



# **SCOTTISH LAW COMMISSION**

MEMORANDUM NO . 49

THIRD MEMORANDUM ON DILIGENCE : ARRESTMENT  
AND JUDICIAL TRANSFER OF EARNINGS

October 1980



This Memorandum is published for comment and criticism, and does not represent the final views of the Scottish Law Commission.

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## Note on Abbreviations

The following abbreviations are used to refer to reports in the research programme on diligence initiated by the Central Research Unit of the Scottish Office. Fuller details of the publications are set out at Appendix A to our First Memorandum on Diligence:

C.R.U. Diligence Survey	= "The Nature and Scale of Diligence"
C.R.U. Court Survey	= "Debt Recovery through the Scottish Sheriff Courts"
C.R.U. Arrestment Survey	= "Arrestments of Wages and Salaries - A review of Employers' Involvement"
Edinburgh University Debtors Survey	= "The Origins and Consequences of Default - an Examination of the Impact of Diligence"
O.P.C.S. Defenders Survey	= "Survey of Defenders in Debt Actions in Scotland"
C.R.U. Debt Counselling Survey	= "Debt Counselling - An Assessment of the Services and Facilities Available to Consumer Debtors in Scotland"

SCOTTISH LAW COMMISSION

Memorandum No. 49

Third Memorandum on Diligence: Arrestment and  
Judicial Transfer of Earnings

PART I: THE NEED FOR A CONTINUOUS DILIGENCE AGAINST EARNINGS

(1) Preliminary: the main issues

1.1 In this consultative Memorandum, we advance for comment and criticism proposals for reform of the law on arrestment of wages and other earnings.<sup>1</sup> Arrestment is the diligence by which a creditor holding a court decree for payment of debt attaches the next instalment of wages or salary in the hands of the debtor's employer for the purpose of obtaining payment or partial payment of the debt. The topic's importance is reflected in the fact that about 9,000 arrestments of wages and salaries are served every year and second only to the diligence of charge, poinding and warrant sale, arrestment is by far the most commonly used form of diligence in Scotland.<sup>2</sup> We shall revert in a later Memorandum to arrestments of property and funds other than earnings.

1.2 The main issues considered in this Memorandum may be summarised as follows:-

- (a) Should a system of continuous diligence against earnings be introduced in Scotland in place of the existing system whereby an arrestment of earnings only attaches the earnings due for the pay period in which the arrestment is served? In Part I, we provisionally conclude that, primarily in order to prevent repeated arrestments of earnings based on

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<sup>1</sup>This Memorandum is the third of five Memoranda (Nos. 47-51) on diligence issued on the same date. The scope and thrust of these Memoranda and future Memoranda on diligence are briefly explained in our First Memorandum on Diligence: Memorandum No. 47.

<sup>2</sup>See C.R.U. Diligence Survey.

the same debt, a system of continuing diligence against earnings should be established.

- (b) On the question of what form a continuing diligence against earnings should take, we provisionally conclude that there are two main models. The first, which we call "extended arrestment", would be closely modelled on the existing diligence of arrestment, but would arrest a proportion determined by legal rules of the debtor's earnings on each pay day falling within a definite period of several months prescribed by law. This diligence is described in general terms at paras.1.25 and 1.27 below and in more detail in Part II. The second model, which we call an "earnings transfer order" would not only "attach", but require the employer to pay the creditor, a proportion of earnings (possibly fixed by the court in its discretion rather than by legal rules) on each pay day until the debt and expenses were paid (rather than for a definite period fixed by law). This form of diligence would (unlike extended arrestment) require a separate application to the court after decree is obtained. Earnings transfer orders are described in general terms at paras.1.26 and 1.27 below and in more detail in Part III.
- (c) The next question is whether extended arrestments or earnings transfer orders, or both of these forms of diligence, should be introduced and, if both should be introduced, what should be the scope of each? We provisionally conclude at paras.1.28 et seq below that extended arrestments should be introduced for the recovery of ordinary civil debts but that earnings transfer orders might be appropriate for certain categories of case.
- (d) In Part IV, we consider a number of miscellaneous and consequential issues, including the question whether an employer should be prohibited from dismissing an employee as a result of diligence against earnings.

We would emphasise that our conclusions are provisional only and we have described the new forms of diligence in detail so that their advantages and disadvantages can be assessed.

1.3 The research undertaken by us and on our behalf has identified a number of wrong or mistaken practices in the operation of the present system of arrestments of earnings and, in our proposals on extended arrestments, we have sought to correct these practices. Even if our proposals for continuous diligence against earnings were not implemented, reforms would be needed to remove the defects and uncertainties in the law which give rise to these practices.<sup>1</sup>

(2) Arguments for continuous diligence against earnings

1.4 How arrestments of earnings operate: we begin with a brief explanation of the way in which arrestments of earnings operate, since this is sometimes misunderstood. Where a creditor obtains a court decree for payment of a debt, the decree contains a warrant enabling the creditor to instruct an officer of court (sheriff officer or messenger-at-arms) to arrest the debtor's wages. The officer serves a schedule of arrestment on the debtor's employer and, in the case of ordinary debts, thereby attaches a prescribed proportion (half the balance over £4 per week) of the instalment of the debtor's wages due for the pay period in which the arrestment is served.<sup>3</sup> Where the arrestment is used to enforce aliment, rates or taxes, the whole of the earnings for the pay period in question, and not merely a prescribed proportion, are arrested.<sup>4</sup> The effect is that the employer cannot pay the arrested wages to the employee but must hold

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<sup>1</sup>These reforms are summarised at para. 4.19.

<sup>2</sup>Wages Arrestment Limitation (Scotland) Act 1870 as amended by the Wages Arrestment Limitation (Amendment)(Scotland) Act 1960, s.1.

<sup>3</sup>An arrestment normally attaches only debts presently due but an arrestment of certain "termly payments" will attach the whole term's payment though the future part of the term's payment is not yet due. Earnings are treated as termly payments for this purpose: Graham Stewart, Diligence p.53; Umpherston, Master and Servant, p.68; Marshall v. Nimmo & Co. (1847) 10 D.328 at pp.329, 331; cf. Shiel & Co. Ltd. v. Skinner & Co. (1934) 50 Sh.Ct.Reps.101. Earnings paid in advance or for the next pay period will not be attached because they are not presently due at the time of the arrestment.

<sup>4</sup>Wages Arrestment Limitation (Scotland) Act 1870, s.4.

them for the benefit of the arresting creditor.<sup>1</sup> The arrestment, however, does not by itself require or even authorise the employer to pay the arrested sum to the creditor. Before paying that sum to the creditor, the employer must (or should) obtain the authority of the debtor-employee. If this authority (which may be given by oral or written mandate) is refused, the creditor can obtain payment by raising an action of furthcoming in which the debtor or employer will lodge any defences available to them.<sup>2</sup> In practice, the employee-debtor very rarely refuses a mandate authorising payment since he would then be liable for the expenses of an action of furthcoming.

(a) The problem of repeated arrestments

1.5 A single arrestment of earnings will generally not recover the whole of a debt due under a decree for payment. It has been estimated that the average debt sued for in summary cause actions in 1978 was about £102,<sup>3</sup> and that 55% of arrestments laid in that year were used to enforce debts of over £100.<sup>4</sup> It is clear from the discussion (at paras.1.9 and 1.10 below) of the impact of arrestment on wages that, in most cases where earnings are arrested, several arrestments are needed to recover the whole debt out of the earnings, unless an informal arrangement is made between the debtor and creditor for payment immediately or by instalments. In fact, of about 6,000 first arrestments of earnings laid in 1978, nearly 30% (1,700, 28.3%) were repeated at least once. The total number of arrestments against earnings in 1978 is

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<sup>1</sup>An arrestment not only confers on the creditor a preference over the arrested wages in a question with other creditors but brings the arrested wages within the protection of the court in the sense that breach of arrestment is actionable or punishable in various ways: Graham Stewart, op. cit., p.125 et seq; pp.221-3

<sup>2</sup>For example, the debtor may allege that the debt has been paid and the employer may allege that no wages were due at the time of the arrestment or had already been arrested. Either may found on a procedural or formal defect in the arrestment.

<sup>3</sup>C.R.U. Court Survey, para.3.6.

<sup>4</sup>C.R.U. Diligence Survey, para. 4.10, Annex D, Table 5. The arrestments in question cover arrestments of earnings and funds other than earnings but it is thought that the percentage relating to earnings is not significantly lower than 55%.

estimated to have been about 9,000, made up to 6,000 first arrestments, 1,700 single repeat arrestments and 1,000 multiple repeat arrestments.<sup>1</sup>

1.6 Where arrestments are repeated, in almost all cases the debtor is liable to meet the expense of the first arrestment and the repeats.<sup>2</sup> It seems to us that the level of repeat arrestments is unduly high and that it cannot be eliminated or substantially reduced except by the introduction of a system of continuous attachment of earnings.

1.7 A continuous diligence against earnings might be thought unnecessary if arrestments normally operated successfully as a spur to an instalment settlement. Indeed this is the way in which the McKechnie Committee considered that arrestments should operate.<sup>3</sup> Unfortunately, we do not have statistics of the numbers of arrestments which successfully induce an instalment settlement; the Edinburgh University Debtors Survey suggests that few arrestments of earnings induce a settlement which clears the debt, but the sample of debtors subject to arrestment of earnings (25 only) is too small to support reliable generalisation. Even if most arrestments are successful in inducing successful informal arrangements for payment, the numbers of repeats are, in our view, sufficiently numerous to suggest that a continuous diligence against earnings is needed.

1.8 It has been argued that if arrestments of wages and salaries are not well adapted for the recovery of ordinary lump sum debts, then they are even less well adapted to the recovery of arrears of periodic debts, such as decrees

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<sup>1</sup>C.R.U. Diligence Survey, para. 3.6. The multiple repeat arrestments ranged from arrestments repeated twice to arrestments repeated thirteen times. The majority were repeated twice only.

<sup>2</sup>Except in those few cases where the arrestment does not attach sufficient money to cover the expense of the arrestment: see Wages Arrestment Limitation (Scotland) Act 1870, s.2.

<sup>3</sup>Report of the Departmental Committee on Diligence (1958) Cmnd. 456, para. 87.

awarding alimony to or for separated wives, unmarried mothers or children, or awarding periodical allowance to ex-wives after divorce, or to the obligations of a bankrupt to make contributions out of personal earnings to the trustee in his sequestration. In these cases, when default occurs, there is a case for enabling the creditors to intercept a proportion of the debtor's earnings not only to clear the arrears but also to prevent default in respect of future periodic instalments accruing due. Only about 12% of arrestments however, are instructed by spouses or ex-spouses of debtors<sup>1</sup> (usually, it may be presumed, to enforce maintenance) and the number of repeat arrestments and multiple repeat arrestments by spouses and ex-spouses is not significantly high as compared with other groups of creditors. We stress these 'periodic debt' cases less than the need to prevent repeated arrestments of earnings generally.

(b) Inadequacy of subsistence exemption

1.9 As indicated, for ordinary civil debts (viz excluding alimony, rates and taxes), wages are arrestable to the extent of one-half of the surplus above £4 per week. The effect of this formula can be seen by considering its impact on the pay of an average married employee with two children. In April 1979 the national average wage of men in full time employment was £98.80<sup>2</sup> giving a net or "take home" pay of £72.90 after deducting income tax and social security contributions.<sup>3</sup> If the limitation formula had been applied to the net wage,<sup>4</sup> £34.45 would have been arrestable leaving the debtor with a "take home pay" of £38.45, to which must be added child benefit amounting to £6<sup>5</sup> giving

<sup>1</sup>See C.R.U. Diligence Survey, para. 4.5.

<sup>2</sup>Department of Employment Gazette (May 1980) Table 126 at p.568.

<sup>3</sup>Based on the tax rates and allowances and the contribution rate in force in 1978/9.

<sup>4</sup>The C.R.U. Arrestment Survey, para. 25, showed that most employers surveyed operated the formula on employees' net wages rather than on gross wages.

<sup>5</sup>Rate for 1979 (until November).



a total household income of £44.45. If the limitation formula had been applied to the gross wage, then £47.40 would have been arrestable leaving the debtor with a "take home pay" of £25.50 and a total household income of £31.50.

1.10 In 1979, the supplementary benefit scale rate entitlement of a married couple living together with two children under 5 years old was £34.05, to which would have been added a sum for rent (an average figure for which was probably about £8<sup>1</sup>) giving a total benefit of £42. Thus, in the case of an average wage earner, an arrestment would have cut the household income to a sum just above supplementary benefit level, (if reckoned on net pay) or below that level (if reckoned on gross pay). Many debtors earn wages below the national average and in their case the hardship is correspondingly greater. Where the debt is aliment, rates or taxes the whole wages may be arrested. We have no doubt therefore that the present rules produce harsh results especially if repeated arrestments are made. Indeed in many cases the debtor's family can only meet their essential household expenses by defaulting on other commitments or delaying payment of other debts.<sup>2</sup>

1.11 Accordingly, a major objective of reform should be to increase the amount of wages exempt from diligence. It might be thought that this could be relatively easily achieved by increasing the level of exempt wages under the Wages Arrestment Limitation (Scotland) Act 1870. It seems likely, however, that if the subsistence exemption were raised significantly, creditors would have resort to repeated arrestments even more than at present. It seems to us therefore that, in order to raise the subsistence exemption to a realistic level in a way which secures a reasonable return to a creditor using the diligence, it would be necessary to spread the arrestment of earnings over a longer period by introducing a continuous diligence against earnings.

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<sup>1</sup>Edinburgh University Debtors Survey.

<sup>2</sup>Idem.

Possible criticisms of continuous diligence against earnings

1.12 The McKechnie Report rejected a system of continuous diligence against earnings<sup>1</sup> and the submissions by interested bodies to our Working Party on Diligence disclosed that opinion was divided on the question. The main criticisms of such a system seem to be as follows:-

- (a) that a continuous diligence against earnings would cause additional inconvenience and expense to employers;
- (b) that it would increase the risk of the debtor's dismissal from his job;
- (c) that it would induce debtors to terminate their employment;
- (d) that long term restriction of wages would impose hardship on debtors and discriminate against debtors in steady employment; and
- (e) that a continuous diligence would penalise considerate creditors, encourage immediate diligence, and discourage voluntary instalment settlements.

(a) Inconvenience and expense to employers

1.13 A system of continuous diligence against earnings would require employers to make deductions from earnings of smaller sums over longer periods than at present. The formula proposed below for calculating the proportion of wages to be withheld would be more complicated and difficult to apply than at present. This additional burden on employers would only be marginally offset by the abolition, or reduction in the number, of "repeat arrestments". Complications can be to some extent reduced by making explanatory notes, with deduction tables if necessary, available to employers. But continuous diligence against earnings would still impose a considerable additional burden on employers.

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<sup>1</sup>Op. cit., paras. 54 to 56.

1.14 Employers cannot, at present, compel either the creditor or debtor to pay a fee for the work and expense occasioned by an arrestment. By agreement, the employer can deduct a 'handling charge' from the exempt earnings payable to the employee if he is not protected by the Truck Acts, or from the sum remitted to the creditor,<sup>1</sup> and indeed some employers deduct small charges from the arrested sums remitted to the creditor, in which the creditor appears to acquiesce.<sup>2</sup> Although we suggest below<sup>3</sup> that employers should be entitled to charge a fee (payable out of the exempt earnings) in respect of the work involved, this would fall far short of adequate compensation. In proposing a general system of attachment of earnings in England and Wales, the Payne Committee accepted that any fee must be inadequate; the Committee remarked:<sup>4</sup>

"In view of the fact that employers are already used to dealing with deductions for income tax and national insurance without payment, we have concluded on balance that the employer should continue to deduct 6d from each payment as at least a contribution to postage and incidental expenses."

A recent commentator, however, has argued that this is a false analogy:<sup>5</sup>

"The burdens imposed on employers in respect of income tax and national insurance deductions are imposed for the general welfare of the community and the organisation of state services on behalf of that community, whereas wage garnishment is imposed at the discretion of individual creditors and the immediate benefit, at least, is entirely their own."

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<sup>1</sup>See Ewing and Maher, "Arrestment of Wages and Unfair Dismissal" 1979 S.L.T. (News) 185 at p. 187.

<sup>2</sup>See C.R.U. Arrestment Survey, para. 32.

<sup>3</sup>See para. 2.111.

<sup>4</sup>Report of the Departmental Committee on The Enforcement of Judgment Debts (1969) Cmnd. 3909, para. 606.

<sup>5</sup>D. St. L. Kelly, Debt Recovery in Australia (1977) p.86.

As against this, it can be argued that an efficient process of diligence against earnings is essential to an effective system of enforcement of debts, and is therefore essential to the system of consumer credit which, according to the Crowther Report,<sup>1</sup> benefits the whole community.

1.15 While we have sympathy therefore with the arguments advanced on behalf on employers, we suggest that these arguments are not decisive against the introduction of continuous attachment of earnings.

(b) Inducement to dismissal by employers

1.16 As a result of the inconvenience and expense to employers associated with arrestments, and perhaps also as a result of the suspicions of employee-debtors which arrestment can induce, it is possible that employers may dismiss employees whose wages are arrested.<sup>2</sup> Alternatively employers may demote, or fail to promote, or fail to give employment to, an employee whose wages have been attached. There is little evidence that dismissal as a result of arrestments occurs on any significant scale,<sup>3</sup> and the legislation on unfair dismissal would be likely to prevent the practice from developing if continuous diligence against earnings were introduced. If this legislation required strengthening (eg to cover employees not protected by unfair dismissal legislation) special legislation could be enacted to deal with the problem and we revert to this at para. 4.2 below. We do not, however, think that the risk of dismissal should prevent the introduction of continuous diligence against earnings.

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<sup>1</sup>Report of the Departmental Committee on Consumer Credit (1971) Cmnd. 4596.

<sup>2</sup>Cf. McKechnie Report, para. 55 which observed that there was "some risk that the annoyance caused to the [debtor's] employer by a continuous arrestment would cause his dismissal". This conclusion, however, antedated the introduction of "unfair dismissal" legislation.

<sup>3</sup>See para. 4.2 et seq below.

(c) Inducement to voluntary termination of employment

1.17 Even at present debtors may change or give up their jobs to evade repeated arrestments of wages. It may be argued that there would be a greater incentive for debtors to do this if continuous diligence against earnings were introduced. The extent to which voluntary termination of employment occurs will to some extent depend at any given time on the unemployment levels, the level of social security benefits compared with wages obtaining at that time, and on the type of debt. (For a variety of reasons, debtors are often anxious to evade obligations to pay aliment to or for wives or children or periodical allowance to former wives.) It has been argued, indeed, that continuous attachment of earnings orders only work well if the debtor is willing to co-operate. We suggest however, that debtors, particularly those who see a definite end to their liabilities, would be no more likely to change jobs to evade continuous diligence against earnings than to avoid repeated arrestments of wages.

(d) Hardship to debtors

1.18 Among their reasons for rejecting continuous arrestments, the McKechnie Committee referred to "the hardship due to restriction of the debtor's wage packets over a period".<sup>1</sup> This argument would have greater force if the present limitation rules (under which nearly half the debtor's wages are attached in each week or other pay period) were to be applied to a long-term process of continuous arrestment. As already indicated, however, an important objective of continuous diligence against earnings is that the subsistence exemption level can be raised if the diligence is spread over a reasonable period. It seems to us that this solution would cause less hardship to debtors than large payments concentrated into one or two weeks.

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<sup>1</sup>Op. cit., para. 55.

1.19 By their very nature, continuous diligences against earnings could only work well where the debtor is continuously in employment, or perhaps continuously in the employment of one employer. It has been argued that continuous diligence would discriminate against employed debtors since the self-employed, casual workers and the unemployed would be exempt. (We discuss below the need to restrict these diligences to earnings.) On the other hand, it is not a persuasive argument against continuous diligence that it will not work in a minority of cases. Moreover, the present system of arrestment is difficult to operate against the income of the self-employed or unemployed, and nobody regards that as discrimination.

(e) Discouragement of voluntary instalment settlements

1.20 The McKechnie Committee remarked -

"The strongest point against the introduction of a system of continuous arrestments is that it would penalise the good creditor who delayed taking formal enforcement action because he wanted to give his debtor a chance to arrange his affairs. In the fear of seeing his own claim blocked perhaps for years by another's continuous arrestment each creditor would seek to arrest as early as possible."<sup>1</sup>

It is true that a considerate creditor making an instalment settlement may be pre-empted by a swifter creditor who arrests first. Since the existing form of arrestment attaches only a single instalment of wages, there is much less incentive to immediate arrestment than there would be if future instalments were attached. At present, a creditor, whose arrestment is postponed to a prior arrestment in one week, may in the following week be the first or only creditor to lay an arrestment. In the case of a prior extended arrestment, however, the considerate or dilatory creditor would be "shut out" during the subsistence of the extended arrestment.

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<sup>1</sup>Op. cit., para. 56.

1.21 There is no doubt that this disadvantage is a real one, especially where the debtor has few attachable assets other than wages.<sup>1</sup> There are however ways in which this difficulty might be minimised, for example, by adapting the rules on equalisation of arrestments under section 10 of the Bankruptcy (Scotland) Act 1913 (which, we believe, are rarely applied at present to arrestments of earnings) to allow later creditors to share in the proceeds of continuous diligence against earnings,<sup>2</sup> or by enabling the court to conjoin and rank two or more creditors in a "consolidated" order which would intercept the attached wages for disbursement to the conjoined creditors. We discuss these solutions below.<sup>3</sup> If "fair sharing" of the fruits of continuous diligence among competing creditors could be devised, the McKechnie Report's criticism should be met.

1.22 Approaching the problem from another standpoint, it might be argued that the threat of a continuous diligence against earnings would be an insufficient sanction inducing debtors to pay voluntarily since the amounts deducted would be lower than under the present law on arrestments. There is no doubt that the present system of arrestment operates largely as a spur to informal arrangements for payment, usually by instalments. A continuous diligence against earnings, however, would be based on the different premise that the diligence should itself recover instalments of reasonable amount, and that it should not operate so harshly as to compel most people to work outwith it. In any event, the threat of a continuous diligence against earnings together with the disclosure to the employer of the debtor's indebtedness might be as efficient as the threat of a single arrestment in inducing voluntary payments.

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<sup>1</sup>Competitions between two or more arrestments laid in the same pay period already occur from time to time (see C.R.U. Arrestment Survey, para. 29) and the problem of competitions would become more acute if a diligence against earnings subsisted during several pay periods.

<sup>2</sup>For the rules of equalisation of diligence under the Bankruptcy (Scotland) Act 1913, s.10, see para. 2.116 below.

<sup>3</sup>Para. 2.114 et seq.

1.23 We have provisionally concluded that the foregoing disadvantages of continuous diligence are outweighed by the advantages but we invite views on this conclusion.

(4) Extended arrestments and earnings transfer orders

1.24 Assuming that a system of continuous diligence against earnings should in principle be introduced, the next question is, what form should that diligence take? We suggest that either or both of two distinct models, which we have called "extended arrestments" and "earnings transfer orders", might be appropriate.

1.25 Extended arrestments: an extended arrestment would continuously attach future earnings but only for a limited period fixed by law. "Fixed period" forms of enforcement against earnings exist in certain other legal systems,<sup>1</sup> and such a system was suggested by the Law Society of Scotland in a submission to our Working Party. An extended arrestment would be closely modelled on the existing diligence of arrestment and would be so designed as to preserve its main advantages especially its relative simplicity, inexpensiveness and ease of operation - while at the same time raising the subsistence exemption and removing the need for repeated arrestments to enforce payment of most lump sum debts.

1.26 Earnings transfer orders would continuously attach future instalments of earnings, not for a limited period fixed by law, but until the debt was paid.<sup>2</sup> This form of enforcement exists in England and Wales<sup>3</sup> and in Northern

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<sup>1</sup>E.g. British Columbia, Family Relations Act, RSBC 1972, s.36(3); California, Code of Civil Procedure, s.682.3; New South Wales, District Court Act 1973, s.98(3).

<sup>2</sup>We have adopted the name "earnings transfer order", rather than "attachment of earnings order", since the diligence would not only "attach" the earnings in the employer's hands but would also require him to pay the attached sums to the creditor as if the wages had been assigned or transferred to the creditor.

<sup>3</sup>Attachment of Earnings Act 1971.



Ireland<sup>1</sup> (where it is called attachment of earnings) and in those legal systems the procedure is available generally to enforce debts of all kinds. In certain other legal systems it is available only to enforce particular kinds of debt, such as maintenance or taxes.<sup>2</sup>

1.27 Comparison of extended arrestments and earnings transfer orders: each of the two forms of continuous diligence would have advantages and disadvantages as compared with the other. Their main features may be briefly summarised. (1) In an extended arrestment, warrant authorising use of the diligence would be contained in the extract decree constituting the debt whereas, in the case of an earnings transfer order, the warrant for diligence would be obtainable only on a separate application for the order following the issue of the extract decree. (2) In an extended arrestment the level of deductions from earnings would necessarily be determined by fixed legal rules applied directly by employers, whereas in the case of an earnings transfer order, the level could be determined by the court in its discretion when making the order and then intimated to the employer. (3) In extended arrestments, there would be no prior inquiry into the debtor's means (resources and liabilities) whereas in an earnings transfer order the exercise of the court's discretion in fixing deduction levels must be based on a means test. (4) In an earnings transfer order, the deduction levels would be tailored to suit the individual debtor's financial circumstances at the time of the order, whereas the deduction level in an extended arrestment would be framed with the average debtor's circumstances in mind. (5) A discretionary deduction level in an earnings transfer order could be rendered out-of-date by a change in the debtor's financial circumstances, whereas

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<sup>1</sup>Judgments (Enforcement) Act (Northern Ireland) 1969.

<sup>2</sup>E.g. Australia, Regulation 134 Family Law Regulations 1975 made under the Family Law Act 1975; Eire, Family Law (Maintenance of Spouses and Children) Act 1976, ss.10-20.

the deduction level in an extended arrestment would not be affected in that way. (6) The attachment of wages by extended arrestment would be achieved simply and inexpensively by one single act - the service of a schedule of extended arrestment, whereas an earnings transfer order would require an application to the court, the procedure in which would be relatively cumbersome, time-consuming and costly, (since it would involve an enquiry by the court into the debtor's means, a court decision regulating deductions from pay and possibly a court hearing). (7) An extended arrestment would give the debtor no opportunity of evading attachment by changing his job, whereas the prior means inquiry in an earnings transfer order process would give him prior warning of the impending diligence. (8) Extended arrestments would subsist for a limited period whereas it would be possible to provide that earnings transfer orders would endure till the debt was paid, lapsing only temporarily on the debtor's change of job. (9) Since an extended arrestment would subsist only for a limited period and (it is envisaged) payment of the arrested sums to the creditor would require a debtor's mandate failing which a decree of furthcoming, the sums could be paid direct to the creditor rather than indirectly through the court. Since an earnings transfer order would require deductions to be remitted without the debtor's mandate over longer periods, the attached sums would probably have to be paid into court to provide an independent accounting between the parties. (10) In multiple creditor cases, it would be possible to conjoin and rank two or more creditors in one earnings transfer order but not in one extended arrestment, since this would require the intervention of the court to rank the creditors and to disburse attached sums to them according to their ranking. (11) An extended arrestment would be best executed by sheriff officers and messengers-at-arms in the same way as arrestments under the present law. The procedure for obtaining and operating earnings transfer orders might involve solicitors and/or clerks of court to a much greater degree than at present.

(5) Scope and role of extended arrestments and earnings transfer orders

1.28 Assuming that either of the two new forms of diligence against earnings - extended arrestments or earnings transfer orders - would meet the main criticisms of the existing system of arrestments of earnings, the next questions are whether one only or both of these diligences should be introduced and, if both should be introduced, what should be the scope and role of each.

1.29 When we first considered these questions, we had no a priori preference for either type of diligence. Extended arrestments would be a modified form of the existing diligence of arrestment of earnings<sup>1</sup> and their introduction would cause least disruption to the existing machinery and pattern of diligence. On the other hand, a system of earnings transfer orders modelled on the English system of attachment of earnings orders, (which were introduced in 1958 for maintenance and applied to all civil debts in 1970)<sup>2</sup> seemed to offer an attractive alternative.

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<sup>1</sup>An extended arrestment would not be merely an arrestment operative for a longer period than an ordinary arrestment. It would or might differ from an ordinary arrestment in a number of ways which include the following: (a) an extended arrestment would attach future termly payments whereas an arrestment can only attach a current termly payment; (b) a schedule of extended arrestment could in theory be followed by several furthcomings whereas an arrestment may be followed by only one furthcoming; (c) special rules would apply in extended arrestments for the attachment of interest on the debt; (d) the arrestee-employer would have a period (say seven days) in which to comply with an extended arrestment whereas an ordinary arrestment has effect immediately on service; (e) the form of extended arrestments would be prescribed by act of sederunt; (f) special provision would be made for notification of an extended arrestment to the debtor-employee; (g) special rules exempting earnings from extended arrestment would apply and these exemptions might be extended to cases where the earnings had been paid into a bank account; (h) an arrestee-employer would be entitled to a fee for operating an extended arrestment; (i) special provision would be needed on competitions, and extended arrestments might be excluded from the statutory provisions on equalisation of arrestments and poindings on the debtor's notour bankruptcy.

<sup>2</sup>Maintenance Orders Act 1958 and Administration of Justice Act 1970, ss.13-27 (consolidated in the Attachment of Earnings Act 1971).

1.30 The main advantage of earnings transfer orders would be that the level of deductions from earnings would be tailored by the court to suit the individual circumstances of debtors to a far greater extent than would be possible in the case of extended arrestments, where the exemption is prescribed by rules applicable to all cases. Our discussion of extended arrestments in Part II, especially of the subsistence exemption (at paras. 2.67 to 2.94), illustrate the difficulty of formulating a legislative scheme which is simple for employers to operate, fair to all concerned, and capable of being kept easily up-to-date. We concede that the rather arbitrary character of a fixed exemption level is more acceptable when an arrestment attaches only one instalment of pay and acts as a spur to an instalment settlement than when it has effect for several months. In many ways an earnings transfer order would be better from the standpoint of a debtor than an extended arrestment, apart from his possibly higher liability for the creditor's expenses in obtaining the order.

