SCOTTISH LAW COMMISSION

MEMORANDUM NO : 48

Second Memorandum on Diligence:

Poindings And Warrant Sales.

October 1980

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

The Commission would be grateful if comments were submitted by 31 March 1981. All correspondence should be addressed to:

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SCOTTISH LAW COMMISSION

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SECOND MEMORANDUM ON DILIGENCE: POINDINGS AND WARRANT SALES

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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.

"CRU Diligence Survey"	= "The Nature and Scale of Diligence"
"CRU Warrant Sales Report"	= "Characteristics of Warrant Sales"
"CRU Court Survey"	= "Debt Recovery through the Scottish Sheriff Courts"
"Edinburgh University Debtors Survey	= "The Origins and Consequences of Default - an Examination of the Impact of Diligence"
"OPCS Defenders Survey	= "Survey of Defenders in Debt Actions in Scotland"

SCOTTISH LAW COMMISSION

Memorandum No. 48

Second Memorandum on Diligence: Poindings and Warrant Sales

PART I: PRELIMINARY: OPTIONS FOR REFORM

(1) Purpose and context of Memorandum

1.1 In this Memorandum, we present for comment and criticism a range of provisional proposals for reform of the diligence of poinding and warrant sale.[1] As we explained in our First Memorandum on Diligence, there are, in our view, broadly two main approaches to the reform of diligence -

(a) a series of reforms of the existing system designed to make the operation of the main modes of diligence (poindings and arrestments of earnings) more sensitive to the financial circumstances, and hence the social circumstances, of debtors; and

(b) the introduction of a completely new system of enforcement whereby, following a creditor's application for enforcement, the power of instructing diligence to enforce all decree debts would be taken away from the creditor and vested in a new public enforcement agency called a Court Enforcement Office, which, on the basis inter alia of an enquiry into the debtor's means would make all the relevant decisions as to whether, when, for how long and by what mode, diligence should be executed.

[1] This is the second of five Memoranda (Nos. 47 to 51) on diligence issued on the same date. The scope and thrust of these Memoranda and future Memoranda on Diligence are described in our First Memorandum on Diligence, Memorandum No. 47.

The proposals in this Memorandum presuppose that the existing system of diligence (including the system of fee-paid, independent contractor officers of court) would be retained.

(2) Consultation

1.2 In our First Memorandum, we provisionally conclude that a Court Enforcement Office should not be introduced. Whatever theoretical advantages an Enforcement Office system might have - and in Northern Ireland, such a system is in operation - we consider that, however desirable, it would be unrealistic in the present economic situation to propose for Scotland a scheme which would require very substantial and continuing outlays of public funds to replace the present system which makes minimal call upon such funds. If, however, contrary to our present view, it were decided after consultation, that such an Office should be established, the transition to the new system might take a considerable time to complete as extensive new legislation and administrative and other arrangements implementing the legislation would be needed. Legislation reforming poindings and warrant sales, however, is now recognised as urgent whether as a permanent reform, or as an interim measure pending more extensive reform. We have therefore asked that comments on this Memorandum be given to us by 31 March 1981, in advance of comments on the other four Memoranda issued along with this Memorandum.

(3) The different roles of poindings and warrant sales

1.3 As indicated in our First Memorandum, the diligence of poinding and warrant sale fulfils three distinct roles -

(a) together with other diligences, it provides a credible sanction underlying the pre-litigation and court stages of the debt recovery process, which elicit payment in a much greater number of cases than proceed to diligence;

(b) it provides a means whereby a creditor may attach and sell moveable property of the debtor and satisfy his debt in whole or in part out of the proceeds of sale; and

(c) particular steps in the diligence, (charge, poinding, intimation of warrant of sale, advertisement and sale), or the threat of the next step, may operate to put pressure on the debtor to make payment of the debt, usually by instalments out of income.

Where the 'debt-paying' value obtainable on poinding and sale of the goods is relatively high (eg in the case of a motor car or other vehicle or commercial equipment or goods), the diligence still fulfils what is historically its original role as a direct method of compulsory collection of debt out of the proceeds of a judicial sale of the goods. For this reason among others, as indicated in our First Memorandum on Diligence, demands for the abolition of poindings and warrant sales are misconceived and merely divert attention from more useful and realistic reforms.

1.4 Most poindings, however, are used to attach household goods in consumer debtors' dwellinghouses,[1] and second hand household goods normally have a debt-paying value which is either low or non-existent, with the result that the creditor risks incurring diligence expenses which he cannot recover and expenses are added to the debt. Even where the debt-paying value of the goods is relatively high, in certain instances it may not be in the interests of either the debtor or creditor to proceed to a warrant sale.[2] For these reasons, the great majority of poindings and warrant sales are used as a spur to informal payment arrangements, usually for payment by instalments out of social security or other current income. In short, poindings are in form a direct diligence against goods but operate in fact most often as an indirect diligence against income.

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[1] The CRU Diligence Survey, Table 1, shows that 83% of poindings were used against 'personal' debtors, ie individuals or married couples without apparent business connections.

[2] Eg in commercial cases, a warrant sale or its advertisement may damage the debtor's business or otherwise lessen the capacity of the debtor to pay the debt: for an example, see City Bakeries Ltd v. S & S Snack Bars and Restaurants Ltd 1979 S.L.T. (Sh.Ct.) 28.

(4) Main defects in poindings and warrant sales procedures

1.5 If a consensus is to be reached as to the best approach to reform, then it is essential that a broad measure of agreement should also be reached on what are the main defects in the operation of the diligence. We would summarise these as follows.

1.6 First, a number of specific criticisms of the diligence have been made, including the following -

(a) that the existing exemptions of household goods from the diligence do not cover all goods reasonably necessary for subsistence or maintaining a clean and decent home;

(b) that the resale value of household goods and other consumer durables is generally low and difficult to appraise, a fact which leads to allegations that officers of court undervalue goods when fixing an upset (or minimum) price for their sale;

(c) that advertisements of warrant sale in the debtor's dwellinghouse publicising his indebtedness cause undue humilation and embarrassment; and

(d) that, because the diligence is labour-intensive, in the case of debts of small amount, the expense of the diligence relative to the amount of the debt is often disproportionately high.

In addition, many of the forms and procedures used in the diligence are in need of modernisation: in particular, many of the forms served on debtors require to be made more intelligible.

1.7 Second, since the creditor or his collection agent or solicitor controls the use of the diligence, there is no adequate legal restraint on the 'blind' or oppressive use of the diligence.[1]

[1] Until recently the creditor's powers were generally thought to be well nigh absolute and not subject to judicial restraints, but in South of Scotland Electricity Board v. Carlyle 1980 S.L.T. (Sh.Ct.) 98, it was held that the sheriff possesses certain discretionary powers to refuse warrant of sale on grounds of expediency: see paras. 5.4 and 5.24 et seq below.

From the research undertaken on our behalf,[1] it appears that the majority of debtors subjected to the diligence belong to the lowest income groups; many are unemployed or intermittently employed, depend for their subsistence on social security or intermittent earnings of small amount; live on the margin of the statutory level of subsistence (as defined for supplementary benefit purposes); are unable to pay the debt out of savings (for they have none); and their only attachable property consists of some household goods of small value. It also appears that the diligence is often used oppressively in this situation in the sense that the debtors are induced, under threat of the diligence, to enter into informal arrangements for payment which they are unable to comply with, normally because the levels of instalments fixed by the arrangements are unreasonably high, having regard to the debtors' financial circumstances.

1.8 At the other extreme, a small minority of debtors subjected to the diligence are able to pay the debt, own attachable moveable goods with a reasonably high debt-paying value, but simply refuse or delay in payment of the debt. Other debtors subjected to diligence fall between these two extremes, the majority falling at the lower end of the spectrum. Moreover, some multiple debtors can pay some debts but not others.

1.9 The problem therefore is how to define, identify and safeguard those classes of debtors who merit protection and to distinguish them from those who do not.

1.10 Before discussing the possible solutions to this problem, a preliminary point arises. It might be argued that the exemption from the diligence of 'necessary' household goods and clothing (at any rate if it covered all goods

[1] See O.P.C.S. Defenders Survey and Edinburgh University Debtors Survey.

necessary for subsistence and for maintaining a clean and decent home) provides an adequate safeguard. On this view, a debtor can and should obtain protection from poinding by selling his non-exempt (and ex hypothesi non-essential) goods to satisfy the debt in whole or part out of the proceeds of sale: and (so the argument runs) a debtor who does not realise his attachable goods has only himself to blame if the creditor poinds them.

1.11 On the other hand, even if the existing exemption were widened to cover all 'necessary' household goods, most debtors would retain some 'non-essential' goods which, though not necessary for subsistence, are part of the amenities of almost every home. Few debtors unable to pay the debt out of income or savings think of selling their household goods by private bargain, and to expect them to do so is to be unrealistic.

(5) Options in reforming poindings and warrant sales

1.12 We have considered several possible solutions.

(a) One possible option: special application for leave to poind and mandatory means enquiry at commencement of diligence.

1.13 The first option is to provide for a mandatory means enquiry at the commencement of the diligence. A means enquiry form might be served on the debtor along with the charge which the debtor would be required to return duly completed to the court if he did not intend to make payment of the debt in full within the days of charge. It would be for consideration whether the debtor would be required to attend the court for examination as to his means in every case or only where he failed to return the completed form. The creditor would not be entitled to instruct a poinding without leave of the court, and in deciding whether to grant leave to poind, the court would have a discretion exercisable in accordance with statutory guidelines. The court might have power to refuse leave if the debtor had arrestable earnings, and power to make an instalment decree in lieu of an open decree, which might in the court's discretion be secured by an order giving leave to poind.

1.14 The objections to requiring a preliminary means test (which are discussed also in our First Memorandum in the context of a Court Enforcement Office) consist of or include the following -

(a) There would be difficulty in securing participation by debtors, viz. in returning the means enquiry form or in appearing in court for examination as to means, and also difficulty in providing an effective sanction for failure to disclose means; fines or imprisonment seem equally inappropriate.[1]

(b) There would be a risk of false returns and difficulty in verifying the returns.

(c) The proposal takes insufficient account of the 'funnel' or 'filter' effect of the diligence. Having regard to the fact that there are about 46,000 charges and 20,000 poindings every year,[2] a means enquiry would be held in a very large number of cases which would not proceed to a poinding anyway.

(d) In principle, active participation by a debtor in civil debt recovery proceedings against him is, and ought to be, treated as a right and not a duty.

1.15 It is thus ironical that the introduction of a preliminary means enquiry to avoid unnecessary diligence is self-defeating since it adds more elaborate procedures to the existing procedures and requires them unnecessarily in too many cases which would escape poinding anyway. Since there are only about 6,000 warrants of sale, 3,000 advertisements

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[1] It has been suggested that a fine of £10 would usually suffice to ensure the debtor's participation. But the average decree debt is several times that amount: see CRU Court Survey (1980).

[2] CRU Diligence Survey (1980).

and under 300 sales per annum, it seems likely that if a mandatory means enquiry is to be held at all, it would be much more cost-effective to introduce it at a later stage (probably the application for warrant of sale). In any event, it is arguable that the earlier stages of the diligence have a less harsh social impact than the later stages.

1.16 In our view, there are alternative measures which we think would be more satisfactory than a mandatory means enquiry. We therefore provisionally reject this solution.

(b) Second possible option: exemption from poinding of all goods in debtors' dwellings

1.17 If, in addition to the existing exemption for 'necessary' clothing and furniture and plenishings, all moveable goods in a debtor's dwelling were made exempt from poinding, then the main criticisms made of poindings and warrant sales would be met. Since the only attachable property owned by most debtors subjected to the diligence are goods in their dwellings, such an amendment of the law would be tantamount to the abolition of poindings in all, or almost all, the consumer debtor cases where it operates most harshly. While it appears that no other country gives a legal exemption of this kind, there are countries or 'law districts' (eg Northern Ireland and some Canadian provinces) in which the enforcement officers give de facto exemptions of household goods partly on social grounds and partly because of the disproportionately high expense of enforcement against goods.[1]

1.18 On the other hand, if goods in debtors' dwellings could not be poinded, then there would often be no other means of putting many debtors under effective pressure to pay their debts - including not only unemployed debtors but also some self-employed debtors and employed debtors whose employer

[1] See para. 4.16 below and Appendix B.

is unknown to the creditor or officer. Moreover, there would be a risk that people would purchase household goods without any intention of paying for them and that some experienced debtors would put their money in household goods. Furthermore, the solution is arbitrary and lacking in principle: the creditor may be in more straitened circumstances than the debtor and the household goods may be luxury goods, works of art, antiques or other goods with a high debt-paying value. We conclude therefore that, as in England and Wales, enforcement against household and other goods in a debtor's dwelling should continue to be competent inter alia as a spur to instalment arrangements.

(c) Preferred options

(i) Court's power to refuse warrant of sale; other reforms

1.19 The solution which we provisionally favour would introduce a number of safeguards for debtors including the following:

(1) the sheriff would be empowered to refuse the creditor's application for warrant of sale on the ground that further proceedings in the diligence would be harsh and unconscionable;[1]

(2) the court's control on the regularity of the proceedings would be retained and strengthened;[2]

(3) longer and more flexible time-limits would be introduced to allow arrangements for payment of instalments of smaller and more realistic amounts to have effect;[3]

(4) the exemptions from poindings of household goods would be increased to cover all items 'necessary' for subsistence and for maintaining a clean and decent home;[4]

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[1]Paras. 5.24 - 5.32.

[2]Paras. 4.70 and 5.57 et seq.

[3]Paras. 5.8 - 5.22.

[4]Paras. 4.13 - 4.41.

(5) normally the warrant sale would take place in a public auction room rather than the debtor's dwelling so that an advertisement publicising his indebtedness would no longer appear and the diligence would become so far as practicable, a private matter not disclosed to the community. Further, the goods sold under warrant would be seen to fetch a fair market price, whatever that might be;[1]

(6) sales in auction rooms should to a large extent meet the criticisms of low valuations and the debtor would continue to be entitled to buy back the goods at their appraised values;[2]

(7) where poinded goods were adjudged to the poinding creditor in default of sale and not collected by him, it would no longer be possible for him to use the threat of collection as a further inducement to payment;[3] and

(8) provision would be made modernising forms and procedures and rendering documents served on debtors more intelligible.[4]

In addition, a wide variety of technical reforms would be made to bring the law on the diligence up to date. Table A shows the general effect of our proposed changes in procedure and Table B summarises the forms which would be used.[5]

(ii) Debtor's application for sist of diligence, instalment decree at enforcement stage and possibly declarator of unenforceability.

1.20 In addition to these reforms of the diligence procedure, we suggest that a case can be made for giving the debtor a right to apply at any time before warrant of sale to the sheriff

[1] Paras. 5.35 - 5.42.

[2] Paras. 4.57 - 4.60.

[3] Paras. 5.55 - 5.56.

[4] Eg paras. 3.19-21; 4.47; 5.34.

[5] See pages 12-15 below.

for an order substituting, for an open decree, an instalment decree such as can be granted at the stage of a summary cause court action and at the same time sisting (viz. delaying or postponing) diligence under the decree until default in payment of instalments.[1] The sheriff would be empowered to grant the order (a) if the debtor was unable to pay the debt in full and (b) if his only property attachable for debt was property (such as moveable goods in his house of small value) which it would be unreasonable to require him to realise to satisfy the debt. It would be essential to make the procedure as simple and inexpensive to the parties as possible. We note that the county courts in England and Wales possess general powers to stay enforcement proceedings on the ground of inability to pay and to substitute instalment orders.[2] The Payne Report observed that these powers constitute a 'satisfactory code'[3] and that there is "at each stage power in the court to protect the debtor against the hardship of execution if he is genuinely unable to pay the debt or any instalments ordered."[4]

1.21 As against this, it may be argued that debtors should apply for an instalment decree at the litigation stage and have only themselves to blame if they do not avail themselves of that opportunity. The advantages of flexibility have

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[1] Under the present law, in the case of a decree in absence, provision is made for 'reponing' debtors (ie allowing them to defend the action though decree has been granted) at the sheriff's discretion in an ordinary action or as of right in a summary cause action (Summary Cause Rules rule 19). But the procedure is designed to allow the debtor to put forward a defence and we understand that, in the case of summary cause actions, it is generally accepted that the reponing procedure cannot be used for the purpose of enabling the sheriff to substitute an instalment decree for an open decree.

[2] County Courts Act 1959, ss. 99, 121, 123.

[3] Cmnd. 3909 (1969) para. 491.

[4] Ibid., para. 495.

TABLE A

STAGES AND TIME-LIMITS IN CHARGE, POINDING AND WARRANT SALE FOLLOWING DECREE FOR PAYMENT

EXISTING PROCEDURE			PROPOSED PROCEDURE		
Stages	Period	Remarks	Stages	Period	Remarks
Service of charge	20 years after extract decree issued	long negative prescription	Service of charge	2 years after extract decree issued	After 2 years creditor must apply to court for leave to charge and poind
Days of charge	Periods varying from 6 to 15 days: 14 days for summary cause diligence		Days of charge	14 days in all cases	Standardised
Poinding[1]	Summary cause, 1 year after service of charge: other cases, up to 3 or 4 years at common law	In summary causes, period of 1 year renewable by service of new charge	Poinding[1]	3 years after expiry of days of charge	After 3 years creditor must apply to court for leave to poind and to serve a second charge at his own expense
Report to court of poinding	8 days after poinding		Report to court of poinding	14 days after poinding	
Application for warrant of sale	Within 6 months after poinding (Practice Notes of sheriffs principal)	6 months period may be extended in terms of Practice Notes. Second warrants of sale not normally allowed	Application for warrant of sale	Within 1 year after poinding	1 year period may be extended on application within that period.

PROCEDURE AFTER WARRANT OF SALE				[HOUSEHOLD GOODS ONLY](2)	
Intimation of warrant of sale	Not less than 6 days before date fixed by the warrant for the sale	Normally served within few days after warrant of sale granted	Intimation of warrant of sale (notice of time of removal of goods and time and place of auction)	At least 7 days before removal	On one occasion only, arrangements for sale may be cancelled before removal of goods and duration of poinding extended by prescribed period of (say) 6 months from lodging in court of report of cancellation
Advertisement of sale	Within 8 to 20 days before date fixed by the warrant for the sale		Removal of goods to auction room	No specific time limit	
Sale	Must follow poinding 'without undue delay' as implied by Debtors (Scotland) Act 1838, ss.23 to 28: time fixed by warrant of sale		Sale	Within period after warrant (of say about 2 months) prescribed by act of sederunt or possibly period fixed for district by Practice Note	Where sale not in auction room, time of sale fixed by warrant
Report to court of sale	Within 8 days after the date of sale		Report to court of sale or other proceedings	Within 14 days of sale, or, if sale finally cancelled, not later than the last date on which the sale could take place	

(1) Second poindings of goods in same premises not normally allowed.

(2) In the case of poindings of goods other than goods in the debtor's domestic premises, it is proposed that the same time limits might apply as under existing law with few modifications.

TABLE B

FORMS TO BE USED IN CONNECTION WITH POINDINGS AND WARRANT SALES: (PROPOSED PROCEDURE)

	Served etc on debtor or possessor: normal mode of service or intimation*	Lodged in court	Other	Proposition number
[Warrant to charge and poind]				
CHARGE				
Charge	Form 1 (HS)			11
Execution of charge		Form 2 (lodged with poinding schedule)		
POINDING				
Poinding schedule and notice of entitlement to appeal against poinding	Form 3 (delivered by officer)			[27]
Form of appeal against poinding		Form 4		-
Intimation to officer			Form 4A (SC)	-
Report and execution of poinding		Form 5		32
Application for extension of duration of poinding		Form 6		36
Intimation to debtor	Form 6A(SC)			
WARRANT OF SALE				
Application for warrant of sale		Form 7		38
Intimation to debtor	Form 7A(SC)			38
Intimation of sheriff's refusal to grant warrant of sale (or to receive report of poinding)	Form 8 (SC)			38
Intimation of grant of warrant of sale and Notice of date and time of removal of goods and time and place of auction	Form 9 (HS)			37

*N.B. "HS" = Hand service (personal or other mode of service requiring visit by officer)
"PS" = postal service
"SC" = intimation by sheriff clerk

FORMS TO BE USED IN CONNECTION WITH POINDINGS ETC (Cont'd)

	Served etc on debtor or possessor: normal mode of service or intimation*	Lodged in court	Other	Proposition number
THE SALE AND AFTER				
Report by creditor or officer of cancellation of arrangements for sale		Form 10		37
Report of sale by auctioneer to officer			Form 11	46
Report by officer to court of sale or other proceedings		Form 12		46 & 48
Notice that goods have been sold (or adjudged in default of sale)	Form 13(SC)			37 & 46
MISCELLANEOUS				
Application for instalment decree sisting diligence and/or declarator of unenforceability		Form 14		1
Intimated to creditor			Form 14A (SC)	
Application by third party for withdrawal of goods from poinding		Form 15		52
Intimation to creditor			Form 15A (PS)	

*N.B. "HS" = hand service (personal or other mode of service requiring visit by officer)
"PS" = postal service
"SC" = intimation by sheriff clerk

to be weighed against the advantages of finality: under the present Scottish system the parties at least know or can know where they stand. Nevertheless in our view, a power on the lines proposed is needed.

1.22 On the basis of a Northern Ireland precedent,[1] it is for consideration whether, in addition to the foregoing powers, the court should also have power on the debtor's application to make an order declaring that the debt due under the decree is unenforceable in whole or in part where it appears that the debtor is unable to pay the debt in whole or in part in reasonable instalments within a reasonable period (say two or three years) and that his only attachable property was property which it would be unreasonable to require him to realise. The creditor would be entitled to have the declarator recalled on a change in the debtor's circumstances. The declarator would be deemed to constitute notour bankruptcy thereby entitling any creditor to apply for the debtor's sequestration.[2] The power to grant a declarator of partial unenforceability would in effect enable the court to compel the creditor to accept a composition of the debt and it would be possible to apply for a combined instalment decree and declarator of partial unenforceability.

1.23 While we have discussed these new powers in the context of the reform of poindings and warrant sales, it should be observed that a sist of diligence and a declarator of unenforceability would preclude the execution by the same creditor of other modes of diligence to enforce the decree in question unless and until the sist or declarator was recalled.

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[1] Judgments (Enforcement) Act (Northern Ireland) 1969, s.15.

[2] "Notour bankruptcy" originally denoted insolvency which was publicly acknowledged but the requirements for the constitution of notour bankruptcy are now defined by the Bankruptcy (Scotland) Act 1913, s.5: these requirements include insolvency concurring with failure to pay a debt within the days of charge, or concurring with a poinding for recovery of rates or taxes.

1.24 It might be thought that a mandatory means test at the commencement of the diligence would be preferable as being more humane to debtors. If we are right, however, in arguing that fines or imprisonment would be an inappropriate penalty for failure to co-operate in a means enquiry, then the most obvious sanction for such a failure would be to bar the debtor from applying for an instalment decree and sist of diligence or a declarator of unenforceability and to allow diligence to proceed. This solution would, in our view, be less humane and satisfactory from the standpoint of debtors than our proposal to enable debtors to apply, up to and including the stage of the application for warrant of sale, for one or more of the proposed remedies precluding diligence and giving the debtor time to pay.

1.25 We recognise that many debtors might fail to make application for an instalment decree or a sist of diligence or a declarator of unenforceability, but on the other hand, the fact that a debtor could make such an application, if so advised, should strengthen his negotiating position where a creditor or debt collecting agency was pressing him for payment by instalments at a level which he could not meet. We would also hope that our suggestions for the provision of information to consumer debtors in our Memorandum No. 47, Part II (eg leaflets enclosed with the summons and possibly intimation of the decree for payment) would assist debtors in need to take the initiative. In our view, these reforms would go far to making the present system more sensitive to the financial circumstances of debtors and repnesent a major change in the law.

1.26 Accordingly we invite views on the following provisional conclusions and proposals: (1) it is considered that the protection of debtors from poindings should not take the form of either (a) a creditor's application for leave to poind and

a mandatory enquiry into the debtor's means at the commencement of the diligence, nor (b) and exemption from poinding of all goods in the debtor's dwelling. (2) On the other hand a debtor should be entitled, at any stage after an open decree for payment has been pronounced against him, to apply to the court for an order both -

(i) substituting an instalment decree for the open decree; and

(ii) sisting further proceedings in any diligence under the decree commenced against him, or precluding the commencement of any such diligence, unless and until he defaults in payment under the instalment decree by allowing a prescribed number of instalments to remain in arrears.

The court would grant the order if it was satisfied that -

(a) the debtor was unable to pay the debt due under the decree (including the diligence expenses for which the debtor was liable) in full forthwith but could pay the debt by instalments; and

(b) his only property attachable for debt was property which it would be unreasonable at that time to require him to realise to satisfy the debt.

(3) Where the sheriff has granted an instalment decree and sisted diligence following a poinding, it is for consideration whether the sheriff should have power to extend the duration of the poinding as security for payment under the decree. (4) Should the present default provision affecting summary cause instalment decrees (which are converted to open decrees where the debtor allows one instalment to remain in arrears till the next instalment falls due) be adopted without modification or should it be modified so that the instalment decree subsists until the debtor defaults in three (or even four) instalments? (5) It is for consideration whether the court should also be empowered to make an order declaring a debt due under a decree to be unenforceable in whole or in part where the court is satisfied that -

(a) the debtor is unable to pay the debt in whole or in part within a reasonable period (of say two or three years) from the time of the application; and

(b) his only property attachable for debt is property which it would be unreasonable at that time to require him to realise to satisfy the debt out of the proceeds of sale.

Such a declarator should constitute notour bankruptcy.

(6) If either or both of the proposed types of order were introduced, it is suggested that -

(a) title to apply for each type of order would only be conceded to individuals and not to corporate bodies, partnerships and unincorporated associations;

(b) having regard to the new powers proposed below enabling the sheriff to refuse warrant of sale and to make an instalment decree or other orders in lieu of such a warrant, the declarator and sist of diligence should not affect a diligence of poinding where the sheriff had already granted warrant of sale of the poinded goods; and

(c) both types of order should be subject to variation or recall on a material change in the debtor's circumstances.

(7) Both types of order should be available in respect of sheriff court summary cause decrees for payment. Views are invited on the question whether the orders should also be available in respect of decrees in sheriff court ordinary actions, and in Court of Session actions, for payment.

(8) The procedure in applications for the orders should be kept as simple and inexpensive to the parties as possible. In particular, the procedure might involve -

(a) the use of prescribed means enquiry forms, and written offers to pay by instalments;

(b) intimation of the application to the creditor by the court rather than the applicant;

(c) examination in private by the sheriff, or the sheriff clerk, of the debtor as to his means; and

(d) non-legal representation of the parties where representation is appropriate.

(Proposition 1).

(6) The problem of expense and other matters

1.27 The expense of the diligence presents difficult problems, which are discussed in more detail in our First Memorandum. The diligence is labour-intensive and the fees chargeable for each step can appear disproportionately high in the case of debts of small amount. Creditors must not be deterred by expense from resort to the diligence. Liberalising measures can have the paradoxical effect of increasing the expense for which the debtor is ultimately liable.

1.28 Our proposals below would achieve some reduction in the expense of execution of charges,[1] but the expense of removal to a sale room would inflate expenses in the smaller number of cases which proceed to those stages.

1.29 So far as the diligence involves court procedure, we think that expense to the parties would be minimised by the use of prescribed forms and by requiring the sheriff clerk to intimate particular steps in procedure. There are precedents for this in appeals by debtors against poindings where the sheriff clerk intimates the appeal to the officer of court,[2] and in at least one sheriff court, the sheriff clerk informs the debtor by informal letter of an application for

[1] See our proposal that witness would not be required to the execution of a summary cause charge (para. 3.15).

[2] Act of Sederunt (Appeals against Poindings) 1973, rule 6.

warrant of sale and gives the debtor an opportunuty to object to the valuation. There are other precedents.[1] On this view, the sheriff clerk would -

(a) intimate to the creditor a debtor's application for an instalment decree sisting diligence and/ or declarator of unenforceability;

(b) intimate to the officer of court a debtor's appeal against poinding;

(c) intimate to the debtor a creditor's application for extension of the duration of the poinding;

(d) intimate to the debtor a creditor's application for warrant of sale;

(e) intimate to the creditor the debtor's objections to such an application;

(f) intimate to the debtor that the goods have been sold or adjudged in default of sale.

While these functions would have financial and manpower implications for the Scottish Court Service, the expense would be less than a system of salaried officers.

1.30 There is some evidence that creditors sometimes proceed with the diligence notwithstanding that the debtor has entered into an arrangement for payment by instalments and is complying with that arrangement. This problem is discussed in Memorandum No. 47.

1.31 We now turn to examine each of the main stages of the diligence beginning with the warrant to charge and poind.

[1] Sheriff clerks intimate applications for registration of clubs under the Licensing (Scotland) Act 1976 to various authorities, and also make various intimations under the Maintenance Orders (Reciprocal Enforcement) Act 1972.

PART II: WARRANT TO CHARGE AND POIND

2.1 It is a general rule that the diligence cannot be executed unless a warrant to charge and poind has been granted by a competent court. The main question arising in this connection is whether a warrant should be competent for poinding a debtor's goods in security of a debt claimed in a debt action, but in addition, a few technical questions arise on which views are invited.

(1) No poinding on the dependence of an action

2.2 Warrants to charge and poind are only granted in execution of extract decrees or liquid documents of debt,[1] and it is thus incompetent to charge and poind on the dependence of an action or in security of a debt payable in the future.

2.3 As the McKechnie Committee recognised,[2] it seems at first sight difficult to justify a rule whereby arrestment on the dependence is allowed but poinding on the dependence is incompetent. However that may be, in practice arrestment is generally a quicker, cleaner and cheaper diligence and less often attended by unpleasant consequences; and it has been traditional in Scotland to use an arrestment rather than a poinding as a diligence of first resort. We do not think that diligence on the dependence or indeed poindings should be made more widely available than is necessary. We therefore propose that the diligence of poinding should not be automatically available on the dependence of a court action, nor in security of debts payable in the future. (Proposition 2).

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[1] See eg as to decrees Debtors (Scotland) Act 1838, Schs. 1 and 6; Sheriff Courts (Scotland) Extracts Act 1892; Summary Cause Rules, rule 89(2) and Forms U1-U5, U7-U14; as to extract registered deeds, Writs Execution (Scotland) Act 1877; as to protests of bills of exchange, Bills of Exchange Act 1681 and Inland Bills Act 1696.

[2] Report of the Departmental Committee on Diligence (1958; Cmnd. 456) paras. 48-49.

2.4 We note that the Maxwell Report on Jurisdiction and Enforcement proposed that the Court of Session should have a discretionary power to make an order securing inter alia moveable property in the hands of a defender on the dependence of an action in the Court of Session.[1] The order would be enforced in Scotland by the ordinary procedure of poinding and would thus be a type of poinding on the dependence which, on final judgment, would be converted into a poinding in execution followed ultimately by warrant of sale. This recommendation appears to be a response to European cases which suggest that the Scottish courts would be required by Community law to give effect to comparable orders of Courts in EEC Member States made on the dependence of actions in those courts.

2.5 The security order recommended by the Maxwell Report would not be automatically available to a pursuer as of right but only if the Court of Session (which alone could make the proposed new order) considered it reasonable to grant security.[2] In view of its discretionary character, the order would not be open to the same objection as a poinding on the dependence and we do not regard the proposal as inconsistent with Proposition 2.

(2) Styles of warrant

2.6 The manner in which statutory rules prescribe the styles of warrant to charge and poind, and regulate their legal effect is, for purely historical reasons, rather confusing. Long forms of warrant for use in extract decrees were introduced in 1838 and made equivalent to letters of horning

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[1] Report of the Scottish Committee on Jurisdiction and Enforcement (1980) H.M.S.O., Edinburgh, paras. 14.8-14.25: (chairman: the Hon. Lord Maxwell).

[2] See ibid., para. 14.20, sub-para. (c).

and poinding or letters of poinding;[1] and subsequently short forms were introduced superseding (but not abolishing) the long forms.[2] We suggest that the statutory provisions prescribing the style of warrants to charge and poind and regulating their legal effect should be uniform and, to simplify the law, the long forms of warrant should be abolished. (Proposition 3).

(3) Letters of horning and poinding and letters of poinding

2.7 Letters of horning and poinding and letters of poinding remain competent and it has been represented to us that the procedure is archaic and should be abolished. Though applications for the grant of letters are rare,[3] resort to the procedure is necessary (1) where there has been an inter vivos or mortis causa assignation or transmission of the debt to a new creditor after decree but before extract or after a deed is signed but before it has been registered for execution, or (2) where extrinsic evidence is needed to identify the creditor.[4] It may be, however, that a simpler procedure could be introduced on the lines of the existing procedure whereby the executor or assignee of the creditor in an extract decree or bond can deduce title and acquire right to the decree or bond by a simple minute endorsed on the document and produced to the court along with the relevant link in title.[5] Such a solution would also avoid

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[1] Debtors (Scotland) Act 1838 s.1 (now repealed) and s.9; and Schs. 1 and 6.

[2] R.C.64 and 65; Sheriff Courts (Scotland) Extracts Act 1892, s.7(1) and Sch., Form 1; Summary Cause Rules, rule 89(2) and Forms U1-U5, U7-U14.

[3] We understand that there have been no applications for letters of poinding within the last 24 years.

[4] Graham Stewart, Diligence, pp. 284-5.

[5] See Debtors (Scotland) Act 1838, s.7 and Sch. 5; s.12 and Sch. 9.

questions arising as to whether the statutory procedure or letters of horning were the appropriate method of deducing title to the warrant for diligence.[1]

2.8 To elicit views on this matter we suggest that applications for letters of horning and poinding and for letters of poinding should be abolished, and the simplified procedure by minute under sections 7 and 12 of the Debtors (Scotland) Act 1838 (diligence at the instance of a person acquiring right to an extract decree or bond) should be made available to persons acquiring right to unextracted decrees or to bonds registrable for execution. (Proposition 4).[2]

(4) Abolition of warrants of concurrence

2.9 Before a charge on a sheriff court ordinary action decree can be served outside the sheriffdom in which the decree was granted, a warrant of concurrence must be obtained from the sheriff court of the place of execution or from the Court of Session.[3] This formal requirement is not needed for charge and poinding on summary cause decrees,[4] nor where the place of execution is in a different court district of the same sheriffdom,[5] nor in connection with arrestments on the dependence.[6]

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[1] See Mitchell v. St Mungo Lodge 1916 S.C.689 in which the judges seem to have held different opinions on the question whether the trustees of a Friendly Society required to deduce title to an extract bond by letters of horning or by the procedure under sections 7 and 12 of the Debtors (Scotland) Act 1838.

[2] The abolition by statute of the old forms of letters would have to take account of the fact that warrants in extract decrees, including decrees of registration, are declared by the 1838 Act to have the same legal effect as the old forms, but this difficulty could be overcome.

[3] Debtors (Scotland) Act 1838, s.13.

[4] Summary Cause Rules, rule 11.

[5] Practice Notes of the Sheriffs Principal.

[6] Sheriff Court Rules, rule 10: warrants of concurrence are still needed in connection with arrestments in execution, and we revert to this in a later Memorandum.

2.10 We agree with the McKechnie Report[1] and Grant Report[2] that the requirement is an unnecessary formality and accordingly we propose that it should be competent to serve a charge and to execute a poinding on a sheriff court ordinary action decree in a different sheriffdom without the need for a warrant of concurrence. (Proposition 5)

[1] Op. cit. para. 143.

[2] Report of the Departmental Committee on The Sheriff Court (1967) Cmnd. 3248, para. 648.

PART III: CHARGING THE DEBTOR TO PAY

3.1 The charge is a formal demand in writing served by an officer of court on the debtor requiring him to pay the sum due under the decree within a specified time, in default of which his goods may be poinded. Strictly speaking the charge is a preliminary to the diligence rather than a stage of the diligence, and, as such might conceivably be dispensed with. In this Part, therefore, we seek views on the question whether it should be retained or abolished, and, if retained, what improvements should be made in the form, manner of service and effect of charges.

