(b) failing payment within a specified period,a warrant to adjudge unspecified heritable property belonging to the debtor by registering an adjudication document ("a notice of adjudication") in the property registers; and

(c) a warrant to sell the adjudged property (subject to safeguards proposed below).

(Proposition 3.4).

(5) Avoiding undue disruption of normal conveyancing practice: mandatory period of litigiosity

The problem described

3.18 In our view, it is an essential condition of the introduction of the new diligence of adjudication and sale that it should not disrupt the normal course of conveyancing transactions relating to heritable property. The risk that such disruption could occur flows from the following two factors.

First, the fact that reports on searches for incumbrances in the Sasines Register do not disclose the up-to-date state of the proprietor's title means that a purchaser or lender on security taking a conveyance registrable in that Register cannot know whether, in the previous weeks or months, a competing adjudication affecting the property has already been registered.

Second, the rule that priority of title is governed by priority in date of registration in the property registers (Sasines or Land Registers) means that a purchaser or lender on security cannot know whether his deed will win a race to the register against a competing adjudication.

Both of these factors may deter solicitors from granting letters of obligation to deliver searches for incumbrances showing a clear title, and also deter solicitors from with-drawing deeds from the Sasines Register for correction and re-registration, lest their client lose priority to a competing adjudication. These are very technical matters which require further explanation.

3.19 The role of searches for incumbrances. Purchasers of heritable property and lenders on the security of heritable property are normally entitled to receive from the sellers or borrowers searches for incumbrances in the Sasines Register, or corresponding reports relating to the Land Register, against the property concerned showing deeds or registered interests affecting the title. They are also entitled to receive searches in the personal register against those who have had a title to the property within the period of the positive prescription. The actual inspection of the registers is undertaken by private seachers in the

case of the Sasines Register, and by official searchers in the case of the Land Register. The searches are guaranteed. In the course of a normal conveyancing transaction involving deeds registrable in the Sasines Register, a search is made on two occasions. (1) An interim report on continuation of the Search for incumbrances is obtained near to the date of settlement (when the disposition is exchanged for the price, or security deed for the loan) but leaving enough time to deal with items unexpectedly disclosed by the search. (2) After settlement it is normal for a completed search to be obtained showing the recorded deed. A completed search is not available at settlement. Most transactions are settled on the basis of an interim report on the search, together with a letter of obligation by the seller's or borrower's solicitor to exhibit or deliver to the purchaser's or lender's solicitor a clear search within a specified period after settlement.

3.20 A similar practice obtains in the case of registration of title in the Land Register. In the case of first registration of a property in the Land Register, there will be three searches: (1) a report at or before missives, (Form 10 report, covering Sasines and Land Registers); (2) a report immediately before settlement bringing the Form 10 Report up-to-date (Form 11 Report); and (3) a search by the Keeper before issuing the Land Certificate, which broadly corresponds to the completed search for incumbrances. Once property has been registered in the Land Register, a Form 12 Report during a current transaction takes the place of the interim report on a Sasines Register Search, and the Land Certificate takes the place of the completed search for incumbrances.

3.21 Registration in the Sasines Register involves four stages, namely entry of the deed in (1) the Presentment Book; (2) the Minute Book; (3) the Record Volume; and (4) the non-statutory Search Sheet, in that sequence. The private searchers use the Minute Book to compile their searches and interim reports. While the recording date in the Sasines Register is the date of presentment of the deed to the Department of the Registers (recorded immediately in the Presentment Book), the recording procedure as a whole takes a period of weeks or months from the time of presentment to the entry in the Minute Book and, later, the Record Volume and Search Sheet. The period varies in different Divisions of the Register. At the present time, it may take up to six months in some Divisions for a deed to be entered in the Minute Book and thus disclosed by a search. In the absence of any facility for computerised searching of the Presentment Book, it is not in practice possible to include, in an interim report or a completed search, deeds which have been presented for recording but have not entered the Minute Book.

3.22 The problem of out-of-date reports on search is limited to the Sasines Register. The personal register (the Register of Inhibitions and Adjudications) is computerised. At present, the use of inhibitions and notices of litigiosity does not deter solicitors from granting letters of obligation to deliver or exhibit clear searches partly because an up-to-date interim report on a search of the personal register can be obtaineed disclosing inhibitions registered up to 24 hours before the issue of the search and partly because inhibitions and notices of litigiosity do not render reducible deeds implementing contracts concluded before the date of registration of the inhibition or notice.

3.23 Like the personal register, the Land Register is computerised. A report on search in the Land Register will not merely disclose completed registrations (ie those in respect of which a Title Sheet has actually been opened or entries made in an existing Title Sheet) but will disclose all Applications for Registration which have been received by the Department of the Registers up to the close of business on the day preceding the date of issue of the report.

3.24 Computerisation of Sasines Register not a practical solution. If the Sasines Register Presentment Book were computerised, searches could be provided which would be as up-to-date as searches in the personal register or Land Register. We understand, however, that the computerisation of the Presentment Book, while it is feasible if resources were provided, would be expensive and it may be doubted whether the expense could be justified merely to facilitate the reform of adjudications. It is not at present a high priority. We also understand that computerisation might increase the cost of searches in the Sasines Register.

3.25 In any event up-to-date searches in the Sasines Register would not solve the other problems identified in para. 3.18 above, namely the race to the registers against competing adjudications and its possible effect in deterring solicitors from granting letters of obligation, and from withdrawing defective deeds from the Sasines Register for correction.

3.26 The risk of disruption of conveyancing transactions. In a competition between an adjudication (whether under the present

law or under our proposals) and a disposition or heritable security, priority of title is governed by priority of ranking of the respective deeds in the Sasines Register, or of the respective interests in the Land Register, as the case may be. It follows that where a debtor has entered into missives of sale, or an agreement to grant a security for a loan, an adjudication of the property by a third party creditor which was registered in the property registers before registration of the delivered disposition or security deed in the property registers would have priority of title even though the adjudication was registered after the conclusion of the missives or agreement.

3.27 This factor distinguishes an adjudication from an inhibition which, as we have seen, only renders reducible deeds granted voluntarily after the date of registration of the inhibition and therefore does not affect deeds granted after that date "involuntarily" ie. in pursuance of a contract concluded before that date. Accordingly an adjudication would affect normal conveyancing transactions in a way in which inhibitions do not.

3.28 There is a risk therefore that solicitors will be deterred from granting letters of obligation to deliver or exhibit searches for incumbrances showing a clear title. At present solicitors grant letters of obligation even though there is a risk that a decree of adjudication may be registered. In modern practice, adjudications are so rare that the risk can be borne. It seems likewise that the risk of statutory charging orders is also discounted for a variety of reasons. Moreover, solicitors are not deterred in practice from granting letters of obligation by the risk that a sequestration, or in the case of a debtor company, the commencement of a winding-up or attachment of a floating

charge, might intervene though the reasons for this are obscure. Then again solicitors granting letters of obligation take the chance that their client, the seller or borrower on security, has not granted, and will not grant, a conveyance to a third party outwith the solicitor's knowledge.

3.29 If, however, as seems possible, adjudications for debt come to be used relatively frequently, solicitors may well become reluctant to grant letters of obligation. A solicitor acting for a purchaser or lender is much more likely to know whether his client can be trusted not to grant a deed to a third party, than to know whether the seller or borrower on security has a creditor who may adjudge. Adjudications may also be used far more frequently in practice than insolvency processes or charging orders. In these circumstances, adjudications could not be excepted from letters of obligation since a purchaser or lender would reject the letter as worthless.

3.30 It has also been represented to us that solicitors might become reluctant to withdraw defective deeds from the Sasines Register for correction and re-registration[1] lest their client's title lose priority to an adjudication. Of all deeds presented for recording in the Sasines Register (about 250,000 to 300,000 per annum), about 12% are withdrawn for correction. In these circumstances, stoppage of the practice of withdrawing deeds for correction would have an important adverse effect on the correctness of that Register.

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[1] See Titles to Land Consolidation (Scotland) Act 1868, s.143.

Proposed solution

3.31 In order to solve the foregoing problems, we put forward for consideration a proposal which has the following three main elements.

(1) A creditor proposing to adjudge should be required to register a notice of litigiosity in the personal register within 14 days after serving on the debtor a charge to pay and notice of entitlement to adjudge.

(2) The creditor should not be entitled to register a notice of adjudication until the expiry of a prescribed period after the date of registration of the notice of litigiosity. The period should be prescribed by statute or statutory instrument. The period should be sufficiently long to allow most or almost all conveyancing transactions commenced by missives of sale or an agreement to lend on security before the registration of the notice of litigiosity to be completed by registration of the delivered deed in the property registers before the expiry of that period. As a matter of preference, if not necessity, the period should be sufficiently long to allow defective deeds to be withdrawn from the Sasines Register for correction and re-registered. It is suggested that the period should preferably be 9 months and certainly not more than that nor less than 6 months.

(3) Any notice of adjudication registered in the property registers in breach of either of the foregoing requirements would be ineffectual.

3.32 First requirement: registration of notice of litigiosity as mandatory prelude to registration of notice of adjudication. Under our proposals,[1] a creditor must serve a charge and notice of entitlement to adjudge (specifying the subjects to be adjudged) before proceeding to register a notice of adjudication. The period of charge will be 14 days or, if the debtor is abroad or his whereabouts are unknown, 28 days. We now suggest that within say 14 days after serving the charge to pay and notice of entitlement to adjudge, the creditor should be required to register in the personal register a notice of litigiosity specifying the subjects to be adjudged by a sufficient conveyancing description.[2]

3.33 An important effect of this requirement would be to enable conveyancers to use the up-to-date interim reports on search of the personal register to identify whether an adjudication had been registered, or might have been registered, in the Sasines Register in the period covered by the search in the personal register, and in particular in the interval between the (out-of-date) date of search in the Sasines Register ending some months previously and the (up-to-date) date of search in the personal register. If no notice of litigiosity were disclosed by the latter search, he would know that no adjudication had been registered.

3.34 Second requirement: mandatory period of delay between registration of notice of litigiosity and registration of notice of adjudication. The main purpose of the second requirement is to give a purchaser or lender on security transacting with the debtor

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[1] See Vol. 2, Proposition 5.3 (para.5.15).

[2] We discuss at para. 3.40 below the need for "interim" and "final" notices of litigiosity.

an opportunity of winning a race to the register against a competing adjudger. Let us assume that the mandatory period of delay is 6 or 9 months. If the conveyancer acting for the purchaser or lender ascertains from the interim report on search in the personal register that no notice of litigiosity has been registered in that register, he will know that he has at least 6 or 9 months in which to complete the transaction and register his disposition or security deed free of the risk of being "trumped" by an adjudication. If the interim report on search identifies that a notice of litigiosity has been registered after the date of conclusion of the missives, the conveyancer will know that a subsequent disposition or security deed will not violate the litigiosity and that he has 6 or 9 months from the date of the registration of the notice of litigiosity within which to complete his transaction and register his disposition or security deed. If on the other hand, the interim report on search in the personal register discloses the registration of a notice of litigiosity prior to the date of conclusion of the missives, the conveyancer will know that that notice has to be cleared off the register before he can safely proceed, just as under the present law. Conveyancers acting for purchasers or lenders on security wishing to withdraw defective deeds from the Sasines Register for correction will know how long a period they have before a competing adjudication can be registered. Conveyancers acting for sellers or borrowers on security will be able to grant letters of obligation to deliver or exhibit clear searches showing that no adjudication affecting the subjects of search has been registered prior to a specified date.

3.35 The duration of the mandatory period of delay and of litigiosity. The length of the period of delay should, in our view, be such as to allow all but the most lengthy conveyancing

transactions to be completed from the conclusion of missives preceding the notice of litigiosity to the registration in the property registers of the delivered deed. In our provisional view, the length of the period of delay should also be such as to allow all or almost all defective deeds on the Sasines Register to be withdrawn for correction and re-registered. Generally, it is only when the draft Minute of a transaction for entry in the Minute Book is being revised shortly before such entry that defects in deeds are drawn to the attention of the presenting solicitor. As already mentioned, this may be up to 6 months after presentment, and could be longer depending on the pressure of work within the Department of the Registers. This suggests that 9 months might be an appropriate period. Whatever period is chosen, we suggest that the creditor should be required to register a notice of adjudication within one month after the expiry of that period, and the litigiosity created by the notice would cease to have effect on such registration, or on the expiry of the one month, whichever first occurs. In default of such registration, the creditor would require to begin the procedure by re-service of a charge and notice of entitlement to adjudge if he wished to proceed with an adjudication.

3.36 During this period of litigiosity, the creditor will be protected by the litigiosity against dispositions and security deeds voluntarily granted by the debtor within that period. Moreover, the creditor will not lose priority to a competing adjudger whose notice of litigiosity was registered after the registration of his own notice of litigiosity. We have identified only three ways in which the creditor may be prejudiced. First, a statutory charging order,not being a deed voluntarily granted by the debtor, is not rendered reducible by the litigiosity of the subjects affected by

the charging order and thus the creditor may lose priority to a charging order. Most charging orders have priority over all adjudications, whenever registered, affecting the property charged.[1] In a very few cases, however, the priority of the charging order depends on priority in time of the respective dates of registration of the order and the competing adjudication[2], and it is only in these cases that the mandatory period of delay would prejudice the adjudger in a competition with a charging order. One possible solution would be to impose on charging orders of the latter type similar requirements of a mandatory notice of litigiosity and period of delay of 6 or 9 months before registering the charging order as we have proposed for adjudications. We doubt whether such a solution is necessary but invite views. Second, if the debtor dies during the mandatory period of litigiosity, the creditor will lose the benefit of his diligence, and must begin diligence anew, whereas an adjudication executed before the debtor's death may be completed thereafter.[3]

3.37 The third risk is that the creditor may lose priority to the general body of creditors or to a floating charge holder where an insolvency process (ie. a sequestration, the grant of a "protected" trust deed for creditors,[4] the commencement of a winding-up, or the appointment of a receiver)[5] intervenes during the mandatory period of litigiosity. This may have the effect of increasing the number of sequestrations, involuntary liquidations

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[1] See paras. 9.17 and 9.18 in volume 2.

[2] Viz. charging orders under the Agricultural Holdings (Scotland) Act 1949, s.82, Civil Legal Aid (Scotland) Regulations 1987 (SI 1987/381) reg. 40, and Health and Social Services and Social Security Adjudications Act 1983, s. 23 (not yet in force).

