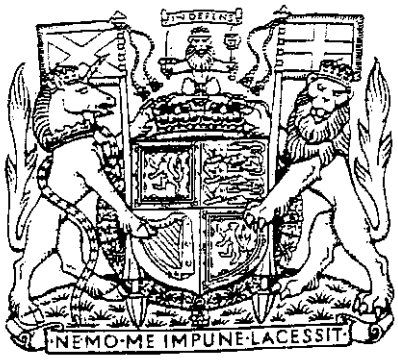

SCOTTISH LAW COMMISSION

MEMORANDUM NO . 47

FIRST MEMORANDUM ON DILIGENCE : GENERAL ISSUES AND INTRODUCTION

VOL 1 ; Parts I- III

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

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SCOTTISH LAW COMMISSION

DILIGENCE

MEMORANDUM NO. 47

FIRST MEMORANDUM ON DILIGENCE: GENERAL ISSUES AND INTRODUCTION

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SCOTTISH LAW COMMISSION

Memorandum No. 47

First Memorandum on Diligence: General Issues and Introduction

PART I: PRELIMINARY AND SUMMARY OF ISSUES FOR CONSIDERATION

A. Preliminary

(1) Purpose of Memorandum

1.1 This Memorandum is the first of a series of seven Memoranda issued in pursuance of Item No. 8 of our Second Programme of Law Reform,[1] the Reform of the Law of Diligence.[2]

1.2 In this Memorandum -

(a) we seek views on what the general approach to reform of the system of diligence should be and on certain reform measures of general application;

(b) we give a general outline of the scope and purpose of the later Memoranda on specific diligence topics in order to explain their inter-relationship; and

(c) we set diligence in the wider context of the system of debt recovery (of which it forms the last stage), and identify measures connected with debt recovery which fall outwith our terms of reference but which we draw to the attention of the competent authorities since they affect the execution of diligence.

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[1] Scot.Law Com. No. 8 (1968). Our intention to issue these Memoranda was stated in our Thirteenth Annual Report, 1977-78 (Scot.Law Com. No. 55) para. 36.

[2] Diligence is the Scottish legal term denoting the measures (such as arrestments of wages or poindings and warrant sales) which can be taken to enforce civil court decrees ordering the payment of debts or the implement of other legal obligations and includes also measures to secure property pending a court action, viz. arrestments and inhibitions on the dependence. Its main purpose is to compel people to pay the debts which they have incurred and which the courts have ordered them to pay.

(2) Other Memoranda on diligence

1.3 Along with this Memorandum, we are also issuing -

- Memorandum No. 48 on Poindings and Warrant Sales;
- Memorandum No. 49 on Arrestment and Judicial Transfer of Earnings;
- Memorandum No. 50 on Debt Arrangement Schemes; and
- Memorandum No. 51 on the Administration of Diligence.

The general scope and thrust of these Memoranda are explained in this Memorandum.[1] We would be grateful if comments on Memorandum No. 48 were submitted by 31 March 1981 and comments on the remaining four Memoranda by 30 June 1981.

1.4 The series of consultative memoranda will be completed by a Memorandum on the recovery of aliment and periodical allowance[2] and by a Memorandum on miscellaneous topics in the domain of diligence.[3]

(3) Research on social aspects of diligence

1.5 As indicated in our Annual Report for 1977-78, the Central Research Unit of the Scottish Office initiated on our behalf a programme of research, which will be embodied in eight reports, illuminating many aspects of the operation of the system of diligence, debt recovery and related matters and providing information essential for the formulation of policy on the reform of diligence. The ambit of these reports and details of their publication are described in Appendix A. Of these reports, at least four will be available as from the date of issue of this Memorandum,[4] and the remainder will be published in early

[1] See paras. 1.60-1.81.

[2] See Part V, Section A, (paras. 5.2-5.5) below.

[3] See Part V,. Section B, para. 5.6 et seq below.

[4] Namely the C.R.U. Diligence Survey, the C.R.U. Warrant Sales Report, the C.R.U. Court Survey, and the C.R.U. Arrestments Survey.

course. Throughout our Memoranda we have generally referred to these reports by the abbreviations specified in Appendix A.

(4) Acknowledgments and disclaimer

1.6 We shall in our final Report have the opportunity to acknowledge more fully, if not adequately, the work done on our behalf by the staff of the Central Research Unit of the Scottish Office, the researchers who worked with them, members of our former Working Party on Diligence,[1] and many others who have provided us with information.[2] We wish, however, to make it clear that none of those persons bears any responsibility for any statements not directly attributed to him or her nor for the formulation of the provisional proposals on policy contained in this and subsequent memoranda.

B. The need for reform

1.7 We begin this Section by examining the criticisms which have been made of the system of diligence from the standpoint of debtors and those made from the standpoint of creditors. We then attempt to place these criticisms in perspective by explaining the relationship of diligence to credit and debt recovery, and thereafter set out what in our view should be the objectives of the system of diligence or debt enforcement and certain guidelines for reform. In Section C below, we briefly describe what in our opinion are the main legislative options for reform and state which options should, in our view, be adopted at the present stage of the development of the law.

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[1] Responsibility for the preparation of consultative memoranda was transferred from our Working Party to the Commission in the year 1976/77, in which year the Central Research Unit of the Scottish Office commenced their work on our behalf.

[2] We are grateful to the Society of Messengers-at-Arms and Sheriff Officers for the information which they have provided and the help and co-operation which they accorded to researchers on our behalf.

(1) Criticisms of diligence from the standpoint of debtors

1.8 In recent years, the great expansion of consumer credit and the consequent increase in consumer insolvency and consumer default has made the debt enforcement process the target of criticism in Scotland as in other countries. As we explain more fully in Appendix B,[1] diligence is the culmination of a process which in consumer cases commences with the extension of credit by the creditor to the debtor and the occurrence of default in payment and thereafter proceeds through the three stages of 'informal' attempts at collection by the creditor or his agents; the raising of a court action for payment; and finally the enforcement of the debt decree by one or more of the competent modes of diligence. Consumer debt cases are far more numerous than all other kinds of debt cases (eg commercial debt, damages or maintenance cases) at all stages of the debt recovery process.[2] Because of this, the most common uses of diligence by far consist in the poinding of goods, usually household goods, and the arrestment of earnings to enforce debts due in respect of consumer goods and services.[3]

1.9 The main criticisms of diligence therefore concentrate on the use of poindings and arrestments of earnings to enforce consumer debts. These criticisms may be discussed under the following heads, (a) creditors' control of diligence; (b) officers of court (viz. messengers-at-arms and sheriff officers) as independent contractors; (c) specific criticisms of poindings and warrant sales and arrestments of earnings; and (d) diligences against multiple debtors.

[1] In Appendix B, using the results of the empirical research undertaken or sponsored by the Central Research Unit of the Scottish Office on our behalf, we attempt to describe in varying degrees of detail the scale and nature of debt recovery and diligence in Scotland, the relationship between the different stages of the debt recovery process, the information available as to creditors' practices and policies and debtors' circumstances, the role of organisations providing help to debtors (such as Citizen's Advice Bureaux, Information Centres and local authority social work departments) and generally the factual background against which diligence is used.

[2] See C.R.U. Diligence Survey and C.R.U. Court Survey.

[3] We exclude from consideration ejections for non-payment of rent, which fall outside our terms of reference.

(a) Creditors' control of diligence

1.10 Under the present law, a creditor holding an extract decree for payment has wide powers to instruct officers of court[1] to carry out diligence against the debtor's "non-exempt" property in execution of the decree; to choose the mode or modes of diligence to be used; to use these diligences concurrently or consecutively; and (subject to the qualification mentioned at para. 1.12) to prosecute them to the limit or to abandon them at any stage. The extract court decree itself contains a warrant of the court authorising the use of the competent modes of diligence normally used - poinding and arrestment and where appropriate ejection or delivery.[2] The creditor therefore need not apply to the court before proceeding to enforce his debt by arrestment or charge and poinding, though he must apply to the court for warrant of sale of poinded goods.

1.11 An important criticism of the present system is that it confers too wide powers on creditors, and the debt collection agencies or other agents representing them. The debtor has in theory a right to damages if the creditor uses diligence "with malice and want of probable cause", but this uncertain and virtually empty right cannot be relied on where the decree is unexceptionable and the diligence is regularly executed: in these circumstances -

> "There is no action for oppressive use of diligence and a creditor may proceed by way of diligence, although there is another way open to him which would be less injurious to the debtor."[3]

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[1] We use the term of "officers of court" to denote mesengers-at-arms and sheriff officers.

[2] With one exception, diligence can be used to attach all forms of property and funds, including moveable goods in the debtor's possession (poinding and warrant sale); funds or moveable property belonging to the debtor in the hands of a third party (arrestment and furthcoming); and heritable property belonging to the debtor (inhibition and adjudication, which, however, require separate proceedings from the debt action except in the case of inhibition on the dependence). The exception is that cash and negotiable instruments in the debtor's hands cannot be attached outside bankruptcy proceedings.

[3] Encyclopaedia of Scots Law (1926) s.v. "Abuse of Civil Process" Vol. 1 at p.25.

1.12 Until recently, the powers of creditors to control the use of diligence were virtually unfettered. Within the last few years, however, some important restrictions on creditors' powers to use the diligence of poinding and warrant sale have been imposed including restrictions on the duration of poindings,[1] on repeated poindings[2] and on second warrants of sale.[3] At one time, a creditor who had poinded goods could prosecute his diligence to the final stage of warrant sale even though it was clear that the expenses of the advertisement and sale would exceed the proceeds of sale and that expenses would thereby be added to the debt without direct financial benefit to the creditor. Indeed, in small debt poindings, no application for warrant of sale was necessary. With the replacement in 1976 of small debt procedure by summary cause procedure, however, creditors must now in all cases apply to the court for warrant of sale,[4] and the courts have recently developed the law by assuming powers to refuse warrant of sale on equitable goods, and exercised the powers where the likely proceeds of sale would not cover the expenses of advertisement and sale.[5]

1.13 The recent restrictions on creditors' powers, however, have not entirely met the more radical criticisms of the creditor-controlled system since inter alia they only apply once a charge and poinding has been carried out.[6] The gist of

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[1] New Day Furnishing Stores Ltd v. Curran 1974 S.L.T. (Sh.Ct.) 20; Practice Notes of the sheriffs principal. See Memorandum No.48, Part V, for a discussion of the cases and Practice Notes referred to in the footnotes to this paragraph.

[2] Idem: the restriction prevents a second poinding (of any goods not merely the same goods) on the same premises for the same debt unless poindable goods have been brought on to the premises since the first poinding.

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

[4] The procedure in poindings and warrant sales on all court decrees has since 1976 been regulated by the Debtors (Scotland) Act 1838, which formerly applied only to Court of Session and sheriff court ordinary action decrees.

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

[6] Indeed, insofar as restrictions on the duration of poindings and second applications for warrant of sale require creditors to ask debtors to pay instalments of larger amounts than the debtors can afford, the restrictions may well operate to the disadvantages of debtors in some cases.

these criticisms is that diligence has a harsh social impact on many, perhaps most, consumer debtors subjected to it; that most of those debtors are unable rather than unwilling to pay; and that therefore the creditor-controlled system results in the "blind" and oppressive use of diligence.

1.14 The harsh social impact of diligence can take several different forms: the loss of income needed for the support of the debtor and his family; the loss of a job through low performance induced by financial worries (though dismissal as a direct result of arrestment is rare); the loss of household goods at a fraction of their use value to the debtor or of their replacement value; the recourse to 'desperation borrowing' which worsens insolvency; the humiliation which accompanies the publication of indebtedness; the loss of morale, and the fear and even panic which can accompany the threat of enforcement; the effect of financial strain in causing marital breakdown and disrupting family life.[1]

1.15 Since diligence is the last stage in a process which is generally very protracted,[2] those consumer debtors who are ultimately subjected to diligence are generally unable rather than unwilling to pay the debt outright.[3] Sometimes the inability to pay is due to an over-extension of the debtor's budget for which the debtor himself may be responsible. But some debtors need credit for the necessaries of life, not merely for gas, electricity and rent but also for consumer durables and clothing, and, since they cannot expect a rise in real income, may pledge future income which they do not have. Sometimes the default stems from an unforeseen interruption of income through loss of employment, sickness, death of the family breadwinner or marital breakdown: when the debtor has no savings and lives on the margin of subsistence, the effect on his or her solvency can be severe.

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[1] See generally the Edinburgh University Debtors Survey for an account of the impact of diligence on debtors and their families.

[2] See Appendix B.

[3] See Edinburgh University Debtors Survey.

1.16 Since the debtors subjected to diligence can normally pay their debts only by instalments out of income, the particular steps in diligence, (the service of a charge, the execution of a poinding, the grant of warrant of sale and its intimation to the debtor, the advertisement of sale, the sale itself, and the service of an arrestment), or the threat of the next step, are used by creditors to spur the debtors to make informal arrangements for payment by instalments out of income. It has been asserted that the absence of control by the courts of diligence and of the related instalment settlements which diligence induces -

> "effectively grants licence to the strong creditor to exploit the position of a weak debtor if he wishes to do so. Under threat of further diligence, a debtor may agree to terms which are wholly outwith his capacity to meet and by doing so create further problems for himself and his family. Thus the law serves to enforce a rather primitive commercial morality and to legitimate the power of the creditor over the debtor and the actions taken by the creditor to recover his debts."[1]

On this view, creditors' control of diligence would only be defensible if debtors subjected to diligence were normally able but unwilling to pay their debts outright which is not true of most debtors subjected to poindings and arrestments.

1.17 Although the creditor controls the diligence, there is no procedure, short of sequestration under the Bankruptcy (Scotland) Act 1913, whereby he can compel the debtor to disclose his property, assets and income. Officers' visits in serving a charge are used in practice to elicit information on the debtor's means, and poindings are used to ascertain the extent of his poindable goods. Similar practices in England

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[1] See Adler and Wozniak, "More and Less Coercive Ways of Settling Debts" in Drucker and Drucker, Scottish Government Yearbook 1980 161 at p.168.

and Wales were characterised by the Payne Report as "a singularly speculative mode of enforcement"; thus, "the wrong mode of enforcement may be pursued first".[1] Further, "blind" diligence may be oppressive in its effects.

1.18 To the foregoing criticisms, a rider must be added. Although the creditor instructs diligence, and must pay diligence fees to the officer of court, those fees are recoverable by the creditor from the debtor. Poinding procedures are relatively expensive and may increase the debtor's liability, sometimes without corresponding financial benefit to the creditor.

1.19 The conclusion to which arguments on these lines lead is that further restraints should be placed on creditors' powers.[2] Debt should not be treated as a purely private matter. Just as in criminal procedure, inquiry into an offender's financial and social circumstances may be made before the court passes sentence, so (it is argued) there should be an enquiry into the debtor's circumstances by the court or by a new public enforcement agency before diligence is commenced.

(b) Officers of court as independent contractors

1.20 The counterpart of the creditor's power to instruct officers of court to execute diligence is that officers of court not only hold the public office of messenger-at-arms or sheriff officer but are also independent contractors who receive instructions to

[1] Report of the Departmental Committee on The Enforcement of Judgment Debts Cmnd. 3909 (1969), para. 296.

[2] See Adler and Wozniak, supra; McCreadie, 1976 SCOLAG Bulletin 73, especially at p.75.

execute diligence in much the same way as commercial agents receive instructions from their principals.[1]

1.21 From the standpoint of debtors, it has been argued that the status of officers of court as independent contractors instructed by creditors is inconsistent with their status of public enforcement officers who are, or ought to be, independent and impartial as between debtor and creditor. It has also been argued that the practice of officers of court undertaking debt collection, as the creditor's agent, even before the debts have been constituted by court decrees or before court actions have been commenced, further adversely affects their status as independent and impartial enforcement officers.

1.22 We refer at para. 1.79 below to other aspects of the organisation of officers of court which could be improved, including the arrangements for regulating standards of conduct, training qualifications, disciplinary procedures and the supervision and control of officers. Some of these proposals would provide directly or indirectly further safeguards for debtors.

(c) Specific criticisms of poindings and warrant sales and arrestments of earnings

1.23 In addition to these generalised criticisms of creditors' control and the nature of the office of officers of court, specific criticisms have been advanced from the standpoint of consumer debtors of the diligences of poinding and warrant sale and arrestment of earnings.

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[1] There are important differences, however, insofar as an officer of court has a duty to execute diligence when instructed and cannot pick and choose as between instructing creditors; his fees for executing diligence are prescribed in detail by rules of court; and he is subject to the disciplinary authority of the sheriff principal for fault in the performance of his official functions: see generally Memorandum No. 51.

1.24 Poindings and warrant sales: the criticisms of poindings and warrant sales are of two kinds. Some critics argue that the diligence suffers from intrinsic and ineradicable defects. Other criticisms relate to particular and remediable aspects of the diligence.