(1) Retention of the procedure of serving a charge and mode of service

3.2 The service of a charge has been a necessary preliminary to poinding since 1669[1] except that, under the small debt procedure, a charge was unnecessary if the defender had been personally present in court when the decree was granted against him.[2] The McKechnie Report recommended that, even in these circumstances, a charge should be given prior to poinding since they doubted whether most debtors would

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[1] Originally poinding was competent without the need for a prior charge. By custom, the debtor was given 15 days in which to implement the decree (Graham Stewart, op. cit., p.337). The Poinding Act 1669 which is still in force, provides that poinders for 'personal' debts (ie debts not secured over heritable property) must first charge and wait for the days of charge to expire before poinding under pain of punishment for spuilzie (illegal interference with moveable goods) and nullity of their diligence. The Debtors (Scotland) Act 1838, s.4 further provides that "on the expiration of the days of charge it shall be lawful by virtue of such extract [decree of the Court of Session] to poind the moveable effects of the debtor in payment of the sums of money therein mentioned". Similar provision for sheriff court extracts is made by section 9 of the 1838 Act.

[2] Small Debt (Scotland) Act 1837, s.13.

realise the consequence of the grant of decree.[1] Under the present law in consonance with this recommendation, a charge must be given in summary cause diligence whether or not the defender was present when decree was granted.[2]

3.3 It is for consideration whether the service of a charge should be retained as a necessary preliminary to poinding. There are two arguments favouring abolition of which the first is the reduction in expense. The expense of a charge, where three miles' travelling is involved, ranges between £3.12 and £6.00 depending on the type of decree and whether a solicitor is involved or not.[3] In rural areas, the expense of the charge can easily exceed £10.00.

3.4 The other main argument in favour of abolition is that a charge is not an essential step in the procedure as summary warrant poindings show. It may be alleged that debtors should be aware that decree has been pronounced against them.

3.5 We think, however, that the service of charges should be retained for the following reasons. First, although the effect of a poinding is merely to prohibit the debtor from disposing of his goods, we think that the debtor should receive a formal warning before his premises are entered and his goods poinded. The charge not only warns the debtor

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[1] Op. cit., para. 157.

[2] Summary Cause Rules, rule 91(1); Sheriff Courts (Scotland) Extracts Act 1892, s.7(1).

[3] For summary causes, the sheriff officer's fee for service of a charge is £1.80 together with mileage charges of 44p per mile (one way only). In addition the creditor's solicitor is entitled to a fee of £1.30 if he instructs the officer to charge. For decrees of the sheriff's ordinary court or of the Court of Session, the fee is £3.68 plus mileage charges as above: see Act of Sederunt (Fees of Sheriff Officers) 1978; Act of Sederunt (Fees of Messengers-at-Arms) 1978; Act of Sederunt (Solicitors' Fees) 1978 as amended.

of the possibility that continued default may result in a poinding but is also designed to ensure that the debtor is informed, before a poinding takes place, of the existence of the decree against him: the Edinburgh University Debtors Survey shows that the charge plays an important role in informing the debtor of the decree's existence. In our First Memorandum, we discuss whether the court should intimate the decree to the debtor,[1] but we envisage that this would supplement rather than replace the service of a charge.

3.6 Second, as indicated elsewhere, settlements of the debt, or decisions by creditors to abandon pursuit, are often made after a charge has been served and before a poinding has been executed.[2] The charge is thus a valuable means of eliciting payment in full or by instalments or of preventing further diligence.

3.7 Moreover, if our proposals in Proposition 1 are accepted, then the charge could be used as a means of informing the debtor of his right to apply for an instalment decree and a declarator of unenforceability. We revert to this below (Proposition 10(3), para. 3.23). For these reasons, we provisionally consider that charges should be retained as a necessary preliminary to poinding.

3.8 The next question is whether provision should be made to ensure that charges are served by recorded delivery post rather than by 'hand service' (that is, service on the debtor personally or by one of the substitute modes of service requiring the officer to visit the debtor's dwelling

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[1] Memorandum No. 47, Part II.

[2] See CRU Diligence Survey which estimates that in 1978 there were 46,000 charges and only 20,000 poindings.

or place of business).[1] Generally a charge must be served by an officer of court in the presence of a witness (who is usually a member of the officer's staff travelling with him). In summary cause diligence, the service of a charge by recorded delivery or registered post is allowed where the place of execution is (i) in any of the islands of Scotland or in any of the 'counties' in which there is no resident officer, or (ii) more than twelve miles from the court granting the decree on which the debtor is being charged.[2] We note that the McKechnie and Grant Reports[3] (but not the Ashmore Report[4]) favoured the introduction of postal service of charges.

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[1] In the case of summary cause decrees, the charge must normally be served personally on the defender or left in the hands of an inmate at the debtor's dwelling place or of an employee at his place of business. If unsuccessful in effecting service by these modes, the officer must deposit the charge in the defender's dwelling place or place of business through the letter box or by other lawful means or affix it to the door, and in that event send the charge by ordinary post to the address where the debtor is most likely to be found: see Summary Cause Rules, rule 6 as substituted by Act of Sederunt (Summary Cause Rules, Sheriff Court)(Amendment) 1980, s.7. In diligence following Court of Session and sheriff court ordinary action decrees, the normal modes of service of the charge are similar: viz. service on the debtor personally, delivery to someone in the debtor's dwelling, or, if admittance is not obtained, affixing to the door or putting it in the keyhole: Citation Act 1540 (c.75).

[2] Execution of Diligence (Scotland) Act 1926, s.2(1)(b) as amended. This provision as originally enacted referred to 'counties' but it is possible that this is to be taken as a reference to sheriffdoms: see Sheriff Courts (Scotland) Act 1971, Sch. 1, para. 1. Since all sheriffdoms have a resident sheriff officer, the provision would to that extent be deprived of effect by the 1971 Act, and it might be preferable if the provision referred to sheriff court districts.

[3] See respectively op. cit., para. 149; op. cit. para. 644.

[4] First Report of the Departmental Committee on Messengers-at-Arms and Sheriff Officers (H.M.S.O., Edinburgh; 1923), Chairman, Lord Ashmore.

3.9 We have found this to be a difficult question. It has been represented to us that charges would lose many of their existing advantages if they were served by post. First, a visit by an officer to serve a charge may enable him to make an assessment of the debtor's means and to report to the creditor on the likelihood of recovery, thereby preventing further diligence. Second, an officer making contact with a debtor may be able to arrange an instalment settlement. In other words, there is no assurance that the large reduction from the number of charges (46,000) to the number of poindings (20,000) effected every year would continue.[1] Third, it has been argued that officers serving charges by hand can sometimes elicit information on the debtor's employment which enable an arrestment of earnings to be used in lieu of a poinding. Fourth, there is evidence that in up to 10% of cases where documents are served by recorded delivery post, in connection with civil proceedings, the documents may not reach the defender or debtor[2] and it has been argued that hand service by an officer is much more reliable.

3.10 On the other hand, postal service of charges would have several advantages. The first and primary advantage would be the reduction in expense. The current fee for service of a summary cause charge by post is only £1.59 as compared with £3.12 (3 miles travelling) and £6.24 (10 miles travelling) for personal service. It has been represented to us that this is uneconomic and has been accepted by sheriff officers in the past only because there have been so few postal charges. Nevertheless, the fee for service of a charge by post should be appreciably less than the fee for personal service or other mode of service by hand. Second,

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[1] See CRU Diligence Survey.

[2] See OPCS Defenders' Survey and Edinburgh University Debtors' Survey.

while we do not have statistics distinguishing between the numbers of 'keyhole service' and 'personal service' cases,[1] nevertheless, there is reason to suppose that in the majority of cases where a charge is served by hand, the officer is unable to make contact with the debtor himself (or herself) though he may make contact with the debtor's wife from whom he may gain the information which he requires to report on the potential for recovery or the debtor's employment. Where the officer is unable to hand the charge to the debtor's wife or other person on the premises, and effects keyhole service, we doubt whether this is any more effective than postal service. Third, while personal contact between officer and debtor is far more likely to elicit instalment payments than information in writing explaining the serious consequences of continual default, nevertheless, such information could be given in the charge itself or an accompanying document which might have an effect in a proportion of cases.[2] The arguments thus appear fairly evenly balanced.

3.11 The crucial point however in our view is that fewer than half of the cases in which a charge is served proceed to a poinding and we think therefore that the present law should not be changed. To elicit views, we suggest that (1) the service of a charge requiring the debtor to pay the debt should continue to be a necessary preliminary to the execution of a poinding. (2) No change should be made

[1] The Edinburgh University Debtors Survey reveals that, out of 73 poinding cases examined in which charges were (or ought to have been) served, 9 charges were executed by keyhole service.

[2] In our Memorandum No. 49 paras. 2.29-2.33 we suggest that an officer serving a charge should be authorised to require the debtor to disclose details of his arrestable earnings (if any) and clearly such a provision would operate more satisfactorily if the officer made personal contact with the debtor. But again the requisition could be made in a document accompanying the charge.

in the present law whereby with certain statutory exceptions, charges are generally served by hand (personal or other mode of service requiring visit by officer. (Proposition 6).

(2) Witnesses to service of a charge

3.12 The service of a charge by an officer on an ordinary action decree requires the attendance of a witness[1] who, with the officer, must also sign the certificate of execution of the charge (called 'the execution').[2] This requirement applies also to the service of a charge on summary cause decrees, except where the charge is served by post.[3] The fees payable to the witness are one-third of those of the officer.[4]

3.13 One way of reducing the expense of a charge would be to abolish the requirement of a witness. Under the former small debt procedure, no witness was required to the service of a charge and the system seemed to operate without difficulty. It can be argued that an officer of court can be trusted to serve charges validly and return accurate executions. On the other hand, the witness provides corroboration of the officer's actings and affords a protection to the officer himself, in a situation where exact compliance with the law is essential, and where his execution of the charge may be disputed. Moreover service of a charge is a preliminary to notour bankruptcy, sequestration and liquidation, and it is desirable that charges should not be easily challengeable.

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[1] Debtors (Scotland) Act 1838, s.32; Citations (Scotland) Act 1846.

[2] Debtors (Scotland) Act 1838, Sch. 2; R.C., Appendix, Form 44.

[3] Summary Cause Rules, rule 6(3) as inserted by Act of Sederunt (Summary Cause Rules, Sheriff Court) (Amendment) 1980 (S.I. 1980/455); Execution of Diligence (Scotland) Act 1926, s.2(2)(e). The Post Office receipt for the registered or recorded delivery letter is evidence of receipt by the debtor until the contrary is proved.

[4] Act of Sederunt (Fees of Messengers-at-Arms) 1978; Act of Sederunt (Fees of Sheriff Officers) 1978.

3.14 We think, however, that the need to reduce expense in the case of debts of relatively small amount outweighs these arguments and that the old small debt rule should apply to summary cause charges even though the latter can relate to larger sums that did the former.

3.15 We suggest therefore that (1) it should no longer be necessary for an officer serving a charge on a summary cause decree to be accompanied by a witness and the officer's execution of the charge, though not attested by a witness, should be treated as probative unless it is proved that the charge was not validly served. (2) Views are invited on the question whether the same rule should apply to Court of Session decrees and sheriff court ordinary action decrees. (Proposition 7).

(3) Edictal service of a charge

3.16 Edictal service of a charge is used where the debtor cannot be found and has no domicile of citation within Scotland. In the case of a Court of Session decree, the charge is served on the keeper of edictal citations (now the Extractor of the Court of Session) in Edinburgh.[1] Charges on sheriff court ordinary action decrees may also be served edictally, but with this difference that, if the debtor has a known residence or place of business in England or Ireland, then, in addition to edictal service, a copy of the charge must be sent by post to him.[2]

3.17 It must be doubted whether edictal service by itself is effective to bring the charge to the notice of the debtor at all, let alone within the 14 days allowed

[1] Court of Session Act 1850, s.22.

[2] Sheriff Court Rules, rule 15. Edictal service is not used on summary cause charges: see Summary Cause Rules, rules 8 and 9 as substituted by Act of Sederunt (Summary Cause Rules, Sheriff Court)(Amendment) 1980, ss.9 and 10

for complying with it.[1] The Rules of the Court of Session already recognise the inadequacy of edictal service where a summons is concerned since a copy must also be posted to the defender if he has a known residence or place of business furth of Scotland as well as to his Scottish solicitor (if any).[2] With the advent of a relatively reliable and fast air mail postal service to nearly all parts of the world, it would seem sensible to widen the additional requirements of postal service to cover debtors anywhere furth of Scotland. We propose therefore that where a debtor furth of Scotland is charged by edictal service, then in addition to the present requirement of service on the keeper of edictal citations, the officer should be required to send a copy of the charge to the debtor by post if he has a known residence or place of business furth of Scotland. (Proposition 8).

(4) Service of charge on firms

3.18 In the Court of Session, a firm with a social name (eg 'Smith, Jones & Brown') is charged by service at the place of business. But if the firm has a descriptive name (eg 'Modern Builders') then in addition to service on the firm at the place of business, the officer must charge three partners (if there are as many) personally or at their dwelling places.[3] In the sheriff court, it is competent to charge a firm (whether it has a descriptive or social name) at the principal place of business without service on the partners.[4] We consider that the sheriff court rule is to be preferred and suggest that service on a firm with a social name of a charge under a Court of Session decree should be effected by service on the firm at its principal place of business as in the case of other charges on firms under Court of Session and sheriff court decrees. (Proposition 9)

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[1] Court of Session Act 1868, s.14.

[2] R.C. 75(c).

[3] Graham Stewart, op. cit., p.325.

[4] Sheriff Court Rules, rule 151.

(5) The form and content of the charge

3.19 It has been observed that:

> "There is no statutory form of the charge - there is nothing but practice; and if a charge is so expressed as to convey to the person charged sufficient information of what he is required to do, and the warrant and authority on which the requisition is made, it complies with all that the common law requires."[1]

The common law styles of charge currently in use refer to the decree, and specify what sums are to be paid, by whom and to whom. The McKechnie Committee thought that the form of a charge might not be wholly intelligible to a layman and suggested that the formal charge should be accompanied by an explanatory note setting out what the debtor is required to do and the result of non-compliance.[2] The McKechnie Committee's view is corroborated by representations made to us and by the research into debtors' circumstances.[3]

3.20 We note that in the case of Court of Session diligence the extract decree must be served on, or left for, the debtor[4] whereas, in the sheriff court, the officer must have the extract decree with him when serving the charge but need only exhibit it to the debtor.[5] Extract decrees can be complicated documents and it seems unnecessary to require that they be served on the debtor in connection with sheriff court diligence although it appears that this is often done.

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[1] Williamson v. McLachlan (1866) 4 M 1091 per L.J.C. Inglis at p.1095.

[2] Op. cit., para. 155.

[3] Edinburgh University Debtors Survey,

[4] R.C. Appendix, Form 44 (which prescribes a form of execution of a charge, which form states that a copy of the extract was served on or left for the debtor).

[5] Graham Stewart, op. cit., p.290; the statutory style of execution of a charge in Sch. 2 to the Debtors (Scotland) Act 1838 does not require the officer to certify that a copy of the extract decree was served on, or left for, the debtor.

3.21 It seems anomalous that the form of execution of a charge returned to the creditor, and lodged in court at a later stage of the diligence, should be prescribed by statutory rules while the form of charge served on the debtor is not so prescribed. The latter form requires equally careful drafting so that it can be readily understood by ordinary citizens. We suggest that (1) the form of the charge served on the debtor, together with explantory notes, should be prescribed by act of sederunt with a view to making the import of the charge more intelligible to debtors. (2) The charge should specify the extract decree containing warrant to charge and the state of the debt, (including the expenses incurred in serving the charge for which the debtor is liable) and should include a demand for payment within the specified days of charge. (3) The explanatory notes might give information to the debtor of the legal consequences of non-compliance (in particular its effects in rendering the debtor's goods liable to poinding and perhaps its effect in constituting notour bankruptcy) and might specify how and to whom payment should be made. If our proposals in Proposition 1 above are accepted, then the notes should also inform the debtor of his right to apply to the court for an instalment decree and a declarator of unenforceability. To cater for the very common case where the creditor is willing to consider informal arrangements for payment by a debtor in genuine financial difficulties, the explanatory notes might include a paragraph for completion by the creditor, if so advised, specifying the person whom the debtor should contact for the purpose of discussing such arrangements. (Proposition 10).

(6) Standardising the days of charge

3.22 The form of charge served on the debtor specifies the number of days within which payment is demanded. On the expiry of this period (called 'the days of charge' or induciae[1]) without payment, then the creditor may proceed to instruct a poinding. As Table C shows, the number of days of charge varies according to the type of decree on which the charge proceeds and the place where the charge is served.[2]

3.23 The McKechnie Committee recommended that the days of charge in every case should be fourteen with the proviso that the court should be given power to shorten or lengthen the days of charge.[3] The submissions made to our Working Party were unanimously in favour of uniformity. Various periods were suggested but in no case was the period longer than fourteen days, which is the period applying to summary cause charges. The argument in favour of a shorter period (such as seven days) is that the unscrupulous debtor should not have time to transfer his moveable assets. While the risk of evasion might be a ground for shortening the days of charge in particular cases, it does not justify a shorter period than fourteen days in the usual case. To elicit views we suggest that the present multiplicity of different periods prescribed for the days of charge should be replaced by a single period which should be fixed at fourteen days. The court should be given power, on cause shown, to shorten or lengthen the period in appropriate cases. (Proposition 11).

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[1] Literally the days of warning. In reckoning the number of days, the day on which the charge is served does not count nor can poinding proceed on the day on which the charge expires.

[2] The Table does not include charges on decrees of ejection, removing, recovery of heritable property or delivery of goods or children.

[3] Op. cit., para. 156.

(7) Abolition of registration of executions of charges?

3.24 The Debtors (Scotland) Act 1838 enables a creditor to register the execution of a charge which has expired without payment,[1] the effect of registration being to accumulate the debt, the interest due and the expenses into a principal sum bearing interest. Registration is no longer required as an essential preliminary to an application for imprisonment for wilful refusal to implement a decree ad factum praestandum,[2] and does not now seem to have any other relevance than to permit accumulation. The last registration of an execution of a charge in the Register of Hornings kept at Edinburgh occurred in 1936 and we understand that registrations of executions in sheriff court registers of hornings are rare. It may be that the provisions for registration have become obsolete and ought to be repealed. We invite views therefore on the suggestion that it should no longer be competent to register executions of expired charges in the register of hornings for the purpose of accumulating the debt, interest and expenses into a principal sum bearing interest. (Proposition 12)

(8) Time limits on charges and poindings, and competence of second charges.

3.25 The time-limits on the various steps in procedure are illustrated by Table A (pages 12-13). It will be seen that, once a poinding has been executed, shorter time

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[1] See s.5 (which enables executions of Court of Session charges to be registered in the Register of Hornings kept at Edinburgh) and s.10 (which enables executions of sheriff court charges to be registered in the registers of hornings kept at each sheriff court).

[2] See Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, Schedule (now repealed as spent by Statute Law Revision). Registration is not needed for imprisonment to recover rates and taxes which is, in any event, unknown in modern practice.

TABLE C

Periods prescribed for the days of charge

Decree etc	Debtor	Days	Authority
Court of Session decrees	(1) Within Scotland	15	Codifying Act of Sederunt 1913, Book VIII, Sch. A.
	(2) Furth of Scotland	14	Court of Session Act 1868 section 14
Extracts of deeds registered for execution in books of court or Sasines Register	(1) Within Scotland	6	Titles to Land Consolidation Act 1868 section 138; Land Registers (Scotland) Act 1868, section 12
	(2) Furth of Scotland	14	Court of Session Act 1868 Section 14
Decrees in Exchequer causes in favour of the Crown	(1) Within Scotland	6	Exchequer Court (Scotland) Act 1856 section 28 and Schedule G
	(2) Furth of Scotland	6	do.
Decrees of Teind Court	(1) Within Scotland	10	Act of Sederunt 17 July, 1925
	(2) Furth of Scotland	60	do.
Decrees of sheriff courts (ordinary actions)	(1) Within Scotland	7	Sheriff Courts (Scotland) Extracts Act, 1892, section 7, Schedule 1
	(2) Furth of Scotland	14	Sheriff Courts (Scotland) Extracts Act 1892 section 7(6) and Sheriff Court Rules, Rule 15

Decrees of sheriff courts (summary causes)	(1) Within Scotland	14	Summary Cause Rules, Rule 91(1)
	(2) Furth of Scotland	14	do.
Registered protests of bills of exchange	(1) Within Scotland	6	Bills of Exchange Act 1681 Inland Bills Act 1696
	(2) Furth of Scotland	14	Court of Session Act 1868, section 14
Extract certificates registered under Judgments Extension Act 1868	Within Scotland	15	Codifying Act of Sederunt 1913 B.VI.5
Extract certificates registered under Inferior Courts Judgments Extension Act 1882	Within the Sheriffdom	15	Codifying Act of Sederunt 1913, L.IX.2
Foreign judgments or awards registered under the Administration of Justice Act 1920, Foreign Judgments (Reciprocal Enforcement) Act 1933, or Arbitration International Investment Disputes Act 1966	Within Scotland	15 (or period fixed by court)	R.C. 248(f), 249(ii), 249A(3)
Decrees of the Land Court	(1) Within Scotland	7	Crofting Reform (Scotland) Act 1976, section 17(1)
	(2) Furth of Scotland	14	
Orders for recovery of criminal fines	Within or furth of Scotland	10	Criminal Procedure (Scotland) Act 1975, section 411

limits apply than at the earlier stages, in relation to which, it may be thought, the time-limits appear unduly long.

(a) Existing law

3.26 Period within which charge may be served: there is no special rule fixing a definite period following the extract of a decree within which the creditor may serve a charge with a view to commencing diligence. Accordingly, the duration of that period is determined by the general law on the negative prescription of obligations under which the period of prescription of an obligation to obey a decree of court is twenty years.[1] The charge, however, may be served more than twenty years after the extract of the decree, since the negative prescription of an obligation to pay a debt under a decree will run against a creditor only if, and for so long as, (a) the creditor does not enforce the debt by diligence[2] and (b) the debtor does not 'acknowledge' the debt, for example, by making payments to account.[3] Moreover, the debt is not extinguished by prescription unless there has been no enforcement or 'acknowledgment' for a continuous period of twenty years: if the prescriptive period is interrupted, eg by payments to account, a new prescriptive period commences.

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[1] See Prescription and Limitation (Scotland) Act 1973, s.7. Under s.6, the short negative prescription of five years applies to contractual debts and many other common forms of obligation, but Sch. 1, para. 2(a) provides that the short negative prescription does not apply "to any obligation to recognise or obtempter a decree of court". It appears therefore that the decree has the effect of changing the prescriptive period applicable from five to twenty years in cases where the obligation is constituted by a court decree.

[2] Prescription and Limitation (Scotland) Act 1973, s.7(1)(a) as read with s.9(1).

[3] Ibid., s.7(1)(b) as read with s.10(1)(a). The debtor may also 'acknowledge' the debt by an unequivocal written admission that the obligation still subsists: s.10(1)(b).

3.27 Period of entitlement to poind after expiry of days of charge: a poinding can only proceed after the days of charge have expired without payment. In the case of Court of Session decrees and decrees in sheriff court ordinary actions, there is no fixed period prescribed by law determining how long after the expiry of the charge the unpaid creditor may wait before proceeding to poind. Poindings executed up to four years after the expiry of the days of charge have been held to be validly executed.[1] In summary causes, however, the former small debt rule is retained whereby an expired charge is a valid basis for poinding for one year only from the date of the charge, but the right to poind may be reconstituted by service of a new charge.[2]

3.28 Second charges: despite doubts expressed in a recent case,[3] there is nothing to stop a creditor abandoning a charge on an ordinary action decree and then serving a new charge.[4] This seems a necessary rule since inter alia a charge may be needed for bankruptcy proceedings[5] and is unobjectionable provided that the creditor cannot abandon a poinding or a warrant of sale and serve a second charge

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[1] Graham Stewart, op. cit., p.338.

[2] Summary Cause Rules, rule 91(2); cf. Small Debt (Scotland) Act 1837, s.13. The one year period runs from the date of the service of the charge and not from the date of the expiry of the charge.

[3] See New Day Furnishing Stores Ltd v. Curran 1974 S.L.T. (Sh.Ct.) 20 at p.21.

[4] Clark v. Hamilton and Lee (1875) 3 R. 166. It is however essential that proceedings for the suspension of the first charge are not in dependence, except in relation to expenses.

[5] If a second charge were not competent, then on the lapse of four months following the expiry of the first charge without payment, the creditor would lose his right to petition for the debtor's sequestration: see Bankruptcy (Scotland) Act 1913, ss.5, 7 and 13. Where a second charge is rendered necessary through some fault of the creditor (or officer instructed by him) the expenses of the charge would not be recoverable from the debtor.

with a view to evading the time-limits on the period between the execution of a poinding and the carrying out of a warrant sale. This however, seems already to be the law.[1]

(b) Possible amendments of the law

3.29 Though creditors intending to enforce their decrees by diligence generally do so within weeks or months rather than years after the decree is extracted, nevertheless the facts that a charge may be served up to twenty years, and even longer in certain circumstances, after the extract of the decree, and that a poinding may be executed up to four years after a charge in certain cases, mean that debtors may be subject to the threat of enforcement for very long periods. It has been represented to us that shorter time-limits on enforcement by charge and poinding are needed. While the time-limit on service of a charge depends on the long negative prescription, we do not think it appropriate in the present context to suggest an amendment of the rules on negative prescription since inter alia those rules not only affect enforcement by diligence but also involve the extinction of the obligation, and therefore compensation (set off), recourse against cautioners, and other matters which are not directly relevant. It might, however, be provided that where an extract decree containing warrant to charge and poind has not been followed by the service of a charge within the period of two years after the decree was extracted, the creditor should be required to apply to the court for leave to charge and poind. In the case of instalment decrees, the two year period would require to run from the date of default. There are analogies for

[1] It is at least implicit in New Day Furnishing Stores Ltd v. Curran, supra.

the court's intervention in the minute of awakening procedure where civil actions have fallen asleep, and in the English time-limits on enforcement.[1] If the proposal were accepted, it is difficult to see why it should not apply also to arrestments.

3.30 As regards the period between the charge and the poinding, it seems likely that the summary cause time-limit of one year was enacted to protect small or consumer debtors who might need a new warning upon the view that, after a year, the debtor might have ordered his affairs in the belief that no poinding would ensue and that he would need the fourteen days of the charge to re-order them. We doubt whether this is realistic. An informal settlement in response to a charge can endure for a substantial period which may be longer than a year. If payments to account of the debt are being made, it seems unsound to require the creditor to keep alive his right to poind by serving a new charge. We doubt, therefore, whether the one year time-limit confers a substantial advantage on debtors for whose benefit it was presumably designed. From the standpoint of creditors, it is clearly an advantage to provide for a longer period, especially in the case of peripatetic debtors or defenders in accident cases visiting the district only rarely.

3.31 Another solution suggested to us is that, where a charge has been served and not followed by poinding within a prescribed period, then the creditor should notify the debtor by letter of his intention to proceed to a poinding within a specified time. The notification would be made by the creditor or his agent, not the officer, and the expenses would not be chargeable to the debtor.

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[1] County Courts Rules 1936, Order 23, rule 16 (leave to enforce required where two years have expired from the date of the order or judgment or from the date of some payment into court thereunder).

3.32 We invite views on the following. (1) It is suggested that a creditor seeking to enforce an extract decree by charge and poinding should be required to apply to the court for leave to charge and poind where he has not served a charge within two years after the decree was extracted. (2) If this suggestion is accepted, should a creditor holding an extract decree be required also to apply to the court for leave to enforce his decree by arrestment after the expiry of two years from the date of extract? (3) (a) The period of the unpaid creditor's entitlement to poind following expiry of the days of charge should be fixed by act of sederunt, or statute variable by act of sederunt in the case of Court of Session decrees and sheriff court ordinary action decrees, as well as summary cause decrees. It is suggested that the period should be three years in all cases rather than one year (the present summary cause time-limit) or five years (the short negative prescription). (b) If the creditor has not enforced the decree by poinding within the three year period, it is suggested that he should require to apply to the court for leave to poind and to serve a second charge at his own expense. (4) Should a creditor be required to intimate to the debtor his intention to instruct a poinding where a period of say two or three months has elapsed since the date of the charge? (Proposition 13).

No change should be made in the present rule whereby a charge may be withdrawn and a new charge served on the debtor by the same creditor under the same warrant to charge. Service of a new charge, however, should not enable a creditor to evade the foregoing time-limits on poinding, nor to evade the restrictions on repeated poindings and warrants of sale by repeating the whole process on the basis of the new charge. (Proposition 14).

PART IV: POINDING THE DEBTOR'S GOODS

4.1 The poinding is the stage of the diligence in which the moveable goods of the debtor are 'attached', that is to say, secured to the creditor and brought within the control and protection of the court, until they can be realised at a warrant sale. The procedure is simple in its essentials; the poinding attaches the goods in the debtor's possession without the need for any 'walking possession agreement' such as is required for attachment of goods on the debtor's premises in English law and legal systems derived from it.[1] But while simple in its essentials, the poinding stage is in need of technical revision and also presents important and controversial questions - such as the problems of low valuations and the extent to which household and other goods should be exempt - all of which we discuss in this Part.

(1) The time when poinding is allowed

4.2 The days on which poindings and other diligences may be competently executed are fixed by an old common law rule which is uncertain in its boundaries. It is clear that poindings cannot be executed on Sundays but it is not clear whether or to what extent poindings on public holidays are

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[1] In England execution against goods on the debtor's premises involves a 'walking possession agreement' whereby the debtor is made responsible for the security of the goods as if he were a kind of sub-bailiff. Such agreements are necessary to constitute a valid 'seizure' (see Watson v. Murray & Co. [1955] 2 Q.B. 1) but the agreement may be made not only by the debtor but also by any responsible person in the house though not authorised by the debtor (National Commercial Bank of Scotland v. Arcam Demolition and Construction Ltd [1966] 2 Q.B. 593).

void.[1] We understand that the current practice is not to execute diligence on Sundays, nor on Christmas Day, New Year's Day nor Good Friday. The present uncertainty is unnecessary and can cause difficulty for officers of court who may be liable in damages for not executing diligence timeously.[2] Some diligences (eg the execution of an order to deliver a child to its lawful custodier, or the arrestment of a ship) should probably be competent on any day, but poindings are not in this category.

4.3 A poinding must be executed during the hours of daylight: if it is commenced before sunset and ends while there is still daylight, it will be upheld. If the poinding is not completed in the hours of daylight, it must be adjourned to the next day. It has been represented to us that this rule is unduly restrictive. It sometimes requires an officer executing a long poinding in a remote area to stay overnight unnecessarily. By itself the criterion of the hours of darkness may be thought unsatisfactory since they vary in different parts of the country and at different times of the year, and further, for historical reasons, take no account of the invention of the electric light. On the other hand, any rule allowing poinding during the hours of darkness would require to be applied with common sense since the debtor's electricity supply may have been disconnected. Further, some flexibility is needed since a rigid rule will not be uniformly appropriate to all circumstances, eg cars and other vehicles may never be at the debtor's premises at the permitted hours.

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[1] Stair, Institutions IV. 47.27 states that execution may not be carried out "on the Lord's day or on other solemn days appointed by the Church or State for humiliation or thanksgiving". Bankton, Institute IV. 42.3-5 is to a similar effect. In Monteith v. Hutton (1900) 8 S.L.T. 250, Lord Kincairney doubted whether a proclamation by the magistrates of a public holiday in Perth in celebration of Queen Victoria's birthday prevented an arrestment from being served, at least if the debtor's premises were open. The Tables of Fees for officers of court allow an additional 75% of the normal fee to be charged to the creditor (not the debtor) when diligence is necessarily done on a public holiday.

[2] See Monteith v. Hutton, supra.

4.4 To elicit views on these matters, we suggest that (1) the days on which poindings and other diligences are not competent should be clearly regulated to remove the present uncertainty in the law. No poinding should be competent on a Sunday, Christmas Day, New Year's Day or Good Friday, nor on such other day as may be prescribed by or under act of sederunt. (2) It should be declared incompetent to commence a poinding before 9 am or after 8 pm except by leave of the sheriff. (3) It should be incompetent to continue to execute a poinding after 8 pm unless the officer either has obtained prior authority from the sheriff for so doing or, in his report to the court of the poinding, shows reasonable cause why the poinding was continued after 8 pm. (Proposition 15).

(2) Property which may be poinded

4.5 There are three different kinds of limitation on the competence of poinding. The first relates to the nature of the property to be attached and to the person in whose possession it is. The second relates to the exemptions from poindings to protect the standard of living of the debtor and his dependants. The third relates to the inclusion in poindings of the goods of third parties. We discuss the first two limitations in this Part and the third limitation in Part VI.

(a) Goods in the possession of the poinding creditor or a third party

4.6 In 1898 Graham Stewart noted that "as a general rule all corporeal moveables belonging to the debtor or in the hands of the poinder or a third party, may be poinded", but that "In practice, however, poinding is only used to attach goods which are either actually or constructively in the possession of the debtor".[1] That remains the position today.

[1] Op. cit., pp.338, 339. For examples, however, of poindings of the debtor's goods in a third party's hands, see McLean v. Boyek (1894) 10 Sh.Ct.Reps. 10; McNaught & Co. v. Lewis (1935) 51 Sh.Ct.Reps. 138.

4.7 At common law, it is competent for a creditor to poind goods belonging to the debtor which are in his (the creditor's) possession,[1] though the Debtors (Scotland) Act 1838, section 24 does not make special provision for the delivery by the officer of the poinding schedule to the debtor, rather than the possessor, in such a case.

4.8 In addition, section 40 of the Sale of Goods Act 1979 provides:

> "In Scotland, a seller of goods may attach them while in his own hands or possession by arrestment or poinding; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party."[2]

4.9 For reasons given in more detail in Appendix A, we think that this provision is defective in a number of respects, that the unpaid seller has already adequate remedies under the Sale of Goods Act, and that the problems created by the provision are out of proportion to its utility.

4.10 We suggest therefore that (1) section 40 of the Sale of Goods Act 1979 (poinding and arrestment by seller of goods in his possession) should be repealed. (2) No change however should be made in the common law rule whereby a creditor in possession of his debtor's goods may poind those goods, provided that the poinding schedule is delivered to the debtor (rather than the possessor) in such a case. (Proposition 16).

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[1] Lochhead v. Graham (1883) 11 R.201 (poinding by landlord of furniture left by tenant on leased premises); Tillicoultry v. Lord Rollo (1678) Mor. 10517.

[2] Several commentators have observed on the authority of Lord Kinnear's judgment in Lochhead v. Graham, supra, that poinding rather than arrestment is the appropriate process. S.40 of the 1979 Act (a consolidation measure) derives virtually unaltered from the Sale of Goods Act 1893, s.40.

(b) Money and negotiable instruments

4.11 It is still an open question whether coin and bank notes may be poinded,[1] but the invariable practice is to exclude these items from poindings.[2] Cash may be taken by the trustee in a sequestration[3] and it is arguable that it should be attachable for debt outside sequestration, at least, in cases where attachment would not circumvent the exemption from arrestment of social security and earnings. Attachment would, however, require to be by a different process than poinding and warrant sale. Poinding is inappropriate since in many cases the only way to prevent a debtor from spending cash would be for the officer to take possession of it, and more importantly the later stages of advertisement and sale by public auction, being designed to realise property into money, are inappropriate where the thing attached is money. Similar considerations apply to negotiable instruments. Accordingly we propose that it should be clearly declared by statute that the poinding and warrant sale of money and negotiable instruments is incompetent. (Proposition 17).

(c) Poinding and sale of ships

4.12 At common law, the only competent diligence for attaching ships is arrestment and sale.[4] We have identified two statutory exceptions to this general rule[5] but have been

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[1] Graham Stewart, op. cit., p.340; Bell, Commentaries (7th ed.) vol. ii, p.60; Alexander v. McLay (1826) 4 S. 439.

[2] See McKechnie Report, op. cit., para. 50: the Report recommended that the practice should remain.

[3] Bankruptcy (Scotland) Act 1913, s.15; it may also be taken in Crown diligence under the Exchequer Court (Scotland) Act 1856, s.32. We shall revert to Crown diligence in a later Memorandum on miscellaneous topics in diligence.

[4] Graham Stewart, op. cit., p.242; McMillan Scottish Maritime Practice p.56.