[3] See Proposition 7.1 (para. 7.10) in volume 2.

[4] Within the meaning of the Bankruptcy (Scotland) Act 1985, Sch. 6.

[5] An attached floating charge will have priority over a prior notice of litigiosity but not a prior adjudication because the former is not, but the latter is, an "effectually executed diligence".

and receivership orders, because of the advance warning given to other creditors by the notice of litigiosity and the adequate time allowed for such processes to be commenced. While it may be unfortunate that the creditor will be at risk for such a long period, an adjudger under the present law may lose priority under the Diligence Act 1661 if an insolvency process intervenes within a year after his adjudication. We do not think that the results are unjust.

3.38 Proposals to apply to Land Register as well as Sasines Register. We consider that the proposals should apply to the Land Register as well as the Sasines Register even though there is no problem of out-of-date searches in the Land Register. In principle a purchaser or lender on security who has concluded missives of sale or a loan agreement with a debtor should have an opportunity to win a race to the Land Register against a competing adjudger. Since withdrawal of a deed from the Land Register for correction does not generally prejudice priority of the grantee's infeftment, the period of delay should be shorter if regard was paid only to the Land Register. We consider, however, that it would be confusing and unnecessary to have different periods of delay for the Sasines and Land Registers, and that the period should be fixed by reference to the factors affecting the Sasines Register.

3.39 Summary of advantages and disadvantages. The foregoing proposals would:

(a) dispense with the need to incur the expense of computerising the Sasines Register Presentment Book as a precondition of introducing the new diligence of adjudication and sale;

(b) avoid any increase in the cost of searches by firms in the Sasines Register;

(c) avoid the disruption of ordinary conveyancing transactions by giving purchasers and lenders on security contracting with debtors prior to the creation of litigiosity a known and reasonable period within which to win a race to the registers against a competing adjudger;

(d) leave unaltered the present practice whereby solicitors acting for sellers and borrowers on security grant letters of obligation to deliver searches showing a clear title;

(e) leave unaltered the present practice under which solicitors acting for purchasers and lenders on security withdraw defective deeds from the Sasines Register for correction and re-registration;

(f) protect prospective adjudgers by litigiosity in the period of enforced delay before registering their adjudication; and

(g) provide incidentally a measure of protection for debtors by delaying the adjudication and sale.

The disadvantages are that during the period of enforced delay, the adjudger might lose the benefit of his diligence if the debtor dies, or might lose priority to the general body of creditors or a floating charge holder because of the intervention of an insolvency process and that such insolvency processes might possibly be encouraged. We think that the advantages greatly outweigh the disadvantages.

3.40 "Interim and "final" notices of litigiosity. A creditor registering a notice of litigiosity would require to produce to the Department of the Registers the certificate by the messenger-at-arms or sheriff officer of the execution of the charge and notice of entitlement to adjudge as his authority for registering the notice. There might therefore often be a gap of several days between the service of the charge and notice of entitlement to adjudge, and the registration of the notice of litigiosity. This gap would in turn create a risk that a debtor, if he is well advised and acts promptly, might defeat the notice of litigiosity by concluding forthwith a contract to dispose of or burden the property.[1] It would not matter that the contract had been entered into for the purpose of pre-empting litigiosity.

3.41 This gap must be closed if the diligence is to be effective. We have considered various solutions but at present see no alternative to a double-notice procedure akin to the law on inhibitions and notices of inhibition.[2] We suggest that the creditor should be entitled to register in the personal register an "interim" notice of litigiosity before the service of the charge and notice of entitlement to adjudge; that the interim notice would have provisional effect, the proviso being that a "final" notice of litigiosity referring to the execution of the charge and notice of entitlement to adjudge is registered in the same register within 21 days thereafter; and that the litigiosity created by a duly registered final notice would draw back to the date of registration

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[1] This gap does not arise in the case of notices of summonses of adjudication which are authorised by a signeted summons, though it has not been served and therefore has not alerted the debtor to take prompt avoidance action: see Titles to Land Consolidation (Scotland) Act 1868, s.159.

[2] See the 1868 Act, s.155.

of the interim notice. We are aware that this is likely to double the number of registered notices and cause more work for creditors and the Department of the Registers, but simpler solutions seem to cause worse problems.[1]

3.42 Expenses. If the analogy of the present law on the expenses of inhibitions were to be followed, the expense of expeding and registering interim and final notices of litigiosity would be borne by the creditor and not recoverable from the debtor. This analogy may not be entirely apt, however, since a notice of litigiosity by an adjudger would be a mandatory prelude to adjudication, whereas an inhibition is not. We seek views on whether the expenses should be recoverable from the debtor.

3.43 We propose:

(1) **A creditor should be entitled to register in the personal register an interim notice of litigiosity affecting specified subjects to be adjudged without producing to the Department of the Registers a certificate of execution of a charge and notice of entitlement to adjudge. The interim notice should have effect only if a "final" notice of litigiosity, such as is mentioned in para. (2) below, is registered within 21 days after the date of registration of the interim notice, and the effect of a duly registered final notice should draw back to that date.**

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[1] For example, if it were provided that only one notice of litigiosity was competent and that this had effect from the date of execution of the charge though not yet registered, a gap would be created in the faith of the personal register.

(2) A creditor who has served a charge to pay and notice of entitlement to adjudge should be required to register a "final" notice of litigiosity, within 14 days after such service, on producing to the Department of the Registers the certificate of execution of the charge and notice of entitlement to adjudge as authority for registration of the final notice.

(3) The creditor should not be entitled to register a notice of adjudication until the expiry of a period, after the date of registration of the final notice of litigiosity, to be prescribed by statute or possibly statutory instrument. Views are invited on the length of the period, but it is suggested that it should preferably be 9 months, and certainly not more than that nor less than 6 months. The creditor should be required to register a notice of adjudication within one month after the expiry of the foregoing period and the notice of litigiosity should cease to have effect on the date of registration of the notice of adjudication, or the expiry of the one month, whichever first occurs.

(4) Any notice of adjudication registered in the property registers in breach of the requirements mentioned in paras. (2) and (3) above should be ineffectual.

(5) Should the requirements of a mandatory notice of litigiosity and period of delay apply to those statutory charging orders whose priority in ranking depends on priority in time of the respective dates of registration of the order and the competing incumbrance? If so, no

prior charge nor notice of entitlement should however be required before registering the order.

(6) Should the expense of interim and final notices of litigiosity be chargeable against the debtor?

(Proposition 3.5).

(6) Summary of proposed procedure in the new diligence of adjudication and sale

3.44 In Part V in volume 2 of this Discussion Paper, we examine fully the detailed procedures which would be followed in the new diligence of adjudication and sale, mainly to elicit views from those with the requisite technical knowledge and expertise. In the following Table, we summarise the main steps in procedure to assist the reader of this volume in understanding the procedural background to the main policy issues.

Table

SUMMARY OF PROCEDURE

Charge to pay and period of litigiosity

1. Registration by creditor in personal register of interim notice of litigiosity affecting specified subjects to be adjudged.

   (Proposition 3.5(1) at para. 3.43)

2. Service on debtor at instance of creditor of charge to pay and notice of entitlement to adjudge (specifying the subjects).

(Proposition 5.3 at para. 5.15)

3. Within 14 days after such service, creditor registers in personal register final notice of litigiosity referring to the execution of the charge and notice of entitlement to adjudge and specifying the subjects affected.

If duly registered within 21 days after date of registration of interim notice of litigiosity, the effect of the final notice draws back to that date.

Litigiosity subsists until either registration in property registers of notice of adjudication or period (10 months after registration of final notice of litigiosity) for such registration expires without registration being made.

(Proposition 3.5 at para. 3.43)

4. After expiry of days of charge (14 or 28 days) without full payment, creditor may demand by statutory notice, served on debtor or third party, delivery or exhibition of any unregistered writs in the progress of titles and, if the notice is not complied with within 4 weeks, may apply to the sheriff for an order for exhibition or delivery.

(Proposition 5.4(5) at para. 5.25)

Registration of notice of adjudication

5. Not less than (say) 9 months after the date of registration of the final notice of litigiosity, and not more than (say) 10 months after that date, the creditor may acquire and

complete title as adjudger by registering a notice of adjudication in the property registers.

Any notice of adjudication registered without prior registration of the final notice of litigiosity or in breach of the foregoing time-limits is ineffectual.

(Propositions 3.5(3) and (4) at para. 3.43 and 5.4(2) at para. 5.25)

Time to pay order

6. An application for a time to pay order is competent after service of charge and notice of entitlement to adjudge at any stage before the date of registration of the notice of adjudication.

An adjudication may be registered while an application for a time to pay order is in dependence but no further proceedings may be taken in the diligence then or while the time to pay order is in effect.

(Proposition 3.6 at para. 3.51)

Title to exercise remedies in cases of concurrent adjudications

7. Where two or more adjudications of all or part of the same subjects are in effect at the same time, the co-adjudger entitled to exercise the remedies of sale or foreclosure will be the co-adjudger whose adjudication was registered first, or as selected by agreement between the co-adjudgers.

Where a co-adjudger having an exclusive title to exercise remedies refuses or delays unreasonably in doing so, or where his adjudication ceases to have effect otherwise than on sale or foreclosure, the sheriff would be empowered to devolve the exclusive title on another co-adjudger.

(Proposition 5.25 at para. 5.140)

Title to exercise remedies in cases of concurrent adjudications and heritable securities

8. Where a heritable security (voluntary security or charging order) ranks prior to or pari passu with an adjudication, the heritable creditor has a title to exercise the remedies of sale, foreclosure etc; the adjudger's title to exercise remedies is suspended.

The sheriff would be empowered to give a concurrent adjudger an exclusive title to exercise remedies if the prior or pari passu heritable creditor failed to comply with a notice requiring him to complete his remedies within 2 years or his heritable security ceased to have effect otherwise than on sale or foreclosure.

Where a heritable security is postponed to an adjudication, the adjudger has the preferable title to exercise remedies.

(Proposition 5.26 at para. 5.147)

Procedure between adjudication and notice of commencement of sale procedure: adjudged subjects owned exclusively by debtor

9. After registering a notice of adjudication, the creditor must intimate the registration to the debtor.

(Proposition 5.5 at para. 5.31)

The intimation must notify the debtor of his right to apply, within 8 weeks after the intimation, to the sheriff for restriction of the adjudication.

(Proposition 3.7(5) at para. 3.55)

10. Where the adjudged subjects are a matrimonial home within the meaning of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, and the debtor is an "entitled spouse" who owns the subjects, the adjudger must, in certain circumstances, within 14 days of the date of registration of the notice of adjudication inform the non-entitled spouse of her right within 40 days thereafter to challenge the adjudication as collusive in terms of section 12 of the 1981 Act by an application to the Court of Session.

(Proposition 5.36 at para. 5.205)

11. Where the adjudged subjects consist of or include the home of the debtor or his family, (called "protected persons")

the adjudger must obtain the written consent to sale of the "protected persons" or, if unable to obtain those consents, the authority of the sheriff to the sale.

(Proposition 3.8 at para. 3.65)

12. In such an application the sheriff will have certain powers to postpone the granting of the application or to grant the application with or without conditions.

(Proposition 3.8 at para. 3.65)

13. Before advertising the property for sale, the adjudger must serve a notice of commencement of the sale procedure on the debtor.

Such a notice should not be served until:

(a) either an application for restriction has been disposed of or the 8 weeks period has expired without such an application being made; and

(b) where the adjudged property consists of or includes the home of a "protected person", the written consent of that person, or the sheriff's authority, to the sale has been obtained.

(Proposition 5.11 at para. 5.48)

Procedure between adjudication and notice of commencement of sale procedure: adjudication of common property

14. The creditor of a debtor who has a pro indiviso share of common property is generally entitled to adjudge and sell the common property itself, not the debtor's share. The creditor must intimate the registration of the notice of adjudication to the co-owners whose whereabouts are known to him, as well as to the debtor, and inform them of their rights mentioned below.

(Proposition 3.17(1) and (2) at para. 3.122)

15. A co-owner may at his option either (a) purchase the debtor's share at a valuation or (b) apply to the sheriff for an order requiring the adjudger to sell only the debtor's share and restricting the adjudication to that share.

(Proposition 3.17(3) at para. 3.122)

The debtor and a co-owner are entitled to apply for the restriction of the adjudication to a physical part of the common property.

(Proposition 3.17(5) at para. 3.122)

Any exercise by a co-owner of his option to purchase must be notified to the adjudger, and any application for restriction must be commenced by a co-owner or debtor, within 8 weeks after he received intimation of registration of the notice of adjudication.

(Proposition 3.17(7) at para. 3.122)

16. Where the co-owner does not exercise his option to purchase and the common property consists of or includes the home of the debtor or his family, or the home of a co-owner or his family, (called "protected persons") the adjudger must obtain the written consent to sale of the protected persons or the authority of the sheriff to the sale.

(Proposition 3.17(8) at para. 3.122)

An application to the sheriff for authority to sell is only competent when either an application for restriction has been disposed of or the 8 weeks period has expired without an application for restriction being made.

17. Before advertising the property for sale, the adjudger must serve a notice of commencement of the sale procedure on each co-owner as well as the debtor.

Such a notice should not be served until:

(a) either an application for restriction has been disposed of or the 8 weeks period or periods has or have expired without such an application being made; and

(b) where the common property consists of or includes the home of a "protected person", the written consent of that person, or the sheriff's authority, to the sale has been obtained.

(Proposition 3.17(10) at para. 3.122)

The sale procedure

18. Creditor exercises general powers and duties to advertise sale by private bargain or public auction and to secure the best price reasonably obtainable. There are no time limits on the period for sale or the duration of the adjudication other than that implied by the law on the long negative prescription of the obligation to pay debts.

(Propositions 5.12 at para. 5.53 and 3.15 at para. 3.103)

19. In a case where the adjudged subjects are affected by an inhibition, adjudger intimates sale to inhibitor before expiry of one week thereafter and then registers certificate of intimation in personal register.