1.31 An equally important question, however, is whether creditors would regard extended arrestments or earnings transfer orders as effective modes of enforcement: we assume that it would be generally regarded as undesirable if creditors began to instruct poindings in place of arrestments of earnings. There seems to be a long tradition in Scotland whereby creditors who know the name and address of the debtor's employer will generally instruct an arrestment of earnings in preference to a charge or a poinding. The Hill Burton Report in 1854 observed that poinding is "ever surrounded by unpleasant circumstances" and "is a much more protracted, expensive and cumbrous process than arrestment". Arrestment, according to the Report -

"is easy and systematic . It is a method of drawing off a portion of the workman's supplies ere they reach himself. It makes the creditor a participator in the income of the debtor; and in point of ease in

operation between it and other methods of recovery, there is all the difference that there is between the interception of money before it comes into possession and its seizure after it comes into possession."<sup>1</sup>

A survey of diligence instructed in 1974/75 showed that, in Scotland, creditors relied on enforcement against earnings rather than enforcement against goods<sup>2</sup> much more than in England and Wales<sup>3</sup> (though in both jurisdictions enforcement against goods is the most common mode of enforcement). The reason seems to be that arrestments of earnings were more attractive to creditors than attachment of earnings orders. It seems to us therefore that creditors would be likely to prefer to instruct an extended arrestment (which would be as simple to execute as an arrestment under existing law) rather than to make a new application to the court for an earnings transfer order (which, like an application for an English attachment of earnings order, would be procedurally complicated, would involve a means enquiry, and would have an uncertain outcome, possibly resulting in the court's refusal to make an order).

1.32 A survey conducted in 1978, however, shows that there was a dramatic fall in the use of diligence in the late 1970s,

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<sup>1</sup>Parliamentary Papers (1854) LXIX, p.41.

<sup>2</sup>The results of the survey (carried out by the Society of Messenger-at-Arms and Sheriff Officers) in a 5½ month period, (September 1974 - March 1975) showed that there were 31,291 charges and 17,900 poindings as compared with 13,006 arrestments (of which 8,700 were first arrestments of earnings and 3,200 repeats). Thus the ratio of first arrestments of earnings to charges was about 1:4 and to poindings was about 1:2. See Interim Report by the Central Research Unit of the Scottish Office on The Social Aspects of Diligence (1977).

<sup>3</sup>In 1975, the ratio of county court applications for attachment of earnings orders to warrants for execution against goods was 1:17 and the ratio of attachment of earnings orders actually made (the great majority of which were county court orders) to warrants for execution against goods was 1:35.

and that the fall was especially heavy in relation to arrestments.<sup>1</sup> In 1978, therefore, arrestments were used relatively less than in 1974/75 or at about the time of the McKechnie Report (1955).<sup>2</sup>

1.33 On the basis of the 1978 Survey, it is estimated that in Scotland in that year, 6,000 first arrestments of earnings (ie not counting repeats) were served, 45,600 charges were served and 20,000 poindings were executed (resulting in under 300 sales). In England and Wales in 1978 there were 100,577 applications in the county court for attachment of earnings orders (of which 1,419 were to secure maintenance) and 53,132 attachment of earnings orders were made (of which 1,016 were to secure maintenance).<sup>3</sup> On the other hand, in England and Wales as many as 1,070,533 county court warrants for execution against goods were issued (resulting in 2,180 sales).<sup>4</sup> It follows that, in 1978, in Scotland for every first arrestment of wages (viz not counting repeats) there were 8 charges and as few as 3 poindings, whereas in England and Wales in the same year, for every application to the county court for attachment of earnings there were 10 warrants of execution against goods but for every county court attachment of earnings order actually made there were as many as 20 warrants of execution against goods.

1.34 Despite the recent relative decline in the use of first arrestments of earnings as compared with charges and poindings, (which cannot be wholly explained by reference to the rise in unemployment levels<sup>5</sup>), the ratio of arrestments to poindings

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<sup>1</sup> See C.R.U. Diligence Survey (1980), paras. 3.7-3.11. There was a reduction from 68,000 charges (estimate for 1974/75) to 46,000 charges (1978 estimate) and from 22,000 to 7,000 first arrestments of wages, salaries and other funds or assets.

<sup>2</sup> Op. cit., para. 61 (between 20,000 and 30,000 arrestments per annum estimated).

<sup>3</sup> Annual Report on Judicial Statistics (1978; Cmnd. 7627), Table F.1(b).

<sup>4</sup> Ibid., Table F.1(a).

<sup>5</sup> See C.R.U. Diligence Survey, para. 3.10.

(1:3) is still much more favourable than the ratio of English attachment of earnings orders to warrants for execution against goods (1:20).<sup>1</sup> This suggests that, unless the power to choose the mode of diligence is taken away from the creditor and entrusted to a Court Enforcement Office,<sup>2</sup> extended arrestments rather than earnings transfer orders should be the diligence against earnings used to enforce ordinary civil debts.

1.35 There are, however, special categories of cases where earnings transfer orders might be the more appropriate form of diligence, for example, to resolve a competition between two extended arrestments, or to secure payments out of earnings to a trustee in a bankrupt's sequestration, or to the administrator of a debt arrangement scheme (such as we discuss in our Memorandum No. 50) and possibly also for the enforcement on default, and collection even in the absence of default, of payments of aliment and periodical allowance. The diligence might also be used to enforce payment of criminal fines. We discuss these cases in Part III and thereafter outline for comment and criticism a legislative scheme for introducing earnings transfer orders.

1.36 If extended arrestments or earnings transfer orders or both modes of continuous diligence are introduced, we think that ordinary arrestments should no longer be available as a means of arresting earnings. Otherwise the policy of preventing repeat arrestments might be prejudiced and the law would become unduly complicated. We shall revert in a later Memorandum to the reform of arrestments of funds and assets other than earnings.

<sup>1</sup>We concede that the tradition of enforcement against earnings is much longer in Scotland than in England and Wales and this might make for some marginal cross-border differences. For the history of the 19th century agitation for wages arrestment limitation, see the McKechnie Report, paras. 66-76; and Marwick, Economic Developments in Victorian Scotland (1936) pp.151-2. For the history of attachment of wages in England and Wales in the same period, see J.C.Wood, "Attachment of Wages" (1963)26 M.L.R.51. The Wages Arrestment Limitation (Scotland) Act 1870 was paralleled in England by the Wages Attachment (Abolition) Act 1870.

<sup>2</sup>See our First Memorandum on Diligence, (Memorandum No. 47) Part I.

(6) Main proposals on which views invited

1.37 We would not expect commentators, on the basis of the information provided so far, to reach a view on the need for continuous diligence against earnings, or on the relative merits of extended arrestments and earnings transfer orders. To pave the way for the more detailed discussion which follows, however, it is convenient at this stage to invite views on the following propositions: (1) There is a need to introduce in Scots law a system of continuous diligence against earnings to reduce the incidence of repeated arrestments and to allow the debtor's subsistence exemption to be raised to a more realistic level. (2) To achieve this aim, two modes of continuous diligence are considered in this Memorandum, namely extended arrestments, (based on the existing Scottish diligence of arrestment and having parallels in other legal systems) and earnings transfer orders (based on the English system of attachment of earnings orders). It is suggested that extended arrestments should be introduced as the main diligence against an individual's earnings. (3) If continuous diligence against earnings is introduced, arrestments in common form should no longer be competent as a means of attaching earnings. (Proposition 1).



## PART II: SPECIFIC PROPOSALS ON EXTENDED ARRESTMENTS

### Preliminary

2.1 In this Part of our Memorandum, we advance detailed proposals for the introduction in Scots law of the modified form of arrestments of income which we have called 'extended arrestments', the main aims and features of which were described in Part I.

(1) Earnings etc attachable and debts recoverable by extended arrestment

(a) Only sums due by employer of debtor should be attachable by extended arrestment

2.2 We think that an extended arrestment should only be available to attach the pay of an individual employee. The statutory wages arrestment limitation rules apply in terms only to "the wages of all labourers, farm servants, manufacturers, [scil. factory workers] artificers and workpeople"<sup>1</sup> but in practice are applied also to salary-earners.<sup>2</sup> We think that salary-earners as well as all wage-earners should be subject to any new system of extended arrestment. On the other hand, extended arrestments should not be available to attach the income of companies and other corporate bodies or the income of the self-employed.

2.3 Clearly the concept of a subsistence exemption is out-of-place in relation to companies and other corporate bodies. We doubt whether repeated arrestments are frequently an inconvenience to creditors enforcing debts against companies but it would be legislatively possible to apply extended arrestments to these bodies by assessing the subsistence exemption at nil in their case. Generally speaking, however, a creditor enforcing debts against a company, if he does not apply for the company's liquidation, will often be able to attach by arrestment the income-yielding assets of the company and not merely the income from those assets. Such statistics

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<sup>1</sup>Wages Arrestment Limitation (Scotland) Act 1870, s.1.

<sup>2</sup>See C.R.U. Arrestment Survey, passim. For several decades after the 1870 Act, the scope of the categories of employees to which the Act applies was much litigated, but the last reported case seems to be Thomson v. Cohen (1915)32 Sh.Ct. Reps.15.

as we possess suggest that the scale of the problem is considerable and none of the bodies who gave evidence to our Working Party suggested that there was a need for a continuing diligence against the income of companies or other corporate bodies. Similar considerations apply to partnerships and unincorporated associations. We have therefore excluded all of these bodies from our proposals.

2.4 An individual's income may come from many sources, including salary or wages, pensions, social security benefits, the profits of a trade, profession or business, and investment income such as dividends, interest or rents. We consider that the income of self-employed persons should not be attachable by extended arrestment. We note that the General Council of the Trades Union Congress, in their evidence on attachment of income in English law given to the Payne Committee, stated that they were in favour of continuous attachment but that "it should apply to all incomes and not merely to those of persons who happen to be employed".<sup>2</sup> They mentioned expressly bank interest and company dividends as examples of income which should be included. This proposal was not accepted and continuous attachment in England and Wales only applies to earnings. Whatever may be the legal position in England, there is no need in Scotland to provide for an extended diligence against share dividends and the interest from bank deposits since under the present law, arrestments attach the shares and deposits themselves, and therefore the income arising from them.<sup>3</sup> We may add that even if arrestment

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<sup>1</sup>Department of Employment Family Expenditure Survey 1978 HMSO, Table 39,

	72%	of household income	from wages and salaries
	12%	"	"
	5%	"	"
and the remaining	11%	"	"

from social security benefits  
from self-employments  
from investments, pensions and rents.

<sup>2</sup>Payne Report, op.cit., para. 590.

<sup>3</sup>As to shares, see Graham Stewart, Diligence pp. 231, 240, 847-9; American Mortgage Co. v. Sidway 1908 S.C. 500; Stenhouse London Limited v. Allwright 1972 S.C. 209.

did not have this effect, it would be difficult to apply the extended arrestment proposals to investment income inter alia because of the spread of investments in most portfolios, as well as of the irregularity in payment of the income, and the fluctuations in amounts.

2.5 For a variety of reasons, there would seem to be little point in bringing rents within the scope of the proposals. A landlord's creditor can attach rent by arrestment at present and the wages arrestment limitation rules do not apply, no doubt because rent is in a quite different category from wages or salary. Rent is unlikely to be the main source of the landlord's income and, where it is, the rent is likely to be due from a number of tenancies. Moreover a tenant of a private sector dwelling house might find the computations involved in extended arrestment difficult to cope with.

2.6 Generally speaking, the variety of income sources of the self-employed and the irregularity and fluctuations in the amounts of the payments made to them combine to make it in practical terms impossible to apply extended arrestments to their income. For example, a shopkeeper, plumber, solicitor or accountant receives his income from many customers to whom he supplies goods or services. There is no one person on whom an arrestment can be served to attach the self-employed man's income and there is no one person in a position to calculate the subsistence exemption. Some professional people, such as doctors, dentists and opticians, do receive substantial payments from one source. Thus, in the above examples, the Area Health Boards pay for services rendered to National Health Service patients. The self-employed person, however, has to pay the expenses of his practice (eg salaries for receptionists and outgoings on repairs and maintenance of premises) and many have other professional sources of income. Limitation rules appropriate for most employees could not be applied to their income and a lengthy and complex means inquiry would be needed to fix an appropriate deduction level for each particular case. Such an inquiry would defeat a main objective of introducing

extended arrestment, namely to keep the procedure simple. For reasons such as these, extended arrestment should not be applicable to advocates' income from Faculty Services Ltd. nor to solicitors' payments from Legal Aid Committees. Arrestments of sums already due should continue to be competent against the income of the self-employed.

2.7 We acknowledge the difficulties in evolving a scheme which combines the advantages of simplicity and fairness. Even in the easiest case, that of the employee, it cannot be assumed that employees invariably have only one employer. Moreover, people in employment can have investment income (which is left out of account from the present wages arrestment limitation rules). Subsistence exemptions in any extended arrestment scheme are necessarily somewhat arbitrary.

2.8 On the other hand, the argument that to confine the scheme to employees discriminates against them is, in our view, not well-founded. To be sure, an extended arrestment would have disadvantages from the standpoint of the debtor employee because it would attach his pay for a considerable period (which we envisage might be several months). But it would also benefit him because it would preclude other diligences against pay during that period, <sup>and</sup> it would leave him with sufficient to live on, whereas repeated arrestments of the traditional kind do not.

2.9 In the light of these remarks, we advance for comment the proposal that an extended arrestment should in general be available to attach the future salary or wages of an employee but not to attach the future income of corporate bodies, partnerships or unincorporated associations or self-employed persons. (Proposition 2).

(b) Sums already due by debtor's employer and future earnings to be attachable

2.10 Under the present law, an arrestment attaches all sums owed by the employer to the employee at the time of service of the

arrestment, together with the wages or salary (or a proportion thereof) due for the unexpired portion of the pay period in which the arrestment is served. We think that an extended arrestment should attach (1) all sums for which the employer is liable to account to the employee at the time when the extended arrestment takes effect, whether or not they are strictly "earnings" and (2) all earnings due for a prescribed period (which we define below). If the extended arrestment were not to attach all sums due at that time, then the creditor might serve an ordinary arrestment, and an extended arrestment, for the expenses of both of which the debtor would be liable.

2.11 In defining the earnings which would be attachable by an extended arrestment, a convenient starting point is the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, section 1(2)(a) (exemptions of earnings and pensions from arrestment on the dependence) and the English Attachment of Earnings Act 1971, section 24(1)(a) which define "earnings" in a similar way. The former defines "earnings" to mean:

"any sums payable by way of wages or salary (including any fees, bonus, commission, overtime pay or other emoluments payable in addition to wages or salary by the person paying the wages or salary or payable under a contract of service)."

We revert to pensions below. The emoluments covered by this definition would appear to include contractual payments such as 'holiday pay', 'sick pay' or 'lay-off pay'. We think that this definition would be apt to include certain non-contractual, statutory rights to remuneration such as maternity pay,<sup>1</sup> sick pay during periods of notice,<sup>2</sup> remuneration during suspension on medical grounds<sup>3</sup> and guarantee payments when the employee is laid-off because work is not available.<sup>4</sup> The earnings should be payable to the employee-debtor and accordingly an extended arrestment would not attach payments by the employer to the

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<sup>1</sup>Employment Protection (Consolidation) Act 1978, s.33.

<sup>2</sup>Ibid., s.49 and Sch. 3.

<sup>3</sup>Ibid., ss.19 and 20.

<sup>4</sup>Ibid., ss.12-18.

managers or trustees of a pension, superannuation, or sick fund, nor credits paid to the managers of a holiday fund such as are common for employees in the building industry.<sup>1</sup>

2.12 Moreover, an extended arrestment would not attach lump sums payable by way of damages or compensation (such as redundancy payments;<sup>2</sup> compensation for unfair dismissal<sup>3</sup> or dismissal on grounds of race, sex or marital status;<sup>4</sup> or damages at common law or under the Health and Safety at Work Act 1974) unless the employer had a liability to account to the debtor for the sum at the time when the extended arrestment takes effect. We do not think that these payments would or should be included in the definition of future earnings attachable by extended arrestments.

2.13 To sum up, we propose that (1) subject to the special exemptions mentioned at Propositions 4 and 5 below an extended arrestment should attach -

- (a) all sums for which the debtor's employer is liable to account to the debtor at the time when the extended arrestment takes effect, whether or not these sums are earnings; and
- (b) all future earnings falling due within a prescribed period (so far as not subject to a subsistence exemption).

(2) Earnings for this purpose should be defined to mean any sums payable by way of wages or salary (including any fees, bonus, commission, overtime pay, or other emoluments payable in addition to wages or salary or payable under a contract of service). It is thought that the foregoing definition would include certain non-contractual emoluments due under the Employment Protection (Consolidation) Act 1978 as mentioned in para. 2.11, but would not cover lump sums payable by way of damages or compensation. (Proposition 3).

<sup>1</sup>Cf. London County Council v. Henry Boot & Sons Ltd [1959] 3 All E.R. 636: C.R.U. Arrestments Survey, para. 14.

<sup>2</sup>Redundancy payments under the Employment Protection (Consolidation) Act 1978 are in the nature of compensation to a long term employee for loss of security should therefore be treated in the same way as damages.

<sup>3</sup>Employment Protection (Consolidation) Act 1978, Part V.

<sup>4</sup>Race Relations Act 1976, Sex Discrimination Act 1975.

(c) Special exemptions of income from arrestment

2.14 Certain categories of income are exempt from arrestment, viz merchant seamen's pay, Armed Forces' pay, many pensions and annuities deemed to be 'alimentary' at common law or exempt under specific enactments on superannuation, and social security benefits, pensions and allowances.

2.15 Merchant seamen's pay: in 1977, the Department of Trade issued a consultative document to interested bodies suggesting that, in modern conditions, it was doubtful whether there was still a case for the exemption of merchant seamen's pay from arrestment.<sup>1</sup> In the light of consultations, however, a compromise solution was effected by the Merchant Shipping Act 1979, section 39(2) and (3) whereby the exemption of the wages of seamen on fishing boats was abolished, and the wages of all seamen were made arrestable under decrees of aliment, financial provision on divorce and other 'maintenance orders' but not under other decrees. In the light of this recent legislation it would not be appropriate for us to re-open the topic.

2.16 Armed Forces' pay: the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, section 2, introduced arrestment of the pay of Crown servants but specifically excluded the pay of members of the armed forces of the Crown and women's services administered by the Defence Council. On application by a creditor, however, the Defence Council will usually make periodic deductions from pay to discharge the debt. Some bodies who gave evidence to our Working Party thought that service pay should be arrestable but others (including the Law Society of Scotland) stated that the existing arrangements worked well. Since the extended arrestment process described below would be very similar to the arrangements operated by the

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<sup>1</sup> See Merchant Shipping Act 1970, s.11(1)(a) as amended.

Defence Council, we see no need to disturb those arrangements. Accordingly we propose that the pay of members of the armed forces and of women's services administered by the Defence Council should be exempt from extended arrestment. (Proposition 4).

2.17 'Alimentary' provisions and occupational pensions: a current instalment of an 'alimentary' liferent or annuity in a private trust deed is exempt from diligence but only to the extent that it exceeds a suitable aliment for the beneficiary.<sup>1</sup> The same principles apply to pensions payable out of private occupational pension funds administered by trustees.<sup>2</sup> In addition the enactments regulating statutory occupational pension schemes invariably make provision in common form protecting pensions from attachment by diligence or sequestration: for example, the superannuation enactments affecting the police, firemen, teachers, local government officers, NHS and Armed Forces personnel, civil servants, customs and excise officers and MPs. Whereas "alimentary" funds are only exempt at common law to the extent that they provide a suitable aliment (which will be fixed by the court on each occasion on which an arrestment is served), there is some doubt whether the statutory exemptions in the superannuation enactments exempt the whole pension or merely the excess above a suitable aliment.<sup>3</sup> The view generally held seems to be that the public sector pensions in question are completely exempt.

<sup>1</sup> An arrestment of an alimentary provision will also be competent in the case (1) of arrears of past instalments; and (2) where the arrestment is based on a debt which is itself "alimentary" the term "alimentary" having a special meaning in this context.

<sup>2</sup> Officers' Superannuation and Provident Fund etc. v. Cooper 1976 S.L.T. (Sh.Ct.) 2.

<sup>3</sup> See Borthwick v. McRitchie (1908) 24 Sh.Ct.Reps. 374 and Macfarlan v. Glasgow Corporation (1934) 50 Sh.Ct.Reps. 247 (construing an enactment now contained in the Police Pensions Act 1976, s.9) in which it was held that the exemption was total. On the other hand, Macdonald's Trustee v. Macdonald 1938 S.C. 536 (relating to section 98(2) of the Bankruptcy (Scotland) Act 1913 which confers powers on the court analogous to its common law powers to fix a suitable aliment) suggests that the exemption does not apply to the excess above a suitable aliment.



2.18 So far as statutory occupational pensions are concerned, the McKechnie Report recommended that such pensions should be arrestable subject to the same limitations as arrestments of earnings.<sup>1</sup> Generally a pension may be regarded as deferred remuneration and, on this view, it would be illogical to allow an extended arrestment of pay but not a pension. Further it may seem unjust to give exemptions to statutory public sector pensions (which may be above an alimentary level and even index-linked) while private sector pensions are less privileged (at any rate if they are not alimentary). We note that in England and Wales, attachment of earnings orders may be made against pensions,<sup>2</sup> but this would not appear to override the specific exemptions in superannuation enactments. So far as 'alimentary' liferents and pensions are concerned, there are risks in allowing continuing orders against future instalments. Thus in the English case of Edmonds v. Edmonds,<sup>3</sup> it was held that when the trust deed provided for the pension to cease if the pensioner suffered anything whereby the pension became payable to another person, the making of an attachment of earnings order against the pension caused it to determine. Nevertheless, the same result would seem to follow if the creditor uses repeated arrestments.

2.19 (1) It is suggested that it should be competent to attach future instalments of a liferent, pension or annuity payable under a private trust deed (whether or not declared to be alimentary), but subject to an exemption for the beneficiary's subsistence. Views are invited on whether the diligence should take the form of an extended/arrestment or an earnings transfer order.

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<sup>1</sup>Op.cit., para. 108.

<sup>2</sup>Attachment of Earnings Act 1971, s.24(1)(b) defines "pension" to include "an annuity in respect of past services, whether or not rendered to the person paying the annuity, and including periodical payments by way of compensation for the loss, abolition or relinquishment, or diminution in the emoluments of any office or employment.

<sup>3</sup>[1965] 1 All E.R. 379.

(2) The exemption by specific statutes and statutory instruments of pensions and annuities payable under public sector occupational pension schemes should be abolished, and it should be competent to attach future instalments of such pensions and annuities subject to an exemption for the beneficiary's subsistence. Views are invited on whether the diligence should take the form of an extended arrestment or an earnings transfer order.  
(Proposition 5).

2.20 Social security benefits: the wide range of social security benefits, pensions and allowances payable by the Department of Health and Social Security and unemployment benefit payable by the Department of Employment are exempt by statute<sup>1</sup> and perhaps also at common law.<sup>2</sup> In our First Memorandum on Diligence, we concluded that the case for rendering supplementary benefit and other social security benefits attachable for debt could only be adequately considered by an advisory body with United Kingdom terms of reference and that, as at present advised, we do not consider that social security benefits should be attachable for debt.

(d) Debts enforceable by extended arrestment along with principal sum

2.21 The sums due by a debtor under an extract decree for payment consist of:

- (a) the principal sum sued for in the court action, which sum is specified in the decree;
- (b) interest on the principal sum at a rate

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<sup>1</sup> See eg Child Benefit Act, 1975, s.12; Supplementary Benefit Act 1976, s.16; Social Security Pensions Act 1975, s.48.

<sup>2</sup> Sinton v. Sinton 1976 S.L.T. (Sh.Ct.) 95.

specified in the decree;<sup>1</sup> and

(c) the expenses of the court action.

These sums are attachable by arrestment of wages and, in addition, in practice the expense of the arrestment may also be paid out of the wages. Two questions arise, namely (i) to what extent should interest on the principal sum be attachable by extended arrestment, and (ii) whether, or to what extent, should the extended arrestment attach the expenses of that arrestment?

(i) Interest on the principal sum

2.22 The form of schedule of arrestment in general use states that the principal sum is arrested together with inter alia all sums of money due by the arrestee to the debtor (viz the common debtor) until payment is made to the arresting creditor of the principal sum, interest at a specified rate from a specified date until payment, and the expense of the court action, under deduction of sums paid to account. The officer will normally endorse on the schedule of arrestment a statement of the debt, viz the principal sum and court expenses (which are attached by the arrestment), the solicitor's fee (if any) for instructing the arrestment, and the officer's arrestment fee (which is not attached by the arrestment), less payments to account. Thus in arrestments of wages, though the rate of interest is referred to in the schedule of arrestment, it is almost always excluded from the statement of the debt. The reason is that creditors find it difficult to compute the interest (which is calculated on a day-by-day basis)

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<sup>1</sup>The pursuer may request the court to fix interest at a particular rate but, if he does not, interest will run at a rate (currently 11% per annum) prescribed by Act of Sederunt: see Rules of the Court of Session, Rule 66 as amended; Sheriff Courts (Scotland) Extracts Act 1892, s.9 as amended by Act of Sederunt (Interest in Sheriff Court Decrees or Extracts) 1975 (S.I. 1975/948) made under the Administration of Justice (Scotland) Act 1972, s.4. Interest runs at the contractual rate until decree but interest after decree runs at the rate fixed in the decree: National Commercial Bank v. Stuart 1969 S.L.T. (Notes) 52; Avco Financial Services Ltd v. McQuire 1976 S.L.T. (Sh.Ct.) 33.

when a series of payments to account have been made at different dates, and accordingly they normally do not inform the officer of the amount of interest which is due, and do not seek to recover it.

2.23 Having regard to the need for a simple procedure, we think that the amount of interest attachable by an extended arrestment should not exceed the interest accrued up to the date of the service of the extended arrestment, and that such interest should only be attached if, and to the extent that, it is specified in the schedule of extended arrestment. During the period for which the extended arrestment has effect, interest would in theory continue to run on the principal sum and might be recovered by other diligence, but we would expect creditors to continue in future to waive their right to interest as they do at present.

(ii) Recovery of expenses of arrestment

2.24 Under the present law on the recovery of the expenses of an arrestment -

- (a) the expenses are not chargeable against the debtor "unless in virtue of such arrestment the arresting creditor shall recover a sum larger than the amount of such expense or cost";<sup>1</sup>
- (b) it is generally accepted that the arrestment does not attach or secure the expenses of the diligence, even if the arrested earnings are large enough to cover the expenses of the arrestment;<sup>2</sup> and
- (c) if the debtor refuses or delays in payment of the expenses, then in order to recover the expenses, the creditor must either conclude for the expenses in the action of furthcoming, or in a separate action for payment.

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<sup>1</sup>Wages Arrestment Limitation (Scotland) Act 1870, s.2.

<sup>2</sup>Graham Stewart, op.cit., p.133.

We consider that the first of these rules should apply to extended arrestments so that if the extended arrestment is abortive for some reason, then the expenses will be borne by the creditor and not by the debtor.

2.25 As regards diligence expenses, very few arrestments attach a sum equal to, or more than, the debt on which the arrestment is based, but the problem can arise in the case of repeated arrestments.<sup>1</sup> We have already argued in our First Memorandum on Diligence that an extract decree should contain warrant for the recovery of the expenses of the diligence to follow thereon, and we suggest that this principle should apply to extended arrestments.<sup>2</sup>

(iii) Proposals

2.26 To sum up, (1) It should be competent to attach by an extended arrestment of wages or salary the principal sum, interest and judicial expenses due under the decree. (2) The amount of interest attachable by the extended arrestment should not exceed the interest accrued up to the date of the service of the schedule of extended arrestment. Such interest should only be attached if, and to the extent that, the amount thereof is specified in the schedule of extended arrestment. (3) As mentioned in our First Memorandum on Diligence, a warrant for extended arrestment of earnings in an extract decree should operate as a warrant to attach the prescribed expenses of the officer of court chargeable for laying the arrestment and of the solicitor for instructing the officer of court. It should be competent for the debtor to require that the amount of these expenses should be taxed by the auditor of court. (Proposition 6).

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<sup>1</sup> See C.R.U. Arrestment Survey, para. 31.

<sup>2</sup> See Memorandum No. 47, Part III. The question is raised there whether an arrestment (or extended arrestment) should attach the expenses of that arrestment only or of other diligences.

(2) Laying an extended arrestment

2.27 So far as possible the procedure for laying an extended arrestment of wages should be as uncomplicated as the procedure for laying an arrestment of wages under the present law and practice. Our proposals on procedure are framed so as to achieve this objective.

(a) Warrant for extended arrestment

2.28 Under the present law, an extract court decree contains a warrant for all lawful diligence, including immediate arrestment.<sup>1</sup> Accordingly, the creditor is entitled to lay an arrestment of wages without a further application to the court. In some other legal systems, a creditor holding an order for payment has to apply to the court for a wage attachment or wage "garnishment" order.<sup>2</sup> This would be pointless formalism in Scottish procedure and we propose therefore that, an extract court decree containing a warrant for immediate arrestment should also contain a warrant for an immediate extended arrestment of earnings without the need for a further application to the court. (Proposition 7). Following recommendations of the McKechnie and Grant Reports<sup>3</sup> and statutory precedents dispensing with warrants of concurrence for arrestments in certain cases,<sup>4</sup> we suggest that it should be competent to enforce a decree of a sheriff court by serving an extended arrestment on an employer outwith the district or sheriffdom of that court without the need for a warrant of concurrence. (Proposition 8).