[5] Merchant Shipping Act 1894, s.693; Prevention of Oil Pollution Act 1971 s.20(1) (which derives ultimately from the Oil in Navigable Waters Act 1922, s.7(3)).

unable to discover any justification for their divergence from that rule.[1] Accordingly, to remove this apparent anomaly,we suggest that ships should be attachable under section 693 of the Merchant Shipping Act 1894 and section 20 of the Prevention of Oil Pollution Act 1971 by the process of arrestment and sale rather than poinding and sale. (Proposition 18).

(3) Exemptions and other protection from poinding

4.13 The second type of limitation is more important and controversial, namely the exemptions from poindings to protect the standard of living of the debtor and his dependants.

(a) The present law

4.14 The present law may be summarised as follows:-

(a) The necessary clothing of the debtor and his wife and family is exempt at common law.[2]

(b) Under the Law Reform (Diligence)(Scotland) Act 1973, a prescribed list of household goods in the dwelling house where the debtor resides are exempt, provided that they are "reasonably necessary to enable him and any person living in family with him in that dwellinghouse to continue to reside there without undue hardship".[3] The list (which may be amended by statutory instrument[4]) consists of "beds or bedding material;

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[1] It seems likely that the reference in the statutes to poinding was adopted by the draftsman as an analogue of the English process of distress.

[2] Graham Stewart, op. cit., p.345 and see also Bankruptcy (Scotland) Act 1913 s.91 (which exempts from the bankrupt's statement of affairs "the necessary wearing apparel" of the debtor, his wife and family).

[3] 1973 Act, s.1(1).

[4] Ibid., s.1(3): the power to amend the list (which is vested in the Secretary of State) has not been exercised.

chairs; tables; furniture or plenishings providing facilities for cooking, eating or storing food; furniture and plenishings providing facilities for heating."[1]

(c) Under a common law rule, "tools of the trade" by which the debtor earns his livelihood are exempt.[2] The rule is uncertain in its scope. The classic case is a joiner's tools but the rule has been held to apply to books belonging to a teacher of languages,[3] to a dentist's instruments,[4] as well as to the sewing maching of a dress-maker[5] and a boot-repairer.[6] On the other hand, it has been held not to apply to a solicitor's library,[7] nor to a motor-cycle used by a self-employed photographer in connection with his work in a remote country area,[8] nor to the furniture of a hotel-keeper.[9] Generally, the exemption has been construed as mainly intended for low income debtors whose "tools of trade" are of relatively small value.[10]

(d) Under the Diligence Act 1503 (c.45) goods used for ploughing (generally called "plough goods") cannot be poinded during the ploughing season

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[1] Ibid., s.1(2).

[2] Graham Stewart, op. cit., pp.345-6.

[3] Gassiot, 12 November 1814, F.C. per L.J.C.Boyle.

[4] Macpherson v. Macpherson's Trustee (1905) 8 F.191.

[5] McMillan v. Barrie and Dick (1890) 6 Sh.Ct. Reps.103.

[6] Morgan v. Browne 1924 S.L.T. (Sh.Ct.)12.

[7] Pennell v. Elgin 1926 S.C. 9.

[8] Steele v. Eagles 1922 S.L.T. (Sh.Ct.)30.

[9] Gassiot, supra, per Lord Robertson quoted with approval in Pennell v. Elgin, supra, at p.14.

[10] Idem: see also Graham Stewart, op.cit., p.346.

if other moveables are available for poinding.[1]
There are no modern reported cases.[2]

The same exemptions apply in bankruptcy proceedings.[3]

(b) Exemption laws in other countries

4.15 In Appendix B, we briefly describe some of the exemption laws relating to moveable goods which apply in other countries including England and Wales, Northern Ireland, some Commonwealth countries, the USA and France. All of these include exemptions in some form for clothing, household goods and 'tools of trade' while many include exemptions for agricultural implements. The exemptions in English law are narrow compared with those applicable in many USA states. The Australian states and Canadian provinces originally had narrow restrictions modelled on English law but most Canadian provinces have widened their exemptions, probably under American influence.[4]

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[1] The Act provides: "in tyme tocum na manner of schiref nor officiare pund nor distrenye the oxin horse nor othir gudis pertening to the pleucht and that laboris the grond the tyme of the lauboring of the sammyne quhair ony othir gudis [or land] are to be [apprisit or] pondit accordin to the commoun law." The words in square brackets (which protected the plough goods if the debtor had lands which could be adjudged) are abrogated by desuetude: see Graham Stewart, op. cit., pp.344-5.

[2] The last reported case appears to be Lord Advocate v. Forgan 20 Feb. 1811 F.C. Appendix No. I.

[3] See Bankruptcy (Scotland) Act 1913, s.97(1) which vests in the trustee in the bankrupt's sequestration "the moveable estate and effects of the bankrupt, wherever situated, so far as attachable for debt, or capable of voluntary alienation by the bankrupt..." Goods which are not attachable for debt but are capable of voluntary alienation are nevertheless deemed exempt from the bankrupt's sequestration.

[4] The exemptions often reflect the economy of the country or province at the time when they were enacted: thus the Canadian prairie provinces (Alberta, Manitoba and Saskatchewan) include exemptions for agricultural implements used in arable and livestock farming, while Nova Scotia exempts fishing nets.

4.16 Mere comparison of exemption enactments in different countries can, however,mislead, since the legal exemptions can be widened by the policy or practice of the enforcement officers in allowing "de facto" exemptions. For example in Northern Ireland, household goods are very rarely seized in execution partly because of a liberal interpretation of the exemption provision; partly because the Enforcement Office will not make a seizure order unless it is prepared to carry the enforcement through to a sale; and partly because the Enforcement Office has itself to bear the costs of removal to auction rooms and the auction of the goods there, which is usually uneconomic.[1] The position is similar in some Canadian provinces.[2]

4.17 On the other hand, in England and Wales, execution against goods (including household goods) is by far the most commonly used method of enforcement and, relatively speaking, is used more than in Scotland.[3] The resale value of goods is no higher than elsewhere, and actual sales are extremely uncommon, but a policy similar to that in Scotland prevails, namely that it is legitimate to use enforcement against goods as a method of putting pressure on a debtor to pay the debt out of income. The

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[1] See Appendix B.

[2] See eg Report of the Law Reform Commission of Manitoba (cited in Appendix B) at pp.9-10. "The Sheriff's officers will rarely seize second hand furniture and bedding. The primary consideration in any seizure is the resale value of the property. The policy is not to seize where the deprivation suffered by the debtor and his family obviously outweighs the debt paying value obtainable by levy and sale of such property by the creditor. As a result, the exemptions provided in the statute are expanded upon by the Sheriff's officers to include de facto exemptions where the market value of the goods is customarily so low as to warrant a general practice of non-seizure."

[3] More than a million levies of execution against goods are issued in the county courts annually.

fact that "walking possession" (attachment without removal) is allowed enables pressure to be put on debtors to pay, while preserving meantime the use of the goods by the debtors. In contrast to Northern Ireland and other systems, the fact that the expenses of removal and sale may outweigh the "debt-paying value" of the goods does not prevent the initial seizure, advantage being taken of the fact that removal is postponed to a later stage in the procedure.

(c) Methods of defining exemptions

4.18 The legislative techniques in defining exemptions have been much discussed in other countries which have been, or are, modernising their exemption laws. The main types of exemptions are -

(1) a list of specified objects prescribed as exempt (eg one tractor, one combine and one motor vehicle for use by a farmer); there are no examples in Scots law;

(2) a provision exempting a general class or category of goods; all the provisions in Scots law are of this kind;[1]

(3) a list of specified objects, or a class exemption, coupled with conditions which may be -

(a) a monetary ceiling on the value of the goods in the list or class (such as is used in English law[2]); or

(b) a condition that the goods must be 'necessary' or satisfy some other test.

4.19 The condition that the goods must be 'necessary' is relevant to the Scots common law exemptions of clothing and

[1] See para. 4.14 above: in North America these provisions are called 'selective exemptions' as opposed to 'specific exemptions'.

[2] See Appendix B.

probably 'tools of the trade' and, in the case of furniture and plenishings in the debtor's dwelling, they must be reasonably necessary to enable the debtor to live there without undue hardship.[1] A refinement of these exemptions would be that, in certain cases, (eg where there is a monetary ceiling) the debtor might be allowed to choose which goods within the prescribed class or list should be exempt.

4.20 Generally speaking, a specific exemption or 'shopping list' of specified objects has some advantages. It is easily understood by all concerned; it is easily applied by officers of court; and it is not affected by inflation. The main disadvantages are, first, that the exemption may operate arbitrarily (for example a valuable antique cupboard used for storing food may be treated in the same way as a cheap plywood cupboard,) and, second, that experienced debtors may use the exemptions to evade liability by putting their money in exempt objects.

4.21 In the case of specific or class exemptions subject to a monetary ceiling, the ceiling may become rapidly out-of-date because of inflation. Successive Governments have been slow to make statutory instruments updating the wages arrestment limitation formula, and the problem of inflation is thus not easy to solve. While lump sums treat all debtors equally, debtors' circumstances vary and what may be too generous for a bachelor may not be generous enough for a married man with a wife and children to support. Moreover, in view of the difficulty experienced by officers of court in appraising the value of poinded goods for the purpose of fixing an upset price at a subsequent sale, it may seem unwise to make exemptions also depend on the officer's valuation.

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[1] See para. 4.14 above.

(d) Possible reforms

4.22 In our First Memorandum on Diligence, we referred briefly to the specific objectives of exemption legislation, some or all of which may be relevant to a greater or lesser extent in poindings depending on the circumstances of individual debtors.[1] The primary objective is to relieve the suffering of the debtor and his family, and more than in any other diligence, an important consequence of the exemption is to minimise losses arising from the diligence, since household goods and tools of the trade usually have a low resale value. We have already rejected the proposal that all goods in a debtor's dwelling house should be exempt from diligence and in formulating proposals for reform, it seems necessary to bear in mind that poindings of household goods have replaced imprisonment for debt as the only near-universal diligence which can be used to put pressure on debtors to pay.

(i) A statutory code

4.23 The present law on exemptions from poindings is a mixture of statute and common law. We suggest that (1) the exemptions from poindings should be codified in one enactment. (2) Provision should be made on the lines of the Law Reform (Diligence)(Scotland) Act 1973 (which relates to furniture and plenishings in the debtor's dwelling-house) for appeals against poinding in relation to all exempt goods. (Proposition 19).

(ii) Clothing

4.24 At present the 'necessary' clothing of the debtor and his dependants is exempt so far as not extravagant' for the social position of the debtor. Several Commonwealth

[1] See Memorandum No. 47 Part III. These include (1) to prevent the imposition of undue hardship on the debtor and his family; (2) minimising the risk of marital breakdown and the splitting up of the family; (3) helping debtors and their dependants to avoid having recourse to social security for their support; (4) rehabilitation of the debtor; (5) encouraging debtors to pay their debts; (6) helping debtors to avoid bankruptcy proceedings; and (7) minimising the losses which the debtor may incur from a compulsory judicial sale.

enactments exempt 'necessary and ordinary' clothing while the US Uniform Exemptions Act 1979 provides that the clothing be "reasonably held for the personal use of the individual or a dependant". We suggest that it should be expressly declared by statute that the 'necessary and ordinary' clothing of the debtor and his dependants should be exempt. (Proposition 20).

(iii) 'Necessary' household goods

4.25 Having regard to the considerations mentioned at paragraphs 4.18-21 above, we suggest that the approach of the Law Reform (Diligence) (Scotland) Act 1973 (viz. prescribing a list of categories of goods as exempt so far as necessary to prevent undue hardship) should not be changed. The Act is less arbitrary than a simple, unqualified list of objects or classes of object would be and is not rendered out-of-date by inflation. The disadvantage that the test of 'undue hardship' can be difficult for officers to apply is probably outweighed by the advantages and is minimised so far as practicable by the provisions allowing an appeal to the sheriff.

4.26 Before executing a poinding, officers of court normally enquire how many people reside in the debtor's household and then assess what articles are exempt. So far as we have ascertained, appeals under the 1973 Act are not common. At the time when this Memorandum was written, there had only been three appeals in Edinburgh sheriff court.[1] There are no reported cases and it is not possible to ascertain from the scanty court records how well the appeal provisions are operating. We should be grateful for views and comments.

[1] In one case (1974) an appeal relating to a three piece suite and a sideboard was allowed. In a second case (1975), an appeal was allowed in respect of a refrigerator, a sideboard and a three-piece suite but was disallowed so far as relating to a television set, a standard lamp, a three piece lounge suite, a rug, dressing table, wardrobe, dressing table, wardrobe, a five-drawer chest, a table lamp and three piece bedroom unit. The third case (1976) was dismissed by default since the debtor did not appear at the hearing of the appeal.

4.27 A more difficult question is whether, or to what extent, the list of household goods prescribed by the 1973 Act should be expanded. The Department of Health and Social Security make supplementary benefit exceptional needs payments for 'essential' items of bedding, furniture and household equipment.[1] There is no statutory definition of the items covered, but the Supplementary Benefit Commission's Handbook includes curtains and floor coverings (normally linoleum), wardrobes (if there is no adequate storage space) and fire guards for open fires (if there are young children or elderly and infirm people):[2] none of these are exempt items in the 1973 Act list.

4.28 Opinions are likely to vary greatly as to what other household goods should be included in the statutory list and we should be grateful for views. Possible additional items include, among other things, refrigerators,[3] implements for mending clothes (such as sewing machines) or for cleaning and pressing clothes (washing machines and irons) which may be necessary where there are infants or young children.

4.29 It would be possible so to widen the list of exemptions that poindings become virtually impossible in relation to household goods especially since many non-exempt goods may be held on hire or hire-purchase. At this stage we merely seek views on the possible additions to the list of exempt articles.

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[1] See Supplementary Benefits Handbook, (rev'd Nov. 1979) Chapter 7: at para.7.3. the Handbook explains the criterion of exceptional needs payments as follows: "The main question to be decided in each case is whether the need is essential, that is, whether hardship would be caused to the claimant or his dependants if it were not met. The Commission would not think it right to provide amenities which, however desirable on social or other grounds are beyond the reach of those with incomes marginally above supplementary benefit level. Exceptional needs payment are intended to help those who would otherwise fall below the standard of living provided by the supplementary benefit scheme; it is (sic.) not designed to raise people above it."

[2] We revert to fireguards below.

[3] Which indeed, have been included on appeal as exempt: see para. 4.27 (footnote 1) above.

4.30 We would be grateful for views on the following questions and provisional proposals: (1) it is suggested that the approach of the Law Reform (Diligence)(Scotland) Act 1973 (which exempts household goods and furnishings so far as necessary to enable the debtor and his family to continue residence in the debtor's dwelling house without undue hardship) should be retained, and that no monetary ceiling should be prescribed. (2) It is suggested that the statutory list of exempt goods, which at present consist of -

beds or bedding material;
chairs;
tables;
furniture or plenishings providing facilities for cooking, eating or storing food;
furniture or plenishings providing facilities for heating;

should be extended to include the following -

curtains;
floor coverings;
implements used for cleaning the dwellinghouse and one piece of furniture for storing those implements;
implements used for cleaning, mending and pressing clothes; and
one piece of furniture for storing clothing and bedding materials,

These would be exempt only so far as satisfying the 'necessary' test in the 1973 Act.
(3) Views are invited on what other 'necessary' household goods, if any, should be included in the list.
(Proposition 21).
We revert to other possible exemptions below.

(iv) 'Tools of trade'

4.31 While the Scottish common law exemption for 'tools of trade' is somewhat ambiguous, the statutory 'selective' or

'class' exemptions in other systems are equally uncertain in their scope.[1] Implements, tools, books and other equipment used in connection with a profession, trade or business can be worth many thousands of pounds, and it would be inappropriate to exempt them entirely from diligence. In Scots law, it appears that restrictions on aggregate value are imposed by construing the exemption as mainly intended for low income debtors whose 'tools of trade' are of relatively small value.[2] In the statutory exemptions cited,[1] the same objective is achieved by imposing a monetary limit on the aggregate value of the exempt goods and, despite our reservations about monetary limits outlined above, we think that such a limit might be needed if the common law exemption were to be replaced by statute. A monetary limit should be so framed as not to require the valuation of all 'tools of trade' belonging to the debtor. To elicit views on this matter, we suggest that the common law exemption for 'tools of trade' should be replaced by a statutory rule exempting implements, tools of trade, books and other equipment used by the debtor in practice of his profession, trade or business but not exceeding in aggregate value a prescribed sum (fixed initially at say £250) variable by statutory instrument. (Proposition 22).

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[1] In several Canadian provinces, for example, there are identical provisions making an exemption for:

> "The tools, agricultural implements, and necessaries, used by the judgment debtor in the practice of his trade, profession or occupation to the value of [a prescribed sum]."

The prescribed sums vary between $1,000 and $5,000. The US Uniform Exemptions Act 1979, s.8(c) provides inter alia that:

> "An individual is entitled to an exemption, not exceeding $1,000 in aggregate value, of implements, professional books, and tools of the trade; ..."

See also County Courts Act 1959, s.124 which exempts "the tools and implements of [the debtor's] trade" to a prescribed value of £150: see Protection from Execution (Prescribed Value) Order 1980 (S.I. 1980/26).

[2] See para. 4.14 above.

(v) 'Plough goods' and agricultural implements

4.32 The old statutory exemption for plough goods differs from the exemption for tools of trade in two ways. First, it does not exempt the goods from poinding permanently but merely delays it until the end of the ploughing season. Second, the exemption is conditional on the availability of other goods which may be poinded in lieu of plough goods. The old case-law defines the ploughing season as varying in different parts of the country according to custom, but "generally may be considered to begin in October and end with June".[1]

4.33 It is not easy to justify the retention of the exemption for 'plough goods' in modern conditions. Why should goods used for ploughing be treated differently from goods used in other occupations or seasonal occupations, or indeed why should they be treated differently from livestock or from agricultural implements other than 'plough goods' such as combine harvesters or sprayers? We have not, however, received representations for the abolition or modification of the exemption nor do we have evidence whether it is used in practice.

4.34 Assuming for the moment that the policy underlying the 1503 Act is still appropriate today, we suggest that the Act should be replaced by a modern provision which would allow a creditor to poind the goods in question but would provide safeguards permitting the debtor to continue to use them for his agricultural operations for a limited period. Apart from that, we have not formulated precise proposals but seek views on specific questions. To sum up, (1) should the temporary and conditional exemption of 'plough goods' under the Diligence Act 1503 be retained or abolished? (2) If it is thought that an exemption on these lines should be retained, then we suggest that it

[1] Graham Stewart, op. cit., p.345.

should be brought up-to-date by a rule whereby it would be competent at any time of year to poind the agricultural implements in question, but that the debtor should be entitled to apply to the sheriff for a sist of further proceedings in the diligence for a period not exceeding (say) one year from the poinding to enable him to use the implements during that period. (3) Views are invited on the following questions: (a) should the sist of diligence apply only to 'plough goods' or should it apply also to other agricultural implements and, if so, what implements? (b) Should the sist of diligence be conditional on (i) the debtor not owning other poindable goods sufficient to satisfy the debt and expenses or (ii) the fact that the debtor could not hire goods in place of the poinded goods? (c) Should there be a monetary ceiling on the value of the goods covered by the sist? (Proposition 23).

(vi) Residential mobile homes

4.35 Mobile homes present special problems.[1] There is no 'homestead' exemption in Scotland or the UK, and, as we mention in our First Memorandum, we think it reasonable that debtors should obtain rented accommodation rather than stay in a dwelling of considerable value, in effect at the creditor's expense.[2] In principle, the same rule should apply to mobile homes since it is difficult to make one category of homes altogether creditor-proof. A debtor

[1] There has been a recent case in which a local authority has poinded under summary warrant caravans on licensed caravan sites to recover rates due by the site-owner (not the caravan-owner): see also Hansard H.C. 6 Feb. 1980, Col. 492-3. This problem is dealt with at para. 7.9 (Proposition 56) below. It has been estimated that approximately 3,800 households (some 10,000 people) were living in mobile homes on licensed sites in Scotland in 1975: see Scottish Office Central Research Unit Paper on Residential Mobile Homes in Scotland(1977).

[2] At present, houses and other heritable property adjudged for debt can only be sold after 10 years but this rule, which dates from 1672, is prima facie out-of-date, will be reviewed in a later Memorandum and does not provide an analogy for a provision safeguarding residential mobile homes from poinding.

whose only residence is a mobile home will often be able to obtain an instalment decree and sist of diligence, but he may have other property which would prevent the court from granting a sist. Special provision for a sist of diligence is therefore needed to allow the debtor time to obtain alternative accommodation.[1] This is especially important since many mobile homes are situated in rural areas where alternative accommodation may be scarce. On the other hand, if there were no time-limit on the sist, the debtor might make no effort to obtain alternative accommodation. It is suggested therefore that (1) where a mobile home which is the only residence of the debtor is poinded, the debtor should be entitled to apply to the sheriff for a sist of further proceedings in the diligence for a period to be determined by the sheriff. (2) The sist should be renewable for a further period or periods. (3) Views are invited on the question whether a maximum period (eg six months) should be prescribed for the duration of each period of the sist. (Propsition 24).

(vii) Other possible exemptions

4.36 Reference is made to Appendix B for precedents for exemptions of moveable goods in other systems. The US Uniform Exemptions Act 1979, for example, provides for exemptions to an extent not exceeding $50 in any item, for inter alia animals, books and musical instruments, and for jewellery not exceeding $750 in aggregate value: both categories must be "reasonably held for the personal use" of the debtor or a dependant. Family portraits and heirlooms of a particular sentimental value to the debtor are also exempt. French law contains similar provisions under a law of 1977. In addition, French law exempts children's things (eg toys) and books and other things necessary for education and vocational training.

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[1] It is thought that a debtor rendered homeless by a poinding of a mobile home would not be 'intentionally homeless' within the meaning of the Housing (Homeless Persons) Act 1977.

4.37 The US Uniform Act, section 5(2) also exempts "health aids reasonably necessary to enable the individual or a dependant to work or to sustain health", eg wheel-chairs for persons unable to walk, while in Canada it has been suggested that a list of medical aids (eg hearing aids and orthopaedic equipment) should be prescribed as exempt and also that a monetary ceiling is unnecessary "given the high price of medical equipment, the likely intensity of the debtor's need for it, and the scant possibility of fraud or abuse".[1] French law also exempts goods necessary for disabled persons. Goods necessary for the debtor's safety (such as fireguards) might also be exempt.

4.38 Although the sheriff officers would in practice often give a 'de facto' exemption to many of these goods, a specific exemption would put the matter beyond doubt. On the other hand, it might be thought unwise to extend exemptions far beyond those applicable elsewhere in the United Kingdom. In particular, we suggest that cars and motor cycles should not be exempt unless they fall within the business exemption. Motor vehicles are often the only goods having a reasonable 'debt-paying value' which the creditor can sell to satisfy his debt in whole or in part.

4.39 It might be thought unjust that the seller of moveable goods (eg a refrigerator) on credit should be precluded by the exemption from poinding the goods to recover the unpaid price. For this reason, French law allows the seller to seize the goods in execution.[2] On the other hand, the seller has the alternative of securing the contract by hire purchase or conditional sale and the officer might have difficulty in identifying the goods as those which had been sold by the creditor. On balance, we think that such a provision should not be introduced.

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[1] J.A.Kasanjian, Assets Subject to Seizure (1975) Ontario at p.74: quoted by the Manitoba Law Reform Commission Report on Exemptions and Procedure under The Executions Act (1979) p.28.

[2] Code of Civil Procedure, Art. 592-2 (inserted by Decree of 24 Mar. 1977).

4.40 To sum up, (1) it is suggested that exemptions might be extended to cover

(a) medical aids necessary to enable the debtor or a dependant to work or to sustain health and equipment (eg fireguards) necessary for safety in the home; and

(b) books and other goods needed for the education and development of children of the debtor's family or for vocational training.

(2) Views are invited on the questions whether other goods (such as 'personal' possessions) should be specified as exempt, and if so how these goods might be defined. (3) Cars, motor-cycles and other vehicles should not be exempt from diligence unless falling within the business or medical aid exemptions. (4) No exception from the exemptions should be made enabling the seller of goods otherwise exempt from poinding to recover the unpaid price by poinding the goods. (Proposition 25).

(viii) Exemptions to be available in respect of all debts and diligences

4.41 The exemptions from poinding under the Law Reform (Diligence)(Scotland) Act 1973 apply not only in ordinary 'personal' poindings but also in poindings under summary warrants for recovery of rates and taxes[1] and poindings of the ground by heritable creditors. The exemption does not apply, however, to sequestration for rent under the landlord's hypothec.[2] There are also difficulties in applying the exemption in sequestrations under the Bankruptcy (Scotland) Act 1913 since the procedures for appeals against poindings do not apply.[3] While the common

[1] Cf. 1973 Act, s.1(5).

[2] We leave aside Crown diligence under the Exchequer Court (Scotland) Act 1856 which is rarely (if ever) used because of doubts whether it is competent: see Crown Proceedings Act 1947 s.26.

[3] This procedural matter will be dealt with in our forthcoming Report on Bankruptcy.

law exemption for tools of trade probably applies where the goods are arrested in the hands of a third party,[1] the statutory exemption for household goods under the 1973 Act does not apply where such goods are arrested in the hands of a third party. To sum up, we suggest that it should be made clear that the exemptions applying in poindings extend to all diligences against moveable property including (a) sequestration for rent under the landlord's hypothec and sequestration under the Bankruptcy (Scotland) Act 1913, and (b) arrestments of moveables of the debtor in the hands of a third party except where the exemption is conditional on the goods being in the debtor's dwelling (viz. furniture and plenishings). (Proposition 26).

(4) Procedure in carrying out a poinding

4.42 The procedure which officers must follow in carrying out a poinding is partly regulated by the Debtors (Scotland) Act 1838 and partly by common law rules. It is generally accepted that the procedure is in some need of modernisation, clarification and reform.

(a) The existing procedure

4.43 The procedure, as described by Graham Stewart[2] and other authorities, is as follows -

(1) According to the traditional styles of executions of poindings currently or until recently, in use, the officer first cries three oyesses, and reads the extract decree containing the warrant to poind and the execution of the charge.[3] (If

[1] See e.g. Steele v. Eagles 1922 S.L.T. (Sh.Ct.) 30.

[2] Op. cit., p.348 et seq.

[3] This requirement stems from the common law but is almost certainly directory rather than mandatory, i.e. its omission may not affect the validity of the diligence: see para. 4.4.8 below, and it is not in practice followed though the certificate of execution often refers to the ceremony.

a messenger's credentials are disputed, he must display his blazon; a sheriff officer, however, has no official credentials.[1])

(2) The officer must then demand payment of the debt.[2]

(3) Before carrying out the poinding, the officer should make enquiries as to ownership of the goods proposed to be poinded.[3]

(4) If payment in full is not tendered, the officer is in theory required to appoint two persons as valuators, or, in summary cause poindings, one person as valuator.[4] They accept office and take the oath de fideli administratione (i.e. an oath to perform their duties properly).[5]

(5) In theory, the valuators should examine the goods and fix their value.[6]

(6) The officer draws up a schedule of poinding which must specify the goods poinded, and at whose instance they were poinded and state their values as appraised by the valuators.[7]

(7) The officer makes three 'offers back' of the goods to the debtor, or to anyone who appears for him, on payment of the appraised values.[8]

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[1]See Graham Stewart op. cit., p.348: in our Memorandum No. 51; we suggest that sheriff officers should be furnished with official identity cards.

[2]Graham Stewart, op. cit., p.348.

[3]See Part VI below.

[4]Debtors (Scotland) Act 1838, s.23; Summary Cause Rules, rule 90.

[5]Graham Stewart, op. cit., p.348; Le Conte v. Douglas (1880) 8R. 175 per Lord Craighall at p.177.

[6]Graham Stewart, op. cit., p.348; in practice, the valuation is done by the officer of court with the valuator(s) as witness(es) see para. 4.54 below.

[7]Debtors (Scotland) Act 1838, s.24.

[8]Graham Stewart op. cit., p.348: in part this stems from the common law and at least one offer back would appear to be mandatory: see para. 4.48 below.

(8) If the debtor refuses to accept the offer back, and the poinding is not otherwise competently interrupted, the officer adjudges and declares the poinding to be complete and the goods to belong to the poinding creditor, and ordains them to remain on the premises under certification that any person intromitting with them may be imprisoned until he restores them or pays double the appraised value.[1]

(9) The proceedings must take place before two witnesses (or in a summary cause poinding, one witness) who may be and usually are the two valuators (or valuator).[2]

(10) The officer leaves the pointed goods in the hands of the possessor and delivers to him a schedule of poinding signed by him (but not necessarily by the witness or witnesses)[3] together with (in the case of household goods) a notice informing the debtor of his entitlement to appeal to the sheriff within seven days against the poinding.[4]

(b) Proposed new procedure

4.44 For the reasons discussed in more detail below, we suggest that the existing procedure in executing a poinding should be replaced by a new procedure on the following lines -

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[1] Graham Stewart, op. cit., p.348: this formality would appear to be mandatory.

[2] Debtors (Scotland) Act 1838, s.25; Summary Cause Rules, rule 90. The purpose of requiring witnesses is to identify the pointed goods since they remain in the debtor's premises: Norman v. Dymock 1932 S.C. 131, 134.

[3] Debtors (Scotland) Act 1838, s.24.

[4] See Act of Sederunt (Appeals against Poinding) 1973, s.3 and Form A; Law Reform (Diligence)(Scotland) Act 1973, s.1(4).

(1) The opening ceremony (viz. publication by three oyesses and reading of the extract decree and execution of charge) should be expressly abolished by statute. The officer should, however, continue to have with him the extract decree containing warrant to poind and relative execution of charge which he should show to the debtor, possessor, or other interested person, if required.

(2) Before carrying out the poinding the officer should, as at present, (a) demand payment of the debt, and (b) make enquiries of any person present on the premises as to the ownership of the goods.

(3)(a) In place of the appointment by the officer of one valuator (summary cause poindings) or two valuators (other cases), the officer himself should be required to make the valuation except, possibly, in special circumstances when the valuation might be made by a specialist valuator or broker. (b) The officer should be accompanied by one witness to the proceedings (as is the case at present in summary cause poindings) rather than two witnesses, and the form of execution should be treated as probative though signed by the officer and only one witness.

(4)(a) The officer should complete the poinding schedule, which should specify the poinded effects, at whose instance they were poinded and the value thereof as is at present required by section 24 of the Debtors (Scotland) Act 1838. (b) It is suggested that the form of the poinding schedule should be prescribed by act of sederunt which might also prescribe notes for the benefit of the debtor or possessor explaining the effect of the poinding and should include the other matters specified below.

(5) As under the existing law, the officer should be required to make an 'offer back' of the goods at their appraised values, to the debtor, or his representative, if present at the poinding, but the existing requirement that the offer back be made three times should be abolished.

(6) As under the present law, if the offer back is not accepted, and the poinding has not otherwise been competently interrupted, the officer should sign the poinding schedule and deliver it to the possessor.

(7) The officer should no longer be required orally to adjudge and declare the poinding to be complete and the goods to belong to the poinding creditor. For the purposes of conferring a preference on the poinding creditor, of bringing the goods under the control and protection of the court, and for the purpose of any other rule of law or (except where the contrary intention appears) any enactment, the poinding should be deemed to be complete when the poinding schedule is delivered to the possessor (whether by actual delivery or by being left on the premises for him). (Proposition 27).

(c) Comments on proposed new procedure

4.45 The main purpose of these suggestions is to modernise and to clarify the procedural rules, and to provide additional safeguards for debtors. We now attempt to explain the more important changes.[1]

4.46 Abolition of opening ceremony: the opening ceremony is an anachronism left over from the time when the goods were appraised both at the debtor's premises and the market cross.[2] The foundation of the present procedure was laid by the

[1] We deal in Part VI below with inquiry as to ownership of the goods.

[2] For the original procedure, see Stair Institutions, IV, 47.31, Thomson, Duty and Office of Messenger-at-Arms (1790) 256-7.

Bankruptcy Act 1793,[1] and there is some authority for the view that, since that Act and as a result of it, the opening ceremony has not been necessary in strict law[2] but has been carried forward into modern times by the draftsmen of the published styles of executions of poindings[3] and by officers because of uncertainty whether the statute was intended to abolish the old common law requirement. An unfortunate feature of the present uncertainty is that the officer will sometimes use one of the traditional styles of execution but not follow the procedure which it describes, with the result that his execution will misstate what actually happened.[4] We think that the opening ceremony should be expressly abolished.

4.47 The poinding schedule: the traditional styles of poinding schedule specify not only the matters required by

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[1]The Bankruptcy Act 1793 (c.74) s.3 (otherwise known as the Payment of Creditors Act 1793) dispensed with the need for a second appraisal at the market cross and provided inter alia that the debtor should leave the poinded goods in the hands of the debtor with a schedule of the goods and a note of the appraised values and thereafter report this to the sheriff. This section was repealed and re-enacted by the Bankruptcy Act 1814 which was in turn repealed and re-enacted with modifications by the Debtors (Scotland) Act 1838, s.24 of which inter alia provides that the poinding schedule is to be left with the possessor (cf. debtor) and s.25 of which made new provision as to the content of the poinding schedule.

[2]See McKnight v. Green (1835) 13 S.342; cf. J.Ratcliff & Co Ltd v. McKelvie 1977 S.L.T. (Sh.Ct.) 64 where the sheriff was of opinion that the opening ceremony was accepted practice "on which Parliament has not yet innovated".

[3]See the forms of executions of poindings in Bell, System of the Form of Deeds (3rd ed., 1812) vol. 6, p.584; Darling, Powers and Duties of Messengers-at-Arms (1840) p.164; Gillespie Powers and Duties of Sheriff Officers (1852) p.94: Campbell on Citation (1862) p.238.

[4]See J.Ratcliff & Co Ltd v. McKelvie 1977 S.L.T. (Sh.Ct.) 64.

statute[1] but also other matters,[2] though it seems that errors in the non-statutory parts of a poinding schedule do not invalidate the diligence.[3] A variety of styles of schedule have been recently in use (including some which are more appropriate to the now abolished small debt procedure) and some of them are not readily intelligible to consumer debtors. Our general view that the legal forms served on debtors in the course of the procedure should be prescribed by act of sederunt applies to the poinding schedule. The schedule must inform the debtor or possessor that certain of his goods have been poinded, identify the poinded goods, and state their appraised values. It should also warn him of the penalties for removal of the goods. It should identify the creditor, give the state of the debt (including diligence expenses to date); specify the person to whom payment should be sent; and include a notice of the debtor's entitlement to appeal against the poinding.

4.48 The 'offer back': though the three 'offers back' of the goods at their appraised values are not prescribed by statute, the procedure affords a protection to debtors[4] which has been held an essential formality under the common law[5] although it may be that even under the present law one offer back would be enough. Although the 'offer back' is not often accepted, we think it should be retained as a safeguard for debtors.

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[1] Debtors (Scotland) Act 1838, s.24, see para.4.43, head (6).

[2] Graham Stewart, op. cit., p.349 states that the schedule also narrates the extract decree and warrant, the poinding of the goods, the names and designations of the valuators, and generally the procedure followed by the officer in carrying out of the poinding.

[3] McKnight v. Green (1835) 13 S. 342 per L.J.C.Boyle at p.346 "Provided there is a schedule with a note or notandum of the appraised value, that is all which is required": Urquhart & Son v. Wood (1906) 22 Sh.Ct.Reps. 255.

[4] Only the debtor, or those appearing on his behalf in the poinding, can accept the offer back: Hogg v. Taylor 1934 S.L.T. (Sh.Ct.) 36; and goods re-acquired by the debtor in this fashion cannot be poinded again for the same debt: Fiddes v. Fyfe (1791) Bell's Octavo Cases 355.

[5] Broomberg v. Reinhold & Co Ltd (1944) 60 Sh.Ct.Reps. 45; and see J.Ratcliff & Co Ltd v. McKelvie 1977 S.L.T. (Sh.Ct.) 64.

4.49 Abolition of adjudication of goods at the stage of poinding: we have proposed that the officer should no longer be required orally to adjudge and declare the poinding to be complete and the goods to belong to the poinding creditor. The latter declaration is inappropriate since a poinding does not by itself transfer ownership to the poinding creditor, but merely creates a kind of right in security. It is, however, necessary to establish for various legal purposes when the poinding is complete. Thus, section 104 of the Bankruptcy (Scotland) Act 1913, in providing that sequestration renders certain poindings ineffectual, refers to a "poinding executed... on or after the sixtieth day prior to the sequestration".[1] It has long been an open question whether a poinding is 'executed' for this purpose (a) when at the end of the actual poinding the officer adjudges the goods to belong to the poinding creditor, or (b) only when the report of the sale, or of the delivery of the goods to the poinding creditor in default of sale, is lodged.[2] We shall argue in another context that the end of the actual poinding should be the appropriate time. The completion of the poinding by adjudication of the goods is also relevant to determine whether apart from sequestration a poinding falls to be equalised with another diligence within the prescribed period before and after notour bankruptcy;[3] and whether a creditor can be

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[1] See also Companies Act 1948, s.327(1)(a).