(Proposition 5.17 at para. 5.83)

Disposition on sale

20. In event of sale adjudger -

(a) grants disposition (or assignation of long lease) to purchaser in implement of power of sale;

(Proposition 5.14 at para. 5.61)

(b) in a sale in lots, may apportion feu duty and burdens and grant and register deed of conditions;

(Proposition 5.13 at para. 5.55)

(c) ranks prior, pari passu and postponed claims secured by heritable security or diligence, and any claim by an inhibitor or arrester, and either pays any surplus to debtor or consigns it.

(Proposition 5.18 at para. 5.92)

Foreclosure procedure

21. (a) In default of sale (which must include exposure for sale by public auction), an adjudger may apply to sheriff for decree of foreclosure. After such intimation and enquiry as the sheriff thinks fit, he may (i) order further attempts at sale by private bargain or public auction; or (ii) give the debtor up to 3 months in which to pay the debt; or (iii) grant a decree of foreclosure.

(b) On registration of decree of foreclosure in property registers (i) debtor's right of redemption is extinguished, and creditor acquires a real right as proprietor (or tenant of registered long lease); (ii) subjects are disburdened of adjudication and any postponed heritable security or diligence; (iii) prior or pari passu heritable securities and diligences continue to subsist but creditor acquires right to redeem them; (iv) debt extinguished to the extent of the price at which subjects acquired and creditor may recover any balance remaining due by other diligence.

(Proposition 5.22 at para. 5.114)

Report on sale and diligence expenses

22. (a) Where all the adjudged subjects have been sold, the solicitor effecting the sale submits to the sheriff a report on sale within a period prescribed by act of sederunt following the date of sale or, in the event of sale in lots on different dates, the date of the last sale.

(b) Where all or part of the adjudged subjects have not been sold and the adjudger applies for decree of foreclosure with respect to the unsold subjects, the report is submitted along with the application for decree of foreclosure.

(c) The report is remitted by the sheriff to the auditor of court for taxation and on receipt of the auditor's report the sheriff declares a balance to be due to or by the debtor.

(Proposition 5.34 at para. 5.194)

B. Protection of debtor or home of his family

3.45 In devising procedures and rules regulating the new diligence of adjudication and sale, the aim must be to strike a proper balance between the interests of creditors and debtors. The diligence must be effective in recovering lawful debts. On the other hand, it should not impose undue hardship on debtors. The economic and social impact of the diligence on debtors may often be severe. In this Section, we consider what safeguards should be provided to prevent the infliction of undue hardship on debtors in appropriate cases. In Section C, below, we consider the limits on those safeguards and other matters from the standpoint of the protection of the legitimate interests of creditors and the need for effective enforcement.

(1) Time to pay decrees and orders under Debtors (Scotland) Act 1987.

3.46 The Debtors (Scotland) Act 1987, Part I, [1] introduces in Scots law two new types of court order designed to give debtors in financial difficulties a breathing space in which to settle their debts free from the immediate threat of diligence. The first of these orders is a time to pay direction, in a court decree for payment (which may be called a time to pay decree), which will provide for payment by instalments or a deferred lump sum and stop diligence during the period allowed for payment. Such decrees will be available in debt actions against individuals in the Court of Session or sheriff court where the sum payable under the decree does not exceed £10,000. They will replace summary cause instalment decrees. The second type of order is a time to pay order which will convert "open" decrees (ie decrees for payment of a lump sum) into decrees having similar effects to time to pay

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[1] Which will come into operation on an appointed day.

decrees. Whereas time to pay decrees will be available in court actions, time to pay orders will be available at the later stage when a charge to pay has been served on the open decree or where an arrestment has been used or an action of adjudication commenced.

3.47 Under the Debtors (Scotland) Act 1987 [1], an adjudication is one of the diligences precluded by a time to pay decree or a time to pay order. As we mentioned in our Report on Diligence and Debtor Protection, a time to pay decree would be of little use if the debtor could be ejected from his home by an adjudging creditor.[2] Similar considerations apply to the new diligence of adjudication and sale where the adjudged property may be sold within a relatively short time. We think therefore that the execution of the new diligence of adjudication should be precluded by time to pay decrees and time to pay orders.

3.48 Under the Debtors (Scotland) Act 1987, section 5(1), a time to pay order becomes competent when a charge to pay has been served on the debtor, or an arrestment of property other than earnings has been executed or an action of adjudication for debt has been commenced. Under our present proposals adjudication would cease to be an action and would always be preceded by a charge, and accordingly the third condition of competence should be repealed. The Debtors (Scotland) Act 1987further provides that a time to pay order is not competent

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[1] Sections 2(1) and 9(1)

[2] Para. 3.28. Furthermore, if an adjudger were to retain his right to collect the rents, payment of those rents would be inconsistent with the terms of the time to pay direction in the decree. We propose however that an adjudger would no longer be entitled to obtain the rents: see vol.2, para. 5.120 ff.

after a diligence enforcing the debt has reached an advanced stage of a type specified in the Act and for so long as the diligence subsists.[1] To elicit views, we propose that under the new procedure the relevant stage would be the registration of a notice of adjudication, which would be preceded by a long mandatory period of litigiosity.

3.49 Under the Debtors (Scotland) Act 1987, on receipt of an application for a time to pay order, the sheriff makes an interim order sisting diligence.[2] The general effect of this order is that the creditor may not start adjudication proceedings, and if he already has, he can complete title but not enter into possession or eject the debtor.[3] Since the reforms we propose would transform adjudications into a "warrant diligence" as distinct from an "action diligence", we suggest that an interim order in an application for a time to pay order should have the same effect mutatis mutandis as in the case of poindings and of arrestments of property other than earnings[4]. The creditor should accordingly be entitled to commence and proceed with his diligence up to the stage of registration of the notice of adjudication (including the registration of a notice of litigiosity) but should not be entitled to take other or further steps. In this way, the debtor would be protected from sale but the adjudger would not lose the benefit of his adjudication in a competition with other adjudgers.

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[1] Section 5(5). The relevant stage in an adjudication is (1) the creditor's entry into possession, or (2) a decree of mails or duties or (3) a decree of removing or ejection of the debtor: section 5(5)(c). In the new diligence of adjudication and sale creditors would only be entitled to enter into possession in limited circumstances; decrees of mails and duties would not be available; and removing or ejection would only be competent in limited circumstances: vol.2, Proposition 5.23 (para. 5.124) and Proposition 5.24(2) and (3) (para. 5.130).

[2] Section 6(3).

[3] Section 8(1)(d).

[4] Section 8(1)(a) and (c).

3.50 A more difficult question is whether the sheriff, on making or varying a time to pay order, should be empowered to extinguish an adjudication securing the debt already executed or merely to prohibit the creditor from taking any further steps in the diligence. Under the Debtors (Scotland) Act 1987, the sheriff, on or after making a time to pay order, may make an order recalling a poinding or recalling or restricting an arrestment,[1] but if, on making a time to pay order, he does not recall such a diligence, he must order that no further steps shall be taken by the creditor in that diligence.[2] On the other hand, the sheriff has no power to extinguish an adjudication on or after making a time to pay order. Where on making a time to pay order, an action of adjudication has already been commenced, the sheriff may merely prohibit the taking of any steps in the diligence after the adjudger has completed title.[3] We suggest that in the new diligence of adjudication, where the creditor has registered a notice of adjudication and the sheriff thereafter makes a time to pay order, the sheriff should also make an order prohibiting the adjudger from taking any further steps in the diligence (eg service of the notice of commencement of the sale procedure). Any such steps taken in contravention of the order would be incompetent and ineffectual. The sheriff should not, however, have power to extinguish an adjudication. If the sheriff did have such a power and exercised it, the adjudger might lose priority in a competition

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[1] Sections 9(2)(d) and (e); 10(2).

[2] Section 9(4). Such an order makes it incompetent for a court to grant warrant of sale of poinded goods or decree of furthcoming of arrested property: section 9(8).

[3] Section 9(2)(c).

with other creditors.[1] Moreover, we propose elsewhere that the adjudger would not be entitled to receive the rents of the adjudged property[2] nor in the normal case to enter into possession before sale or foreclosure[3] so that the debtor would not be unduly prejudiced by the continued existence of the adjudication. Furthermore, its continued existence would not be inconsistent with the terms of the time to pay order since under our proposals the adjudger would not receive the rents. A time to pay order has no effect on an inhibition and likewise should have no effect on a notice of litigiosity which should continue to have effect for a maximum of five years from the date when it first took effect.[4] If while the adjudication was in effect, the time to pay order lapsed on the debtor's default, the adjudger would be entitled to puruse the diligence by intimating the registration of the adjudication to the debtor.

3.51 We propose:

The provisions of the Debtors (Scotland) Act 1987 on time to pay directions in court decrees (for short a time to pay

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[1] We concede that on recall of an arrestment or poinding, the arresting or poinding creditor might also lose priority in a competition with other creditors but in competitions as to heritage, loss of priority is perhaps more likely to be seriously prejudicial to the creditor.

[2] Proposition 5.23(4)(para.5.124).

[3] See Proposition 3.9 (para. 3.69).

[4] This is the period for which inhibitions have effect and determines the length of searches in the personal register.

decree) and on time to pay orders should be adapted to integrate with the new diligence of adjudication and sale as mentioned below.

(1) A time to pay decree and time to pay order should (as under the 1987 Act) preclude the commencement of adjudication and sale.

(2) An application for a time to pay order should be competent after the service of a charge and at any stage in the diligence of adjudication and sale until the registration of the notice of adjudication.

(3) An interim order sisting diligence in connection with an application for a time to pay order should not prevent the creditor from registering a notice of litigiosity or commencing a diligence of adjudication and sale or from proceeding with the diligence up to the stage of registration of a notice of adjudication , but it should prevent an adjudging creditor from taking further steps such as serving a notice of commencement of sale procedure or entry into possession.

(4) Where the creditor has registered an adjudication and the sheriff thereafter makes a time to pay order, the sheriff should be required to make an ancillary order prohibiting the adjudger from taking any further steps in the diligence. Any steps taken in contravention of the prohibition should be incompetent. The sheriff, however, should not have power in such circumstances

to extinguish an adjudication and the notice of litigiosity would continue in effect for a maximum period of 5 years from the date when it first took effect.

(5) If while the adjudication was in effect, the time to pay order lapsed on the debtor's default, the adjudger would become entitled to pursue the diligence by intimating the registration of the notice of adjudication.

(Proposition 3.6)

(2)Restriction by court of exorbitant adjudication

3.52 As we have seen[1], although a primary object of the Adjudications Act 1672 was to make the security or nexus created by an adjudication proportionate to the amount of the debt,the Act failed to achieve that object. The result is that an adjudication may attach property which is disproportionately greater in value than the amount of the debt. The Act of 1672 does enable the Court of Session, on the debtor's application, to restrict the adjudger's possession where the rent of the lands exceeds the interest on the debt secured by the adjudication. This power of restriction appears to relate to the creditor's possession[2] and not to the extent of the nexus over the lands created by the adjudication.[3]

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[1] See para.2.3 above.

[2] Erskine, Institute II, 12, 21.

[3] On the other hand, some authorities write as if it were the security which is restricted: Graham Stewart, p.663; Parker on Adjudications p.59 (cf. Graham Stewart, p.664).

3.53 We consider that the power under the 1672 Act should be replaced by a new statutory power of restriction of the nexus rather than simply the creditor's right of possession which would in any event only arise in limited circumstances under our proposals. Where the sheriff, on the debtor's application, is satisfied that the property adjudged is disproportionately greater in value than is necessary to satisfy the debt (principal, interest and such expenses as are exigible) and any other debt heritably secured over the property,he should make an order restricting the adjudication to subjects which are reasonably proportionate in value to the amount of that debt or those debts and disburdening the remaining subjects. Such an order, however, should not be competent in any case where, in the opinion of the sheriff, the adjudged property was a unit which ought not to be divided (eg a dwelling house and its curtilage).

3.54 There may be cases where it is likely, but not certain,that a sale of part of divisible adjudged subjects would satisfy the sums recoverable by the adjudication. In such a case, we suggest that the sheriff should have power, on the debtor's application, to allow a sale of part of the adjudged subjects and to sist or 'freeze' the diligence in relation to the remaining subjects, rather than to restrict the adjudication and to disburden the remaining subjects. Likewise, where two or more separate subjects were attached by separate adjudications for the same debt, the sheriff should have power, on the debtor's application, to extinguish or 'freeze' one adjudication and to allow the other to proceed. The debtor should be informed of his right to make the foregoing applications in the creditor's notice to him intimating registration of the notice of adjudication. In fairness to creditors,

it is suggested that the application by the debtor should be competent only within a prescribed period of (say) 8 weeks after the date of intimation. We suggest that, in contrast to the present law ,title to apply should be personal to the debtor and should not be extended to postponed adjudgers and heritable creditors since their interests would be safeguarded by ranking on any surplus proceeds of sale.[1].

3.55 We propose:

(1) **The power of the Court of Session under the Diligence Act 1661 to restrict an adjudger's possession should be repealed.**

(2) **Where the sheriff, on the debtor's application, is satisfied that the property attached by the adjudication is divisible (ie does not form a unit which in the sheriff's opinion should not be sold in lots), then:-**

(a) **if the sheriff is satisfied that the sale of part of the adjudged property would satisfy the sums recoverable by the adjudication (ie the adjudger's debt and any other debt heritably secured over the property and falling to be ranked on the proceeds of sale), he should make an order having the effect on registration in the property registers of restricting the adjudication to that part of the adjudged property, and disburdening the remaining part;**

(b) **if the sheriff is of opinion that the sale of part of the adjudged property is likely to satisfy the sums**

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[1] See vol.2, Proposition 5.18 (para. 5.92).

recoverable, he should have power to make an order allowing only that part of the property to be sold, and sisting further procedure in the diligence in relation to the remaining part until the outcome of the sale is known.

(3) Where the sheriff makes an order allowing part of the adjudged property to be sold and sisting further procedure in relation to the remaining part as mentioned in para.(2)(b) above, then:-

(a) if the proceeds of sale of the part sold satisfy the sums recoverable -

(i) the adjudger should at his own expense register in the property registers a statutory certificate in the prescribed form having the effect on such registration of disburdening the unsold part of the adjudication and any other diligence or security which had secured the sums recoverable;

(ii) if the adjudger does not register the certificate within a reasonable time after the sale, the sheriff on the debtor's application should have power to make an order disburdening the unsold property of the adjudication and any other diligence or security which had secured the sums recoverable, and awarding the expenses of the application and the registration against the adjudger in favour of the debtor;

(b) if the proceeds of sale of the part sold do not satisfy the sums recoverable, the sheriff on the creditor's application should be empowered to recall the sist of the diligence.