<sup>1</sup> Debtors (Scotland) Act 1838, ss.2 and 9; R.C. 65; Sheriff Courts (Scotland) Extracts Act 1892, ss.4 and 7; Summary Cause Rules, rule 89(2).

<sup>2</sup> These applications must be distinguished from applications for attachment of earnings orders in England and Wales where the court investigates the debtor's means and resources. Applications of that kind are appropriate to earnings transfer orders which we deal with in Part III. The applications in the legal systems mentioned are purely formal steps: the court has no power to investigate means and must grant the order on the ex parte averments of the creditor.

<sup>3</sup> See paras. 144 and 648 of these Reports respectively.

<sup>4</sup> Sheriff Court Rules, rule 10; Summary Cause Rules, rule 11; cf. Debtors (Scotland) Act 1838, s.13 and Sch.10.

(b) Debtor's duty to disclose information on arrestable earnings

2.29 A practical difficulty often confronting a creditor seeking to arrest wages or salary is that he may not know the name and business address of the debtor's employers. As indicated in Part I, there is ample evidence that creditors prefer arrestments to poindings and warrant sales since the former is swifter, cheaper and easier. Yet the number of poindings exceeds the number of arrestments and one of the probable reasons for this is that the creditor knows the debtor's home address far more frequently than he knows the address of the debtor's employer. At present, there is no special procedure whereby the creditor can compel an employed debtor to disclose his employer's name and address or other particulars of his attachable funds or assets.

2.30 In considering whether such a process should be introduced, it is necessary to determine what should be the procedure for eliciting the information; what should be the scope of the information which the debtor would be obliged to disclose; and what should be the sanction for the debtor's refusal or delay in disclosure?

2.31 As regards the first of these questions, we suggest that the sheriff officer should be empowered to put to the debtor questions as to the name and place of business of the debtor's employer, and as to other prescribed particulars such as the next pay day and the works reference number (if any) of the debtor. The debtor would be under a duty to answer these questions. The sheriff officer would then make a report to the creditor. The sheriff officer would put these questions when serving a charge to pay. If the charge was not served on the debtor in person, the sheriff officer would serve a written questionnaire in prescribed form at the same time as he served the charge. The debtor would be under a duty to return the form to the sheriff officer (rather than the court) before the expiry of the days of charge unless payment was made within that period.

2.32 Second, it may be difficult to justify logically the restriction of the procedure to arrestable earnings. In certain other legal systems, the judgment summons or examination summons procedure enables creditors to obtain information as to a debtor's attachable funds and assets by means of a public examination before the court. Such a procedure, however, would go beyond the policy of diverting diligence against employed debtors from poidings of household goods to arrestments of earnings which is our main objective.

2.33 Third, we do not consider that such a procedure should be backed by sanctions which might ultimately result in the debtor's imprisonment, (such as a summons to appear in court for examination on pain of imprisonment). It would however be for consideration whether the debtor would be barred, by his non-compliance, from applying for an instalment decree sisting diligence or a declarator of unenforceability such as we discuss in Memorandum No. 48.

2.34 We assume that most employed debtors regard arrestments of earnings as a lesser evil than poidings and warrant sales of household goods (or at least the later stages of that form of diligence). Such a procedure might be to their advantage. On the other hand, a debtor who regards arrestments as a lesser evil than a poiding would presumably reveal his employer's address if the creditor required him to do so under threat of a poiding. It is, however, necessary to take into account the interests of employers. The provision to creditors and sheriff officers of information concerning the debtor's employment should tend to reduce the number of "fishing arrestments" and should help sheriff officers to meet the problems, highlighted by the Central Research Unit Arrestment Survey,<sup>1</sup> which make it difficult for employers to handle arrestments of earnings. On balance, therefore, we think that a creditor should be entitled to instruct a sheriff officer when serving a charge to require the debtor to disclose

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<sup>1</sup>See paras. 18 to 21.



particulars of his employment (if any) such as the name and address of the employer, the debtor's works reference number (to assist in identification) and possibly the dates when wages or salary are paid. A debtor not complying with this requirement should be barred from applying for an instalment decree sisting diligence or declarator of unenforceability such as are mentioned in Memorandum No. 48. (Proposition 9).

(c) Mode of service of extended arrestments

2.35 Under the present law, it is competent to serve an arrestment on a sheriff court summary cause decree by registered or recorded delivery letter,<sup>1</sup> and service is invariably effected by an officer of court.<sup>2</sup> The CRU Arrestment Survey suggests (at para. 17) that most arrestments on firms are served personally by the officer on an employee at a place of business of the firm,<sup>3</sup> though some firms with places of business away from the main centres of population received arrestments by recorded delivery. In our First Memorandum, we have sought views on whether it should be competent to serve by post arrestments on Court of Session and sheriff court ordinary action decrees where the place of execution is twelve miles or more from the nearest court house in order to cut down the expense of diligence in the rural or remote areas.<sup>4</sup> In this Memorandum,

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<sup>1</sup> Execution of Diligence (Scotland) Act 1926, s.2 as amended by the Schedule to the Recorded Delivery Service Act 1962 and by the Sheriff Courts (Scotland) Act 1971 Sch.1, para. 2. The same rule applied to small debt decrees.

<sup>2</sup> The 1926 Act, s.2(b) provides that the letter "may be sent by a sheriff officer who would be entitled to execute the arrestment or the charge according to the law and practice existing at the passing of this Act, or by a messenger-at-arms resident in the sheriffdom in which the place of execution is situated, or, if there is no sheriff officer, or messenger-at-arms resident in the sheriffdom, by a law agent enrolled in such sheriffdom." This is an exception to the general rule whereby service of writs on summary cause decrees must be executed by a sheriff officer, not a messenger-at-arms: Summary Cause Rules, rule 6.

<sup>3</sup> We understand that personal service (and other modes of service requiring a visit by an officer) of arrestments on summary cause decrees, is generally regarded as regulated inter alia by rule 6 of the Summary Cause Rules on the view that the reference to the "defender" in that rule is to be liberally construed as including a reference to an arrestee.

<sup>4</sup> Memorandum No. 47, Part III.

we are concerned with the question whether postal service of extended arrestments of earnings should be competent on such decrees wherever the place of execution is situated. Postal service of extended arrestments would reduce the expense of service considerably.<sup>1</sup>

2.36 The McKechnie Report in 1958 recommended that "service of arrestments by registered post should be made competent but that ... service by an officer should be retained as a competent alternative to postal service, the additional expense being recoverable only when it can be shown that such service was expedient in the interests of justice."<sup>2</sup> The bodies who submitted evidence to our Working Party on this point all agreed with this recommendation, with the exception of the Society of Messengers-at-Arms and Sheriff Officers. The Society argued (a) that "the Postal service, subject as it is to delays and continuing reduction would be a poor substitute for the present system. It would place upon a postman a measure of responsibility which he is neither fitted nor paid to discharge nor indeed would an individual postman be held to account for any negligence displayed in either failing to deliver an arrestment or in delivering it to the wrong address." (b) They also argued that "the cheapness of postal arrestment and the ease with which it could be executed would make for erratic and uncontrolled use of the procedure." (c) The Society foresaw "difficulties of competition of arrestment if arrestments were posted on different days, but arrived at the premises of an arrestee by the same post." (d) The Society further observed:

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<sup>1</sup>The fee chargeable by sheriff officers for postal service of an arrestment on a summary cause decree is £1.59. The fee for personal service is £1.80 plus travelling expenses of 44p per mile (one way only). The expenses of personal service of arrestments under decrees of the sheriff's ordinary court or the Court of Session is higher. These expenses are chargeable against the creditor, and, unless the amount arrested is insufficient to cover them, ultimately the debtor.

<sup>2</sup>Op.cit., para. 148.

"Even if a postal system as suggested by McKechnie were to be instituted it would still be necessary for Sheriff Officers to maintain staff for the purpose of serving urgent arrestments. In view of the occasions on which urgent arrestments are required the retention of staff for that purpose would be uneconomic and wasteful." (e) Finally the Society argued: "The present arrangements whereby an officer and a witness serve arrestments personally permits the officer to obtain information as to the likelihood of further procedure being successful and also enables the officer to explain to the arrestee the significance of the arrestment and the rights and duties of the arrestee thereafter. The Society believes that the provision of this information to arrestees by the Sheriff Officers is significant in preventing a more widespread breach of arrestment."

2.37 As regards (a), it may be conceded that personal service is, or ought to be, more reliable than postal service and is often quicker. Personal service should also ensure that the schedule is given to an appropriate employee of the employer (though this is not always done<sup>1</sup>). We doubt whether the arguments at heads (b) and (c) carry much weight and, as regards (d), it would be possible to make express provision regulating competitions between postal extended arrestments if that should prove necessary. While there is some force in the argument at (e), larger employers lay down guidelines for dealing with arrestments,<sup>2</sup> and employers who do not realise the significance of arrestments can contact the officer by telephone.<sup>3</sup> Moreover, the officer of court invariably does not make contact with the debtor when serving an arrestment of wages and it seems unlikely, therefore, that he can often form a view as to the likelihood of further procedure being successful (in contrast to cases where a

<sup>1</sup> C.R.U. Arrestment Survey, para. 20.

<sup>2</sup> Ibid., para. 15.

<sup>3</sup> See, however, ibid., para. 36, which does not suggest that advice is often sought on the significance of arrestments as opposed to special difficulties with a particular arrestment.

charge is served personally or at the dwelling place).<sup>1</sup> Moreover, while there may be a good case for retaining personal service of arrestments of bank accounts in the case of large debts, we doubt whether there is a good case for distinguishing between summary cause arrestments of earnings and other arrestments of earnings.

2.38 The service of an arrestment on an ordinary action decree by an officer requires the attendance of a witness<sup>2</sup> who with the officer, must also sign the certificate of execution of the schedule of arrestment. This requirement applies also to the service of an arrestment on summary cause decrees, except in postal service.<sup>3</sup> The fees payable to the witness are one-third of those of the officer.<sup>4</sup> We suggest that, to minimise expense, the requirement of a witness should be abolished, at least in summary cause arrestments.<sup>5</sup>

2.39 Accordingly, we suggest that (1) it should be competent to serve an extended arrestment of earnings on the employer by recorded delivery or registered letter as an alternative to personal service, whether the arrestment is based on a Court of Session or sheriff court ordinary decree or a summary cause decree. (2) The expenses of personal service should be recoverable from the debtor only if the auditor of court certifies that such service was expedient in the interests of justice. (3) It should no longer be necessary for an officer serving a schedule of arrestment on a summary cause decree to be accompanied by a witness, and the officer's execution of the schedule of arrestment, though not attested by a witness, should be treated as probative. Views are invited on the question whether this proposal should apply also to Court of Session decrees and sheriff court ordinary action decrees. (Proposition 10).

<sup>1</sup>Ibid., para.37. The Edinburgh University Debtors Survey corroborates this.

<sup>2</sup>Debtors (Scotland) Act 1838 s.32; Citations (Scotland) Act 1846.

<sup>3</sup>Summary Cause Rules rule 6(3) as inserted by Act of Sederunt (Summary Cause Rules, Sheriff Court) (Amendment) 1980 (SI 1980/455); Execution of Diligence (Scotland) Act 1926 s.2(2)(e).

<sup>4</sup>Act of Sederunt (Fees of Messengers-at-Arms) 1978; Act of Sederunt (Fees of Sheriff Officers) 1978.

<sup>5</sup>Cf. our Memorandum No.48 para.3.15 where we suggest that a witness to the service of charge should no longer be needed.

(d) The place of execution and other factors affecting compliance by employer with extended arrestment

2.40 The CRU Arrestment Survey<sup>1</sup> shows clearly that the place where an arrestment of wages is served, and the person to whom it is given, can be important factors in determining whether the arrestment can be applied by the employer conveniently or at all to the debtor's wages on the next pay day following the arrestment, and also on whether the arrestment is kept confidential.

(i) The existing position

2.41 The present law: a summary cause arrestment served by registered or recorded delivery letter must normally be posted to the residence or place of business of the arrestee.<sup>2</sup> In practice, this is construed as empowering the officer to serve the arrestment at a branch office or branch place of business. Where the employer-arrestee is a company or corporation, though it has been doubted whether personal service on the company or corporation can be made at all,<sup>3</sup> it seems now to be generally accepted in practice that an arrestment by delivering a schedule of arrestment to an employee of the arrestee-company at one of its branch places of business constitutes personal service on the company.<sup>4</sup> Arrestments served on companies may be served at their registered office,<sup>5</sup> but this rule is not mandatory. In view of the doubts expressed

<sup>1</sup> See para. 2.42 below.

<sup>2</sup> Or to his last known address if it continues to be his legal domicile or proper place of citation: Execution of Diligence (Scotland) Act 1926, s.2(a).

<sup>3</sup> See Campbell v. Watson's Trs. (1898) 25 R. 690; Corson v. Macmillan 1927 S.L.T. (Sh.Ct.) 13 at p.15.

<sup>4</sup> See e.g. Robertson & Johnston v. N.B. Ry. Co. (1893) 9 Sh.Ct.Reps.72; Macintyre v. Caledonian Railway Co. (1909) 25 Sh.Ct.Reps. 329.

<sup>5</sup> Dobie, Sheriff Court Practice, p.263; Companies Act 1976, s.23(1). See also Local Government (Scotland) Act 1973, s.190 for service on a local authority.

concerning personal service on companies (and other corporate bodies), the safest practice in sheriff court decree diligence is to hand the arrestment to an employee of the company at a place of business of the company, and thereafter to send a copy by post to the relevant place of business of the company in terms of Rule 126 of the Sheriff Court Rules.<sup>1</sup>

#### 2.42 Employer's difficulties in operating arrestments:

Employers can experience difficulties concerning either the office at which the schedule is served or the person to whom the schedule is given.<sup>2</sup> The implementation of an arrestment of salary or wages is usually part of the normal work of the employer's wages section, or of a particular member of staff responsible for wages payments. Sheriff officers, with their local knowledge, can often avoid problems by serving the schedule on the appropriate employee, but this is not always possible and not always done. Large companies often administer arrestments at the head office but as we have seen arrestments may be competently served at a branch office where the staff may be inexperienced in dealing with arrestments. On occasion an arrestment may be competently served on a branch office before the employee is paid, but may not reach the appropriate office until after the employee has received his pay.<sup>3</sup> Indeed, an employer who receives an arrestment of pay too late for convenient operation may apply it to the instalment of pay next following the instalment to which it should have been applied in strict law.<sup>4</sup>

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<sup>1</sup>This Rule provides "If a schedule of arrestment has not been personally served upon an arrestee, it shall be necessary, to make the arrestment effectual, that a copy of the schedule be also sent by postal registered letter to the last known place of abode of the arrestee, or, if such place of abode is unknown, or, if the arrestee is a firm or corporation, to the arrestee's principal place of business if known, or if not known, to any known place of business of the arrestee, and the officer shall in his execution certify that this has been done, and specify the said address." The Rule is applied to summary cause diligence by the Act of Sederunt (Summary Cause Rules, Sheriff Court) 1976, section 3(2).

<sup>2</sup>See C.R.U. Arrestment Survey, paras. 15, and 17 to 20, on which this paragraph is based.

<sup>3</sup>Cf. C.R.U. Arrestment Survey, para.19.

<sup>4</sup>Ibid., para.28.

(ii) Proposals for reform

2.43 Time for employer's compliance with extended arrestment:  
it is not possible to frame legal rules which will ensure that arrestments or extended arrestments are served at the most appropriate place or on the most appropriate person to facilitate compliance with the arrestments. We think however that provision should be made giving the employer more time in which to operate an extended arrestment. This provision can be more easily introduced in relation to a continuing diligence such as an extended arrestment than to the existing form of arrestment which attaches only one instalment of pay. We suggest that an extended arrestment should only come into operation on the expiry of a prescribed period after the date of service of the schedule of extended arrestment on the employer. There is an English precedent under which an employer is not bound to comply with an attachment of earnings order until the lapse of seven days from the date when the order was served on him, but apparently may comply with the order if he is so advised.<sup>1</sup>

2.44 In deciding what period should be allowed, regard must be had to the varying practices of employers in administering wages and salaries including the calculation of the sums payable and the making up and distribution of the pay packets.<sup>2</sup> Smaller firms generally calculate pay manually on local premises, and the whole process is carried out over one or two days. Medium and larger firms generally use computers for calculating pay and the process is more complex as the relevant information (eg on overtime) has to be ascertained and sent from each workplace to the computer officer. This may take several days. The day on which the computer is run varies for weekly and monthly paid staff. Again, there are various practices, having various degrees of flexibility, in making up and distributing wages, in

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<sup>1</sup>See Attachment of Earnings Act 1971, s.7(1) which provides: "Where an attachment of earnings order has been made, the employer shall, if he has been served with the order comply with it; but he shall be under no liability for non-compliance before seven days have elapsed since the service."

<sup>2</sup>See C.R.U. Arrestment Survey, paras.11-14.

the use of security firms to make up and distribute wages paid in cash, and in the sending of instructions to local offices to withdraw money from the bank and to distribute the wages locally. On the whole, we think that seven days from the date of service of the extended arrestment would be a reasonable period, though we concede that in the case of larger firms a longer period would obviate inconvenience to the employer.

2.45 The postal copy: we have seen that the initial service of an arrestment on a company or other body corporate is in practice often followed by intimation of a postal copy to the company's principal place of business, if known, or if not known, to any known place of business of the company.<sup>1</sup> It appears that the execution of the arrestment is not complete until the postal copy has been sent,<sup>2</sup> though it may be doubted whether employers are always aware of this.

2.46 Two questions arise: first, it has been represented to us that the intimation by post of a copy of the schedule of arrestment should be abolished in the case of arrestment by personal service or service requiring a visit by an officer. Moreover, in the case of service by registered or recorded delivery letter, it seems inappropriate to require an additional service by post of a copy of the schedule. Second, if intimation of a copy by post is retained, it is for consideration whether the proposed seven day period before the extended arrestment takes effect should be reckoned from the initial service or the postal intimation (which completes the execution). An

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<sup>1</sup> See Rule 126 of the Sheriff Court Rules, cited at para. 2.41 above. The rule does not apply where the initial service is by post: see Execution of Diligence (Scotland) Act 1926, s.2(2)(g).

<sup>2</sup> Dobie, op. cit., p.263.



intimation sent eight days after the initial service has been held effectual<sup>1</sup> and, when added to the seven days period before the diligence takes effect, would seem to constitute too long a period. We suggest that postal intimation should not be necessary and, if this accepted, the second question would be superseded.

2.47 Proposals: to sum up, we suggest that (1) an extended arrestment should only come into operation on the expiry of a prescribed period after the date of service of the schedule of extended arrestment on the employer. It is suggested that the period should be fixed at seven days. (2) (a) It should be made clear that personal service of an extended arrestment on a company (or other corporate body) may be effected by delivering the schedule of extended arrestment to an employee of the company at a place of business of the company. (b) It should not be necessary to intimate to a company by post a copy of the schedule of extended arrestment where the schedule has been served, on an employee of the company, whether by recorded delivery or registered letter or by personal service. (c) It is for consideration whether the suggestions at sub-paragraphs (a) and (b) should apply to partnerships and unincorporated associations as well as to corporate bodies. (Proposition 11).

(e) Modernisation of forms and guidance for employers

2.48 The forms of schedule of arrestment and of the officer's certificate of execution of arrestment are regulated by the common law and practice. The McKechnie Report commented that often an arrestee does not appreciate the import of an arrestment served on him,<sup>2</sup> and criticisms of the forms have been made

<sup>1</sup>Hart v. Grant and Wylie etc. (1907) 23 Sh.Ct.Reps. 186.

<sup>2</sup>Op. cit., para. 153.

to us and were made by employers interviewed in connection with the CRU Arrestment Survey.<sup>1</sup> While the Society of Messengers-at-Arms and Sheriff Officers have framed improved forms of schedule of arrestment, we think that the forms should be prescribed by the Court of Session to which Parliament has entrusted wide powers to regulate the forms used in diligence, and whose rules would bind all officers of court. The McKechnie Report proposed that there should be "a standard form of arrestment in execution containing an explanatory note with information to the arrestee as to its effect and his duties and obligations under it".<sup>2</sup> Brief explanatory notes might, however, be misleading in the case of extended arrestments, and it might be preferable if the competent authorities were to issue through HMSO a short explanatory booklet for employers such as exists for attachment of earnings orders in England and Wales.<sup>3</sup> The schedule of extended arrestment would draw attention to this booklet.

2.49 We propose that (1) a modernised form of schedule of extended arrestment, and of the officer's certificate of execution to follow thereon, should be prescribed by act of sederunt. (2) A brief explanatory booklet on extended arrestments should be produced by the competent authorities and published by HMSO for the guidance of employers in operating extended arrestments. Reference should be made to this booklet in the standardised forms of schedules of extended arrestment served on employers. (Proposition 12).

(f) Identification of debtor to whom extended arrestment applies

2.50 Employers, especially the larger firms, sometimes have difficulty in identifying the employee to whom an arrestment applies eg where two employees have the same name, or where

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<sup>1</sup> Op.cit., para. 22.

<sup>2</sup> Op.cit., para. 153.

<sup>3</sup> See Home Office and Lord Chancellor's Office, The Attachment of Earnings Act 1971: Explanatory Booklet for Employers (H.M.S.O., London, 1971).

there is a discrepancy between the debtor's address shown in the schedule and the employer's records.<sup>1</sup> The McKechnie Report recommended that "the arresting creditor should be required to submit to the arrestee sufficiently detailed particulars of the debtor to enable the arrestee, eg the National Coal Board readily to identify the employee in question".<sup>2</sup> We have sympathy with this proposal but do not think that fuller and better particulars can be inserted in the schedule of extended arrestment. Further, we do not consider that the creditor should in effect be compelled to use the procedure proposed at para.2.34 above in order, for example, to ascertain the debtor's works reference number (if any) or whether, to the debtor's knowledge, there is another employee of the same name employed by the same firm. We suspect that the employer will often be in a better position to ascertain the relevant information than is the creditor or officer, and that creditors or officers will give such aid in identification as they can to employers since to do so is in the creditor's interest. We provisionally conclude therefore that (1) it would be impractical to require that a schedule of extended arrestment should specify sufficiently detailed particulars of the debtor to enable the arrestee-employer readily to identify in every case the debtor to whom the schedule applies. (2) It might however, be expressly enacted that where the schedule does not specify correctly the name and address of the debtor as at the date of service of the extended arrestment the employer should not be liable for failure to comply with the arrestment notwithstanding that the debtor is in fact in his employment and that the extended arrestment is not invalid by reason of the mistake in specification. (Proposition 13).

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<sup>1</sup>See C.R.U. Arrestment Survey, para. 21.

<sup>2</sup>Op.cit., para. 154.

(g) Notification to debtor of extended arrestment

2.51 An arrestment of wages or salary is not intimated by the officer or creditor to the debtor who almost invariably is informed for the first time of the arrestment by the employer. The employer must give the debtor an itemised pay statement every time payment of wages or salary is made and this statement should include a statement of variable deductions from the gross wages or salary,<sup>1</sup> including presumably a sum deducted in implement of an arrestment. While most employers note the deduction on the statement of pay (describing it as a "special deduction") it appears that some employers may not always comply with this statutory duty.<sup>2</sup> There is no duty on the employer to show the schedule of arrestment to the employee though this will no doubt be done on request and is done by some employers, usually when the employee gives a mandate authorising payment of the arrested sum to the creditor.

2.52 In the new process of extended arrestment, the employee debtor may not appreciate that future earnings not yet due will be attached by the extended arrestment. We propose therefore that not later than the first pay day in which earnings are deducted in pursuance of an extended arrestment, the employer should give the debtor employee a prescribed notice (which should be supplied to the employer by the officer of court who served the extended arrestment) explaining the effect of the extended arrestment. (Proposition 14).

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<sup>1</sup>Employment Protection (Consolidation) Act 1978, s.8.

<sup>2</sup>C.R.U. Arrestment Survey, para. 33. See also Edinburgh University Debtors Survey.

### (3) Duration and repeats of extended arrestments

#### (a) Duration of extended arrestments

2.53 Once an extended arrestment of pay has been served on the employer, a number of questions arise. How long should it have effect against the debtor's pay? Should it endure until the sums recoverable under the decree, and the expenses of the arrestment, have been paid? Or should there be a fixed time limit? If there is to be a time limit, what should that limit be? Should the arresting creditor be able to lay a second extended arrestment immediately on the expiry of the first?

2.54 Duration for fixed period, or until debt cleared?: in the case of ordinary lump sum debts, an extended arrestment might endure until the debt due under the decree, together with the expenses of the arrestment, was paid.<sup>1</sup> The advantage would be that the diligence would clear the debt in due course without any further action by the creditor, and without further expense for which the creditor and ultimately the debtor would be liable.

2.55 For a number of reasons, however, we think that it would be preferable to impose a prescribed time limit on the duration of an extended arrestment.<sup>2</sup> First, in cases where the debt is large, the extended arrestment could subsist for a very long period of months or years. Too long a period might be a psychological barrier to payment and might induce voluntary termination of employment. Second, there is also a risk that too long a period would impose financial hardship on the debtor. We envisage that extended arrestments would be a relatively simple and quick diligence to execute not involving any prior judicial investigation into a debtor's financial circumstances.

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<sup>1</sup>A proposal of this kind was made to the McKechnie Committee (see their Report, para. 54) and in evidence to our Working Party.

<sup>2</sup>This solution was suggested to our Working Party by the Law Society of Scotland and is adopted in certain other legal systems (see para. 1.24 above).

Any limitation on the amount arrestable must therefore be fixed by statutory rules applicable to all cases. The rules which we have formulated below would leave more for a debtor than is left to him at present but the rules would be somewhat arbitrary and could not prevent hardship in some cases. Third, to some extent the solution depends on whether an extended arrestment should have effect as a series of arrestments and furthcomings (so that the creditor could demand payment every week or other pay period) or as a single cumulative arrestment and furthcoming (so that the creditor could only demand payment of the attached sums at the end of the period of attachment). If the second solution is adopted, a time limit would be essential to allow the employer to account to the creditor within a reasonable time. Fourth, even if an extended arrestment were to operate as a series of arrestments with separate accountings or furthcomings for each deduction from pay (which is our preferred solution), there would be practical reasons for having a definite period (such as six or seven months) to allow any problems to be identified or resolved. We note that the legal systems which we have studied only allow indefinite attachments of earnings where the subsistence exemption from attachment has been fixed by the court after inquiry into the debtor's means.<sup>1</sup> We have concluded therefore that an extended arrestment should subsist only for a limited period prescribed by statute, but the period should be variable by statutory instrument. (Proposition 15).

2.56 How long a period? too long an arrestment period would have the same disadvantages as an indefinite extended arrestment while too short a period would require repeated arrestments to recover the debt in full and defeat a principal aim of the new form of diligence. The period of an extended arrestment should ideally be such that most debts can be paid within it. This involves estimates of the average amounts of decree debts or at least those enforced by arrestments of earnings, and estimates of the weekly amount

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<sup>1</sup>E.g. attachment of earnings orders in England and Wales and in Northern Ireland.

which the average debtor subject to arrestments of earnings can reasonably be expected to pay. The statistics which we have relate to 1978, but we assume that the increase in the amounts of decree debts through inflation would be offset by a corresponding increase in the levels of earnings.

2.57 The CRU Court Survey estimates that nearly two-thirds (65%) of summary cause payment actions in 1978 were for principal sums of less than £100 and 85% for sums of less than £200.<sup>1</sup> About 63% of all sheriff court actions for payment (summary and ordinary causes) were for principal sums of under £100.<sup>2</sup> The CRU Diligence Survey<sup>3</sup> estimates that in 1978 45% of all arrestments involved principal sums under £100, 52% sums under £125, 57% sums under £150, 61% sums under £175, 64% sums under £200, and 83% sums under £500. Taking a principal sum of £125, there must be added up to £20 for expenses<sup>4</sup> making a total of nearly £150.

2.58 As regards the weekly amount which the average debtor can afford to pay, in 1978 the average wage of adult persons in full-time employment was £78.10 per week<sup>5</sup> (£88.40 in 1979), but the Edinburgh University Debtors Survey suggests that the average weekly earnings of debtors subjected to arrestment of earnings is considerably lower. The net "household income" of the 25 debtors subject to arrestment of earnings interviewed in connection with the Edinburgh University Debtors Survey, was as follows: 4 under £32 per week; 10, under £33-57 per week; and 11 over £58 per week. At

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<sup>1</sup>Op. cit., para. 3.5: 45% of such actions were for principal sums of less than £50. Of the 34% of such actions involving principal sums of over £100, 19% were for sums between £100 and £200, and only 15% for sums between £200 and £500.

<sup>2</sup>Ibid.,

<sup>3</sup>Op. cit., Annex D, Table 5: 25% were for sums under £50. These statistics relate to all arrestments, not merely arrestments of earnings, but the difference is thought to be marginal.

<sup>4</sup>The judicial expenses for a principal sum of £125 were (in 1978) £18.77 while the fee for a summary cause postal arrestment was £1.47.

<sup>5</sup>Department of Employment, New Earnings Survey, April 1978.

the time of the interview (after an arrestment had been served) the "household income" of 8 debtors was below the poverty line (set a supplementary benefit level plus 20%); 12 debtors' households had less than twice their supplementary benefit entitlement at the time of the interview.

2.59 If it is assumed that most employed debtors could only make instalment payments from earnings of about £5 or £6 per week,<sup>1</sup> an extended arrestment which endured for up to 30 weeks would probably result in the discharge of most debts (viz. principal sum not exceeding £125 exclusive of judicial and diligence expenses).

2.60 An arrestment attaches pay for the whole pay period in which it is served, and not merely the proportion earned as at the date of service.<sup>2</sup> Accordingly, employers do not have to make an apportionment as between the arrested and non-arrested wages. In the case of an extended arrestment, it would be important to ensure that apportionments are avoided so far as practicable, for example by a provision that an extended arrestment would attach (subject to the subsistence exemption) the pay for the whole pay period in which it took effect but not any proportion of the pay for the pay period in which it expired.