[2] Support for this latter view is found in Tullis v. Whyte 18th June 1817 F.C.; Samson v. McCubbin (1822) 1 S.407; Wm. S.Yuile Ltd v. Gibson 1952 S.L.T. (Sh.Ct.) 22 but the former view appears to receive recognition in New Glenduffhill Coal Co Ltd v. Muir & Co (1882) 10 R. 372; Galbraith v. Campbell's Trustees (1885) 22 S.L.R. 602; Bendy Bros Ltd v. McAlister (1910) 26 Sh.Ct.Reps. 152.

[3] See s.10 of the Bankruptcy (Scotland) Act 1913 which, in describing the diligences which are to be equalised, refers to "poindings which shall have been used within" the statutory period.

conjoined in a poinding.[1] If therefore the adjudication of the goods to the poinding creditor is abolished, some rule is required to fix the time of the completion of the poinding for the purposes of competitons between creditors and for other legal purposes.

(d) Powers of entry and search

4.50 Where an officer goes to the debtor's dwelling house or other premises to carry out a poinding, he may find that the door is locked and that either the house is empty or the debtor refuses him entry. Warrants for poinding contain warrants "to open shut and lockfast places" for use if forcible entry and search is necessary to effect the poinding.[2] The warrant for entry is normally construed as a warrant for entry to the debtor's premises and not the premises of a third party. Where the goods are in the possession of a third party, the creditor will generally use the alternative diligence of arrestment which can be effected without entry. Preventing the officer from gaining entry constitutes the common law crime of deforcement and if necessary the officer may invoke the aid of the police to assist him in gaining entry.

4.51 If nobody is in the premises, and it is necessary to open a locked door, the practice of officers is generally to write a letter to the debtor or possessor or leave a note for him. Only if no contact is made will a locksmith (whose fees are chargeable against the debtor) be engaged to open the door. In this way the expense of a locksmith's charges is usually avoided. Any error as to the address or identity of the debtor usually emerges before the premises are forcibly entered. Officers will normally use their powers to open locked

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[1] See Dobie, Sheriff Court Practice, pp.279-280; it may also be relevant in cases of breach of poinding and it fixes the commencement of the period within which the report of poinding must be lodged and the period within which an application for warrant to sell must be made.

[2] Debtors (Scotland) Act 1838, Schs. 1 and 6; Writs Execution (Scotland) Act 1877, s.3; Sheriff Courts (Scotland) Extracts Act 1892, s.7(1).

cupboards and the like within the debtor's premises with care, tact and discretion, and we are not aware of any complaints. The Edinburgh University Debtors Survey, however, disclosed cases in which the officers executed a poinding when only minor children were present. We think that if regulation is required of the manner in which powers of entry and search are used, this should be effected by Practice Notes of the sheriffs principal or rules of conduct such as we discuss in Memorandum No. 51.

4.52 Apart from this, the present law seems to work satisfactorily and special applications for warrants of entry or search would simply add to the expenses. Accordingly we suggest that no change should be made in the present law whereby warrants for poinding automatically contain warrants to open shut and lockfast places. (Proposition 28).

(5) The valuation of the poinded goods

4.53 In Proposition 27, we propose that the officer should normally value the goods, that no valuator or valuators should be appointed, and that (to save expense) only one witness should attend the poinding and sign the execution. These proposals were also made by the McKechnie Report.[1]

(a) Valuators of poinded goods

4.54 There is at present a gap between the theory and the practice of the law on who should value poinded goods. When the requirement of appointment of two valuators was introduced in 1814,[2] it was probably the intention that the valuators should be independent persons who would be skilled in valuation.[3] In fact, for some considerable time, the officer

[1] Op. cit., paras. 163 and 165.

[2] Bankruptcy Act 1814, s.4, replaced by Debtors (Scotland) Act 1838, s.23.

[3] See Bell, Commentaries (7th edn.) vol. 2, p.58. In Broomberg v. Reinhold & Co Ltd (1944) 60 Sh.Ct.Reps. 45, the officer had placed values on poinded goods himself and asked the valuators if they agreed: the sheriff observed (at p.55) "While I am not prepared to go the length of holding that this made the valuation a nullity, I think it is not in accordance with the intention of the Act and is very apt to undermine the essential independence of the valuators."

has valued the goods and the 'valuators' (who are usually members of the staff of the officer's firm) merely act as witnesses. The McKechnie Report[1] recommended that the law should be brought into line with existing practice. We endorse this view: save in exceptional circumstances, it would be far too expensive to require the use of specialist valuers.

(b) The objective of the valuation

4.55 The objectives of the officer's valuation are, first, to fix the upset price for the pointed goods at the subsequent warrant sale;[2] second, to fix the amount to be deducted from the debt where the pointed goods are not sold but delivered to the pointing creditor;[3] and, third, to ensure that the total of the values of the goods pointed does not exceed the amount of the debt, interest and expenses. (This includes a reasonable estimate of the expenses which would be incurred if the diligence were prosecuted to a warrant sale:[4] otherwise, a fresh action and further diligence would be needed for the expenses of which the debtor would be liable.) The officer must appraise the pointed goods separately.[5] If the appraised values are not a reasonable approximation of the true market values, the officer may be liable in damages and, in cases of gross under-valuation, the pointing may be held null.[6]

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[1] Op. cit., para. 165.

[2] Debtors (Scotland) Act 1838, s.27.

[3] Idem: Practice Notes by the sheriffs principal make it clear that this rule has to be applied even when the pointed goods are not uplifted by the pointing creditor.

[4] McNeill v. McMurchy, Ralston & Co (1841) 3 D. 554; McKinnon v. Hamilton (1866) 4 M. 852.

[5] Le Conte v. Douglas (1880) 8 R. 175.

[6] Idem; Scottish Gas Board v. Johnstone 1974 S.L.T. (Sh.Ct.) 65

4.56 The fact that the officer's appraised value operates as an upset price is not altogether satisfactory. In conducting a roup, the auctioneer normally starts by inviting bids at a moderately high price, and if no bids are made, lowers the price to stimulate interest with a view to working it up as bids are made. It would seem to be in the interest of both the creditor and debtor that the officer's valuation should be treated as a reserve price, undisclosed to the potential bidders, so that the auctioneer would be more likely to obtain a reasonable price. The auctioneer would withdraw the goods from the sale if the bidding did not reach that price: the goods would then be deemed to be adjudged to belong to the poinding creditor and the debtor would be credited with the appraised value.

4.57 We suggest that in appraising the value of poinded goods, the officer should as at present be required to fix a reasonable approximation of the value of each lot but the appraised value should be treated in the subsequent auction as a reserve price not disclosed to bidders (being the price at which, if not met, the article will be withdrawn from the sale) rather than an upset price (being the price at which bidding commences). (Proposition 29)

(c) The problem of low valuations

4.58 Over a very long period, criticisms have been made from time to time that the values placed by officers of court on poinded household goods are too low.[1] In considering these

[1] In Stewart v. Carson (1900) 16 Sh.Ct.Reps. 115, the sheriff observed: "It is a question whether there should be some amendment of the law with regard to the sale of poinded and sequestrated effects ... the clerk of court informs me that it has been a matter of very frequent complaint to him of the low prices at which articles ... are sold." See also Scottish Gas Board v. Johnstone 1974 S.L.T. (Sh.Ct.) 65. Representations about the low appraised values of poinded goods were made to our Working Party by the British Association of Social Workers and by the Scottish Association of Citizens' Advice Bureaux.

criticisms, a number of factors must be borne in mind. First, it is well known that the resale price of second hand furniture and other household goods is generally very low. This was recognised by the Payne Committee when considering execution upon goods in England and Wales[1] and by the Crowther Committee in considering repossession of hire purchase goods.[2] Both Committees stressed that the threat of sale or repossession provided a strong incentive to pay and this, rather than the yield on resale of the goods, justified the procedures.[3] Second, officers of court in Scotland have to appraise household goods against the background of the existing procedures whereby prices in warrant sales held in domestic premises may well be depressed. (In 1977, of the sales of domestic plenishings which actually took place, in very few cases were the goods sold at substantially more than their appraised value.[4]) Third, other factors may influence the officer's valuation. On the one hand, the fees of poinding are calculated by reference to the appraised value of the poinded goods and therefore the officer may be said to have no personal interest in undervaluing the poinded goods. On the other hand, officers may be liable

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[1] Op. cit., para. 634: "... the price of second hand furniture and other goods is so low that the sums realised are often hardly worth the trouble involved in removing the goods to a sale room and putting them up for auction."

[2] Report of the Departmental Committee on Consumer Credit (1971; Cmnd. 4596), paras. 6.6.45 - 6.6.50.

[3] Payne Report, para. 635; "there can be no doubt that the effectiveness of execution as a mode of enforcement rests in the threat to sell, which exerts a powerful inducement on the debtor to avoid a sale by raising the sum required, if need be by borrowing and so avoiding the hardship which would otherwise follow": quoted with approval by Crowther Report, para. 6.6.49.

[4] In 58 of the 94 'personal' (i.e. non-business) sales examined in the CRU Analysis of Reports of Warrant Sales in 1977, the goods were adjudged to the poinding creditor in default of sale. In 9 of the 36 warrant sales which actually took place, the price exceeded the appraised value, but generally only by a few pounds. Only in three cases was the excess substantial.

in damages to creditors for over-valuation. Thus, if goods are delivered to the poinding creditor at too high an appraised value, so that a greater amount is deducted from the debt than the goods fetch on resale, the creditor may sue the officer for damages.[1]

4.59 Fourth, in fairness to officers of court, it is right to say that recent allegations of deliberate low valuations in collusion with second hand furniture dealers, were not substantiated and no reliable evidence has been adduced that such a practice has existed in the recent past.[2] Allegations which are not backed by hard evidence are to be deprecated but in any event the facts that sales are publicly advertised (albeit not well attended), that the goods are usually adjudged to the poinding creditor and are rarely uplifted by him, and that any officer of court found guilty of collusion would be dismissed by the sheriff principal, make it inherently unlikely that the allegations are well founded.

4.60 To sum up, while mistakes can occur, it seems likely that in general low valuations of poinded goods can be attributed to the low and uncertain second hand market value of most consumer durables, to the depressed prices fetched at warrant sales held in domestic premises, and to the fact that the valuation represents an upset or minimum price.

4.61 If the foregoing conclusion is correct, then the options for reform are limited. We note that, in at least one sheriff court, it is the practice of the sheriff clerk,

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[1] While there are no reported decisions, we understand there have been several cases where actions of damages have been raised or threatened and thereafter settled. Creditors are more likely than consumer debtors to sue officers for mistaken valuations.

[2] Since 1772, there has been a rule prohibiting a messenger-at-arms "or others commissioned by him" from purchasing poinded goods exposed for sale: see now R.C.51. In Memorandum No. 51, we suggest that this rule should apply in modern form to sheriff officers as well.

where an application for warrant of sale is made, to write a letter to the debtor inviting him to make representations to the court if he is aggrieved by the appraised values placed on the goods so that the matter can be investigated before warrant of sale is granted. We suggest below that the debtor should have an opportunity to object to the grant of warrant of sale and low valuation should be one of the grounds of objection. We conclude therefore that, insofar as the problem of low valuations of poinded household goods can be solved, this might be done (a) by requiring that sales of such goods should take place in auction rooms so that the goods would fetch, and be seen to fetch, their true market price, whatever that might be, and (b) by giving the debtor an opportunity to object to the application for warrant of sale on the ground of the under-valuation of the goods. (Proposition 30).

(d) Postponement of valuation of poinded goods

4.62 It has been suggested to us that if warrant sales are normally to take place in auction rooms, then, at the stage of poinding, the officer's function should be to poind or 'seize' the goods by inventorying them and by delivery of a poinding schedule to the possessor. The appraisal of the poinded goods would either be dispensed with or at least postponed to a later stage in the diligence e.g. on intimation of warrant of sale or immediately before the goods are removed for sale. This would relieve officers of the difficult and invidious function of valuing household goods, or at least (because of the 'filter' or 'funnel' effect of the diligence) require then to make valuations in a smaller number of cases, perhaps smaller by several thousand. A flat rate fee would be chargeable which might be less than the fees currently charged for poindings. There are precedents for the attachment of moveables without valuation in the procedures for poindings under summary warrants[1] and for sequestration for rent.

[1] Though in summary warrant diligence and sequestration for rent the officer can only sell as many of the goods as are required to be sold to satisfy the debts and expenses.

4.63 This proposal merits serious consideration. Its disadvantages are, first, that there would be no formal valuation on which the officer would base the extent of the poinding. Second, we suggest below[1] that the creditor's application for warrant of sale, which should be intimated to the debtor, should be considered by the sheriff who would refuse the application of his own motion or on the debtor's motion if he considered that the grant of warrant to sell would be harsh and unconscionable. We think that the sheriff should have a valuation of the goods before him so that, for example, he could assess whether the proceeds of sale of the poinded goods were likely to cover the expenses of further proceedings in the diligence. Third, the valuation of the officer is meant to safeguard the debtor by fixing a minimum upset price. Even if the goods were exposed for sale at a public auction this safeguard would arguably still be necessary, even if it means that goods which the creditor did not want are adjudged and delivered to him so that he has to expose them for sale a second time at his own expense or otherwise uplift them. Fourth, the 'offer back' of the poinded goods at the appraised values would not be practicable until a valuation was made.

4.64 In the light of these remarks views are invited on two alternative proposals on valuation. (a) The first is that the officer would not value the goods when poinding them upon the view that the poinded goods would fetch their true market price if exposed for sale in an auction room. (b) The second alternative is that the officer would not value the goods at the stage of poinding but might be required to value them at a later stage, viz. when warrant to sell is intimated to the debtor and before the goods are removed to the auction room. (Proposition 31)

(6) Interruption or stoppage of poinding

4.65 A poinding may be competently interrupted or precluded by:

[1] Para. 5.32.

(a) a claim by a third party that the goods proposed to be poinded belong to him or her; we revert to this in Part VI;

(b) a tender of payment of the debt; or

(c) an award of sequestration against the debtor.

In addition, if our proposals on the sist of diligence and on debt arrangement schemes are introduced, the effect of these procedures on poindings would be similar to the effect of an award of sequestration.[1]

4.66 Tender of payment: we have seen that an officer is entitled to proceed with a poinding only if, after his demand for payment, it is delayed or refused.[2] If payment is tendered at any stage, the poinding proceedings must be stopped. Only the principal sum and judicial expenses (including dues of extract) need be tendered and the officer is not then entitled to proceed with the poinding to recover the expenses of charging and poinding.[3] This rule would, however, require to be changed if, as we suggest elsewhere, a warrant for diligence were to include a warrant to recover the expenses of diligence.[4] The debtor would require to tender payment of the diligence expenses accrued to date. Since the offer of payment must be unconditional, the debtor cannot demand delivery of the extract decree as a condition of payment.[5]

4.67 Payment by cheque is contingent on the debtor having either sufficient free cash in the bank, or sufficient credit with the bank, to cover payment of the amount of the cheque.

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[1] See para. 1.20 above and Memorandum No. 50.

[2] In our Memorandum No. 51, we propose that collection of a debt due under a decree should be an official function of the officer covered by his bond of caution.

[3] Inglis v. McIntyre (1862) 24 D. 541; Holt v. National Bank of Scotland 1927 S.L.T. 484.

[4] See Memorandum No. 47, Part III.

[5] Inglis v. McIntyre, supra; Denholm & Co v. Apsley (1891) 7 Sh.Ct.Reps. 280; Miller v. Anderson (1897) 13 Sh.Ct.Reps. 130; the basis of these decisions seems to have been that the creditor would need the extract decree to recover his diligence expenses.

It is therefore a conditional payment involving a certain delay before the condition is satisfied and a certain risk that it will not be satisfied. On these grounds, it has been held that a payment by cheque does not preclude or interrupt diligence.[1] We suggest however that it should be made clear that payment by a cheque supported by a banker's card, or payment by a banker's draft, should be as effective as payment by cash in interrupting or precluding a poinding or other diligence. (Proposition 32).

(7) Conjoining creditors in the poinding

4.68 Section 23 of the Debtors (Scotland) Act 1838 provides:

> "where an officer of the law shall proceed to poind moveable effects, he shall, if required, before the poinding is completed, conjoin in the poinding any creditor of the debtor who shall exhibit and deliver to him a warrant to poind..."

The officer may refuse to conjoin the second creditor only if there is an objection such as would have entitled him to refuse to act in the first place: for example, if the days of charge on the second creditor's decree have not expired.[2] If the officer conjoins the second creditor, he must then poind sufficient goods to satisfy the claims of both creditors.[3] If there are not enough goods of sufficient value, then the conjoined creditors rank pari passu (i.e. rateably in proportion to their debts) in the poinding.[4] Section 23 seems to have been designed to deal with the situation where two officers representing different creditors arrive to poind virtually simultaneously. The real utility of the section, lies in the more frequent cases where one officer is

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[1] Caithness Flagstone Co v. Threipland (1907) 15 S.L.T. 357. Where, however, a creditor objects to the tender of a cheque on grounds other than that a cheque is not legal tender (e.g. that it does not cover the expenses of diligence) he must be held to have waived any objection to the payment not having been tendered in money: Holt v. National Bank of Scotland 1927 S.L.T. 484.

[2] Bell Commentaries (7th edn.) vol. 2, p.58.

[3] Graham Stewart, op. cit., p.356.

[4] Idem.

instructed by two or even three agents, acting for different pursuers against the same debtor. This occurs, for example, in commercial debt cases in outlying areas which the officer does not visit daily. The section enables the officer to act for all the instructing creditors.

4.69 The only defect in the present law appears to be the doubt as to the time when the poinding is complete for the purposes of section 23 of the 1838 Act.[1] When taken together with the provisions on equalisation of diligences[2] these provisions appear sensible and satisfactory and accordingly we merely observe that, subject to the clarification of the time of completion of poinding suggested in Proposition 27(6) above, the statutory procedure for conjoining creditors before completion of a poinding should be retained without modification. (Proposition 33)

(8) Report of poinding to the court

4.70 After the poinding has been carried out, the officer must report it to the sheriff (by lodging his certificate of execution) within eight days unless he can show cause for delay.[3] Where by reason of delay, the court refuses to receive the report of poinding, the effect is that the poinding is

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[1] See Graham Stewart, op. cit., p.356.

[2] Where the second creditor has an extract decree or liquid grounds of debt but no warrant to poind, or has such a warrant but is too late to be conjoined, he may nevertheless lodge (within a prescribed period of notour bankruptcy) a claim to participate in the proceeds of the sale of the poinded goods under section 10 of the Bankruptcy (Scotland) Act 1913.

[3] See Debtors (Scotland) Act 1838, s.25, which provides: "... the officer shall, within eight days after the day on which the poinding was executed (unless cause be shewn why the same could not be done within the period of eight days), report the execution thereof to the sheriff ...". In the five sheriffdoms having more than one court district, it is provided by Practice Note that a report of poinding must be made to the sheriff of the sheriff court district in which the goods are situated.

null,[1] and since a second poinding of the same goods is not competent,[2] the consequences of delay are serious. It has been represented to us that a period of 14 days should be allowed. Sheriff officers' firms may sometimes have many reports of poindings to prepare and lodge and the time scale can be very tight.[3] The purpose of the report of poinding is to enable the court to supervise the diligence and for this purpose the sheriff can take note of errors and deficiencies in the report, or of the poinding of his own motion without the need for an application by the debtor.[4]

4.71 The duty to report the poinding is imposed by statute,[5] and section 25 of the 1838 Act prescribed certain particulars which the execution must specify.[6] In addition, some at any rate of the somewhat uncertain requirements of the common law should be included in the report.[7] Much of the uncertainty as to what should be included in an execution of poinding

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[1] All the reported cases e.g. Miller v. Stewart (1835) 13 S.483 were decided on a construction of the Bankruptcy Act 1814 (which required the report to be lodged 'forthwith'), but on this point these cases remain authoritative in relation to the Debtors (Scotland) Act 1838.

[2] See para. 5.10 below.

[3] The critical date is the date of the receipt of the report and we understand that no extension is allowed for postage of the report, though a postal delay of a report which had been timeously posted would no doubt be reasonable cause for receiving the report of poinding late.

[4] See Thornton, Applicant 1967 S.L.T. (Sh.Ct.) 71.

[5] Reports of poindings were first introduced by the Bankruptcy Act 1793, s.5; replaced by the Bankruptcy Act 1814, s.4; which in turn was replaced by the Debtors (Scotland) Act 1838, s.25.

[6] These are "the diligence under which the poinding is executed, the amount of the debt, the names and designations of the debtor and of the creditor at whose instance the effects were poinded, the effects poinded, the value thereof, the names and designations of the valuators, the person in whose hands they were left, and the delivery of the schedule ...".

[7] In particular, whether the 'offer back' of the poinded goods to the debtor was made and, in a case where no offer was made, the reasons for absence of the offer; the adjudication that the poinded goods belong to the poinding creditor; see paras. 4.48 and 4.49 above.

would presumably be removed if (as we suggested above) the procedure were codified in an enactment. We suggest, however, that the revision of the procedure in poindings should be accompanied by an act of sederunt prescribing the form of the officer's execution of poinding. Some of the forms currently in use have not been much altered for the past 150 years and are archaic; a uniform style should make it easier for sheriff clerks to check reports for omissions and inaccuracies.

4.72 To sum up, (1) views are invited on the question whether the period for reporting a poinding to the sheriff (which is currently eight days from the date of completion of the poinding) should be extended to (say) 14 days from that date. (2) It is suggested that the form of reports of poindings should be prescribed by act of sederunt. (Proposition 34).

(9) Legal effect of poinding and security of pointed goods

4.73 Poinding has the following legal consequences -

(a) It confers a preference on the poinding creditor in a question with other creditors, subject to certain qualifications.[1]

(b) It renders the property 'litigious' (i.e. the debtor is prohibited from voluntarily disposing of it).[2]

(c) To some extent, it brings the poinded goods within the control and protection of the court in the sense that -

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[1] That is to say, it gives the poinding creditor a right to satisfy his debt out of the proceeds of the warrant sale (or, as the case may be, a right to the goods delivered to him in default of sale) in preference to other creditors. In a competition with other inchoate diligences (poindings and arrestments) priority is determined by the times of execution, but the first diligence to be completed by warrant sale, or (as the case may be) by furthcoming, has priority: see Graham Stewart op.cit., pp.364-7. Other qualifications to the poinding creditor's preference arise on notour bankruptcy sequestration, liquidation of companies or the appointment of a receiver.

[2] But the debtor can transfer a good title to a bona fide purchaser for value taking without notice of the poinding: Graham Stewart, op.cit., p.358.

(i) the goods cannot be removed from the premises without the court's authority and a person unlawfully intromitting with them is liable, on summary civil complaint, to be imprisoned until he restores the goods or pays double the appraised values to the poinding creditor;[1]

(ii) breach of poinding is probably also a contempt of court,[2] although the matter is not free from doubt; and

(iii) following the report of the poinding, the sheriff has a duty, where necessary, to give orders for security of the poinded goods, and for their immediate disposal if they are perishable, under such precautions as he thinks fit.[3]

(d) Breach of poinding is also a delict against the poinding creditor, who may sue the unlawful intromitter for damages.[4]

It seems likely that the poinding creditor must elect between the remedies of application for civil imprisonment, action of damages, and (if it is competent) petition and complaint for contempt of court.

4.74 The rules on preferences, litigiosity and creditors' remedies against unlawful intromitters are closely analogous to the corresponding rules affecting arrestments and we shall revert to them later.[5] Apart from some minor points it might be thought that the law is satisfactory but it appears from the Central Research Unit Analysis of Reports of Warrant Sales in 1977 that, where commercial goods are involved,

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[1] Debtors (Scotland) Act 1838, s.30.

[2] Graham Stewart, op. cit., pp.357 and 222-3.

[3] Debtors (Scotland) Act 1838, s.26.

[4] Arnot v. Dowie (1863) 2M. 119; Angus Bros Ltd v. Crocket (1909) 25 Sh.Ct.Reps. 322 at p.326.

[5] Viz. in a Memorandum on miscellaneous diligence topics.

breach of poinding occurs quite frequently. In the absence of police involvement, there are, or may be, difficulties in detecting persons unlawfully intromitting with poinded goods. At this stage we make no proposals, but views are invited on the question whether the remedies and sanctions for breach of poinding are effective or adequate. (Proposition 35).

PART V: THE SALE OF THE POINDED GOODS

Preliminary: the main issues

5.1 The later stages of the diligence[1] are regarded as especially harsh to debtors. The main issues in the reform of those stages may be summarised as follows:-

(i) What time-limits should be imposed on the various procedural steps with a view to allowing instalment settlements to have effect?

(ii) Up to what stage in the procedure should it be possible for the creditor and debtor to make instalment arrangements with the effect of delaying the next step in the procedure? In other words, at what stage should there be finality so that the creditor is put to his choice of either prosecuting the diligence to the final stage of warrant sale or abandoning the diligence?

(iii) Should the creditor be entitled in his discretion to determine whether the diligence should proceed to the final stage of a warrant sale, or should the court have power to refuse warrant of sale and to make an instalment decree or other order in lieu of granting the warrant of sale?

(iv) Should warrant sales in the homes of debtors and advertisements of sale publicising their indebtedness continue to be allowed or should the diligence be made a private matter so far as practicable by the removal of poinded goods for sale anonymously in auction rooms?

(v) Where goods are adjudged to the poinding creditor in default of sale, should the creditor be

[1] Viz. the application for warrant of sale, the intimation of the warrant to the debtor, the advertisement of the sale and the sale itself.

entitled to use the threat of collecting the goods as a means of putting further pressure on debtors to pay?

5.2 Time-limits: the intention underlying the Debtors (Scotland) Act 1838 was probably that, following the report of the poinding, the inchoate diligence should be completed by a quick procedure, under the direction and control of the sheriff, for the sale of the goods or their delivery to the poinding creditor in default of sale.[1] Indeed, the 1838 Act may have contemplated that the application for warrant of sale would be made at about the same time as the report of poinding was lodged. This time-scale, however, took insufficient account of the fact that in most cases a warrant sale is not in the interest of either the debtor or the creditor. And the later stages of the diligence, in particular the advertisement of the sale, can be as effective as the earlier stages, or even more so, in inducing informal settlements. On this view holding a warrant sale is a mark of the failure of the diligence rather than of its success. The present law and practice represents a compromise between these two conflicting policies, developed by judicial decisions and Practice Notes, whereby a period of six months, and in some cases longer, is allowed between the poinding and the application for warrant of sale to permit informal payment arrangements to have effect. In section (1) of this Part, we propose that the period should be extended to one year with the possibility of an extension by the sheriff on cause shown. We suggest, however, that once warrant of sale is granted, the sale should (as at present) follow without undue delay, the precise provisions varying according to whether the sale is to be in an auction room or elsewhere. We also suggest that the restriction on repeated poindings should be retained, albeit based on statutory rules rather than Practice Notes.

5.3 Instalment settlements after warrant of sale: the threat of a warrant sale, and especially of its related

[1] Bell, Commentaries (7th edn) vol. 2, p.58.

advertisement, operates as a powerful incentive to payment and, until recently at any rate, creditors could cancel sales at any time up to the date of sale to allow informal settlements to have effect under threat of a second warrant of sale. The practice of granting second warrants on the breakdown of informal payment arrangements was, however, held in a recent case not to be in accordance with the Debtors (Scotland) Act 1838.[1] If, as we propose, advertisements of the sale of household goods publicising indebtedness are virtually abolished, the removal of the goods to a sale room would become a critical event which would operate as a spur to instalment arrangements, perhaps as effectively as the advertisement of sale, but without the socially undesirable element of publication. We propose in Section (1) therefore that the creditor should be entitled to cancel arrangements for a warrant sale and to make an instalment arrangement secured by an extension of the duration of the poinding, but that in order to ensure that the diligence does not endure indefinitely, this should be possible on one occasion only and the extension of the poinding should be limited in time.

5.4 Sheriff's power to refuse warrant of sale: until recently it was generally thought that a creditor has an unfettered discretion to prosecute his diligence to the final stage of a warrant sale although the occasions on which he did so were rare. In a recent case, however, it was held that the sheriff may refuse warrant of sale on grounds of expediency, and that it would be inexpedient to grant warrant of sale where the proceeds of the sale would not cover the expenses of the sale.[2] In Section (2) we suggest that the sheriff's powers to refuse warrant on equitable grounds should be placed on an unchallengeable

[1] City Bakeries Ltd v. S. & S. Snack Bars & Restaurants Ltd 1979 S.L.T. (Sh.Ct.) 28.

[2] South of Scotland Electricity Board v. Carlyle 1980 S.L.T. (Sh.Ct.) 98.

statutory basis and that he should be expressly empowered to refuse warrant of sale where further proceedings would be harsh and unconscionable. In addition, we suggest that, in lieu of granting warrant of sale, the sheriff should have new powers to grant an instalment decree or extend the duration of the poinding to allow an instalment decree to have effect. He should also retain his existing powers and duties of checking the regularity of the proceedings.

5.5 Sales of household goods in auction rooms: in Section (3) we propose, on social grounds, that the warrant sale of goods poinded in a debtor's dwelling should take place in an auction room unless the debtor consents to a sale in his home. In this way, advertisements publicising indebtedness would no longer appear and the sale itself would be a less painful experience for debtors.

5.6 Adjudged goods: since we propose that warrant sales of household goods would normally take place in auction rooms, and that goods exposed for sale in an auction room and adjudged to the poinding creditor in default of sale would require to be uplifted by him, it would no longer be possible in such cases for creditors to use the threat of uplifting goods adjudged to them as a means of putting further pressure on debtors to pay the balance of the debt. In the few remaining sales in debtors' premises, we suggest that the creditor must uplift the goods within a short prescribed period, failing which the debtor would not be divested of ownership and threats to uplift the goods would not be possible.

5.7 We now consider these issues in more detail and other reforms of the later stages in the procedure.

(1) Procedural time-limits and restrictions on repeated poindings and warrant of sale

(a) Existing law and practice

5.8 Within eight days from executing the poinding, the

officer must report it to the court.[1] Thereafter, in the normal case there are four main steps of procedure leading to the warrant sale, viz: the application for warrant of sale; the intimation of the warrant to the debtor; the advertisement of the sale; and the sale itself. The time scale for these steps is regulated partly by the Debtors (Scotland) Act 1838, section 26,[2] as interpreted by the courts and partly by Practice Notes of the sheriffs principal.

5.9 Time of application for warrant of sale: the period within which the creditor must apply for warrant of sale is not expressly regulated by the Debtors (Scotland) Act 1838. The courts, however, have held it to be an implied condition of the Act that the poinding should be followed by sale "without undue delay",[3] and what is to be treated as undue delay in applying for the warrant is now in effect fixed for each sheriffdom by Practice Notes. In some sheriffdoms,[4] the application must be made within six months of the date

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[1] Debtors (Scotland) Act 1838, s.25: we suggested at para. 4.72 above that the period might be extended to 14 days.

[2] This section provides: "on the execution being reported... if no lawful cause be shewn to the contrary, [the sheriff] shall, if required, grant warrant to sell [the poinded goods] by public roup, at such time and at such place, with such public notice of the sale, as may appear to the sheriff most expedient for all concerned, and at the sight of a judge of the roup to be named by the sheriff; provided that the sale shall not take place sooner than eight days nor at a longer period than twenty days after the date of the publication of the said notice of sale; and the sheriff shall order a copy of the warrant of sale to be served on the debtor, and on the possessor of the poinded effects, if he be a different person from the debtor, at least six days before the date of the sale, excepting in the case of perishable effects."

[3] Henderson v. Grant (1896) 23 R. 659; New Day Furnishing Stores Ltd v. Curran 1974 S.L.T. (Sh.Ct.) 20; City Bakeries Ltd v. S. & S. Snack Bars & Restaurants Ltd 1979 S.L.T. (Sh.Ct.) 28.

[4] Lothian and Borders (Practice Note dated 28 June 1976); South Strathclyde, Dumfries and Galloway; Grampian, Highland and Islands (Practice Notes dated 1 July 1976).

of the poinding but within that period an application may be made for an extension of up to a further six months.[1] In the other sheriffdoms, warrant of sale will be granted without special enquiry if the application is made within six months of the date of poinding; thereafter the application must set out the reasons for delay.[2]

5.10 Time of intimation of warrant of sale to debtor: the 1838 Act, section 26 requires the sheriff to order intimation of the warrant of sale to the debtor (and the possessor of the goods if he is a different person) at least six days before the date of sale. The intention was no doubt to give the debtor adequate notice of the sale and the Act contemplates that intimation might be after the advertisement. In practice, intimation is made by the officer as soon as may be after the grant of the warrant of sale. This is in the debtor's interest, but it also gives warning not only of the sale but of the impending advertisement, which as the Edinburgh University Debtor's Survey shows, is often as powerful an inducement to payment as the threat of sale.

5.11 Time of advertisement of sale: the 1838 Act provides that public notice of the sale must be given between 8 and 20 days before the sale takes place and warrants of sale normally stipulate that the advertisement be made once in a specified local newspaper within that period. The probable intention was to ensure that the public notice was neither too short (lest potential bidders could not make arrangements to be there) nor too long (lest potential bidders might forget about it). In practice, these provisions do not now normally secure the attendance of bidders at sales of household goods in domestic premises.

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[1] A copy of the application for extension is sent to the debtor.

[2] Practice Notes in Tayside, Central and Fife (12 March 1977); North Strathclyde (3 July 1978); and Glasgow and Strathkelvin (14 Dec. 1979).

5.12 Time of sale: the date and hour of the sale are fixed by the sheriff's warrant of sale and should take place 'without undue delay'. As we construe the various Practice Notes on the duration of poindings, the sale itself need not take place with the six months period following the completion of the poinding, provided the application for the warrant is made within that period.

5.13 Restriction on second poindings and second warrants of sale: to prevent evasion of the implied statutory condition that a warrant sale must be effected without undue delay, it has been held that a second poinding of the same goods in the same premises under the same extract decree is invalid.[1] Moreover, where a creditor purports to poind for a second time goods in the same premises under the same extract decree, and when the value of the poinded articles in the first poinding was less than the debt due, a presumption is raised that the goods referred to in the officer's execution and schedule of the second poinding are the same as the goods covered by the first poinding.[2] Following the case cited, Practice Notes expressly prohibit or restrict second poindings of goods (not merely the same goods but any goods) in the same premises by the same creditor unless the debtor has brought into the premises poindable goods which were not in the premises when the first poinding was executed.

5.14 More recently, it has been held that while there is nothing inherently unlawful in an application for a second warrant of sale, this second application, like the first, must be sought without undue delay as implied by the 1838 Act.[3] The effect of the decision is that, where a

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[1] New Day Furnishing Stores Ltd v. Curran, supra, at p.25.

[2] Idem.

[3] City Bakeries Ltd v. S. & S. Snack Bars & Restaurants Ltd 1979 S.L.T. (Sh.Ct.) 28.

warrant of sale operates as a spur to an informal arrangement for payment, then the creditor is not entitled to obtain a second warrant if for example the negotiations for the arrangement break down or the debtor defaults in making the payments. Normally the creditor must have the advertisement published and the sale carried out at the dates specified in the warrant of sale, or lose altogether his right to sell.

(b) Proposals on time-limits and repeated diligence

5.15 We have already emphasised that, in the great majority of cases, warrant sales now operate as a threat to compel payment out of income rather than as a direct method of obtaining payment out of the proceeds of sale. If, therefore, the diligence is to retain its effectiveness, an appropriate period after the poinding must be allowed to enable informal instalment settlements to have effect.