1.25 As indicated in Memorandum No. 48, the majority of debtors subjected to the diligence belong to the lowest income groups; many are unemployed or intermittently employed and 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 have no attachable property other than some household goods of small value. But the debt-paying value of household goods obtainable on poinding and warrant sale is generally low and, if all the steps in the diligence are carried through, may in many cases not even cover the expenses of the diligence.[1] Poindings therefore most often operate as a means of putting pressure on debtors to pay the debt out of income rather than as a way of satisfying the debt in whole or in part out of a sale of the poinded goods.[2]

1.26 Poindings and the threat of warrant sale are usually a most unpleasant way of eliciting payment of debts. Some of the unpleasantness is intrinsic to the use of the diligence in consumer debt cases,especially the invasion of privacy involved in forcible entry by officers into debtors' homes and the fact that the diligence is directed at the household goods of people on low incomes who have no other attachable property.

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[1] See C.R.U. Warrant Sales Report, para. 41.

[2] It is for this reason that there are so few warrant sales; see Table A at page 22 below.

(This unpleasantness is made worse by avoidable defects such as we describe in the next paragraph.) On these grounds, it has been argued that it would be consonant with the development of the law and of social policy to abolish poindings and warrant sales, just as imprisonment for debt was virtually abolished in Scotland as a creditor's diligence in 1880.[1] The arguments for abolition are sometimes fortified by assertions that execution against goods is a mode of enforcement peculiar to Scotland and not known to other civilised countries. We revert to the arguments for abolition at para.1.63 below.

1.27 On a less fundamental level, criticisms of the diligence include 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 for warrant sale in the debtor's dwelling house publicising his indebtedness cause undue humiliation and embarrassment; and

(d) that many of the forms and procedures used in the diligence are in need of modernisation; in particular,many forms served on debtors are not understood by them.

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[1] See Debtors (Scotland) Act 1880. The comparable reform was not effected in England and Wales until the Administration of Justice Act 1970 was passed.

The advertisements of warrant sale publicising indebtedness are especially resented by debtors, the more so since the advertisements are generally unsuccessful in encouraging potential purchasers to appear and bid at warrant sales. We revert to these criticisms at para. 1.68 below.

1.28 Arrestments of earnings: so far as we are aware, there have been no demands in Scotland for the abolition of arrestments of earnings in recent times. In contrast to English law, which prohibited attachment of wages from 1870 to 1970 (or, in the case of maintenance debts, to 1958),[1] Scots law has a long and unbroken tradition of reliance on arrestmentsof earnings which creditors use in preference to poindings and warrant sales where they know the name and address of the debtor's employer. An arrestment of earnings only attaches the earnings (or a proportion thereof) for the pay period in which the arrestment is served and does not attach earnings due in later pay periods.[2] The main criticisms from the standpoint of debtors are:-

(a) that unless a single arrestment of earnings induces an instalment settlement or the creditor writes off the debt, repeated arrestments are needed to clear most debts, and the debtor is liable for the expenses of these arrestments; and

(b) that in the case of ordinary debts, the exemption from arrestment of the debtor's earnings allowed for the subsistence of the debtor and his family (£4 plus half the balance of the weekly wage[3]) is too low, and leaves

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[1] Wages Attachment Abolition Act 1870; Administration of Justice Act 1970; Maintenance Orders Act 1958.

[2] See our Memorandum No. 49, para. 1.4.

[3] Wages Arrestment Limitation (Scotland) Act 1870, s.2.

> the debtor with insufficient means on which to subsist. In the case of arrestments for the recovery of aliment, rates and taxes, there is no statutory exemption.[1]

These criticisms lead to the conclusion that a continuous diligence against earnings should be introduced as explained at para. 1.67 below.

1.29 The other possible criticisms of arrestments of earnings are relatively minor and relate to such matters as changes to the mode of service of schedules of arrestment designed to reduce expense (viz whether postal service should be allowed in all cases and the requirement of witnesses to personal service abolished); and problems relating to the way in which the statutory limitation formula applies to pay periods other than a week.[2] These are generally as much criticisms from the standpoint of creditors and employers as debtors.[3]

(d) Diligences against multiple debtors

1.30 The plight of a debtor subjected to diligence by one creditor may be bad enough but may be considerably worsened if he is pressed on all sides by several creditors. We have seen that particular steps in diligence frequently operate as a catalyst for an instalment settlement. Where, however, the debtor has defaulted on debts due to several creditors, he may

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[1] Ibid., s.4.

[2] See Memorandum No. 49, paras. 2.35-2.39; 2.74; 2.78.

[3] Criticisms from the standpoint of employers include the facts that employers are often not given a sufficient period within which to administer an arrestment before the time of payment of the wage; that employer-arrestees are generally not entitled to deduct a handling charge for their work in operating an arrestment; and that some of the forms of schedules of arrestments served on employers are difficult to understand and in need of modernisation.

find it difficult to enter into payment arrangements with all his creditors. Frequently, for any of a variety of possible reasons, he may not respond to invitations by his creditors to make an instalment settlement. If he simply does nothing, then his total indebtedness may be increased considerably since his several creditors may initiate separate court actions, and instruct separate diligences, for the expenses of which the debtor will be liable. As we show more fully in our Memorandum No. 50, an insolvent multiple debtor cannot obtain relief from the diligences of his creditors under the present law except by applying for his own sequestration under the Bankruptcy (Scotland) Act 1913.[1] This is a drastic step and often inappropriate since most insolvent wage-earners have insufficient assets to make sequestration of benefit to creditors.

1.31 Accordingly there is a gap in the provision made by the law of Scotland for helping ordinary wage-earners in multiple debt situations to arrange for the orderly and regular payment of their debts in the interests of the debtors and indeed of the creditors. We revert to this at para. 1.73 below.

(2) Criticisms of diligence from the standpoint of creditors

1.32 There appears to be far less dissatisfaction with the present system of diligence on the part of creditors than on the part of debtors. The submissions made to our former Working Party on behalf of creditors were generally to the effect that the Scottish system provided an effective means of recovery of debts. (Further information may be elicited on this in response to our memoranda and in the CRU Creditors Survey which is currently being undertaken.) This is hardly surprising given the wide powers which creditors possess to control diligence and the fact that 'open' or 'lump sum' decrees rather than instalment decrees preponderate.[2] The submissions, however, preceded the recent restrictions on the duration of poindings

[1] See Memorandum No. 50, Part I.

[2] See Appendix B, para. 29. Instalment decrees account for 1 in 5 of summary cause decrees for principal sum and expenses.

and on repeated poindings and warrant sales, and the new practice of refusing warrant of sale in certain cases: these developments have made it more difficult for creditors to use the later stages of the diligence (the advertisement and the sale) as a means of inducing instalment settlements. Nevertheless the main principles of the system still seem to be acceptable from the creditors' standpoint.

1.33 The characteristics of flexibility and freedom of choice for creditors in the Scottish system contrast with the system in England and Wales where, according to the Payne Report,[1] a creditor -

> "... must select and use his modes of enforcement independently of other modes of enforcement. For each process he must make a separate application to court and pay a separate fee. He will pursue, for example, garnishee proceedings quite independently of execution against goods and indeed sometimes he will not be able to pursue two remedies at the same time. He cannot ask the Court for enforcement generally and then pursue the remedies concurrently or consecutively as the circumstances, when ascertained, may suggest. This segregation of the modes of enforcement renders enforcement generally unduly cumbersome, inefficient and expensive. The lack of flexibility and discretion which permeates the system is galling to creditors and plays into the hands of persistent debtors. It is also bewildering and oppressive to the other types of debtor, the inadequates and unfortunates, who are struggling to free themselves from the burden of debt."

It will be seen that the Scottish system, where the courts do allow enforcement generally, avoids these defects identified by the Payne Committee.

1.34 The criticisms which we have received were generally (a) that the courts or an enforcement agency should intervene to help creditors at the stage of enforcement; and (b) that improved provision is needed in multiple debt cases. We now consider these criticisms and thereafter the effectiveness of diligence.

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[1] Op.cit., para. 295.

(a) Intervention to assist creditors in enforcement?

1.35 It is a corollary of creditors' wide powers of enforcement that the courts do not intervene to help creditors to enforce their own decrees. On this aspect of the system, the Law Society of Scotland commented:

> "The successful litigant is often surprised to discover that his decree cannot be instantly turned into cash, or delivery, or whatever. It seems to him curious that all the procedures of the Court result, in the end of the day, only in a Court order, and that the responsibility for translating that document into effective action is his - that the Court having adjudicated on the matter of liability has no further responsibility, leaving it to him at his own expense and at his own discretion to take the initiative from there on. The Courts appoint Sheriff Officers, of course and invest them with powers. The Courts also provide procedures - arrestments, poindings etc - which have the force of law. But it is up to the litigant to decide for himself what steps to take, to give the necessary instructions and to pay for the services he orders - often in vain. Litigants, who have gone to court, as they supposed, 'to recover damages', 'to get their property back', or 'for maintenance', find it odd that the Court takes no part in, and has no responsibility for, the part of the procedure that most concerns them, namely the enforcement of their decrees. And one can understand that."

While agreeing that some creditors have the attitude described by the Law Society, we do not think that the present Scottish system generally gives insufficient help to creditors. Three points may be made. First, we doubt whether any enforcement system has been devised which can provide for instant execution or recovery. In all systems, the creditor must take some steps after decree, and even in the Northern Ireland Enforcement Office system (in which the Office itself prosecutes enforcement) a creditor must apply for enforcement and dilatory creditors can forfeit priority.[1] Second, the vast bulk of debt decrees are granted in favour of public utilities, retailers and other commercial organisations[2] who do not need the court's help in enforcement. We suspect

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[1] See Judgments (Enforcement) Act (Northern Ireland) 1969, s.18 and s.114B (inserted by the Judgments Enforcement and Debts Recovery (Northern Ireland) Order 1979).

[2] See Appendix B, paras. 21-22, 40 and 54.

that the majority of these creditors prefer the Scottish system of instructing fee-paid officers to the English county court bailiff system and the Northern Ireland Enforcement Office system. Third, creditors suing in respect of the supply of defective goods or services, or damages, or maintenance, can obtain legal aid if within the financial limits on disposable income and capital. The main areas where creditors are in need of help is in relation to the collection, and possibly the enforcement, of aliment and periodical allowance on divorce. Here the main problem possibly arises less from the system of enforcement than the continuing nature of the legal obligation and the social and economic factors discussed in the Finer Report.[1]

1.36 In our view, the main problem is not that the Scottish system gives creditors insufficient help but that, if anything, it confers on them too wide powers.

(b) Diligences against multiple debtors

1.37 Multiple debt cases can cause unfairness to creditors since it can lead to an unco-ordinated race of diligences in which the practical rule of priority among the competing creditors is "first come, first served". The considerate creditor, who wishes to allow the debtor time to pay, risks being 'shut out' by the prior diligences of competing creditors.

1.38 Scots law, however, already provides for the fair sharing among competing creditors of the fruits of diligence against multiple debtors both in sequestrations under the Bankruptcy (Scotland) Act 1913 and in statutory provisions for

[1] We revert to the problems of the collection and enforcement of aliment and periodical allowance in Part V.

equalisation of poindings and arrestments within a prescribed period of the debtor's notour bankruptcy.[1] The latter provisions take effect even in the absence of sequestration if the debtor is made notour bankrupt. The aim of both sets of provisions is to prevent a race of diligences against a multiple debtor and to secure fair treatment for his creditors.

1.39 The provisions on equalisation of diligences outside sequestration are rarely used in consumer debt cases for reasons which are problematic.[2] It may be therefore that, from the standpoint of creditors, new provision is needed to prevent a race of diligences and promote fair sharing of debts among the competing creditors of a multiple debtor. We revert to this at para.1.73 below.

(c) Effectiveness of diligence from creditors' standpoint

1.40 So far as we are aware, creditors have not advanced criticisms of a fundamental character that the Scottish system of debt recovery and diligence is ineffective in recovering debts.[3] Criticisms have been expressed by creditors of some aspects of the system such as the expense of diligence and indeed court actions (especially in relation to debts of small amount) and about technical aspects of the procedure

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[1] Bankruptcy (Scotland) Act 1913, s.10, which provides that arrestments and poindings used within 60 days before and four months after, notour bankruptcy all rank equally as if used on the same date. A creditor producing in legal proceedings a liquid document of debt within that period may also share in the proceeds of those arrestments or poindings. Notour bankruptcy is constituted inter alia by the expiry of the days of charge without payment.

[2] One possible reason is that it is not altogether clear whether equalisation takes place if a poinding is not followed by a warrant sale or an arrestment by a furthcoming. Warrant sales and furthcomings are very rare in consumer cases. Moreover, in most warrant sales the goods are adjudged and delivered to the poinding creditor in default of sale and it is not clear whether the provisions for equalisation operate in such cases.

[3] Criticisms to that effect have been made, almost as an afterthought, by persons criticising the system from the standpoint of debtors and concerned to argue that the social impact of diligence on debtors is not justified by the financial benefit enuring to creditors from diligence.

(such as the language of forms). We hope that more information will be made available by consultation and by the completion of the CRU Creditors Survey.

1.41 In assessing the effectiveness of diligence, regard must be had not only to cases which proceed to diligence but also to cases in which creditors are paid by the debtor at an earlier stage in the debt recovery process (viz. before court action is raised or at the time of the court action). We revert to the question of effectiveness at para. 1.44 below.

(3) The criticisms in perspective: relationship of diligence to credit and debt recovery

1.42 Because of the serious social impact of diligence on some debtors, it is perhaps understandable that the debate on reform should generate strong emotions and that simplistic solutions, such as the abolition of warrant sales, should be advocated to relieve evident hardship. Law reform proposals, however, if they are to be effective and are to avoid unintended consequences, cannot adopt such simplistic solutions but must have regard to the scale of the problem and to its wider perspectives. Account must be taken of the scale of diligence relative to the scale of default debt and of consumer credit as a whole, of the relationship between the different stages of the debt recovery process of which diligence is only the final stage, and of the impact which reform of the law relating to diligence may have on the continuing availability of consumer credit.

1.43 As regards the scale of the use of diligence, Appendix B shows that the numbers of debtors subjected to diligence are small relative to the number of default debtors and very small indeed relative to the total number of persons to whom credit is extended. The debt recovery process has a 'funnel' or

'filter' effect: since at any given stage, some debtors pay and some creditors write off the debt and abandon pursuit, fewer cases proceed to the next stage. The great majority of debtors pay in response to 'informal' demands for payment by the creditor or his agents and only a very small fraction of default cases result in court actions.[1] The raising of a court action itself and the granting of a court decree are often sufficient to secure payment: about 30% of all summary cause payment actions are dismissed, generally because payment has been made, and about 37% of decrees in such actions are not sent to officers of court for enforcement, again presumably because payment has been made.[2]

1.44 In the diligence of charge, poinding and warrant sale, though a charge was served in about 46,000 cases in 1978, fewer than 300 warrant sales were held in the same year (about the same per capita of population as in England and Wales).[3] Diligence under summary warrants has a similar 'filter' effect.[4] Although we do not possess precise information as to the numbers of cases in which the debt is paid at each stage of diligence and the number of cases in which the creditor abandons pursuit,[5]

[1] Preliminary results obtained from creditors interviewed in connection with the C.R.U. Creditors Survey suggest that, while varying proportions of debts owed to creditors reach the stage of a court action, the proportion is generally well under 10% in value and often less than 1%.

[2] See C.R.U. Court Survey, para. 3.11; C.R.U. Diligence Survey, para.5.4.

[3] See Table A at page 22 for statistics on the funnel effect of diligence.

[4] See Appendix B, para. 44.

[5] See C.R.U. Diligence Survey, para. 2.7, footnote (2) (which states that officers of court were unable to supply this information, presumably because payment is so often made direct to the creditors or their agents). The Edinburgh University Debtors Survey gives information, based on interviews with 100 debtors, on the extent to which instalment settlements are induced by diligence. However, all the debtors interviewed had already been subjected to diligence and accordingly the sample does not throw light on the debt cases in which successful payment arrangements were made at an earlier stage, and did not proceed to diligence.

TABLE A

DECREES GRANTED IN ACTIONS AND DILIGENCE (POINDINGS AND WARRANT SALES AND ARRESTMENTS) EXECUTED IN 1978

	Total	Court of Session	Sh.Ct. Ordinary Action	Sh.Ct. Summary Cause
DECREES IN ACTIONS[1]				
Decrees in favour of pursuer				
Debt decrees	?	?[2]	9,582	72,885
Divorce, other matrimonial decrees and alimentary decrees	9,836	8,794[3]	1,042[4]	-[5]
Other decrees	?	?[2]	1,764	32,490[6]
Total	126,171	9,428	12,388	104,375
Whereof in absence		(698	8,410	100,715
in foro		8,730	2,978	3,660)
Decrees in favour of defender and otherwise disposed of				
Absolvitor, dismissal, sisted, 'fallen asleep', remitted[7]	33,355	2,493	6,186	24,676
Total actions disposed of by final judgment	159,546	11,921	18,574	129,051
DILIGENCE[8]				
Decrees passed to officers for enforcement by poinding or arrestment	53,000			
Charge, poinding and warrant sale				
Charges	46,000	700	6,200	39,100
Poindings	20,000	200	2,500	17,300
Warrants of sale	6,200			
Advertisements of sale	3,000			
Sales executed	300			
Arrestments of earnings[9]				
First arrestments	6,000	700	1,300	4,000
Single repeat arrestments[10]	1,700			
Multiple repeat arrestments[10]	1,000			
Total arrestments of earnings	8,700			

SOURCES: Civil Judicial Statistics for Scotland for 1978 (1980, Cmnd. 7762), Tables 3, 4(a) and (b), 6, 9, 10A.
CRU Diligence Survey.