2.61 It is for consideration whether the prescribed period should be expressed in days, weeks or calendar months. Use of calendar months might be preferred because even for weekly paid employees (and a fortiori employees paid monthly) it is easier to see from a calendar the date of expiry of the extended arrestment if the duration is expressed in months.

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<sup>1</sup>This is the average weekly amount which the 25 debtors interviewed in the Edinburgh University Debtors Survey thought they could personally afford to pay over an extended period.

<sup>2</sup>See para. 1.4 above, footnote 3.



2.62 In the light of these remarks we propose that earnings attachable by an extended arrestment should include (subject to the subsistence exemption mentioned below):-

- (a) all arrears of pay due to the debtor at the date when the extended arrestment takes effect (viz. seven days after the date of service in terms of Proposition 11 above); and
- (b) all pay due on each pay day falling within a prescribed period of (say) seven months from that date or, as the case may be, for such lesser period as is required to pay the debt due under the decree together with the expenses of the extended arrestment.

The period mentioned in sub-paragraph (b) should be variable by statutory instrument. (Proposition 16).

(b) Repeats of extended arrestments

2.63 While the period during which an extended arrestment has effect should be sufficiently long to allow most lump sum debts to be paid within that period, there will be cases where there is an outstanding balance due to the arresting creditor at the end of the period.

2.64 We think that the arresting creditor must be allowed to lay an extended arrestment again for one or more further periods until the debt is cleared. We do not regard this as a diligence of indefinite duration any more than repeated arrestments under the present law are of indefinite duration. The aim of the reform is to reduce the number of repeated arrestments to an acceptable level, to reduce the work of creditors and the expenses for which debtors are liable, rather than to eliminate repeated arrestments entirely.

2.65 Problems could arise, however, where other creditors of the debtor wish to attach the debtor's earnings by extended arrestment. We understand that the legislative solution proposed in California is that there should be a mandatory interval of ten days between the expiry of the earnings with-

holding order (which is akin to an extended arrestment) and re-service on the employer of a new order by the same creditor.<sup>1</sup> To make such a solution effective, it might be necessary to require employers to inform, on request, any creditor holding a warrant for diligence of the date of expiry of the existing extended arrestment. If, as we propose below,<sup>2</sup> a creditor "shut out" by an extended arrestment could claim a pari passu ranking or could be conjoined and ranked in an earnings transfer order which would supersede an existing extended arrestment, then an interval of the kind proposed in California might be regarded as unnecessary. Moreover, a wage-earner who wishes to make an arrangement for the orderly payment of debts to his several creditors would, under our proposals in Memorandum No. 50, be entitled to apply to the court for an order confirming a debt arrangement scheme, which would also supersede an existing extended arrestment.

2.66 We provisionally propose that (1) a creditor who has already laid an extended arrestment should be entitled to lay one or more subsequent extended arrestments against the same debtor's pay for the same debt until the debt and the expense of the extended arrestments have been discharged. (2) If (as we propose in Proposition 21 below) provision is made to secure fair sharing among competing creditors outwith sequestration in cases where an extended arrestment has been laid, then it should not be necessary to provide for a mandatory interval between the expiry of the extended arrestment and the laying of a subsequent extended arrestment by the arresting creditor against the same debtor's pay for the same debt. (Proposition 16A).

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<sup>1</sup> Assembly Bill No. 393 (1977).

<sup>2</sup> Para. 2.125 (Proposition 21).

(4) Limitation of amount arrestable for protection of subsistence of debtor and his family

2.67 As already indicated, a main objective of extended arrestment is to allow a debtor a larger exemption than at present from the arrestment of his wages, while securing to the creditor a reasonable return from the diligence over a period. The deductions from wages must be fixed by a formula which can be applied reasonably easily by employers at a level which has regard to the interests of the creditor and the debtor. If the amounts attached by the extended arrestment are too small, the debt will be paid too slowly to the prejudice of the creditor. If the amounts attached are too large, the debtor and his family may suffer hardship which in turn may cause voluntary termination of employment to the prejudice of the creditor, and possibly the employer.

(a) Models for limitation rules

2.68 The possible models for arrestment limitation or earnings exemption rules include the following:-

- (i) Exempt earnings as fixed sum in sterling.
- (ii) Exempt earnings as fixed percentage of earnings.
- (iii) Exempt earnings as fixed percentage of surplus earnings above fixed sum.
- (iv) Exempt earnings as percentage of whole earnings with fixed sum limitations.
- (v) Exempt earnings defined by sliding scale percentage exemptions.
- (vi) Exempt earnings defined by reference to continually revised statutory formulae (Supplementary Benefit scale rates).
- (vii) Exempt earnings as fixed percentage of 'taxable pay' for pay period.

We discuss these in that order.

(i) Fixed sum in sterling

2.69 A very simple solution would be to allow all disposable earnings above a fixed sum expressed in sterling to be attachable. This system was used in Scotland between 1870 and 1960,<sup>1</sup> and was adopted in some other legal systems.

2.70 This scheme is relatively easy to operate, and is intelligible to all concerned, but it has several disadvantages. First it is said there is no incentive for a debtor during the period of attachment to earn more than the fixed sum since he is just "working for his creditors". Second, a debtor earning £100 per week would have far more taken from his earnings than a debtor earning £50 per week. This appears unfair to more highly paid debtors. Third, in inflationary times, the fixed sum requires continual upward adjustment if it is to continue to be fair to the debtor. Fourth, where the pay period in a given case (eg a month) differs from the pay period referred to in the exemption statute (eg a week), the employer has to make an additional arithmetical calculation which leads to uncertainty and the risk of error. Fifth, a single fixed sum takes no account of any dependants whom the debtor is liable to maintain.

2.71 The last two disadvantages could be minimised respectively by provisions prescribing a different fixed sum for different pay periods equivalent in effect to the statutory fixed sum,<sup>2</sup> and by a provision prescribing further fixed sum exemptions for the debtor's dependants.<sup>3</sup> We think, however, that the disadvantages of this system outweigh the advantages.

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<sup>1</sup>The Wages Arrestment Limitation (Scotland) Act 1870 as originally enacted, provided a fixed exemption of 20 shillings per week which was raised in 1924 to 35 shillings. The Wages Arrestment Limitation (Amendment)(Scotland) Act 1960 replaced the fixed sum formula by the present formula exempting £4 plus half the balance of the weekly wage.

<sup>2</sup>Cf. the Uniform Consumer Credit Code of the USA, section 5.105 (2)(c).

<sup>3</sup>For example, in Alberta, there are fixed sum exemptions of \$300 per month where the debtor is unmarried; \$400 where he is married; and \$80 for each dependent child.

(ii) Fixed percentage of whole earnings

2.72 Some legal systems exempt a fixed percentage of the debtor's earnings. For example, in several Canadian provinces, including Ontario, 70% of the debtor's wages are exempt.<sup>1</sup> In the USA, several states changed from fixed sum to percentage exemptions,<sup>2</sup> and US federal law enacts a minimum exemption for all states of 75%.<sup>3</sup>

2.73 In a percentage exemption system, the exemption keeps in step with inflation whereas a fixed sterling sum does not. The computation by the employer is simple and the formula applies uniformly to earnings paid on a weekly, monthly or other periodic basis. On the other hand, the system can be said to be unfair to low paid debtors and the creditors of high income debtors, since high income debtors are left with more than required for subsistence. It has also been observed that the absence of a minimum band of totally exempt earnings "would make it difficult for the low paid worker to provide for his needs" and that the "low income debtor would have no incentive to continue working if he could obtain more on welfare than in employment".<sup>4</sup>

2.74 Disposable or gross earnings: in a percentage formula, it is important to establish whether the percentage is to be reckoned on disposable or gross earnings, and, if the former, how disposable earnings are to be defined. The Wages Arrestment Limitation (Scotland) Act 1870 does not make express provision on whether the 50% exemption above £4 is to be reckoned on gross or disposable wages and there are wide variations in practice.<sup>5</sup>

<sup>1</sup>Wages Amendment Act 1920 (Ontario): see Puckett, "Wage Garnishment in Ontario" (1978) 28 University of Toronto Law Journal 95 at p.100.

<sup>2</sup>Brunn, "Wage Garnishment in California" (1965) 53 California Law Review 1214 at p.1224.

<sup>3</sup>Consumer Credit Protection Act (1970) s.303, limiting garnishment on a weekly basis to 75% of disposable earnings or 30 times the federal minimum hourly wage.

<sup>4</sup>Alberta Institute of Law Research and Reform, Working Paper on Exemptions from Execution and Wage Garnishment (1978) p.60.

<sup>5</sup>See C.R.U. Arrestment Survey, paras. 24 and 25.

If the object of the exemption is to enable the debtor to retain enough to live on, then it is arguable that the percentage should be reckoned only on disposable earnings. This is the approach adopted in several legal systems and by the US Consumer Credit Code, s.5:105, which defines 'disposable earnings' to mean -

"that part of the earnings of an individual remaining after the deduction from those earnings of amounts required by law to be withheld."

A convenient precedent is the English definition of "attachable earnings" as meaning the earnings payable to the debtor after deduction of (a) income tax; (b) Primary Class 1 contributions under Schedule 1 to the Social Security Act 1975; and (c) amounts deductible under any enactment, or in pursuance of a request in writing by the debtor, for the purpose of a superannuation scheme within the meaning of the Wages Council Act 1979.<sup>1</sup> This definition is not the same as "take-home pay" since it does not cover SAYE, union dues, and other "voluntary" deductions.

2.75 A disadvantage of reckoning the percentage exemption on net or disposable earnings is that a debtor with a wife to support would pay more to his creditors than an unmarried debtor who is earning the same wage: the former pays less tax and has therefore higher disposable earnings than the latter. Yet, other things being equal, a debtor with a wife to support who is herself unemployed can afford to pay less to his creditors than an unmarried debtor. A possible method of minimising this disadvantage would be to vary the percentage exemptions where there are dependants,<sup>2</sup> or to add fixed sum

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<sup>1</sup> Attachment of Earnings Act 1971, Sch.3, para. 3.

<sup>2</sup> For example, in 1965 according to Brunn (loc.cit., at pp.1250 et seq), in Colorado there was a 70% exemption for heads of families and 35% exemptions for single persons; in Michigan for judgment debts, the percentage exemptions were 60% for householders having a family, 40% for others, with certain maxima and minima; in Oklahoma, the percentage was 75% or 100% where the wages were needed to support the debtor's family.

exemptions for each dependant. The disadvantage deriving from liability to support dependants has become less important, however, with the replacement of income tax allowances by child benefit.

(iii) Fixed percentage of surplus earnings above fixed sum

2.76 The next model, used in certain legal systems,<sup>1</sup> has been in force in Scotland since 1960, that is to say, an exemption defined by reference to a fixed sum (£4) (below which earnings are wholly exempt) together with a percentage (50%) of the surplus wages above that sum.<sup>2</sup> The McKechnie Committee, who proposed this formula, thought that the exemption "must be sufficiently stiff in its effect to encourage the debtor to make an arrangement with his creditors,"<sup>3</sup> but this conclusion was reached on the basis that an arrestment would attach only one instalment of pay. An extended arrestment would not operate as a spur to an instalment arrangement but would itself recover reasonable instalments which the debtor can afford to pay. It would be possible to adapt the 1960 formula to extended arrestments by raising the level of the fixed sum and/or the percentage so that the over-all exemption was appropriate for continuous attachment.

2.77 There are however, several disadvantages associated with this approach. First, the fixed sum requires continual upward adjustment by legislation. Although the Secretary of State has a power to vary the fixed sum by statutory instrument subject to negative resolution,<sup>4</sup> this power has never been exercised despite the inflation of the period since then.

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<sup>1</sup>E.g., in the U.S.A., the States of Georgia (\$3 per day plus 50% of excess); Indiana (\$15 per week plus 90% of excess) (1965 figures: Brunn loc.cit.).

<sup>2</sup>Wages Arrestment (Limitation)(Scotland) Act 1870 as amended by the Wages Arrestment Limitation (Amendment)(Scotland) Act 1960, s.1.

<sup>3</sup>Op. cit., para. 87.

<sup>4</sup>Law Reform (Miscellaneous Provisions)(Scotland) Act 1966, s.3.

Legislative inertia is a real problem, not easily circumvented by statutory instruments, at any rate if they are subject to Parliamentary scrutiny and debate. Second, the statutory fixed sum requires adaptation to pay periods other than a week. At present, the questions of whether and how the fixed sum of £4 should be applied to a pay period other than a week, eg a four-weekly or calendar monthly pay period, is not expressly regulated by statute and employers' practices vary.<sup>1</sup> Third, the formula is a combination of the fixed sum and percentage exemption systems, and like those systems, leaves a larger subsistence to the high income debtor than to the low income debtor. Fourth, there are no allowances for the support of dependants.

(iv) Fixed percentage exemptions with fixed sum limitations

2.78 Another method of combining fixed sum and fixed percentage exemptions is to exempt a percentage of a debtor's weekly wage with the proviso that the exempted amount must not fall below a certain prescribed sum.<sup>2</sup> This system ensures that the debtor always has exempted from his pay an amount sufficient for his subsistence. By prescribing a further exempt sum for each dependant, allowance can be made for a debtor with a family to support. The following table indicates how the system might operate:-

Net weekly pay	£ 50	£ 60
Amount exempted if <u>percentage exemption</u> was (say) 80%	40	48
Amount exempted from pay of single man where <u>prescribed sum</u> was (say) £25	40	48
Amount exempted from pay of married man with 2 children where <u>prescribed sum</u> was (sav) £45	45	48

<sup>1</sup> See C.R.U. Arrestment Survey, para. 26, which discloses that, when applying the limitation formula in the 1870 Act to four-weekly or calendar monthly pay periods, some employers base their calculations on half the balance over £16 (4 weeks x £4); or on the calendar month equivalent, £17.50 appeared to be the figure normally used, (i.e. approximately  $52 \times 4 \div 12$ ); or on half of the balance of the monthly or four-weekly wage over £4. One employer took the view that a salary of a monthly paid employee is not protected by the 1870 Act and accordingly the whole of the earnings are arrestable.

<sup>2</sup> British Columbia, Attachment of Debts Act, RSBC 1960 as amended.



2.79 There are three disadvantages to this method. First, the prescribed sums would have to be altered frequently in times of rapid inflation. This problem could be circumvented by making the sums variable by statutory instrument and by requiring an annual review of the figures. Second, an employer would have to find out from the debtor how many dependants (if any) he supported before he could operate an extended arrestment. Third, the sums would require adaptation to pay periods other than a week.

(v) Sliding scale percentage exemption

2.80 It is a considerable disadvantage of the percentage exemption and of the combined fixed sum/percentage exemptions just discussed that highly paid debtors are left more earnings for their subsistence than low income debtors. As we indicated above, this may be said not only to discriminate against low income debtors but also to be unfair to the creditors of high income debtors. The amount exempted should be such as to permit attachment of earnings not needed for the debtor's subsistence: it should not "allow the debtor to live in comparative affluence at the expense of his creditors".<sup>1</sup> One method of removing this disadvantage is to introduce a sliding scale of exemption rates whereby a high percentage exemption is allowed on the lowest income brackets and the percentage exemption decreases as the earnings rise through successive income brackets till a maximum level is reached above which all earnings are arrestable.<sup>2</sup> A system on these lines is used in France in computing exemptions from "saisie-arret",<sup>3</sup> and in Hawaii.<sup>4</sup>

2.81 In such a system, it would be important to fix the initial exemption at an appropriate level, which we suggest might be 90% or thereby. The sliding scale rates might be on the following lines:-

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<sup>1</sup> Alberta Working Paper (1978) supra p.63.

<sup>2</sup> Certain states in the USA have as a refinement of the fixed sum and fixed percentage exemption system a fixed sum "ceiling" above which the debtor's weekly earnings are wholly attachable. We think that such a system is too complex.

<sup>3</sup> Article R.145-1, Chapitre V, Code du Travail.

<sup>4</sup> Brunn, loc. cit. p.1250.

Net earnings brackets	Percentage exemption
Earnings up to £60 per week	90%
Earnings bracket £60 to £100 per week	80%
" " £100 to £150 " "	70%
" " £150 to £200 " "	50%
" " £200 to £250 " "	30%
" " £250 to £300 " "	15%
" " over £300 " "	No exemption

Thus a man earning £100 net per week would have the following exemptions:-

On earnings up to £60	(90% of £60) = £54
" " between £60 and £100	(80% of £40) = £32
Total Exemption	<u>£86</u>

These figures are purely illustrative.

2.82 This system does not provide for extra allowances for the support of dependants. Another disadvantage is that the figures defining the income brackets would have to be adapted to deal with debtors who were paid other than weekly. Although inflation would render those figures out of date, failure to uprate them would not have such a great effect on the proportion attachable from a debtor's pay as would failure to uprate prescribed sums which provide minimum exemptions or protected earnings.

(vi) Exemption defined by reference to continually revised statutory formulae (Supplementary Benefit scale rates)

2.83 To obviate the need for frequent legislative intervention a solution adopted in certain legal systems is to link

the exemption rate to a statutory formula which is kept under constant review and continually updated by primary or subordinate legislation. As already indicated, the US (Federal) Consumer Credit Protection Act (1970) section 303 provides that a creditor may not attach more than the lesser of (a) 25% of the debtor's disposable earnings for any work week, or (b) the amount by which his disposable earnings exceed 30 times the Federal minimum hourly wage.<sup>1</sup>

2.84 There is no equivalent to the minimum hourly wage in Scotland, but we have considered the possibility of linking the exemption to the supplementary benefit scale rates for the time being in force which determine a person's 'normal requirements' or, in popular language, his subsistence level. The objective of the Supplementary Benefits Act 1976 is that a person not in full employment should be entitled to claim various supplementary benefits to bring his financial resources up to the 'normal requirements' prescribed by a complicated scale set out in the Act.<sup>2</sup> In Billington v. Billington,<sup>3</sup> the English High Court held that a court, in making or varying an attachment of earnings order, should not normally fix a 'protected earnings rate'<sup>4</sup> which would have the effect of bringing the debtor's resources below the prescribed scale rates for supplementary benefit purposes. An important reason for the decision was that the Department of Health and Social Security "does not normally pay supplementary benefit to a man to enable him to meet a court order even if that order leaves him or brings him below normal subsistence level".<sup>5</sup>

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<sup>1</sup>The Federal minimum hourly wage is prescribed by the Fair Labor Standards Act 1938, section 6(a)(1) which is continually kept up to date. The US Uniform Consumer Credit Code s.5.105 is to a like effect, with the modification that 40 times the Federal minimum hourly wage is exempt.

<sup>2</sup>See especially Schedule 1 to the Act.

<sup>3</sup>[1974] Fam.24.

<sup>4</sup>In the Attachment of Earnings Act 1971 s.6(5) this rate is defined as "the rate ... below which, having regard to [the debtor's] resources and needs, the court thinks it reasonable that the earnings actually paid to him should not be reduced."

<sup>5</sup>Supra at p.29.

2.85 The Department of Health and Social Security in Scotland presumably adopt a similar policy of not normally making payments to meet court decrees and arguably, therefore, an extended arrestment should not bring the debtor's earnings below subsistence level for supplementary benefit purposes. We do not think, however, that this can be done satisfactorily through legislation by express reference to the supplementary benefit scale rates in force when a given extended arrestment is laid. First, employers are generally not familiar with the legislation and it would be unreasonable to require them to have regard to it. Second, the provisions prescribing the scale rates in the Supplementary Benefits Act 1976 are extremely complex and would not be easily construed or applied by employers even if copies of the Act were supplied. The scale rates are or may be an excellent guide for a rule-making authority updating fixed sum exemptions or for a court fixing a protected earnings rate in its discretion, but the formulae are far too complex for direct application by employers. In any event, the formulae would only be suitable as a minimum exemption and further provisions would be needed.

(vii) Fixed percentage of 'taxable pay' for a pay period

2.86 We have considered whether the employee's tax code could be used as a basis for exemption of wages from extended arrestment. Under this system -

- (a) the pay due to the employee for the pay period (say a week) in which the arrestment was served would be ascertained;
- (b) using the employee's PAYE code number and Free Pay Tables supplied by the Inland Revenue, the "free pay" for a period of one week would be ascertained;
- (c) the free pay would be subtracted from the gross pay, leaving a figure (which may be called 'the taxable pay' for the pay period); and
- (d) the prescribed percentage exemption (say 75%) limiting the amount arrested (to 25%) would be reckoned on the taxable pay.

The following example illustrates the system:

A single person, who has (say) a PAYE code number of 98, earns gross pay in a week:-	£60
Subtract the 'free pay' for a week (as ascertained from Free Pay Tables and PAYE Code No.):-	£19.05
leaves taxable pay for a week of:-	£40.95
of which sum, the arrestment attaches 25%:-	£10.25
leaving the debtor -	
the balance (75%) of taxable pay:-	£30.75
plus the free pay:-	£19.05
making a total subsistence exemption of:-	£49.75

2.87 The basis of this system is that, if the debtor's "taxable pay" provides a measure of his ability to pay tax out of his earnings, then it should also provide a measure of his ability to pay his creditors out of his earnings. There would be a number of advantages in this system. First, the employee's PAYE code number (unlike the supplementary benefit scale rates) are known to the employer. Second, the code number is amended by the Inland Revenue as the employee's financial circumstances change, and any amendments are forthwith communicated to the employer. Third, the employee's personal tax allowances (which determine his PAYE code number) reflect such outgoings as his liability to support his spouse, and secured loan interest payable to building societies. Furthermore, the PAYE code is adjusted to allow the collection from earnings of tax on other sources of income (eg a pension or pay from another job, or rent from lodgers).

2.88 This model would, however, suffer from too many important disadvantages. First, it should be noted that the employer does not calculate the taxable pay corresponding to the current pay

period when computing the taxable pay for Inland Revenue purposes.<sup>1</sup> He would have to make a separate computation of the taxable pay for the period and reckon the percentage on that figure. Second, it has been represented to us that, in very many cases, the code number actually in operation does not clearly reflect the commitments of the taxpayer-debtor even to the extent which they may be taken into account in code numbers.<sup>2</sup> On balance, therefore we think that this system would not be suitable.

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<sup>1</sup>The taxable pay is ascertained by (a) adding the pay for the current pay period to the total of previous payments from 6 April to date (the cumulative or total pay to date) and (b) ascertaining the proportion of tax allowance from 6 April to date, using the PAYE code and tax tables (the cumulative free pay) and (c) subtracting the cumulative free pay from the cumulative pay: see Employers' Guide to PAYE (April 1979 edition) (issued by the Board of Inland Revenue) page 9. Income Tax (Employment) Regulations 1973 (S.I. 1973/334) regulation 13.

<sup>2</sup>For example, (1) not infrequently a married man is taxed under the code for a single man, as, for example, where he has delayed the completion of a return of income or claim for allowances. (2) Since child allowances have been replaced by child benefit, the taxpayer's liability to maintain children is not reflected in the code number. (3) The code number may not reflect the gross allowances due to the taxpayer because it may have been reduced in order to recover tax underpaid in earlier years. (4) Where an employee has a subsidiary source of income, then if it is substantial, it will not be reflected in the code number but will be taxed separately in a Schedule D assessment or by the operation of Code 1 at the subsidiary source. (5) A taxpayer with an option loan secured on his house does not get relief through his code number and will suffer by comparison with those with normal secured loans. (6) The code takes into account loan interest but not rent, so that tenants will suffer by comparison with home-buyers. (7) Where an employer operates a "net pay arrangement" (see Employer's Guide to PAYE supra para. 46) the code makes no allowance for the superannuation contributions which he has to pay whereas relief may be given for those in other cases. This would discriminate as between employees in similar circumstances.

(b) Court's power to vary exemption in individual cases

2.89 Before the limitation rules were introduced by the Act of 1870, it was the practice of the courts to make orders exempting a proportion of the debtor's wages from arrestment in pursuance of common law powers.<sup>1</sup> The limitation rules were introduced in part to get rid of the uncertainty and variations of practice to which the exercise of these powers had given rise,<sup>2</sup> but, it appears that the Act of 1870 did not abolish the common law powers, and that a debtor could, and still can, claim an exemption above the statutory limit on the ground of need.<sup>3</sup> It appears, however, that this power is little known and rarely applied to earnings except in bankruptcy proceedings.<sup>4</sup> Debtors in cases of need may apply to the Department of Health and Social Security for an urgent needs payment<sup>5</sup> or their local

<sup>1</sup>The common law powers, under the principle known as the beneficium competentiae, enable the courts to fix a suitable aliment to a debtor where an arrestment is laid against an "alimentary fund", wages for this purpose being treated as an alimentary fund: see Shanks v. Thomson (1838) 16 S.1353.

<sup>2</sup>See McKechnie Report, paras. 66-68.

<sup>3</sup>Section 2 of the Act provides that the surplus above the exempt wages "shall still be liable to arrestment as before the passing of this Act", that is to say, the surplus is still exempt at common law from arrestment insofar as necessary for the wage-earner and his dependants. This view was accepted in the McKechnie Report, op. cit., para.75. The power of the court, in an application under s.98(1) of the Bankruptcy (Scotland) Act 1913 (to fix a suitable aliment for a bankrupt from his personal earnings vesting in the trustee after sequestration) is unequivocally based on the assumption that the common law powers of the beneficium competentiae still apply to earnings: see generally Caldwell v. Hamilton 1919 S.C. (H.L.) 100; Young v. Turnbull 1928 S.N. 46; Webster v. Douglas (1933) 49 Sh.Ct.Reps. 294; Birrell's Tr. v. Birrell 1957 S.L.T. (Sh.Ct.) 7; Cochran's Tr. v. Cochran (1958) 74 Sh.Ct.Reps.75.

<sup>4</sup>See, however, Thomson v. Cohen (1915) 32 Sh.Ct.Reps.15.

<sup>5</sup>Supplementary Benefits Act 1976, s.4 (as originally enacted and as amended by the Social Security Act 1980). This section enables persons in full employment and others ineligible for weekly supplementary benefit to receive supplementary benefit if they are in urgent need. See Supplementary Benefits Handbook (H.M.S.O.; revised Nov. 1979) para. 1.14 for a brief description of the circumstances in which the power is used.

Social Work Department for financial assistance.<sup>1</sup> We do not have statistics for the number of payments or grants awarded, though the powers are exercised from time to time to help debtors whose wages are arrested.<sup>2</sup>

2.90 It is nevertheless for consideration whether the courts should have powers to restrict the sums attached by extended arrestments in cases of hardship and whether a statutory power should be introduced in lieu of the obsolescent common law power. Such a power exists in some states of the USA<sup>3</sup> and the US National Commission on Consumer Finance recommended in 1972 that debtors should be permitted to qualify for greater earnings exemptions by demonstrating special needs, such as illness in the family or previous unemployment.<sup>4</sup> A similar suggestion was made to the McKechnie Committee by the Law Society of Scotland.<sup>5</sup>

2.91 Conversely, one way of dealing with the problem of high income debtors would be to allow the creditor to apply to the court for an order lowering the exemption. Few legal systems afford creditors such a protection but in the State of New York, the court may lower the exemption if, or insofar as, the creditor establishes that it is "unnecessary for the reasonable requirements of the ... debtor and his dependants."<sup>6</sup>

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<sup>1</sup> Social Work (Scotland) Act 1968, section 12. Statistics on the percentages of payments given for electricity, gas and rent arrears are set out in the C.R.U. Report on Debt Counselling in Scotland but no separate figures are available of grants to persons whose wages were arrested.

<sup>2</sup> The McKechnie Report (para. 80) states that the National Assistance Board gave 32 urgent needs payments to men whose wages had been arrested in Scotland in one month in 1956.

<sup>3</sup> California, North Carolina, South Carolina, Connecticut and Montana: see Vukovich (1974) loc.cit. at p.818, footnote 228.

<sup>4</sup> Vukovich, supra, p.818.

<sup>5</sup> McKechnie Report, op.cit., para. 78: the Society suggested that "there should be provided for debtors whose wages have been arrested a simple procedure whereby, at the debtor's request that he be allowed to retain more than the standard amount, the National Assistance Board would fix the amount of wages considered necessary for the aliment of the debtor and his family, regard being had, however, to whether the arresting creditor's claim was an alimentary one".

<sup>6</sup> New York Civil Practice Law, section 5205(e) cited by Vukovich supra., at p.819. According to this author, New York was the only American State with such a provision (in 1974).



2.92 We suggest that there are two reasons why such a power should not be introduced. First, applications for orders varying the exemption limits would require to be disposed of quickly given the relatively short duration of extended arrestments, and yet enquiries into means can be notoriously time-consuming. Second, it is likely that a new statutory power would be used more frequently than the existing little-known common law powers to reserve a suitable aliment to the debtor. If the courts were to be flooded by applications, the advantages of extended arrestments would be lost and it would then be more appropriate to introduce a system of earnings transfer orders such as we outline in Part III.

(c) Questions for consideration

2.93 The foregoing discussion illustrates the difficulties of formulating a scheme which is simple to operate, fair to all concerned, and capable of being easily kept up-to-date. An arbitrary exemption level may be acceptable where the arrestment attaches only one instalment of pay and operates in practice as a catalyst for an instalment settlement. But, where the arrestment has effect for several months, the level of the exemption becomes extremely important. On the other hand, every system which achieves flexibility tends to be complicated for employers to operate.

2.94 We provisionally favour the sliding scale percentage exemption system outlined in paras. 2.80-2.82. We would expect that the calculations which it involves would not be too complex for employers to operate given the comparatively small number of arrestments which even large employers receive. As a second choice, we would select the percentage exemption with minimum fixed sum exemptions outlined in paras. 2.78-2.79, the fixed sums being variable to take account of dependants. To sum up, (1) views are invited on the system for new limitation rules for extended arrestments. It is tentatively suggested that system A or alternatively system B should be adopted.