(4) Where two (or more) separate subjects are adjudged by separate adjudications for the same debt, the sheriff should have the same powers to extinguish or sist one of the adjudications as if the separate subjects were parts of divisible property attached by one adjudication.

(5) The debtor should be notified in the intimation of registration of the notice of adjudication, of his right to make an application for restriction of an adjudication and the application should be competent within (say) 8 weeks after the date of intimation.

(6) The sheriff's decision in any of the foregoing applications should be final except on a question of law.

(Proposition 3.7)

(3) Consent to sale of home of debtor or his family

3.56 As we indicated above,[1] the present law gives no protection to the home of the debtor or his family with the result that an adjudger can eject him or them, by action if necessary, immediately after obtaining decree of adjudication. We believe this to be unacceptable in modern conditions and propose two kinds of safeguard. The first safeguard is to impose a restriction on sale of the dwelling of the debtor or his family. The second safeguard is to prevent ejection of the debtor or his family in the normal case until the property is sold or the adjudger acquires the

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[1] Para.2.8.

property by decree of foreclosure. We deal with this second safeguard below[1].

3.57 We consider that a restriction should be imposed on the sale of the home of the debtor or of his family (as defined) to give him or them sufficient time to obtain alternative accommodation. A similar, but not identical, provision is to be found in section 40 of the Bankruptcy (Scotland) Act 1985. This introduced for the first time in sequestrations under the Bankruptcy Acts a measure of protection for the home of a bankrupt's family. Before the permanent trustee in the sequestration can sell or otherwise dispose of the bankrupt debtor's interest in the home of his family, the permanent trustee must obtain the consent of certain individuals or, if he cannot obtain that consent, the court's authority for the sale or disposal. Section 40 of the 1985 Act defines "family home" to mean property, in which the debtor has an interest as owner, whether alone or in common with any other person, occupied as a residence at a particular date "by the debtor and his spouse, or by the debtor's spouse or former spouse (in any case with or without a child of the family) or by the debtor with a child of the family". The consents required are (i) where the family home is occupied by the debtor's spouse or former spouse, the consent of the spouse or former spouse or (ii) where the family home is occupied by the debtor with a child of the family but not by the debtor's spouse or former spouse, the consent of the debtor. The sheriff may refuse to grant an application for authority to sell, or postpone the granting of the application for up to 12 months, or grant the application subject to conditions.[2]

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[1] Para.3.66 below.

[2] See para. 3.60 below.

3.58 At first we inclined to the view that since section 40 of the 1985 Act has been enacted by Parliament in a very recent statute, and since (other things being equal) the protection for debtors in bankruptcy proceedings and diligence should as a general rule be the same, a provision similar to section 40 should apply to the new diligence of adjudication and sale. On reflection, however, we think that section 40 could be improved in at least two important respects and that we should at least consult on these possible improvements. First, it will be seen that section 40 is designed to protect the home of the debtor's spouse, former spouse or children of the family but does not afford protection to the home of the debtor himself if he lives there alone or with persons other than those specified, eg. an elderly parent. In this respect, the safeguard appears to us to be too narrow. Second, while section 40 sets out certain factors to which the court must have regard in disposing of an application for authority for sale[1], there seems nothing in law to prevent the court from refusing absolutely to grant authority for sale. In this respect, the safeguard appears to us to be too wide.

3.59 We suggest that the paramount objective of the safeguard should be to afford the persons residing in the adjudged dwelling a reasonable time to obtain alternative accommodation. If this

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[1] See section 40(2): the factors are all the circumstances of the case including the following enumerated factors, namely, (a) the needs and financial resources of the debtor's spouse or former spouse; (b) the needs and financial resources of any child of the family; (c) the interests of the creditors; and (d) the length of the period during which the family home was used as a residence by any of the persons referred to in (a) or (b).

change in the law were to be accepted, there would then, in our view, be ample justification for extending the protection to the debtor himself. We do not think that the court should be empowered to refuse absolutely to give consent to sale since that would remove a very valuable asset of the debtor from the reach of his creditors indefinitely. Such a power would amount in effect to a homestead exemption which we reject for reasons set out below.[1]

3.60 The present powers of the court in bankruptcy proceedings to deal with an application for authority for sale consist of (a) a power to refuse to grant the application; (b) a power to postpone the granting of the application for such period (not exceeding 12 months) as it may consider reasonable in the circumstances; and (c) a power to grant the application subject to such conditions as it may prescribe.[2]. As regards the first of these powers of disposal, while the court must have power to refuse an application on the basis of "preliminary" pleas or grounds such as want of jurisdiction, or procedural defects rendering the application incompetent, it follows from our argument in the previous paragraph that the court should not possess power to refuse consent to sale on the substantive ground that the attached property should not be sold at all. The second power seems to amount to a power to sist, continue or adjourn the application for a specified period of up to 12 months (rather than a power to grant the application with postponed effect).[3] We suggest that the court should have power to continue, or further continue, the application for a period or periods specified by the court. The time-limit of 12 months is presumably intended as a safeguard for

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[1] See para. 3.90.

[2] 1985 Act, s.40(2)

[3] A power to grant the application with postponed effect is a power to grant the application subject to a suspensive condition which falls within the third category of the court's powers.

creditors.[1] If however the legislation expressly states that the purpose of the safeguard is to give the protected persons a reasonable time within which to obtain alternative accommodation, then a statutory time-limit may be unnecessary. Normally however 12 months should be a sufficient time to enable the protected persons to obtain alternative accommodation and we invite views on whether there should be a time-limit.

3.61 The protection should apply to persons who have been resident in the adjudged property on and after a particular date,[2] which we suggest should be the date of service of the notice of entitlement to adjudge. To cater for cases where the occupants are temporarily absent on that date, we suggest that the concept of ordinary residence or habitual residence should be employed. Further, if an occupant has two or more residences, the protection should apply only to the principal residence.

3.62 If we are right in thinking that the safeguards for debtors in bankruptcy proceedings and diligence should in principle be the same, and if the approach we have just outlined is accepted as valid and appropriate for adjudications, then it is difficult to escape the conclusion that that approach should be adopted for bankruptcy proceedings in place of section 40 of the 1985 Act. We invite views.

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[1] It is difficult to see how this truly protects creditors if the court may absolutely refuse to grant the application and thereby circumvent the 12 months time-limit.

[2] Under section 40 of the 1985 Act, the date is the date of sequestration.

3.63 There may be cases where the adjudger is unable to ascertain whether there is in fact any person whose consent is required. There is no examination of the debtor such as is possible in a sequestration. We think that such a case will be unusual. Often the necessary information may be obtained by the messenger-at-arms or sheriff officer who served the charge and notice of entitlement to adjudge. We doubt whether any suitable procedure can be devised for eliciting this information which does not create more problems than it solves. We propose later[1] that provision should be made protecting the title of a bona fide purchaser where the solicitor executing the diligence certifies that the diligence has been regularly executed.To be worth anything, this protection must be effectual against actions of reduction by the debtor or his spouse or ex-spouse whose consent should have been but was not obtained. We suggest that the primary remedy of such a person should be an action of damages against the adjudger. The risk of such an action should suffice to ensure that in almost all cases the relevant consent, if required, is obtained. It is however for consideration whether, in a case where the adjudger is unable to ascertain whether a person exists whose consent is required, the adjudger should be entitled at his own expense to apply to the sheriff for authority to sell, in order to protect himself from an action of damages.

3.64 If the right to give or withhold consent is to be exercisable freely, then the person refusing to give consent must not be held liable in the expense of the adjudger's application to the sheriff, whether the application is opposed or not.

3.65 We propose:

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[1] Volume 2,Proposition 5.15(1)(para. 5.65).

(1) Where the adjudged subjects consist of or include the home of the debtor or his spouse or former spouse, (hereafter called "protected persons"), the adjudger, before serving a notice of commencement of the sale procedure,should be required to obtain:

(a) the written consent to sale of each of the protected persons, if he or she resides there an also resided there on the date of service of the notice of entitlement to adjudge; or

(b) where the adjudger is unable to obtain that consent, the authority of the sheriff for the sale.

(2) The procedure should apply to the home of the protected persons in the sense of property belonging to the debtor (whether alone or in common) which any of the protected persons ordinarily (or habitually) have occupied as a residence, or principal residence if such a person occupied more than one residence, on and after the date of service of the notice of entitlement to adjudge.

(3) It should be made clear by statute that the paramount object of the sheriff's powers in dealing with an adjudger's application for authority to sell is to give the protected person a reasonable time to obtain alternative accommodation for himself and any child of the family residing with him.

(4) In dealing with such an application, the sheriff after giving any protected person an opportunity to be heard, should have power:

(a) to postpone the granting of the application for such period or further period as he may specify. Views are invited on whether there should be an over-all limit of (say) 12 months from the date of the application;

(b) to grant the application with or without conditions.

The sheriff should not,however, have power to withhold consent to sale indefinitely whether by refusing to grant the application on the purported ground that sale is unjustifiable on the merits, or otherwise.

(5) Views are invited on whether the adjudger should also be entitled to apply to the sheriff for authority to sell where he is unable to ascertain whether there is any person whose consent is required.

(6) The expense of the adjudger's application to the sheriff should be borne by the adjudger, and in an opposed application each party should bear his or her own expenses.

(Proposition 3.8)

(4) Debtor's right to retain interim possession pending sale

3.66 Where the debtor is in personal occupation of the adjudged property or any part thereof, the adjudger has the same right as a heritable creditor to take proceedings for ejection of the debtor as if the debtor were an occupant without title.[1] Such a right is

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[1] Heritable Securities (Scotland) Act 1894, s.5; Graham Stewart, pp.521, 624.

virtually absolute and we believe that, in its application to adjudications, it cannot be justified in modern conditions. We consider that, as a general rule, a debtor in occupation or other occupant possessing by permission of the debtor, (whether in either case an individual or a body corporate or unincorporate) should be entitled to retain possession for so long as the debtor has the right to redeem the adjudged property, which we propose later should be until the date of the conclusion of the contract of sale entered into by the adjudger in exercise of his powers of sale, or as the case may be until the adjudger obtains decree of foreclosure in default of sale.[1] The only exceptions to this general rule would be cases considered later where the debtor or other occupant deriving right from him does not comply with certain conditions eg as to maintenance and repairs,[2] or refuses access to prospective purchasers.[3]

3.67 Where the adjudged property consisted of or included the home of the debtor or his family as defined above[4], then a refusal of consent to sale by the debtor or his spouse or ex-spouse, or the postponement of sale by the sheriff,[5] would have the effect of lengthening the time during which such a person and his family could retain possession free from the immediate threat of ejection.

3.68 An adjudger who has concluded a contract for sale would normally have to give vacant possession at the date of settlement

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[1] See Proposition 3.2(3)(para. 3.7) above.

[2] See vol.2, Proposition 5.24(3)(para. 5.130).

[3] See vol.2, Proposition 5.24(2)(para. 5.130).

[4] See Proposition 3.8 (para. 3.65).

[5] See Proposition 3.8(4) (para. 3.65).

of the transaction, which would often be only 4 or 6 weeks after the conclusion of the sale. If the debtor then refused to move, the period allowed for a court action of removing or ejection would be unnecessarily short. We consider therefore that where the contract for sale is concluded, the adjudger should have by law a summary power of ejection following a charge of 7 days, the ejection being effected by sheriff officers. Given that the debtor will have had ample warning of the need to remove at least in dwellinghouse cases,a charge of 7 days does not appear unfair but we invite views.

3.69. We propose:

(1) As a general rule, a debtor (whether an individual or a body corporate or unincorporate) in personal possession of adjudged subjects, and any person possessing by permission of the debtor, should be entitled to retain possession for so long as the debtor has the right to redeem the subjects, which under our proposals would be the date of conclusion of the contract of sale or of the granting of decree of foreclosure, as the case may be.

(2) Where a contract of sale of the adjudged subjects is concluded, the adjudger should have by law, and without the need for a court decree, a right to require the debtor and persons deriving right from him (other than tenants) occupying the subjects to remove on a charge of 7 days on pain of ejection by sheriff officers.

(Proposition 3.9).

(5) Other safeguards for debtor where debt disproportionately small relative to value of adjudged property.

3.70 At present an adjudication is competent in respect of any debt however small the amount. It is for consideration whether, in addition to the safeguards proposed above:

(a) a safeguard against adjudication and sale should be introduced in the case of debts which are small, or are relatively small in comparison with the value of the adjudged property; and

(b) if so, what form that safeguard should take?

3.71 Possible need for safeguard. It is certainly arguable that where a debtor owns heritable property of considerable value but still refuses or delays to pay a debt, the property should be adjudgeable however small the debt may be. In principle, a debtor's assets should be available for payment of his lawful debts. If the debtor has assets other than heritable property, he should use them to satisfy the debt. If the debtor's only marketable asset is heritable property, a prohibition of adjudication of that property for a small debt would make that debt unenforceable outside sequestration. To exclude adjudication in such cases might encourage creditors to use the more drastic remedy of sequestration. It is also arguable that time to pay directions in decrees for payment, and time to pay orders, precluding or freezing adjudications for debts under £10,000 would render the suggested safeguard unnecessary.

3.72 On the other hand, there is at least a pragmatic case for saying that the use of an expensive diligence such as adjudication and sale to enforce a small debt is an uneconomic use of resources. Moreover, co-owners of the adjudged property as well as the debtor himself may be affected. Arguably, it is like taking a sledgehammer to crack a nut and the addition of the heavy expenses to the small amount of the debt would be unfair to debtors. The availability of time to pay directions in decrees for payment and of time to pay orders may not always protect debtors either because they fail to obtain a direction or order, or because the direction or order lapses on default. In either case, the debtor may have been feckless or unable, rather than unwilling, to pay.

3.73 The case for a safeguard is strengthened by the fact that in England and Wales, where the court has a discretion whether or not to make a charging order on land,[1] there is good authority that it is not a proper exercise of the court's discretion to make a charging order on an asset of considerable or substantial value in respect of a relatively small debt.[2] In Northern Ireland, the Enforcement of Judgments Office was originally barred from making a charging order in respect of a debt below £50[3] though this restriction was later removed.[4] While a charging order is a mode of enforcing a judgment debt, it creates a security and does not itself authorise sale. The Northern Ireland Enforcement of Judgments Review Committee recently took the view that while a charging order creating a security on valuable property should not be precluded by the relatively small amount of a debt, the disproportion between the property and the debt is clearly a legitimate circumstance to be taken into account in considering

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[1] Charging Orders Act 1979, s.1.