NOTES

(1) The statistics include only actions in the narrow sense; they do not include other proceedings disposed of by final judgment in 1978; viz. Court of Session petitions (2,676) and sheriff court applications relating to miscellaneous and administrative business (32,416) among which are 4,934 summary warrants for recovery of rates and taxes. C J S Tables 6 and 12A. In many of these cases, the final judgment may have granted warrant for diligence to enforce an award of the expenses of the proceedings or some other order for payment.

(2) This information is not available from the CJS.

(3) These include 8,448 divorce decrees many of which contained awards of periodical allowance (6,176 were decrees to wives) or of aliment (in 4,448 divorce actions there were children of the marriage under 16 years of age) but the precise statistics are not available: C J S Tables 4(a) and 4(b).

(4) These include decrees in actions of separation and aliment, adherence and aliment, other actions for aliment, others actions relating to marriage, and affiliation and aliment: C J S, Table 10A.

(5) Summary cause decrees of interim aliment are included in the miscellaneous group referred to in note (6).

(6) These decrees comprise recovery of possession of heritable property (27,994), damages (499), sequestration for rent (51), delivery of goods (1,406) and other decrees (1,540) (viz. furthcomings, multiple poindings, interim aliment and specific implement other than delivery): C J S, Table 10A.

(7) The great majority of these are decrees of absolvitor or dismissal in the defender's favour with or without an award of expenses enforceable by diligence.

(8) All the statistics on diligence are estimates derived from the CRU Diligence Survey except for the statistics on warrants of sale (6,208) and sales executed (289): CJS Tables 10A and 11A.

(9) The CRU Diligence Survey, para. 3.6 estimates that in 1978 there were 900 arrestments of properties and funds other than earnings (excluding arrestments on the dependence).

(10) A 'single repeat' arrestment is an arrestment of the debtor's wage or salary a second time by the same creditor: a 'multiple repeat' arrestment is an arrestment against the debtor's wage or salary on a third or subsequent occasion by the same creditor.

we suggest that creditors or their agents would presumably not resort to diligence if it were not generally effective in inducing payment.

1.45 There is a close and direct relationship between the grant of credit in consumer cases and the procedures for debt recovery. It has been observed that:

> "the law relating to creditors' remedies is a primary factor determining the perimeter of consumer credit. Any strengthening of creditors' remedies that increases recovery rates creates an incentive to expand the granting of credit into more marginal categories of risk Conversely, any retraction of creditors' remedies will tend to increase bad debt ratios and thereby create an incentive to retract the perimeter of consumer credit in the marginal categories of risk."[1]

Furthermore, as Appendix B shows, the different stages of the debt recovery "process" (informal pre-litigation collection, court action and diligence) are also inter-dependent. The earlier stages would be ineffective if the later stages did not exist. Conversely, many more debt cases would proceed to the later stages if the earlier stages were less successful in eliciting payment. Thus, the abolition of warrant sales would render ineffective the earlier stages of the diligence although these stages elicit payment in a very much larger number of cases than the cases proceeding to warrant sale. Moreover, it seems reasonable to infer that diligence is a credible sanction which underlies the informal demands for payment by creditors and their agents at the pre-litigation stage, and the claims for payment at the court stage, of the debt recovery process. As already mentioned, these stages elicit payment in a much greater number of cases than proceed to diligence.

1.46 Furthermore, it seems likely that the ultimate background threat of enforcement provides a main reason why the credit-

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[1] Ison, Credit Marketing and Consumer Protection (1979) p.270.

worthy pay their debts and honour their obligations. People take it for granted that if they do not pay a debt, the law will enforce it against them.

1.47 Accordingly, in addition to the two obvious roles of diligence as a method of obtaining payment out of attached funds or property and as a spur to informal arrangements for payment by debtors against whom a debt decree has been pronounced, diligence fulfils a third role which is perhaps far more important in actual practice, albeit more difficult to describe with precision. Lying behind the successful operation of every aspect of private law (including, but not only, consumer credit) are the rules of the law of diligence which enable sanctions to be imposed equivalent in many respects to the custodial and pecuniary penalties of the criminal law.[1] Arguably, it is because the system of diligence operates so effectively as a system of credible sanctions that it comparatively rarely becomes necessary to have recourse to it, even in the field of consumer credit transactions which give rise to the bulk of diligence. In our view, it would be unwise to take steps which, by materially reducing the credibility of those sanctions, would adversely affect the whole basis of credit and ultimately (it is not fanciful to suggest) our system of private law.

1.48 The research into debtors' circumstances tends to show that most debtors subjected to diligence are unable rather than unwilling to pay. It may therefore be argued that diligence is not only unnecessary, but, in view of its social consequences, positively harmful. This argument is unsound since it takes insufficient account of the role of diligence

[1] Diligence is a sanction in the sense that it is a threat inducing payment. It is not, however, a sanction in the sense of a punishment for non-payment.

as a system of credible sanctions underlying the payment of debts, by those who are able to pay, at all stages of the debt recovery process.

1.49 On the other hand, from the research into debtors' circumstances and other evidence, it clearly emerges that there is substance in the criticism that the existing system of diligence can and does inflict undue hardship on a number of default debtors and their families, and though the numbers of cases are small relative to the total number of default debtors and very small indeed relative to the total number of persons to whom credit is extended, they are significant enough to require legislative action.

(4) Objectives of diligence

1.50 These considerations lead us to suggest that the system of diligence should have the following two main objectives:-

(a) It should seek to provide effective machinery, in which the public have confidence and for which they have respect, whereby creditors can obtain payment of the debts and the implementation of other legal obligations owing to them.

(b) Within the constraints imposed by the need to maintain an effective system of enforcement, it should have regard to the desirability of protecting debtors and their dependants from undue hardship.

In addition, provision should be made to protect debtors from undue harassment, and from simulation of legal process, by their creditors and to secure, so far as practicable, the rehabilitation of debtors and the provision of budgeting or 'money management' advice and debt counselling in appropriate cases. In our view budgeting advice and debt counselling can only be to a limited extent part of the diligence procedures operated by officers of court, which are necessarily coercive.[1]

[1] In Part II, we have identified for consideration by the competent authorities possible provisions on harassment, simulation of legal process and other matters which might be made to supplement our proposals for the reform of the law of diligence.

1.51 The two main objectives of diligence have long been accepted in Scotland though the law has not accorded them equal emphasis. The second objective has been recognised, for example, in the old common law principle exempting from diligence against personal earnings sufficient money for the subsistence of the debtor and his dependants[1] and in several statutes eg providing limitations on the arrestment of wages;[2] exemption from poinding of certain 'necessary' household goods;[3] the abolition of civil imprisonment as a general creditor's diligence;[4] judicial restraints on civil imprisonment in those few cases where it remains competent;[5] and exemptions from arrestment of social security payments.[6]

1.52 The first objective however is necessarily paramount. The enforcement of default debts is essential to the commercial and consumer credit systems and indeed to the rule of law. If people cannot enforce their legal rights by legal process, they will have resort to extra-legal methods which may be difficult to regulate and control.

1.53 The premise from which we begin therefore is that citizens should pay legally binding debts. We recognise that arguments have been advanced that wide classes of consumer debts should not be legally binding at all,[7] or that private law obligations of maintenance should not be enforceable but

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[1] This principle (known as the beneficium competentiae) is now in practice only applied in connection with bankruptcy sequestrations, trust deeds for creditors and 'alimentary' liferents, annuities and pensions.

[2] Wages Arrestment Limitation (Scotland) Act 1870 (as amended).

[3] Law Reform (Diligence) (Scotland) Act 1973.

[4] Debtors (Scotland) Act 1880.

[5] Civil Imprisonment (Scotland) Act 1882; Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.

[6] See para.3.3, head (3) below.

[7] E.g. Ison, op.cit. pp.284-292.

be replaced entirely by State income maintenance legislation.[1] These questions generally fall outside our terms of reference for to admit them would require us to review huge tracts of substantive law (including rules applicable throughout Great Britain eg on consumer credit and consumer protection) under the pretext of examining diligence.[2]

(5) Guidelines for the reform of diligence

1.54 To sum up, in framing proposals for reform to achieve the foregoing objectives, regard should be had to the following guidelines, namely:-

(a) that, at the present stage of the development of the law, the primary aim of reform should be to make the operation of diligence more sensitive to the financial circumstances, and hence the social circumstances, of debtors while retaining the effectiveness of the system of enforcement;

(b) that proposals to change any stage in diligence procedures, or indeed the pre-litigation practices or court procedures, must be assessed in the light of their implications for the extension of credit and for all other stages in the debt recovery process, and in the light also of the importance of diligence to the general effectiveness of the rule of law;

(c) that proposals to change the modes of diligence (especially arrestments and poindings) must take account of the implications of the proposals for the organisation of officers of court and the

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[1] Such arguments were advanced to the Finer Committee on One-Parent Families, and to ourselves in connection with our Memorandum No. 22 on Aliment and Financial Provision (1976).

[2] We have, however, considered and rejected a proposal that the irresponsible granting of credit should affect a creditor's right to enforce his debt by diligence: see paras. 2.3-2.11.

administration of the system of diligence and citation (for example, the viability of sheriff officers' firms), and vice versa;

(d) that new or revised forms of diligence should be seen by the creditor and his agents as effective enforcement procedures; for example, any revised form of arrestment of earnings should not be such as to encourage creditors to abandon that form of diligence and to resort instead to poindings of household goods; and

(e) that proposals to change the legal, procedural or organisational aspects of diligence should have regard to the possible impact on, and the possible contribution of, the groups and interests subsidiarily involved in diligence and debt enforcement (eg employers handling arrestments of earnings; the sheriffs and sheriff clerks involved in supervising diligence; debt collection agencies and solicitors acting for creditors; and statutory and voluntary organisations and solicitors providing assistance for debtors).

C. The options for reform

1.55 We have said that a primary objective of reform must be to make the operation of diligence more sensitive to the financial circumstances, and therefore the social circumstances, of debtors.

1.56 Given the well-nigh intractable difficulties of providing a system of debt enforcement which is completely satisfactory from the standpoint of both creditors and debtors, one approach might be to give up the struggle and make wide categories of consumer debt altogether unenforceable; thus,

it has been suggested that "debt as a cause of action should be abolished for the price of goods sold at retail".[1] As already mentioned, however, this solution falls outwith our terms of reference because it relates to substantive law rather than diligence. Moreover, the proposal rests on assumptions which prima facie are unsafe, for example, that reservation of title and repossession of goods, or adverse credit reporting, by an unpaid creditor are adequate substitutes for enforcement. Furthermore, the proposal might indirectly restrict the granting of credit to consumers generally most of whom, according to the Crowther Report, use it wisely and benefit from it considerably. It would not be appropriate for us to advance proposals which would almost certainly infringe the guidelines for economic and social policy towards consumer credit suggested by the Crowther Report.[2]

1.57 Since this radical solution is not a real option, we think that the choice lies between two main approaches to reform, namely, either:-

(a) that the existing system of enforcing debts by court action and diligence should be retained but that a series of reforms should be made to the legal, procedural and organisational aspects of diligence, designed mainly to make its operation more sensitive to debtors' circumstances, and to bring the law and practice of diligence up-to-date; or

(b) that a completely new system of enforcement should be introduced whereby, apart from the rights of a creditor to apply for enforcement and to abandon

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[1] Ison, op.cit., p.288.

[2] Op.cit., Chapters 3.8 and 3.9: see especially para. 3.9.2: "Since the vast majority of consumers use credit wisely and derive considerable benefit from it, the right policy is not to restrict their freedom of access by administrative and legal measures but to help the minority who innocently get into trouble to manage their financial affairs more successfully - without, however, also making conditions easier for the fraudulent borrower. The basic principle of social policy must, therefore, be to reduce the number of defaulting debtors."

his application, the power of controlling the use of diligence to enforce debts would be taken away from the creditor and vested in a 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 of whether, when, for how long and by what mode, diligence should be executed.

(1) Preferred option: reforms of existing system (Parts II to IV of this Memorandum and Memoranda Nos. 48 to 51)

1.58 We provisionally favour the first of these options, and in later Parts of this Memorandum and in Memoranda Nos. 48 to 51 issued with this Memorandum, we advance provisional proposals, for retention and reform of the existing system, in sufficient detail to enable the feasibility of the proposals to be assessed. In paras. 1.59 to 1.81 below, we give a synopsis of these reforms, referring where necessary to later Parts of this Memorandum and to subsequent Memoranda. This synopsis will, we hope, enable the reader to compare our chosen solution with the more radical solution of a Court Enforcement Office which we discuss at paras. 1.82 to 1.86 below.

(a) Extending credit, debt collection, debt counselling and debt actions (Part II)

1.59 In Part II of this Memorandum, we consider but reject proposals that creditors' rights to enforce their debts by diligence should be restricted because of their alleged fault in extending credit to debtors;[1] we conclude that the courts' jurisdiction to entertain actions for the recovery of admitted debts should be retained and not transferred to a special enforcement agency;[2] and we bring to the attention

[1] Part II, Section A.

[2] Part II, Section B.

of the competent authorities possible administrative and legal provisions to improve debt-counselling services, to curb unreasonable harassment of debtors, to curb also demands for collection charges which are not legally enforceable, and possible measures which might prevent some debt cases from reaching the stage of diligence.[1]

(b) Reform of diligence procedures; new remedies for debtors precluding diligence (Memoranda Nos 47 to 50)

1.60 In Memoranda Nos. 47 to 50, we put forward for consideration a wide range of proposals for the reform of specific diligence procedures and for conferring on the courts powers to prevent creditors from using diligence in inappropriate cases.

(i) Instalment decrees sisting diligence and declarators of unenforceability (Memorandum No. 48)

1.61 In response to the arguments for restraints on creditors' powers outlined at paras. 1.10 to 1.19 above, we seek views in Memorandum No. 48 on the introduction of two new remedies for debtors.[2] Already a debtor can obtain an instalment decree in a summary cause action for payment. We suggest that, in addition, he should be entitled to apply for an order converting an 'open' or 'lump sum' decree into an instalment decree and, if diligence has commenced, sisting (ie delaying) the diligence unless and until the debtor defaults under the instalment decree by allowing a prescribed number of instalments to remain in arrears. This procedure would be of value to unemployed and other debtors unable to pay their debts in full. In connection with this procedure, the debtor would require to make a full disclosure of his financial circumstances, but in contrast to the alternative solution of a mandatory means enquiry,[3] the initiative would rest with him.

[1] Part II, Section C, and summary at para. 2.38.

[2] See Part I of that Memorandum paras. 1.20-1.26: we consider in that Part but reject the introduction of mandatory means enquiries before the diligence is commenced and the exemption from poinding of all goods in a debtor's dwelling.

[3] See Memorandum No. 48, paras. 1.13 to 1.17.

1.62 In Memorandum No. 48, we also seek views on whether the court should be empowered in certain circumstances to declare a debt to be unenforceable in whole or in part.[1] We put forward this tentative proposal with some hesitation, since it may well be thought to tilt the balance of fairness against creditors.

(ii) Reform of poindings and warrant sales (Memorandum No. 48)

1.63 We referred at paras. 1.25 and 1.26 above to arguments that the diligence of poinding and warrant sale should be abolished. We do not accept these arguments for the following reasons. First, the demands for abolition appear to be based on criticisms of the impact on individual debtors and their families of poindings and warrant sales of household goods, especially those belonging to consumer debtors but perhaps also household goods of commercial debtors. While these are the common cases in which poindings are used, it seems necessary to emphasise that there are three other types of case where the use of poindings is unexceptionable and non-controversial, namely - (i) their use against limited companies, partnerships and unincorporated associations; (ii) their use against articles and goods used by individuals for the purpose of a profession, trade or business, although the exemptions of 'tools of trade' and 'plough goods' may require some modification;[2] and (iii) their use against goods other than clothing and household goods (eg cars and other vehicles). In almost all cases in these categories, the "debt-paying value" of the goods obtainable on poinding and warrant sale is reasonably high and subject possibly to the exceptions noted, we think that most reasonable people would regard the use of poindings in these categories as altogether justifiable.

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[1] See Memorandum No. 48, paras. 1.20-1.26.

[2] See Memorandum No. 48, paras. 4.31-4.34.

1.64 Second, it would make for injustice if all articles of moveable property in the possession of debtors were made "creditor-proof" from diligence and bankruptcy proceedings.[1] There would be a risk that people would purchase goods on credit without any intention of paying for them and that experienced debtors would convert their money into moveable goods.