### System A

On every pay day while an extended arrestment subsists a proportion of the debtor's disposable earnings should be treated as exempt from arrestment. The proportion would be calculated by means of a sliding scale exemption table along the lines of that discussed in para. 2.81.

### System B

On every pay day while an extended arrestment subsists a prescribed percentage of the debtor's disposable earnings should be treated as exempt from arrestment provided that in no case should the exempt earnings be less than a prescribed sum, together with a further prescribed sum for each dependant supported by the debtor.

(2) "Disposable earnings" might be defined to be the earnings remaining after deduction of certain amounts required by law to be withheld by the employer, viz, income tax (PAYE), Primary Class I contributions under Schedule 1 to the Social Security Act 1975, and amounts deductible under any enactment or written request by the debtor for a superannuation scheme within the meaning of the Wages Council Act 1979.

(3) The sums in both of the systems described above should be variable by statutory instrument. It is suggested that the competent rule-making authority should have a duty to review the figures every year, and should prescribe equivalent sums for calendar monthly pay periods.

(4) It is thought that the court should not retain its common law powers to fix a different exemption from the statutory exemption and should not have a special statutory power to vary the exemption.

(Proposition 17)

(5) Payment by employer to creditor of arrested sums

(a) Furthcomings and mandates

2.95 As we have seen, an arrestment of wages does not require the employer to pay the arrested sum to the arresting creditor. The arrestment is merely an inchoate diligence attaching or "freezing" the debtor's pay in the hands of the employer-arrestee. The creditor can only compel payment by obtaining decree in an action of furthcoming. While this appears complex, the system operates far more simply in practice.

Once an arrestment is served on the employer, the creditor is normally paid without the need for an action of furthcoming. The debtor may authorise the employer to pay the arrested sum to the creditor, and normally it is in his interest to do so since he admits the debt and since his refusal to authorise payment would merely render him liable for the expenses of an action of furthcoming. Further since an arrestment only requires the employer to deduct the amount arrested from the wages, he can then simply await the employee-debtor's mandate or the creditor's action of furthcoming. His role after deducting the arrested portion of wages is passive, as arguably it ought to be since it is not his dispute. In short, actions of furthcoming are a good method of inducing the resolution of a three-cornered problem and the action is rarely brought in respect of arrested earnings.<sup>1</sup>

2.96 In practice, an employer should obtain from the debtor a written or oral mandate authorising payment to the arresting creditor of the arrested sums. Evidence from interviews with employers in the CRU Arrestment Survey<sup>2</sup> suggests that most

<sup>1</sup>There are no published statistics on the numbers of actions of furthcoming but it is thought that they are very rare in the case of arrestments of earnings. Only two employers out of 28 employers interviewed in connection with the CRU Arrestment Survey, had had experience of actions of furthcoming: (para. 23).

<sup>2</sup>Op.cit., para. 23 (see previous note).

employers do in fact obtain a mandate, usually in writing, before releasing the arrested sum. A few employers however (3 out of 22 having experience of arrestments) did not obtain mandates since they regarded the schedule of arrestment itself as providing sufficient authority not only to deduct the arrested sum but also to pay it to the creditor.<sup>1</sup> Evidence from interviews with debtors in the Edinburgh University Debtors Survey, on the other hand, suggests that the practice of not obtaining mandates is more widespread.<sup>2</sup> Both surveys suggest the need for the insertion in a schedule of arrestment, or extended arrestment, of a note giving employers guidance as to the advisability of not making payment of an arrested sum to the creditor without first obtaining a written or oral mandate from the debtor.

2.97 The rules relating to furthcomings and mandates would require to be modified in their application to extended arrestments. If, like an ordinary arrestment, an extended arrestment were to operate as an inchoate diligence merely attaching each instalment of the arrested wages, further provision would be required to clarify the question whether the extended arrestment takes effect as a single cumulative arrestment (so that an action of furthcoming would be competent only at the expiry of the period of extended arrestment) or whether it takes effect as a series of consecutive arrestments (so that an action of furthcoming would be competent immediately after the arrested wages were withheld on each pay day occurring while the extended arrestment subsists). On the other hand, some of those who gave evidence to our Working Party suggested that a diligence against wages should not only require the employer to withhold the arrested wages but require him also to pay the withheld sums to the creditor. We examine this suggestion first; then a modified version of it; thereafter, the principle of cumulative arrestment; and finally our preferred solution, the principle of consecutive arrestment.

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<sup>1</sup>Idem.

<sup>2</sup>Of the 25 debtors subjected to arrestment who were interviewed only 10 said that they gave their permission (9 in writing and one orally) to the release of the arrested wages.

(i) One possible option: requirement on employer-arrestee to pay attached sums to the arresting creditor

2.98 The first alternative would depart from the existing theory of arrestment as an inchoate diligence since an extended arrestment would not only require the employer to deduct the attached sums but would also require him to pay the arrested sums to the arresting creditor. On this view, an extended arrestment would be equivalent to an arrestment and furthcoming and the expression "extended arrestment" would be a misnomer. Such a procedure exists in other legal systems. This approach, however would present a number of problems. First, if no action of furthcoming or employee's mandate were required before the employer's payment of the arrested sums to the arresting creditor, then an alternative procedure would be needed to allow the employer or the debtor to advance pleas in bar of payment. The problem could be overcome by introducing a new procedure, whereby intimation was given to the employee of the service of the schedule of extended arrestment whereupon the debtor and employer would both have an opportunity to apply, within a short prescribed period, to the court for an order restricting or loosing the extended arrestment. It is arguable that the employee should be in a position to challenge the extended arrestment at the beginning of the period of extended arrestment.

2.99 A fundamental disadvantage of this system, however, is that the employer would be obliged to deduct and pay over sums without the protection of the debtor-employee's consent. That, we think, would place employers in an invidious position and we accordingly reject this option.

(ii) Second possible option: payment by employer-arrestee contingent on employee's non-objection or positive consent

2.100 To remove that disadvantage, the proposal might be modified to give the employee an opportunity to object within a prescribed period and failing objection within that period, his consent to payment would be implied by law. The employee,

however, cannot, in our opinion, be expected to give consent, or implied consent, to a payment to the creditor until the sum withheld is ascertained and falls to be paid. Accordingly, on each pay day the employer might be required to notify the employee of the sum withheld from his pay packet and of his right within a short prescribed period to object to payment by the employer of the withheld sum to the arresting creditor. If the employee's non-objection is to be sufficient authority for the employer's payment, then it must be conclusive against the employee to be worth anything. But there appears to us to be almost insuperable difficulties in obtaining evidence of non-objection. Furthermore, it seems unrealistic to infer consent from the employee's inaction since the inaction may be attributable to quite different factors than consent.

2.101 An alternative approach would be to make the employer's duty of paying the creditor contingent on the debtor-employee's actual positive consent. When serving the schedule of extended arrestment, the officer of court would deliver to the employer prescribed forms of notification to the debtor. A form would be completed by the employer and delivered to the employee with each statement of pay. The form might have a tear-off slip for the debtor's use containing a mandate authorising payment of the withheld sum to the arresting creditor. This would avoid the evidential difficulties to which we have referred. In practice, the procedure would, however, be almost indistinguishable from the scheme proposed at head (iv) below whereby an extended arrestment would have effect as a series of arrestments and furthcomings. For this reason, we think that the imposition on the employer of a contingent duty to make the arrested sum furthcoming to the creditor would be an unnecessary elaboration and departure from the existing law, and we therefore provisionally reject it.

(iii) Third possible option: cumulative arrestment and furthcoming

2.102 If an extended arrestment were to operate as a cumulative arrestment, the employer would deduct the arrested proportion

of wages every pay day and accumulate them until the period of the extended arrestment had expired. Each deduction made would be notified to the debtor on his pay slip.

2.103 One disadvantage of this approach would be that the arresting creditor would not be able to compel payment by the threat of a furthcoming action until the expiry of the period of extended arrestment. To be sure, there would be nothing to stop the debtor from authorising payment of each deducted amount on or after every pay day. The debtor would not, however, have any inducement to authorise payment to the creditor until the expiry of the extended arrestment because it would not be till then that the creditor could raise his action of furthcoming. For these reasons, we think that this solution should also be rejected.

(iv) Our preferred option: extended arrestment having effect as a series of consecutive arrestments

2.104 The fourth option, which we prefer, is that a schedule of extended arrestment should operate as an arrestment of each instalment of pay so that the creditor could, if so advised, compel payment of the withheld sum by the threat of an action of furthcoming. The advantage from the creditor's standpoint would be that he would not have to await the expiry of the period of extended arrestment before obtaining payment. As under the present law, there would be a positive inducement on the debtor to consent to the payment to the creditor of the withheld sums since, if the sum were due, he would not wish to contest an action of furthcoming for the expenses of which he would be liable.

2.105 From the standpoint of the debtor-employee, the system should not present undue difficulties. The employee would be informed of the sum withheld in each statement of pay while the extended arrestment subsists.<sup>1</sup> This solution would also safeguard

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<sup>1</sup>We have already proposed at para. 2.52 above that the debtor should be notified at the commencement of the period of extended arrestment, of the effect of the extended arrestment on future instalments of pay.

the interests of the employer since he would not be required to pay over the withheld sums unless either the arresting creditor obtained a decree of furthcoming or the employee gave a mandate in respect of each withheld instalment.

2.106 We therefore suggest that (1) an extended arrestment should have effect as a series of consecutive arrestments attaching the arrested proportion of earnings on each pay day while the extended arrestment subsists. (2) The schedule of extended arrestment should contain a note giving the employer guidance as to the advisability of not making payment of the arrested sums to the creditor without first obtaining a written or oral mandate from the debtor authorising the payment. (3) It should be competent for the debtor or the employer to make a summary application to the court for an order recalling or restricting the extended arrestment on the ground that the debt is paid or on any other ground which would found a competent defence to an action of furthcoming. (Proposition 18).

(b) Direct payment to arresting creditor or payment through court

2.107 Although an employer has no duty to remit arrested sums to the creditor or anyone else, almost all schedules of arrestment in practice prominently specify the person to whom an employer should remit the arrested sum, eg the creditor himself or his agents. Apparently, most firms remit the arrested sum to the person specified on the schedule without delay, usually by cheque or postal order, though some employers wait for the creditor, or his agent, to write to them requesting that the arrested sum be paid or for the sheriff officer to come in person to collect the money.<sup>1</sup> Sometimes the debtor will himself settle the debt and the employer will retain the arrested sum until he receives evidence from the debtor of payment.

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<sup>1</sup>See C.R.U. Arrestment Survey, para. 34.



2.108 In England and Wales, in Northern Ireland, and other systems having continuous enforcement against earnings, the employer is required to pay the attached sums to the court which then transmits them to the judgment creditor concerned. The question arises whether the system of payment through the court should be adopted for extended arrestment. The principal advantage would be that the court would keep proper independent accounts as between the employer, creditor and debtor. This might ease the burden on an employer since it could be provided that he could rely on the court's collection department to notify him when the deductions should cease. In a direct payment system, the debtor would have a record of deductions in his pay statements; the employer would have the schedule of arrestment notifying him of the total sum recoverable under the extended arrestment, together with duplicate pay statements and a note of the cheques remitted to the creditor; and the creditor would have the cheques sent to him. Each person concerned should have a full record of the deductions and should be able to work out the amounts due at any given time.

2.109 We think that our proposals to retain mandates and furthcomings would afford sufficient protection to the debtor who could object to any erroneous payment as under the present law.<sup>1</sup> There would, moreover, be disadvantages associated with payment through the court. First, the sheriff courts do not undertake civil debt collection and, having regard to the numbers of extended arrestments which might be laid every year the proposal would have considerable implications for the staffing of the courts. Extra court staff would be needed to ingather and disburse payments, write letters, monitor extended arrestments and audit the accounts. Second, in most cases payment through the court would be likely to cause delay: the

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<sup>1</sup>If an extended arrestment were to take effect as a cumulative arrestment (see para.2.102 above) there would be no case at all for collection through the court. The case for a court collection system would be strongest if the employer were required by the extended arrestment to make payments and not merely to withhold attached sums. But even in that case, the employee should have an opportunity to object before the withheld amounts are paid over: see para.2.98 above.

creditor would receive his money later than if it were sent to him direct. Third, probably a considerable part of the extra expense of payment through the court would have to be borne by the State since a court fee at a realistic level (which would be superimposed on the expenses of the diligence and the employer's fee referred to below) would probably be prohibitively high. We have therefore concluded that sums withheld from the debtor's earnings by an employer in pursuance of an extended arrestment should be paid direct to the arresting creditor or his agents and not through a court collection department. (Proposition 19).

(c) Employer's fee for operating an extended arrestment

2.110 The CRU Arrestments Survey discloses that some employers deduct a sum to meet at least in part, the costs which they incur in operating an arrestment of earnings, or in remitting the arrested sum to the creditor (eg a sum for postal charges or the cost of a postal order or a flat rate charge). In all cases, the 'handling charge' was deducted from the arrested sum remitted to the creditor and not from the exempt wages payable to the debtor. A deduction of the latter type would infringe the Truck Acts 1831-1940 in the case of workmen protected by those Acts.<sup>1</sup> In English law, however, a debtor's employer is allowed by statute to deduct a prescribed sum, (currently 50p) from the earnings otherwise payable to the debtor on each occasion on which he makes deductions under an attachment of earnings order.<sup>2</sup> This statutory charge is a small contribution towards the employer's "clerical and administrative costs" and was apparently not intended to reimburse the employer in full for his work.

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<sup>1</sup> See Ewing and Maher, "Arrestment of Wages and Unfair Dismissal" 1979 S.L.T. (News) 185 at p.187.

<sup>2</sup> Attachment of Earnings Act 1971, s.7(4); and see Attachment of Earnings (Employers' Deduction) Order 1980 S.I. 1980/558, which increased the fee from 13p to 50p.

2.111 We think that employers should be entitled to make a similar charge in Scotland, though a realistic fee would probably be too high. A flat rate would be rational since the work involved does not depend on the amount of pay deducted. We suggest therefore that an employer should be entitled to deduct a "handling charge" for operating an extended arrestment of 50p on each occasion on which he is required to make deductions from the debtor's pay. The charge should be deducted from the earnings payable to the debtor rather than the arrested sum and the employer should give the debtor a statement of the charge deducted along with a statement of the arrested sum. (Proposition 20).

(6) Competitions between extended arrestments

2.112 In this Section, we suggest -

- (a) that while a current extended arrestment subsists, a later extended arrestment against the same debtor's earnings should be ineffective; but
- (b) that provision should be made for fair sharing of the proceeds of the current extended arrestment or for superseding it by a "consolidated" earnings transfer order or by a debt arrangement scheme by means of which the competing creditors would share in the attachable earnings.

(a) Later extended arrestment to be ineffective

2.113 Two or more creditors may serve arrestments on the debtor's employer in the same pay period. In such a case, the general rule is that the creditors rank on the arrested earnings according to the time of the service on the employer of their respective schedules of arrestment.<sup>1</sup> A prior arrestment has priority over a later arrestment although a later arrestment in the same pay period will attach any balance of arrestable wages left. Where the first arrestment is based on an ordinary debt and the second arrestment is based on aliment, rates or taxes, the first arrestment will attach the surplus wages above the statutory subsistence exemption and the

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<sup>1</sup>Graham Stewart, op. cit., p.137. The only apparent exceptions to this general rule are Exchequer decree arrestments to which we revert at para. 4.17.

later arrestment will attach the balance since the subsistence exemption does not apply to arrestments to enforce alimentary debt, rates or taxes.<sup>1</sup> We deal elsewhere with alimentary debts<sup>2</sup> and rates and taxes.<sup>3</sup>

2.114 We do not think that the employer should be required to divide the arrestable earnings among competing arresting creditors rateably (i.e. so that each receives the same proportion of his debt), or equally, or according to any other rule of division. We note that in practice (contrary to the strict letter of the law), some employers do in fact divide arrestable earnings between creditors who lay arrestments in the same pay period,<sup>4</sup> but to authorise and require them to do so throughout the prolonged period of an extended arrestment would impose too heavy a burden on them. In our view, therefore, a later extended arrestment should be ineffective while a current extended arrestment subsists.

(b) Fair sharing between competing creditors

2.115 We do not think that creditors "shut out" by a prior extended arrestment should be required to wait several months since it might encourage poidings or, as the McKechnie Report suggested, encourage also a race of diligences and penalise considerate creditors. Some provision should therefore be made for fair sharing among creditors of the debtor's attachable earnings.

(i) Equalisation under section 10 of Bankruptcy (Scotland) Act 1913

2.116 It would be legislatively possible to bring extended arrestments within the scope of section 10 of the Bankruptcy (Scotland) Act 1913 which provides for the equalisation of poidings and arrestments, and claims by creditors holding liquid documents of debt, used or made within a period of 60 days before and four months after rotour bankruptcy.<sup>5</sup> This provision has effect if no sequestration follows

<sup>1</sup>Wages Arrestment Limitation (Scotland) Act 1870, s.4.

<sup>2</sup>Par. 3.6 et seq.

<sup>3</sup>Para. 4.16 et seq.

<sup>4</sup>See C.R.U Arrestment Survey, para. 29.

<sup>5</sup>We propose to examine this provision in a future Memorandum.

the debtor's notour bankruptcy. If sequestration does follow, then (a) arrestments and poindings executed within the period of 60 days before the date of sequestration are rendered ineffectual, in a question with the trustee in the sequestration, by section 104 of the 1913 Act, and (b) under section 10 of the Act, arrestments and poindings executed more than 60 days before the date of sequestration, but in the same equalisation period as the sequestration, rank pari passu with it, the practical effect being that the arresters and poinders lose their preference over the general body of creditors.<sup>1</sup> While section 10 is sometimes used, in practice, in the case of arrestments of funds in bank accounts and other assets, it is rarely, if ever, used in relation to wages and salary. To incorporate extended arrestments in section 10 would mean that poindings, ordinary arrestments of assets other than earnings, and extended arrestments of earnings, used within the statutory period, would all rank equally. This would seem to us to complicate unduly an already complicated provision. Moreover, there is some doubt whether section 10 only allows sharing of the proceeds of an arrestment among participating creditors outwith sequestration if the arrestment is followed by a furthcoming<sup>2</sup> and this seems inappropriate in the case of extended arrestments. We therefore reject this solution and, moreover, suggest that it should be made clear that section 10 does not apply for the purpose of equalisation of extended arrestments.

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<sup>1</sup>See Stewart v. Jarvie 1938 S.C. 309.

<sup>2</sup>Thus s.10 requires an arresting creditor to account to creditors claiming equal ranking only where the arrester "shall in the meantime obtain a decree of furthcoming and preference, and thereupon shall recover payment...". In practice, we understand that s.10 is sometimes applied by arrangement without the need for a furthcoming though a furthcoming will avoid challenge of the transaction as a fraudulent preference if the debtor is subsequently sequestrated.

(ii) Obligation on arresting creditor to account to later creditors claiming and ranking

2.117 While it would be unsatisfactory to apply section 10 of the 1913 Act to extended arrestments, the sharing among creditors outwith sequestration of sums attached by an extended arrestment might nevertheless be introduced by a provision specially designed for that purpose. Thus, it might be provided that, while an extended arrestment subsists, any creditor holding a decree or liquid document of debt may rank pari passu on any sums paid to the arresting creditor on the debtor's authority by the arrestee-employer, being sums paid after the other creditor has notified the arresting creditor of his claim, but reserving to the arresting creditor the expenses of the extended arrestment. We revert below to the effect of a sequestration of the debtor on a prior or subsisting extended arrestment. An employer would be under a duty to return to the sheriff officer or messenger a schedule of extended arrestment served on him while an earlier extended arrestment was current and to give the officer particulars of the earlier extended arrestment, including the name and address of the creditor on whose behalf it was laid, the debt on which the extended arrestment was based, and the date when it was served. This information would enable the later creditor who instructed the officer to decide whether or not to claim a share in the sums recovered. A form of claim by the later creditor might be prescribed. If the earlier creditor refused or delayed in payment of the later creditor's share of the attached sums, the later creditor would be entitled to enforce the claim by a court action, just as an "equalised" creditor may raise an action to enforce his claim under section 10 of the 1913 Act - though such actions are very rare in modern practice.

2.118 A provision on these lines would meet the claims of later creditors without imposing any substantial burden on employers. Nor would the provision be as complicated as section 10 of the 1913 Act. It would, however, be troublesome to the

first arresting creditor especially if several later creditors made claims at different times to share in the attached sums. Whether it would involve trustees in sequestrations in recovering equalised sums would depend on the retroactive effect of sequestration on prior diligences which we discuss below.

(iii) Conjoining and ranking creditors in 'consolidated' earnings transfer order

2.119 Another approach would be to enable the later creditor to apply to the court for an earnings transfer order such as we discuss in Part III. In making an earnings transfer order, the court would recall the existing extended arrestment quoad future instalments of the debtor's pay and conjoin and rank the competing creditors pari passu (ie rateably in proportion to the amount of their debts) on these future instalments. Such an order would resemble a consolidated attachment of earnings order in England and Wales made by the court under section 17 of the Attachment of Earnings Act 1971. Under such an order, the creditors rank rateably unless one is a priority creditor (ie for maintenance or fines).<sup>1</sup>

2.120 The details of this proposal would have to be specified with some precision. First, the prior extended arrestment would attach the earnings falling due every pay day until the earnings transfer order took effect. The relevant date at which the earnings transfer order would take effect should be prescribed, and might be retroactive to the date of lodging the application in court or the date of intimation of the application to the employer or prior creditor or it might be the date of the order or the pay day next following the grant of the order. The first creditor would be allowed the sums already attached up to the date when the earnings transfer order took effect, and would be allowed the expenses of laying the extended arrestment.

<sup>1</sup>County Court Rules, Order 25, Rule 90(8). In France, later creditors may be conjoined in an existing saisie-arret. The judge calls all the creditors together to agree a distribution in default of which he draws up a scheme of division: Article R. 145-14, Chapitre V, Code du Travail.

The later creditor would not participate in these sums. A second extended arrestment laid while a first extended arrestment subsists should not be competent, nor should the expenses be recoverable. As mentioned at para. 2.117 above, however, it would be necessary to require the employer to return to the officer of court a schedule of extended arrestment served on him while the first was current and to give the officer particulars of the earlier extended arrestment. This would enable the later creditor to re-serve the extended arrestment at a later date, to use another diligence, or to apply for an earnings transfer order.

2.121 On making an earnings transfer order, the court would specify deduction rates which took into account the debtor's liability to both creditors. A third creditor and subsequent creditors could if necessary be conjoined in the order. The date from which a later creditor's ranking takes effect would have to be prescribed and should presumably be the date when his application to be conjoined is granted. The employer would remit the deductions to court for disbursement by the clerks of court to the creditors in accordance with their ranking.

2.122 This solution would involve the expense of judicial proceedings but the burden of ranking creditors would be shouldered by the court, which is arguably best fitted to undertake this task.

(iv) Conjoining and ranking creditors in wage-earner's debt arrangement scheme

2.123 Yet another approach would be to require that, apart from sequestration, an extended arrestment should only be superseded by a wage-earner's debt arrangement scheme such as we discuss in Memorandum No. 50. Such schemes are primarily designed to allow a debtor in a multiple debt situation to make officially supervised and legally regulated arrangements, short of sequestration, for the orderly and regular payment within a prescribed period of his debts out of his future earnings or



other income. In such a scheme, a debtor would be given time to pay in reasonable instalments; a composition or rateable reduction of his debts would be possible; and the scheme would be factored or administered by a person appointed by the court. We consider that the administrator of the scheme should be able to intercept a portion of the debtor's earnings by earnings transfer order.

2.124 We envisage that, normally, the initiative for such a scheme would come from the debtor since his co-operation is essential. In the present context, however, the initiative must come from the later creditor shut out by the prior extended arrestment. Moreover, the principles of extension of time to pay, and of composition of the debts, make debt arrangement schemes more complicated than earnings transfer orders in which creditors are conjoined and ranked and while they might be competent ways of superseding an extended arrestment, an earnings transfer order in which creditors were conjoined and ranked would still be more appropriate than a debt arrangement scheme in cases where the debtor was not willing to make proposals for such a scheme.

What is the appropriate solution?

2.125 Have provisionally concluded that the most appropriate solutions are probably those outlined under heads (ii) and (iii) above. To elicit comment, we put the following propositions: (1) For so long as a debtor's earnings are subject to a current extended arrestment, a later extended arrestment against those earnings should be ineffective (2) Assuming provision should be made to secure equality for later creditors, then (a) should this provision impose an obligation on the arresting creditor to account to later creditors claiming a pari passu ranking while the current extended arrestment subsists, or (b) should provision be made for conjoining and ranking the creditors in a 'consolidated' earnings transfer order such as we consider below? (3) It is suggested that extended arrestments should be expressly excluded from section 10 of the Bankruptcy (Scotland) Act 1913 (equalisation of arrestments and poindings within 60 days before, and four months after, notour bankruptcy). (Proposition 21).

(7) Other matters

2.126 Generally speaking, we think that the rules relating to arrestments should apply (with any necessary modifications) to extended arrestments except where we have indicated otherwise. We envisage, for example, that the court would be empowered to recall or to loose an extended arrestment on payment or consignation of the debt in like manner as an ordinary arrestment in execution may be recalled or loosed.<sup>1</sup> There may, however, be some minor incidental or consequential matters on which specific provision would be desirable; for example, how the three year period of the negative prescription of an arrestment<sup>2</sup> is to apply to an extended arrestment; or whether an extended arrestment, like an ordinary arrestment in execution, should be available to enforce future debts if the debtor is verging on insolvency;<sup>3</sup> or whether the procedure in actions of furthcoming following extended arrestments should be modified or simplified in any way. We leave these matters for future consideration but invite views on whether specific provision is needed on these or any other matters not identified in the Memorandum.

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<sup>1</sup>A recall extinguishes the arrestment; a loosing entitles the arrestee to pay the arrested sums to the debtor, but in case he does not do so preserves the security obtained by the arrestment.

<sup>2</sup>See Debtors (Scotland) Act 1838, s.22.

<sup>3</sup>Graham Stewart, op.cit., p.22.

PART III: PROPOSALS FOR EARNINGS TRANSFER ORDERS AND THEIR  
RELATIONSHIP WITH EXTENDED ARRESTMENTS

Preliminary

3.1 We have already outlined in Part I the main differences between extended arrestments and earnings transfer orders,<sup>1</sup> and we suggested there that extended arrestments should be the main diligence against salary or wages used to enforce ordinary civil debts.<sup>2</sup> In Part II, however, we sought views on the question whether earnings transfer orders might be used to resolve competitions between two or more creditors using, or seeking to use, extended arrestments.<sup>3</sup> In this Part, we seek views on the question whether earnings transfer orders should be competent in other situations.<sup>4</sup> Thereafter, we set out for comment and criticism a possible legislative scheme regulating the making, operation and termination of earnings transfer orders.<sup>5</sup>

(1) Cases where earnings transfer orders might be competent

3.2 In addition to multiple extended arrestment cases, we have identified four other possible situations where earnings transfer orders might be helpful, namely (a) in connection with sequestrations; (b) in connection with debt arrangement schemes such as we discuss in Memorandum No. 50; (c) for the enforcement on default, or collection even in the absence of default, of payments of aliment and periodical allowance; and (d) for the enforcement of criminal fines.

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<sup>1</sup>Paras. 1.24 to 1.27.

<sup>2</sup>Para. 1.37.

<sup>3</sup>Paras. 2.119-2.122 and 2.125.

<sup>4</sup>Paras. 3.2 to 3.24.

<sup>5</sup>Para. 3.25 et seq.

(a) Sequestrations

3.3 At present, under section 98(1) of the Bankruptcy (Scotland) Act 1913, a trustee in a bankrupt's sequestration may obtain a declarator vesting the bankrupt's future wage or salary in the trustee insofar as it exceeds a suitable aliment. This result has been achieved only as a result of robust judicial interpretation.<sup>1</sup> The present theory is that the trustee has only a personal right to the bankrupt's post-sequestration earnings, which right is made real by the court's vesting declarator. The court's order binds the bankrupt to pay the excess earnings above a suitable aliment to the trustee, and the order cannot be directed to the employer binding him to pay the excess earnings to the trustee. In our forthcoming Report on Bankruptcy, we intend to recommend that, in its application to the bankrupt's wages or salary, section 98(1) should be replaced by new provisions whereby these "personal earnings" would vest in the bankrupt but the trustee would be entitled to apply to the court for an order requiring the bankrupt or his employer to make payment to the trustee of such portion of the bankrupt's earnings as the court may determine to be in excess of a suitable aliment for the bankrupt in view of his existing circumstances. Already, the courts have been accustomed to exempt from the sequestration a much larger portion of the bankrupt's earnings than would be exempt under the statutory wages arrestment limitation rules.<sup>2</sup> The level of exempt earnings is above subsistence level: thus it has been held that:

"... it is against the policy of the law to keep a bankrupt at the lowest line of poverty. He must be allowed to enjoy the fruits of his labour insofar as to allow him to live on the social level upon which he stands."<sup>3</sup>

It might be though more important that the debtor pay his creditors than that he should preserve a particular social rank in life, but it seems sensible not to fix the exemption at a level which discourages the bankrupt from continuing to

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<sup>1</sup>See especially Caldwell v. Hamilton 1918 S.C. 677; 1919 S.C. (H.L.) 100.

<sup>2</sup>See Caldwell v. Hamilton, supra; Young v. Turnbull 1928 S.N. 46; Webster v. Douglas (1933) 49 Sh. Ct. Rep. 294; Birrell's Tr v. Birrell 1957 S.L.T. (Sh. Ct.) 7; Cochran's Tr. v. Cochran (1958) 74 Sh. Ct. Rep. 75.