[2] Robinson v. Bailey [1942] Ch. 268 at p. 271 per Simmonds J.

[3] Judgments (Enforcement) Act (Northern Ireland) 1969, s. 45(2).

[4] See Judgments Enforcement (Northern Ireland) Order 1981 (SI 1981/226) article 45 et seq.

whether the land should be sold for the purpose only of realising that security.[1]

3.74 We have found this important question to be difficult and, rather than state a preference, we simply invite views on whether a safeguard against adjudication for small debts should be introduced.

3.75 Form of possible safeguard. On the hypothesis that such a safeguard is needed, we have identified three possible options.

3.76 The first option is the introduction of a threshold or fixed lower limit on the amount of a debt enforceable by adjudication and sale. The amount of the limit is open to debate. One possibility is the amount used in fixing the upper jurisdictional limit on summary cause decrees for payment of money, which is currently £1,000. This sum is likely to be increased from time to time to keep pace with inflation. This may however err on the low side and we invite views on whether £10,000 or some other sum would be appropriate, (provided it was updated from time to time to keep pace with inflation). The amount would have reference to the principal sum and expenses of obtaining decree, or if there were no principal sum, to the expenses, but in either case excluding interest. Probably the limit should have reference to the sums outstanding at the date when the diligence is commenced by service of the charge and notice of entitlement to adjudge rather than the sums quantified in the extract decree for payment. A special rule might be required where one adjudication enforces, or is available to enforce, debts

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[1] Report of the Enforcement of Judgments Review Committee (Northern Ireland) para. 16.20.

in separate extract decrees against the same debtor in favour of the same creditor, the common case being separate extract decrees for a principal sum and for expenses. These debts should probably be aggregated.

3.77 The main advantage of this option is that it lays down a clear rule under which the creditor and debtor can know where they stand, and an application to the court, with its trouble and expense, is avoided. On the other hand, a fixed threshold or lower limit is necessarily arbitrary and creates anomalies. A prior creditor with a debt just below the threshold would be barred from using an adjudication while a later creditor with a debt just above the threshold could proceed to adjudge. Moreover a safeguard of this type is inflexible and does not allow adjudication to proceed where the creditor has no other means outside sequestration of enforcing his debt. If a threshold or fixed lower limit were to be imposed on the amount of debts enforceable by adjudication, it would be for consideration whether a similar restriction should be imposed on the enforcement of debts by inhibitions. While it might be thought anomalous if there were to be a class of debts enforceable by inhibition but not by adjudication, an inhibition would still be useful as giving the inhibitor a preference in ranking processes and as entitling him to reduce deeds violating the inhibition. We suggest that inhibitions should be competent to enforce debts below the threshold.

3.78 The second option is designed to make the safeguard more flexible and, in cases where the debt is small and can be recovered by other modes of diligence, to encourage the creditor to use the other modes rather than adjudication.. Under this option where the debt does not exceed a fixed limit (say £1,000

or some other prescribed sum), the creditor should be entitled to commence the procedure for adjudication only if he had obtained the prior leave of the sheriff. In this context, the debt would be defined to mean the sums outstanding when the creditor seeks to commence the diligence[1] rather than the sums due when the decree was extracted. In the creditor's application for leave to adjudge, the sheriff should have power to grant leave only if it appeared to him on the evidence that the creditor was unable to recover the whole outstanding amount of the debt by other modes of diligence. It would be for consideration whether the expenses of the application for leave to adjudge should be borne by the creditor, in order to discourage the use of adjudications to enforce small debts.

3.79 A disadvantage of this type of safeguard is that creditors might often use other modes of diligence first, fail to recover the whole debt and then apply for leave to adjudge in circumstances where, if there had been no such safeguard, they would have adjudged and recovered the debt without using the other modes of diligence. In other words, it would multiply the modes of diligence, and therefore the amounts of diligence expenses chargeable against the debtor. A threshold or fixed lower limit would avoid this disadvantage.

3.80 A third and yet more flexible solution would be to confer on the sheriff a discretionary power to sist an adjudication already registered if it appears to the sheriff that (a) the debt is disproportionately small relative to the value of the adjudged property; (b) the debtor has not wilfully refused or delayed to pay all or part of the debt out of other assets or income; and (c)

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[1] ie. by service of the charge to pay and notice of entitlement to adjudge.

a sist would otherwise be reasonable having regard to the needs and interests of the creditor as well as the debtor and all the circumstances of the case. The sist would have effect until it is recalled by the sheriff. A recall would be competent only on a material charge of circumstances or on disclosure to the sheriff of material circumstances not disclosed to him at the time when the sist was imposed.

3.81 This option represents a compromise. A creditor would not entirely lose the benefit of his adjudication and could claim a preference in any subsequent insolvency proceedings, but the expense of a sale would be avoided in small debt cases. It would discourage the use of adjudications for small debts. On the other hand, the concept of disproportion is vague and unless clarified by case-law might create undesirable uncertainty for creditors. Moreover, a sist sine die is in some respects unsatisfactory both for creditors and debtors.

3.82 We invite views on the following.

(1) **Should a safeguard for debtors against adjudication and sale be introduced in the case of debts which are small, or relatively small in comparison with the value of the adjudged property?**

(2) **If such a safeguard should be introduced, should it take the form of:**

(a) **a threshold or fixed lower limit on the amount of the debt enforceable by adjudication (as discussed in paras. 3.76 and 3.77); or**

(b) a rule requiring a creditor to obtain the leave of the sheriff before commencing adjudication procedure where the debt did not exceed a prescribed sum (as discussed in paras. 3.78 and 3.79); or

(c) a power enabling the sheriff to sist an adjudication where the debt is disproportionately small relative to the value of the adjudged property (as discussed in paras. 3.80 and 3.81)?

Our provisional preference is for the first of these options.

(3) If there were to be a threshold or prescribed sum as mentioned in para (2)(a) and (2)(b) above respectively, should it be fixed by reference to the upper jurisdictional limit for summary cause actions for payment (currently £1,000), or should a higher amount (such as £10,000) be selected?

(4) If there were to be a threshold as mentioned in para. (2)(a) above, restricting the use of adjudications, the same restriction should not apply to the use of inhibitions.

(Proposition 3.10)

(6) Restriction on advertisements of sale identifying debtor.

3.83 We think that there should be no need for an advertisement of sale of adjudged property to disclose either the name of the debtor or the fact that the sale is a forced judicial sale. In the case of warrant sales of poinded goods, it is well established that many debtors feared and resented newspaper advertisements of warrant sales identifying them as debtors even more than they disliked the sale itself.[1] The Debtors (Scotland) Act 1987[2] provides that where a warrant sale is to be held in premises not belonging to the debtor, the public notice of the sale shall not name the debtor or disclose that the articles for sale are poinded articles.[3] We suggest that a similar rule should apply to sales of adjudged subjects.

3.84 We propose:

> **The advertisement of sale of adjudged subjects in implement of the adjudger's power of sale should not name the debtor nor disclose that the sale is a judicial sale.**

(Proposition 3.11).

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[1] See Report on Diligence and Debtor Protection, para. 2.68; Adler and Wozniak, The Origins and Consequences of Default - An Examination of the Impact of Diligence, (1981) Scottish Office Central Research Unit Papers, paras. 7.20, 7.26, 7.28 and 8.6.

[2] Section 34(5)

[3] Sales in the debtor's dwelling (now only competent with the debtor's consent) may name the debtor, the reason for this being that naming the debtor may be necessary to identify the place of sale: see Report on Diligence and Debtor Protection, para. 5.162.

(7) Obligation of selling or foreclosing adjudger to account to debtor

3.85We indicated above[1] that on foreclosure by decree of declarator of expiry of the legal, it appears that the foreclosing adjudger has no obligation to account to the debtor for the value of the property. If that is right, it follows that foreclosure has no effect in diminishing the debt due and gives the property to the adjudger for nothing. We propose that in the new diligence of adjudication and sale, where the adjudger sells the property, he (or the solicitor executing the diligence on his behalf) must credit the debtor with the price less expenses and account for and pay to the debtor any surplus remaining after meeting the debt and expenses.Further on decree of foreclosure, the foreclosing adjudger must credit the debtor with the price at which the subjects were acquired. We revert later[2] to the method of quantifying that price. We believe that nobody will contest the principle of these proposals but we set them out as a proposition to emphasise how far the present law requires to be reformed.

3.86 We propose:

(1) **Where the adjudger sells the adjudged property:**

(a) **the proceeds of sale (less diligence expenses chargeable against the debtor) must be treated as paid to account of the debt due to the adjudger and any prior, pari passu, or postponed debt which falls to be ranked on the proceeds of sale; and**

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[1] Para.2.6.

[2] Volume 2, para.5.103.

(b) the adjudger must account for and pay to the debtor the free proceeds of sale remaining after deducting the adjudger's debt and diligence expenses chargeable against the debtor, and any prior, pari passu or postponed debts which fall to be ranked on the proceeds of sale.

(2) Where the adjudger obtains decree of foreclosure of adjudged subjects, the price at which the adjudger has acquired the property (mentioned at paras. 5.103(c) and 5.108(a) less diligence expenses chargeable against the debtor must be treated as paid to account of the debt due to the adjudger.

(Proposition 3.12).

C. Protection of creditors' interests

3.87 Our proposals would transform adjudication for debt from an archaic and cumbersome diligence largely unused by creditors into an effective method of enforcing debts. This result would be achieved by (1) the drastic reduction of the legal period of redemption; (2) the provision of a new and simple procedure for attaching (ie. imposing a nexus on) the debtor's heritable property by registration of a notice of adjudication (following decree for payment, an expired charge and registration of a notice of litigiosity); and (3) the introduction of the new remedy of a judicial sale also effected by a relatively quick procedure. These advantages for creditors contrast with the proposals for the protection of debtors outlined in Section B.In general, our provisional view is that these safeguards for debtors would balance fairly the advantages accruing to creditors from our main

proposals. Additional safeguards for debtors would, however, be legislatively possible, and we describe these in this Section together with our reasons for provisionally rejecting them.

3.88 No judicial discretion in granting warrant to adjudge. One possible safeguard for debtors would be to require a creditor holding a decree for payment to make a special application to the court for warrant to adjudge and to confer on the court a discretionary power to decide whether or not to grant the warrant. We would not favour a procedure in which the court had to rely on a compulsory enquiry into the debtor's means or attachable assets. There are grave disadvantages in such compulsory enquiries , especially the extent to which debtors would fail to co-operate satisfactorily or at all in disclosing their means and assets, and the difficulty of the consequential requirement of devising a suitable sanction to compel disclosure. In our Report on Diligence and Debtor Protection[1] we concluded that it was undesirable that a debtor should be compelled to disclose his means in a creditor's application, as opposed to making voluntary disclosure a condition of the debtor obtaining a time to pay decree or order in his own application. We adhere to that view.

3.89 We note that in England and Wales the court has a discretionary power to decide whether or not to make a charging order on land, and must consider all the circumstances of the case including the personal circumstances of the debtor.[2] There is no compulsory means enquiry. Under rules of court, the court makes a charging order nisi on the creditor's ex parte application, which order is then served on the debtor who has an opportunity to show cause why the order should not be made absolute. In

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[1] Para. 2.96 et seq.

[2] Charging Orders Act 1979, s.1(5).

Scotland, orders nisi and absolute are unknown, but it would be possible to give debtors an opportunity to object at a hearing before the court grants warrant to adjudge. From the standpoint of safeguarding debtors, however, it is difficult to see what useful purpose such a procedure would serve which would not be more satisfactorily achieved by the other forms of safeguard considered above, notably time to pay decrees and orders, restrictions on exorbitant adjudications of divisible property, and the possible safeguards against adjudication or sale for small debts.[1] To require an application to the court in every case would add unnecessarily to the expense and procedural complexity associated with the diligence. In our view the only case where the court's leave to adjudge might be reasonable would be where the debt is small, an option discussed above.[2]

3.90 No "homestead" exemption. We have considered whether an exemption should be imposed by operation of law on adjudications of the home of the debtor or of the debtor's family (including his ex-spouse). There is a procedure for this in the homestead legislation of the states of the USA and certain Canadian

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[1] In England and Wales, the court's discretion is also used to prevent the applicant creditor from obtaining a preference over the general body of unsecured creditors where an arrangement has been set on foot, or an insolvency process supervenes after the order nisi is made: see Roberts Petroleum Ltd v. Kenny Ltd [1983] 2 A.C. 192. In Scotland the equal treatment of creditors of an insolvent person is achieved by other legal techniques notably protected trust deeds for creditors and the rendering ineffectual of prior diligences on sequestration or liquidation. Our proposals to abolish or reform equalisation of diligences in the Discussion Paper No. 79 would not adversely affect these techniques.

[2] See paras. 3.78 and 3.79, and Proposition 3.10 (2)(b) (para. 3.82).

provinces. These homestead Acts may vary considerably. Some for example provide a financial upper limit on the value of the exempt beneficial interest, while others contain no limit. The policy underlying these exemption laws vary. Some early Acts were passed to attract settlers; others were a response to periods of economic depression.

3.91 We do not favour the introduction of a homestead exemption. Such an exemption would be an undiscriminating solution, which would often operate unfairly against creditors and confer an inappropriate benefit on undeserving debtors. Creditors would be unduly prejudiced in cases where the dwellinghouse was the debtor's only valuable asset. This solution would also create inequities as between different classes of creditor. The debtor would be able to use his proprietary interest in his dwelling as security for a debt; yet that interest would be exempt from diligence by a prior unsecured creditor holding a decree for payment. It could of course be argued that it would be anomalous for the law to provide exemptions from poinding for necessary household goods[2], while providing no exemption for the family home, the most fundamental necessity of all, from adjudication. In our view, however, adjudications and sale would differ radically from poinding and warrant sale. Warrant sales as such are economically inefficient[3] and may cause disproportionate hardship to debtors. Diligence against heritable property, on the other hand, will generally be economically effective from the creditor's standpoint.