1.65 Third, with the abolition of imprisonment for debt, poindings and warrant sales have become the only diligence which can be used against almost all debtors, and in many cases there is no alternative method of putting pressure on debtors to pay and can be none unless imprisonment is re-introduced or the attachment of social security income is permitted. We doubt whether either of the two latter solutions would be acceptable to public opinion.

1.66 Finally, we would emphasise that enforcement against goods, including household goods, is not peculiar to Scotland. For example, on a *per capita* population basis, the process of execution against goods is used in England and Wales with about the same frequency or slightly more frequently than in Scotland: in the two jurisdictions, the numbers of judicial or warrant sales are roughly similar *per capita* of population,[2] and the procedures are most often used to put pressure on debtors to pay debts by informal arrangements.[3] While several countries have recently revised their laws on exemptions of goods from enforcement,[4] in no country of which we are aware has enforcement against goods been abolished.

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[1] Under the Bankruptcy (Scotland) Act 1913, s.97, a bankrupt's moveable estate does not vest in the trustee in his sequestration if it is not attachable for debt.

[2] In 1978, in England and Wales, 1,070,533 county court warrants for execution against goods were issued resulting in 2,180 sales. In Scotland about 46,000 charges were served (and 20,000 poindings executed) resulting in under 300 sales.

[3] See as to England and Wales, Payne Report, *op.cit.*; paras. 635 and 649, and statistics in footnote 2.

[4] See Memorandum No. 48, Appendix B.

1.67 As already indicated,[1] it would not be practicable to retain poindings and abolish warrant sales since a poinding without the ultimate stage of warrant sale would be altogether ineffective.

1.68 We conclude therefore that the diligence of poinding and warrant sale should be retained but, in order to reform the remediable defects in the diligence summarised at para.1.27 above, and to effect other reforms, we set out in Memorandum No. 48 a large number of safeguards for debtors, including the following[2]:-

(1) the sheriff's power to refuse,on equitable grounds, the creditor's application for warrant of sale would be placed on an unchallengeable statutory basis by a provision enabling him to refuse warrant of sale where further proceedings in the diligence would be harsh and unconscionable;

(2) a longer period between the poinding and the application for warrant of sale and more flexible time limits would be introduced to allow arrangements for payment by instalments of smaller and more realistic amounts to have effect;

(3) the exemptions from poindings would be increased to cover inter alia all 'necessary' household goods;

(4) normally the warrant sale would take place anonymously 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 exposed for sale would be seen to fetch a fair market price, whatever that might be;

[1] See para. 1.45 above.

[2] See Memorandum No. 48, para. 1.19 for references to the discussion of these matters in that Memorandum.

(5) 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;

(6) the court's control over the regularity of the proceedings would be retained and strengthened;[1] and

(7) provision would be made modernising forms and procedures and rendering documents served on debtors more intelligible.

In addition, a range of technical reforms would be made to bring the law on the diligence up-to-date.

(iii) Reform of arrestments of earnings (Memorandum No. 49)

1.69 In response to the criticisms of arrestments of earnings referred to in para. 1.28 above, we suggest in Memorandum No. 49 that the present system of arrestments of earnings should be replaced by a system of continuous diligence against earnings designed to avoid or minimise the need for repeated arrestments and to enable more realistic exemptions from diligence against earnings to be introduced as a corollary to extending the duration of the diligence.

1.70 In Memorandum No.49, we seek views on what form a continuous diligence against earnings should take. We suggest there that either or both of two distinct models, which we have called "extended arrestments" and "earnings transfer orders" might be appropriate. An extended arrestment would continuously attach future earnings but only for a limited period fixed by law (of say six or seven months) whereas earnings transfer orders would continuously attach future instalments of earnings, not for a limited period fixed by law, but until the debt was paid. Other differences[2] would be as follows:

(1) In an extended arrestment, warrant authorising use of the diligence would be contained in the extract decree constituting the debt whereas,

[1] Viz. by requiring reports of proceedings to be lodged in all cases following the grant of warrant sale and not merely, as at present, when the goods are exposed for sale. In Memorandum No. 51, we suggest provisions for the inspection of the work of officers of court.

[2] See Memorandum No. 49, para. 1.27, for a fuller comparison.

in the case of an earnings transfer order, the warrant for diligence would be obtainable only on a separate application for the order following the issue of the extract decree.

(2) In an extended arrestment the level of deductions from earnings would necessarily be determined by fixed legal rules applied directly by employers, whereas in the case of an earnings transfer order, the level could be determined by the court in its discretion when making the order and then intimated to the employer.

(3) In extended arrestments, there would be no prior inquiry into the debtor's means (resources and liabilities) whereas in an earnings transfer order the exercise of the court's discretion in fixing deduction levels must be based on a means test.

(4) In an earnings transfer order, the employer would be required by the order to deduct and pay the sums to the creditor whereas an extended arrestment, would have effect as a series of consecutive arrestments 'freezing' the attached sums in the employer's hands on each pay day while the arrestment subsisted.[1]

1.71 We invite views, in Memorandum No.49, on whether either or both of these forms of diligence would be appropriate and if both were to be introduced, what should be the scope of each.[2] Our provisional conclusion is that extended arrestments should be used for enforcing ordinary civil debts but that earnings transfer orders might be an appropriate method of resolving a competition between two or more extended arrestments, and might be used by trustees in sequestrations or maintenance creditors.[3]

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[1] The effect of an extended arrestment would therefore be that the employer would only pay the attached sums to the creditor if he (the employer) had obtained a mandate from the debtor, or if the creditor obtained a decree of furthcoming. Furthcomings, however would continue to be very rare.

[2] See Memorandum No. 49, paras. 1.28-1.36.

[3] Ibid., para. 1.37.

1.72 In Memorandum No. 49, we also advance proposals to clarify the law in order to prevent inappropriate variations in practice which research has identified (for example, variations in the basis of calculating the exemption of earnings from diligence)[1] and we suggest incidental reforms (including the wider use of the postal service in effecting diligence against earnings and the abolition of the requirement of witnesses to personal service on employers).[2] To encourage the use of diligence against earnings rather than poindings, we suggest the introduction of a procedure whereby a creditor could obtain information as to the debtor's employer.[3] Certain provisions would also be made for the benefit of employers.[4]

(iv) Introduction of debt arrangement schemes (Memorandum No. 50)

1.73 At paras. 1.30-32 and paras. 1.37-39 above, we discussed criticisms, from the standpoints of debtors and creditors respectively, of the lack of adequate provisions for helping a multiple debtor to make payment of debts to his several creditors and for securing fair sharing of the fruits of diligence among the competing creditors of such a debtor. In response to these criticisms, we put forward in Memorandum No. 50 detailed proposals for the introduction in Scots law of a new procedure in terms of which an insolvent wage-earner, with multiple debts, could apply for a court order confirming a scheme (called a "debt arrangement scheme") whereby he would enter into officially supervised and legally regulated arrangements for the orderly and regular payment of his debts out of future earnings or other income.

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[1] Ibid., para. 2.74 (whether statutory limitation formula reckoned on gross or net wages) and para. 2.77 (how formula applies to pay periods other than a week).

[2] Ibid., paras. 2.35-2.39.

[3] Ibid., paras. 2.29-2.34.

[4] Employers would be given a week in which to make arrangements for operating an extended arrestment before it came into force (para. 2.47); the form of schedule of extended arrestment served on them would be prescribed by rules of court to avoid the difficulties some employers have at present in understanding the forms (paras. 2.48-2.49); and employers would be specifically entitled to deduct a prescribed charge for operating diligence against earnings on each pay day (paras. 2.110-2.111).

1.74 As mentioned in Memorandum No. 50,[1] the main features of debt arrangement schemes would be as follows:-

(1) A debt arrangement scheme, (which would come into operation only after it had been confirmed by the sheriff), would allow the debtor an extension of time to pay his debts in reasonable instalments over a period of (say) three years.

(2) Under such a scheme, an administrator appointed by the sheriff would collect the payments due by the debtor[2] and disburse them to creditors. He would also have important functions in preparing a scheme and keeping it under review once it is in operation.

(3) Creditors would be prevented from enforcing their debts by either diligence or sequestration while the debt arrangement scheme is in operation, and diligence would be sisted pending disposal of the application.[3]

(4) The scheme would provide either for payment in full of the debts included in the scheme or, in appropriate cases, for a composition of those debts. The debtor would be entitled to a discharge of debts if, in accordance with the debt arrangement scheme, he pays the whole amount of them or, as the case may be, a composition.

The main difference between a debt arrangement scheme and sequestration under the Bankruptcy (Scotland) Act 1913 is that a scheme would operate as a sequestration only of the debtor's income, and the debtor would not be divested of his assets.

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[1] Paras. 1.5-1.6.

[2] In this connection, the administrator would be entitled to intercept the debtor's earnings by obtaining an earnings transfer order such as we propose in Memorandum No. 49.

[3] An application for a scheme would be refused if a majority in number and value of the creditors whose claims are admitted object, or if the sheriff, in his discretion, upholds an objection by such a creditor.

(v) Other reforms relating to diligence procedures (Part III of this Memorandum)

1.75 In addition to these proposals discussed in detail in Memoranda Nos. 48 to 50, we consider in Part III of this Memorandum a number of possible reforms of miscellaneous matters which might supplement the reform of diligence procedures and the new remedies for debtors.

1.76 Exemption rights:[1] we briefly review debtors' exemption rights and suggest that, apart from changes in the exemptions from poindings and from diligence against earnings already mentioned, further major changes in the law on exemptions would not be appropriate.

1.77 Expenses and the cost of diligence:[2] we suggest that a separate court action should not be needed to entitle a creditor to recover the expenses of diligence, and that an extract decree should authorise recovery of the expenses of diligence to follow thereon. We examine two important problems affecting the cost of diligence, namely the relatively high cost of poindings and warrant sales in the case of debts of small amounts and the problem that mileage charges inflate the expense of diligence in rural areas: we seek views on possible solutions to those problems.

1.78 Diligence-related instalment settlements:[3] we consider whether it would be desirable and practicable to make new provision to deal with the practice, or alleged practice, whereby creditors instruct diligence against debtors notwithstanding that the debtors are complying with informal arrangements for payment by instalments.

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[1] See Part III, Section A.

[2] See Part III, Section B.

[3] See Part III, Section C.

(c) Reform of organisation of officers of court (Part IV of this Memorandum and Memorandum No. 51)

1.79 At para. 1.21 above we referred to criticisms that the status of officers of court as independent contractors adversely affects their independence and impartiality. If a Court Enforcement Office were established, this question would not arise since the officers of court would be full-time, salaried officials rather than independent contractors. An alternative solution would be to replace the existing system of independent contractor officers of court by a system of salaried officers of court employed within the Scottish Court Service. This is considered at Part IV below where we conclude that little is to be gained by such a solution and that the real choice lies between the improved regulation of the present system of independent contractor officers on the one hand and the establishment of a Court Enforcement Office on the other.

1.80 The improved regulation of the present system is discussed in Memorandum No. 51 on the Administration of Diligence, which includes proposals on the following lines:-

(a) Each court, or group of courts, should be responsible for the appointment, discipline and control of the officers who execute its decrees: thus, the sheriffs principal would continue to exercise these functions in relation to sheriff officers and the corresponding functions relating to messengers-at-arms would be transferred from the Lyon King of Arms to the Court of Session.[1]

(b) The Court of Session, acting on the advice of a new advisory body, would have powers to make rules regulating a wide range of matters relating to the administration of sheriff officers as well as messengers-at-arms.[2]

[1] See Memorandum No. 51, paras. 2.2-2.10; 4.6-4.9.

[2] Ibid., paras. 2.11-2.17.

(c) Sheriff court decrees would generally be executed only by sheriff officers and Court of Session decrees only by messengers-at-arms.[1]

(d) To establish national standards of training in place of the present diversity of standards, new rules would be enacted regulating the training and qualifications of sheriff officers.[2]

(e) Sheriffs principal would have, in addition to their existing disciplinary powers, new powers to initiate in appropriate cases formal procedures for the discipline of sheriff officers.[3]

(f) The reformed system would not leave sheriffs principal merely to react to complaints from debtors or other members of the public; new arrangements for the inspection or supervision of sheriff officers as well as improved arrangements for the audit of fees would be made.[4]

(g) Similar powers would be conferred on the Court of Session in relation to messengers-at-arms; messengers-at-arms would be recruited from the ranks of sheriff officers.[5]

(h) The rule precluding an officer from enforcing a debt due to himself would be retained and extended to enforcement on behalf of the officer's spouse or business associates.[6]

1.81 As regards the collection of debts for remuneration, we suggest that a distinction should be drawn between the

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[1] Ibid., paras. 2.21-2.26.
[2] Ibid., paras. 3.2-3.6.
[3] Ibid., paras. 3.19-3.35.
[4] Ibid., paras. 3.36-3.41.
[5] Ibid., Part IV.
[6] Ibid., paras. 5.10-5.20.

collection of debts before the debts have been constituted by court decrees, and the collection of debts after they have been so constituted. We suggest that officers should be specifically prohibited from purporting to act as such in collecting debts before decree.[1] We seek views on whether the prohibition should extend further to cases where the officer acts as a collection agent for a commission and does not purport to act in his official capacity, as where he acts through a debt collection agency under his control.[2] We further suggest that the debt collection by officers after the debts have been constituted by decree should be an official function of the officers guaranteed by their bonds of caution.[3]

(3) Alternative option: Court Enforcement Office: a new approach to enforcement?

1.82 In our view, the foregoing reforms would go as far as is necessary at present towards modernising the system of diligence and making it more sensitive to the financial circumstances of debtors while maintaining its effectiveness in enforcing the payment of debts. In response to representations, however, and following the most recent report on enforcement in England and Wales (the Payne Report)[4] and the establishment of the Enforcement of Judgments Office in Northern Ireland,[5] we have considered whether a more appropriate approach to the reform of the system of diligence would be to take away from creditors their powers to control the use of diligence and to confer those powers on a public enforcement agency (which we have called a "Court Enforcement Office"[6]). In Appendix C, we set out a possible scheme for the introduction of a Court Enforcement Office system in Scotland and in paras. 1.83 to 1.86 we consider the main features and possible advantages and disadvantages of such a system

[1] Ibid., paras. 5.25-5.27.
[2] Ibid., paras. 5.30-5.35.
[3] Ibid., paras. 5.36-5.43.
[4] Op.cit.
[5] See the Judgments (Enforcement) Act (Northern Ireland) 1969 as amended by inter alia the Judicature (Northern Ireland) Act 1978 and the Judgments Enforcement and Debts Recovery (Northern Ireland) Order 1979 (S.I. 1979/296).
[6] This name is a slight misnomer since as we note below, the agency would require to have the status of a court to perform certain of its functions, but the word "office" is used in Northern Ireland and the Payne Committee proposed the title "Enforcement Office".

1.83 Main features of Court Enforcement Office system: the main features of this alternative system and the principles on which it might be based may be summarised as follows:-

(a) Apart from the rights of a creditor to apply for enforcement and to abandon his application, the power to control diligence would be taken away from the creditor and vested in the Enforcement Office which would itself make the relevant decisions of whether, when, for how long, and by what mode, diligence should be executed. An enquiry into the debtor's means would be made before these decisions were taken and, in the case of larger debts, the creditor would be entitled for a reduced fee[1] to obtain a preliminary report on means before lodging (and paying for) his application for enforcement.

(b) The Enforcement Office would have universal and exclusive powers and jurisdiction to enforce by diligence court decrees for debt. Warrants for inhibition and arrestment on the dependence would continue to be granted by the courts who would also retain some powers in connection with diligence on non-money decrees, eg powers to grant warrants of ejection or to make orders enforcing decrees of specific implement.[2]

(c) Despite its name, the Enforcement Office would have the status of a court and exercise judicial functions. The more important orders affecting the rights of creditors and debtors and decisions on disputes as to fact or law, would be made by 'judicial officers' within the Office, or by sheriffs attached to the Office and exercising its jurisdiction. For the rest of the Office would be staffed by full-time salaried officers of the Scottish Court Service.

(d) The Enforcement Office would have powers to sist or postpone diligence and to make orders converting 'open' decrees into instalment decrees or varying instalment decrees. Where payment by instalments of the whole or part of the debt was not possible within a reasonable period, the Office would grant a declarator of

[1] Viz. a lesser fee than the full fee exigible for enforcement.

[2] The diligence and citation functions of officers of court would be examined by officers of the Enforcement Office.

unenforceability precluding further enforcement proceedings in respect of that debt or part thereof, precluding also subsequent applications by creditors for enforcement, and rendering the debtor notour bankrupt.