<sup>3</sup>Webster v. Douglas, supra, at p.296.

hold his job<sup>1</sup> or which destroys the incentive to continue earning at the same level.<sup>2</sup> The court will increase the exemption to take account of dependants<sup>3</sup> and decrease it having regard to a cohabiting spouse's resources.<sup>4</sup>

3.4 We would expect the court to continue to adopt the same principles in the future. We have concluded therefore that it would not be desirable to introduce earnings transfer orders only for use in connection with sequestrations but if such orders are made competent outside sequestrations, then there is a case for making the orders available to a trustee in a sequestration as the means of attaching earnings for the general body of creditors (Proposition 22). Our reason for making this proposal is that exemptions from diligence and from sequestrations should be harmonised so far as possible. We note that, while in England and Wales, attachment of earnings orders may be used in connection with administration orders,<sup>5</sup> a different type of discretionary order on employers is used in connection with bankruptcy proceedings,<sup>6</sup> but this discrepancy seems to be largely a historical accident.

(b) Debt arrangement schemes

3.5 We think that an earnings transfer order would be more appropriate than an extended arrestment to secure payments due to the administrator of a debt arrangement scheme such as we propose in Memorandum No. 50. We envisage that a debt arrangement scheme would endure for much longer than an extended arrestment; the maximum period in the normal case

<sup>1</sup>Caldwell v. Hamilton 1918 S.C. 677 per Lord Salvesen at p.697.

<sup>2</sup>Birrell's Tr. v. Birrell, supra, at p.7.

<sup>3</sup>Caldwell v. Hamilton, supra, Birrell's Tr. v. Birrell, supra, cf. Inglis Tr. v. Inglis 1924 S.C. 226.

<sup>4</sup>Cochran's Tr. v. Cochran, supra.

<sup>5</sup>Attachment of Earnings Act 1971, s.4.

<sup>6</sup>Bankruptcy Act 1914, s.51; Williams on Bankruptcy (18th ed.), pp. 418-9.

might be three years or thereby. Moreover, the level of the employer's deductions from earnings would require to be related by the court to the level of the payments due to the administrator of the debt arrangement scheme. We therefore suggest that if (as we propose in Memorandum No. 50) debt arrangement schemes are introduced in Scots law, it should be competent for the court to make an earnings transfer order to secure payments due by the debtor to the administrator of the scheme.(Proposition 23).

(c) Enforcement of maintenance (aliment and periodical allowance)

3.6 Questions arise as to the use of either extended arrestments or earnings transfer orders to secure the payment of maintenance (ie aliment and periodical allowance on divorce) viz:-

- (i) Would arrears of maintenance be more appropriately enforced by extended arrestment or earnings transfer order? If such arrears are enforced by either diligence, should instalments of maintenance accruing due while the extended arrestment or earnings transfer order subsists be likewise recoverable by the diligence?
- (ii) What exemptions from an extended arrestment or earnings transfer order should be provided for the debtor, when the debt on which the diligence is based is itself a maintenance debt (eg an award of periodical allowance to the debtor's former wife)?
- (iii) If a maintenance debt is enforceable by an earnings transfer order and an ordinary debt by extended arrestment, how should a competition between them be regulated? If the maintenance debt and the ordinary civil debt are made enforceable by one 'consolidated' earnings transfer order, what should be the rule of priority as between arrears of maintenance, or current maintenance, on the one hand, and the ordinary civil debt on the other hand?

- (iv) Should a court having jurisdiction to make and vary an earnings transfer order possess jurisdiction to vary the maintenance order secured by the earnings transfer order?

These questions are closely connected with the questions whether maintenance should be collected through court collection departments as proposed by the McKechnie Report<sup>1</sup> and whether officials of such departments should be entrusted with powers to instruct enforcement by diligence, and powers to apply to the court for orders for the imprisonment of alimentary debtors who wilfully default. We intend to publish proposals on these matters in due course. In this Memorandum, we restrict the discussion to the foregoing questions.

- (i) Maintenance to be enforceable by extended arrestments or earnings transfer orders?

3.7 It is for consideration whether aliment and periodical allowance on divorce should be enforceable by earnings transfer orders rather than by extended arrestment. It is a specialty of maintenance that the creditor will wish to recover not only the debts on which the debtor has already defaulted but also instalments of current maintenance. We think that it should be possible for the maintenance creditor to use a continuous diligence to recover not only arrears but also current instalments falling due while the diligence subsists. We do not think that an extended arrestment could be used for this purpose: while in the case of an ordinary debt an employer could keep a running total of the amounts deducted each pay day and stop deductions when a fixed sum debt had been cleared, he should not be required to deal with new debts accruing due after the extended arrestment is served on him, especially since these amounts may be varied by the court eg on an application 'triggered' by the extended arrestment. By contrast, the court in making an earnings transfer order could make an apportionment of the attached sums, as between arrears and current instalments, having regard to the circumstances of the case.

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<sup>1</sup>Op. cit., Part 7 (Alimentary Debt).

3.8 On the other hand, an earnings transfer order might suffer from the disadvantage that the prior intimation of the creditor's application to the debtor would give him the opportunity to evade diligence by changing his job, and the procedural complications compared with extended arrestments might deter creditors from using it. Research by the Department of Sociology, Bedford College, in England and Wales undertaken for the Payne Committee<sup>1</sup> and referred to by the Finer Report<sup>2</sup> showed that attachment of earnings orders "have not become established as a major mode of enforcing maintenance orders in magistrates courts".<sup>3</sup> This research has to some extent been superseded by the improvements made to the attachment of earnings system in 1970,<sup>4</sup> but as the Table opposite shows, these improvements have not altered significantly the use made by magistrates' courts of attachment of earnings orders in England and Wales.<sup>5</sup> Comparable statistics are not available for Scotland: about 12% of arrestments are served by the debtor's spouse<sup>6</sup> (presumably to enforce aliment and periodical allowance) but there are no published statistics of the awards of aliment and periodical allowance made every year. The Bedford College Survey found that attachment of earnings orders did not secure maintenance for

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<sup>1</sup>Op. cit., Appendix 2, pp. 409-431.

<sup>2</sup>(1974) Cmnd. 5629, paras. 4.140-4.149.

<sup>3</sup>Ibid., para. 4.146.

<sup>4</sup>Administration of Justice Act 1970, re-enacted in the Attachment of Earnings Act 1971.

<sup>5</sup>Attachment of earnings orders made by the English High Court and divorce county courts to secure maintenance are also not numerous, amounting to only 101 orders in 1978: see Judicial Statistics, Annual Report, 1978, Table D.8(f).

<sup>6</sup>C.R.U. Diligence Survey, para. 4.5.



Attachment of earnings orders 1959-1978 as percentage of all maintenance orders made by magistrates' courts in England and Wales.

	No. of attachment of earnings orders	Attachment of earnings orders as percentage of all maintenance orders
1959	1,757	7
1960	4,872	17
1961	4,929	18
1962	4,406	15
1963	3,745	13
1964	4,033	13
1965	4,609	15
1966	4,538	15
1967	3,785	12
1968	3,776	12
1969	3,920	13
1970	3,541	11
1971	3,188	11
1972	3,166	11
1973	3,437	15
1974	2,585	14
1975	2,286	14
1976	2,311	17
1977	2,194	18
1978	1,634	15

Source: Finer Report, Table 4.11; Civil Judicial Statistics for England and Wales.

long periods.<sup>1</sup> The English experience does not suggest that the introduction of earnings transfer orders in Scotland would greatly improve the recovery of maintenance.

3.9 (1) As regards the enforcement of arrears of maintenance (aliment and periodical allowance on divorce), it is suggested that there are three options, viz:

- (a) that only an earnings transfer order would be competent; or
- (b) that, at the creditor's option, either an extended arrestment or an earnings transfer order could be used; or
- (c) that only an earnings transfer order could be used but that an application for an earnings transfer order would have immediate effect as an extended arrestment when a copy of the application is served on the employer until superseded by the earnings transfer order.

Views are invited on which option should be adopted. (2) It should be competent for the court to make an earnings transfer order with the maintenance debtor's consent even in the absence of default, and the court should be empowered to attach not only arrears of maintenance but also current maintenance accruing due while the order subsists.

(Proposition 24).

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<sup>1</sup>The Survey analysed all attachment of earnings orders between February 1959 and January 1966. It found that in 1966, nearly three-quarters of these orders had been discharged. Of the discharged orders more than a third had lasted for less than four months and three-quarters had been discharged in less than a year. In only about one per cent of the cases was the order revoked on the ground that arrears of maintenance had been cleared. The amount of the arrears secured by most orders was between £40 and £60, and less than one quarter of the orders produced a reduction in the outstanding arrears, or even the regular payment of current instalments. Most discharges arose from changes of employment, (though since 1970 the orders lapse temporarily and may be made binding on a new employer).

(ii) Subsistence exemption and maintenance

3.10 Under the present law, whereas an ordinary creditor can only arrest one-half of the debtor's pay in excess of £4 per week, a creditor enforcing "an alimentary allowance or payment" may arrest the debtor's whole wages.<sup>1</sup> It is clear that the alimentary creditor's privilege of arresting the whole wages cannot be applied to extended arrestments or earnings transfer orders without drastic modification. The debtor cannot be stripped of his whole wages for a period of months, still less for an indefinite period under an earnings transfer order. Such a rule would be self-defeating since the debtor would simply leave his job.

3.11 Section 4 of the Wages Arrestment Limitation (Scotland) Act 1870, in defining the arrestments which prevail over the debtor's subsistence exemption, refers to an arrestment laid for "an alimentary allowance or payment". There is considerable uncertainty about the meaning of this phrase. We think that if special provision is made for diligence based on maintenance, the provision should clearly define the maintenance obligations to which it refers. We think that "maintenance" for this purpose should include obligations of aliment arising by operation of law from a subsisting relationship (eg husband-wife, parent-child); obligations based entirely on court orders made under specific statutes where there is no relationship (such as maintenance awarded to step-children in divorce proceedings<sup>2</sup>); and periodical allowance on divorce. In these cases the claims are made by the alimentary dependants or the maintenance creditors. But claims for reimbursement of aliment provided to the debtor or to the debtor's alimentary dependants

<sup>1</sup>Wages Arrestment Limitation (Scotland) Act 1870, s.4, which provides that the limitation formula in the Act does not apply to an arrestment in virtue of decrees for alimentary allowances or payments and thus preserves the common law rule under which the common law exemption from diligence (beneficium competentiae as applied to 'alimentary' provisions) does not prevail against diligence to enforce 'alimentary debts'.

<sup>2</sup>Matrimonial Proceedings (Children) Act 1958, s.7.

are also treated as 'alimentary' so that an arrestment against the debtor's earnings to enforce the claim for reimbursement prevails over a common law subsistence exemption.<sup>1</sup> These are claims for arrears by third parties not in need of aliment themselves, and unless the claims compete with another person's claim, should not be enforceable by earnings transfer order since there is no need to apportion the deductions as between arrears and current instalments.

3.12 In discussing what exemptions should be provided for the subsistence of the debtor when the debt on which the diligence is based is itself a maintenance debt, three types of case have to be considered. The first is where the debtor has no dependants living with him whom he is legally liable to maintain, or whom he is in fact maintaining. In this case, if the limitation rules on extended arrestments allow an exemption for dependants, the exemption should not apply, and, in the case of an earnings transfer order, the deduction levels fixed by the court would take account of the actual position. The second case is where the debtor has dependants whom he is legally liable to maintain living with him, eg a spouse and children by a second marriage. On a strict legal view, the 'first family' comes first and no allowance would be made for the subsistence of the second family who must look to social security. On another view, the reality of the situation may often be that the debtor would terminate his employment rather than support his first family at the expense of the second family, and that the first family should be supported by social security.<sup>2</sup> The third case is where the debtor has dependants (perhaps a cohabiting partner) whom for social security purposes he may be liable to maintain out of earnings; the considerations here are similar to the second case.

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<sup>1</sup>Wilson and Duncan, Trusts, Trustees and Executors (1976) p.97.

<sup>2</sup>Henry v. Henry 1972 S.L.T. (Notes) 26.

3.13 To sum up, (1) the existing rule whereby a maintenance creditor can arrest the whole wages of a debtor should not apply where the aliment is enforceable by earnings transfer order or extended arrestment. (2) If maintenance is to be enforceable by extended arrestment, and the extended arrestment gives an exemption for the subsistence of dependants, then that exemption should not apply where the debt on which the extended arrestment is based is a maintenance debt. Views are invited, however, on whether there should be an exception to this rule where the debtor has alimentary dependants in fact living with him whom he is legally liable to maintain. It is suggested that de facto alimentary dependants whom the maintenance debtor is not legally liable to maintain should not be taken into account. (3) Where maintenance is enforced by earnings transfer order, should the court (in fixing deduction levels) take into account the maintenance debtor's liability to maintain dependants in fact living with him and whom he is legally liable to maintain? (4) "Maintenance" for the purpose of this Proposition and Propositions 24 and 26 should be taken as including aliment, statutory maintenance, periodical allowance on divorce, and maintenance due under comparable non-Scottish orders enforceable in Scotland, but should not include claims by a third party for reimbursement of aliment or maintenance provided to the debtor or his alimentary dependants in the past, notwithstanding that they are treated as "alimentary" at common law for the purposes of exemptions from arrestment. (Proposition 25).

(iii) Priority in competition between diligence for maintenance and diligence for ordinary debt: jurisdiction to vary maintenance in competition cases

3.14 The next question is, if a maintenance debt is enforceable by an earnings transfer order and an ordinary debt by an extended arrestment, how should a competition between them be regulated? We suggest that the creditor 'shut out' by the previous diligence should be entitled to apply for an earnings transfer order in which the two creditors would be conjoined and entitled to a share of the earnings attached after (say) the date of the order.

3.15 It would be necessary to determine what should be the rule of priority as between arrears of maintenance or indeed current maintenance, on the one hand, and the ordinary civil debt on the other hand. The appropriate solution is not self-evident and English law is not necessarily helpful in this respect.<sup>1</sup> The rules of priority should be consonant with the ranking of spouses' claims in sequestrations under the Bankruptcy (Scotland) Act 1913, (which we describe in our Memorandum No. 50<sup>2</sup>). It seems clear that a maintenance creditor should rank equally with the ordinary creditor for arrears of maintenance accrued up to the date of the earnings transfer order. However, in relation to maintenance accruing due while the earnings transfer order subsists, there are two conflicting approaches under the Bankruptcy (Scotland) Act 1913. On the one hand, the maintenance creditor cannot rank for maintenance accruing due during the sequestration, since maintenance is only due where the maintenance debtor has a surplus, and a bankrupt has no surplus. On the other hand, when making an order for payment to the trustee of wages or salary earned during the sequestration, the court will allow the debtor to keep a proportion of earnings for the support of his alimentary dependants at least if living with him because he is unlikely to continue earning if his creditors are preferred to the alimentary claims of his wife and children living in family with him. We think that the first policy is appropriate since the maintenance creditor is not living in family with the debtor any more and giving her priority would not encourage the debtor to continue earning.

3.16 It might be thought unsatisfactory if current maintenance were to continue to accrue while the earnings transfer order in favour of an ordinary creditor prevented the maintenance creditor from enforcing it. One way of dealing with this problem would be to enable the court to vary or recall the maintenance decree.

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<sup>1</sup>Under the Attachment of Earnings Act 1971, Sch.3, paras. 7 and 8, an attachment of earnings order securing maintenance has priority over an order securing an ordinary debt.

<sup>2</sup>Para. 2.48.

3.17 In order to focus the issues we suggest that (1) whatever new diligence is competent to secure payment of maintenance in terms of Proposition 24 above, a competition between diligences against earnings for maintenance and for ordinary debts should be resolved in proceedings for the making, or as the case may be the variation, of an earnings transfer order. (2) The maintenance creditor should rank rateably with the ordinary creditor in respect of arrears of maintenance accrued up to the time of the making of the order or, as the case may be, its variation. (3) The maintenance creditor should not, however, rank with the ordinary creditor in respect of future instalments of maintenance accruing due while the earnings transfer order is in force. (4) It is for consideration whether the court dealing with the earnings transfer order should have power on the application of either party to the maintenance obligation, and perhaps also of its own motion or on the application of the competing ordinary creditor, to review the decree for maintenance, and should have power to vary or recall the decree including power to suspend its operation for the period when payments under the earnings transfer order are made to the ordinary creditor. (Proposition 26).

(d) Enforcement of payment of criminal fines etc

3.18 The Scottish Council on Crime (SCOC) suggested that arrestments of wages used to enforce criminal fines should not require to be made weekly,<sup>1</sup> we assume that one or other of the proposed continuous diligences against earnings should be available to enforce payment of fines. We suggest that earnings transfer orders might be a more appropriate form of diligence against earnings than extended arrestments. The great advantage of extended arrestments is that they can be used without special application to the court and means tests. But in criminal proceedings these advantages do not apply

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<sup>1</sup>Report on Fines (S.H.H.D.; October 1974) para. 4.19.

since the court has itself to consider, on the basis of a means inquiry, whether or not to grant warrant for civil diligence and can at the same time exercise a discretion as to the level of deductions.<sup>1</sup> We suggest that similar considerations apply to the recovery of other debts arising out of criminal proceedings, including caution and sums due under a compensation order against a convicted person such as is provided for by the Criminal Justice (Scotland) Bill 1979-80 currently before Parliament. We note that compensation by offenders under that Bill will be paid into court, for disbursement to the victim of the offence and be enforceable by the court rather than by the victim, and that the court must take the offenders means into consideration so far as known.

3.19 It does not however follow that the court, in fixing the level of deductions, should necessarily be bound by the criteria applicable in civil diligence. The SCOC Report (at para. 3.13) noted:

"the current trend to limit the scope of diligence as (a) means of recovering civil debts presumably so as to avoid undue hardship. While this trend may be understandable in its application to civil debts we can see no reason why it should be extended to the use of civil diligence as a means of recovering fines. Accordingly if further legislation should be introduced so as to limit or restrict the use of civil diligence, we would hope that diligence used for the recovery of fines would be excluded from any such provisions."

This may be taken as meaning that if the level of the subsistence exemption in diligence against earnings is raised, as for example we propose in this Memorandum in the context of both extended arrestments and earnings transfer orders, then consideration should be given to the question whether the increased exemption should apply to diligence for the enforcement of fines. It might be argued that a person should be required to undergo a greater sacrifice to pay a criminal fine than to pay a civil debt. We suggest therefore that in making an earnings transfer order in

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<sup>1</sup>We note two developments, following proposals in the SCOC Report, which may assist the court; namely, that the new form of summary complaint includes a means form, see Act of Adjournal (Form of Complaint) 1978, Sch.6. Further an experiment is being arranged in two sheriff courts in the use of fines collection officers.



criminal proceedings, the court should have a discretion to fix the deductions in its order. Thus if fixed criteria for a normal deduction rate or protected earnings rate were introduced for civil cases, the court in criminal cases would not be bound by them.

3.20 Third, the SCOC Report proposed that the expenses of diligence in criminal cases should be recoverable from the debtor and not, as at present, payable by the Exchequer without recourse against the debtor. Thus the fees of sheriff officers serving an earnings transfer order on the employer and the like would be met by the debtor. As a corollary of this proposal, the Council suggest that this Commission should consider "the desirability of introducing a single process to recover the amount due and the cost of the diligence". This is in consonance with our proposals that a warrant for diligence should cover the expenses of the diligence as well as the debt.<sup>1</sup>

3.21 In the light of these observations we suggest that (1) an earnings transfer order would be a more appropriate mode of diligence than an extended arrestment to enforce payment of criminal fines. (2) In fixing the levels of the periodic amounts deductible from earnings in an earnings transfer order enforcing a fine, the court should have regard to, but should not necessarily be bound by, the criteria applicable in civil cases (3) As in a civil case the offender should be liable for diligence expenses and the sums attached by an earnings transfer order in a criminal case should include the fees and outlays payable to sheriff officers for serving the steps in the diligence process. (4) It is suggested that the above-mentioned proposals should apply to the enforcement of other debts arising out of criminal proceedings (eg caution, and compensation under orders against convicted persons such as are provided for in the Criminal Justice (Scotland) Bill currently before Parliament).  
(Proposition 27).

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<sup>1</sup> See First Memorandum on Diligence (Memorandum No. 47) Part III.

(2) Obtaining an earnings transfer order

3.22 We now turn to consider how an earnings transfer order would be obtained and related matters.

(a) Title to apply; prerequisites of orders and earnings attachable

3.23 The provisions regulating title to apply, the conditions which would have to be satisfied before an earnings transfer order is made and the definition of the earnings attachable by such orders, are to a large extent dependent on the rules as to when such orders should be competent. Generally speaking only creditors holding warrants for diligence should have a title to apply except in a maintenance case where the maintenance debtor could apply.

3.24 There may be cases where it would be useful if the court had a residual power to make an earnings transfer order of its own motion; for example, where two such orders had inadvertently been made perhaps by different courts and it is necessary to consolidate them, or where something had gone wrong which required the court's intervention. We do not think that a general power to make an order of its own motion would be extensively used by the court.

3.25 We have considered whether the court should have a discretion to refuse to make an earnings transfer order. It would, however, clearly be wrong to confine such a discretion to attachment of earnings which is generally regarded as less objectionable than poindings and warrant sales. Discretionary powers to refuse warrants for diligence should be limited to diligences not favoured by the law, such as civil imprisonment,<sup>1</sup> or should be exercised in relation to all diligences - a question which we consider in our Memorandum No. 47.<sup>2</sup> Otherwise there is a risk

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<sup>1</sup>See Civil Imprisonment (Scotland) Act 1882, s.4 which confers such a discretion.

<sup>2</sup>See the discussion of a Court Enforcement Office in Part I of that Memorandum.

that pointings would be encouraged. For the same reason, the court should not have power to delay the operation of an earnings transfer order, though we note that in England and Wales the court may delay the operation of an attachment of earnings order.

3.26 In our view, earnings transfer orders should only be available to attach the earnings of individuals for the reasons given in the context of extended arrestments.

3.27 To sum up these points, (1) the court might be given a residual power to make an earnings transfer order of its own motion, but should not have a discretion to refuse to make an order if the application for the order is competent, nor should it have power to delay the operation of an order. (2) As in the case of extended arrestments, earnings transfer orders should only be available to attach the earnings of individuals. (Proposition 28).

(b) Courts with powers to make earnings transfer orders

3.28 It is suggested that powers to make earnings transfer orders should be conceded to the sheriff courts but not to the Court of Session. If earnings transfer orders were to be made available to enforce all types of debt, and not restricted to the cases specified above, then the fact that the vast bulk of debt decrees emanate from the sheriff court would point to that court as the appropriate forum. If earnings transfer orders are restricted to the cases specified above, then it might be thought that the Court of Session should have power to make such orders since most maintenance orders are pronounced in Court of Session divorce actions rather than sheriff court aliment actions. Nevertheless, even in that event, we think that applications for earnings transfer orders should be made to a sheriff court notwithstanding that the decree to be enforced was pronounced by the Court of Session. Already the sheriffs supervise pointings on Court of Session decrees. There are some 50 sheriff

courts spread throughout Scotland and it is therefore easier and cheaper for the parties or their agents to attend those courts when required, and for officials to give them informal advice and assistance. Moreover, if (as we suggest below) earnings transfer orders were to require payment of the attached sums into court, and sheriff court collection departments were established, the proposal would save the expense of a separate Court of Session collection department. We suggest therefore that jurisdiction to make earnings transfer orders should be conferred on the sheriff courts whether or not the related decree was pronounced by the sheriff court or Court of Session. (Proposition 29).

(c) Local jurisdiction; index of resident debtors subject to orders; and extra-territorial effect of orders

3.29 It is of considerable importance that there should be only one court having exclusive control over each and every earnings transfer order directed at the pay of a particular debtor, and the rules for the assumption of jurisdiction to entertain applications for such orders should reflect this objective. So far as precedents in England and Wales are concerned, it may be observed that a county court application for attachment of earnings must be made to the court for the district where the debtor resides.<sup>1</sup> Where the application is to secure payments by two or more debtors who are jointly liable, the application may be made to one of the relevant courts, in which case that court has sole jurisdiction.<sup>2</sup> The court which made the order has jurisdiction if the debtor does not reside in England or Wales or if the order is a county court maintenance order.<sup>3</sup>

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<sup>1</sup>County Court Rules 1936, Order 25, rules 79 and 94(2).

<sup>2</sup>Idem.

<sup>3</sup>Idem.

3.30 One possible rule would be to concede jurisdiction to the court which pronounced the decree for payment but since we propose that only the sheriff court would have jurisdiction such a rule would be inappropriate for orders to secure payments under Court of Session decrees. In the case of orders to secure maintenance payments, the sheriff court which pronounced the decree may be the most appropriate because it may already have entertained a proof as to the means of the debtor and because it has jurisdiction to vary the decree for aliment. Most maintenance decrees, however, are Court of Session orders for aliment or periodical allowance.

3.31 We therefore suggest that the sheriff court which pronounced the decree for payment should not normally be the appropriate court to make an earnings transfer order and that the court of the debtor's residence may be the most appropriate forum.<sup>1</sup> If the debtor were to change his residence to another sheriffdom and a new application by a different creditor were made to a sheriff court there, then, to avoid confusion, it might be provided that the debtor must disclose the existence of any prior earnings transfer order to the court. It would in any event be in his interest to do so. The court which made the first order should entertain any application for "consolidation" of other orders with it. If it were more convenient to transfer control of an order to another sheriff court following a debtor's change of residence or for some other reason, then the sheriff could transfer the case on application or ex proprio motu under Rule 20 of the Sheriff Court Rules.

3.32 In England and Wales, the registrar of every county court is required to keep an index of the names of debtors resident in his district,<sup>2</sup> and attachment of earnings orders made by a

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<sup>1</sup>By "residence" we mean habitual residence and we do not think that residence for 40 days as required by the Sheriff Courts (Scotland) Act 1907, s.6 is necessary or appropriate.

<sup>2</sup>County Court Rules 1936, Order 25, Rule 78(1).

county court outside that district and by other courts are notified to the registrar.<sup>1</sup> Searches of the index may be carried out. This is presumably an aid in credit rating and also helps to prevent multiple orders in respect of the same debtor.

3.33 As we noted above, there is a trend towards dispensing with the need for warrants of concurrence and we suggest that an earnings transfer order should bind the employer of the debtor even though the employer's place of business is not within the district or sheriffdom of the court which made the order.

3.34 It would be premature to formulate precise rules of jurisdiction before decisions are reached on the types of case in which earnings transfer orders would be competent. At this stage we merely suggest that (1) the rules on jurisdiction to entertain applications for earnings transfer orders should be designed to ensure that one court has exclusive control over every order affecting the pay of a particular debtor.

(2) It is suggested that the sheriff court of the district in which the debtor is resident should normally have jurisdiction. (3) An earnings transfer order should bind the debtor's employer without the need for a warrant of concurrence if his place of business is in Scotland notwithstanding that the court making the order does not otherwise have jurisdiction over him. (4) It is for consideration whether the sheriff clerk should be required to keep an index of the names of debtors resident in his court district who are subject to earnings transfer orders to help prevent multiple orders and possibly to assist credit rating enquiries. (Proposition 30).

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<sup>1</sup> Ibid., rule 78(2); Rules of Supreme Court, Ord. 104 rules 7 and 15; Magistrates Courts (Attachment of Earnings) Rules 1971, rules 6 and 21.

(d) Court's power to fix amounts of deductions from earnings

3.35 In the attachment of earnings order system in England and Wales, the court, after enquiry into the debtor's resources and liabilities, exercises a discretionary power to fix the level of the amounts withheld by the employer from the debtor's earnings. This discretion and the means inquiry sharply distinguish this form of enforcement from arrestments, or extended arrestments. The questions arise whether the court should have such a discretion in making an earnings transfer order, and, if so, what should be the factors or guidelines controlling exercise of the discretion?

(i) Judicial discretion or fixed rules?

3.36 If a court making an earnings transfer order were not to have a discretion based on a means inquiry in fixing deductions from a debtor's earnings but were to apply fixed rules, then the main remaining difference between such orders and extended arrestments would be that it would be possible to conjoin and rank competing creditors in an earnings transfer order but not in an extended arrestment. Other important differences are to some extent directly or indirectly contingent on the existence of a judicial discretionary power to fix the deduction levels: thus, the case for allowing the order a potentially unlimited duration depends on the order being adapted to the individual debtor's circumstances, and the case for requiring payment into court depends largely on the order's potentially unlimited duration, except where the court has to collect and disburse instalments to two or more creditors.

3.37 We suggest that a judicial discretion to fix deduction levels might be appropriate in sequestrations, debt arrangement schemes, and maintenance and fines cases, but where the purpose of the earnings transfer order is to conjoin and rank creditors in multiple extended arrestment cases, it could be argued that the deduction levels used in extended arrestments should apply.

3.38 Fixed rules would avoid the need for a means enquiry and exercise of judicial discretion in making the order and would also facilitate the transfer of an order to a new employer on a change of job. An earnings transfer order system might well fail if an order can be easily defeated by a change of employer. Statutory methods of calculating deductions would avoid the need for a new application to the court for a fresh exercise of discretion on a change of employer: a change of employer would only require (1) a formal amendment of the earnings transfer order to make it binding on the new employer, and (2) intimation of the amended order to the new employer. On the other hand, provisions for the temporary abeyance or lapse of orders on a change of job following the English model might, as we suggest at para. 3.70 below, meet this problem.

(ii) Discretionary criteria of computation

3.39 Assuming for the moment that a judicial discretion in fixing deductions is appropriate, the next question is, what should the discretionary criteria be? In the English system of attachment of earnings,<sup>1</sup> and in the Northern Ireland system based on it, the court's discretion is not absolute.

3.40 In the English system, an attachment of earnings order requires the employer to make periodic deductions from "attachable earnings" as defined,<sup>2</sup> and the deductions are computed by the employer by reference to a "normal deduction rate" and a "protected earnings rate" both of which are specified in the order and expressed as a sum of money per week, month or other period.<sup>3</sup> The normal

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<sup>1</sup> See the Explanatory Booklet for Employers on The Attachment of Earnings Act 1971 published for the Home Office and Lord Chancellor's Office by H.M.S.O. (London, 1971) which provides a brief and clear description for laymen of the way in which the Act operates.