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[1] See Milner, "A Homestead Act for England?" (1959) 22 M.L.R. 458; Vukowich "Debtors' Exemption Rights" (1974) 62 Georgetown Law Journal 779; Uniform Exemptions Act (Uniform Laws Annotated, vol.13, 1979)(USA).

[2] Debtors (Scotland) Act 1987, s.16.

[3] Their economic effectiveness depends on the threat of their use in the very great majority of cases which never proceed to the stage of warrant sale.

3.92 We believe that the court's powers to make time to pay decrees and orders are more flexible, and can take account of a debtor's circumstances more readily, than can the relatively rigid and undiscriminating rules in a homestead Act. The existence of a large public sector housing stock in Scotland coupled with the duty of local authorities to provide housing for the homeless[1] makes available a reasonable alternative to home ownership for those unable to pay their debts. The relief of housing needs is the proper function of public authorities not private creditors. We have advanced proposals designed to enable the court to delay the sale of the home of the debtor or his spouse or former spouse, to enable him or them to obtain alternative accommodation.[2] We suggest that this safeguard, coupled with time to pay decrees and orders, should suffice.

3.93 Provisional proposals. We invite views on the following.

(1) **A creditor should be entitled to obtain a warrant for adjudication and sale as of right, and the courts should have no discretionary power to refuse to grant such a warrant, without prejudice however to the courts' powers to grant time to pay decrees or orders precluding or freezing adjudication and sale, or postponing authority to sale of the home of the debtor or his spouse or former spouse.**

(2) **There should be no homestead exemption, or similar exemption by operation of law, from adjudication and sale. (Proposition 3.13).**

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[1] Housing (Homeless Persons) Act 1977.

[2] Proposition 3.8 (para. 3.65)

D. Summary of mode and procedure for sale and foreclosure

3.94 In general, we propose that the mode and procedure for sale and foreclosure should broadly follow the model of the corresponding procedures for enforcing standard securities by sale and foreclosure under Part II of the Conveyancing and Feudal Reform (Scotland) Act 1970. Our detailed proposals are set out in volume 2.[1]

3.95 In summary, a sale of adjudged subjects could be effected by public auction or private bargain. The creditor would be under general legal duties to advertise the sale and to take all reasonable steps to ensure that the price at which all or any of the adjudged subjects are sold is the best that can reasonably be obtained. There would be no official appraised value fixing an upset or reserve price such as is required in the case of warrant sales of poinded goods because heritable property is generally readily marketable in contrast to second hand goods.

3.96 Foreclosure would be competent only in default of sale. An application to the sheriff for decree of foreclosure would have to be preceded by exposure for sale at a public auction. It would be competent for the sheriff to grant decree of foreclosure only if at a public auction the adjudger had failed to find a purchaser at a price not exceeding the amount of the debt and any prior and pari passu debts secured over the adjudged subjects. The sheriff would have power to defer granting decree of foreclosure for up to 3 months to allow the debtor time to pay the debt. The sheriff

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[1] See para. 5.46 ff.

would also have power to order re-exposure to sale by public auction (or by private bargain which failing by public auction) at a price fixed by the sheriff on the basis of a valuation, by a professional valuer, produced by the creditor to which the debtor could object. Experience in the context of voluntary heritable securities suggests that foreclosure would be rare. If, however, sale was not possible, the decree of foreclosure would transfer to the adjudger ownership of the adjudged property at the price at which the property was last exposed for sale by public auction.

3.97

Comments are invited on the provisional proposals on sale and foreclosure summarised at paras. 3.94 to 3.96 above and discussed in more detail in Part V.

(Proposition 3.14).

E. Duration of adjudication

3.98 We have proposed that the legal period of redemption of 10 years should be abolished.[1] This operates as a minimum limit on the duration of the diligence. Since we propose that the sheriff should be empowered to delay the grant of authority to sell the home of the debtor,[2] or a co-owner,[3] or the spouse or former spouse of either, to enable alternative accommodation to be found, no further minimum limit on the duration of the diligence appears necessary to safeguard debtors or co-owners. If adjudication is, as we propose,[4] to be preceded by a mandatory period of litigiosity of 6 or 9 months, further delay would unduly prejudice creditors.

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[1] Proposition 3.2(3)(para. 3.7).

[2] Proposition 3.8 (para. 3.65).

[3] Proposition 3.17(8) (para. 3.122).

[4] Proposition 3.3(para. 3.43).

3.99 We have carefully considered whether a statutory maximum time-limit should be imposed on the duration of an adjudication, eg. a limit of one year subject to the possibility of extension by the sheriff on cause shown, on analogy with the time-limit on the duration of poindings imposed by the Debtors (Scotland) Act 1987, s.27. Alternatively there might be a limit of (say) 5 years without the possibility of extension.

3.100 A maximum time-limit might be regarded as a safeguard for debtors who arguably should not have the diligence hanging over them for an unduly long period. Such a time-limit would mean that the diligence would only be used by creditors who seriously intended to pursue it to the final stage of a sale. For those creditors who merely wished to restrain the debtor from dealing with the property, the alternative diligence of inhibition would be available.

3.101 We believe, however, that the introduction of a maximum limit on the duration of an adjudication would make the diligence unduly complicated. It would raise the practical difficulty that in computing the duration of the adjudication, periods during which incidental applications to the court were in dependence (eg. applications for restriction of the adjudication[1], or for authority to sell the debtor's or a co-owner's home[2]), and periods during which the adjudger was barred from pursuing the diligence (eg. a postponement of a sale to enable the debtor or co-owner to find alternative accommodation,[3] or because a prior

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[1] Propositions 3.7 (para. 3.55) and 3.17(5)(para. 3.122).

[2] Propositions 3.8 (para. 3.65) and 3.17(8) (para. 3.122).

[3] Proposition 3.8(para. 3.65).

adjudger or heritable creditor had a preferable title to sell,[1] or a time to pay order precluding further proceedings in the diligence was in force[2]) would have to be disregarded. Such "disregards" would be difficult to calculate and in some cases might be impossible. A maximum time-limit intended to protect debtors would also necessarily require the imposition of a restriction on registering a second adjudication against the same subjects for the same debt[3] lest repeated adjudications were used to defeat the maximum time-limit. Such complications are best avoided.

3.102 A maximum time-limit and the complications it would create might well deter creditors from using the diligence. In any event, in cases where the adjudger was willing to use the adjudication as a spur to an instalment settlement, and take the risk of being "trumped" by a sequestration or liquidation, the proposed time-limit would prejudice rather than safeguard debtors. We therefore reject the concept of a maximum time-limit. The long negative prescription could still operate to extinguish the debt and, as a necessary corollary, the adjudication securing the debt. We suggest that this limit on the duration of the diligence should suffice.

3.103 We propose:

> **There should be no statutory maximum limit on the duration of an adjudication other than the limit arising from the operation of the long negative prescription extinguishing the debt secured by the adjudication.**

(Proposition 3.15).

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[1] Volume 2, Propositions 5.25(para. 5.140) and 5.26 (para. 5.147).

[2] Proposition 3.6 (para. 3.51).

[3] Cf. Debtors (Scotland) Act 1987, s. 25.

F. Incidence of liability for diligence expenses and ascription of sums recovered

3.104 Under the existing law, a conclusion for the expenses of an action of adjudication for debt is incompetent, and the expenses of an undefended action are not chargeable against the debtor even in a subsequent separate action for payment though the expenses caused by the debtor's unnecessary opposition to the action may be recovered.[1] The rule in undefended actions is sometimes attributed to the fact that the action is a diligence rather than an action of the normal type (in which expenses normally follow success).[2] This reason is not convincing, however, because under the common law the expenses of other diligences are normally chargeable against the debtor, being sometimes recoverable by the diligence itself and sometimes recoverable by a subsequent action constituting liability followed by further diligence. The real reason is shrouded in the mists of history but may possibly spring from the fact that whereas the sum recoverable by a (now abolished) special adjudication was related inter alia to the amount of the debt and expenses, a general adjudication was not so related and the value of the adjudged property could cover the debt plus expenses plus much more besides.

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[1] Mackay, Manual of Court of Session Practice, p.520; Maclaren Expenses p.109; Graham Stewart, p.589; Riley v. Cameron 1940 S.L.T. (Sh.Ct) 42. The adjudger's expenses in completing title by registering the decree of adjudication seem likewise not to be chargeable against the debtor.

[2] See previous footnote.

3.105 Whatever the true reason for the rule, it now appears anomalous and we think that the opportunity should be taken to apply to the new diligence of adjudication the same principles of expenses as will be applicable to poindings and arrestments under the Debtors (Scotland) Act 1987.[1] Given that in the reformed diligence, the adjudged property will normally be sold, or transferred to the adjudger by decree of foreclosure at a price, there seems no reason in principle why the adjudger should not be entitled to recover expenses properly incurred in executing the diligence from the proceeds of sale or to debit those expenses against the debtor on foreclosure. This would also be consonant with the law on liability for the expenses of a voluntary heritable security in which, in the absence of agreement, the expenses of enforcing the security are chargeable against the debtor.[2]

3.106 We set out in the next paragraph our provisional proposals on expenses and related matters which are based on sections 92 to 95 of the Debtors (Scotland) Act 1987.[3] The proposal also covers (a) the rules on ascription of sums recovered by an adjudication to ensure that those sums are ascribed first to the diligence expenses and (b) termination of adjudications by tender of the sums recoverable.

3.107 We propose:

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[1] Section 93.

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

[3] Implementing our Report on Diligence and Debtor Protection Recommendations 9.8 and 9.9.(paras. 9.32 to 9.58).

(1) The expenses properly incurred by a creditor in executing the diligence of adjudication (including the charge which preceded it) should be chargeable against the debtor.

(2) The expenses should be recoverable from the proceeds of the adjudication concerned but (apart from the expenses of the charge) not by any other legal process except supervening insolvency processes or processes of ranking creditors' claims on the adjudged property (eg in other adjudications or voluntary heritable securities) or time to pay orders. Any expenses not recovered by the time the diligence is completed or ceases to have effect should cease to be chargeable against the debtor, except as aforesaid.

(3) In the case of incidental court applications, each party should bear his own expenses unless the application or the objection thereto was frivolous in which event expenses not exceeding a sum prescribed by statutory instrument may be awarded.

(4) Sums due to the creditor and either recovered by the adjudication or paid to account while the adjudication subsisted would be ascribed in the following order:

(a) the expenses of the adjudication (and expenses of certain previous diligences which may be recoverable);

(b) interest due under the decree or other document accrued at the date of the registration of the notice of adjudication;

(c) any other sum including e.g. the principal sum and court expenses.

(5) An adjudication should cease to have effect if the full amount recoverable by it is paid to the creditor or his agent or is tendered and the tender is not accepted within a reasonable time, provided that the payment or tender is made prior to conclusion of the contract of sale under the power of sale or to the grant of decree of foreclosure.

(Proposition 3.16).

G.Adjudication of common property

3.108 Under the present law, where the debtor is one of two or more co-owners - by which we mean pro indiviso proprietors of common property (as distinct from joint property) whose "undivided shares" are alienable separately from the shares of the other proprietors - , the creditor may adjudge the debtor's share but not the shares of the other co-owners.[1]

3.109 The reform of adjudications of the debtor's share in common property raises very important issues. It is possible that such adjudications will be more usual than adjudications of property wholly owned by the debtor. This results from the fact that at present, co-ownership of the matrimonial home by married couples is very common indeed. A survey of family property

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[1] Graham Stewart, p. 584. The whole of the pro indiviso shares in common property may be adjudged where all the co-owners are co-obligants liable for the debt: eg. Will v. Elder's Trs. (1867) 6M.9.

carried out for us showed that, in 1979, 57% of all owner-occupied matrimonial homes in Scotland were in the joint names of the husband and wife.[1] Among homes purchased after 1977, the proportion was as high as 78%,[2] and we understand that, since then, the proportion may have increased even more as a side-effect of the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

3.110 Exclusion of common property from adjudication not an option. We think it essential that, as a minimum, a creditor should be entitled to adjudge and sell the debtor's share in common property. This results from the principle that a debtor's property should be available to his creditors for payment of his debts. The main question is whether as a general rule a creditor should be entitled to adjudge and sell the property itself (including the share of the co-owners as well as the debtor's share) or only the debtor's share.

3.111 Possible option: adjudication and sale of debtor's share. A right to adjudge and sell only the debtor's share would be consonant with the general principle that a creditor cannot do diligence against one person's property for another person's debts. Such a solution however has several disadvantages. First, a sale by an adjudger of only the debtor's share would be likely to fetch far less than the part of the price referable to the debtor's share in a case where the whole property was sold. This would be unfair to the debtor and possibly the creditor. Second, if an adjudger were to sell the debtor's pro indiviso share, the purchaser or co-owner would in most cases be likely to insist on a

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[1] Manners and Rauta, Family Property in Scotland (HMSO, 1981), Table 2.4.

[2] Idem.

sale of the whole property, by action of division and sale if necessary, rather than to continue as co-owner along with someone to whom he is ex hypothesi a complete stranger. So there would normally be two sales, and perhaps an action of division and sale. Normally such a result would be in nobody's interest and is best avoided. Third, a right to adjudge and sell only the debtor's share in common property would be unlikely to be attractive to creditors and would seriously diminish the utility of the diligence. For these reasons, we provisionally reject this option.

3.112 A refinement of this option would enable a creditor to adjudge and sell only the debtor's share, but subject to the right of any of the co-owners to require a sale of the whole property. This would not meet the foregoing criticisms, and would only be satisfactory if a co-owner exercised his right to require a sale of the whole property. It would be simpler and more satisfactory to enable the creditor as a general rule to adjudge and sell the whole property.

3.113 Preferred solution: adjudication and sale of property itself subject to safeguards for co-owner. We suggest that the general rule should be that a creditor should be entitled to adjudge and sell the whole of the common property and account to the co-owner for his share of the gross proceeds, but subject to certain rights of the co-owner. The co-owner should be entitled at his option either (a) to purchase the debtor's share of the common property at a valuation agreed by the adjudger, co-owner and debtor or as appraised by an independent professional valuer, or (b) to apply to the sheriff for an order requiring the adjudger to sell only the debtor's share and restricting the nexus of the adjudication to that share. The valuer would be selected

by agreement between the adjudger, co-owner and debtor or failing agreement by the sheriff. Where there were two or more other co-owners, any one of them should be entitled to exercise the foregoing option. There is a precedent for this approach in the recent legislation on poinding of moveables owned in common.[1] There may be cases (probably very rare) where the co-owner is content that the common property regime should continue, as where it is held as an investment eg. a tenement of houses, or superiorities or ground annuals. For this reason, we think that the co-owner should have a right to make the application to the sheriff suggested above.