(e) Diligence would be used as a method of collecting debts out of attached property or funds, and presumably might also be used as a spur to informal payment arrangements in much the same way as creditors use diligence at present. It might be anticipated that the main diligences against consumer debtors would be earnings transfer orders rather than extended arrestments[1] and, it is thought, poindings of household goods. Since the Office would bear the expenses of diligence (including the removal of goods and their sale by public auction) the Office would have the same disincentive as creditors currently have to prosecute a poinding to the final stage of a warrant sale. It would be of vital importance, however, to consider whether the Office could use enforcement against goods as a spur to instalment settlements (as in Scotland and England at present) or whether enforcement against goods would only be used where the goods had a considerable debt-paying value making it worthwhile to incur the expense of removal and sale of the goods (as in Northern Ireland).

(f) It would be important to decide whether debts under decrees lodged for enforcement would be collected by the Office (as the Payne Committee proposed) or direct by the creditor or his agents (as in some cases in Northern Ireland).[2] If the former solution

[1] Since a means enquiry would be held in all applications for enforcement and since it would be possible to introduce a means-tested system of earnings transfer orders without making poindings of household goods a diligence of first resort.

[2] In the Northern Ireland system, in the case of attachment of earnings orders, "receiver orders" (broadly equivalent to an arrestment and furthcoming of funds other than earnings) and administration orders, payments are made direct to the Office for disbursement to the creditors. In all other cases (e.g. seizure of goods) payment is made direct to the creditor.

were adopted, then in cases of multiple debt "fair shares distribution" of collected debts among the competing creditors of the multiple debtor would be possible in theory.[1] If the latter solution were adopted, creditors' applications against a multiple debtor would be dealt with by the Office on a "first come, first served" basis.

(g) As in Northern Ireland, the Enforcement Office fees, payable by the creditor on making his application and recoverable from the debtor, would be on a scale proportionate to the amount of the debt. Such a fee would cover all modes of enforcement used by the Office and separate fees would not be chargeable for each mode of diligence.

For the reasons discussed below, we think that a Court Enforcement Office should not have power to examine the circumstances in which credit was extended to the debtor nor power to refuse to execute diligence on the ground of the creditor's failure at that stage to ascertain whether the debtor was creditworthy.[2] Further we do not think that jurisdiction to enforce the recovery of "admitted debts" without decree should be conceded to an Enforcement Office.[3]

1.84 Advantages of Court Enforcement Office: an enforcement agency on these lines would have a number of important advantages:-

(a) The fact that the Enforcement Office rather than the creditor would control the use of diligence on the

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[1] By "fair shares distribution" we mean that as a general rule the creditors of a multiple debtor would rank pari passu in receiving dividends out of the funds recovered by the Office and disbursed to them, i.e. all creditors would receive the same proportion of their debts. But provision might be made for giving priority to certain creditors (e.g. those having preferences in bankruptcy proceedings) and that question would require to be considered.

[2] See paras. 2.3-2.10.

[3] See paras. 2.12-2.16; Appendix C. paras. 53-54.

basis of a means enquiry would make the operation of diligence as sensitive as is reasonably practicable to the financial circumstances of debtors and would thereby so far as possible prevent the "blind" and oppressive use of diligence. The provision of a means enquiry before the diligence commenced should go far to ensuring that the mode of diligence most appropriate in the circumstances was selected since the Office would, or at least should, have a comprehensive picture of the debtor's assets, funds and income.

(b) The fact that the Enforcement Office would control the use of diligence and make instalment decrees if necessary, would be likely to prevent creditors from imposing on debtors instalment settlements of unreasonably high amounts. If the Enforcement Office collected debts under decrees lodged with it for enforcement, some protection might thereby be afforded against the execution of diligence where payment arrangements were being complied with.[1]

(c) Diligence against multiple debtors would cease to be a "free-for-all" among competing creditors.[2] The mere fact of the centralisation of all civil debt enforcement in one Office would relieve the multiple debtor from the pressure of concurrent enforcement proceedings by his several creditors. If the Enforcement Office collected debts under decrees lodged with it for enforcement, and if a system of "fair shares distribution" of collected debts among competing creditors were also instituted, the system would go as far as is possible towards achieving the regular and orderly payment of debts to the several creditors of a multiple debtor. If the Office did not have general collection functions, and if it dealt with applications on a "first come,

[1] See paras. 3.53-3.57 below.

[2] See paras. 1.30-1.31 and 1.37-1.39 above.

first served basis", then (except where a debt arrangement scheme was made) a "race of diligences" between the creditors of a multiple debtor would still exist, but it would be co-ordinated.

(d) The charging of fees on a scale related to the amount of the debt would obviate disproportionately high diligence expenses in the case of debts of small amount, and would also largely solve the problem of high mileage charges for diligence in remoter areas.

1.85 Disadvantages of Court Enforcement Office: on the other hand, in our view there would be a number of disadvantages associated with the system:-

(a) At present about 53,000 decrees for payment are passed to officers of court for enforcement every year[1] and the expense of holding a means enquiry in all of these cases would be likely to impose a considerable financial burden on the Exchequer. Experience in Northern Ireland suggests that the Enforcement Office would operate at a loss.

(b) The argument that an Enforcement Office would avoid the execution of poindings in inappropriate cases has to be considered against the background of the 'funnel' or 'filter' effect of the present system. Since only about 20,000 of the 53,000 decrees are enforced by poindings,[2] means enquiries would be held by the Enforcement Office in a very large number of cases which would not have resulted in a poinding in any event.

(c) There would be difficulty in securing participation by debtors, viz. in returning the means enquiry form or appearing before the Enforcement Office for examination as to means and difficulty in providing an effective and socially acceptable sanction for

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[1] See Table A at page 22 above. This figure relates to enforcement by poinding and arrestment. If orders for ejection or delivery of moveables are included, the relevant figure is 56,000 decrees: see C.R.U. Diligence Survey. But it is envisaged that, in an Enforcement Office system, no means enquiry would be held in ejections or delivery cases.

[2] Idem.

failure to disclose means. There would be a risk of false returns and difficulty in verifying the returns.

(d) It seems unlikely that the Enforcement Office would be more effective in recovering debts than the system of diligence as it presently exists or as reformed, and it might be considerably less effective. The low level of applications for enforcement in Northern Ireland,[1] and of applications for means-tested attachment of earnings orders in England and Wales, suggest that a Court Enforcement Office might not be viewed by creditors as an effective enforcement system. This might, however, depend to a great extent on the willingness of the Office to use poindings of household goods as a spur eliciting payment by instalments from debtors.

(e) The advantages arising from the assumption by the Office of the functions of collecting debts due under decrees lodged for enforcement and of 'fair shares distribution' among the creditors of a multiple debtor, might be counterbalanced by the administrative difficulties and operational expenses which these functions would involve

1.86 Provisional conclusion: the choice between the two main alternative approaches to reform raises important questions of social policy on which we would be grateful for views. The introduction of a Court Enforcement Office system would be a leap in the dark and would be likely to raise unforeseeable problems which would only be solved after a transitional period of possibly several years. The short or medium term disruption of the system would have to be weighed against the ultimate benefits, which are in any event uncertain. Our own provisional view is that reforms on the lines proposed to the existing relatively efficient and cost-effective system would

[1] Even taking into account the present emergency there and the existence of four "no-go" areas where enforcement is not attempted by the Enforcement of Judgments Office.

be preferable to the establishment of a Court Enforcement Office. In any event, we suspect that 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 calls upon such funds.

D. Other reforms (Part V)

1.87 The decisions taken on creditors' powers to control diligence, and on the reform of poindings and warrant sales, arrestments of earnings, and the administration of diligence, will largely determine the future pattern of the system of diligence and we have therefore given priority to these matters. Our terms of reference, however, require us to examine the whole law of diligence and, in Part V below, we briefly describe the ambit of the issues so far identified which will be considered in future papers.

PART II: EXTENDING CREDIT, DEBT COLLECTION, DEBT COUNSELLING AND DEBT ACTIONS

Preliminary

2.1 The solutions to the problems of debt do not lie entirely in the reform of diligence, and accordingly some possible solutions lie outwith our terms of reference. Thus the control of pre-decree debt collection by the Office of Fair Trading[1] lies outwith our remit though the parallel control by the courts of debt collection by sheriff officers[2] is included. The help which can be given to debtors by agencies providing debt counselling services to debtors is generally outwith our terms of reference and responsibility for the network of agencies lies with central and local government departments, voluntary organisations and other groups.[3] We hope that the description of the broader aspects of debt enforcement in the various research studies will assist the other interests involved to review and develop the contribution which they can make.

2.2 There are, however, a number of questions on the margin of our terms of reference which it is necessary to consider. First, it has been argued that default debt can often be attributed to the creditor's irresponsibility in extending credit in the first place and that some restriction should be placed on the creditor's powers of enforcement in such cases: we deal with this in Section A. Second, there is a view that the courts should not entertain actions for the recovery of debts in relation to which the defenders do not dispute liability: we consider this in Section B. Third, in the course of research on the context of diligence, a number of measures have been identified which might prevent some cases of default debt from reaching the stage of diligence, and

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[1] Consumer Credit Act 1974, Part X (Ancillary Credit Businesses).

[2] Memorandum No. 51, paras. 5.21 to 5.45.

[3] See C.R.U. Debt Counselling Survey.

also measures to prevent harassment. These last-mentioned matters are discussed in Section C, and while they strictly fall outwith our terms of reference, we hope that they will be considered by the competent authorities.

A. The extension of credit and possible restrictions on diligence

2.3 It has been argued on behalf of consumer debtors that default debt may arise as much from the fault of the supplier of goods and services as from the fault of the debtor. The Crowther Report on Consumer Credit observed that "all too frequently, credit is extended to those who on subsequent inquiry have been found not to be worthy of credit and indeed who have previously defaulted on numerous credit transactions."[1] It was represented to the Payne Committee that "creditors who acquire new customers already in debt and unable to pay should be treated as the authors of their own misfortunes"[2] and that "some curb should be placed upon creditors who enter into rash, speculative or irresponsible transactions with judgment debtors".[3]

2.4 Credit inquiries and credit rating are facilitated by the growth of credit reference agencies using computerised registers.[4] The Crowther Report thought that credit grantors should be "encouraged" to make proper enquiries before extending credit but recognised "that they could not in fairness be

[1] Op.cit., para. 6.4.1.

[2] Op.cit., para. 56.

[3] Ibid., para. 849.

[4] For a survey of credit reference agencies, see the Younger Report on Privacy (1972; Cmnd. 5012) Chapter 9. Such agencies are now subject to the licensing and regulatory provisions of the Consumer Credit Act 1974 applying to ancillary credit businesses. Following recommendations of the Younger Report (para. 298) sections 158 and 159 of that Act give an individual a legally enforceable right of access to information held about him by such an agency and to require the correction of wrong information. If a person is refused credit, he may require the creditor to give him the name and address of any credit reference agency from which the creditor has applied for a credit report (s.157).

expected to do this unless the law of defamation was relaxed to the extent necessary for the maintenance of an effective credit register and the transmission of information to and from interested parties".[1]

2.5 In England and Wales, the Payne Committee received representations that the courts should have power to restrain multiple debtors from incurring further credit and that the claim of a creditor who gave credit to a judgment debtor should be deferred to the claims of other creditors. The Committee, however, concluded:

> "a. that, apart from bankruptcy and the operation of administration orders, the restriction of a debtor's credit and the individual deferment of a creditor by order of the court are impracticable;
>
> b. that the general restriction of credit of judgment debtors and deferment of creditors by statute are impracticable and difficult to define; and
>
> c. that restriction on speculative trading and the rash granting of credit should come from the greater availability of information, the greater importance attached to credit worthiness and a more responsible attitude from the commercial and trading communities rather than from legislation or the courts."[2]

This view was not challenged by the Crowther Report on Consumer Credit who in 1971 concluded:

> "that consumer insolvency in Britain has not at present become such a serious problem that we need to consider the desirability of controlling the availability of consumer credit to all in order to protect the minority of defaulters."[3]

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[1] Op.cit., para. 6.4.1; and see also paras. 9.1.9-28. At present non-profit making member-owned credit reference agencies are protected by qualified privilege from defamation actions but credit reference agencies operating on a commercial basis may not be so protected. The Faulks Report on Defamation (Cmnd. 5909) para. 237 recommended that qualified privilege should be extended to communications by all licensed credit agencies (whether member-owned or commercial) in the course of their business. Communications to such agencies would not however automatically attract qualified privilege.

[2] Op.cit., para. 853.

[3] Op.cit., para. 3.6.15.

2.6 We have, nevertheless, considered whether a restriction should be placed on the right of a person extending credit for the supply of consumer goods and services to enforce his debt by diligence, and what form such a restriction might take. There seem to be two possible types of restriction.

2.7 The first type would be a rule imposing such a restriction if at the time when the credit was extended, the creditor had not made enquiries as to whether the debtor was an undischarged bankrupt or had had a recent decree for payment pronounced against him, in order to establish the debtor's creditworthiness. The restriction would presumably be confined to "consumer credit" cases, however that expression was defined. Those extending consumer credit would have to make enquiries of a credit reference agency, or themselves inspect the unofficial gazettes recording the names and addresses of persons against whom decrees had been granted, unless an official central registry of decrees were established.[1] We have, however, rejected this approach for the following reasons. First, it is not for us, in the context of reform of the law on diligence, to suggest solutions which would in effect require suppliers of goods and services and other persons extending credit to make enquiries into credit-worthiness in every case where credit was extended for the supply of consumer goods and services. While the Crowther Report on Consumer Credit stated that creditors should be encouraged to make proper enquiries, they did not propose that creditors should in effect be penalised for not making such enquiries. In our view, such a proposal

[1] At paras. 2.18 to 2.22 below, we conclude that the establishment of a central register of court decrees cannot be justified in present circumstances. In a forthcoming report on bankruptcy we shall propose the introduction in Scotland of a central register of insolvencies in which sequestrations of bankrupts, and debt arrangement schemes such as are discussed in Memorandum No. 50, would be registered.

pushes the claims of default debtors too far, would place too onerous a burden on those who extend credit and is not in the best interests of consumers generally, the great majority of whom are credit-worthy and pay their debts. Suppliers of goods or services would not only have to make enquiries, but make and keep records as evidence of their enquiries, in every case where credit was extended or run the risk that payment for the goods or services would be irrecoverable. To take a simple example, a plumber could not in safety mend a tap on credit without both making inquiry into his customer's credit-worthiness and keeping a record of the inquiry. Since default arises in only a small proportion of the cases where goods and services are supplied on credit and since only a very small fraction of default cases reach the formal stages of court action and diligence, the disruption caused by the proposed requirement to the retail and services system and the irritation caused to consumers generally would be out of all proportion to the benefit achieved.

2.8 Second, while the specific reasons for default in consumer cases are still obscure, it appears that in a significant number of cases, default can occur because of some event occurring after credit was extended[1] or for reasons which no creditor could ascertain when extending credit.[2] It seems,

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[1] The Edinburgh University Debtors Survey gives information on such matters as changes in the employment status and household income of debtors at the time when credit was extended and at the time of the debt action. See also Crowther Report (op.cit.) para. 3.6.14 which states that only 6% of debtors interviewed in a survey of credit users (by National Opinion Polls Market Research Ltd) gave over-commitment on credit buying as a reason for their default, but that "this is almost certainly an understatement of the position": two major reasons given were illness (20%) and unemployment (15%).

[2] Thus, Ison, op.cit., p.168, states that of 51 consumer buyers interviewed concerning the reasons for non-payment of their consumer debts, 24 of them said that they "just forgot" or were "too busy". The Crowther Report, para. 3.9.3, stated that default is usually the result of fortuitous circumstances.

therefore, that enquiries into creditworthiness would often not be successful in identifying in advance the likelihood of default.

2.9 Third, the proposed restriction would require that, either at the stage of the debt action or at the stage of diligence, an examination would have to be made into the financial circumstances of the debtor at the time when credit was extended and into the creditors' inquiries at that time into the debtor's creditworthiness. We consider that the expense, trouble and delay involved in such an examination would not be justified on any cost-benefit basis.

2.10 We do not know of any precedent for a restriction of this type and, for the above reasons, we think it should be rejected.

2.11 The other type of restriction on diligence would be a provision giving the court a general discretion to "open up" the credit transaction and declare the debt to be unenforceable if it found that the creditor had acted irresponsibly or recklessly in granting credit to the debtor. The courts already have powers under the Consumer Credit Act 1974, sections 137 to 140, to open up and set aside credit transactions on the ground that the credit bargain is "extortionate" within the meaning of the Act. This power does not seem wide enough to cover a case of the irresponsible granting of credit since, in such a case, the debtor's hardship stems from the creditor's failure to take account of the debtor's financial circumstances and not from the extortionate nature of the credit bargain. We think, however, that such a power would be open to broadly the same objections as is the first type of restriction.

B. Jurisdiction in "admitted debts"

2.12 At present, it is generally necessary for a creditor to obtain a decree for payment in a court action before enforcing his debt, though to this general rule there are some exceptions.[1] The court action enables the debtor to dispute liability or the amount of the debt and, in a summary cause action, to apply for an instalment decree.