5.16 Period between poinding and application for warrant of sale: various factors influence the choice of the appropriate period.[1] (a) It has been argued that moveable goods should not be subject for too long a period to an inchoate diligence which does not by itself transfer ownership of the goods to the creditor, but which prevents the debtor dealing with them. The debtor must keep them on the premises; cannot exchange them for other goods; and if they are damaged, the debtor may be blamed. We doubt, however, whether in practice the restrictions on disposal cause debtors sufficient inconvenience to require that poindings be of very short duration. (b) It has also been said that delay in completing the poinding may be unfair to other creditors since they are prevented from obtaining a right to the goods. It is true that a poinding may induce the debtor to pay the poinding creditor before other oreditors. But the argument overlooks the factsthat a second poinding creditor who obtains warrant of sale first will have priority[2] and that the other creditors can share in the proceeds of sale if they lodge a claim at the proper time,[3] though they may not be entitled to share in payments to account made under pressure of the poinding.[4] In most

[1] For a discussion of these factors, see Henderson v. Grant (1896) 23 R. 659; New Day Furnishing Stores Ltd. v. Curran 1974 S.L.T. (Sh.Ct.)20; City Bakeries Ltd. v. S & S Snack Bars and Restaurants Ltd. 1979 S.L.T. (Sh.Ct.)28.

[2] See para. 4.73 above, footnote 1.

[3] Bankruptcy (Scotland) Act 1913, s.10: the proper time is within the period of 60 days before and 4 months after the debtor's notour bankruptcy.

[4] Section 10 of the 1913 Act appears to impose a duty on the poinding creditor to account to other creditors only if he "shall carry through a sale".

consumer debt cases, to require the poinding creditor to incur the expense of a warrant sale will rarely assist other creditors. (c) Yet another argument is that, by the time of the poinding, usually the debtor has already been long under the ultimate threat of warrant sale and, on this view, further delay is out-of-place especially since the goods have been attached. On the other hand, there are cases where it is only at the stage of poinding that the debtor is moved to make serious efforts at payment. In other cases, the debtor's circumstances may have changed from a position of insolvency to a position where he can pay the debt by instalments. (d) Another argument against delay is that the social impact on the debtor and his family of the threat of warrant sale is such that he and they should not be subjected over too long a period to that threat.

5.17 If, however, it is accepted that poindings should continue to operate as a spur to an instalment settlement, then the period between poinding and the application for warrant of sale should be such as to allow most debts to be paid within it by instalments of reasonable amount.[1] The average amount of the principal sums in decrees against "personal" (ie non-business) defenders in 1978 was estimated at £214. To this sum, judicial and diligence (charge and poinding) expenses have to be added and, from it, payments to account have to be subtracted. In very many cases, the principal sum will still be owing when the poinding is executed. Many debtors subjected to poindings are unemployed and can only pay regularly very small amounts of perhaps not more than £2, £3 or £4 per week.[2] In such cases a debt of £200 may take one or two years to clear. In our Memorandum No. 50 on Debt Arrangement Schemes, we argue that the maximum period which a debtor should be required to undergo the discipline and restraints of payment arrangements is three years. This period seems too long for the duration of a poinding but on the other hand six months is too short having regard to the levels of decree debts and the amounts which debtors can afford to pay.

5.18 As a compromise and to focus the issue (1) it is suggested that the period during which a poinding normally has effect should be one year from the date of the completion

[1] See C.R.U. Diligence Survey, para. 4.11. The average amount in decrees against all defenders (viz. commercial as well as personal debts) subjected to poindings was £275.

[2] Edinburgh University Debtors Survey; also O.P.C.S. Defenders Survey.

of the poinding except where the period is extended in one of the ways mentioned below. The period should be fixed by statute or act of sederunt rather than as at present by statute and Practice Notes. (2) Before the expiry of the period, the creditor should be entitled to apply to the sheriff, by minute intimated by the sheriff clerk to the debtor, for an extension of the period. In determining the application, the sheriff should have power to extend the period by such further period as appears to him reasonable in the circumstances. The fact that the debtor is likely to be able to comply, or to continue compliance, with an informal arrangement for payments to account of the debt should be a ground for extending the period. (3) Provision should be made to ensure that, where within the period of the effective duration of the poinding, an application for its extension or for warrant of sale is lodged, the poinding should continue to have effect at least until the application is disposed of. (4) To prevent evasion of the time-limits on the duration of poindings, the present restriction on second poindings (viz. of goods on the same premises under the same extract decree, except in relation to poindable goods brought on to the premises after the first poinding) should be retained and embodied in statute rather than Practice Notes. (Proposition 36).

5.19 Time-limits after warrant of sale; second warrants of sale: the next question is whether or to what extent it should be competent for the creditor to cancel the arrangements for sale and to make informal instalment payment arrangements after warrant of sale has been granted. If, as we propose below, it is provided that poinded household goods should normally be sold at an auction room rather than at the debtor's dwelling-house, then the threat of the advertisement of sale will lose its present efficacy as an inducement to payment. In such cases the day fixed for the removal of the household goods to an auction room would almost certainly become the most critical date between the granting of the warrant of sale and the actual sale. It is likely that creditors would

consider carefully abandoning the diligence immediately before the stage of the removal to avoid incurring further irrecoverable expenses. Debtors wishing to avoid both the loss of possession of their goods and liability for the expense of removal, might increase their efforts to pay the debt. In other words, the threat of removal of the goods would replace the threat of advertisement as a spur to payment.

5.20 We think it would often be in the interest of the debtor and creditor if the arrangements for removal and sale could be cancelled and the duration of the poinding extended to allow an instalment settlement to have effect.[1] We recognise, however, that there must be an end to the diligence and accordingly suggest that cancellation should be allowed on one occasion only and that the extension of the duration of the poinding should be limited in time. Further, to avoid administrative and legal complications, we think that cancellation of the arrangements for sale and extension of the duration of the poinding should not be possible if the poinded goods had already been removed from the premises of the debtor or other possessor for sale in an auction room or elsewhere. In the exceptional case where the goods are not to be removed for sale, we suggest that cancellation and extension of the duration of the poinding should be competent at any time up to the sale, but on one occasion only and, as above mentioned, the extension of the poinding would be limited in time.

5.21 We think it unnecessary and undesirable that a second application for warrant of sale involving an examination of the merits of the case should be made. A report of the cancellation of the arrangements for sale, or for removal and sale, should, however, be made to the court as a prerequisite of any extension of the duration of the poinding.

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[1] As noted at para. 5.14 above this is not possible at present because of the short time-limits following warrant of sale and the fact that second warrants of sale are not normally competent as a result of the City Bakeries case.

5.22 To obtain comments, we suggest that (1) the duration of the poinding following warrant of sale should be fixed either by act of sederunt for the whole of Scotland or by Practice Notes of the sheriffs principal to take account of local circumstances. (2) In the case of poinded goods to be exposed for sale by public roup along with other goods in a public auction room, the sheriff's warrant need not fix the precise times of removal or of sale. The officer should however give the debtor (and the possessor if he is a different person) (a) intimation of the grant of warrant of sale; (b) not less than (say) seven days' notice of the date and time of removal of the poinded goods; and (c) notice of the time and place of the auction at which the goods are to be exposed for sale. If through circumstances outwith the control of the creditor and officer the original date of the auction is postponed, no intimation of the postponement need be given to the debtor, but the debtor should be notified that he should contact the auctioneer or officer for information. The sheriff clerk should, however, notify the debtor that the goods have been sold (or delivered to the poinding creditor) after he has received the report of the sale (or delivery). (3) Where the goods are to be sold on the debtor's premises, or otherwise than at a sale in a public auction room, then the sheriff should continue to specify in his warrant of sale a precise date and time for the sale to take place and the other provisions on time-limits in the Debtors (Scotland) Act 1838, section 26 should apply without modification. (4) After the grant of warrant of sale the creditor should be entitled on one occasion only to cancel the arrangements for sale and enter into an instalment arrangement with the sanction of a postponed sale. A report of the instalment arrangement signed by the parties would be lodged in court by the creditor or officer and, on registration of the report in the register of poindings, the duration of the poinding would be extended for a prescribed period of say (six) months from the lodging of the report. (5) In the case of goods to be exposed for sale at an auction room or otherwise than at the premises of

the debtor or possessor, the foregoing procedure could not be used after the goods had been removed from the premises. (6) In the event of the debtor's default following a cancelled auction room sale, the creditor would be entitled to instruct the removal of the goods (after due notice) and a second auction room sale within the extended time-limit without the need for a second warrant of sale. In the case of cancelled sales on the debtor's or possessor's premises or elsewhere than an auction room, the creditor would apply for a second warrant fixing the place and time of sale within the extended time-limit. The sheriff, however, could only refuse the application on the ground of an irregularity in the proceedings. (7) Views are invited on the question whether the creditor or debtor should be liable for the expenses of cancelled arrangements for removal or sale. (Proposition 37).

(2) Application for warrant of sale

(a) Retention of separate application for warrant of sale

5.23 The retention of applications for warrant of sale is implicit in our proposals.[1] It has however been proposed to us that a warrant of sale should be granted along with the warrant to charge and poind in the extract decree in order to avoid the delay and expense of a separate application. This was the position in letters and precepts of poinding before 1793[2] and in diligence on small debt decrees between 1837 and 1976.[3] The 1793 Act was apparently introduced to avoid clandestine or collusive sales, and to ensure that the

[1] Under an Act of Sederunt of 6 March 1833, the application for warrant of sale is made by the creditor, officer or solicitor endorsing on the report of the execution of the poinding a short crave: see Graham Stewart p.358; British Relay Ltd v. Keay 1976 S.L.T. (Sh.Ct.) 23 at p.24; New Day Furnishing Co Ltd v. Curran 1974 S.L.T. (Sh.Ct.) 20.

[2] Before the Bankruptcy Act 1793 (c.74) s.5.

[3] Small Debt (Scotland) Act 1837, s.20, under which the officer had power to sell the goods not earlier than two days after the poinding.

creditor's diligence was not disappointed and a fair price obtained, in the debtor's interest, at a sale which had been adequately publicised.[1] While we have sympathy with the proposal and believe that officers are generally to be trusted to arrange sales in a proper manner, we think that control by the sheriff does provide desirable safeguards for all concerned, including officers of court generally, and indeed we suggest below that this control should be strengthened by giving the sheriff substantive powers to refuse warrant of sale in certain circumstances.

(b) Sheriff's powers in disposing of application, etc.

5.24 The Debtors (Scotland) Act 1838, section 26 provides that "if no lawful cause be shewn to the contrary" the sheriff shall, if required, grant warrant of sale. Apart therefore from his power to approve with or without modifications the officer's arrangements for sale (e.g. the time and place of sale),[2] the sheriff has a limited jurisdiction to decide whether warrant of sale should be granted at all. It is well settled that this jurisdiction is 'ministerial' (that is to say, administrative or executive in character). In the exercise of this jurisdiction, the sheriff has a power, or indeed a duty, to decide whether or not the proceedings are ex facie regular,[3] e.g. whether the goods are liable to be poinded; or belong to a third party.[4] He may also decide whether the goods are so grossly undervalued or otherwise so

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[1] Bell, Commentaries (7th edn) vol. ii, p.58.

[2] These are set out in the warrant submitted by the officer or solicitor to the sheriff along with the execution of poinding on which is endorsed the crave for warrant of sale.

[3] See e.g. Clark v. Clark (1824) 3 S. 143 at p.144 (where the court held that the sheriff's power "is merely ministerial and only entitles him to take cognizance of objections arising as to the ex facie regularity of the diligence"); Clark v. Hinde Milne & Co (1884) 12 R. 347 per Lord Shand at p.354" ... the judge must examine the proceedings and satisfy himself of the regularity of what has taken place and of the applicant's right to a warrant"; Jack v. Waddell's Trs. 1918 S.C.73.

[4] Clark v. Clark supra.

irregularly valued as to make the poinding a nullity.[1] He may take objections of his own motion[2] as well as on the motion of a debtor or third party: indeed there is no rule requiring the crave for warrant of sale to be intimated to the debtor or anyone else.[3]

5.25 Until recently, it was generally thought that the sheriff's discretion to refuse warrant of sale is strictly limited to cases where the proceedings are irregular. Practice followed the view that the sheriff has no discretionary power to refuse warrant of sale based on equitable considerations: if the proceedings are regular, he must grant warrant; if they are not regular, he cannot grant warrant.[4] In the recent case of S.S.E.B. v. Carlyle,[5] however, the sheriff principal upheld a sheriff's decision refusing warrant of sale on the ground that the expenses of the sale would be likely to exceed the proceeds derived from it and would only add to the defender's indebtedness. The decision was based on a liberal and wide interpretation of a passage

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[1] Scottish Gas Board v. Johnstone 1974 S.L.T. (Sh.Ct.) 65 (an application for warrant of sale); Le Conte v. Douglas (1880) 8 R. 175, (an action of reduction). In Beaumont, Petitioner (1894) 2 S.L.T. 30 it was held in a petition for sequestration that an execution of poinding could only be set aside by an action of reduction in which the proper parties are called as defenders. It seems, however, that in a poinding process the sheriff can achieve the same result by refusing to grant warrant of sale.

[2] E.g. Thornton, Applicant 1967 S.L.T. (Sh.Ct.) 71; New Day Furnishing Stores Ltd v. Curran 1974 S.L.T. (Sh.Ct.) 20; City Bakeries Ltd v. S. & S. Snack Bars and Restaurants Ltd 1979 S.L.T. (Sh.Ct.) 28; South of Scotland Electricity Board v. Carlyle 1980 S.L.T. (Sh.Ct.) 98.

[3] In at least one sheriff court, however, it is the practice of the sheriff clerk to inform the debtor by letter of the application for warrant of sale and to invite the debtor to make respresentations concerning the appraised value of the goods if he is aggrieved by the valuation.

[4] See e.g. City Bakeries Ltd v. S. & S. Snack Bars and Restaurants Ltd supra, per Sheriff Kearney at p.29.

[5] 1980 S.L.T. (Sh.Ct.) 98. We understand that in several other recent unreported cases prior to S.S.E.B. v. Carlyle, the sheriff had refused warrant of sale but this appears to have been a novel practice.

in Bell's Commentaries.[1] The result of the decision seems to be that the sheriff is entitled to refuse warrant of sale on grounds of 'expediency', and that holding a sale is inexpedient if its result would be to impoverish the debtor, or at least to add to his debts, without financially benefiting the creditor. On the other hand, in comparing the likely proceeds of sale and the diligence expenses, only the expenses subsequent to the warrant of sale are taken into account. The proceeds of sale do not require to cover the whole expenses of the charge and poinding (as well as the expenses of sale) since the "creditor is entitled to take these steps in attempting to enforce his decree and ascertain the extent of his debtor's poindable effects".[2]

5.26 Clearly there is a major difference in principle and practice between, on the one hand, a jurisdiction to decide upon expediency of the mode of sale (which is merely a ministerial or administrative jurisdiction to regulate the mode of sale) or to stop the proceedings because of an irregularity and, on the other hand, a jurisdiction to refuse warrant of sale on what are, in effect, equitable grounds (which prima facie goes beyond administrative matters and affects the creditor's right to obtain warrant of sale). We find it unnecessary however to state a view on whether S.S.E.B. v. Carlyle was correctly decided in law, because we think that the general policy underlying the decision is sound and should be placed on an unchallengeable statutory basis. There is no doubt that until recently, of the

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[1] (7th edn) vol. 2, p.61: "The sheriff in all that belongs to the warrant of sale, has jurisdiction, which entitles him to decide on the regularity of the diligence ex facie; on the correctness of the poinding of particular articles; on the expediency of the mode of sale, upset price and other particulars relative to the conduct of the process".

[2] S.S.E.B. v. Carlyle, supra, at p.100.

admittedly few warrant sales which took place,[1] in a small but significant number the proceeds of sale did not cover the expenses of the advertisement and sale.[2]

5.27 It is, however, no easy task to frame an appropriate criterion for the refusal of warrant of sale. One possible approach would be to enact specific grounds for the refusal of warrant, in addition to the existing ground of irregularity in the proceedings (including gross under-valuation); for example (a) that the creditor does not intend to carry through the sale but is using the procedure to elicit further payments; (b) that non-exempt goods have been poinded which would realise amounts disproportionate to the hardship inflicted on the debtor and his dependants; (c) that payments have been made or promised which would enable the debt to be paid within a reasonable time; and (d) that there is no reasonable likelihood that the proceeds of sale will cover the expenses of the further diligence up to and including the sale. While the last ground reflects the decision in S.S.E.B. v. Carlyle, the others are less satisfactory. Ground (a) will usually be inoperable since the sheriff cannot know the creditor's motives. As regards (b), for reasons given below, we provisionally consider that a test based on balancing hardship would be unsatisfactory. Ground (c) is really a ground for extending the duration of the poinding rather than for a refusal of warrant terminating the poinding. Moreover, it might be impossible to frame a statutory list of specific grounds which would be exhaustive.

5.28 Another test would be one expressly based on a comparison between the appraised values (viz. the likely proceeds of sale) on the one hand, and a fixed proportion of

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[1] Viz. 285 in 1977 and 289 in 1978.

[2] The CRU Warrant Sales Report shows that of 94 reports of sales of household goods in 1977 which were available for examination, the proceeds did not cover the total diligence expenses in 19 cases (NB did not cover the expenses of the advertisement and warrant sale in 10 cases) and did not cover the total judicial and diligence expenses in 37 cases.

the principal sum, judicial and diligence expenses on the other.[1] A test based on fixed proportions would, however, mean that the diligence would cease to be a spur to payment against an experienced or well-advised debtor in cases where the appraised value did not meet the fixed proportion, and the diligence would to that extent lose its credibility as a sanction. Moreover, arguably the creditor should normally be entitled to obtain warrant of sale if the appraised values would cover the expenses of the sale and at least part of the expenses of the charge and poinding.[2]

5.29 An alternative approach would be to prescribe a general discretionary test, with or without statutory guidelines. On the whole, we do not favour statutory guidelines if an appropriate general test can be devised. One possible general test would be that the hardship to be imposed on the debtor by granting warrant of sale would be greater, or disproportionately greater, than the hardship imposed on the creditor by refusing to grant warrant.[3] To take account of exemplary or deterrent diligence, it would have to be made clear that the court must only have regard to the benefit directly enuring to the creditor out of that diligence, and not the indirect benefit of making the debtor an example to other debtors in default. We doubt, however, whether a test based on balancing

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[1] For example, the sheriff might refuse warrant if the appraised value was less than half of the principal sum, judicial and diligence expenses. Of the 94 warrant sales of the household goods of consumer or non-business debtors executed in 1977 on which information is available, the sum realised in 60% of the cases was less than half of the aggregated principal sum, judicial and diligence expenses.

[2] S.S.E.B. v. Carlyle 1980 S.L.T. (Sh.Ct.) 98 at p.100; quoted at para. 5.25 above.

[3] Cf. Rent (Scotland) Act 1971, Sch. 3, Pt. III, para. 1 under which the court cannot make an order for possession of a protected or statutory tenancy required by the landlord as a residence if greater hardship would be caused by granting the order than by refusing to grant it.

hardship would be appropriate. Most creditors are large retail or commercial organisations. In most cases, the hardship imposed on the debtor would be disproportionate to the benefit enuring to the creditor and accordingly warrants of sale might never be granted in consumer cases. If this were to happen there would be a risk that the credibility of the diligence would be undermined.

5.30 Various other tests may be used in which the court's attention would be focussed on the debtor's circumstances far more than in a balance of hardship test. The test of expediency as applied in S.S.E.B. v. Carlyle has the advantage that it has already been construed: its meaning seems to be however that the grant of warrant of sale would be inexpedient if further proceedings would be 'oppressive' to the debtor[1] and 'oppression' is a possible alternative test.[2] Other formulae could be used: for example, that further proceedings in the diligence would cause 'undue hardship'[3] or be 'harsh and unconscionable'.[4] While the statutory precedents do not afford a very reliable guide, they are of some help. 'Undue hardship' perhaps means merely 'more hardship than the circumstances warrant'.[5] In other contexts,[6] the courts

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[1] 1980 S.L.T. (Sh.Ct.) 98 at p.100.

[2] The test that an arrestment is 'nimious and oppressive' is a ground for recalling or restricting arrestments.

[3] This is the test used in the Law Reform (Diligence)(Scotland) Act 1973, s.1: see para. 4.14 above.

[4] This was the test used in the Moneylenders Act 1900, s.1(1) enabling the court to open up moneylending transactions: see Samuel v. Newbold [1906] A.C. 461, 466-7, 469-70; Midland Discount Co v. Macdonald 1909 S.C. 477; Debenham Ltd v. McCall 1923 S.L.T. 365.

[5] See Liberian Shipping Corporation v. King & Sons Ltd [1967] 1 All E.R. 934 per Denning M.R. at p.938 (construing the English Arbitration Act 1950, s.27).

[6] Notably the imposition of 'oppressive' sentences by inferior criminal courts: see Stewart v. Cormack 1941 J.C. 73

have applied the test of 'oppression' very narrowly since a finding of oppression is often thought to have connotations of wrongfulness.[1] It is suggested that 'harsh and unconscionable' would be an appropriate test: it has reference mainly to the debtor's circumstances though it may imply unfairness on the creditor's part, and seems to connote abuse of power rather than wrongfulness.

5.31 There may be cases where, in lieu of refusing warrant of sale outright with the effect of terminating the poinding, the sheriff should have powers, on the motion of either party or of his own motion, (a) to defer warrant of sale by sisting further proceedings in the diligence, (b) to grant an instalment decree, (c) to extend the duration of the poinding as security against further default and (d) to order a reappraisal of the value of the goods (e.g. if they had deteriorated). This would enable the sheriff to deal equitably with the case where the debtor opposes the grant of warrant of sale and satisfies the sheriff that he is willing and able to make payments to account of reasonable amounts. It is implicit in our proposals that in contrast to the present law, the creditor's application for warrant of sale should be intimated to the debtor. Moreover, at present, where the sheriff refuses to receive a report of poinding or refuses warrant of sale with the result that the poinding ceases to have effect, no intimation of this fact is made to the debtor or possessor to whom the schedule of poinding has been delivered. We think that the creditor or officer should be required to make such intimation.

5.32 To sum up, we suggest that (1) an application by a creditor for warrant of sale should be made by a minute intimated by the sheriff clerk to the debtor who should be given an opportunity to object. (2) In dealing with such an appli-

[1] See e.g. Meyer v. S.C.W.S. Ltd 1958 S.C. (H.L.) 40 where (in a case involving a company acting 'in an oppressive manner' against the rights of minority shareholders) Viscount Simonds (at p.47) used the dictionary meaning of 'burdensome, harsh and wrongful'.

cation, the sheriff should have power, of his own motion or on the motion of the debtor, to refuse the application if the grant of the warrant of sale would be harsh and unconscionable. (3) In addition the sheriff should retain his existing powers, exercisable of his own motion or on application, to refuse to receive a report of poinding or to refuse to grant a warrant of sale on the ground of an irregularity in the proceedings. (4) It is suggested that in dealing with an application for warrant of sale the sheriff should have power, on application or of his own motion -

(a) to sist further proceedings in the diligence;

(b) to grant an instalment decree in lieu of the existing decree;

(c) to extend the duration of the poinding as security against the debtor's future default under the instalment decree;

(d) to make an order for re-appraisal of the value of the goods together with such order relating to the expenses of the re-appraisal as appears just; and

(e) to make the foregoing orders subject to terms and conditions.

(5) Where the sheriff refuses to receive a report of poinding or refuses an application for warrant of sale with the result that the poinding ceases to have effect, intimation of this fact should be made by the sheriff clerk to the debtor, and to the possessor of the goods specified in the report of poinding if he is a different person from the debtor. (Proposition 38).

(c) Appeal against sheriff's decision

5.33 At present, an appeal to the sheriff principal against a decision granting or refusing warrant of sale is competent if the sheriff grants leave to appeal,[1] and from the sheriff principal to the Inner House of the Court of Session or direct

[1] Sheriff Courts (Scotland) Act 1907, s.27(f).

to the Inner House.[1] The new test of 'harsh and unconscionable' might raise questions of interpretation on which it would be expedient to promote uniformity throughout Scotland. Accordingly an appeal to the Court of Session would seem desirable.[2] Such an appeal could not be restricted to questions of law since the test raises questions of mixed fact and law. In view of the discretionary nature of the test, the Court would not interfere with the sheriff's decision unless, in its opinion, no reasonable judge properly instructed on the law, would have reached that decision. We suggest that an appeal should lie, by leave of the sheriff, against a decision of the sheriff granting or refusing warrant of sale to the Court of Session, or to the sheriff principal and thereafter to the Court of Session, but no further appeal should be competent. (Proposition 39).

(d) Intimation of warrant of sale to debtor

5.34 A copy of the warrant of sale is intimated to the debtor (and possessor if he is a different person) by recorded delivery.[3] It has been suggested to us that the copy warrant should be served by hand service rather than postal service. The reason given was that the debtor may have flitted since the poinding: hand service by an officer would probably find this out thereby preventing an erroneous advertisment of sale whereas an undelivered recorded delivery letter often takes 14 days to be returned by which time the sale has been advertised. Already many officers serve warrants of sale by hand and the need for this mode of service would arguably increase if the duration of the poinding were extended as mentioned above. The advantages of this and

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[1] Clark v. Clark (1824) 3 S.143.

[2] There is no appeal to the Court of Session relating to exemptions from poinding. Law Reform (Diligence)(Scotland) Act 1973, s.1(4).

[3] Debtors (Scotland) Act 1838, s.26; Citation Amendment (Scotland) Act 1882, s.3; Lochhead v. Graham (1883) 11 R. 201.

of personal contact between officer and debtor have to be balanced against the savings in expense effected by postal service.[1] To elicit views we suggest that personal service of the copy warrant of sale on the debtor should be the normal mode of service. (Proposition 40)

(3) Arranging and conducting the sale

(a) Location and advertisement of sale

5.35 The Debtors (Scotland) Act 1838, section 26 provides that the sheriff must grant warrant to sell by public roup "at such place with such public notice of the sale, as may appear to the sheriff most expedient for all concerned". The current practice is to order one advertisement in a specified newspaper circulating in the area where the goods are to be sold. The sheriff cannot sign a warrant in general terms leaving it to the officer to insert the place of sale later.[2] Except in the Aberdeen area, nearly all sales of household goods take place in the debtor's residence.[3] This practice has been followed for many years,[4] but in recent years it has attracted a great deal of criticism.

5.36 We accept that (as is the practice elsewhere in the United Kingdom) warrant sales of household goods should not take place in the debtor's residence unless the debtor consents.

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[1] Service by recorded delivery letter in summary cause £1.59; service by officer and witness (3 miles travelling) £3.12; (10 miles travelling) £6.20.

[2] McVicar v. Kerr (1857) 19 D. 948.

[3] Out of a total of 94 'personal' sales (viz. involving debtors as individuals rather than in a business capacity) carried out in 1977 for which reports of sale are available, only 8 sales were not held in the debtor's dwellinghouse and, of these sales, most were in the Grampian region: see CRU Warrant Sale Survey.

[4] The McKechnie Committee (op. cit., paras. 172-174) noted the practice in 1958. The Committee thought that selling goods at an auction room was likely to bring a better price than selling them at the debtor's residence, but did not think the practice of sale in auction rooms could "be imposed generally as there are bound to be very many cases in which the cost of conveying the goods from the debtor's premises to the nearest auction room would be prohibitive". In 1958, however, sales in debtors' dwellinghouses were not attacked on social grounds.

The grounds for requiring sales in auction rooms, which are primarily social, may be summarised as follows -

(a) At present, a sale in the debtor's residence necessarily means that the debtor's name or at least his address are identified in the preliminary advertisement of the sale so that his indebtedness is publicised to the community. The Edinburgh University Debtors Survey and other evidence discloses that the humiliation and distress thereby inflicted is deeply resented by debtors and indeed the advertisement is often feared more than the sale itself. The advertisement is not effective in inducing potential bidders to attend sales in debtors' residences, and its primary role is as an inducement to payment; this was not the intention of Parliament when it enacted the 1838 Act.

(b) Apart from the advertisement, it is likely that debtors generally are also distressed by the actual holding of a sale in the home far more than they would be by a sale in an auction room.

(c) As the McKechnie Report recognised,[1] it seems likely that better prices for the poinded goods would be obtained because of the competition which usually occurs at a roup in a public auction room but which is generally lacking at a warrant sale in the debtor's dwellinghouse.[2] Requiring a roup in a public auction room is the most that can be done to ensure that poinded household goods are sold at their market value, and the procedure is more likely to be accepted as fair to all concerned.

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[1] Op. cit., para. 172.

[2] The large proportion of warrant sales in which the goods are adjudged and delivered to the poinding creditor, or sold at the upset price, suggests that competition is rare.

5.37 The main disadvantage of requiring the sale to be at a public auction room, at least in certain cases, is the increase in the expenses (viz. costs of hiring a van and removal men to uplift the goods and deliver them to the auctioneer's premises) to which costs would be added the auctioneer's commission. Another disadvantage would be the expense arising on the cancellation of a sale once the goods had been removed: the debtor would have to pay for the goods to be taken back, which will usually cost more than the cost of an advertisement cancelling a sale in the debtor's dwelling. The increase in the expenses of sale in an auction room would be offset to some extent by certain savings viz. on the fee for the auctioneer and judge of the roup; and on the charges for the newspaper advertisement and on the officer's fee for preparing and placing the advertisement.[1] In cases where the debtor's dwelling was near the auction room, the increase in expense might be small. On the other hand, the officer would have to be paid for supervising the removal and reporting the sale to the sheriff even though he would not have to attend the sale himself.

5.38 Having regard to the low annual volume of warrant sales, it might be thought difficult to make administrative arrangements for the removal of poinded goods from several debtors' dwellings by a removal van on one journey, but we understand that in England and Wales (where the volume of sales for debt is about the same as in Scotland per capita of population) the practice of 'multiple removal' is frequently employed. Moreover, it may be possible for poinded goods to be uplifted along with other goods to be exposed for sale all on one journey. In the more remote areas, however the cost of removal to an auction room would be prohibitive. While sales might be held in local village halls, this might arouse strong opposition from the local community and (apart from the advertisement) the humiliation involved in a sale in such a place in a small cummunity might be as great as where

[1] These items would cost £27.64 for a sale of goods valued at £100 in the debtor's home where five miles travelling is involved, and assuming an auctioneer's fee of £16.20 and advertising expenses of £4.50.

the sale was held in the debtor's home. Moreover, the cost of removal would not be offset by the savings referred to above. Where the costs of removal to an auction room would be prohibitive, and no suitable alternative premises for the sale were available, then the legislative solution is not self-evident. We present below three possible ways of dealing with this problem. The scale of the problem should not, however, be exaggerated: warrant sales in the remote areas are even less frequent than in the populous areas.

5.39 Other disadvantages of requiring sales in auction rooms are that third parties (e.g. hire purchase companies) would no longer be alerted to the possible inclusion of their goods in the poinding, and that a debtor would no longer have the use and possession of goods adjudged to the creditor in default of sale but abandoned on the debtor's premises. These, however, are not powerful arguments for retaining sales in debtors' homes.

5.40 We invite views on the following proposals -

(1) Where goods in a debtor's residence are poinded, the warrant of sale should not provide for a public roup in that residence unless the debtor formally consents to the sale being held there.

(2) Where the debtor does not consent to a sale in his residence, the warrant of sale should normally require that the sale should be held by public roup at an auction room specified in the warrant (being a roup in which goods other than poinded goods are also exposed for sale).

(3) Where the debtor withholds consent, where the costs of removal to an auction room would be unreasonably high and where no other suitable premises for the sale were available, then three possible options may be considered on which views are invited, namely -

(a) the sheriff might be empowered in these special circumstances to direct a sale in the debtor's residence notwithstanding that the debtor has withheld consent;

(b) the sheriff might be empowered to direct that the sale be held at a location other than the debtor's residence or an auction room, even if the location is not altogether suitable;

(c) provision might be made for an Exchequer subsidy towards the cost of removal (i) where the distance between the debtor's residence and the auction room or other suitable location exceeds a prescribed mileage or (ii) where the debtor's residence is on one of the islands having no auction room or suitable location for the sale.

(4) To minimise the expense of removal to an auction room, consideration should be given to the introduction of administrative arrangements, in as many areas as possible, whereby from time to time poinded goods would be removed to an auction room along with other poinded goods, or other goods to be exposed for sale, by a removal firm on one journey and the expense apportioned among the several creditors or vendors concerned. Such 'multiple removal' arrangements would require co-operation between the court, the local officers of court, and the local removal firms and auctioneers. (Proposition 41).

5.41 Despite the foregoing proposals, presumably sales in debtors' homes will still occur occasionally and clearly in such cases the advertisements of sale must identify the debtor's address.[1] We suggest however that an advertisement of a warrant sale in the debtor's dwelling house should not include the debtor's name unless its inclusion is, in the opinion of the sheriff, essential for the identification of the place of sale. (Proposition 42).

[1] In some sheriffdoms, Practice Notes require that the advertisement of a warrant sale must contain the name and address of the debtor, and that where the debtor resides in premises where several houses are described by the same street number, and the sale is to proceed there, the house must be particularised by position and the name of the debtor stated.

5.42 Where a sale takes place on a third party's premises, problems as to the third party's rights and legal uncertainties can arise such as are illustrated by the case of McNaught & Co v. Lewis.[1] In order to resolve these doubts and problems, we suggest that where an applicant for warrant of sale seeks the sheriff's approval for a sale on the premises of a third party (other than the auction room of an auctioneer appointed by the warrant), then -

(a) the application should disclose clearly that the premises are those of a third party;

(b) it is for consideration whether the applicant should be required to obtain the prior consent of the third party for the use of his premises for the warrant sale, or whether the third party should merely be entitled to make representations to the sheriff against the holding of the sale there; and

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[1] (1935) 51 Sh.Ct.Reps. 138. In this case an officer of court advertised for sale under warrant within the premises of a third party (a firm of motor haulage contractors) a car thought to belong to the debtor which the third party had allowed to be garaged there. The third party's consent had not been obtained and the advertisement did not mention that the poinded goods were not the property of the third party. The third party sued the officer for damages for wrongous diligence and defamation. The sheriff substitute dismissed the action as irrelevant; his decision was reversed by the sheriff principal on appeal, and a further appeal was taken to the First Division of the Court of Session, who (in an unreported decision) reverted to the judgment of the sheriff substitute. At p.141, the sheriff substitute observed: "I have never heard, in my modest experience, of any disclosure to the court that the premises on which the sale was to be authorised were the premises of a third party being made or suggested. Nor have I ever heard of their consent being asked .... No doubt a poinding on one's premises is an inconvenient and annoying thing. So is an arrestment in one's hands. But both may be necessary, and, if the proceedings are competent and regular, must, I think, be endured without remedy because no legal wrong has been committed." Compare, however, the sheriff principal's observationsat p.143: "I know of no warrant, statutory or other, to the Court to appoint as the place of sale the private premises of a stranger to the proceedings against his will. Such a thing, in my view, is unthinkable, and, in the knowledge of the Court, would never be granted."

(c) an advertisement of a warrant sale on the third party's premises should make it clear that the goods to be sold do not belong to the third party.

(Proposition 43).

(b) Removal of goods to sale room

5.43 If, as we proposed above, the officer were to give due notice to the debtor(or possessor of the goods) of the date and approximate time of the removal, this date and time need not be fixed by the warrant of sale.[1] A report of when the removal took place would be included in the report of the proceedings at the end of the diligence. The officer should attend the debtor's premises at the time fixed for the removal for three reasons: first, powers of entry and search might be needed to facilitate the uplifting of the goods. Second, the officer should identify the poinded goods and supervise their removal. Third, there should be someone present at the uplifting of the goods empowered to receive payment of the debt on the creditor's behalf, or even to conclude an instalment settlement with the debtor and cancel the removal which would be permitted on one occasion only.[2]

5.44 We suggest that the officer should either carry out or at least supervise the uplifting and removal of the poinded goods from the debtor's premises; and for use, if necessary, in uplifting the goods, the warrant of sale should include a warrant authorising the officer to open shut and lockfast places. (Proposition 44).

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[1] Unless possibly this were throught necessary to facilitate arrangements for multiple removal. Presumably the date of removal would normally be within a day or two of the date of the auction; otherwise, the auctioneer's charges for storage and insurance etc. would be incurred. The period between the dates of removal and sale need not be prescribed.

[2] See Proposition 37(4) and (5) at para. 5.22 above.