3.114 Restriction of adjudication or debtor's share. By analogy with our proposals for judicial restriction of an exorbitant adjudication in a case where the adjudged property is wholly owned by the debtor,[2] we think that it should be possible for the debtor or a co-owner to apply to the sheriff for an order restricting the adjudication to a physical part of the common property, where in the sheriff's opinion the property is physically divisible and where the value of the debtor's share in that part would satisfy the debt of the adjudger and any prior or pari passu debt ranking on the proceeds of sale. The result would be that the part disburdened of the adjudication would continue to be owned in common by the debtor and the other co-owners.

3.115 We considered whether it should also be competent for the sheriff to exercise the same powers to order a physical division of the common property, and allocate a part to each co-owner, as if the process were an action of division and sale, and

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[1] Debtors (Scotland) Act 1987, s. 41.

[2] See Proposition 3.7 (para. 3.55) above.

to have a supplementary power to transfer and restrict the adjudication to the physical part allocated to the debtor. We think, however, that such a procedure would be too complicated for inclusion in this form of diligence.

3.116 Home of debtor or his family. In our view, the fact that the common property affected by the adjudication is a matrimonial home should not prevent the adjudger from selling the property itself, or, if on the application of the the co-owner (who will normally be the debtor's spouse or former spouse) the sheriff so requires, the debtor's share. As we argued above, there should be no exemption for the home of the debtor or his family from adjudication.[1] Consistently with this policy, the Matrimonial Homes (Family Protection) (Scotland) Act 1981, while it provides a safeguard against a collusive adjudication of a matrimonial home owned by one spouse designed to defeat the statutory occupancy rights therein of the other spouse,[2] does not prevent an adjudication used by a creditor in good faith to enforce his debt. Moreover, while the 1981 Act provides that where a spouse brings an action of division and sale of a matrimonial home which the spouses own in common, the court may refuse to grant decree or may postpone the granting of decree in the action,[3] there is no restriction on an adjudication of the share of a spouse for that spouse's debts. On obtaining a right as co-owner of the debtor's share in the home after expiry of the legal, the creditor has an absolute right to decree in an action of division and sale, since the property ceases to be a matrimonial home owned by the spouses in common to which section 19 of the 1981 Act applies. The policy underlying these legal rules is that the interest of a debtor or his spouse in the matrimonial home must yield to the interests of the debtor's

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1 Proposition 3.13(2) (para. 3.93)

2 Section 12.

3 Section 19.

creditors, and in our view, effect should be given to that policy in the present context, subject to adequate safeguards for co-owners as well as debtors to give them time to obtain alternative accommodation.

3.117 The only statutory provision which seems to some extent inconsistent with this policy is section 40(3)(a) of the Bankruptcy (Scotland) Act 1985 which provides that in an action of division and sale of a debtor's family home brought by a permanent trustee in the debtor's sequestration, the court will have the same powers to refuse or postpone decree as it has to refuse or postpone decree in an application for authority to sell the family home under section 40(1)(b) of that Act. With respect to section 40(1)(b), however, we argued above[1] that both in adjudications and sequestrations, the court should have power to delay granting authority for sale to enable the debtor to obtain alternative accommodation, but that it should not have power to withhold authority for sale indefinitely. On this analogy, section 40(3)(a), which simply applies section 40(1)(b), would or should in future give the court, in an action of division and sale by the permanent trustee, power to postpone decree but not power to refuse it indefinitely.

3.118 Home of co-owner or his family. There may be a case where the common property is the home of the co-owner or his family and the co-owner is not married to the debtor. In such a case the property may or may not be occupied also by the debtor as his home. For example, the home may be owned by a debtor and his brother, and the brother and his wife and family may occupy all or part of the property as their home. In such a

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[1] See paras. 3.56 to 3.65.

case, it would seem to be essential to accord to the brother or his family or both, as the case may be, the same protection enabling him or his spouse or former spouse to find alternative accommodation as would be available under our proposals to the debtor and his spouse or former spouse.

3.119 Procedure. Before the adjudger serves on the debtor and the co-owner or co-owners a notice of commencement of the sale procedure, three procedural steps must be taken. First, the registration of the adjudication must be intimated to the debtor and co-owners whose address is known to him and they must be informed of their rights to apply, if so advised, to the sheriff for a restriction of the adjudication where the common property is divisible and the adjudication exorbitant. In most cases of adjudged dwellings and their curtilage if any, the property will probably not be divisible but we cannot at present see any way of dispensing with this step in the procedure in particular classes of case which does not raise more problems than it solves. Second, every co-owner will have to be given an opportunity to exercise, if so advised, his option of purchasing the debtor's share at valuation or applying to the sheriff to restrict the adjudication to the debtor's share. Third, where the common property is or includes the home of the debtor, or a co-owner, or the family of either, the adjudger will require to obtain his or their consent to the sale or, in default of consent, the authority of the sheriff to the sale. These steps should be taken before the adjudger serves a notice of commencement of the sale procedure.

3.120 Preventing concurrent adjudication and action of division and sale. Serious difficulties could arise if the debtor or a co-owner were to raise an action of division and sale while an

adjudication attaching the common property was in effect. Simultaneous attempts at sale under the separate processes would be impractical. If the court wished to grant a decree of division, it is difficult to see what effect such a decree would or should have on the adjudication. It could be provided that the adjudication would attach to the debtor's part of the divided property but it would then be necessary to enable the adjudger to appear in the action to protect his interest, eg. against a collusive division. The simplest and best solution would be to prohibit an action of division and sale while the adjudication of the common property is in effect.

3.121 For similar reasons, we suggest that while an action of division and sale of common property in which a debtor has an interest as co-owner is in dependence, an adjudication of the common property should be ineffectual. But the court should have power to dismiss the action on the creditor's application where the procedure is being unduly prolonged to the prejudice of a creditor holding a warrant for diligence.

3.122 We propose:

(1) **As a general rule, the creditor of a debtor who has a pro indiviso share of common property should be entitled to adjudge and sell the common property itself but not (except as mentioned below) the debtor's share alone. The adjudger (and his solicitor executing the diligence) should be bound to account to the co-owner for the co-owner's proportionate share of the gross proceeds of sale.**

(2) The adjudger should intimate the registration of the adjudication to the co-owners whose whereabouts are known to him as well as the debtor. The intimation should inform them of the rights proposed below.

(3) A co-owner (other than the debtor) should be entitled at his option either (a) to purchase the debtor's share at a valuation or (b) to apply to the sheriff for an order requiring the adjudger to sell only the debtor's share and restricting the adjudication to that share. If there are two or more co-owners, any one of them should be entitled to exercise these rights.

(4) The valuation should be such as is agreed by the adjudger, co-owner and debtor or as appraised by a valuer appointed by them jointly or, in default of such an appointment, by the sheriff.

(5) The debtor and a co-owner should be entitled to apply to the sheriff for restriction of the adjudication to a physical part of the common property. In such an application, where the sheriff considers that the common property is physically divisible, then:

(a) if the sheriff is satisfied that the debtor's share of the proceeds of sale of a physical part of the common property would satisfy the sums recoverable by the adjudication (ie. the adjudger's debt and any prior or pari passu debts), he should make an order having the effect, on registration in the property registers, of restricting the adjudication to that part, and disburdening the remaining part; and

(b) if it appears to the sheriff that the debtor's share of the proceeds of sale of a physical part of the common property is likely to satisfy the sums recoverable, he should have power to make an order allowing only that part of the property to be sold, and sisting further procedure in the diligence in relation to the remaining part until the outcome of the sale is known.

(6) Paragraphs (3), (4) and (6) in Proposition 3.7 (para. 3.55) above should apply with any necessary modifications to a restriction of an adjudication mentioned in the preceding paragraph.

(7) Any exercise by a co-owner of his option to purchase should be notified to the adjudger, and any application by the co-owner or debtor for restriction should be commenced, within 8 weeks after the date or dates of initmation to the co-owner and debtor of the registration of the notice of adjudication.

(8) Where at the date of service of the notice of entitlement to adjudge, the common property affected by the adjudication consisted of or included property occupied as his or her home by:

(a) the debtor or the debtor's spouse or former spouse; or

(b) a co-owner or his spouse or former spouse,

(hereafter referred to as "protected persons") the adjudger, before serving a notice of commencement of the sale procedure, should be required to obtain either:

(i) the written consent to sale of each protected person if still occupying the property as his or her home; or

(ii) where the adjudger is unable to obtain the consent of each such protected person, the authority of the sheriff to the sale.

(9) The proposals on the sheriff's powers to postpone granting authority to sell and the other proposals in paras. (2) to (6) of Proposition 3.8 (para. 3.65) should apply with any necessary modifications to an application for authority to sell mentioned in para. (8)(ii) above.

(10) Unless a co-owner has purchased the debtor's share, the adjudger should serve a notice of commencement of the sale procedure. Service should be made on each co-owner and protected person as well as the debtor. The notice should specify any restriction of the adjudication. Service of the notice should be competent only after:

(a) any application for restriction has been disposed of or the 8-weeks period or periods mentioned above has or have expired without an option to purchase being notified or an application for restriction being made; and

(b) in the case of the home of a protected person, the adjudger has obtained the necessary consents or the authority of the sheriff to the sale.

(11) While an adjudication attaching common property is in effect, it should not be competent for the debtor or any other co-owner to commence an action of division and sale of the common property.

(12) While an action of division and sale of common property, in which a debtor has an interest as co-owner, is in dependence, an adjudication of the common property should be ineffectual. A creditor holding a warrant for diligence against the debtor's property should have a title to appear in the action and to apply for its dismissal, and the court should grant the application if it appears to the court that the action is being unduly prolonged and the right of the creditor to adjudge is being unduly prejudiced by its continuance.

(Proposition 3.17).

PART IV

SUMMARY OF PROVISIONAL PROPOSALS IN VOLUME 1

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

A. A new diligence of adjudication and sale

Need for new diligence for attaching heritable property

3.1

(1) The diligence of adjudication for debt requires reform.

(2) The role of adjudications for debt cannot adequately be filled by resort to inhibitions, or insolvency processes such as sequestration or liquidation. Accordingly some mode of diligence for attaching heritable property should continue to be available to creditors.

(Para. 3.4).

Attachment and sale, with foreclosure in default of sale

3.2

(1) The existing diligence of adjudication should be abolished and the Adjudications Act 1672 should be repealed.

(2) In place of the old diligence of adjudication, a new diligence should be established which should take the form

of an attachment of heritable property belonging to the debtor followed by a procedure for its sale and payment of the debt due to the creditor out of the proceeds of sale. Foreclosure should be a subsidiary remedy available only if the primary remedy of sale is unsuccessful.

(3) The legal period of redemption in its present form (ie. imposing a minimum limit of 10 years on the duration of an adjudication) should be abolished. The debtor should have a right to redeem the adjudged property, by paying the debt, at any time until the date of conclusion of the contract of sale entered into by the adjudger in implement of his power of sale, or as the case may be until the adjudger obtains decree of foreclosure.

(4) The foregoing proposals for a new diligence would replace adjudications of interests in land registrable in the property registers. (Adjudications of interests not so registrable, and of debts due to the debtor secured by heritable securities or adjudications, will be considered in a later Discussion Paper).

(Para. 3.7).

Terminology

3.3

Views are invited on whether the new form of diligence should be called "adjudication and sale" or "attachment and sale of heritable property" or by some other name.

(Para. 3.9).

Warrant for charge, adjudication and sale

3.4

The warrant for diligence in an extract court decree for payment or in an extract registered document of debt should automatically have effect as if it contained:

(a) a warrant to charge the debtor to pay the debt together with a notice of entitlement to adjudge as proposed in Proposition 5.3 at para. 5.15;

(b) failing payment within a specified period, a warrant to adjudge unspecified heritable property belonging to the debtor by registering an adjudication document ("a notice of adjudication") in the property registers; and

(c) a warrant to sell the adjudged property(subject to safeguards proposed below).

(Para. 3.17).

Avoiding undue disruption of normal conveyancing practice: mandatory period of litigiosity before adjudication

3.5

(1) A creditor should be entitled to register in the personal register an interim notice of litigiosity affecting specified

subjects to be adjudged without producing to the Department of the Registers a certificate of execution of a charge and notice of entitlement to adjudge. The interim notice should have effect only if a "final" notice of litigiosity, such as is mentioned in para. (2) below, is registered within 21 days after the date of registration of the interim notice, and the effect of a duly registered final notice should draw back to that date.

(2) A creditor who has served a charge to pay and notice of entitlement to adjudge should be required to register a "final" notice of litigiosity, within 14 days after such service, on producing to the Department of the Registers the certificate of execution of the charge and notice of entitlement to adjudge as authority for registration of the final notice.

(3) The creditor should not be entitled to register a notice of adjudication until the expiry of a period, after the date of registration of the final notice of litigiosity, to be prescribed by statute or possibly statutory instrument. Views are invited on the length of the period, but it is suggested that it should preferably be 9 months, and certainly not more than that nor less than 6 months. The creditor should be required to register a notice of adjudication within one month after the expiry of the foregoing period and the notice of litigiosity should cease to have effect on the date of registration of the notice of adjudication, or the expiry of the one month, whichever first occurs.

(4) Any notice of adjudication registered in the property registers in breach of the requirements mentioned in paras. (2) and (3) above should be ineffectual.

(5) Should the requirements of a mandatory notice of litigiosity and period of delay apply to thosestatutory charging orders whose priority in ranking depends on priority in time of the respective dates of registration of the order and the competing incumbrance? If so, no prior charge nor notice of entitlement should however be required before registering the order.

(6) Should the expense of interim and final notices of litigiosity be chargeable against the debtor?

(Para. 3.43).

B. Protection of debtor or home of his family

Time to pay decrees and orders under Debtors (Scotland) Act 1987

3.6

The provisions of the Debtors (Scotland) Act 1987 on time to pay directions in court decrees (for short a time to pay decree) and on time to pay orders should be adapted to integrate with the new diligence of adjudication and sale as mentioned below.