2.13 The need for a court action has, however, been criticised.[2] (a) It is said that, since the great majority of debtors admit the debt and there is thus no dispute as to liability, the courts are not a proper forum for dealing with those cases. (b) It is said that the main question for debtors who admit the creditor's claim is the terms on which the debt should be paid, (whether there should be payment by instalments and if so of what amounts and at what intervals) and that the courts are not an appropriate forum for deciding this matter: 'that ought to be a matter of good judgment and commonsense made in the light of the debtor's circumstances and should be decided elsewhere'.[3] (c) The expenses of the court action are said to add unnecessarily to the debtor's liability. (d) Finally, it is said that the system is not very effective from the creditor's point of view because of the high rate of decrees of dismissal,[4] (resulting from the settlement of debts before

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[1] See Appendix B, paras. 5 to 7 for a short description of the exceptions.

[2] See e.g. Adler & Wozniak, op.cit., pp. 172 et seq. In April 1979, a provision was enacted enabling creditors in Northern Ireland to apply to the Enforcement of Judgments Office there for enforcement of certain admitted debts even where no judgment had been made. See Judgments (Enforcement) Act (Northern Ireland) 1969, section 86A, inserted by the Judgments Enforcement and Debts Recovery (Northern Ireland) Order 1979 (S.I. 1979/296). The procedure has not been brought into operation and we understand that there are no immediate plans to do so.

[3] Adler & Wozniak, op.cit., p.172.

[4] As mentioned at para. 1.43 above, about 30% of all summary cause payment actions are dismissed.

the serving of the summons and errors on the creditor's part) and the fact that, where a case is dismissed, the creditor has to pay the expenses of the action unless the debt was settled after the action was raised.

2.14 These arguments are not convincing. First, there must be some procedure for ascertaining whether liability and the amount of the claim are admitted, and since the court must decide on these questions if there is a dispute, it seems sensible that the procedure should take place in the courts. Second, the courts are well used to fixing the level of periodical payments in Scotland in other contexts for example in relation to maintenance (aliment and periodical allowance on divorce) and payment of fines (on the basis of means enquiries) and in England and Wales in attachment of earnings orders. Further, it is scarcely an argument for depriving the courts of a jurisdiction that the exercise of that jurisdiction requires "good judgment and commonsense". Third, there is undoubtedly a need to keep the expense of undefended court actions at a moderate level but the problem of expense is not solved by transferring jurisdiction in "admitted debts" to another institution which would require also to ascertain whether the debt was admitted. Fourth the problem of late settlements and mistakes by creditors in commencing recovery proceedings will occur whatever debt recovery procedures are established and while creditors may have criticised the levels of judicial expenses, they have not (so far as we are aware) criticised the principles on which such expenses are awarded.

2.15 We note that the Royal Commission on Legal Services in Scotland rejected the view that civil courts have incurable defects and must always be looked upon as places of last resort.[1] The Commission also proposed that a new procedure for 'small claims' should be introduced[2] which could not only be used by litigants without legal representation but, replacing the summary cause, would "also be the 'debt collecting' procedure for the great mass of actions, where there is no dispute about liability, raised for example by public utilities and large companies".[3]

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[1] (1980) Cmnd. 7846, para. 14.11 ("the Hughes Report").

[2] Ibid., Chapter 11.

[3] Ibid., para. 11.24.

2.16 Whatever procedure is adopted, we think it should continue to be necessary for creditors to obtain decree for payment in a court action before enforcing debts by diligence except where the law already provides otherwise.[1]

C. Possible reforms of matters related to diligence

2.17 It is for consideration whether a number of measures might be taken to prevent debt cases reaching the stage of diligence, and measures which are otherwise intimately connected with diligence. These measures include the establishment of a central register of court decrees in Scotland, the maintenance and improvement of debt counselling services, certain reforms of pre-litigation collection procedures, and also certain reforms of the procedure in summary cause debt actions.

(1) Central register of court decrees

2.18 An important aid for creditors checking the credit standing of potential customers are the gazettes (such as Stubbs Weekly Gazette and Kemp's Mercantile Gazette) which record the names and addresses of persons against whom decrees have been granted. (These in turn are used by the various credit reference agencies.) It is for consideration whether a central register of decrees should be established, related to the courts, to assist in credit-rating enquiries which are probably as much for the benefit of the debtor as the creditor.

2.19 At present, there is no central register of court decrees for debt in Scotland although such registers exist in respect of orders of the county courts of England and Wales[2] and in respect of decrees lodged for enforcement with the Enforcement of Judgments Office in Northern Ireland.[3] We understand that the Northern Ireland Register is not much used by creditors. In England and Wales, the Payne Report proposed that a register of judgments should be established to assist in credit-rating.[4]

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[1] See para. 2.12, footnote 1.

[2] County Courts Act 1959, s.101(4) and (5).

[3] Judgments (Enforcement) Act (Northern Ireland) 1969, ss.97 and 98.

[4] Op.cit., paras.1172-1208.

2.20 In fairness to debtors, a central register of court decrees should record cases in which the debtor had paid the debt and thereby implemented the decree. In 1970, we received a proposal that a procedure should be introduced in Scotland allowing a debtor to "clear his name" once a debt due under a small debt decree had been settled. As there was no support at that time from the individuals and organisations consulted, we decided to take no action.[1] We understand, however, that recently the Scottish Association of Citizens' Advice Bureaux, supported by other bodies, have made representations to central government on this matter.

2.21 There are unfortunately administrative and other difficulties involved in establishing a central register in which decrees for payment, and the implementation of such decrees, can be registered. There seems little point in establishing a central register unless it can do something which private enterprise publications of decrees (such as Stubbs Weekly Gazette or Kemp's Mercantile Gazette) cannot (or will not) do. Private enterprise publications cannot record the implementation of debt decrees automatically but only if asked by the debtor.[2] It would only be possible, however, for an official Scottish central registry to register automatically the implementation of Scottish court decrees if the payments under the decrees were collected by the courts and the courts notified the central registry of the implementation of each decree debt which was paid in full. Therefore, the case for establishing a central register of Scottish court decrees depends in part on the introduction of a system of collection of decree debts

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[1] See our Seventh Annual Report for 1971-72 (Scot. Law Com. No. 28) para. 57.

[2] In practice, we understand that publishers of lists of debt decrees will publish, on the debtor's request, the fact that payment has been made implementing the decree.

through the courts on the model of the county court collection system in England and Wales (under which, technically, all payments under debt decrees are or should be made into court). The debtor could in theory be required to inform an official Scottish central registry of the implementation of debt decrees but it is unlikely that full and accurate coverage would be obtained.[1]

2.22 In Scotland, the case has not been made out for the introduction of court collection departments for ordinary civil debts.[2] (We concede that it may be necessary to provide for collection of civil debts through the court in connection with earnings transfer orders and wage earners' debt arrangement schemes such as we discuss in Memoranda Nos. 49 and 50 but only because these procedures would not operate satisfactorily unless court collection departments were used.) We have therefore provisionally concluded that the establishment of a central register of court decrees, in which debt decrees and their implementation were recorded, would not be practicable in present circumstances, and that the establishment of a central register of decrees in which the implementation of decrees was not recorded, is unnecessary.

(2) Debt counselling and related services

2.23 A number of reports by official advisory bodies have pointed to the need to develop the provision of debt counselling and related services in order to give information, advice and assistance free of charge to insolvent consumer debtors in low income groups and thereby to perform for such persons 'the

[1] If (as we suggest below) a warrant for diligence were to include warrant to recover the expenses of diligence without further court action, this would also create difficulties in monitoring the outstanding balance of decree debts.

[2] There may be a stronger case for collection by the courts in the case of aliment or periodical allowance on divorce: see Part V below.

functions which are performed for the more successful members of the community by bank managers, accountants and solicitors."[1]

2.24 The CRU Debt Counselling Survey assesses the nature and extent of debt counselling services and facilities free of charge for consumer debtors in Scotland. Reference is made to this Survey for a description of the organisations providing such services, the debt problems brought to those organisations and the types of assistance given. This assistance includes the provision of information and general advice concerning debt recovery procedures and related topics including welfare rights, negotiating with creditors, establishing a person's eligibility for welfare rights (a 'benefits check'), and budgeting or 'money management' advice. The Survey shows that there are and should be a range of types of agencies providing debt counselling and related services to debtors, and that, in the main, these should be 'generalist' rather than specialist organisations. Two types or organisation appear to offer most potential for expanding debt counselling services in Scotland - local authority social work departments and voluntary grant-aided generalist advice agencies such as Citizens Advice Bureaux and welfare rights organisations. The Survey suggests that the former could provide services for debtors who require longer term help for financial problems and those who face a multiplicity of social problems with which debt is closely enmeshed. The generalist advice agencies could provide services for the remaining types of debtors, ie those requiring information or advice and assistance for an immediate debt crisis. We note that the Hughes Report recommended that high priority should be given to developing a money management counselling service which would be an essential component of the improved provision of generalist advice centres.[2]

[1] See the Payne Report, op.cit., paras. 1213-1223 (which recommended the establishment of a social work agency, attached to the proposed Enforcement Office with trained staff to assist the debtor and the court); Crowther Report, op.cit., Chapter 9.3; Hughes Report, op.cit., paras. 12.6-12.12.

[2] Op.cit., paras. 12.9-12.10 and Chapter 7.

2.25 The provision of such services is relevant to diligence in at least two ways. First, debt counselling agencies are at present often instrumental in preventing debt cases proceeding to diligence, for example by acting as a channel of communication between the debtor and creditor and acting as 'broker' for payment arrangements. Improved provision of such services should prevent more cases from proceeding to diligence.

2.26 Second, we have proposed that debtors should be entitled to apply for certain types of court order precluding diligence[1] but the initiative in applying for such orders would rest with the debtors.[2] Debt counselling agencies might have an important role to play in advising debtors as to the existence of these orders, in helping them to make applications to the courts for the orders, and in overcoming the possible reluctance of debtors to make the applications. (The very possibility that applications by debtors for such orders might be made should strengthen the position of debt counsellors negotiating instalment settlements with creditors on behalf of debtors.)

2.27 We therefore support the general aims of the Hughes Report in seeking to improve the provision of debt counselling within the framework of generalist advisory services.

(3) Possible reforms at pre-litigation stage

2.28 There are two matters affecting debt collection which merit attention. First, we note that the practice of simulation by debt collectors of legal process and the unreasonable harassment of debtors are criminal offences in England and Wales[3] and that the Younger Report on Privacy[4] recommended that the same provision should apply in Scotland. In

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[1] Viz. instalment decrees sisting diligence after decree; declarators of unenforceability; orders refusing to grant warrant of sale; and orders confirming debt arrangement schemes.

[2] Except in the case of orders refusing to grant warrant of sale which we propose the court would grant of its own motion as well as on the debtor's motion.

[3] Administration of Justice Act 1970, s.40.

[4] Op.cit., para. 278; see Appendix D.

Appendix D we explore this matter more fully and give our reasons for endorsing the Younger Report's recommendations. Though unreasonable harassment may not be a significant problem in Scotland at present, there may be a direct correlation between, on the one hand, the severity of the modes of diligence and the ease with which creditors can use them and, on the other hand, the extent to which debt collectors have resort to improper harassment tactics. Accordingly, legislation on this matter may become desirable, or more desirable, if the modes of diligence are made less severe.

2.29 Second, there is a practice, which may be widespread, whereby debt collectors make demands for collection charges which are not legally enforceable.[1] In Scotland, this may or may not amount to the crime of extortion but we think that specific legislation should be introduced to prohibit the practice.

(4) Possible measures at stage of court actions

2.30 The research conducted on our behalf suggests that measures might be taken at the stage of a debt action to prevent debt cases proceeding to diligence. The research indicates that the procedure in debt actions is liable to be misunderstood by debtors and this contributes to the likelihood of default debt and diligence arising.

(a) Receipt of summons

2.31 The OPCS Defenders Survey and Edinburgh University Debtors Survey both disclosed that a significant proportion of debtors against whom a decree in absence had been pronounced (about 10% of those interviewed) alleged that they had not received the summons which ought to have been

[1] Collection charges claimed by the creditor, or creditor's agent, against the debtor are only legally enforceable if the original credit contract so provides.

served on them. Debtors who do not receive a summons lose the chance to apply for an instalment decree or to make informal instalment arrangements before decree, and thereby become liable for increased expenses. While we are not in a position to evaluate the reliability of this evidence, the matter has been brought to the attention of the Scottish Courts Administration in order that such remedial action as may be required can be taken.

(b) Use of instalment decrees

2.32 The CRU Court Survey discloses that in 1978, only about 1 in 7 defenders in summary cause payment actions made an offer to pay by instalments and only 1 in 5 of the decrees in such actions was an instalment decree. Greater use of instalment decrees might prevent diligence being executed in many cases. The introduction from 15 January 1979 of a new style of summons or service document and relative form of offer to pay by instalments[1] may have helped to increase the number of instalment decrees.

2.33 We think that an attempt should be made to monitor the numbers of offers to pay by instalments and of instalment decrees granted and if an information leaflet such as we discuss below is served with the summons (or service document), the leaflet should draw particular attention to the advantages of instalment decrees.

(c) Availability of information leaflets and intimation of decrees in absence

2.34 Several of the research studies have highlighted the significant level of ignorance among debtors of court and diligence proceedings. The Scottish Information Office have

[1] Act of Sederunt (Summary Cause Rules, Sheriff Court) (Amendment No. 2) 1978, inserting in Summary Cause Rules, Rule 50A and new Forms A and Q. The form of service document (Form A) draws the defender's attention in block capitals to the possibility of replying to the service document, and Form Q contains detailed instructions.

issued a "Guide to the summary cause in the Sheriff Court" which gives advice in simple language to pursuers and defenders but, while this is a most useful document, it reaches only a small fraction of summary cause defenders[1] and is not specifically designed for defenders in debt actions. While this leaflet, and the summary cause service document, advise debtors in general terms to consult solicitors or Citizens Advice Bureaux, the coverage of CABx in Scotland is very incomplete; no reference is made to other local advisory agencies, nor to addresses to contact in the defender's locality.

2.35 It has been suggested to us that, in order to fill the information gap, leaflets should be issued (along with the summons or service document) setting out briefly what happens at the court stage; what communications debtors should expect; what they can do (eg offer to pay by instalments, appear in court etc); what will happen (in terms of proceedings and expenses) if decree is granted and diligence is executed and referring to advisory agencies, in the locality of the defender's residence, where he can go for advice. The cost of such a leaflet would be small and would be by far the cheapest method of bridging the information gap. It would, however, require to be brief having regard to the length of the service document served on defenders in summary cause payment actions.

2.36 When decree for payment has been granted by the court, there is no requirement that intimation should be made to the debtor informing him of the existence of the decree. This often means that after the debtor has received the summons, he may hear nothing about the proceedings for a period of as long as eight to twelve weeks, and his next experience

[1] While this leaflet is widely distributed to sheriff clerks' offices, CABx etc., the highest annual distribution was 3,000, which compares with 129,051 summary cause actions disposed of in 1978.

of the procedure is either an arrestment of his wages or the service upon him of a charge. In the case of instalment decrees, standard forms of letters are used in some sheriff courts to intimate instalment decrees to defenders. Some courts, however, do not follow this practice and, as the Edinburgh University Debtors Survey discloses, default on two instalments (which converts the instalment decree into an open decree enforceable by diligence) can occur before the debtor becomes aware that an instalment decree has been granted.

2.37 Having regard to the incomprehension prevalent among debtors about the nature of the process, it is for consideration whether the court should assume responsibility for informing the debtor of the granting of decree, and possibly reminding him of what he can do to make settlement and of the risk that diligence may be done. We think that this is particularly important in the case of instalment decrees. We do not, however, envisage that such intimation would take the place of a charge served by an officer of court before poinding.

2.38 The conclusions reached in this Section may be summarised as follows:-

(1) The establishment of a central register of court decrees, in which debt decrees and their implementation were recorded, would not be practicable in present circumstances, and the establishment of a register of decrees in which the implementation of decrees was not recorded is not necssary. (paras. 2.17-2.22).

(2) We consider that there is no need to establish specialist debt counselling agencies, and we support the general aims of the Royal Commission on Legal Services in Scotland in seeking to improve the provision of debt counselling within the framework of generalist advisory services. (paras. 2.23-2.27).

(3) We support the recommendation of the Younger Report on Privacy that the practice of simulation by debt collectors of legal process and the unreasonable harassment of debtors should be criminal offences in Scotland. (para. 2.28).

(4) Provision should be made prohibiting the practice whereby debt collectors make demands for collection charges which are not legally enforceable, (that is to say, where not provided for by the original credit contract). (para. 2.29).

(5) We draw attention to problems in the service of summonses in debt actions which merit consideration by the competent authorities. (para. 2.31).

(6) Steps should be taken to encourage debtors to apply for instalment decrees in summary cause debt actions. Information leaflets might be issued along with the summons or service document drawing attention to the defender's entitlement to apply for an instalment decree and to the advantages of such decrees. (paras. 2.32-2.33).