(c) Appointment and functions of auctioneer and judge of the roup

(i) The existing law and practice

5.45 Under the present law, the personnel reponsible for the conduct of a warrant sale are the auctioneer and the judge of the roup. The functions of the judge of the roup, who is appointed in the warrant of sale,[1] are (a) to open the sale, to supervise the sale, to intervene if any irregularity occurs and to close the sale;[2] (b) if the goods are not sold, to deliver the goods to the poinding creditor;[3] and (c) to make a report of the sale(or delivery) to the sheriff within eight days.[4] The practice is for an officer of court to be appointed judge of the roup,[5] the advantage being that if he does not carry out the functions properly, he may be disciplined by the sheriff principal. There is also advantage in appointing the officer who conducted the poinding lest any dispute arise as to the identity of the poinded goods.

5.46 The auctioneer is also appointed by the warrant of sale.[6] At one time there was a practice in ordinary action diligence to appoint an employee, employer or partner of the officer as auctioneer (as was competent in small debt procedure[7]), but this practice was disapproved on the ground that the auctioneer should be independent of the sheriff officer who nominates him and who acts as judge of the roup.[8] Practice Notes now require that the auctioneer appointed by the sheriff must be a person who, alone or with others, carries

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[1] Debtors (Scotland) Act 1838, s.26.

[2] Strachan v. Auld (1884) 11 R. 756.

[3] Debtors (Scotland) Act 1838, s.27.

[4] Ibid., s.28:

[5] This practice was approved in Practice Notes of the sheriff principal following Cantors Ltd v. Hardie 1974 S.L.T. (Sh.Ct.) 26.

[6] The sheriff's power of appointing the auctioneer stems from the common law.

[7] Small Debt (Scotland) Act 1837, s.20 and Sch. G.

[8] Cantors Ltd v. Hardie, supra.

on business as an auctioneer and who is not a partner, employer or whole-time employee of the sheriff officer or the creditor.[1] It is understood that the auctioneer is usually a member of the Institute of Auctioneers and Appraisers in Scotland or the Scottish Association of Auctioneers.

(ii) Sales at the debtor's premises

5.47 It has been represented to us that, on the analogy of the old small debt procedure,[2] an officer of court should be able to act as auctioneer and judge of the roup, with one witness in attendance. If as we propose goods poinded in a debtor's dwelling are usually removed for sale to auction rooms, then the sales in debtors' premises would normally be sales of goods used in connection with a profession, trade or business.

5.48 It would be a strong argument in favour of the existing practice of appointing specialist auctioneers if better prices were obtained because of the professional skills of the auctioneer. From the Central Research Unit Warrant Sales Survey, however, it appears that, in 1977, in 80% of the sales at business premises, the items were either sold at their appraised values or delivered to the poinding creditor. It may therefore be doubted whether the appointment of an auctioneer is justified on this ground.

5.49 A second possible argument is that the appointment of an independent auctioneer makes it appear that every effort has been made to obtain a fair price for the goods: on this view, the auctioneer -

> "should be independent of the sheriff officers who nominate him and act as judge of the roup. Otherwise it cannot be said that the judge of the roup will be seen to be there 'to see fair play on both sides at the sale and to interfere if anything irregular is done'."[3]

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[1] If such a person is not available, the sheriff must appoint a person suitably qualified to perform the duties of auctioneer.

[2] Small Debt (Scotland) Act 1837, Sch. G in terms of which the officer acted as both auctioneer and judge of the roup, with two witnesses in attendance.

[3] Cantors Ltd v. Hardie 1974 S.L.T. (Sh.Ct.) 26, at p.28.

On the other hand, it has been represented to us that, if an officer of court cannot be trusted to conduct an auction fairly, then the remedy is to dismiss the officer rather than to burden creditors, and ultimately debtors, with the extra expense of an auctioneer's fee.

5.50 The main disadvantage of the present practice is extra expense though this is less heavy in the case of auctions of commercial goods than of household goods. The CRU Warrant Sales Survey shows that, in the case of commercial goods where an auctioneer was involved, the fee varied between 1% and 20% (average 5%) of the proceeds of sale (including appraised values of goods delivered in default of sale). The fee was proportionally higher for goods of relatively small value and the average auctioneer's fee was 9% for sales under £500. There is therefore a stronger case for allowing the officer of court to act as auctioneer in summary cause sales. If the prohibition on the officer acting as auctioneer were removed, there would have to be a requirement that he should be attended by a witness (who would probably normally be a member of the staff of the officer's firm).

5.51 We invite comments on the following questions: (1) in the case of sales not held at an auction room, should the existing prohibition on officers (or their employers, employees and associates) acting as auctioneers be retained, or should the officer, attended by one witness, be capable of acting as auctioneer and of carrying out the(non-supervisory) functions of the judge of the roup? (2) Should the prohibition be maintained in relation to sales under ordinary decrees but abolished in relation to summary cause sales? (Proposition 45).

(iii) Sales in auction rooms

5.52 Different considerations apply where the sale is held in an auction room. Under present practice, the sheriff appoints the auctioneer of the sale room to which the goods

are removed to act as auctioneer in the warrant sale and the officer attends as judge of the roup. In other legal systems, there are panels of auctioneers, approved by the competent authorities, entitled to act in judicial sales, and such a system could be introduced if it proved more convenient for auction room sales. More importantly, we suggest that to save expense, the officer should not be required to attend in an auction room to act as judge of the roup. An auctioneer accepting instructions to act in a warrant sale would be required to keep a record of the poinded goods exposed for sale and the price at which the goods were knocked down to the purchaser or became the property of the poinding creditor. The auctioneer would deliver a report on a prescribed form with the roup rolls to the officer who would make a report to the sheriff of the sale or delivery within (say) 14 days. The officer would inform the creditor of the result of the sale and it would be the responsibility of the creditor to uplift the goods from the sale room. The sheriff clerk would intimate the result of the sale to the debtor after the report of sale was lodged. (Proposition 46).

(d) Adjudication and delivery of goods to poinding creditor in default of sale

5.53 If the goods are not sold, then the judge of the roup is required by the Act to deliver them to the poinding creditor.[1] The appraised values of the goods so delivered are deducted from the debt.[2] It is at the stage of the delivery of the goods that ownership of them passes to the poinding creditor, and it would be convenient if the term, 'adjudication', were used for this step in the procedure.[3]

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[1] Or such part of the goods as according to their appraised values may satisfy the debt, interest and expenses: Debtors (Scotland) Act 1838, s.27.

[2] Following Scottish Gas Board v. Johnstone 1974 S.L.T. (Sh.Ct.) 65, Practice Notes of the sheriffs principal make it clear that the appraised values must be deducted from the debt even where the poinding creditor does not uplift the goods from the debtor's premises and therefore where, technically, there may not yet have been delivery to the poinding creditor.

[3] As noted above the earlier 'adjudication' of the goods 'to belong to the poinding creditor' at the poinding stage only creates a right in security or preference and does not transfer ownership.

5.54 Clearly the debtor must be credited with the amount bid or the appraised value, whichever is greater, and in an auction room sale, he must cease to have an interest in the article once it is exposed for sale, so that he is not charged with the expense of storage and further auctions.

5.55 On one view, in a sale in the debtor's premises the proper practice is that the goods which have been adjudged to the creditor in default of sale should be removed immediately after the sale or on the day of the sale. If there is a short delay before removal, then the officer should remain in possession of the goods on the premises. In warrant sales of household goods, the creditor often simply abandons the goods to the debtor. There have, however, been cases where the creditor has used the threat of collecting the goods to put pressure on the debtor to make further payments. This practice seems altogether inappropriate though it cannot occur where household goods are sold at auction rooms.

5.56 To deal with these matters, we suggest that (1) where the warrant of sale directs that the sale should take place at the debtor's dwelling or some other place not being an auction room and no bid at or above the reserve price is made, then the judge of the roup should adjudge the goods to belong to the poinding creditor in default of sale, but subject to the condition that the ownership of the goods will not pass from the debtor to the poinding creditor unless and until the creditor has removed the goods from the premises. The period within which the creditor may remove the goods should be prescribed by statute or act of sederunt, and might be fixed at 24 hours after the goods were conditionally adjudged. (2) In the case of warrant sales at auction rooms, where the goods are not sold, ownership should be deemed to pass to the poinding creditor when the goods are withdrawn from the sale by the auctioneer. (3) The present rule should be retained whereby the appraised value of goods adjudged in default of sale is deducted from the debt. (4) In the light of these

proposals, it seems unnecessary to prohibit creditors from using the threat of collecting adjudged goods as a means of putting further pressure on debtors ot pay. (Proposition 47).

(4) Further control by court and procedure following the sale

(a) Report to the court of the proceedings

5.57 Within eight days from the date of the sale, the officer, in his capacity of judge of the roup, presents a report of the sale to the sheriff, together with the roup rolls (or certified copies) relating to the items sold.[1] The report on sale has two purposes:

(a) to provide an independent accounting, through the auditor of the sheriff court, between the debtor and creditor;[2] and

(b) to enable the court to check that the sheriff's warrant of sale has been properly and regularly carried out.

These aims would suggest that a report should be made to the sheriff even if the proceedings following the warrant of sale have not reached the stage of a sale.[3] For some considerable time, however, it has been the practice that only where a sale has been carried out is a report on the proceedings made to the sheriff.

5.58 It follows from this practice that, in about 95% of the cases in which warrant of sale is granted by the courts, the courts make no check on the way in which the warrant has

[1] The report details the creditor and debtor; specifies the warrant of sale; sets out the date on which the sale was carried out and by whom; and contains a statement of whether each item was sold or delivered to the creditor, the price at which each article was sold. The whole expenses of the diligence are itemised and a statement of the balance due by or to the debtor is made.

[2] See Cantors Ltd v. Hardie 1974 S.L.T. (Sh.Ct.) 26.

[3] After the Debtors (Scotland) Act 1838 was enacted, it was the practice for the execution of the intimation of the warrant of sale to the debtor to be returned to the sheriff clerk together with a note of expenses to date for taxation: see McGlashan Sheriff Court Practice (2nd edn., 1842) paras. 1679-1680. We understand that this practice has not been followed for many years.

been implemented, or on the diligence expenses, except in the rare event where a complaint has been made. The accounting and other errors identified in recent reported cases, and other evidence of errors identified by the research undertaken on our behalf, suggest that there is a need to ensure that, on the termination of proceedings following warrant of sale, a report should be made to the sheriff. We do not suggest that a report should be made at each stage (e.g. at the intimation of the warrant and after the advertisement of sale) but rather at the end of the proceedings, and not later than 14 days after the date of sale fixed in the warrant of sale or, in the case of sale in an auction room, some other prescribed date.

5.59 We propose that to provide an independent accounting between the debtor and creditor and to enable the court to check the regularity of the proceedings following the grant of warrant of sale in every case (and not merely as at present where the goods are sold or delivered), a report of the proceedings following the warrant of sale should always be made to the sheriff. (Proposition 48).

5.60 A longer period than eight days should probably be allowed for lodging the report of sale and the roup rolls, especially since most sales will take place in auction rooms.[1] The form of the report is not prescribed and the CRU Warrant Sales Survey disclosed the use of a wide variety of styles. It would seem desirable that the form of the report should be standardised, especially if reports are to be required in every case whether or not a sale is held.

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[1] To enable the court to check whether the report has been timeously lodged, the report must specify the date when the sale or delivery took place: Cantors Ltd v. Hardie 1974 S.L.T. (Sh.Ct.) 26, and Practice Notes of the Sheriffs Principal.

5.61 Although the procedure for auditing and checking reports of sale was at one time open to criticism,[1] a procedure has since been introduced by Practice Notes in all sheriffdoms to ensure that reports of sale are properly checked and the expenses taxed.[2]

5.62 The sheriff may approve the report of sale, with or without amendments made on application or his own motion, or he may refuse to approve it.[3] Refusal of approval may render the whole diligence null but this is not entirely clear.[4] It is not, however, usual to regulate by statute the legal effect of procedural defects and this matter might be left to be developed by the common law.

5.63 We suggest that (1) the report of the sale or delivery of the poinded goods should be made to the sheriff within 14 days (instead of 8 days as at present) after the date of the sale or delivery. Where the diligence was abandoned or otherwise terminated before the date of sale, the report of the proceedings following the sale should be lodged within such period as may be prescribed. (2) A style should be

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[1] Cantors Ltd v. Hardie 1974 S.L.T. (Sh.Ct.) 26 at p.30.

[2] On receiving the report, the sheriff signs an interlocutor remitting it to the auditor of court, or sheriff clerk as auditor, for taxation. The auditor then submits his report to the sheriff with a docket stating that the report has been examined and setting out the balance due to or by the debtor. Finally, the sheriff adds a further docket signifying his approval of the report after allowing, if necessary, both creditor and debtor an opportunity of commenting on any points made by the auditor in his report.

[3] Cantors Ltd v. Hardie 1974 S.L.T. (Sh.Ct.) 26; British Relay Ltd v. Keay 1976 S.L.T. (Sh.Ct.) 23. The sheriff's decision is subject to appeal.

[4] Graham Stewart op.cit., p.361 states that a report of sale should be lodged within the statutory period to prevent any question arising. In McGhie v. Mather (1824) 3 S. 339, (a case on the Bankruptcy Act 1814 in which the same requirement was imposed) it was held that a delay of 36 days after the sale did not render the diligence null.

prescribed by act of sederunt for reports of sale and other reports of proceedings following the grant of warrant of sale. (3) No change should be made in the present procedure whereby the sheriff, following the auditor's report, may approve the report of sale with or without amendments or refuse to approve it, after allowing the parties to object where necessary. (Proposition 49).

(b) Consignation or payment of proceeds of sale

5.64 Following the report of sale, the sheriff may order the judge of the roup (viz. the officer) to lodge the proceeds of sale in the hands of the sheriff clerk.[1] The power to order consignation is discretionary and rarely exercised but may be needed where, for example, another creditor with a decree or other document of debt has lodged a claim in the proceedings to be ranked to a share in the proceeds of sale.[2] In the absence of consignation, the officer usually pays the proceeds of sale to the poinding creditor. This practice seems sensible since the creditor has often already had to wait long enough for his money. Where a claim for equalisation is made after the payment to the creditor, the creditor is bound to consign the funds, since until the expiry of the period for equalisation of diligence on notour bankruptcy or the cutting down of diligence by sequestration the funds are deemed to be still technically in the hands of the court.[3] Difficulties could, however, arise if for example there had been an overpayment or if a claim for equalisation was made after the payment and the creditor could no longer be traced.

5.65 It seems that the present practice causes few problems. Moreover, it seems unnecessary to provide for consignation in

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[1] Debtors (Scotland) Act 1838, s.28.

[2] Bankruptcy (Scotland) Act 1913, ss.10 and 104. It is not clear whether or how a claim could be made under these sections where the goods are delivered in default of sale to the poinding creditor.

[3] Gillon & Co Ltd v. Christison (1909) 5 Sh.Ct.Reps. 283.

every case for the benefit of creditors until the expiry of the statutory periods for equalisation or cutting down of the diligence. On the other hand, the debtor must be fully protected from mistaken overpayments to creditors out of the proceeds of a judicial sale of his property. In most cases of mistakes of this kind, the officer may be responsible (e.g. mistaken summation of the account or in the charging of a fee) and the amount due will be recovered by his bond of caution. However, views are invited on the question whether, as a safeguard against overpayment to creditors out of the proceeds of sale, the proceeds should be consigned in court until the time when the sheriff approves the report of sale or whether the officer should be required to retain the proceeds until that time or whether the present law and practice should be retained. (Proposition 50).

(5) Abandonment or withdrawal of goods from poinding

5.66 A creditor may abandon his diligence at any time and, perhaps because of the rules against repeated poindings and warrants of sale, generally the debt is written off and no question in practice arises of whether the creditor may recover the diligence expenses incurred before abandonment or whether the debtor must be credited with the appraised value of the poinded goods. If such questions were to arise, we suggest that the creditor should not be entitled to those expenses and the debtor should not be credited with the appraised values.

5.67 In principle, it appears that a poinding creditor cannot release or withdraw goods from a poinding.[1] Accordingly, where a sale of poinded goods is executed, all of the goods must be exposed for sale and the poinding creditor is not entitled to hold back poinded goods from the sale on the ground that they have deteriorated or for some other reason or to refuse to credit the debtor with the appraised values.[2] This rule would require

[1] We suggest in Part VI below that the officer should be empowered to withdraw goods claimed by third parties.

[2] Cantors Ltd v. Hardie 1974 S.L.T. (Sh.Ct.) 26 at p.30.

modification, however, if goods are to be removed to sale rooms. In such cases, the officer should be empowered to uplift only such part of the poinded goods as, according to their appraised values, would satisfy the debt, interest and expenses, and to withdraw the remaining goods from the poinding. Subject to this exception, we think that the rule is sound and that, since the creditor may choose when to apply for warrant of sale, he must bear the risk of deterioration attributable to the passage of time.[1]

5.68 Accordingly we propose that where goods are to be removed for sale at an auction room, the officer should be empowered (a) to uplift and remove only such part of the poinded goods as, according to their appraised values, would satisfy the outstanding balance of the debt, interest and expenses, and (b) to withdraw the remaining goods from the poinding. Otherwise the present rule against withdrawal of goods from the poinding should be retained. (Proposition 50A).

[1] If the deterioration is due to the conduct of the debtor or a third party, then the offender will be liable for wrongful intermeddling with poinded goods.

PART VI: INCLUSION IN POINDINGS OF THE GOODS OF THIRD PARTIES

(1) The nature of the problems

6.1 The inherent difficulty of distinguishing the goods of the debtor from the goods of third parties presents problems in poindings. In the common case of the pointing of household goods, the problems are exacerbated by the widespread use of hire purchase, conditional sale and hiring agreements relating to consumer durables and by the mingling of the debtor's household goods with those of his spouse, together with the recent increase in joint tenancies and common ownership by spouses of the matrimonial home which makes it more difficult to apply the rule that ownership is presumed from possession.

6.2 In this branch of the law, the primary problem is how best to reconcile the protection of the property rights of innocent third parties with the need to ensure that poindings are not stopped, by spurious claims by or on behalf of third parties, to an extent that undermines the effectiveness of the diligence. It may seem axiomatic that a creditor should not be entitled, nor an officer empowered, to poind and sell the goods of A for B's debts. This is indeed the primary principle which the courts apply in determining whether the goods of a third party should be excluded from a poinding, or whether an interdict should be granted prohibiting a warrant sale of his goods, or whether he can recover the goods after the proceedings from the poinding creditor to whom they have been delivered in default of sale or, as the case may be, from a bona fide purchaser for value at the sale. On the other hand, to impose strict liability on an officer for mistakenly including the goods of third parties in a poinding would place an impossible burden on officers. Adjudication on moveable property rights can raise difficult questions of law, and especially of fact, which cannot be resolved at the stage of a poinding, even if an officer of court were a lawyer or judge, which he is not. The rule is therefore that, if an officer makes certain enquiries, and reports the third party's

claims to the court, he can competently poind the third party's goods but at a later stage the goods can be excluded by the sheriff from the poinding or warrant sale, on the application of the third party, if he or she is the true owner.

6.3 It follows that the general question whether a creditor is or should be entitled to poind the goods of A for B's debts does not receive a simple affirmative or negative answer, and is perhaps best approached by considering the following specific questions -

(a) What duties are, and ought to be, imposed on officers of court with a view to ensuring, so far as practicable, that the goods of third parties are excluded from a poinding and warrant sale?

(b) What remedies are, and ought to be, available to a third party owner of goods mistakenly or wrongly included in a poinding to recover the goods before the warrant sale?

(c) Following a warrant sale, what should be the rights and remedies of the third party owner, and of either the poinding creditor to whom the goods are delivered or, as the case may be, a bona fide purchaser for value?

(d) What special provision, if any, is needed where the goods belong to the debtor's spouse?

(2) Officer's functions, and claims by or on behalf of third parties, during the poinding

6.4 The officer's powers, duties and liabilities with respect to the poinding of the goods of third parties are governed by common law rules which have been supplemented, in some sheriffdoms, by Practice Notes of the sheriffs principal.

6.5 The position is as follows -

(a) As a general rule, if goods are in the debtor's possession, the officer may treat them as the debtor's property and include them in the poinding though

the true owner may later claim the goods in an application to the sheriff.[1] The rule has to be used with common sense however and in cases where the debtor's business involves the deposit with him of his customers' goods (e.g. auctioneers, laundries and garages) the rule that ownership is presumed from possession would not justify the poinding of those goods.

(b) If an officer poinds a third party's goods on a third party's premises, the poinding is normally inept.[2] Before proceeding to poind, therefore, the officer should ascertain whether the debtor is owner or tenant of the premises where the goods are located and thus the presumed possessor of the goods,[3] for example, by checking the Valuation Roll.

(c) At one time, it was the orthodox view that the onus was on the debtor or third party to claim that the goods belonged to the third party.[4] The fact that hire purchase agreements relating to household goods were common did not place on officers the onus of inquiring into the true

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[1] Graham Stewart, op. cit., p.351.

[2] Ibid., p.352; Thompson v. A.G. fur Glasindustrie 1917 2 S.L.T. 266; Broomberg v. Reinhold & Co Ltd (1944) 60 Sh.Ct.Reps. 45 at pp.54-55: but see McLean v. Boyek (1894) 10 Sh.Ct.Reps. 10 for a case where the officer was held justified in poinding the goods formerly belonging to the debtor in a third party's hands.

[3] Idem; see also Jack v. McCaig (1880) 7 R. 465 per Lord Deas at p.468: "Every man who is going to excute a poinding of furniture is bound to inquire whether it belongs to the individual for whose debt he is going to poind. He is further bound to inquire whether he is the proprietor or the tenant of the house."

[4] Graham Stewart, op. cit., p.351-2.

ownership of the goods.[1] But in 1953 (in a case concerned with the title to goods rather than the officer's duties in carrying out a poinding), Lord President Cooper observed obiter that enquiry should be made.[2] The practice of officers did not, however change until in certain sheriffdoms, Practice Notes were made in 1976 requiring a sheriff officer, before carrying out a poinding, to inquire of the debtor if any of the goods proposed to be poinded are the subject of a hire purchase agreement or are otherwise the property of a third party. No fee is allowed for poinding goods which are not the property of a debtor except on cause shown. There are older authorities to the effect that the officer need not listen to statements by the debtor or any other person who is not the person claiming ownership,[3] but it is doubtful whether the courts would now follow these authorities.

(d) Where a claim or statement as to ownership is made by or on behalf of a third party, it depends on circumstances whether the officer is justified in stopping the poinding or, alternatively, in proceeding with the poinding and mentioning the

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[1] Singer Manufacturing Co v. Beale & Mactavish (1905) 8 F. (J) 29 per Lord Johnston at p.32: "If the Singer Company and others peril their machines on contracts of [hire-purchase] they must either rely on the honesty and alertness of their customers, or themselves attend to their own interests. They cannot require the sheriff officers to act as detectives on their behalf."

[2] George Hopkinson Ltd v. N.G.Napier & Son 1953 S.C. 139 at p.147: "I do not think it is an overstatement of the position today to say that any creditor proposing to poind the furniture in an average working-class dwelling is put on his enquiry as to whether the furniture is the property of his debtor or is only held by him upon some limited title of possession. The possession of the furniture per se goes only a short distance towards establishing a presumption of ownership."

[3] Graham Stewart, op. cit., pp.352-3.

claim or statement in his report to the court of the poinding. The orthodox view, expressed by Graham Stewart, is that, as the poinded goods are not removed from the premises, "it would seem permissible and will be advantageous in most cases for the officer to execute the poinding and leave the matter for decision by the sheriff."[1]

(e) Where a claim is made and no documentary evidence is produced, the common law rule seems to be that the officer should delay poinding and examine the claimant on oath as to the ownership of the goods and how the goods came to be in the debtor's possession.[2] At any rate this rule applied where the claim was made by the third party though there was authority for the view that the officer was not bound to listen to claims made by the debtor that the goods belonged to a third party.[3] Now the Practice Notes of the sheriffs principal mentioned above provide that where a debtor claims that goods are subject to a hire purchase agreement but refuses, or is unable, to produce evidence to that effect, the sheriff officer may poind the goods but must note the debtor's claim in his report of the poinding. The Practice Notes also provide that no fee is allowed if the debtor subsequently establishes that the goods were in fact subject to a hire purchase agreement.

(f) If documentary evidence (such as a hire purchase, conditional sale or hiring agreement or an assignation of furniture by the debtor to his wife) is produced, it seems that the officer has a measure of discretion.

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[1] Op. cit., p.353.

[2] Graham Stewart, op. cit., p.352. (In Cameron v. Cuthbertson 1924 S.L.T. (Sh.Ct.) 67, it was held by the sheriff-substitute that an officer's failure to put a third party claimant on oath and make inquiry into the claim rendered the poinding inept.)

[3] Ibid., pp.351-2.

Graham Stewart's opinion is that "it would seem reasonable that production of a written title, fortified by the oath of the claimant, would be sufficient to stop the poinding".[1] The practice of officers of court, however, is to accept documentary evidence, without an oath, unless the document appears collusive. Only if ownership is doubtful on the evidence should the officer proceed and leave the third party to vindicate his right before the sheriff.[2]

(g) Failure by the officer to specify in his report of poinding that a claim has been made by or on behalf of a third party is a breach of a mandatory requirement which will render the poinding null.[3]

6.6 The criticisms which may be made of the present law seem to be relatively minor. First, the old rule that the officer does not listen to claims unless made by the third party himself does not seem to have been expressly superseded by the Practice Notes which only require that enquiries should be made of debtors. In poindings of household goods, third party owners (other than the debtor's spouse) are usually not present. Second, the Practice Notes do not apply in all sheriffdoms and neither do, nor could, apply to messengers-at-arms. Third, it has been represented to

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[1] Ibid., p.353.

[2] See e.g. Bell Commentaries (7th edn.) vol. 2 p.59: "Where the evidence of property is perfectly clear on the part of the claimant the messenger ought to stop; expressing in his execution the grounds of his forbearance. Where the property is doubtful, he ought to proceed, leaving it to the claimant to make good his right before the sheriff".

[3] See Maxwell v. Controller of Clearing House 1923 S.L.T. (Sh.Ct.) 137; Cameron v. Cuthbertson 1924 S.L.T. (Sh.Ct.) 67: failure to note the third party's claim could prejudice the third party in a subsequent claim for the goods. It might also prejudice the third party's entitlement to the expenses of a subsequent successful claim or action of interdict against the warrant sale: cf. Anderson v. Jackson (1920) 36 Sh.Ct.Reps. 237.

us that the Practice Notes either purport to change the common law and deprive officers of statutory fees for executing poindings which are regular at common law, in which case they are ultra vires; or they do not change the common law, in which case they are unnecessary. It is not for us to question the validity of Practice Notes (which are in any event in consonance with the most recent authority) and it seems to us that the policy of requiring officers to make enquiries is necessary.

6.7 We seek views on the following proposals--
(1) Officers of court executing a poinding should be under a duty to make such enquiries of the debtor, or other person on the premises, as are reasonable in the circumstances, on the question whether the goods proposed to be poinded are subject to a hire purchase agreement or are otherwise the property of a third party. (2) It is for consideration whether this duty should be imposed by statute or act of sederunt applying uniformly in all sheriffdoms and to messengers-at-arms as well as to sheriff officers, rather than by Practice Note. (3) Views are invited on the question whether the sanction for breach of this duty should be (a) a liability to make reparation to the third party for effecting the poinding irregularly or, as the case may be, liability to pay the expenses of the third party's claim to have the goods withdrawn; or (b) disallowance of the fee payable by the creditor. (Proposition 51).

(3) Third parties' claims between poinding and warrant sale
6.8 Once the officer has completed the poinding, the third party's remedy depends on the stage which the procedure has reached.

(a) The lodging of the report of the poinding in the sheriff court creates a new judicial process, and a third party claiming ownership of the goods may lodge in the process a minute objecting to the inclusion of the goods in the

poinding.[1] Alternatively he may raise an action of interdict in the sheriff court, prohibiting the creditor from proceeding to obtain warrant of sale and, if so advised, an action for delivery of the goods.[2]

(b) After the warrant of sale has been granted but before the sale has taken place, the third party may raise an action in the sheriff court for interdict of the warrant sale and for delivery.[3] However, a minute claiming ownership is not competent at this stage.[4]

(c) Where the true owner takes away his goods from the debtor's premises in ignorance of the fact that they have been poinded, he will not be liable for unlawful intromission with the goods unless he delays in returning them after getting knowledge of the poinding.[5] In principle, the proper course is for him to return the goods and rely on the above remedies.

6.9 We understand that most standard form hire purchase, conditional sale and hiring agreements require the debtor to notify the finance company or other owner if the goods are poinded. Frequently, however, where the debtor neglects to

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[1] Lamb v. Wood (1904) 6 F. 1091.

[2] Burn-Murdoch, Interdict p.189. A petition for suspension and interdict in the Court of Session is also competent at any stage after the grant of the warrant of sale.

[3] Jack v. Waddell's Trustees 1918 S.C. 73; Burn-Murdoch, loc. cit..

[4] Philp v. Stuart (1959) 75 Sh.Ct.Reps. 109; Dobie, Sheriff Court Practice p.280.

[5] Cf. A and B v. Allan (1911) 27 Sh.Ct.Reps. 139 (third party claiming to be true owner who, in full knowledge of the poinding, removed the goods, held liable to restore the goods or pay double the appraised value under s. 30 of the Debtors (Scotland) Act 1838); cf. also Trustees of A.B. v. Irvine (1894) 10 Sh.Ct.Reps. 214, where held that though rates were preferable to the landlord's hypothec, removal by the collector of rates of goods sequestrated for rent was a breach of the sequestration and warrant to carry back granted.

do this, the true owner is alerted by the advertisement of the warrant sale and will check informally with the officer to ascertain whether his goods have been poinded. If the goods of the third party have been poinded, the third party or his representative will often produce the hire purchase agreement to the officer at any time up to and including the warrant sale. The officer will then normally exclude the goods from the sale and although technically the third party's remedy is an interdict, this practice seems sensible. The safeguard provided by the advertisement will, however, no longer apply if (as we have proposed above) advertisements identifying the debtor are virtually abolished. We think therefore that the safeguards for third parties should be strengthened in other ways.

6.10 Accordingly we suggest that (1) the poinding schedule delivered to the possessor of the poinded goods should warn him of the advisability of notifying the finance company or other third party owner (if any) of goods included in the poinding. (2) On the analogy of claims by minute made between the time of the poinding and the grant of the warrant of sale, it should be competent for a third party claiming ownership of goods included in the poinding, instead of raising an action of interdict of the warrant sale, to apply to the sheriff by minute in the process for an order withdrawing the goods from the poinding and recalling the warrant of sale so far as relating to those goods. The sheriff should have power to make such incidental and consequential orders as he thinks fit, e.g. to allow a further poinding of the debtor's goods in the same premises and a second warrant of sale. (3) It is for consideration whether an officer should be expressly empowered by statutory rules to exclude goods from the poinding or warrant sale, if satisfactory evidence of ownership is produced by a third party after the poinding, provided that he adds a note to that effect in the report of the proceedings. (Proposition 52)

(4) Remedies of third parties after sale: restitution or damages

6.11 It is clearly established that where the goods are delivered to the poinding creditor in default of sale, the true owner may obtain restitution of the goods.[1] There is also sheriff court authority to the effect that the third party may obtain restitution from a bona fide purchaser for value at the warrant sale.[2] In our Memorandum No. 27,[3] we suggested that a bona fide purchaser of goods at a judicial sale should acquire a statutory title to the goods preferable to the claim of the third party whose goods had been poinded, subject to the proviso that the judicial sale had been properly conducted after advertisement. If, however, advertisements identifying the debtor's name and address are virtually abolished, the safeguard for the third party will be useless. Moreover, if most sales of poinded goods take place in public auction rooms, a bona fide purchaser at such a sale should have the same right to obtain a good title as the purchasers of other goods at the sale, whatever these rights may be.

6.12 These rights will be dealt with in due course in a Report on the rights of bona fide onerous acquirers of goods. The Report will not deal with the title to goods delivered to a poinding creditor but, since the appraised value of the goods is deducted from the debt, the creditor should be treated as an onerous acquirer of the goods.

6.13 To sum up, we suggest that the title of a bona fide purchaser for value of goods at a warrant sale should be the same as the title acquired by the purchasers of the other goods at auction sales. The title of a poinding

[1] George Hopkinson Ltd v. N.G.Napier & Son 1953 S.C. 139.

[2] Carlton v. Miller 1978 S.L.T. (Sh.Ct.) 36: in Hopkinson v. Napier, supra, the judges had reserved their opinions on whether the same rule would apply to resitution from a bona fide purchaser as applies to restitution from the poinding creditor.

[3] Memorandum on Corporeal Moveables: Protection of the Onerous Bona Fide Acquirer of Another's Property (1976), para. 50.

creditor to whom goods are delivered in default of sale should be the same as that of a bona fide purchaser for value. (Proposition 53).

6.14 There is no doubt that a third party can obtain damages if the poinding was not regularly executed.[1] The question, however, has been raised whether, where an article belonging to a third party has been attached by a regularly executed poinding and then sold, the third party can claim damages, for loss of the article, from the poinding creditor or officer if the creditor or officer had been informed of his claim of ownership before the sale was carried out.[2] The answer may depend, at least in part, on whether the third party will be personally barred from claiming damages by his failure to apply to the court to have the goods withdrawn from the poinding.[3] Further, in two sheriff court cases a claim for damages was rejected on the ground that the third party's intimation of his claim of ownership to the creditor or officer was not sufficiently specific or credible to be effectual.[4] In our view, however, an assertion should not suffice unless it so convinces the officer that he agrees to exclude the goods from the poinding.

6.15 The law is in need of clarification. Accordingly views are invited on the proposal that a third party whose goods have been mistakenly included in a poinding which has been regularly executed should be entitled to claim damages for wrongful poinding and sale of the goods from the poinding creditor if, but only if, the creditor, or the officer on his behalf, has agreed to exclude the goods from the warrant sale and failed to implement that agreement. (Proposition 54).

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[1] See e.g. Thompson v. A.G. fur Glasindustrie 1917, 2 S.L.T. 266;

[2] Graham Stewart, op. cit., p.771: the existence of such a right seems to have been assumed by Lord Johnston in Jack v. Waddell's Trs. 1918 S.C. 73 at p.80.

[3] Graham Stewart, loc. cit; Boyle v. James Miller and Partners Ltd 1942 S.L.T. (Sh.Ct.) 33; cf. Macintyre v. Murray and Muir (1915) 31 Sh.Ct.Reps. 49.

[4] Aitkenson Bros. v. McHarg (1911) 27 Sh.Ct.Reps. 258; Farrell v. Gordon & Co (1928) 44 Sh.Ct.Reps. 208.

(5) Goods owned by debtor's spouse or jointly by both spouses

6.16 It is almost impossible for an officer to distinguish between household goods belonging to the debtor and those belonging to the debtor's spouse. Often there is no documentary evidence of ownership; the debtor's wife may have bought the goods as agent for the debtor so that a receipt in favour of the debtor's wife is not reliable evidence of her ownership. While claims by the debtor's spouse have bulked large in the reported cases,[1] the diligence has remained effective because, if the title to the matrimonial home was in the debtor's name as sole owner or tenant, then the debtor was deemed to be possessor and presumptive owner of the goods and the onus rested on the debtor's spouse to claim the goods by an application to the sheriff. Increasingly, however, district councils are granting joint tenancies to husbands and wives and, in the owner-occupier sector, there is a trend towards common ownership of the matrimonial home by married couples. In such cases, presumably the married couple are possessors and thus presumptive owners of the household goods for the purpose of a poinding and, since goods held in common ownership by the debtor and a third party cannot be poinded,[2] it is becoming increasingly difficult to rely on the presumption.

6.17 In Northern Ireland, following a recommendation of the Anderson Report,[3] the Enforcement Office possesses powers to seize in execution -

> "goods of the debtor's spouse, where it appears to the Office that the judgment debt relates to -
>
> (i) goods obtained or services rendered; or

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[1] See for example, Thompson v. A.G. fur Glasindustrie, 1917, 2 S.L.T. 266; Johnston v. Crabb (1886) 2 Sh.Ct.Reps. 290; Ross v. Sinclair (1904) 20 Sh.Ct.Reps. 317; Maxwell v. Controller of Clearing House 1923 S.L.T. (Sh.Ct.) 137; Cameron v. Cuthbertson 1924 S.L.T. (Sh.Ct.) 67; Farrell v. Gordon & Co (1928) 44 Sh.Ct.Reps. 208; Konchater v. Jarvie (1949) 65 Sh.Ct.Reps. 98; Philp v. Stuart (1959) 75 Sh.Ct.Reps. 109.