<sup>2</sup> Attachment of Earnings Act 1971, Sch.3, para. 3, discussed at para. 2.74 above.

<sup>3</sup> 1971 Act, s.6.



deduction is what the court thinks reasonable to meet the debtor's liability and is usually expressed as a weekly or monthly rate. The protected earnings rate is what the court thinks it reasonable for the debtor to retain having regard to his resources and needs.

3.41 On each pay day, the debtor's protected earnings are set aside before a deduction from his attachable earnings is made, and must be paid to the debtor insofar as he has enough to cover them.

3.42 If the balance of attachable earnings, after setting aside the protected earnings, is large enough to allow a deduction at the normal deduction rate specified in the order, then that deduction is made and paid into court and the balance given to the employee in addition to his protected earnings.

3.43 If the balance of the attachable earnings, after setting aside the protected earnings rate, is too small to allow full deduction at the normal deduction rate specified in the order, then the employee receives only his protected earnings and the remainder is paid into court for disbursement to the creditor or creditors.

3.44 Under this system, the protected earnings rate guarantees the debtor sufficient for his subsistence. The Supplementary benefit scale rates<sup>1</sup> are circulated to the court registries in England and Wales to be used as a rough guide for the court in fixing the protected earnings rate. In Billington v. Billington<sup>2</sup> it was held that while the 1971 Act gives the court a discretion to fix the protected earnings rate, it would not normally be reasonable to fix a rate which would have the effect of bringing the debtor's resources below the supplementary benefit scale rates determining a person's "normal requirements" (ie the subsistence

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<sup>1</sup>Supplementary Benefit Act 1976, Sch. 1.

<sup>2</sup>[1974] Fam. 24; [1974] 1 All E.R. 546.

level giving rise to a claim for supplementary benefit). It was observed that the special circumstances of a debtor (eg support by a wealthy spouse) could mean that his earnings were only pocket money.<sup>1</sup>

3.45 If the Scottish courts were to have a discretionary power to fix deduction levels in earnings transfer orders, there would be advantage in adopting the bases used in the English system of attachment of earnings. The English experience would be helpful in establishing and operating a Scottish system and harmonisation might assist employers and creditors with businesses in both "law districts".

3.46 To sum up, (1) views are invited on the most appropriate method of calculating the deductions to be made from a debtor's earnings in pursuance of an earnings transfer order. In particular, should the amount of the deductions be set by reference to statutory rules or be fixed by the court in its discretion? (2) If the deductions are to be fixed by judicial discretion, then it is suggested that (following the pattern of attachment of earnings orders in England and Wales) an earnings transfer order should set a "protected earnings rate" (being the minimum amount which the debtor retains from his earnings) and a "normal deduction rate" (being the amount deducted from the balance of net earnings left after setting aside the protected earnings rate and paid to the creditor). It is envisaged that, in fixing a normal deduction rate, the sheriff would have regard to, but would not be bound by, the supplementary benefit scale rates for the time being in force, and thus would not usually fix a deduction rate which would bring the debtor's resources below supplementary benefit scale rates. (Proposition 31).

(e) Means enquiries and procedure in applications for earnings transfer orders.

3.47 To enable the court to determine deduction levels appropriate to an individual debtor's financial circumstances, a prior means enquiry would be needed. The main questions are

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<sup>1</sup> Compare, however, Pepper v. Pepper [1960] 1 All E.R. 529 which is authority for the proposition that the court cannot consider the debtor's potential earnings in some other job than that in which it is sought to attach his earnings. This approach seems unduly restrictive.

whether the means enquiry should be by way of a prescribed pro forma questionnaire or oral examination, whether it should be treated as a mandatory prerequisite of an order or merely as an opportunity afforded to the debtor to give at his discretion information to the court to prevent too high deductions. Unfortunately experience in other legal contexts suggests that provision for a means enquiry will present very difficult and perhaps intractable problems.<sup>1</sup> The SCOC Report on Fines observed -

"Even with time and manpower available for the purpose, it is not easy to establish an individual's means - his capital, income and commitments, necessary and less than necessary. This has, for instance, been the experience of the Supplementary Benefits Commission in assessing disposable income and disposable capital for the purpose of the civil legal aid scheme. The calculation is, by itself, quite complex and it requires exact information of a kind which is available only if the person being assessed will, and can, declare it accurately."<sup>2</sup>

We respectfully agree with this observation.

3.48 Sequestrations and debt arrangement schemes: whether time and manpower would be available depends on the context in which an earnings transfer order is competent. In sequestrations, the objects of the bankrupt's statement of affairs and public examination are to discover and trace the bankrupt's estate for distribution among the creditors and to examine the bankrupt's conduct and the causes of his bankruptcy, and these provisions enable the court to assess what the bankrupt may pay to the trustee out of earnings. Similarly, in a debt arrangement scheme such as we consider in Memorandum No. 50, a means enquiry would play an indispensable part in the process.

3.49 Fines cases: in the case of fines, the SCOC Report found that the heavy case-load and the time-scale of the criminal

<sup>1</sup>The Second (Thomson) Report on Criminal Procedure (1975) Cmnd. 6218 para. 60.16 remarked that of all the topics on which they received evidence, the means enquiry procedure in fines enforcement was subjected to the strongest criticism from their witnesses.

<sup>2</sup>Op.cit., para. 1.4.

courts make a means inquiry peculiarly difficult, especially where the accused pleads guilty by letter. Since July 1978, the papers accompanying a summary complaint have invited the accused to make a statement of means on a prescribed form. The SCOC Report, however, observed that such a form "will improve the position but cannot be expected to result in the court having any exact picture." Although the purpose of the means questionnaire is primarily to enable the court to fix the amount of a fine, presumably it could be used in appropriate cases to fix deductions in an earnings transfer order.

3.50 Maintenance cases: although an award of aliment or periodical allowance is made by the court having regard to the debtor's financial position, the assessment is often rough and ready especially in undefended cases; the award may become out-of-date through a change in circumstances; and the debtor's ability to pay may be affected by a heavy accumulation of arrears.

3.51 Competing extended arrestments: in the case of competitions between extended arrestments, the degree of urgency will depend on a number of variable circumstances but considerations of fairness to later creditors shut out by a current extended arrestment and other factors suggest that the procedure should be as simple and expeditious as practicable.

3.52 Precedents outside Scotland: in considering means enquiries we have had regard to the procedure used in England and Wales to obtain attachment of earnings orders. Completion by the debtor of the means enquiry form is mandatory. The Payne Report recommended that a means enquiry should be a compulsory prerequisite of all forms of enforcement.<sup>1</sup> The Report placed great faith in pro forma written questionnaires which, in their opinion (a) would in

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<sup>1</sup>Op.cit, para. 393.

<sup>2</sup>Para. 450.

many cases avoid the need for the parties to attend the Enforcement office for oral examination; (b) would be cheap; (c) would be quicker than oral examination; and (d) would provide information in a standardised and permanent form. Failure to complete and return the questionnaire within eight days would be followed by an order for personal appearance for examination, and failure to appear would be punishable as contempt of court.<sup>1</sup>

3.53 Outline of possible procedure: it is not easy to devise a procedure which would be simple, cheap and effective. For the sake of simplicity and cheapness, we think that written means questionnaires should be used in the first instance in lieu of oral examination. We revert below to the question whether completion of the questionnaire should be mandatory. In view of the importance of the procedural aspects we feel bound to describe a possible procedure which illustrates the various issues involved. The scheme outlined below assumes the case where a later creditor's extended arrestment is ineffective by reason of a prior subsisting extended arrestment.

- (1) The later creditor would lodge an application in the appropriate sheriff court in a prescribed form giving particulars of the extract decree, of the state of the debt, and of the subsisting extended arrestment disclosed to him by the employer.
- (2) It would be for consideration whether the creditor could be represented by someone other than a solicitor at this stage and at least some later formal stages.
- (3) A copy of the application would be served on the debtor and on the prior arresting creditor by recorded delivery. If the service copies were returned as undelivered, re-service would be effected by sheriff officer.

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<sup>1</sup>The Law Reform Commission of New South Wales in making similar proposals for a means inquiry, said in terms that they were not as optimistic as the Payne Committee regarding the effectiveness of a questionnaire but hoped that it would provide a basis of information in most cases. See Draft Proposal Relating to the Enforcement of Money Judgments (1975) p.48.

- (4) The copy of the application served on the debtor would enclose a means questionnaire in a prescribed form, order the debtor to return it duly completed within, say, eight days, and also cite him to attend court at a specified time (say 15 days) if he wishes to make representations or to object on competent grounds, eg that the debt had been paid. The form would invite the debtor to state what sums he would be prepared to have deducted from earnings. It would also indicate the consequences of failure to return the completed form timeously.
- (5) If the debtor returned the questionnaire duly completed, the sheriff clerk would notify the applicant creditor and prior arresting creditor who would only need to attend court on the stated day if they did not accept the debtor's proposals or the debtor had indicated that he wished to attend. If neither creditor appeared, the sheriff would make an earnings transfer order in terms of the debtor's proposals on deductions, or, if no proposals had been made, would fix such deductions as appeared reasonable.
- (6) The earnings transfer order would be made by the sheriff after hearing the parties (if they attended) or considering their proposals (if any). A proof would be ordered if any substantive defence to the diligence disputing relevant facts was lodged. After the order had been granted, the applicant creditor would obtain an extract and serve it on the employer and the prior arresting creditor by recorded delivery post, which failing by sheriff officer. The debtor might be sent a copy for information.

3.54 Means questionnaire mandatory or discretionary? The foregoing procedure is complicated enough, but would become even more complicated if return by the debtor of a completed means questionnaire were made a mandatory requirement. If he failed to comply with such a requirement, it would be necessary to

empower the court on the creditor's motion to order him to attend the court on pain of proceedings for contempt of court or on the analogy of letters of second diligence.<sup>1</sup> If on the other hand, completion and return of the questionnaire were not mandatory, debtors might not return the questionnaire. A possible compromise solution might be to follow the precedent of the summary criminal complaint questionnaire. The return of the questionnaire would not be mandatory but would nevertheless have a sanction (by which we mean a threat tending to induce compliance rather than a penalty for non-compliance) namely that, in the absence of a completed questionnaire, the court might fix an unduly high level of deductions from earnings.

3.55 In the light of these remarks, (1) Views are invited on the procedure outlined in para.3.53 to be followed in obtaining an earnings transfer order. (2) In particular, (i) should the means enquiry be by way of a prescribed written questionnaire served on the debtor or oral examination? (ii) Should completion and return of a written questionnaire within a prescribed period be treated as a mandatory requirement on the debtor or merely as an opportunity afforded to the debtor to give at his discretion information as to his means to prevent the court from fixing too high a level of deductions from earnings? (Proposition 32).

(f) Appeals

3.56 We invite comments on the proposition that an appeal on a question of law should lie, by leave of the sheriff, against his decision disposing of an application for the making, variation or recall of an earnings transfer order, to the Court of Session, or to the sheriff principal and thereafter to the Court of Session, but no other or further appeal should be competent. (Proposition 33).

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<sup>1</sup> Sheriff Court Rules, rule 73.

(3) Operation and termination of earnings transfer orders

3.57 In addition to the provisions just discussed, further provisions would be needed on the payment of sums attached by an earnings transfer order to the creditor; on variation of orders by the court and the effect on such orders of changes of employer; and on the termination of such orders by court order or otherwise.

(a) Direct payments to creditor or payments through the court

3.58 At para. 2.107 above, we discussed the advantages and disadvantages of a system of payment through the court of sums attached by extended arrestments. We proposed that the existing Scottish practice of the employer remitting directly to the creditor or his agents should be followed. In the case of earnings transfer orders, however, we think that the deducted sums should be paid by the employer into court and disbursed by the court to the creditor or creditors as the case may be.

3.59 There are several reasons why collection by the court would seem desirable. First, an earnings transfer order would require the employer not merely to withhold payment of the attached sum as in the case of extended arrestment but also to pay the attached sum to someone, whether the creditor or the court on the creditor's behalf. We envisage that the latter duty would not arise in the case of extended arrestments. Since the law would require the employer, who is not a party to the dispute, to pay the sums, it seems desirable that the State should provide a proper independent accounting of the sums paid.<sup>1</sup> Second, earnings transfer orders might subsist for much longer periods than extended arrestments and, accordingly, the chance of mistakes occurring are to that extent greater. The employer should be entitled to rely on a court collection department to notify him of the time when the deductions should cease. Third, an extended arrestment would operate only in favour of one creditor. It

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<sup>1</sup>We revert to this at paras. 3.72 to 3.74 below.



is a principal advantage of earnings transfer orders, as already indicated, that they could attach sums for the benefit of two or more creditors conjoined and ranked by the court as payees under the order. It would be an intolerable burden on employers if they were required to divide and remit the deducted sums among the several creditors.

3.60 It would be legislatively possible to require direct payments where the earnings transfer order is in favour of single creditor (eg in the case of maintenance) and payment through the court where several creditors are involved, but for the reasons already given we think that payment through the court is preferable.

3.61 Collection of attached sums by the court would have considerable implications for the staffing of the sheriff clerks' departments. The extent of the increase in staff required would depend on the range of situations in which earnings transfer orders would be available. At present, the sheriff clerks' departments only collect fines and other debts arising in criminal proceedings. We think that they might well collect sums due under a debt arrangement scheme, perhaps as agent for the administrator of the scheme as mentioned in Memorandum No. 50.

3.62 Since at present proof of payments is restricted to the creditor's writ or oath, provision should be made for the giving of receipts or certificates of payments into court under earnings transfer orders.

3.63 In paragraphs 2.107-109 above, we discussed employers' fees for operating extended arrestments and we suggest that similar fees should be permitted in the case of earnings transfer orders.

3.64 To sum up we suggest that (1) an employer should be required to remit sums deducted under an earnings transfer order to the sheriff clerk's department of the court specified in the order for disbursement to the creditor or creditors. (2) Provision should be made for giving the debtor receipts for payments into court, and to the employer on request. (3) An employer should be entitled to charge a fee similar to that proposed for extended arrestments in respect of each remittance to the court. (Proposition 34).

(b) Variation of earnings transfer orders and temporary lapse on changes of employer

3.65 There are a number of situations where an earnings transfer order may require variation on the application of an interested person (creditor, debtor or employer) or by the court of its own motion.

3.66 Change in debtor's resources and liabilities: if a material change occurs in the debtor's financial circumstances such as a pay increase, or loss of overtime, or increased outgoings or legal liabilities (eg a second family for whose aliment he is liable), then the normal deduction rate or protected earnings rate may require to be changed. At the time when an order is made steps should be taken to notify the debtor of his right to apply for a variation, though many debtors are unfortunately slow to take advantage of such rights as they have as the small numbers of instalment decrees show. The procedure for obtaining a variation should be kept as simple as possible.

3.67 Changes of employer: a debtor may change his job during the course of a long term diligence such as an earnings transfer order. At one time in England and Wales, where the debtor changed his job, the attachment of earnings order lapsed, and

the creditor had to apply for a new order. Further, if the debtor's new job entailed a change in the level of his earnings, the normal deduction rate and protected earnings rate had to be recalculated. The whole order had to be considered afresh by the court and the relevant court procedures had to be followed all over again. The Payne Committee recommended that a change in the debtor's employment should not operate to discharge an order but to suspend it.<sup>1</sup> Following this recommendation, the order now merely lapses and may be re-served on the new employer.<sup>2</sup> The court on its own motion may make consequential variations (eg to insert the new employer's name). Either party may then apply for a variation.

3.68 The Payne Committee regarded it as an essential feature of attachment of earnings that the employee, an existing employer operating an attachment of earnings order, and a new employer who acquires knowledge of such an order directed to a previous employer, should all be under a duty to notify the relevant court of a change in the debtor's employment.<sup>3</sup>

3.69 We suggest that similar provisions should apply to earnings transfer orders. The procedures would depend on whether payments are made into court or to the creditor. If, as we propose, payments are made into court, the employer would inform the court that the debtor had left his employment. The court would then notify the creditor or creditors concerned. If the creditor or his agents traced the debtor's new employer he would apply to the court in the prescribed manner for amendment of the order and a warrant for re-service on the new employer.

3.70 Accordingly we suggest that (1) on a change of employer, an earnings transfer order should lapse only temporarily and it should be competent to re-serve it on a new employer.

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<sup>1</sup> Op.cit., paras. 601 and 612.

<sup>2</sup> Attachment of Earnings Act 1971, s.9(4).

<sup>3</sup> Op. cit para. 612.

(2) An earnings transfer order should be variable by the court which made it on application by an interested person on a material change of circumstances. (3) The debtor, an employer operating an earnings transfer order, and a new employer who acquires knowledge of such an order directed to a previous employer, should be under a duty to inform the court of a termination or change of employment. (Proposition 35).

(c) Termination of earnings transfer orders

3.71 To avoid wrongous diligence, earnings transfer orders should cease to have effect as soon as the debt and other sums due under the decree are extinguished. It is desirable that the provisions for terminating the order should be such as to minimise the likelihood of error.

3.72 It might be provided that the employer should cease of his own accord to make deductions and remittances once the debt had been cleared. This would require that the employer should keep a running total of payments made to the creditor, (perhaps on a form annexed to the copy of the earnings transfer order served on him), and work out himself when to stop deductions.<sup>1</sup> On the other hand, it might be thought that this imposed an extra burden on the employer which he should not be required to bear. On this view if payment was made through the court, the court could notify the employer when the order ceases to have effect, which is the solution adopted in England and Wales<sup>2</sup> and since 1979 in Northern Ireland.<sup>3</sup> For this solution to work, however, payments would have to be made through the court.

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<sup>1</sup>This was the solution adopted in Northern Ireland, where payments were made directly to the creditor at one time: Judgment Enforcement Rules 1971, rule 63(2)(d). Since 1979, however, the employer pays the deductions to the Enforcement Office at monthly intervals.

<sup>2</sup>Attachment of Earnings Act 1971, s.12.

<sup>3</sup>Judgments (Enforcement) Act (Northern Ireland) 1969, s.76(8) (inserted by the Judgments Enforcement and Debts Recovery (Northern Ireland) Order 1979, Article 17 and Sch.1.)

3.73 If collection through the court were not introduced or were restricted to "consolidated" earnings transfer orders, then it would be for consideration whether the creditor should notify the employer of the expiry of the order, or whether the order should continue to have effect until the order was recalled and intimation made to the employer. Recall by the court would be an expensive and cumbersome formality, and we think that in the absence of a court collection department the creditor should be under a duty to inform the employer of the termination of the order, by notice in the prescribed form, intimated to the court (and perhaps also, for information, to the debtor). The court would then recall the order without further procedure. This seems, however, less satisfactory than a system of notification by the court based on accounts kept of payments through the court. The circumstances in which recall or variation may be needed are difficult to foresee and there would be advantage in prescribing by statutory instrument rather than statute the circumstances in which a court may of its own motion vary or recall an order, as in England and Wales.<sup>1</sup>

3.74 We suggest therefore that (1) the clerks of court collecting sums due under an earnings transfer order should be under a duty to inform the employer of the time when deductions should cease. (2) An earnings transfer order should cease to have effect when the debts which it enforces have been paid. (3) Provision should be made by statutory instrument prescribing the circumstances in which the court may vary or recall an order of its own motion, eg on a termination of employment, where more than one order has been made in respect of the same debtor; where the order is superseded by a sequestration or by a debt arrangement scheme such as we propose in Memorandum No. 50. (Proposition 36).

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<sup>1</sup>County Court Rules 1936, Order 25, Rule 89.

(d) Enforcing compliance with orders

3.75 We have already referred to the sanctions needed to enforce the return by debtors of duly completed means questionnaires. Consequential provision would also be needed to punish breaches of the various duties imposed in connection with earnings transfer orders, including the employer's duty to obey the order by making deductions and the duty of the debtor and his employer and previous employer to notify a termination or change of employment. It would be for consideration whether fixed penalties (criminal or civil<sup>1</sup>) should be prescribed or whether the failure to comply should be dealt with by the court in its discretion as a contempt of court. The employer's failure to obey the order is in the nature of a contempt whereas a failure to inform the court of a change of employment seems of a different character. To elicit comments it is suggested that breach of the duties imposed on an employer to comply with an order or on a debtor or employer to notify a change of employment, and other duties imposed on the parties in connection with an earnings transfer order, should be punishable by fixed penalties. It is for consideration whether the penalties should be imposed in a special statutory civil application to the court which made the earnings transfer order rather than in criminal proceedings. (Proposition 37).

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<sup>1</sup> Compare the civil application for a penalty for breach of poinding under section 30 of the Debtors (Scotland) Act 1838.

#### PART IV: MISCELLANEOUS ISSUES

4.1 We conclude this Memorandum with a brief examination of certain issues which are incidental to the foregoing proposals for reform.

(1) Dismissal etc. of employees following diligence against earnings.

4.2 The first issue is whether legislation is needed specifically prohibiting an employer from dismissing an employee following diligence against earnings and as a result of it.

4.3 Does dismissal occur in practice? The Edinburgh University Debtors Survey discloses that, of the twenty-five debtors subjected to arrestment who were interviewed, one debtor reported that he had been threatened with dismissal<sup>1</sup> and two had been asked to resign. The CRU Arrestment Survey discloses that, of 22 employers interviewed, only one employer had dismissed an employee within the previous few years as a result of an arrestment.<sup>2</sup> This employer said that it was a condition of employment that employees would be dismissed after a third arrestment. The other employers said that they would not dismiss an employee simply because his wages had been arrested. The fact that the employee might handle money in the course of his employment did not, apparently, make any material difference.

4.4 The Advisory, Conciliation and Arbitration Service of the Department of Employment (ACAS) could refer us to only one unfair dismissal complaint handled by the conciliation

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<sup>1</sup>This was, however, apparently an empty threat since the employer received further arrestments without dismissing the debtor. One debtor reported that he had been sacked from a previous job following a series of arrestments and six were worried that they might lose their job but there was no evidence that any of the 25 debtors interviewed were about to be dismissed.

<sup>2</sup>Op. cit., para. 39.

officers involving an arrestment of wages.<sup>1</sup> This case went before an industrial tribunal<sup>2</sup> but was not a simple case of dismissal by reason only of an arrestment. The Central Office of Industrial Tribunals (Scotland) informed us that this was the only case before an industrial tribunal involving dismissal as a result of an arrestment which they had been able to trace. The statutory right not to be unfairly dismissed, however, only arises where the employee has been continuously employed for a qualifying period, which is currently 52 weeks (in the case of dismissal effective from 1.10.1979).<sup>3</sup> Relying on information supplied by their conciliation officers, ACAS informed us that "in a small number of cases - no more than, say, 6 a year - arrestment notices are given as the reason or one of the reasons for the termination of their employment by people who do not have the qualifying service to complain of unfair dismissal."

4.5 On the basis of this evidence, it seems likely that dismissal as a result of arrestment occurs infrequently in practice but that it may be more frequent in the case of employees not protected by unfair dismissal legislation

4.6 "Unfair dismissal" legislation: it seems likely that dismissal resulting from an arrestment would be held "unfair" in the statutory sense. The question seems to be whether the employer could establish that the dismissal "related to the conduct of the employee" or that it was "for some other substantial reason of a kind such as to justify the dismissal

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<sup>1</sup>A.C.A.S. conciliation officers seek to conciliate every year in about 4,300 unfair dismissal complaints arising in Scotland. Records are not kept of the grounds of the complaints but, in response to our query, enquiry was made of conciliation officers whether they could recall cases involving arrestments of earnings.

<sup>2</sup>Burke v. Veitch Moir Ltd S/4354/77 (unreported).

<sup>3</sup>Employment Protection (Consolidation) Act 1978, s.64; Unfair Dismissal (Variation of Qualifying Period) Order 1979. The previous periods were from 28.2.72 two years; from 16.9.74 one year; from 16 Mar. 1975 to 1 Oct. 1979, 26 weeks.



of an employee holding the position which that employee held".<sup>1</sup> It has been strongly argued that an employer would be unlikely to succeed in establishing that the dismissal was fair, for example that indebtedness was evidence of misconduct, or that the expense and trouble involved in administering an arrestment was a substantial reason for dismissal.<sup>2</sup> But it is, however, a question of circumstances and a continuous diligence against earnings would be more difficult to administer than an arrestment under the existing law.

#### 4.7 Is a specific prohibition against dismissal needed?

Although the Payne Report argued that it would be impractical to legislate to prevent the dismissal of employees as a result of attachment of earnings,<sup>3</sup> there are enactments in other jurisdictions which specifically protect employees from dismissal on that ground.<sup>4</sup> Moreover, notwithstanding the general unfair dismissal legislation, there are UK statutes prohibiting dismissal on specific grounds,<sup>5</sup> and to prevent doubts being cast on the application of the general legislation elsewhere in the UK, its generality might be expressly "saved". Thus, there seems to be no technical objection to a specific prohibition.

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<sup>1</sup>Employment Protection (Consolidation) Act 1978, s.57(1) and (2). The relevant issues are set out in Ewing and Maher, "Arrestment of Wages and Unfair Dismissal" 1979 S.L.T. (News) 185.

<sup>2</sup>See Ewing and Maher, supra.

<sup>3</sup>Op. cit., para. 608.

<sup>4</sup>In the U.S.A., the Consumer Credit Protection Act 1968 Title III provides that an employee must not be dismissed for a single wage garnishment and the Uniform Consumer Credit Code and several state laws are to a like effect. There are similar provisions in Australia e.g. Magistrates (Summary Proceedings) Act 1975 (Victoria) and Community Welfare Act 1972 (South Australia), and in Canada, the Federal Labour Code s.34U; the Attachment of Debts Act (British Columbia).

<sup>5</sup>E.g. the Rehabilitation of Offenders Act 1974, s.4(3)(b) which provides inter alia that a "spent" conviction shall not be a proper ground for dismissing a person from employment or for prejudicing him in any way in any employment; cf. Employment Protection (Consolidation) Act 1978, s.60 (dismissal on ground of pregnancy to be treated as unfair dismissal except in certain circumstances).

4.8 The OPCS Defenders Survey and Edinburgh University Debtors Survey show that many default debtors, including debtors subjected to arrestments, are employed only intermittently, and for relatively short periods. Many may not have been in employment for the period required to qualify for protection from unfair dismissal. Moreover, it would be essential to the operation of continuous diligence against earnings that employees should not be dismissed as a result of such diligence.

4.9 Although a diligence against earnings might blight an employee's prospects of obtaining a new job, or his prospects of promotion in his existing job, we do not think that it would be practicable to enforce specific prohibitions relating to such matters.<sup>1</sup>

4.10 Accordingly (1) views are invited on the question whether provision should be made specifically prohibiting an employer from dismissing an employee wholly or mainly on the ground of diligence against the employee's wages or salary. (2) If such provision should be made, should breach of the prohibition be a criminal offence or civil wrong and, if the latter, should the ordinary courts or industrial tribunals have jurisdiction to grant the employee a remedy?  
(Proposition 38).

(2) "Tracing" exempt earnings paid into bank account etc.

4.11 Increasingly, employers pay salary and even wages by cheque or by direct transfer to the employee's bank account.<sup>2</sup>

<sup>1</sup>It has been pointed out that compensation awarded for unfair dismissal following an arrestment of wages would itself be arrestable and that thereby "the employee may lose incentive to enforce his remedy for unfair dismissal with the result that his creditor's interests are frustrated through the lack of any arrestable subject": Ewing and Maher, loc. cit., p.187. We doubt whether an employee minded to seek compensation and properly advised would be deterred by the risk that it might be arrested in the employer's hands, but even if we are wrong in this, we do not think that any mischief arises requiring legislative action.

<sup>2</sup>See C.R.U. Arrestment Survey, para. 12.

The enactments prohibiting arrestment of earnings on the dependence of an action and limiting the amount arrestable in execution of a decree<sup>1</sup> do not, however, protect the earnings when they are deposited in a bank account or invested in some non-exempt assets.<sup>2</sup> Creditors could frustrate the statutory exemptions by arresting the employee's bank account. In some other jurisdictions, this practice has been stopped by judicial decisions construing a statutory exemption of an income payment as applicable to the bank account in which the income payment was lodged.<sup>3</sup> We do not think, however that the Scottish legislation could be construed in this way.

4.12 It would be possible to extend the exemption of earnings by statute: thus, the U.S. Uniform Exemptions Act (1979) section 9(b) provides that money exempt under certain provisions of the Act -

"remains exempt after its receipt by, and while it is in the possession of the individual [scil. debtor] or in any other form into which it is traceable, for example, in a bank or savings account.

(c) Money or other property and proceeds exempt under this Act are traceable under this section by application of the principle of first-in first-out, last-in first-out, or any other reasonable basis for tracing selected by the individual."<sup>4</sup>

The Act limits the time within which the exempt funds can be traced. Scots law, however, does not have general principles and rules regulating tracing and specific provision would have to be made.

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<sup>1</sup>Law Reform (Miscellaneous Provisions)(Scotland) Act 1966, s.1; Wages Arrestment Limitation (Scotland) Act 1870.

<sup>2</sup>When the earnings are paid in cash direct to the employee the prevailing view is that they are not subject to diligence simply because there is no appropriate diligence for attaching cash in a debtor's hands: see Memorandum No. 48, para. 4.11.

<sup>3</sup>Holy Spirit Parish Credit Union Society v. Kwiatkowski (1969)68 W.W.R.684 (Manitoba Queen's Bench); Porter v. Aetna Casualty and Surety Co. 370 U.S. 159 (1962).

<sup>4</sup>The Act does not apply to personal earnings, which are protected by the Uniform Consumer Credit Code and Consumer Credit Protection Act.

4.13 We have not received representations for extension of the exemptions and are doubtful whether such an extension would be needed even if a continuous diligence, with its higher exemption levels, were to be introduced. Accordingly, (1) views are invited on the question whether the prohibition of diligence against earnings on the dependence of an action, and the restriction on diligence against earnings in execution, should be extended so as to exempt the earnings after they have been paid into a bank or savings account or converted to some other form into which they might be traceable. (2) If such an extension is thought necessary, what rules for tracing the earnings should be provided, and what time-limit should be imposed on the exemption? (Proposition 39).