(7) (a) It is for consideration whether an information leaflet should be sent to defenders in summary cause debt actions at the stage of service of the summons and a further leaflet after decree against the debtor is pronounced. (b) Consideration should also be given to provisions requiring the court to intimate to a debtor the passing of a decree in absence for payment against him, especially where the decree is for payment by instalments. It is envisaged, however that such intimation would supplement, rather than replace, the requirement for service of a charge before a poinding is executed. (paras. 2.34 to 2.37).

PART III: DEBTORS' EXEMPTION RIGHTS, THE COST OF DILIGENCE, AND DILIGENCE-RELATED INSTALMENT SETTLEMENTS

Preliminary

3.1 In this Part, we consider a miscellaneous group of possible measures which might supplement our proposals for reforming poindings of goods and arrestments of earnings and for introducing new remedies for debtors precluding diligence.[1] These are -

(a) whether the law exempting certain property and income of debtors (other than goods and earnings[2]) from diligence requires reform, especially in relation to the family home and social security income;

(b) possible measures relating to the recovery of diligence expenses and the cost of diligence, especially as respects debts of small amount and enforcement in the remote areas; and

(c) whether creditors should be expressly precluded by statute from executing diligence where debtors are complying with arrangements for payment by instalments.

A. Debtors' exemption rights and "diversion" or attachment of social security payments

3.2 In common with most other legal systems, Scots law gives debtors rights to retain part of their property and income free from the diligence of creditors. The main exemptions relate to the poindings of household goods,[3] whose reform is considered in

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[1] See paras.1.60-1.74 above for a synopsis of the proposals set out in detail in Memoranda Nos.48 to 50.

[2] Exemptions from diligence of certain goods and earnings are considered respectively in Memoranda Nos.48 and 49.

[3] There is an exemption from poindings of necessary clothing, statutorily defined categories of necessary household goods, and "tools of trade". There is also a special kind of conditional and temporary exemption for "plough goods".

Memorandum No.48,[1] and arrestments of earnings,[2] whose reform is suggested in Memorandum No.49.[3]

3.3 In this Memorandum, we review the remaining exemptions which consist of the following -

(1) 'alimentary' liferents and annuities in private trust deeds granted by individuals are wholly or partially exempt from diligence,[4] and the same principles apply to pensions payable out of private occupational pension funds administered by trustees;[5]

(2) statutory occupational pension schemes invariably make provision in common form protecting pensions from attachment by diligence or sequestration;[6] and

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[1] Paras.4.14-4.41.

[2] There is by statute an absolute exemption of earnings from arrestment on the dependence of an action; a statutory partial exemption (£4 plus half the balance of the weekly wage) of earnings in execution except where the debt is aliment, rates or taxes; and also the courts retain their common law powers to exempt earnings from execution, but these powers are rarely invoked nowadays.

[3] Paras.2.67-2.94; 3.35-3.46.

[4] An arrestment will be competent in the case (1) of arrears of past instalments; (2) of a current instalment quoad the excess above a suitable aliment; and (3) where the decree containing warrant to arrest is for an 'alimentary' debt - the term 'alimentary' having a special meaning in this context: see Wilson and Duncan, Trusts, Trustees and Executors, pp.96-97.

[5] Officers' Superannuation and Provident Fund etc. v. Cooper 1976 S.L.T. (Sh.Ct.) 2.

[6] Exemptions are provided in the superannuation enactments affecting for example, the police, firemen, teachers, local government officers, NHS and Armed Forces personnel, civil servants, customs and excise officers and MPs. A typical example is in the Police Pensions Act 1976, s.9 deriving from enactments construed in Borthwick v. McRitchie (1908) 24 Sh.Ct.Reps. 374 and Macfarlan v. Glasgow Corporation (1934) 50 Sh.Ct.Reps. 247, which held that the exemption was total. But see Macdonald's Trustee v. Macdonald 1938 S.C. 536 (a sequestration case) which suggests that the excess above a suitable aliment is arrestable.

(3) the wide range of social security benefits, pensions and allowances payable by the Department of Health and Social Security and unemployment benefit payable by the Department of Employment are exempt both by statute[1] and probably at common law.[2]

In addition, it is generally accepted that cash and negotiable instruments cannot be attached by any diligence short of sequestration[3] and, though the reason for this is simply the absence of any appropriate form of diligence which can be used, the effect is to give an important exemption which prevents, for example, the attachment of social security payments in a debtor's hands.

3.4 It has been suggested that the policy underlying exemption rights is one of "preserving for the debtor and his family the basic necessities of life and the means of carrying on and earning a living as a productive member of society".[4] More elaborate descriptions of the policy objectives have been suggested.[5] Scots law, like the law of England and Wales,

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[1] See e.g. Child Benefit Act 1975, s.12; Supplementary Benefits Act 1976, s.16; Social Security Pensions Act 1975, s.48

[2] Sinton v. Sinton 1976 S.L.T. (Sh.Ct.) 95.

[3] See Memorandum No.48, para.4.11: the later stages in poinding procedures (viz. the advertisement and sale), being designed to realise property into money, are inappropriate where the thing attached is money. Section 15 of the Bankruptcy (Scotland) Act 1913 makes it clear that cash in the debtor's hands falls into the sequestration of his estate, though as a general rule only property attachable for debt may be sequestrated.

[4] Alberta Institute of Law Research and Reform Working Paper on Exemptions from Execution and Wage Garnishment, (1978), p.4.

[5] See Vukowich, "Debtors' Exemption Rights" (1974) 62 Georgetown Law Journal 779 who suggests (at pp.782-788) the following objectives or consequences, viz:- (1) relieving hardship suffered by 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) financial 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.

provides, as a general rule, for relatively narrow exemptions restricted to the basic necessities of life.

3.5 To this general rule, the common law powers of the court to exempt alimentary liferents, annuities and pensions from arrestment form an exception. In fixing the level of exempt income, the court may allow the debtor an aliment suitable to his social position.[1] It seems difficult to justify a rule which in effect permits a debtor to maintain a particular social position at the expense of his creditors, and it might be more appropriate if the level of exempt income were in principle to be fixed by reference to subsistence (as defined for supplementary benefit purposes).[2] We invite views on this question, Otherwise (apart from poindings and arrestments), we do not think that the law on exemption rights requires material alteration. Two questions, however, merit special mention: namely, whether the family home should be protected and whether social security should be attachable for debt in any circumstances.

(1) Exemption for the debtor's family home not to be introduced

3.6 Though an exemption from enforcement of the debtor's residence or family home exists in some jurisdictions,[3] there has been no pressure for introducing such an exemption in the United Kingdom.[4] Generally speaking, in Scotland, most debtors live in public or private sector rented homes: these are not

[1] Wilson and Duncan, loc.cit.

[2] In the case of arrestment of earnings, where the court fixes too low an exemption, the debtor may be induced thereby to give up his job, but different considerations apply where the arrested alimentary fund is a liferent, annuity or pension.

[3] In all but six states of the USA and in the Canadian prairie provinces, a "homestead" exemption is provided to safeguard the home for the debtor and his family. The exemption is usually subject to a monetary or territorial limitation or both. The exemptions were introduced to encourage settlers and their justification in modern conditions has been questioned. See generally Vukowich, op.cit., p.797 et seq; U.S. Uniform Exemptions Act 1979, s.4; Alberta Institute of Law Research and Reform, op.cit., p.24 et seq.

[4] See, however, Milner, "A Homestead Act for England?" (1959) 22 M.L.R. 458.

adjudgeable for debt because of legal or contractual provisions excluding assignees or adjudgers and accordingly an exemption of rented homes would be of little practical value. Moreover, in our view, there is no case for introducing exemptions for owner-occupied heritable property. It seems reasonable to require an insolvent owner-occupier debtor to move to rented accommodation: the policy of encouraging home ownership ought not to be promoted by making very substantial assets exempt from the claims of creditors. In any event, adjudications for debt are very rare.[1] It will, however, be for consideration whether, in reforming the archaic procedures of adjudication for debt [2] (as a result of which adjudications may become more common), provision should be made giving to a debtor whose home is adjudged time to seek alternative accommodation.[3]

(2) Social security benefits not to be attachable for debt

3.7 The exemptions from diligence of social security have the disadvantage that creditors resort to the diligence of charge, poinding and warrant sale in order to put pressure on debtors to pay their debts out of their social security income. The research on debtors' circumstances suggests that poindings against recipients of supplementary benefit and other forms of social security are relatively common.[4] Further, the research also suggests that debtors would not necessarily be averse to the diversion of social security income to creditors to pay their debts.[5] Already, the Department of Health and Social Security

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[1] See Appendix B. It should be noted that there is no exemption in bankruptcy proceedings for the debtor's residence: White v. Stevenson 1956 S.C. 84.

[2] See Part V below.

[3] In Memorandum No.48, para.4.35, we propose that a similar provision should apply in cases where a residential mobile home is poinded.

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

[5] Edinburgh University Debtors Survey.

(DHSS) pay exceptional circumstances additions (ECAs), exceptional needs payments (ENPs), and urgent needs payments to pay certain debts,[1] and deductions from the weekly scale rate of supplementary benefit may be paid direct to a fuel authority or local authority landlord.[2]

3.8 On these grounds, it has been suggested that small amounts from social security might be made attachable for debt.[3] For a number of reasons, especially the need to preserve uniformity in the rules on social security throughout the United Kingdom, we think that this proposal could only be appropriately considered by an advisory body having United Kingdom terms of reference as well as expertise in social security law and administration and the enforcement laws of all three United Kingdom legal systems.

3.9 It may, however, be observed that if any conclusion is to be drawn from the willingness of certain debtors to allow social security to be diverted to creditors, that conclusion may be that social security should be assignable by the claimant rather than attachable by his creditors. This is a matter for social security law reform rather than diligence. Moreover, the obligations assumed by DHSS to pay consumer debts out of social security appear to be limited to cases where essential goods and services currently needed by the debtor (which DHSS would otherwise have to provide) would be repossessed or withdrawn if the debt (viz. fuel, rent or hire-purchase debt) were not paid and "diversion" procedures apply only to public

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[1] Supplementary Benefits Handbook (rev'd Nov.1979), D.H.S.S. Supplementary Benefits Administration Papers 2, para.1.14 (urgent need); para.6.18 (ECAs); paras.7.24-26, 7.37 (ENPs).

[2] Ibid., paras.7.39; 12.29-31.

[3] See Adler and Wozniak, op.cit., at p.174.

sector fuel and rent debts. It does not necessarily follow from these precedents that DHSS should assume liability for debts not incurred for essential goods or services or that they should operate diversion procedures in respect of such debts, or any debts, to private sector creditors.

3.10 In some respects our proposals may change the position. If (as we propose in Memorandum No.48), the exemptions from poinding are widened to protect all, or almost all, truly necessary household goods, then debtors should rarely, if ever, require to seek ECAs, ENPs or urgent needs payments to preserve such goods from poinding. Poindings of non-exempt goods, nevertheless, would still put pressure on debtors to pay their debts out of weekly scale supplementary rate/benefit or other forms of social security. In such cases, however, the debtor would be entitled to apply for one of the new remedies precluding diligence discussed in Memoranda Nos.48 and 50[1] or to apply for his own summary sequestration. Giving an insolvent debtor time to pay or precluding diligence may be preferable to attachment of his social security income.

B. Recovery of diligence expenses and the cost of diligence

3.11 It is an important principle of the present system that, as a general rule, the debtor is liable to the creditor for the expenses of diligence in addition to his liability under the debt decree.[2] It is an unfortunate feature of the present law that the debt can be inflated by diligence expenses (in addition to court expenses) so that where diligence is executed in a remote area or where the debt is of relatively small amount, the expenses of recovery appear high relative to the amount of the debt. Before discussing this problem, it is necessary to note two issues relating to the recovery and audit of diligence expenses.

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[1] Viz. instalment decrees sisting diligence, declarators of unenforceability or debt arrangement schemes.

[2] An officer of court must look to the creditor for payment of his scale fees for executing diligence on the creditor's behalf. In no circumstances does the officer become a creditor in his own right of the debtor for the expenses of the diligence.

(1) Warrant for diligence to cover all diligence expenses

3.12 The law on the recovery by the creditor of diligence expenses[1] may be summarised as follows -

(1) The expenses of diligence are, as a general rule, recoverable under the extract decree only if a poinding is followed by a warrant sale[2] or an arrestment is followed by an action of furthcoming.[3] (The expenses of an arrestment of wages are only recoverable if by virtue of the arrestment the creditor recovers a sum larger than the amount of the expenses[4]).

(2) If (as is usual) diligence does not reach the final stage of sale or furthcoming, then the creditor must raise a separate action to recover the expenses of the stages of diligence which have been executed.

(3) It is a corollary of the foregoing that, if the amount due under a decree (principal sum, interest, and judicial expenses) is paid or tendered, then it is not competent for the creditor to continue the diligence in order to recover the expenses of diligence out of a sale or furthcoming.[5]

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[1] The law on the recovery of diligence expenses varies with the type of diligence and the discussion here is confined to the main diligences of poindings and arrestments.

[2] In the case of a charge, poinding and warrant sale, it is, however, competent to poind sufficient goods to cover the expenses of the charge (see Graham Stewart, op.cit., p.347), the poinding and the ensuing stages of the diligence: Debtors (Scotland) Act 1838, s.28; McNeill v. McMurchy, Ralston & Co (1841) 3 D. 554.

[3] An arrestment does not attach diligence expenses: Encyclopaedia of Scots Law, voce "Expenses" vol.6, p.569; MacLaren, Expenses, p.111; Graham Stewart, op.cit., p.133. It is, however, usual for the officer of court to endorse a note of the diligence expenses on the schedule of arrestment, and for the arrestee, with the debtor's consent, to deduct and pay over the expenses together with the sum arrested, if the amounts held by the arrestee are sufficient.

[4] Wages Arrestment Limitation (Scotland) Act 1870, s.2.

[5] Inglis v. McIntyre (1862) 24 D. 541; Harvie v. Luxram Electric Ltd (1952) 68 Sh.Ct.Reps. 181: cf. Holt v. National Bank of Scotland Ltd 1927 S.L.T. 484.

3.13 The need in certain circumstances to raise a fresh action to recover the expenses of diligence seems to be objectionable on several grounds. First, it is difficult to justify the extra expense involved in a second action, and possibly further diligence, to recover the expenses of the earlier diligence. Second there are circumstances where, if the creditor does not take a firm line, the debtor may use dilatory and evasive tactics and pay off the decree debt but not the diligence expenses leaving the creditor to raise a fresh action or forego his diligence expenses.[1] Third, the rule can in theory lead to a progression of diligences to infinity since in the case of each successive diligence there may always have to be a further court action and diligence to recover the expenses of that diligence.

3.14 In consonance with the views of the McKechnie Report[2] and representations which we have received, we suggest that (1) an extract decree should contain an award of the expenses of an arrestment, (including an extended arrestment such as we propose in Memorandum No. 49), charge, poinding or warrant sale used to enforce the decree. Payment or tender by the debtor of the outstanding balance of the principal sum, interest and judicial expenses should not interrupt the diligence unless the expenses of diligence already executed are also tendered. (2) An arrestment in execution, (including an extended arrestment), should attach a sum equivalent to the expenses of the arrestment in addition to the outstanding balance of the principal sum, interest and judicial expenses. (3) It is for consideration whether one diligence should recover the expenses not only of that diligence but also of a previous diligence of the same or a different type executed under the same decree.

(2) Improved arrangements for audit and taxation of diligence expenses

3.15 Because of the rule that an extract decree does not include warrant to recover the expenses of the diligence following thereon except where an arrestment is followed by an action of

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[1] See Harvie v. Luxram Electric Ltd, supra.

[2] Op.cit., para. 179.

furthcoming or a charge and poinding proceeds to a warrant sale, it is only in these rare cases that the expenses recovered from debtors are audited by the court. Having regard to the high incidence of cases in which settlement is made before the final stage of warrant sale or furthcoming is reached, then, assuming such settlements usually include settlement of the diligence expenses, it seems likely that almost all diligence expenses recovered from debtors are not audited by the court. No doubt the debtor is entitled to require that the expenses be audited and taxed by the clerk or auditor of court, but few, if any, debtors ever exercise this right.

3.16 It seems desirable that provision should be made for the audit and taxation of diligence expenses recoverable from debtors. First, the overcharging of diligence expenses does from time to time occur though it is difficult to ascertain how widespread overcharging may be. Second, provision is made for the checking or audit of judicial expenses before an award of those expenses against the defender is included in the extract decree and there seems no ground for not applying analogous controls at the later stage of diligence.

3.17 The difficulty lies in devising a cost-effective means of audit and taxation and this question is discussed in our Memorandum No.51.[1]

[1] See paras.3.26 to 3.30 in that Memorandum.

(3) The cost of diligence

3.18 The cost of diligence presents two main problems namely -

(a) that, in the case of debts of relatively small amounts, the expenses (for which the debtor is ultimately liable) of the diligence of charge, poinding and warrant sale can increase the debtor's liability to an extent which appears high relative to the amount of the debt; and

(b) that, because of the way in which the system of mileage charges operates, the cost of diligence is unduly high in rural areas remote from a sheriff court or an officer's place of business with the result that debtors in such areas may be financially prejudiced or creditors deterred from executing diligence.