[2] See Graham Stewart, op. cit., p.346.

[3] Report of the Joint Working Party on the Enforcement of Judgments, Orders and Decrees of the Courts in Northern Ireland: (HMSO: Belfast; 1965), para. 93: Chairman, Master A E Anderson.

(ii) the rent of, or rates due in respect of the occupation of, premises;

for the general use or enjoyment of the debtor, his spouse and his dependants residing with him".[1]

The Payne Committee received many proposals for a change on similar lines in English law but rejected the Anderson Report's approach, without giving any reason except that it "introduces more problems than it solves".[2] They remarked that:

> "The potential creditor's proper course in any transaction where he is likely to want recourse against a husband and wife is to make both of them parties to the contract either as principal or guarantor."

6.18 Since household goods are rarely seized in Northern Ireland, there is little information on the operation of the Northern Ireland provision. There is no doubt that such a provision would cause problems in Scotland. Although the marriage would usually be verifiable by production of a marriage certificate, it might be difficult for the officer to ascertain the status of the debtor's alleged spouse in some cases. Moreover, it might often be virtually impossible for the officer of court to know whether the debt relates to goods obtained or services rendered for the general use and enjoyment of the family.

6.19 The imposition of joint liability on spouses in relation to family assets is not, in our view, irreconcilable with current trends and thinking in family law. Joint liability would be wholly consistent with the idea that

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[1] Judgments (Enforcement) Act (Northern Ireland) 1969, s.33(d).

[2] Op. cit., paras. 676 and 677: The Report observed (para. 677) "We recognise the force of the objection that a wife or husband can easily defeat an attempted execution ... against the goods of husband or wife regardless of which is the judgment debtor, where goods fall within the limited class of 'furniture, clothing or other goods of such nature that they might be enjoyed and used by the family', but after careful consideration we have come to the conclusion that such a change in the law of execution introduces more problems than it solves and we do not recommend it."

marriage is akin to a partnership in which the gains and losses should be shared. Further, in most cases, the spouses would usually be living together in the same household since their household goods are ex hypothesi mingled.

6.20 On the other hand, the proposal would make a major change in the law of husband and wife. It would seem more consistent with principle to provide for joint obligations in respect of contracts, or at any rate contracts relating to 'family assets', than to provide for separate obligations enforceable against the goods of both spouses. Furthermore, by making the goods of one spouse subject to diligence by the other spouse's creditors, the provision may go further than is necessary. It seems to us that what may be needed is a rule allowing the officer to poind the goods even when the title to the house is in joint names. The debtor's wife would still be able to establish ownership either at the poinding or in a subsequent application to the sheriff. The onus would, however, rest on her.

6.21 To elicit views we suggest that the rule whereby for the purposes of the execution of a poinding, goods on the debtor's premises may be presumed to be owned by the debtor should apply where the premises are a matrimonial home owned or tenanted by both the debtor and his (or her) spouse in common, without prejudice however to the right of the debtor's spouse to rebut the presumption by making a claim at the stage of the poinding or subsequently in an application to the sheriff or by any other competent remedy. (Proposition 55).

PART VII: SPECIAL STATUTORY POINDING PROCEDURES

(1) Preliminary

7.1 In this Part, we are primarily concerned with the special poinding procedures for the recovery of rates and taxes under summary warrants. In our First Memorandum, we set out the information currently available as to the scale of use of summary warrants. Suffice it to note here that the procedure has a 'funnel' or 'filter' effect similar to the effect of ordinary poinding procedures. Generally speaking, the debtors do not come from the lowest income groups, being self-employed in the case of income tax or VAT, or domestic owner-occupiers or commercial firms in the case of rates. In this Part, we also consider other special poinding procedures for the recovery of public debts and for the enforcement of criminal fines. We leave till a later memorandum questions relating to central and local government preferences and the recovery of Crown debts under the Exchequer Court (Scotland) Act 1856.

(2) Recovery of rates and taxes under summary warrants

(a) Existing law

7.2 The local authority's Collector of Rates, the Inland Revenue Collector of Taxes and the Collector of Customs and Excise have statutory powers to use special poinding procedures under summary warrants for the recovery of rates or taxes.[1] The procedures differ from normal debt recovery proceedings in two ways. First, the procedure for obtaining a warrant for diligence is by a summary ex parte application to the sheriff supported by a certificate that the rates or taxes are due, rather than by a debt action.[2] Summary

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[1] Local Government (Scotland) Act 1947, s.247(2) (local rates); Taxes Management Act 1970, s.63 (income tax, corporation tax, capital gains tax, development land tax and petroleum revenue tax); Value Added Tax (General) Regulations, 1977 (S.I. 1977/1759) reg. 59; Car Tax Regulations 1972 (S.I. 1972/1245) reg.12.

[2] The public authority may proceed by way of debt action and the ordinary modes of diligence if so advised, but normally does so only if liability is in dispute. We understand that, where liability is disputed, the Inland Revenue will not instruct diligence for tax if the taxpayer has invoked the statutory appeals procedure and there has been no final determination of the appeal.

warrant procedure has advantages for the debtor as well as the creditor: it avoids the publicity attendant on the appearance of the debtor's name in court records, and although the debtor has no prior opportunity to object to the grant of the summary warrant, the public authority creditor incurs strict liability in damages for wrongful diligence if the debtor establishes that the certificate was erroneous in a material particular.[1] We are not, however, concerned in this Memorandum with the procedure for obtaining a summary warrant.

7.3 Second, after a warrant has been granted the procedures used by the creditors differ from the normal poinding procedure. There are two main types of procedure, one used for recovery of rates and the other used for the recovery of various central government taxes.

7.4 Local government rates:[2] a summary warrant in favour of a rating authority authorises officers of court to enter premises occupied by the debtor and "to poind, seize, remove or secure" any goods belonging to him or in his "lawful possession" of a value up to the amount of the arrears of rates together with a surcharge of the ten per cent of those arrears.[3] If the arrears and surcharge and expenses are

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[1] Grant v. Magistrates of Airdrie 1939 S.C. 738; in Hutchison v. Magistrates of Innerleithen 1933 S.L.T. 52 it was held that the rating authority is liable for the acts of the collector of rates.

[2] See Local Government (Scotland) Act 1947, s.247(2).

[3] It is generally accepted that the ten per cent surcharge covers any claim for interest on arrears of rates, as well as the collector's expenses of the application and of obtaining the warrant, but that the expenses of the poinding, advertisement and sale, and any expenses of preserving the goods, are a charge on the proceeds of sale additional to the surcharge: see section 247(2)(b) of the Act and Hutton, The Local Government (Scotland) Act 1947 p.335.

not paid within four days thereafter, the goods may be sold by public auction on three days' notice. The collector of rates must apply the proceeds of sale towards the rates, surcharge and expenses and account to the debtor for any balance remaining.

7.5 The more important differences from ordinary poinding procedure consist of or include the following -

(i) No charge is served before the poinding is executed.

(ii) The officer may remove the goods from the premises immediately after poinding them whereas in ordinary poindings he must first obtain the sheriff's authority.

(iii) Goods of third parties may be poinded and sold if they are "in the lawful possession of" the debtor.[1]

(iv) The values of the poinded goods are not appraised, there is no 'offer back' and no upset price is fixed for the sale.

(v) The officer in performing his functions is not accompanied by witnesses.[2]

(vi) The officer's performance of his functions is not supervised by the sheriff: thus, no report of the poinding or of the sale is made to the sheriff; the arrangements for sale (the time, place and public notice of the sale) are made by the officer without the prior approval of the sheriff.

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[1] See Orchard Trust Ltd v. Glasgow Corporation (1951) 67 Sh.Ct. Reps. 59; Glasgow Corporation v. Midland Household Stores Ltd 1967 S.L.T. (Sh.Ct.) 22.

[2] Norman v. Dymock 1932 S.C. 131.

(vii) The ten per cent surcharge is a flat rate penalty exigible from the moment when the summary warrant is granted, and broadly corresponds to the interest and litigation expenses due under extract decrees for payment. In addition to the surcharge, however, the expenses of the poinding, advertisement and sale and any expenses of preserving the goods are a charge on the proceeds of sale. There is no provision for the audit and taxation by the court of these expenses even where a sale is carried out.

(viii) No provision is made for the adjudication and delivery of the goods to the public authority in default of sale.

7.6 Inland Revenue, Value Added and Car Taxes: the poinding procedures under summary warrants for the recovery of Inland Revenue taxes have been prescribed by successive statutes since the early 19th century,[1] and virtually identical provision is made by regulations for the recovery of value added tax and car tax.[2] The procedure resembles the procedure for the recovery of rates,[3] but there are significant differences -

(i) If a local authority obtains a decree for rates in common form, it cannot subsequently use summary warrant procedure,[4] but it seems that the Inland Revenue is not debarred from using summary warrant procedure by a previous decree in common form for arrears of tax.[5] Both a collector of rates and a

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[1] See now Taxes Management Act 1970, s.63.

[2] Value Added Tax (General) Regulations 1977 reg. 59; Car Tax Regulations 1972, reg. 12.

[3] For example, no charge is served before the poinding is executed; the officer may remove the goods from the premises without special authority from the sheriff; the officer's performance of his functions is not supervised by the sheriff.

[4] Local Government (Scotland) Act 1947, s.247(2), proviso.

[5] Wright v. Craig (1919) 35 Sh.Ct.Reps. 22.

collector of taxes can abandon the summary warrant procedure and sue for the arrears of rates or taxes in common form,[1] but in the case of rates, the summary warrant must not have been "put in force".[2]

(ii) The warrant can be executed only by a sheriff officer of the district and not by a messenger-at-arms.

(iii) The officer may remove the goods without special authority but must notify the defaulter of the place where they are kept.

(iv) The goods of third parties cannot be poinded and sold.

(v) The goods must be detained in the officer's custody for at least five days during which they may be redeemed by payment of the tax and the officer's "costs".[3]

(vi) After the expiry of the five day period, the poinded goods are valued by two appraisers appointed by the officer and the appraised values operate as an upset price at the sale. After the expiry of another five days, the goods may be sold.

(vii) The appraised values (viz. the redemption payment or proceeds of sale at the first sale) are applied first to the satisfaction of the tax due and second to the payment of a flat rate commission of ten per cent (of the unpaid tax) to the sheriff officer. There is, however, no ten per cent surcharge due

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[1] Govan Police Commissioners v. Clark (1889) 5 Sh.Ct.Reps. 156; Kilmarnock Town Council v. Sloan (1914) 30 Sh.Ct. Reps. 238; Lanarkshire County Council v. Burns (1915) 31 Sh.Ct.Reps. 301; Wright v. Craig (1919) 35 Sh.Ct.Reps. 22; Staig v. McMeekin (1943) 59 Sh.Ct.Reps. 126.

[2] Local Government (Scotland) Act 1947; s.247(1), proviso.

[3] Where a notice annexed to the poinding schedule erroneously stated the period for redemption at four days instead of five, it was held that the error did not invalidate the diligence: Rutherford v. Lord Advocate 1931 S.L.T. 405.

from the time when the summary warrant is granted. The ten per cent statutory commission is payable to the officer only if the goods are redeemed or if they are sold at the first or second sale and there is a balance of the price left after payment of the tax.[1]

(viii) If the goods are not sold at the first sale, provision is made for consignation of the goods in the sheriff's hands and a second sale by public roup by order of the sheriff who becomes liable to pay the tax to the collector and the statutory commission (and fees) due to the officer.

(b) Possible reforms

7.7 In paras. 7.8 to 7.22 , we suggest that the special diligence procedures should not be replaced by diligence in common form; that there should be one uniform code regulating summary warrant diligence based on the procedure for rates; and that some modifications should be made to that procedure.

(i) Special poinding procedure to be retained

7.8 Our proposals for the reform of the ordinary procedure of poinding and warrant sale are largely designed to enable the courts to restrain creditors and debt collection agents from using diligence in an oppressive manner. Summary warrant procedures are, however, instructed by central and local government departments, who generally themselves retain a direct and tight control over the use of the diligence.[2] They

[1] Cuthbert and Wilson v. Shaw's Trustee 1955 S.C. 8.

[2] We understand that the Inland Revenue issues sheriff officers whom it instructs with a memorandum of instructions covering the withdrawal or suspension of proceedings, execution of poinding, the use of serially numbered acknowledgments (supplied by the Collector of Taxes) for all payments of tax and/or costs, and the weekly pay-over to the Collector of monies collected, and providing for the inspection of the Sheriff Officer's records. Each Sheriff Officer is also required to take out a bond in a sum determined by the Board of Inland Revenue indemnifying the Revenue and, therefore, the taxpayer against any losses incurred.

do not give mandates to debt collection agencies. These creditors are public bodies who ought to be trusted to use their powers of enforcement in a responsible manner, and so far as we are aware, few complaints are made about their exercise of these powers. This may be due to the discretion and good sense exercised by collectors of rates and taxes and officers of court. It is normal for the collectors to allow payment by instalments when the defaulter lacks the means to pay in one sum.[1] We envisage that the new powers of the sheriffs principal, suggested in Memorandum No. 51, relating to the supervision, inspection and discipline of officers would apply to summary warrant diligence. Having regard to these factors, we suggest that summary warrants for the recovery of rates and taxes should continue to be enforceable by special statutory poinding procedures rather than by poindings in common form. (Proposition 56).

(ii) Uniform diligence procedures under summary warrant

7.9 In implement of our statutory duty to make proposals for simplification of the law, we suggest that there should be one form of summary warrant diligence used by central and local government authorities alike. At one time, county rates were enforceable in the same manner as taxes.[2] The Local Government (Scotland) Act 1947, section 247 introduced a uniform code for rates (based with modifications on the procedure formerly applicable in burghs[3]) and we think that the 1947 Act procedure would be a better model for a new uniform code for summary warrant diligence than the early 19th century provisions preserved in the Taxes Management Act 1970. We suggest therefore that to simplify the law, there should be one uniform code regulating

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[1] We understand that where, after a poinding, a late appeal is made by the taxpayer and the tax found due is less than the tax originally shown on the summary warrant, the officer of court will accept modified costs based on the reduced tax payable.

[2] Local Government (Scotland) Act 1889.

[3] Burgh Police (Scotland) Act 1892, ss.353 and 357.

summary warrant diligence whether used by collectors of rates or collectors of central government taxes. This code should be modelled on the Local Government (Scotland) Act 1947, section 247(2). (Proposition 57).

(iii) Modifications of summary warrant procedure

7.10 Assuming that a procedure modelled on the rates recovery procedure is appropriate, a number of modifications to that procedure merit consideration.

7.11 Charge to pay: none of the present summary warrant procedures require the service of a preliminary charge to pay. Before a warrant is granted, the collector of rates or taxes must have given the defaulter a notice requiring payment, and in the case of central government taxes, and probably also rates due to most local authorities, repeated demands for payment will have been made. If this is so, the further delay and expense necessitated by a charge is probably unnecessary.

7.12 Poinding goods of third party: we have noted above that a local government collector of rates, but not the central government collectors of taxes, may poind the goods of third parties if they are in the possession of the rates defaulter. This privilege was considered by the Law Reform Committee for Scotland who justified the privilege on the ground that rating authorities "do not choose their debtors".[1] While we recognise the force of the Committee's argument, we think that it takes insufficient account of the injustice of a rule whereby the authority may take and sell an innocent

[1] See Fourteenth Report of the Committee (1964); Cmnd. 2343), para. 30: "The privileged position of rating authorities is probably justified on the view that they do not choose their debtors. They carry out numerous essential services for the benefit of the community as a whole and for individual citizens in particular. They cannot refuse to perform these statutory duties towards persons whose credit they suspect and they cannot provide against default in payment of rates by such persons. They should be given all assistance to recover by way of rates from all who benefit from such services a contribution towards their cost. Private traders can refuse to supply goods or give credit for services rendered and have other means of securing payment without having to resort to diligence over the debtor's goods.

third party's goods for a rates defaulter's debt.[1] Moreover, the privilege is anomalous since it is not shared by the central government revenue-collecting departments, who also cannot choose their debtors, and we have received no representations that the privilege should be conceded to them. We propose therefore that whether the special diligence procedure under summary warrants for recovery of rates is retained or abolished, a collector of rates should no longer be empowered to poind and sell goods owned by a person other than the rates defaulter. It should be competent for a third party claiming goods poinded under rates or tax warrants to apply to the sheriff for withdrawal of the goods from the poinding, and for the officer to exclude goods claimed by a third party, as in the case of ordinary poindings. (Proposition 58).

7.13 Appraisal and sale of poinded goods: goods poinded under the rates recovery procedure are not formally appraised by a detailed valuation, but a general and approximate valuation must be made since the Act contemplates that the officer will only poind sufficient goods to satisfy the rates arrears and the ten per cent surcharge. Since there is no appraised value the goods do not require to be withdrawn from a sale because they do not realise an upset price. As we construe the 1947 Act, the goods may be exposed for sale on subsequent occasions. No provision is made, however, for disposal of the goods where no bidder appears at any sale. In the tax recovery procedures, a formal appraisal is made which operates as an upset price,[3] and if the goods are not sold, they are consigned to the sheriff who must order a second sale.[4] In

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[1] As noted above, in a recent case a local authority poinded, on the rates defaulter's caravan site, a caravan belonging to a third party.

[2] Local Government (Scotland) Act 1947, s.247(2)(a).

[3] E.g. Taxes Management Act 1970, s.63(4).

[4] Ibid, s.63(7).

neither procedure is provision made for the delivery and transfer of ownership of goods to the rates or tax authority, presumably because it was thought that a public authority would have no use for the goods, and ownership of them would merely prove an embarrassment.

7.14 The appropriate solution is not self-evident. In ordinary poinding procedure, the creditor has generally no more use for goods delivered to him in default of sale than has a rating or tax authority. Ownership of the goods gives the creditor the options of re-exposing them for sale at his own expense, or arranging for their destruction, or retaining them for his own use, or abandoning them to the debtor. The creditor nearly always chooses the last option. In every case, the debtor is credited with the appraised value.

7.15 From the standpoint of the debtor, the ordinary and tax warrant procedure provisions for an appraised value seem preferable to the rates warrant provisions in which there is no appraised value. Since the sheriff would not grant a separate warrant of sale and therefore need not be provided with a valuation of the poinded goods, a formal appraisal need not be made at the time of poinding and can be postponed till immediately before the auction. In practice it is unlikely that the goods will be exposed for sale unless they are likely to fetch a fair price.

7.16 We suggest therefore that to safeguard the rates or tax defaulter, the goods should be appraised by the officer immediately before their exposure for sale at an auction and the appraised value should operate as a reserve price (rather than an upset price). If the goods are not sold, they should be adjudged and delivered to the rating or tax authority and the appraised value credited to the rates or tax defaulter. (Proposition 59).

7.17 Surcharge, commission and expenses: the next question is whether separate or uniform provision should be made with respect to the local authority's ten per cent surcharge on arrears of rates (which arises as soon as the summary warrant is granted) and, in central government tax cases, the officer's ten per cent commission on the tax due (which is payable only if the officer executes a poinding).

7.18 We have received representations that the local authority's ten per cent surcharge should be abolished. The surcharge is presumably designed to recompense the local rating authority for the expenses of obtaining the warrant, for the fact that arrears of rates do not bear interest, and for their work in pursuing rates defaulters. The surcharge can be a large sum if the rates are large and may bear little relation to the actual loss suffered by the authority.[1] On the other hand, in times of high interest rates it may be argued that ten per cent is not an unreasonable penalty: it is easily calculated, thereby minimising administrative costs whereas interest is so troublesome to calculate that creditors very rarely instruct officers to recover it in a poinding. It would not therefore be satisfactory to replace the surcharge with a right to recover interest at a prescribed rate.

7.19 No surcharge is exigible in the case of central government taxes but interest is often, but not always, due on the arrears.[2] In addition, an officer executing a summary warrant for recovery of such taxes is entitled to claim a statutory commission of ten per cent of the amount of tax due

[1] The court dues for the grant of summary warrant are charged at a flat rate but one warrant can apply to one defaulter or several hunderd or even several thousand defaulters since the warrant is usually granted in respect of certificates presented en bloc.

[2] Normally Inland Revenue arrears recoverable by summary warrant carry interest but there are exceptions (e.g. Class 4 National Insurance contributions). Where the interest chargeable does not exceed a prescribed sum, it is remitted. The prescribed sum is currently £10 but under the Finance (No.2) Bill currently before Parliament, will be £30. VAT debts do not carry interest.

"for his trouble".[1] Once the poinding has been executed, the goods are held for a period during which they may be redeemed on payment of the tax plus the ten per cent commission. If a sale is carried out, then the proceeds of sale are applied first towards satisfaction of the tax and then towards the officer's commission. In addition, the officer is allowed the expenses of maintaining the goods up to the time of sale and the expenses of the sale (eg the cost of the advertisement, removal expenses etc). Where the officer is unable to recover his expenses, the Inland Revenue will reimburse him by administrative arrangement.

7.20 The officer's ten per cent commission often bears no relation to the amount of work done by him. Sometimes if the officer recovers a small amount in a remote area, ten per cent may be insufficient but in many cases ten per cent exceeds the fees which which would be due and has a penal effect.[2] We think that if there is to be a penalty, it should not be payable to the officer.

7.21 To elicit views on these matters, (1) it is suggested that the ten per cent surcharge on rates arrears should not be abolished nor replaced by a right to interest at a prescribed rate. In addition to the surcharge the expenses incidental to the sale should be recoverable by the authority from the rates defaulter as under the present law. (2) The officer's ten per cent commission for executing tax warrants should be abolished. Officers executing tax and rates warrants should be remunerated by the instructing authority for the work actually done in accordance with the scale fees. (3) It is for consideration whether in tax warrants there should be (i) a surcharge as in the case of rates arrears or (ii) a liability on the debtor to pay the expenses of the diligence to the instructing authority or to the officer on that authority's behalf. Since

[1] Taxes Management Act 1970, s.63; Value Added Tax (General) Regulations 1977, reg. 59; Car Tax Regulations 1972, reg.12.

[2] E.g. in Cuthbert and Wilson v. Shaw's Trustee 1955 S.C. 8, Lord Patrick observed (at p.13) that the Taxes Management Act "has quantified the sums due by the Crown's debtor to the sheriff officer at a sum far in excess of any merit involved in his services".

interest is due on tax arrears in many cases alternative (ii) seems preferable. (Proposition 60).

7.22 Since the officer's fees and expenses would require to be paid to the officer by the instructing tax or rates authority, it would be inappropriate to provide that the proceeds of sale should be applied to the diligence expenses first and then to the tax or rates arrears, or vice versa. In the unlikely event of any surplus remaining from the proceeds of sale after paying the arrears and expenses, the officer would account to the rates or tax defaulter for that surplus.

(iv) Arrestment on tax warrants

7.23 Summary warrants for the recovery of rates authorise the use of arrestments[1] but tax warrants are limited to poindings. We suggest that, if a uniform code for recovery of rates and taxes were enacted, then a summary warrant for the recovery of tax arrears should be enforceable by arrestment in like manner as a rates warrant under the present law. (Proposition 61).

(3) Other enforcement procedures

7.24 We note the existence of two special enforcement procedures which appear to us to be anomalous.

7.25 A special procedure is laid down for the recovery of various betting and gaming duties.[2] The procedure is even more abbreviated than in the case of diligence under summary warrants for recovery of rates and taxes. No summary warrant is granted by the sheriff and the diligence is executed, not by officers of court, but by a person authorised by an officer

[1] Local Government (Scotland) Act 1947, s.247(3).

[2] See Betting and Gaming Duties Act 1972, Sch.1, para. 13 (general betting duty and pool betting duty); Sch.2, para. 10 (gaming licence duty); Sch.3, para. 14, (bingo duty). Though the procedures are enacted in different schedules, they are identical.

of Customs and Excise.[1] While this procedure is consonant with the English practice whereby public bodies enforce their own debts, it seems to infringe a basic principle of the Scots law of diligence that, while diligence may be executed by an officer of court instructed by the creditor, the officer should not be appointed by the creditor.[2] We suggest therefore that if a uniform code for the recovery under summary warrants of central and local government fiscal debts is introduced, then it should be available for the enforcement of betting and gaming duties in place of the present summary process of "diligence" under the Betting and Gaming Act 1972. (Proposition 62).

7.26 Another special procedure is provided by the Fisheries (Scotland) Act 1810, sections 6 and 7 which may be ripe for abolition as obsolete and the matter requires further investigation.

(4) Enforcement of criminal fines by poinding and warrant sale

7.27 If our proposals for the reform of poindings and warrant sales are implemented, the question will arise whether the same procedures should be used for the recovery of fines and other debts arising out of criminal proceedings[3] (including compensation orders against convicted persons under the Criminal Justice (Scotland) Bill currently before Parliament) or whether the procedure should be modified. The Scottish Council on Crime

[1] The enactments provide that the amount recoverable "may be levied by [diligence] on (the defaulter's) goods and [corporeal moveables], and the proper officer may for the purpose by warrant signed by him authorise any person to distrain accordingly and to sell anything so distrained by public auction after giving six days notice of the sale". The proceeds of sale are applied towards the cost of the "distress" and sale and the payment of the amount recoverable, and the balance if any is paid to the defaulter.

[2] Stewart v. Reid 1934 S.C. 69.

[3] Criminal Procedure (Scotland) Act 1975, s.411. There are legislative proposals in the Criminal Justice (Scotland) Bill currently before Parliament to remove the present restrictions whereby the court cannot order imprisonment in default of payment of a fine and then order civil diligence or vice versa.

(SCOC)[1] and the Thomson Committee[2] (whose findings on this matter were accepted by the Government in 1976[3]) accepted that there was little scope for using civil diligence against individuals (as opposed to corporate bodies). The SCOC Report (para. 3.13) remarked:

> "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."

Thus, it is not self-evident that the exemptions from the diligence or the "harsh and unconscionable" test for refusing warrant of sale should apply in the case of fines upon the view that a person may reasonably be required to undergo a greater sacrifice to pay a criminal fine than to pay a civil debt.

7.28 The applicability of the new procedures to criminal proceedings, depending as it does on such factors as the type of criminal case in which the diligence should be used, is a matter mainly for government departments concerned with the administration of criminal justice to consider at or after the submission of our ultimate report on the reform of poindings and warrant sales. To enable us to advise those departments on the appropriate solution, however, views are invited on the question whether fines and other debts arising in criminal proceedings should be enforceable by the ordinary procedure

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[1] Report on Fines (S.H.H.D.; October 1974) paras. 3.11-14;4.15-19.

[2] Second Report of the Departmental Committee on Criminal Procedure (1975) Cmnd. 6218, paras. 60.38-44.

[3] S.H.H.D. Circular No.2/1976 dated 18 March 1976 which observed: "The Secretary of State agrees with the [SCOC Report on Fines] (and the Second Thomson Report) that there is little scope for using civil diligence at present in the enforcement of fines against individuals. On the other hand, he was impressed by the arguments in Part 3 and paragraphs 4.15-4.16 for its use in the occasional case, eg where there is a refusal to pay a duly imposed fine as a protest when civil diligence could be used effectively without hardship to the family. The Secretary of State suggests that courts might bear in mind the possibility of the use of this form of enforcement against the possible identification of cases in which it is a practicable (and therefore preferable) method of enforcement in comparison with imprisonment in default."

of charge, poinding and warrant sale with or without modification, or whether the simpler process of diligence suggested for the enforcement of summary warrants for rates and tax arrears would be more appropriate. (Proposition 63).

PART VIII: SUMMARY OF PROVISIONAL PROPOSALS AND QUESTIONS FOR CONSIDERATION

Para.

I. SIST OF DILIGENCE, INSTALMENT DECREE AT ENFORCEMENT STAGE AND DECLARATOR OF UNENFORCEABILITY

1. (1) It is considered that the protection of debtors from poindings should not take the form of either (a) a creditor's application for leave to poind and a mandatory enquiry into the debtor's means at the commencement of the diligence, nor (b) an exemption from poinding of all goods in the debtor's dwelling. 1.26

(2) On the other hand a debtor should be entitled, at any stage after an open decree for payment has been pronounced against him, to apply to the court for an order both -

(i) substituting an instalment decree for the open decree; and

(ii) sisting further proceedings in any diligence under the decree commenced against him, or precluding the commencement of any such diligence, unless and until he defaults in payment under the instalment decree by allowing a prescribed number of instalments to remain in arrears.

The court would grant the order if it was satisfied that -

(a) the debtor was unable to pay the debt due under the decree (including the diligence expenses for which the debtor was liable) in full forthwith but could pay the debt by instalments; and

(b) his only property attachable for debt was property which it would be unreasonable at that time to require him to realise to satisfy the debt.

(3) Where the sheriff has granted an instalment decree and sisted diligence following a poinding, it is for consideration whether the sheriff should have power to extend the duration of the poinding as security for payment under the decree.

(4) Should the present default provision affecting summary cause instalment decrees (which are converted to open decrees where the debtor allows one instalment to remain in arrears till the next instalment falls due) be adopted without modification or should it be modified so that the instalment decree subsists until the debtor defaults in three (or even four) instalments?

(5) It is for consideration whether the court should also be empowered to make an order declaring a debt due under a decree to be unenforceable in whole or in part where the court is satisfied that -

(a) the debtor is unable to pay the debt in whole or in part within a reasonable period (of say two or three years) from the time of the application; and

(b) his only property attachable for debt is property which it would be unreasonable at that time to require him to realise to satisfy the debt out of the proceeds of sale.

Such a declarator should constitute notour bankruptcy.

(6) If either or both of the proposed types of order were introduced, it is suggested that -

(a) title to apply for each type of order should only be conceded to individuals and not to corporate bodies, partnerships and unincorporated associations;

(b) having regard to the new powers proposed below enabling the sheriff to refuse warrant of sale and to make an instalment decree or other orders in lieu of such a warrant, the declarator and sist of diligence should not affect a diligence of poinding where the sheriff had already granted warrant of sale of the poinded goods; and

(c) both types of order should be subject to variation or recall on a material change in the debtor's circumstances.

(7) Both types of order should be available in respect of sheriff court summary cause decrees for payment. Views are invited on the question whether the orders should also be available in respect of decrees in sheriff court ordinary actions, and in Court of Session actions, for payment.

(8) The procedure in applications for the orders should be kept as simple and inexpensive to the parties as possible. In particular, the procedure might involve -

(a) the use of prescribed means enquiry forms, and written offers to pay by instalments;

(b) intimation of the application to the creditor by the court rather than the applicant;

(c) examination in private by the sheriff, or the sheriff clerk, of the debtor as to his means; and

(d) non-legal representation of the parties where representation is appropriate.

II WARRANT TO CHARGE AND POIND

2. The diligence of poinding should not be automatically available on the dependence 2.3

of a court action, nor in security of debts payable in the future.

3. The statutory provisions prescribing the style of warrants to charge and poind and regulating their legal effect should be uniform and, to simplify the law, the long forms of warrant should be abolished. 2.6

4. Application for letters of horning and poinding and for letters of poinding should be abolished, and the simplified procedure by minute under sections 7 and 12 of the Debtors (Scotland) Act 1838 (diligence at the instance of a person acquiring right to an extract decree or bond) should be made available to persons acquiring right to unextracted decrees or to bonds registrable for execution. 2.8

5. It should be competent to serve a charge and to execute a poinding on a sheriff court ordinary action decree in a different sheriffdom without the need for a warrant of concurrence. 2.10

III CHARGING THE DEBTOR TO PAY

6. (1) The service of a charge requiring the debtor to pay the debt should continue to be a necessary preliminary to the execution of a poinding. 3.11

(2) No change should be made in the present law whereby with certain statutory exceptions, charges are generally served by hand (personal or other mode of service requiring a visit by an officer).

Para.

7. (1) It should no longer be necessary for an officer serving a charge on a summary cause decree to be accompanied by a witness and the officer's execution of the charge, though not attested by a witness, should be treated as probative unless it is proved that the charge was not validly served. (2) Views are invited on the question whether the same rule should apply to Court of Session decrees and sheriff court ordinary action decrees. 3.15

8. Where a debtor furth of Scotland is charged by edictal service, then in addition to the present requirement of service on the keeper of edictal citations, the officer should be required to send a copy of the charge to the debtor by post if he has a known residence or place of business furth of Scotland. 3.17

9. Service on a firm with a social name of a charge under a Court of Session decree should be effected by service on the firm at its principal place of business as in the case of other charges on firms under Court of Session and sheriff court decrees. 3.18

10. (1) The form of the charge served on the debtor, together with explanatory notes, should be prescribed by act of sederunt with a view to making the import of the charge more intelligible to debtors. 3.21
(2) The charge should specify the extract decree containing warrant to charge and the state of the debt, (including the expenses incurred in serving the charge for which the debtor is liable) and should include a demand for payment within the specified days of charge.

Para.

(3) The explanatory notes might give information to the debtor of the legal consequences of non-compliance (in particular its effects in rendering the debtor's goods liable to poinding and perhaps its effect in constituting notour bankruptcy) and might specify how and to whom payment should be made. If our proposals in Proposition 1 above are accepted, then the notes should also inform the debtor of his right to apply to the court for an instalment decree and a declarator of unenforceability. To cater for the very common case where the creditor is willing to consider informal arrangements for payment by a debtor in genuine financial difficulties, the explanatory notes might include a paragraph for completion by the creditor, if so advised, specifying the person whom the debtor should contact for the purpose of discussing such arrangements.

11. The present multiplicity of different periods prescribed for the days of charge should be replaced by a single period which should be fixed at fourteen days. The court should be given power, on cause shown, to shorten or lengthen the period in appropriate cases. 3.23

12. It should no longer be competent to register executions of expired charges in the register of hornings for the purpose of accumulating the debt, interest and expenses into a principal sum bearing interest. 3.24

Para. 3.32

13. (1) It is suggested that a creditor seeking to enforce an extract decree by charge and poinding should be required to apply to the court for leave to charge and poind where he has not served a charge within two years after the decree was extracted.

(2) If this suggestion is accepted, should a creditor holding an extract decree be required also to apply to the court for leave to enforce his decree by arrestment after the expiry of two years from the date of extract?

(3)(a) The period of the unpaid creditor's entitlement to poind following expiry of the days of charge should be fixed by act of sederunt, or statute variable by act of sederunt in the case of Court of Session decrees and sheriff court ordinary action decrees, as well as summary cause decrees. It is suggested that the period should be three years in all cases rather than one year (the present summary cause time-limit) or five years (the short negative prescription).

(b) If the creditor has not enforced the decree by poinding within the three year period, it is suggested that he should require to apply to the court for leave to poind and to serve a second charge at his own expense.

(4)Should a creditor be required to intimate to the debtor his intention to instruct a poinding where a period of say two or three months has elapsed since the date of the charge?

Para.

14. No change should be made in the present rule whereby a charge may be withdrawn and a new charge served on the debtor by the same creditor under the same warrant to charge. Service of a new charge, however, should not enable a creditor to evade the foregoing time-limits on poinding, nor to evade the restrictions on repeated poindings and warrants of sale, by repeating the whole process on the basis of the new charge. 3.32

IV. POINDING THE DEBTOR'S GOODS

(1) The time when poinding is allowed

15. (1) The days on which poindings and other diligences are not competent should be clearly regulated to remove the present uncertainty in the law. No poinding should be competent on a Sunday, Christmas Day, New Year's Day or Good Friday, nor on such other day as may be prescribed by or under act of sederunt. 4.4

(2) It should be declared incompetent to commence a poinding before 9 am or after 8 pm except by leave of the sheriff.

(3) It should be incompetent to continue to execute a poinding after 8 pm unless the officer either has obtained prior authority from the sheriff for so doing or, in his report to the court of the poinding, shows reasonable cause why the poinding was continued after 8 pm.

(2) Property which may be poinded

16. (1) Section 40 of the Sale of Goods Act 1979 (poinding and arrestment by seller of goods in his possession) should be repealed. 4.10

Para.

(2) No change however should be made in the common law rule whereby a creditor in possession of his debtor's goods may poind those goods, provided that the poinding schedule is delivered to the debtor (rather than the possessor) in such a case.