(1) A time to pay decree and time to pay order should (as under the 1987 Act) preclude the commencement of adjudication and sale.

(2) An application for a time to pay order should be competent after the service of a charge and at any stage in the diligence of adjudication and sale until the registration of the notice of adjudication.

(3) An interim order sisting diligence in connection with an application for a time to pay order should not prevent the creditor from registering a notice of litigiosity or commencing a diligence of adjudication and sale or from proceeding with the diligence up to the stage of registration of a notice of adjudication, but it should prevent an adjudging creditor from taking further steps in the diligence.

(4) Where the creditor has registered an adjudication and the sheriff thereafter makes a time to pay order, the sheriff should be required to make an ancillary order prohibiting the adjudger from taking any further steps in the diligence. Any steps taken in contravention of the prohibition should be incompetent. The sheriff, however, should not have power in such circumstances to extinguish an adjudication and the notice of litigiosity would continue in effect for a maximum period of 5 years from the date when it first took effect.

(5) If while the adjudication was in effect, the time to pay order lapsed on the debtor's default, the adjudger would become entitled to pursue the diligence by intimating the registration of the notice of adjudication.

(Para. 3.51).

Restriction by court of exorbitant adjudication

3.7

(1) The power of the Court of Session under the Diligence Act 1661 to restrict an adjudger's possession should be repealed.

(2) Where the sheriff, on the debtor's application, is satisfied that the property attached by the adjudication is divisible (ie. does not form a unit which in the sheriff's opinion should not be sold in lots), then:-

(a) if the sheriff is satisfied that the sale of part of the adjudged property would satisfy the sums recoverable by the adjudication (ie. the adjudger's debt and any other debt heritably secured over the property and falling to be ranked on the proceeds of sale), he should make an order having the effect on registration in the property registers of restricting the adjudication to that part of the adjudged property, and disburdening the remaining part;

(b) if the sheriff is of opinion that the sale of part of the adjudged property is likely to satisfy the sums recoverable, he should have power to make an order allowing only that part of the property to be sold, and sisting further procedure in the diligence in relation to the remaining part until the outcome of the sale is known.

(3) Where the sheriff makes an order allowing part of the adjudged property to be sold and sisting further procedure in relation to the remaining part as mentioned in para.(2)(b) above, then:-

(a) if the proceeds of sale of the part sold satisfy the sums recoverable -

(i) the adjudger should at his own expense register in the property registers a statutory certificate in the prescribed form having the effect on such registration of disburdening the unsold part of the adjudication and any other diligence or security which had secured the sums recoverable;

(ii) if the adjudger does not register the certificate within a reasonable time after the sale, the sheriff on the debtor's application should have power to make an order disburdening the unsold property of the adjudication and any other diligence or security which had secured the sums recoverable and awarding the expenses of the application and the registration against the adjudger in favour of the debtor;

(b) if the proceeds of sale of the part sold do not satisfy the sums recoverable, the sheriff on the creditor's application should be empowered to recall the sist of the diligence

(4) Where two (or more) separate subjects are adjudged by separate adjudications for the same debt, the sheriff should have the same powers to extinguish or sist one of the adjudications as if the separate subjects were part of divisible property attached by one adjudication.

(5) The debtor should be notified in the intimation of registration of the notice of adjudication, of his right to make an application for restriction of an adjudication and the application should be competent within (say) 8 weeks after the date of intimation.

(6) The sheriff's decision in any of the foregoing applications should be final except on a question of law.

(Para. 3.55).

Consent to sale of home of debtor or his family

3.8

(1) Where the adjudged subjects consist of or include the home of the debtor or his spouse or former spouse, (hereafter called "protected persons"), the adjudger, before serving a notice of commencement of the sale procedure, should be required to obtain:

(a) the written consent to sale of each of the protected persons, if he or she resides there and also resided there on the date of service of the notice of entitlement to adjudge; or

(b) where the adjudger is unable to obtain that consent, the authority of the sheriff for the sale.

(2) The procedure should apply to the home of the protected persons in the sense of property belonging to the debtor (whether alone or in common) which any of the protected persons ordinarily (or habitually) have occupied as a residence, or principal residence if such a person occupied more than one residence, on and after the date of service of the notice of entitlement to adjudge.

(3) It should be made clear by statute that the paramount object of the sheriff's powers in dealing with an adjudger's application for authority to sell is to give the protected person a reasonable time to obtain alternative accommodation for himself and any child of the family residing with him.

(4) In dealing with such an application, the sheriff after giving any protected person an opportunity to be heard, should have power:

(a) to postpone the granting of the application for such period or further period as he may specify. Views are invited on whether there should be an over-all limit of (say) 12 months from the date of the application;

(b) to grant the application with or without conditions.

The sheriff should not, however, have power to withhold consent to sale indefinitely whether by refusing to grant

the application on the purported ground that sale is unjustifiable on the merits, or otherwise.

(5) Views are invited on whether the adjudger should also be entitled to apply to the sheriff for authority to sell where he is unable to ascertain whether there is any person whose consent is required.

(6) The expense of the adjudger's application to the sheriff should be borne by the adjudger, and in an opposed application each party should bear his or her own expenses.

(Para.3.65).

Debtor's right to retain interim possession pending sale

3.9

(1) As a general rule, a debtor (whether an individual or a body corporate or unincorporate) in personal possession of adjudged subjects, and any person possessing by permission of the debtor, should be entitled to retain possession for so long as the debtor has the right to redeem the subjects, which under our proposals would be the date of conclusion of the contract of sale or of the granting of decree of foreclosure, as the case may be.

(2) Where a contract of sale of the adjudged subjects is concluded, the adjudger should have by law, and without the need for a court decree, a right to require the debtor and persons deriving right from him (other than tenants) occupying the subjects to remove on a charge of 7 days on pain of ejection by sheriff officers.

(Para. 3.69).

Other safeguards for debtor where debt disproportionately small relative to value of adjudged property

3.10

(1) Should a safeguard for debtors against adjudication and sale be introduced in the case of debts which are small, or relatively small in comparison with the value of the adjudged property?

(2) If such a safeguard should be introduced, should it take the form of:

(a) a threshold or fixed lower limit on the amount of the debt enforceable by adjudication (as discussed in paras. 3.76 and 3.77); or

(b) a rule requiring a creditor to obtain the leave of the sheriff before commencing adjudication procedure where the debt did not exceed a prescribed sum (as discussed in paras. 3.78 and 3.79); or

(c) a power enabling the sheriff to sist an adjudication where the debt is disproportionately small relative to the value of the adjudged property (as discussed in paras. 3.80 and 3.81)?

Our provisional preference is for the first of these options.

(3) If there were to be a threshold or prescribed sum as mentioned in para. (2)(a) and (2)(b) above respectively, should it be fixed by reference to the upper jurisdictional limit for summary cause actions for payment (currently £1,000), or should a higher amount (such as £10,000) be selected?

(4) If there were to be a threshold as mentioned in para. (2)(a) above, restricting the use of adjudications, the same restriction should not apply to the use of inhibitions.

(Para.. 3.82).

Restriction on advertisements of sale identifying debtor

3.11

The advertisement of sale of adjudged subjects in implement of the adjudger's power of sale should not name the debtor nor disclose that the sale is a judicial sale.

(Para. 3.84).

Obligation of selling or foreclosing adjudger to account to debtor

3.12

(1) Where the adjudger sells the adjudged property:

(a) the proceeds of sale (less diligence expenses chargeable against the debtor) must be treated as paid to account of the debt due to the adjudger and any

prior, pari passu or postponed debts which fall to be ranked on the proceeds of sale; and

(b) the adjudger must account for and pay to the debtor the free proceeds of sale remaining after deducting the adjudger's debt and diligence expenses chargeable against the debtor, and any prior, pari passu or postponed debts which fall to be ranked on the proceeds of sale.

(2) Where the adjudger obtains decree of foreclosure of adjudged subjects, the price at which the adjudger has acquired the property (mentioned at paras. 5.103(a) and 5.108(a)) less diligence expenses chargeable against the debtor must be treated as paid to account of the debt due to the adjudger.

(Para. 3.86).

C. Protection of creditors' interests

3.13

(1) A creditor should be entitled to obtain a warrant for adjudication and sale as of right, and the courts should have no discretionary power to refuse to grant such a warrant, without prejudice however to the courts' powers to grant time to pay decrees or orders precluding or freezing adjudication and sale, or postponing authority to sale of the home of the debtor or his spouse or former spouse.

(2) There should be no homestead exemption, or similar exemption by operation of law, from adjudication and sale.

(Para. 3.93).

D. Mode and procedure for sale and foreclosure

3.14

Comments are invited on the provisional proposals on sale and foreclosure summarised at paras. 3.94 to 3.96 above and discussed in more detail in Part V.

(Para. 3.97).

E. Duration of adjudication

3.15

There should be no statutory maximum limit on the duration of an adjudication other than the limit arising from the operation of the long negative prescription extinguishing the debt secured by the adjudication.

(Para. 3.103).

F. Incidence of liability for diligence expenses and ascription of sums recovered

3.16

(1) The expenses properly incurred by a creditor in executing the diligence of adjudication (including the charge which preceded it) should be chargeable against the debtor.

(2) The expenses should be recoverable from the proceeds of the adjudication concerned but (apart from the expenses of the charge) not by any other legal process except supervening insolvency processes or processes of ranking creditors' claims on the adjudged property (eg in other adjudications or voluntary heritable securities) or time to pay orders. Any expenses not recovered by the time the diligence is completed or ceases to have effect should cease to be chargeable against the debtor, except as aforesaid.

(3) In the case of incidental court applications, each party should bear his own expenses unless the application or the objection thereto was frivolous in which event expenses not exceeding a sum prescribed by statutory instrument may be awarded.

(4) Sums due to the creditor and either recovered by the adjudication or paid to account while the adjudication subsisted would be ascribed in the following order:

(a) the expenses of the adjudication (and expenses of certain previous diligences which may be recoverable);

(b) interest due under the decree or other document accrued at the date of the registration of the notice of adjudication;

(c) any other sum including eg. the principal sum and court expenses.

(5) An adjudication should cease to have effect if the full amount recoverable by it is paid to the creditor or his agent or is tendered and the tender is not accepted within a reasonable time, provided that the payment or tender is made prior to conclusion of the contract of sale under the power of sale or to the grant of decree of foreclosure.

(Para. 3.107).

G. Adjudication of common property

3.17

(1) As a general rule, the creditor of a debtor who has a pro indiviso share of common property should be entitled to adjudge and sell the common property itself but not (except as mentioned below) the debtor's share alone. The adjudger (and his solicitor executing the diligence) should be bound to account to the co-owner for the co-owner's proportionate share of the gross proceeds of sale.

(2) The adjudger should intimate the registration of the adjudication to the co-owners whose whereabouts are known to him as well as the debtor. The intimation should inform them of the rights proposed below.

(3) A co-owner (other than the debtor) should be entitled at his option either (a) to purchase the debtor's share at a valuation or (b) to apply to the sheriff for an order requiring the adjudger to sell only the debtor's share and restricting the adjudication to that share. If there are

two or more co-owners, any one of them should be entitled to exercise these rights.

(4) The valuation should be such as is agreed by the adjudger, co-owner and debtor or as appraised by a valuer appointed by them jointly or, in default of such an appointment, by the sheriff.

(5) The debtor and a co-owner should be entitled to apply to the sheriff for restriction of the adjudication to a physical part of the common property. In such an application, where the sheriff considers that the common property is physically divisible, then:

(a) if the sheriff is satisfied that the debtor's share of the proceeds of sale of a physical part of the common property would satisfy the sums recoverable by the adjudication (ie. the adjudger's debt and any other debt heritably secured over the property and falling to be ranked on the proceeds of sale) he should make an order having the effect, on registration in the property registers, of restricting the adjudication to that part, and disburdening the remaining part; and

(b) if it appears to the sheriff that the debtor's share of the proceeds of sale of a physical part of the common property is likely to satisfy the sums recoverable, he should have power to make an order allowing only that part of the property to be sold, and sisting further procedure in the diligence in relation to the remaining part until the outcome of the sale is known.

(6) Paragraphs (3), (4) and (6) in Proposition 3.7 (para. 3.55) above should apply with any necessary modifications to a restriction of an adjudication mentioned in the preceding paragraph.

(7) Any exercise by a co-owner of his option to purchase should be notified to the adjudger, and any application by the co-owner or debtor for restriction should be commenced, within 8 weeks after the date or dates of intimation to the co-owner and debtor of the registration of the notice of adjudication.

(8) Where at the date of service of the notice of entitlement to adjudge, the common property affected by the adjudication consisted of or included property occupied as his or her home by:

(a) the debtor or the debtor's spouse or former spouse; or

(b) a co-owner or his spouse or former spouse,

(hereafter referred to as "protected persons") the adjudger, before serving a notice of commencement of the sale procedure, should be required to obtain either:

(i) the written consent to sale of each protected person if still occupying the property as his or her home; or

(ii) where the adjudger is unable to obtain the consent of each such protected person, the authority of the sheriff to the sale.

(9) The proposals on the sheriff's powers to postpone granting authority to sell and the other proposals in paras. (2) to (6) of Proposition 3.8 (para. 3.65) should apply with any necessary modifications to an application for authority to sell mentioned in para. (8)(ii) above.

(10) Unless a co-owner has purchased the debtor's share, the adjudger should serve a notice of commencement of the sale procedure. Service should be made on each co-owner and protected person as well as the debtor. The notice should specify any restriction of the adjudication. Service of the notice should be competent only after:

(a) any application for restriction has been disposed of or the 8-weeks period or periods mentioned above has or have expired without an option to purchase being notified or an application for restriction being made; and

(b) in the case of the home of a protected person, the adjudger has obtained the necessary consents or the authority of the sheriff to the sale.

(11) While an adjudication attaching common property is in effect, it should not be competent for the debtor or any other co-owner to commence an action of division and sale of the common property.

(12) While an action of division and sale of common property, in which a debtor has an interest as co-owner, is in dependence, an adjudication of the common property should

be ineffectual. A creditor holding a warrant for diligence against the debtor's property should have a title to appear in the action and to apply for its dismissal, and the court should grant the application if it appears to the court that the action is being unduly prolonged and the right of the creditor to adjudge is being unduly prejudiced by its continuance.

(Para. 3.122).

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