(3) Effect of debtor's sequestration on continuous diligence against earnings

4.14 Under section 104 of the Bankruptcy (Scotland) Act 1913, a sequestration renders an arrestment (or poinding) ineffectual in a question with the trustee in the sequestration if the arrestment (or poinding) was executed within 60 days prior to the date of the sequestration. At present, the arrestment is only "cut down" by section 104 if it is still subsisting at the date of sequestration: payments made within the 60 day period in pursuance of a forthcoming or in consideration of the creditor abandoning the arrestment, are not affected by section 104.<sup>1</sup> We intend to review this latter rule in our forthcoming Report on Bankruptcy. Section 104 would require amendment if continuous diligence against earnings were introduced. We suggest therefore that (1) a sequestration should render ineffectual an extended arrestment or earnings transfer order attaching the bankrupt's earnings only if, and in so far as, the diligence has attached instalments of earnings accruing due within the period before sequestration prescribed by section 104 of the Bankruptcy (Scotland) Act 1913.

<sup>1</sup>Johnston v. Cluny Trustees 1957 S.C.184.

(2) Should the diligence be cut down by a provision on the foregoing lines only if the diligence is still in operation at the date of sequestration? (Proposition 40)

(4) Privileges for rates, taxes and Crown debts: diligence on summary warrants

4.15 Special provision may be necessary or desirable in the case of diligence against earnings to secure payment of rates, taxes and Crown debts, and on summary warrants.<sup>1</sup>

(i) Priority of arrestment for rates and taxes

4.16 Under the Wages Arrestment Limitation (Scotland) Act 1870, section 4, the statutory limitation on arrestment of wages does not apply in the case of arrestments for "rates and taxes imposed by law". The effect is that the whole of the debtor's wages are arrestable for rates and taxes.<sup>2</sup> Clearly as in the case of aliment, a continuous diligence against earnings should not attach the debtor's whole earnings over a prolonged period<sup>3</sup> and accordingly we suggest that

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<sup>1</sup>Arguably there is a need to review generally the privileged position of diligences for the recover of rates, taxes and Crown debts; their preferences in sequestration; the right of rates and taxes creditors to recover arrears out of ordinary creditor's diligences. Such a review may be made in a later Memorandum on diligence and in our Report on Bankruptcy. The McKechnie Report (para. 92) recommended that the privilege for rates should be abolished but made no recommendations as to the priority for taxes.

<sup>2</sup>It is suggested in Appendix A that the debtor still has the right to apply to the court to reserve to him a suitable aliment under the common law principle known as the "beneficium competentiae". But in practice this is rarely done if ever.

<sup>3</sup>Even in the case of a single arrestment the McKechnie Report (at para. 92) observed that a rates defaulter and his family should be left with enough to live on. The provision does not necessarily safeguard the public purse since in practice the debtor might obtain an urgent needs payment from the D.H.S.S.

an extended arrestment or earnings transfer order for rates and taxes should not prevail over the exemptions from diligence (Proposition 41). Although a local authority and the Collector of Taxes have a preference for one year's arrears of rates or taxes out of diligences against moveable goods, this does not extend to arrestments of wages and accordingly we suggest that in a "consolidated" earnings transfer order for the recovery both of arrears of rates or taxes and of ordinary debts, no priority over the ordinary debts should be accorded to the arrears of rates or taxes. (Proposition 42).

(ii) Priority of Exchequer decree arrestment over debtor's subsistence exemption and ordinary debts

4.17 Under the Exchequer Court (Scotland) Act 1856, section 30, a Crown arrestment proceeding on an Exchequer cause decree operated to transfer the arrested fund to the Crown preferably to all other creditors, without the need of a furthcoming. The effect was that the Exchequer cause arrestment had priority over arrestments for all other debts, even if the arrestments were earlier in date. The provision also excluded the debtor's subsistence exemption at common law and the combined effects of the 1856 Act and section 4 of the 1870 Act was that, in the normal case of an Exchequer cause decree for recovery of taxes, the debtor's subsistence exemption under the 1870 Act was excluded. There is, however, some doubt whether Exchequer diligence is now competent having regard to the Crown Proceedings Act 1947, section 26(1). We propose to discuss the possible abolition of Exchequer diligence in a later Memorandum and meantime make no proposals in the present context since we understand that Exchequer arrestments are rarely, if ever, used and it is extremely unlikely that they would be used against earnings.

(c) Diligence on summary warrants

4.18 By an accident of legal development, arrestment is competent on a summary warrant for recovery of local authority

rates<sup>1</sup> but not on warrants for the recovery of taxes or VAT.<sup>2</sup> We advance proposals in Memorandum No 48 to cure this anomaly<sup>3</sup> and views are invited on the proposition that (1) an extended arrestment should be competent to enforce a summary warrant for the recovery of local authority rates. (2) If arrestment is made competent on summary warrants for the recovery of Inland Revenue taxes and VAT, then extended arrestment should likewise be made competent on those warrants. (Proposition 43).

(5) Possible reforms of arrestments of earnings if continuous diligence against earnings not introduced

4.19 As mentioned at para. 1.3 above, even if continuous diligence against earnings were not introduced, a number of reforms to the existing system of arrestment of earnings would be needed. These reforms might consist of or include the following:-

- (i) It should be made clear that the limitation rule on arrestment in the Wages Arrestment Limitation (Scotland) Act 1870 applies to salaries as well as wages and to all categories of employees.
- (ii) Provision should be made for adapting the limitation formula to pay periods other than a week (eg four weeks or a calendar month).
- (iii) It should be clearly provided that the limitation rule applies to net or disposable earnings rather than gross earnings and net earnings should be defined for this purpose.
- (iv) It would be for consideration whether pensions under private trust deeds or public sector occupational pensions should be arrestable subject

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<sup>1</sup>Local Government (Scotland) Act 1947, s.247(3).

<sup>2</sup>Taxes Management Act 1970, s.63; Value Added Tax (General) Regulations 1977, reg. 59.

<sup>3</sup>Para. 7.23 (Proposition 61) where we suggest that if a uniform code for rates and tax warrants is enacted, then tax warrants should be enforceable by arrestment.

to the limitation rule for earnings.

- (v) It would be for consideration whether the same or different limitation rules would apply to cases where the arrestment of earnings is based on aliment, rates or taxes and "aliment" for this purpose should be clearly defined.
- (vi) Service by recorded delivery post should be competent in the case of arrestments of earnings on Court of Session decrees and sheriff court ordinary action decrees as well as summary cause decrees.
- (vii) Warrants of concurrence should no longer be needed.
- (viii) The form of schedules of arrestments of earnings should be standardised and modernised.
- (ix) An employer-arrestee should be given a period (of say seven days) before he was bound to comply with an arrestment of earnings.
- (x) An employer-arrestee might be permitted to deduct a handling charge.



PART V: SUMMARY OF PROPOSALS AND QUESTIONS  
FOR CONSIDERATION

- |   | <u>Para.</u> |
|---|--------------|
| I. <u>Proposal for introducing extended arrestments</u>   |              |
| 1. (1) There is a need to introduce in Scots law a system of continuous diligence against earnings to reduce the incidence of repeated arrestments and to allow the debtor's subsistence exemption to be raised to a more realistic level. (2) To achieve this aim, two modes of continuous diligence are considered in this Memorandum, namely extended arrestments, (based on the existing Scottish diligence of arrestment and having parallels in other legal systems) and earnings transfer orders (based on the English system of attachment of earnings orders). It is suggested that extended arrestments should be introduced as the main diligence against an individual's earnings. (3) If continuous diligence against earnings is introduced, arrestments in common form should no longer be competent as a means of attaching earnings. | 1.37         |
| II. <u>Specific proposals on extended arrestments</u>   |              |
| (1) <u>Earnings etc attachable and debts recoverable by extended arrestment</u>   |              |
| 2. An extended arrestment should in general be available to attach the future salary or wages of an employee but not to attach the future income of corporate bodies, partnerships or unincorporated associations or self-employed persons.   | 2.9          |
| 3. (1) Subject to the special exemptions mentioned at Propositions 4 and 5 below, an extended arrestment should attach -  | 2.13         |
| (a) all sums for which the debtor's employer is liable to account to the debtor at the time when the extended arrestment takes effect, whether or not these sums are earnings; and  |              |

(b) all future earnings falling due within a prescribed period (so far as not subject to a subsistence exemption).

(2) Earnings for this purpose should be defined to mean any sums payable by way of wages or salary (including any fees, bonus, commission, overtime pay, or other emoluments payable in addition to wages or salary or payable under a contract of service). It is thought that the foregoing definition would include certain non-contractual emoluments due under the Employment Protection (Consolidation) Act 1978 as mentioned in para. 2.11, but would not cover lump sums payable by way of damages or compensation.

4. The pay of members of the armed forces and of women's services administered by the Defence Council should be exempt from extended arrestment. 2.16
  
5. (1) It is suggested that it should be competent to attach future instalments of a life rent, pension or annuity payable under a private trust deed (whether or not declared to be alimentary), but subject to an exemption for the beneficiary's subsistence. Views are invited on whether the diligence should take the form of an extended arrestment or an earnings transfer order. 2.19  
(2) The exemption by specific statutes and statutory instruments of pensions and annuities payable under public sector occupational pension schemes should be abolished, and it should be competent to attach future instalments of such pensions and annuities subject to an exemption for the beneficiary's subsistence. Views are

invited on whether the diligence should take the form of an extended arrestment or an earnings transfer order.

6. (1) It should be competent to attach by an extended arrestment of wages or salary the principal sum, interest and judicial expenses due under the decree. (2) The amount of interest attachable by the extended arrestment should not exceed the interest accrued up to the date of the service of the schedule of extended arrestment. Such interest should only be attached if, and to the extent that, the amount thereof is specified in the schedule of extended arrestment. (3) As mentioned in our First Memorandum on Diligence, a warrant for extended arrestment of earnings in an extract decree should operate as a warrant to attach the prescribed expenses of the officer of court chargeable for laying the arrestment and of the solicitor for instructing the officer of court. It should be competent for the debtor to require that the amount of these expenses should be taxed by the auditor of court. 2.26
- (2) Laying an extended arrestment
7. An extract court decree containing a warrant for immediate arrestment should also contain a warrant for an immediate extended arrestment of earnings without the need for a further application to the court. 2.28
8. It should be competent to enforce a decree of a sheriff court by serving an extended arrestment on an employer outwith the district or sheriffdom of that court without the need for a warrant of concurrence. 2.28

- |   | <u>Para.</u> |
|---|--------------|
| 8. A creditor should be entitled to instruct a sheriff officer when serving a charge to require the debtor to disclose particulars of his employment (if any) such as the name and address of the employer, the debtor's works reference number (to assist in identification) and possibly the dates when wages or salary are paid. A debtor not complying with this requirement should be barred from applying for an instalment decree sisting diligence or declarator of unenforceability such as are mentioned in Memorandum No. 48.  | 2.34         |
| 10. (1) It should be competent to serve an extended arrestment of earnings on the employer by recorded delivery or registered letter as an alternative to personal service, whether the arrestment is based on a Court of Session or sheriff court ordinary decree or a summary cause decree. (2) The expenses of personal service should be recoverable from the debtor only if the auditor of court certifies that such service was expedient in the interests of justice. (3) It should no longer be necessary for an officer serving a schedule of arrestment on a summary cause decree to be accompanied by a witness, and the officer's execution of the schedule of arrestment, though not attested by a witness, should be treated as probative. Views are invited on the question whether this proposal should apply also to Court of Session decrees and sheriff court ordinary action decrees. | 2.39         |
| 11. (1) An extended arrestment should only come into operation on the expiry of a prescribed period after the date of service of the schedule of extended arrestment on the employer. It is   | 2.47         |

suggested that the period should be fixed at seven days. (2)(a) It should be made clear that personal service of an extended arrestment on a company (or other corporate body) may be effected by delivering the schedule of extended arrestment to an employee of the company at a place of business of the company. (b) It should not be necessary to intimate to a company by post a copy of the schedule of extended arrestment where the schedule has been served, on an employee of the company, whether by recorded delivery or registered letter or by personal service. (c) It is for consideration whether the suggestions at sub-paragraphs (a) and (b) should apply to partnerships and unincorporated associations as well as to corporate bodies.

12. (1) A modernised form of schedule of extended arrestment, and of the officer's certificate of execution to follow thereon, should be prescribed by act of sederunt. (2) A brief explanatory booklet on extended arrestments should be produced by the competent authorities and published by HMSO for the guidance of employers in operating extended arrestments. Reference should be made to this booklet in the standardised forms of schedules of extended arrestment served on employers. 2.49
13. (1) It would be impractical to require that a schedule of extended arrestment should specify sufficiently detailed particulars of the debtor to enable the arrestee-employer readily to identify in every case the debtor to whom the schedule applies. (2) It might, however, be 2.50

expressly enacted that where the schedule does not specify correctly the name and address of the debtor as at the date of service of the extended arrestment, the employer should not be liable for failure to comply with the arrestment notwithstanding that the debtor is in fact in his employment and that the extended arrestment is not invalid by reason of the mistake in specification.

14. Not later than the first pay day in which earnings are deducted in pursuance of an extended arrestment, the employer should give the debtor employee a prescribed notice (which should be supplied to the employer by the officer of court who served the extended arrestment) explaining the effect of the extended arrestment. 2.52
- (3) Duration and repeats of extended arrestment
15. An extended arrestment should subsist only for a limited period prescribed by statute, but the period should be variable by statutory instrument. 2.55
16. Earnings attachable by an extended arrestment should include (subject to the subsistence exemption mentioned below):- 2.62
- (a) all arrears of pay due to the debtor at the date when the extended arrestment takes effect (viz. seven days after the date of service in terms of Proposition 11 above); and
  - (b) all pay due on each pay day falling within a prescribed period of (say) seven months from that date or, as the case may be, for such lesser period as is required to pay the debt

due under the decree together with the expenses of the extended arrestment.

The period mentioned in sub-paragraph (b) should be variable by statutory instrument.

- 16A. (1) A creditor who has already laid an extended arrestment should be entitled to lay one or more subsequent extended arrestments against the same debtor's pay for the same debt until the debt and the expenses of the extended arrestments have been discharged. (2) If (as we propose in Proposition 21 below) provision is made to secure fair sharing among competing creditors outwith sequestration in cases where an extended arrestment has been laid, then it should not be necessary to provide for a mandatory interval between the expiry of an extended arrestment and the laying of a subsequent extended arrestment by the arresting creditor against the same debtor's pay for the same debt. 2.66

(4) Limitation of amount arrestable for protection of subsistence of debtor and his family

17. (1) Views are invited on the system for new limitation rules for extended arrestments. It is tentatively suggested that system A or alternatively system B should be adopted. 2.94

System A

On every pay day while an extended arrestment subsists a proportion of the debtor's disposable earnings should be treated as exempt from arrestment. The proportion would be calculated by means of a sliding scale exemption table along the lines of that discussed in para. 2.81.

System B

On every pay day while an extended arrestment subsists a prescribed percentage of the debtor's

disposable earnings should be treated as exempt from arrestment provided that in no case should the exempt earnings be less than a prescribed sum for each dependant supported by the debtor.

(2) "Disposable earnings" might be defined to be the earnings remaining after deduction of certain amounts required by law to be withheld by the employer, viz, income tax (PAYE), Primary Class I contributions under Schedule 1 to the Social Security Act 1975, and amounts deductible under any enactment or written request by the debtor for a superannuation scheme within the meaning of the Wages Council Act 1979.

(3) The sums in both of the systems described above should be variable by statutory instrument. It is suggested that the competent rule-making authority should have a duty to review the figures every year, and should prescribe equivalent sums for calendar monthly pay periods

(4) It is thought that the court should not retain its common law powers to fix a different exemption from the statutory exemption and should not have a special statutory power to vary the exemption.

(5) Payment by employer to creditor of arrested sums

18. (1) An extended arrestment should have effect as 2.106  
a series of consecutive arrestments attaching the arrested proportion of earnings on each pay day while the extended arrestment subsists.
- (2) The schedule of extended arrestment should contain a note giving the employer guidance as to the advisability of not making payment of the arrested sums to the creditor without first obtaining a written or oral mandate from the debtor authorising the payment. (3) It should be competent for the



debtor or the employer to make a summary application to the court for an order recalling or restricting the extended arrestment on the ground that the debt is paid or on any other ground which would found a competent defence to an action of furthcoming.

19. Sums withheld from the debtor's earnings by an employer in pursuance of an extended arrestment should be paid direct to the arresting creditor or his agents and not through a court collection department. 2.109
20. An employer should be entitled to deduct a 'handling charge' for operating an extended arrestment of 50p on each occasion on which he is required to make deductions from the debtor's pay. The charge should be deducted from the earnings payable to the debtor rather than the arrested sum and the employer should give the debtor a statement of the charge deducted along with a statement of the arrested sum. 2.111
- (6) Competitions between extended arrestments outside sequestration
21. (1) For so long as a debtor's earnings are subject to a current extended arrestment, a later extended arrestment against those earnings should be ineffective. (2) Assuming provision should be made to secure equality for later creditors, then (a) should this provision impose an obligation on the arresting creditor to account to later creditors claiming a pari passu ranking while the current extended arrestment subsists, or (b) should provision be made for conjoining and ranking the creditors in a 'consolidated' earnings transfer order such as we consider below? (3) It 2.125

is suggested that extended arrestments should be expressly excluded from section 10 of the Bankruptcy (Scotland) Act 1913 (equalisation of arrestments and poindings within 60 days before, and four months after, notour bankruptcy).

III Proposals for earnings transfer orders and their relationship with extended arrestments

(1) Cases where earnings transfer orders might be competent

22. It would not be desirable to introduce earnings transfer orders only for use in connection with sequestrations but if such orders are made competent outside sequestrations, then there is a case for making the orders available to a trustee in a sequestration as the means of attaching earnings for the general body of creditors. 3.4
23. If (as we propose in Memorandum No. 50) debt arrangement schemes are introduced in Scots law, it should be competent for the court to make an earnings transfer order to secure payments due by the debtor to the administrator of the scheme. 3.5
24. (1) As regards the enforcement of arrears of maintenance (aliment and periodical allowance on divorce), it is suggested that there are three options, viz: 3.9
- (a) that only an earnings transfer order would be competent; or
  - (b) that, at the creditor's option, either an extended arrestment or an earnings transfer order could be used; or

(c) that only an earnings transfer order could be used but that an application for an earnings transfer order would have immediate effect as an extended arrestment when a copy of the application is served on the employer until superseded by the earnings transfer order.

Views are invited on which option should be adopted. (2) It should be competent for the court to make an earnings transfer order with the maintenance debtor's consent even in the absence of default, and the court should be empowered to attach not only arrears of maintenance but also current maintenance accruing due while the order subsists.

25. (1) The existing rule whereby a maintenance creditor can arrest the whole wages of a debtor should not apply where the aliment is enforceable by earnings transfer order or extended arrestment. (2) If maintenance is to be enforceable by extended arrestment, and the extended arrestment gives an exemption for the subsistence of dependants, then that exemption should not apply where the debt on which the extended arrestment is based is a maintenance debt. Views are invited, however, on whether there should be an exception to this rule where the debtor has alimentary dependants in fact living with him whom he is legally liable to maintain. It is suggested that de facto alimentary dependants whom the maintenance debtor is not legally liable to maintain should not be taken into account. (3) Where maintenance is enforced by earnings transfer order, should

3.13

the court (in fixing deduction levels) take into account the maintenance debtor's liability to maintain dependants in fact living with him and whom he is legally liable to maintain? (4) "Maintenance" for the purpose of this Proposition and Propositions 24 and 26 should be taken as including aliment, statutory maintenance, periodical allowance on divorce, and maintenance due under comparable non-Scottish orders registered in Scotland, but should not include claims by a third party for reimbursement of aliment or maintenance provided to the debtor or his alimentary dependants in the past, notwithstanding that they are treated as "alimentary" at common law for the purposes of exemptions from arrestment.

26. (1) Whatever new diligence is competent to secure payment of maintenance in terms of Proposition 24 above, a competition between diligences against earnings for maintenance and for ordinary debts should be resolved in proceedings for the making, or as the case may be the variation, of an earnings transfer order. (2) The maintenance creditor should rank rateably with the ordinary creditor in respect of arrears of maintenance accrued up to the time of the making of the order or, as the case may be, its variation. (3) The maintenance creditor should not, however, rank equally with the ordinary creditor in respect of future instalments of maintenance accruing due while the earnings transfer order is in force. (4) It is for consideration whether the court dealing with the earnings transfer order should have power, on the application of either party to the maintenance obligation, and perhaps also of its own motion
- 3.17

or on the application of the competing ordinary creditor, to review the decree for maintenance, and should have power to vary or recall the decree including power to suspend its operation for the period when payments under the earnings transfer order are made to the ordinary creditor.

27. (1) An earnings transfer order would be a more appropriate mode of diligence than an extended arrestment to enforce payment of criminal fines. (2) In fixing the levels of the periodic amounts deductible from earnings in an earnings transfer order enforcing a fine, the court should have regard to, but should not necessarily be bound by, the criteria applicable in civil cases. (3) As in a civil case the offender should be liable for diligence expenses and the sums attached by an earnings transfer order in a criminal case should include the fees and outlays payable to sheriff officers for serving the steps in the diligence process. (4) It is suggested that the above-mentioned proposals should apply to the enforcement of other debts arising out of criminal proceedings (eg caution, and compensation under orders against convicted persons such as are provided for in the Criminal Justice (Scotland) Bill currently before Parliament).
- 3.21

(2) Obtaining an earnings transfer order

28. (1) The court might be given a residual power to make an earnings transfer order of its own motion, but should not have a discretion to refuse to make an order if the application for the order is competent, nor should it have power to delay the operation of an order. (2) As in
- 3.27

the case of extended arrestments, earnings transfer orders should only be available to attach the earnings of individuals.

29. Jurisdiction to make earnings transfer orders should be conferred on the sheriff courts whether or not the related decree was pronounced by the sheriff court or Court of Session. 3.28
30. (1) The rules on jurisdiction to entertain applications for earnings transfer orders should be designed to ensure that one court has exclusive control over every order affecting the pay of a particular debtor. (2) It is suggested that the sheriff court of the district in which the debtor is resident should normally have jurisdiction. (3) An earnings transfer order should bind the debtor's employer without the need for a warrant of concurrence if his place of business is in Scotland notwithstanding that the court making the order does not otherwise have jurisdiction over him. (4) It is for consideration whether the sheriff clerk should be required to keep an index of the names of debtors resident in his court district who are subject to earnings transfer orders to help prevent multiple orders and possibly to assist credit rating enquiries. 3.34
31. (1) Views are invited on the most appropriate method of calculating the deductions to be made from a debtor's earnings in pursuance of an earnings transfer order. In particular, should the amount of the deductions be set by reference to statutory rules or be fixed by the court in its discretion? (2) If the 3.46

deductions are to be fixed by judicial discretion, then it is suggested that (following the pattern of attachment of earnings orders in England and Wales) an earnings transfer order should set a "protected earnings rate" (being the minimum amount which the debtor retains from his earnings) and a "normal deduction rate" (being the amount deducted from the balance of net earnings left after setting aside the protected earnings rate and paid to the creditor). It is envisaged that, in fixing a normal deduction rate, the sheriff would have regard to, but would not be bound by, the supplementary benefit scale rates for the time being in force, and thus would not usually fix a deduction rate which would bring the debtor's resources below supplementary benefit scale rates.

32. (1) Views are invited on the procedure (outlined in para. 3.53) to be followed in obtaining an earnings transfer order. (2) In particular, (i) should the means enquiry be by way of a prescribed written questionnaire served on the debtor or oral examination? (ii) Should completion and return of a written questionnaire within a prescribed period be treated as a mandatory requirement on the debtor or merely as an opportunity afforded to the debtor to give at his discretion information as to his means to prevent the court from fixing too high a level of deductions from earnings? 3.55

- |   | <u>Para.</u> |
|---|--------------|
| 33. An appeal on a question of law should lie, by leave of the sheriff, against his decision disposing of an application for the making, variation or recall of an earnings transfer order, to the Court of Session, or to the sheriff principal and thereafter to the Court of Session, but no other or further appeal should be competent.  | 3.56         |
| <br>(3) <u>Operation and termination of earnings transfer orders</u>  |              |
| 34. (1) An employer should be required to remit sums deducted under an earnings transfer order to the sheriff clerk's department of the court specified in the order for disbursement to the creditor or creditors. (2) Provision should be made for giving the debtor receipts for payments into court, and to the employer on request. (3) An employer should be entitled to charge a fee similar to that proposed for extended arrestments in respect of each remittance to the court. | 3.64         |
| 35. (1) On a change of employer, an earnings transfer order should lapse only temporarily and it should be competent to re-serve it on a new employer. (2) An earnings transfer order should be variable by the court which made it on application by an interested person on a material change of circumstances. (3) The debtor, an employer   | 3.70         |



operating an earnings transfer order, and a new employer who acquires knowledge of such an order directed to a previous employer, should be under a duty to inform the court of a termination or change of employment.

36. (1) The clerks of court collecting sums due under an earnings transfer order should be under a duty to inform the employer of the time when deductions should cease. (2) An earnings transfer order should cease to have effect when the debts which it enforces have been paid. (3) Provision should be made by statutory instrument prescribing the circumstances in which the court may vary or recall an order of its own motion, eg on a termination of employment, where more than one order has been made in respect of the same debtor; where the order is superseded by a sequestration or debt arrangement scheme such as we propose in Memorandum No. 50. 3.74
37. It is suggested that breach of the duties imposed on an employer to comply with an order or on a debtor or employer to notify a change of employment, and other duties imposed on the parties in connection with an earnings transfer order, should be punishable by fixed penalties. It is for consideration whether the penalties should be imposed in a special statutory civil application to the court which made the earnings transfer order rather than in criminal proceedings. 3.75

IV Miscellaneous issues

(1) Dismissal etc of employees following diligence against earnings

38. (1) Views are invited on the question whether 4.10  
provision should be made specifically prohibiting  
an employer from dismissing an employee wholly  
or mainly on the ground of diligence against the  
employee's wages or salary. (2) If such provision  
should be made, should breach of the prohibition  
be a criminal offence or civil wrong and, if the  
latter, should the ordinary courts or industrial  
tribunals have jurisdiction to grant the employee  
a remedy?

(2) "Tracing" exempt earnings paid into bank account etc

39. (1) Views are invited on the question whether the 4.13  
prohibition of diligence against earnings on the  
dependence of an action, and the restriction on  
diligence against earnings in execution, should  
be extended so as to exempt the earnings after they  
have been paid into a bank or savings account or  
converted to some other form into which they might  
be traceable. (2) If such an extension is thought  
necessary, what rules for tracing the earnings  
should be provided, and what time-limit should  
be imposed on the exemption?

(3) Effect of debtor's sequestration on continuous diligence against earnings

40. (1) A sequestration should render ineffectual an 4.14  
extended arrestment or earnings transfer order  
attaching the bankrupt's earnings only if, and in  
so far as, the diligence has attached instalments  
of earnings accruing due within the period before  
sequestration prescribed by section 104 of the  
Bankruptcy (Scotland) Act 1913. (2) Should the

diligence be cut down by a provision on the foregoing lines only if the diligence is still in operation at the date of sequestration?

(4) Privileges for rates, taxes and Crown debts: diligence on summary warrants

- |     |  |      |
|-----|--|------|
| 41. | An extended arrestment or earnings transfer order for rates and taxes should not prevail over the exemptions from diligence.   | 4.16 |
| 42. | In a "consolidated" earnings transfer order for the recovery both of arrears of rates or taxes and of ordinary debts, no priority over the ordinary debts should be accorded to the arrears of rates or taxes.   | 4.16 |
| 43. | (1) An extended arrestment should be competent to enforce a summary warrant for the recovery of local authority rates. (2) If arrestment is made competent on summary warrants for the recovery of Inland Revenue taxes and VAT, then extended arrestment should likewise be made competent on those warrants. | 4.18 |



APPENDIX A

WAGES ARRESTMENT LIMITATION (SCOTLAND) ACT 1870 (c. 63)

Ss. 1, 2, 4, 5

An Act to limit Wages Arrestment in Scotland  
(9th August 1870)

*Act extended by Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 (c. 19), s. 2(6),  
Preamble omitted under authority of Statute Law Revision (No. 2) Act 1893 (c. 54)*

1. The wages of all labourers, farm servants, manufacturers, artificers, and workpeople shall cease to be liable to arrestment for debts...<sup>1</sup> save as herein-after excepted.

†Wages of artificers not to be liable to arrestment for debts after 1 Jan. 1871.

2. If the amount of wages earned exceeds [<sup>2</sup>four pounds per week, one-half of] any surplus above that amount shall still be liable to arrestment as before the passing of this Act, but the expense or cost of any such arrestment shall not be chargeable against the debtor unless in virtue of such arrestment the arresting creditor shall recover a sum larger than the amount of such expense or cost.

Limitation of liability of wages to arrestment.

*Power to amend s. 2 conferred by Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 (c. 19), s. 3*

3. . . . .

4. This Act shall in no way affect arrestments in virtue of decrees for alimentary allowances or payments, or for rates and taxes imposed by law; but every arrestment for such alimentary allowances or payments, or for rates and taxes imposed by law, shall set forth the nature of the debt for which it has been used, otherwise the same shall not be effectual.

Act not to affect decrees for alimentary allowances or for rates and taxes.

5. This Act may be cited as "The Wages Arrestment Limitation (Scotland) Act."

<sup>1</sup>Words repealed by Statute Law Revision (No. 2) Act 1893 (c. 54)

<sup>2</sup>Words submitted by Wages Arrestment Limitation (Amendment) (Scotland) Act 1960 (c. 21), s.1