17. It should be clearly declared by statute that the poinding and warrant sale of money and negotiable instruments is incompetent. 4.11

18. Ships should be attachable under section 693 of the Merchant Shipping Act 1894 and section 20 of the Prevention of Oil Pollution Act 1971 by the process of arrestment and sale rather than poinding and sale. 4.12

(3) Exemptions and other protection from poinding

19. (1) The exemptions from poindings should be codified in one enactment. (2) Provision should be made on the lines of the Law Reform (Diligence)(Scotland) Act 1973 (which relates to furniture and plenishings in the debtor's dwelling-house) for appeals against poinding in relation to all exempt goods. 4.23

20. It should be expressly declared by statute that the "necessary and ordinary" clothing of the debtor and his dependants should be exempt. 4.24

21. (1) It is suggested that the approach of the Law Reform (Diligence)(Scotland) Act 1973 (which exempts household goods and furnishings so far as necessary to enable the debtor and his family to continue residence in the 4.30

debtor's dwelling house without undue hardship) should be retained, and that no monetary ceiling should be prescribed.

(2) It is suggested that the statutory list of exempt goods, which at present consists of -

- beds or bedding material;
- chairs;
- tables;
- furniture or plenishings providing facilties for cooking, eating or storing food;
- furniture or plenishings providing facilities for heating;

should be extended to include the following -

- curtains;
- floor coverings;
- implements used for cleaning the dwellinghouse and one piece of furniture for storing those implements;
- implements used for cleaning, mending and pressing clothes; and
- one piece of furniture for storing clothing and bedding materials.

These would be exempt only so far as satisfying the 'necessary' test in the 1973 Act.

(3) Views are invited on what other 'necessary' household goods, if any, should be included in the list.

22. The common law exemption for 'tools of trade' should be replaced by a statutory rule exempting implements, tools of trade, books and other equipment used by the debtor in the practice of his profession, trade or business but not exceeding in aggregate value a prescribed sum (fixed initially at say £250) variable by statutory instrument. 4.31

Para.

23. (1) Should the temporary and conditional exemption of 'plough goods' under the Diligence Act 1503 be retained or abolished? (2) If it is thought that an exemption on these lines should be retained then we suggest that it should be brought up-to-date by a rule whereby it would be competent at any time of year to poind the agricultural implements in question, but that the debtor should be entitled to apply to the sheriff for a sist of further proceedings in the diligence for a period not exceeding (say) one year from the poinding to enable him to use the implements during that period. (3) Views are invited on the following questions: (a) should the sist of diligence apply only to 'plough goods' or should it apply also to other agricultural implements and, if so, what implements? (b) Should the sist of diligence be conditional on (i) the debtor not owning other poindable goods sufficient to satisfy the debt and expenses or (ii) the fact that the debtor could not hire goods in place of the poinded goods? (c) Should there be a monetary ceiling on the value of the goods covered by the sist? 4.34

24. (1) Where a mobile home which is the only residence of the debtor is poinded, the debtor should be entitled to apply to the sheriff for a sist of further proceedings in the diligence for a period to be determined by the sheriff. (2) The sist should be renewable for a further period or periods. (3) Views are invited on the question whether a maximum period (e.g. six months) should be prescribed for the duration of each period of the sist. 4.35

Para.

25. (1) It is suggested that exemptions might be extended to cover - 4.40

(a) medical aids necessary to enable the debtor or a dependant to work or to sustain health, and equipment (e.g. fireguards) necessary for safety in the home; and

(b) books and other goods needed for the education and development of children of the debtor's family or for vocational training.

(2) Views are invited on the questions whether other goods (such as 'personal' possessions) should be specified as exempt, and if so how these goods might be defined. (3) Cars, motor-cycles and other vehicles should not be exempt from diligence unless falling within the business or medical aid exemptions. (4) No exception from the exemptions should be made enabling the seller of goods otherwise exempt from poinding to recover the unpaid price by poinding the goods.

26. It should be made clear that the exemptions applying in poindings extend to all diligences against moveable property including - 4.41

(a) sequestration for rent under the landlord's hypothec and sequestration under the Bankruptcy (Scotland) Act 1913, and

(b) arrestments of moveables of the debtor in the hands of a third party except where the exemption is conditional on the goods being in the debtor's dwelling (viz. furniture and plenishings).

Para.

(4) Procedure in carrying out a poinding

27. The existing procedure in executing a poinding should be replaced by a new procedure on the following lines - 4.44

(1) The opening ceremony (viz. publication by three oyesses and reading of the extract decree and execution of charge) should be expressly abolished by statute. The officer should, however, continue to have with him the extract decree containing warrant to poind and relative execution of charge which he should show to the debtor, possessor, or other interested person, if required.

(2) Before carrying out the poinding the officer should, as at present, (a) demand payment of the debt, and (b) make enquiries of any person present onthe premises as to the ownership of the goods.

(3)(a) In place of the appointment by the officer of one valuator (summary cause poindings) or two valuators (other cases), the officer himself should be required to make the valuation except, possibly, in special circumstances when the valuation might be made by a specialist valuator or broker.

(b) The officer should be accompanied by one witness to the proceedings (as is the case at present in summary cause poindings) rather than two witnesses, and the form of execution should be treated as probative though signed by the officer and only one witness.

(4)(a) The officer should complete the poinding schedule, which should specify the poinded effects, at whose instance they were poinded and the value thereof as is at

present required by section 24 of the Debtors (Scotland) Act 1838. (b) It is suggested that the form of the poinding schedule should be prescribed by act of sederunt which might also prescribe notes for the benefit of the debtor or possessor explaining the effect of the poinding and should include the other matters specified below.

(5) As under the existing law, the officer should be required to make an "offer back" of the goods at their appraised values, to the debtor, or his representative, if present at the poinding, but the existing requirement that the offer back be made three times should be abolished.

(6) As under the present law, if the offer back is not accepted, and the poinding has not otherwise been competently interrupted, the officer should sign the poinding schedule and deliver it to the possessor.

(7) The officer should no longer be required orally to adjudge and declare the poinding to be complete and the goods to belong to the poinding creditor. For the purposes of conferring a preference on the poinding creditor, of bringing the goods under the control and protection of the court, and for the purpose of any other rule of law or (except where the contrary intention appears) any enactment, the poinding should be deemed to be complete when the poinding schedule is delivered to the possessor (whether by actual delivery or by begin left on the premises for him).

Para.

28. No change should be made in the present law whereby warrants for poinding automatically contain warrants to open shut and lockfast places. 4.52

(5) The valuation of the poinded goods

29. In appraising the value of poinded goods, the officer should as at present be required to fix a reasonable approximation of the value of each lot but the appraised value should be treated in the subsequent auction as a reserve price not disclosed to bidders (being the price which, if not met, the article will be withdrawn from the sale) rather than an upset price (being the price at which bidding commences). 4.57

30. Insofar as the problem of low valuations of poinded household goods can be solved, this might be done (a) by requiring that sales of such goods should take place in auction rooms so that the goods would fetch, and be seen to fetch, their true market price, whatever that might be, and (b) by giving the debtor an opportunity to object to the application for warrant of sale on the ground of the under-valuation of the goods. 4.61

31. Views are invited on two alternative suggestions on valuation. (a) The first is that the officer should not value the goods when poinding them upon the view that the poinded goods would fetch their true market price if exposed for sale in an auction room. (b) The second alternative is that the officer would not value the goods at the stage of poinding but might be required to value them at a later stage, e.g. when warrant to sell is intimated to the 4.64

Para.

debtor and before the goods are removed to the auction room.

(6) Interruption or stoppage of poinding

32. It should be made clear that payment by a cheque supported by a banker's card, or payment by a banker's draft, should be as effective as payment by cash in interrupting or precluding a poinding or other diligence. 4.67

(7) Conjoining creditors in the poinding

33. Subject to the clarification of the time of completion of poinding suggested in Proposition 27(7) above, the statutory procedure for conjoining creditors before completion of a poinding should be retained without modification. 4.69

(8) Report of poinding to the court

34. (1) Views are invited on the question whether the period for reporting a poinding to the sheriff (which is currently eight days from the date of completion of the poinding) should be extended to (say) fourteen days from that date. (2) It is suggested that the form of reports of poindings should be prescribed by act of sederunt. 4.72

(9) Effect of poinding and security of poinding goods

35. Views are invited on the question whether the remedies and sanctions for breach of poinding are effective or adequate. 4.74

Para.

V. THE SALE OF THE POINDED GOODS

(1) Procedural time-limits and restrictions on repeated poindings and warrants of sale

36. (1) It is suggested that the period during which a poinding normally has effect should be one year from the date of the completion of the poinding, except where the period is extended in one of the ways mentioned below. The period should be fixed by statute or act of sederunt rather than as at present by statute and Practice Notes. 5.18

(2) Before the expiry of the period, the creditor should be entitled to apply to the sheriff, by minute intimated by the sheriff clerk to the debtor, for an extension of the period. In determining the application, the sheriff should have power to extend the period by such further period as appears to him reasonable in the circumstances. The fact that the debtor is likely to be able to comply, or to continue compliance, with an informal arrangement for payments to account of the debt should be a ground for extending the period.

(3) Provision should be made to ensure that, where within the period of the effective duration of the poinding an application for its extension or for warrant of sale is lodged, the poinding should continue to have effect at least until the application has been disposed of.

(4) To prevent evasion of the time-limits on the duration of poindings, the present restriction on second poindings (viz. of goods on the same premises under the same extract decree, except in relation to poindable goods brought onto the premises after the first poinding) should be retained and embodied in statute rather than Practice Notes.

37. (1) The duration of the poinding following warrant of sale should be fixed either by act of sederunt for the whole of Scotland or by Practice Notes of the sheriffs principal to take account of local circumstances. 5.22

(2) In the case of poinded goods to be exposed for sale by public roup along with other goods in a public auction room, the sheriff's warrant need not fix the precise times of removal or of sale. The officer should however give the debtor (and the possessor if he is a different person) (a) intimation of the grant of warrant of sale; (b) not less than (say) seven days' notice of the date and time of removal of the poinded goods; and (c) notice of the time and place of the auction at which the goods are to be exposed for sale. If through circumstances outwith the control of the creditor and officer, the original date of the auction is postponed, no intimation of the postponement need be given to the debtor, but the debtor should be notified that he should contact the auctioneer or officer for information. The sheriff clerk should, however, notify the debtor that the goods have been sold (or delivered to the poinding creditor) after he has received the report of the sale (or delivery). (3) Where the goods are to be sold on the debtor's premises, or otherwise than at a sale in a public auction room, then the sheriff should continue to specify in his warrant of sale a precise date and time for the sale to take place and the other provisions on time limits in the Debtors (Scotland) Act 1838, section 26 (relating to the intimation of the warrant and to the advertisement) should apply without modification. (4) After the grant of warrant of sale the creditor should be entitled on one occasion only to cancel the arrangements for sale and enter into instalment arrangement with the sanction of a postponed sale. A report of the instalment arrangement signed by the parties would be lodged in court by the creditor or officer and, on registration of the

report in the register of poindings, the duration of the poinding would be extended for a prescribed period of say (six) months from the lodging of the report. (5) In the case of goods to be exposed for sale at an auction room or otherwise than at the premises of the debtor or possessor, the foregoing procedure could not be used after the goods had been removed from the premises. (6) In the event of the debtor's default following a cancelled auction room sale, the creditor would be entitled to instruct the removal of the goods (after due notice) and a second auction room sale within the extended time-limit without the need for a second warrant of sale. In the case of cancelled sales on the debtor's or possessor's premises or elsewhere than an auction room, the creditor would apply for a second warrant fixing the place and time of sale within the extended time-limit. The sheriff, however, could only refuse the application on the ground of an irregularity in the proceedings. (7) Views are invited on the question whether the creditor or debtor should be liable for the expenses of cancelled arrangements for removal or sale.

(2) Application for warrant of sale

38. (1) An application by a creditor for warrant of sale should be made by a minute intimated by the sheriff clerk to the debtor who should be given an opportunity to object. 5.32

(2) In dealing with such an application, the sheriff should have power, of his own motion or on the motion of the debtor, to refuse the application if the grant of the warrant of sale would be harsh and unconscionable.

Para.

(3) In addition the sheriff should retain his existing powers, exercisable of his own motion or on application, to refuse to receive a report of poinding or to refuse to grant a warrant of sale on the ground of an irregularity in the proceedings.

(4) It is suggested that in dealing with an application for warrant of sale the sheriff should have power, on application or of his own motion -

(a) to sist further proceedings in the diligence;

(b) to grant an instalment decree in lieu of the existing decree;

(c) to extend the duration of the poinding as security against the debtor's future default under the instalment decree;

(d) to make an order for re-appraisal of the value of the goods, together with such order relating to the expenses of the re-appraisal as appears just; and

(e) to make the foregoing orders subject to terms and conditions.

(5) Where the sheriff refuses to receive a report of poinding or refuses an application for warrant of sale with the result that the poinding ceases to have effect, intimation of this fact should be made by the sheriff clerk to the debtor, and to the possessor of the goods specified in the report of poinding if he is a different person from the debtor.

39. An appeal should lie, by leave of the sheriff, against a decision of the sheriff granting or refusing warrant of sale to the Court of Session, or to the sheriff principal and thereafter to the Court of Session, but no further appeal should be competent. 5.33

Para.

40. Personal service of the copy warrant of sale on the debtor should be the normal mode of service. 5.34

(3) Arranging and conducting the sale

41. (1) Where goods in a debtor's residence are pointed, the warrant for sale should not provide for a public roup in that residence unless the debtor formally consents to the sale being held there. 5.40

(2) Where the debtor does not consent to a sale in his residence, the warrant for sale should normally require that the sale should be held by public roup at an auction room specified in the warrant (being a roup in which goods other than pointed goods are also exposed for sale).

(3) Where the debtor withholds consent, where the costs of removal to an auction room would be unreasonably high, and where no other suitable premises for the sale were available, then three possible options may be considered on which views are invited, namely:

(a) the sheriff might be empowered in these special circumstances to direct a sale in the debtor's residence notwithstanding that the debtor has withheld consent;

(b) the sheriff might be empowered to direct that the sale be held at a location other than the debtor's residence or an auction room, even if the location is not altogether suitable;

(c) provision might be made for an Exchequer subsidy towards the cost of removal (i) where the distance between the debtor's residence and the auction room or other suitable location exceeds

Para.

a prescribed mileage, or (ii) where the debtor's residence is one of the islands having no auction room or other suitable location for the sale.

(4) To minimise the expense of removal to an auction room, consideration should be given to the introduction of administrative arrangements, in as many areas as possible, whereby from time to time poinded goods would be removed to an auction room along with other poinded goods, or other goods to be exposed for sale, by a removal firm on one journey and the expense apportioned among the several creditors or vendors concerned. Such 'multiple removal' arrangements would require co-operation between the court, the local officers of court, and the local removal firms and auctioneers.

42. An advertisement of a warrant sale in the debtor's dwelling house should not include the debtor's name unless its inclusion is, in the opinion of the sheriff, essential for the identification of the place of sale. 5.41

43. Where an applicant for warrant of sale seeks the sheriff's approval for a sale on the premises of a third party (other than the auction room of an auctioneer appointed by the warrant), then - 5.42

(a) the application should disclose clearly that the premises are those of a third party;

(b) it is for consideration whether the applicant should be required to obtain the prior consent of the third party for the use of his premises for the warrant sale or whether the third party

should merely be entitled to make representations to the sheriff against the holding of the sale there; and

(c) an advertisement of a warrant sale on the third party's premises should make it clear that the goods to be sold do not belong to the third party.

44. The officer should either carry out or at least supervise the uplifting and removal of the poinded goods from the debtor's premises; and for use, if necessary, in uplifting the goods, the warrant of sale should include a warrant authorising the officer to open shut and lockfast places. 5.44

45. (1) In the case of sales not held at an auction room, should the existing prohibition on officers (or their employers, employees and associates) acting as auctioneers be retained, or should the officer, attended by one witness, be capable of acting as auctioneer and of carrying out the (non-supervisory) functions of the judge of the roup? (2) Should the prohibition be maintained in relation to sales under ordinary decrees but abolished in relation to summary cause sales? 5.50

46. To save expense, the officer should not be required to attend in an auction room to act as judge of the roup. An auctioneer accepting instructions to act in a warrant sale would be required to keep a record of the poinded goods exposed for sale and the price at which the goods were knocked down to the purchaser or became the property of 5.52

the poinding creditor. The auctioneer would deliver a report on a prescribed form with the roup rolls to the officer who would make a report to the sheriff of the sale or delivery within (say) 14 days. The officer would inform the creditor of the result of the sale and it would be the responsibility of the creditor to uplift the goods from the sale room. The sheriff clerk would intimate the result of the sale to the debtor after the report of sale was lodged.

47. (1) Where the warrant of sale directs that the sale should take place at the debtor's dwelling or some other place not being an auction room, and no bid at or above the reserve price is made, then the judge of the roup should adjudge the goods to belong to the poinding creditor in default of sale, but subject to the condition that ownership of the goods will not pass from the debtor to the poinding creditor unless and until the creditor has removed the goods from the premises. The period within which the creditor may remove the goods should be prescribed by statute or act of sederunt, and might be fixed at 24 hours after the goods were conditionally adjudged. 5.56

(2) In the case of warrant sales at auction rooms, where the goods are not sold, ownership should be deemed to pass to the poinding creditor when the goods are withdrawn from the sale by the auctioneer.

(3) The present rule should be retained whereby the appraised value of the goods adjudged in default of sale is deducted from the debt. (4) In the light of these proposals, it seems unnecessary to prohibit creditors from using the threat of collecting adjudged goods as

a means of putting further pressure on debtors to pay.

(4) Further control by court, and procedure following the sale

48. To provide an independent accounting between the debtor and creditor and to enable the court to check the regularity of the proceedings following the grant of warrant of sale in every case (and not merely as at present where the goods are sold or delivered), a report of the proceedings following the warrant of sale should always be made to the sheriff. 5.60

49. (1) The report of the sale or delivery of the poinded goods should be made to the sheriff within 14 days (instead of 8 days as at present) after the date of the sale or delivery. Where the diligence was abandoned or otherwise terminated before the date of sale, the report of the proceedings following the warrant of sale should be lodged within such period as may be prescribed. (2) A style should be prescribed by act of sederunt for reports of sale and other reports of proceedings following the grant of warrant of sale. (3) No change should be made in the present procedure whereby the sheriff, following the auditor's report, may approve the report of sale with or without amendments or refuse to approve it, after allowing the parties to object where necessary. 5.63

50. Views are invited on the question whether, as a safeguard against overpayment to creditors out of the proceeds of sale, the proceeds should be consigned in court until the time 5.65

when the sheriff approves the report of sale or whether the officer should be required to retain the proceeds until that time or whether the present law and practice should be retained.

50A. Where goods are to be removed for sale at an auction room, the officer should be empowered (a) to uplift and remove only such part of the poinded goods as, according to their appraised values, would satisfy the outstanding balance of the debt, interest and expenses, and (b) to withdraw the remaining goods from the poinding. Otherwise the present rule against withdrawal of goods from the poinding should be retained. 5.68

VI INCLUSION IN POINDINGS OF GOODS OF THIRD PARTIES

51. (1) Officers of court executing a poinding should be under a duty to make such enquiries of the debtor or other person on the premises, as are reasonable in the circumstances, on the question whether the goods proposed to be poinded are subject to a hire-purchase agreement or are otherwise the property of a third party. (2) It is for consideration whether this duty should be imposed by statute or act of sederunt applying uniformly in all sheriffdoms and to messengers-at-arms as well as to sheriff officers, rather than by Practice Note. (3) Views are invited on the question whether the sanction for breach of this duty should be (a) a liability to make reparation to the third party for effecting the poinding irregularly or, as the case may be, liability to pay the expenses of the third party's claim to have the goods withdrawn; or (b) disallowance of the fee payable by the creditor. 6.7

52. (1) The poinding schedule delivered to the possessor of the poinded goods should warn him of the advisability of notifying the finance company or other third party owner (if any) of goods included in the poinding. (2) On the analogy of 6.10

claims by minute made between the time of the poinbding and the grant of the warrant of sale, it should be competent for a third party claiming ownership of goods included in the poinding, instead of raising an action of interdict of the warrant sale, to apply to the sheriff by minute in the process for an order withdrawing the goods from the poinding and recalling the warrant of sale so far as relating to those goods. The sheriff should have power to make such incidental and consequential orders as he thinks fit, e.g. to allow a further poinding of the debtor's goods in the same premises and a second warrant of sale. (3) It is for consideration whether an officer should be expressly empowered by statutory rules to exclude goods from the poinding or warrant sale if satisfactory evidence of ownership is produced by a third party after the poinding, provided that he adds a note to that effect in the report of the proceedings.

53. The title of a bona fide purchaser for value of goods at a warrant sale should be the same as the title acquired by the purchasers of other goods at auction sales. The title of a poinding creditor to whom goods are delivered in default of sale should be the same as that of a bona fide purchaser for value. 6.13

54. A third party whose goods have been mistakenly included in a poinding which has been regularly executed should be entitled to claim damages for wrongful poinding and sale of the goods from the poinding creditor if, but only if, the creditor, or the officer on his behalf, has agreed to exclude the goods from the warrant sale and failed to implement that agreement. 6.15

Para.

55. The rule whereby for the purposes of the execution of a poinding, goods on the debtor's premises may be presumed to be owned by the debtor should apply where the premises are a matrimonial home owned or tenanted by both the debtor and his (or her) spouse in common without prejudice however to the right of the debtor's spouse to rebut the presumption by making a claim at the stage of the poinding or subsequently in an application to the sheriff or by any other competent remedy. 6.21

VII. SPECIAL STATUTORY POINDING PROCEDURES

Poindings for recovery of rates and taxes

56. Summary warrants for the recovery of rates and taxes should continue to be enforceable by special statutory poinding procedures rather than by poindings in common form. 7.8

57. To simplify the law, there should be one uniform code regulating summary warrant diligence whether used by collectors of rates or collectors of central government taxes. This code should be modelled on the Local Government (Scotland) Act 1947, section 247(2). 7.9

58. Whether the special diligence procedure under summary warrants for recovery of rates is retained or abolished, a collector of rates should no longer be empowered to poind and sell goods owned by a person other than the rates defaulter. It should be competent for a third party claiming goods poinded under rates or tax warrants to apply to the sheriff for withdrawal of the goods from the poinding, and for the officer to exclude goods claimed by a third party, as in the case of ordinary poindings. 7.12

Para.

59. To safeguard the rates or tax defaulter, the goods should be appraised by the officer immediately before their exposure for sale at an auction and the appraised value should operate as a reserve price (rather than an upset price). If the goods are not sold, they should be adjudged and delivered to the rating or tax authority and the appraised value credited to the rates or tax defaulter. 7.16

60. (1) It is suggested that the ten per cent surcharge on rates arrears should not be abolished nor replaced by a right to interest at a prescribed rate. In addition to the surcharge the expenses incidental to the sale should be recoverable by the authority from the rates defaulter as under the present law. (2) The officer's ten per cent commission for executing tax warrants should be abolished. Officers executing tax and rates warrants should be remunerated by the instructing authority for the work actually done in accordance with the scale fees. (3) It is for consideration whether in tax warrants there should be (i) a surcharge as in the case of rates arrears or (ii) a liability on the debtor to pay the expenses of the diligence to the instructing authority or to the officer on that authority's behalf. Since interest is due on tax arrears in many cases alternative (ii) seems preferable. 7.21

Arrestments on tax warrants

61. If a uniform code for recovery of rates and taxes were enacted, then a summary warrant for the recovery of tax arrears should be enforceable by arrestment in like manner as a rates warrant under the present law. 7.21

Para.

Betting and gaming duties

62. If a uniform code for the recovery under summary warrants of central and local government fiscal debts is introduced, then it should be available for the enforcement of betting and gaming duties in place of the present summary process of "diligence" under the Betting and Gaming Act 1972. 7.25

Criminal fines

63. Views are invited on the question whether fines and other debts arising in criminal proceedings should be enforceable by the ordinary procedure of charge, poinding and warrant sale with or without modification, or whether the simpler process of diligence suggested for the enforcement of summary warrants for rates and tax arrears would be more appropriate. 7.28

APPENDICES

APPENDIX A: REPEAL OF SECTION 40 OF SALE OF GOODS ACT 1979

1. At paragraph 4.9 of our Memorandum, we point out that section 40 of the Sale of Goods Act 1973 is rarely, if ever, invoked and that the problems which it raises are disproportionate to its utility.

2. First, it may be argued that the unpaid seller of goods already has adequate remedies under the Sale of Goods Act 1979 without the addition of the statutory right of attachment.[1]

3. Second, it has been observed[2] that it is unclear whether the "arrestment and poinding" are diligences properly so called or merely a piece of legal machinery derived ultimately from the Mercantile Law Amendment (Scotland) Act 1856, section 3, (which was invented as a limited or modified substitute for the broad right of retention which the seller enjoyed before the 1856 Act[3]) and which has no value in the context of the Sale of Goods Act.

4. Third, there is considerable doubt as to the point of time at which the statutory right to attach under section 40 terminates. There is authority for the view that the sequestration of the debtor is not a bar to attachment.[4] Gloag and Irvine argue that the validity of an arrestment or poinding must be judged by considering whether an arrestment or poinding by a third party would have been competent.[5] On this view, the seller would lose his right to attach them by the mere fact of a sub-sale by the purchaser taking place, though the sub-sale has never been intimated to him. Professor Brown seems to have taken a different view arguing that "as long as the original seller held possession he could grant new credit to the original buyer and proceed to arrest or poind the goods in order to secure payment of his new debts".[6]

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[1] The unpaid seller has a right of retention or lien sections 39, 41-43); a right of stoppage *in transitu* (sections 39, 44-46); a right of resale (sections 39 and 48); and a right to withhold delivery if property has not passed (section 39).

[2] Brown, *Sale of Goods* (2nd ed.) pp.314-318.

[3] See *Wyper* v. *Harveys* (1861) 23 D. 606 at p.615.

[4] Gloag and Irvine, *Rights in Security*, p.269 citing *Wyper* v. *Harveys* (*supra*).

[5] *Op. cit.*, p.269, citing *Browne & Co.* v. *Ainslie & Co.*(1893) 21 R. 173.

[6] *Op. cit.*, p.318.

5. Fourth, the section is arguably inconsistent with section 47 of the Sale of Goods Act 1979:[1] the safeguards in that section (for the rights of third parties taking in good faith and for value documents of title for the goods from the purchaser on a sub-sale or pledge)are not expressly applied to the seller's right of attachment under section 40 but only to his rights of retention and stoppage in transitu.

6. It is of course possible that section 40 of the 1893 Act (now 1979 Act) was merely intended to codify the common law of Scotland.[2] The 1893 Act for the first time enabled a seller to transfer property on sale without delivery and it therefore became competent for the seller to poind undelivered goods in his own hands at common law since they belonged to the debtor. But if this were the intention, it was not achieved since section 40 of the Act differs from the common law (a) in allowing arrestment (as well as poinding) of goods in the creditor's hands and (b) in allowing poinding of goods belonging to the seller where the contract of sale postpones transfer of title to the goods.

7. We consider that though section 40 of the 1979 Act should be repealed, the common law rule should be retained.

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[1] This section provides that a seller's lien or right of retention and his right of stoppage in transitu are not affected by a sale or other disposition of the goods by the buyer, unless the seller has assented thereto; but the rights are affected where documents of title have been given to the buyer and transferred on a sub-sale to a third party taking in good faith and for value. If the documents are transferred by the original buyer, not on sub-sale but by way of pledge or other disposition, then the lien or right of stoppage in transitu is retained but is subject to the rights of the transferee.

[2] Although in the Acts of 1893 and 1979, section 40 appears in a group of sections with the shoulder note "Rights of unpaid seller against the goods", it is generally accepted that the section entitles the seller to poind the goods not merely for the price but for any debt due to him by the purchaser: Gloag and Irvine, op. cit., p.269; Brown op. cit., p.318.

APPENDIX B: COMPARATIVE SURVEY OF EXEMPTION LAWS

1. In England and Wales, the wearing apparel, bedstead and bedding of a judgment debtor and his family, not exceeding the value of £100 and the tools and implements of his trade not exceeding the value of £150 are exempt from seizure.[1] The current sterling ceilings were fixed by statutory instrument with effect from 18 February 1980.[2] The Payne Committee recommended that a list of exempt goods should be compiled which should be based on the principle that:

> "a tradesman should retain such tools of trade and goods as are necessary to enable him to maintain his earnings, and that such household goods and personal clothing should be exempted as are necessary to provide a clean and decent home for the whole family."[3]

2. In Northern Ireland, property exempt from seizure includes tools of trade to the value of £50 and -

> "such wearing apparel, furniture, bedding and household equipment of the debtor and his spouse as appear to the [Enforcement of Judgments] Office to be essential for the domestic purposes of the debtor, his spouse and his dependants residing with him or any of them."[4]

As we indicated in our First Memorandum, however, seizures of household goods are almost unknown in Northern Ireland partly because of the Office's liberal interpretation of the foregoing test and partly because the Office must bear the loss if the proceeds of sale do not defray the expenses of valuation, removal and sale and accordingly it is reluctant to make seizure orders in respect of household goods.

3. In Australia, the exemptions vary from State to State and as between different courts in the same State, but generally are comparable to those in England and Wales, though practice may vary.[5] In the State of South Australia, for example, few executions of goods are apparently levied.[6]

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[1] Small Debts Act 1845, s.8; Administration of Justice Act 1956, s.37; County Courts Act 1959, s.124; the Protection from Execution (Prescribed Value) Order 1980, (S.I.1980/26).

[2] See previous note.

[3] Op. cit., para. 675.

[4] Judgments (Enforcement) Act (Northern Ireland) 1969, s.34(d).

[5] See Kelly, Debt Recovery in Australia (1977) p.73 et seq.

[6] Ibid. p.74.

4. In the United States of America, in addition to the wide "homestead" exemptions, almost every State's laws make exemptions for personal, household and miscellaneous possessions. Vukovich (1974)[1] described the position as follows:

> "These provisions are designed to ensure that debtors will have necessary items for living in reasonable comfort and earning a living. The statutes vary as to the types of item that are exempt and as to the amount of their exempt value. . Household furnishings are exempt in practically every jurisdiction. Some states limit the value of the furnishings, leaving the choice of the particular furnishings to the debtor, while other jurisdictions limit the exemption to "necessary" furnishings. Some jurisdictions also list specified exempt items such as stoves, beds, sewing machings, televisions and radios, refrigerators, laundry equipment and kitchen utensils. A few states place no limits on the amount or types of household goods that are exempt.
>
> In addition to useful household items, the exemption statutes also commonly apply to more personalised, arguably less necessary, items such as family pictures, Bibles, wedding rings and other jewelry, books, historical and scientific collections, guns, church pews .... The States also allow debtors and members of their families to keep all their clothing or such as is necessary.
>
> Finally, the exemption laws also protect items used by a debtor to earn his living, such as tools, books, machinery and farm implements. These items often are limited by a maximum dollar value or by the requirement that the items be necessary in carrying on the debtor's occupation. Furthermore, certain debtors benefit from various livestock and feed exemptions. The family car occasionlly is claimed as exempt but such claims are usually unsuccessful. Although a number of States explicitly exempt a debtor's vehicle, most require that the vechicle be used in the debtor's profession or trade or that it have an unreasonably low value considering the value of today's automobiles."

5. The U.S. Uniform Exemptions Act 1979[2] provides for the following exemption of personal property subject to value limitations:

> (a) An individual is entitled to exemption of the following property to the extent of a value not exceeding $500 in any item of property:

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[1] "Debtors' Exemption Rights" (1974) 72 Georgetown Law Journal 779 at pp.826-829 (footnote references are omitted from the quotation).

[2] Uniform Laws Annotated, vol.13, 1979 Pamphlet.

(1) furnishings and appliances reasonably necessary for one household;

(2) if reasonably held for the personal use of the individual or a dependent, wearing apparel, animals, books, and musical instruments; and

(3) family portraits and heirlooms of particular sentimental value to the individual.

(b) An individual is entitled to exemption of jewelry, not exceeding $750 in aggregate value, if held for the personal use of the individual or a dependent.

(c) An individual is entitled to exemption, not exceeding $1,000 in aggregate value, of implements, professional books, and tools of the trade; and to an exemption of one motor vehicle to the extent of a value not exceeding $1,500.

(d) In addition to any exemption provided by this Act or other law, an individual is entitled to exemption of cash and other liquid assets to the extent of a value not exceeding (1) $500 if the individual claims a homestead exemption (Section 4), or (2) $1,500 if the individual does not claim a homestead exemption. The term "liquid assets" includes deposits, securities, notes, drafts, unpaid earnings not otherwise exempt, accrued vacation pay, refunds, prepayments, and other receivables.

6. In the Provinces of Canada, the exemptions of personal property are generally wider than in the British legal systems though not so wide as in some American States. Generally the Pronvices' laws prescribe a list of exempt goods often coupled with a dollar ceiling.[1] For example, the Alberta Exemptions Act[2] provides:

"The following real and personal property of an execution debtor is exempt from seizure under any writ of execution:

(a) the necessary and ordinary clothing of an execution debtor and his family;

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[1]See, eg Dunlop, "Execution against Personal Property - England and British Columbia" (1972) 7 University of British Columbia Law Review 171; Working Paper by Institute of Law Research and Reform, Alberta, on Exemptions from Execution and Wage Garnishment (1978); Report by Law Reform Commission of Manitoba on Enforcement of Judgments Part III: Exemptions and Procedure under "The Executions Act" (1979).

[2]R.S.A. 1970, c.129, s.2.

(b) furniture and household furnishings and household appliances to the value of $2,000;

(c) cattle, sheep, pigs, domestic fowl, grain, flour, vegetables, meat, dairy or agricultural produce, whether or not prepared for use, or such of them as will be sufficient either themselves or when converted into cash to provide -

(i) food and other necessaries of life required by the execution debtor and his family for the next 12 months,

(ii) payment of any sums necessarily borrowed or debts necessarily incurred by the execution debtor -

(A) in growing and harvesting his current crop, or

(B) during the preceding period of six months, for the purpose of feeding and preparing his livestock for market,

(iii) payment of current taxes and one year's arrears of taxes or in case taxes have been consolidated, one year's instalment of the consolidated arrears, and

(iv) the necessary cash outlays for the ordinary farming operations of the execution debtor during the next 12 months and the repair and replacement of necessary agricultural implements and machinery during the same period;

(d) horses or animals and farm machinery, dairy utensils and farm equipment reasonably necessary for the proper and efficient conduct of the execution debtor's agricultural operations for the next 12 months;

(e) one tractor, if it is required by the execution debtor for agricultural purposes or in his trade of calling;

(f) either -

(i) one automobile valued at a sum not exceeding $2,000, or

(ii) one motor truck,

required by the execution debtor for agricultural purposes or in his trade or calling;

(g) seed grain sufficient to seed the execution debtor's land under cultivation;

(h) the books of a professional man required in his profession;

(i) the necessary tools and necessary implements and equipment to the value of $5,000 used by the execution debtor in the practice of his trade or profession; ..."

7. In France, Articles 592 to 593-1 of the Code of Civil Procedure (as amended by the Decree No.77-273 of 24 March 1977) provides for the exemption of moveable goods from seizure ("saisie-execution"). Under Article 592, the following moveable goods necessary for the standard of living and for the work of the debtor and his family are exempt:

clothing;
bedding;
household linen;
things necessary for taking care of the house;
food;
things necessary for keeping, cooking and conserving food (including refrigerators and cookers);
things necessary for heating;
tables and chairs for having meals in common;
one piece of furniture for storing clothing and linen and one piece of furniture for storing housework tools;
goods needed for the disabled;
books and other articles necessary for studying or vocational training;
children's things (e.g. toys);
personal or family "souvenirs";
pet animals or watchdogs;

(in rural areas) two cows or 12 goats or sheep (at the debtor's choice); a pig and 24 poultry; yard animals together with the straw, fodder and grain, necessary to feed the animals until the next harvest;
tools and other working implements needed for the personal practice of a profession or vocation.

However, any of these articles may be seized (under Article 592-1) where (a) they are situated in another place than the debtor's dwelling or work-place; or (b) they are goods of high value by reason of their importance, the material of which they are made or their rarity, or because they are

antiques or luxury quality; or (c) if they have lost their status as necessities because several are available; or (d) if they form part of stock in trade or business assets ("fonds de commerce"). The exemptions are available in respect of all debts (including those due to the State) unless the debt is for payment of the price of the goods to the unpaid seller, or person who lent money for purchase of the goods or for the services of the manufacturer or repairer of the goods.