(a) Expenses of poindings and warrant sales in case of debts of small amount

3.19 The fees for poindings and for warrant sales are on scales which increase as the amount of the debt increases.[1] Table B[2] shows the expenses of the diligence for each step of a range of summary cause decrees for payment. It will be seen that as the amount of the principal sum decreases, the proportion which the litigation and diligence expenses bear to that sum increases so that they reach levels which appear high relative to debts of small amount.

[1] Fees are chargeable for each step of the diligence of poinding (i.e. charge, poinding, application for warrant of sale, and intimation thereof, advertisement of sale, and execution of sale)

[2] See next page.

TABLE B

Expenses in relation to principal sum sued for

Principal sum	£ 20	£ 50	£ 100	£ 250	£ 500
Judicial expenses for an undefended action	12.56	22.10	24.60	24.60	32.13
Total of principal sum and expenses for which diligence is done	32.56	72.10	124.60	274.60	532.13
Charge	4.42	4.42	4.42	4.42	4.42
Poinding[3]	9.94	11.74	17.14	29.74	51.34
Sub total	14.36	16.16	21.56	34.16	55.76
Sale advertised[4]	10.84	10.84	10.84	10.84	10.84
Sub total	25.20	27.00	32.40	45.00	66.60
Sale executed[5]	16.98	18.33	24.88	39.33	65.53
Total Diligence Expenses	42.18	45.33	57.28	84.33	132.13
Total judicial and diligence expenses	54.74	67.43	21.88	108.93	164.26
Total expenses as % of principal sum	274	135	82	44	33
Diligence expenses as % of principal sum and judicial expenses	130	63	46	30	25

Notes

1. Fees are taken from Act of Sederunt (Fees of Sheriff Officers) 1978 which came into operation on 1 November 1978, Act of Sederunt (Amendment of Fees for Sheriff Clerks) 1980 which came into operation on 28 April 1980, and Act of Sederunt (Solicitors Fees) 1979 which came into operation on 7 January 1980.
2. Solicitor's instruction fee of £1.30 allowed at every stage of diligence. Reckonable travelling distance of 3 miles.
3. Assuming goods poinded to an appraised value of £75, £100, £175, £350 and £650 respectively.
4. Assuming the advertisement of sale cost £4.50.
5. Assuming the appraised value of goods sold was £75, £100, £175, £350 and £650 respectively and the auctioneer's fee was £7.50, £10, £15 and £25 respectively.

3.20 It has been suggested that diligence fees are disproportionately high relative to small debts, but the disproportion, if it is correctly so described, should not be taken as necessarily implying that diligence is unduly expensive. The disproportion between the expenses of diligence and debts of small amount is a direct consequence of the amount of work which requires to be done in executing diligence: it does not suggest that the fees yield officers of court too high rewards. On the face of it, diligence fees seem reasonable viewed as remuneration for work done.

3.21 Arrestments are a relatively inexpensive diligence, unless used repeatedly to enforce the same debt,[1] and in Memorandum No.49 we seek views on proposals that, to reduce expense,all arrestments of earnings and not merely summary cause arrestments should be served by recorded delivery post and the requirement of witnesses to personal service (or other service involving a visit by the officer) should be abolished.[2]

3.22 The main problem concerns the diligence of charge, poinding and warrant sale, and, apart from dispensing with the need for witnesses to the service of a charge,[3] there is in our view little scope for reducing the expense of the diligence by effecting changes in procedure.

3.23 The criticism that expenses are disproportionately high relative to debts of small amount appears to have been made

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[1] The incidence of repeated arrestments would be much reduced by the introduction of extended arrestments. The real cost of diligence against earnings (whether it be a single arrestment, repeated arrestment or proposed new form of extended arrestment) is and would be borne by the employer. The debtor's liability would be increased to some extent, however, if our proposals for employers' fees for operating extended arrestments were implemented; (see Memorandum No.49, paras.2.110-2.111). The other form of continuous diligence against earnings which we discuss above (viz, earnings transfer orders) would be more expensive than either arrestments or extended arrestments.

[2] Memorandum No.49, paras.2.35-2.39.

[3] Memorandum No.48, paras.3.12-3.15.

mainly from the standpoint of consumer debtors. Against the proposition, it has been represented to us that debtors often have only themselves to blame: the smaller the debt, the less justification for non-payment. Moreover, in many consumer debt cases the increase in the debtor's liability is often somewhat theoretical since, unless the debtor has arrestable funds or property, the poinding creditor is often in practice compelled to write off the debt.[1] Furthermore, at present, a debtor unable to pay a decree debt in full cannot prevent the diligence from proceeding except by bankruptcy proceedings, but our proposals for introducing new remedies for debtors would change this situation. A debtor unable to pay a small debt outright would be entitled to apply to the court for an instalment decree sisting diligence, and possibly a declarator of unenforceability,[2] so that it would only be in cases where the debtor did not avail himself of these remedies, or could not pay the debt and expenses in full, that the problem would arise. Finally, the criticism presupposes that relief for debtors from liability for the expense of diligence should be related to the size of the debt whereas it is arguable that such relief, if it is to be given at all, should be related to the debtor's need.

3.24 The contrary argument is that the debtor, whatever his means, should not be liable for the full cost of the diligence in relation to debts of small amount upon the view that such liability is penal in its effect. Because of differences in procedure it is difficult to make comparisons with execution against goods under county court warrants in England and Wales and under seizure orders made by the Enforcement of Judgments

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[1] Creditors are deterred from prosecuting the diligence to a warrant sale by the knowledge that the proceeds of sale would not cover the expenses of sale and, in any event, warrant of sale will not now be granted in such circumstances: moreover, a second poinding in the debtor's dwelling is not competent unless poindable goods have been brought on to the premises since the first poinding.

[2] See paras. 1.61 and 1.62 above.

Office in Northern Ireland. Nevertheless, at the earlier stages of the English county court execution procedure (viz before the expenses of uplifting, removal and sale have been incurred), the expenses appear to be less than in the Scottish system.[1] In Northern Ireland, an applicant for enforcement "buys" all modes of enforcement and the creditor cannot apply for enforcement against goods alone. Nevertheless, the scale fees are relatively low.[2] These comparisons may suggest that the cost of poinding procedures should be reduced at any rate in relation to small debts.

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[1] In the English county court execution procedure, a fee is chargeable to the creditor (recoverable from the debtor) at the time of issue of the warrant for execution based on the amount recoverable under the warrant. A warrant for execution cannot be issued for very small amounts: see para. 3.27, fn. 1 below. As at 1 September 1980, the scale fees were 15p in the £ with a minimum fee of £3.50 and a maximum fee of £25. Further fees are only incurred in the event of a removal. Fees are charged for removing the goods which vary but the supervising bailiff hires a van and does a round to collect goods on a number of warrants. The auctioneer is entitled to charge for the reasonable cost of advertisement; and to charge for appraising the goods (5p in the £ of the appraised value) and a sale or no-sale fee (15p in the £ on the amount realised and 10 p on the appraised value if the sale is stopped). If the sale is stopped after advertisement and appraisment, the fees for those stages are chargeable.

[2] The following table will enable a rough comparison to be made with the Scottish fee system:-

	£	£	£	£	£
Debt	20	50	100	250	500
English fee for warrant of execution*.....	3.50	7.50	15	25	25
Northern Ireland Enforcement fee*	6	15	30	66	78

(*as at 1 September 1980)

In addition, in Northern Ireland a creditor may be required to pay a small sum as "conduct money" for a debtor attending the Enforcement Office for a means examination.

3.25 If this conclusion is accepted, then there seem to be three possible legislative options, viz -

(i) to exclude enforcement by poinding and warrant sale in the case of debts of very small amount;

(ii) to limit the liability of the debtor to reimburse the creditor for the full cost of diligence in the case of decrees in the lower ranges of principal sums;

(iii) to introduce an Exchequer subsidy in relation to debts of small amount.

3.26 In terms of the first option, it might be provided that, where the principal sum in a decree for payment was less than a prescribed sum of small amount (say £10 or £20), then the warrant for diligence would not authorise enforcement of the decree by poinding and warrant sale, though it would still be competent to enforce the decree by other diligence.

3.27 It might be thought that this solution would prevent creditors from putting any pressure on debtors whose employer was unknown or who had no arrestable assets to induce them to pay debts below the prescribed amount and creditors might be deterred from extending credit to consumers where the price of the goods or services was below the prescribed limit for enforcement by poinding. On the other hand, there is a precedent for this in county court practice in England and Wales.[1]

3.28 In terms of the second option, the creditor would, as at present, require to pay the officer of court his diligence fees as determined by the relevant acts of sederunt. In the case of decrees in the lower ranges of principal sums, however, the creditor would only be entitled to recover from the debtor a proportion of the diligence expenses. The proportion would vary on a sliding scale with the amount of the debt: the smaller the debt, the smaller the proportion of the diligence expenses which would be recoverable by the creditor from the debtor. The maximum liability of the debtor would require to

[1] A county court warrant for execution cannot issue for debts under £10 (or one monthly instalment, or four weekly instalments, whichever is greater): County Court Rules 1936, Order 25, Rule 13(5).

be specified in the extract decree, so that the debtor was informed of the limits of his liability along with the state of the debt when he received the charge and so that the recovery of the diligence fees could be audited by the auditor of court.

3.29 We find it difficult to justify this option. If the underlying policy is to give, on social grounds, relief to consumer debtors in need, then it is difficult to see why such relief should be provided at the creditor's expense rather than the State's expense. Moreover, the size of the debt bears no necessary relation to the debtor's ability to pay; a debtor with small means may have a large debt, and conversely. There might, moreover, be practical difficulties in operating the system and the sliding scale would have to be continually updated to keep pace with inflation.

3.30 The third possible solution is an Exchequer subsidy. The present system operates with minimal direct charge to public funds. As already mentioned, if relief of the debtor's liability is based on social grounds, then the State rather than the creditor should bear the cost. The scale of subsidy required for "small debts" would depend inter alia on which stages of the diligence were subsidised, the level of subsidy, and how small debts were defined.

3.31 There are many different ways of providing subsidies. By way of illustrating the issues and possible scale of expenditure, it is estimated that, in order to limit liability for diligence expenses on consumer debts up to £200, to the levels shown in Table C overleaf, a subsidy of about £250,000 per annum (excluding administration costs) would be required, made up as follows -

charges	£72,000
poindings	£164,000
sales advertised	£16,000
sales executed	£3,000
	£255,000

TABLE C

Principal sum	Maximum diligence expenses which would be payable at each stage, the balance being paid by Exchequer subsidy			
	Charge	Poinding	Sale Advertised	Sale Executed
£10-49.99	£1 (10-2%)	£2 (20-4%)	£ 3 (30-6%)	£ 4 (40-8%)
£50-99.99	£2 (4-2%)	£4 (8-4%)	£ 6 (12-6%)	£ 8 (16-8%)
£100-199.99	£4.42 (4-2%)	£9.42 (9-5%)	£14.42 (14-7%)	£19.42 (19-10%)

Notes: (1) For simplicity, the scheme presupposes that debts under £10 would not be enforceable by poinding: few debts of that amount are in fact enforced by poinding.

(2) The sums due as expenses would be a percentage of the principal sum. The maximum and minimum percentages are shown in parenthesis in relation to each sum.

(3) Fees are assumed to be at the levels shown in Table B.

One result of the scheme would be that the diligence expenses payable on debts of over £200 would appear to be unduly high relative to the subsidised expenses. To avoid this result, it would be necessary to give the same subsidy to debts of £200 and over as are given to debts of just under £200. The scheme presupposes that the scale of use of diligence would be as in Table A (at page 22 above) but the very existence of the subsidy would be likely to increase the use of diligence. No account is taken of the amendments to poinding procedures in Memorandum No. 48. Thus, if warrants of sale were served by personal service or if sales were held in auction rooms, the scale fees would require to be changed, and the main element in

expenses at the later stages would be transport and auctioneers' fees. It would, however, probably not be appropriate to subsidise the later stages of the diligence having regard to the court's power to refuse warrant of sale. The subsidy scheme could be restricted to debts under £100 which would reduce the subsidy for poindings from £164,000 to £110,000 per annum or restricted to debts under £50 which would reduce the subsidy to £57,000 per annum. In addition, there would be administration costs. The scheme could be adjusted in other ways.

3.32 While we have not costed the alternative system of salaried officers within the Scottish Court Service (see Part IV below), subsidising the independent contractor system would be likely to cost substantially less.

3.33 If the case for an Exchequer subsidy rests on social grounds, then it should arguably be available only to debtors and should be related to debtors' financial circumstances rather than the size of the debt. But a subsidy on these lines would certainly be expensive to administer and probably impracticable.

3.34 To sum up, (1) views are invited on whether special provision is needed to reduce the expense incurred by creditors and ultimately debtors for diligence in respect of debts of small amount. (2) Should provision be made excluding enforcement by poinding and warrant sale (but not arrestment or other diligence) in the case of debts not exceeding a small amount (say £10) to be prescribed by statutory instrument? (3) If it is thought that provision is needed to reduce the liability of the debtor or creditor for the expenses of diligence, then views are invited on whether such provision should take the form of -

(a) a limitation on the creditor's right to recover the full amount of the diligence expenses from the debtor; or

(b) an Exchequer subsidy for the particular stages of the diligence (eg up to the stage of application for warrant of sale).

(b) Expenses of diligence in the remote areas

(i) Scarcity of officers in remote areas and mileage charges

3.35 The difficulties of enforcing decrees by diligence in the remote areas arise because of the scarcity of resident officers of court in those areas, combined with the fact that the distances to be covered inflate the mileage charges which are an important element in the fees of officers in respect of stages in diligence requiring a visit by the officer to the place of execution.[1]

3.36 There have been two attempts to solve the problems of enforcement in the remote areas viz. the Execution of Diligence (Scotland) Act 1926 and the Remote Areas Diligence Payments Scheme (RADPS) established in 1959. The provisions of that Act and Scheme are outlined in Appendix E. The 1926 Act as amended provides inter alia for the service by registered/recorded delivery letter of summary cause arrestments and for summary cause charges where the place of execution is in the islands, or a county with no resident sheriff officer, or more than 12 miles from the court granting the decree. The RADPS

[1] Viz. arrestments and charges on Court of Session or sheriff court ordinary action decrees, which cannot be served by post, and poindings and warrant sales on all decrees which always require the attendance of officers of court, witnesses and, in the case of sales, auctioneers.

provided, in implement of the McKechnie Report's proposals, a scheme for subsidising mileage charges where the place of execution was 30 miles from the nearest officer's place of business or so situated as to require an overnight stay.

3.37 The McKechnie Committee saw enforcement in the remote areas as the major problem with which they had to deal. Views differ as to how acute the problem is today. It has been represented to us that although diligence in the remote areas still presents problems, it is no longer a major problem largely in view of the improvements in communications over the past two decades: reference may be made to the absence of complaint to the Grant Committee.[1] But the Law Society of Scotland made representations to the Secretary of State in 1968 and to ourselves concerning the difficulties of the remote areas[2], and it is clear that there are delays in executing diligence since officers of court can only execute diligence economically in these areas if they execute several diligences on one journey.

3.38 There is still a scarcity of officers in the remote areas. The map on page 91 shows the distribution of sheriff officers' places of business in Scotland. It will be seen that there is a spread of such businesses throughout Central Scotland, and to a lesser extent in Tayside, the Borders and the South West. The Sheriffdom of Grampian, Highland and Islands is served by officers with places of business at Aberdeen, Elgin and Inverness. There is also one sheriff officer nearby in Dalmally (North Strathclyde). Officers in some of the large city-centred firms hold commissions in Grampian, Highland and Islands. Since mileage charges are reckoned from the nearest court house or officer's place of business, whichever distance is shorter, the creditor and debtor are not prejudiced by this.

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[1] See Report of the Departmental Committee on the Sheriff Court (1967) Cmnd. 3248, paras. 638-650.

[2] See Appendix E, para. 6.

3.39 There is, however, no sheriff officer's or messenger's business north or west of the Caledonian Canal. In the north west Highlands and Islands, therefore, distances of 50 miles, in theory at least, are not unusual distances for an officer to travel.

3.40 It may be conceded that, in practice, the problem is made less acute by the fact that there are fewer occasions in the remote areas on which debt actions are raised and diligence executed.[1] It may be that this reflects either a lower incidence of indebtedness in the remote rural areas, or the unwillingness of creditors to raise debt actions because of the high expenses which they might be required to meet to enforce them. It may also be conceded that, notwithstanding the latter possibility, there is no evidence to suggest that the major organisations extending credit restrict the giving of credit to customers in the remote areas, but the C.R.U. Creditors Survey will, we hope, yield further information on this matter.

3.41 It does appear, on the other hand, that debtors in the remote areas are liable to pay higher diligence expenses because the area in which they live is far from a sheriff court or officer's place of business, and that creditors may be prejudiced for extending credit to consumers in those areas.

(ii) Possible solutions

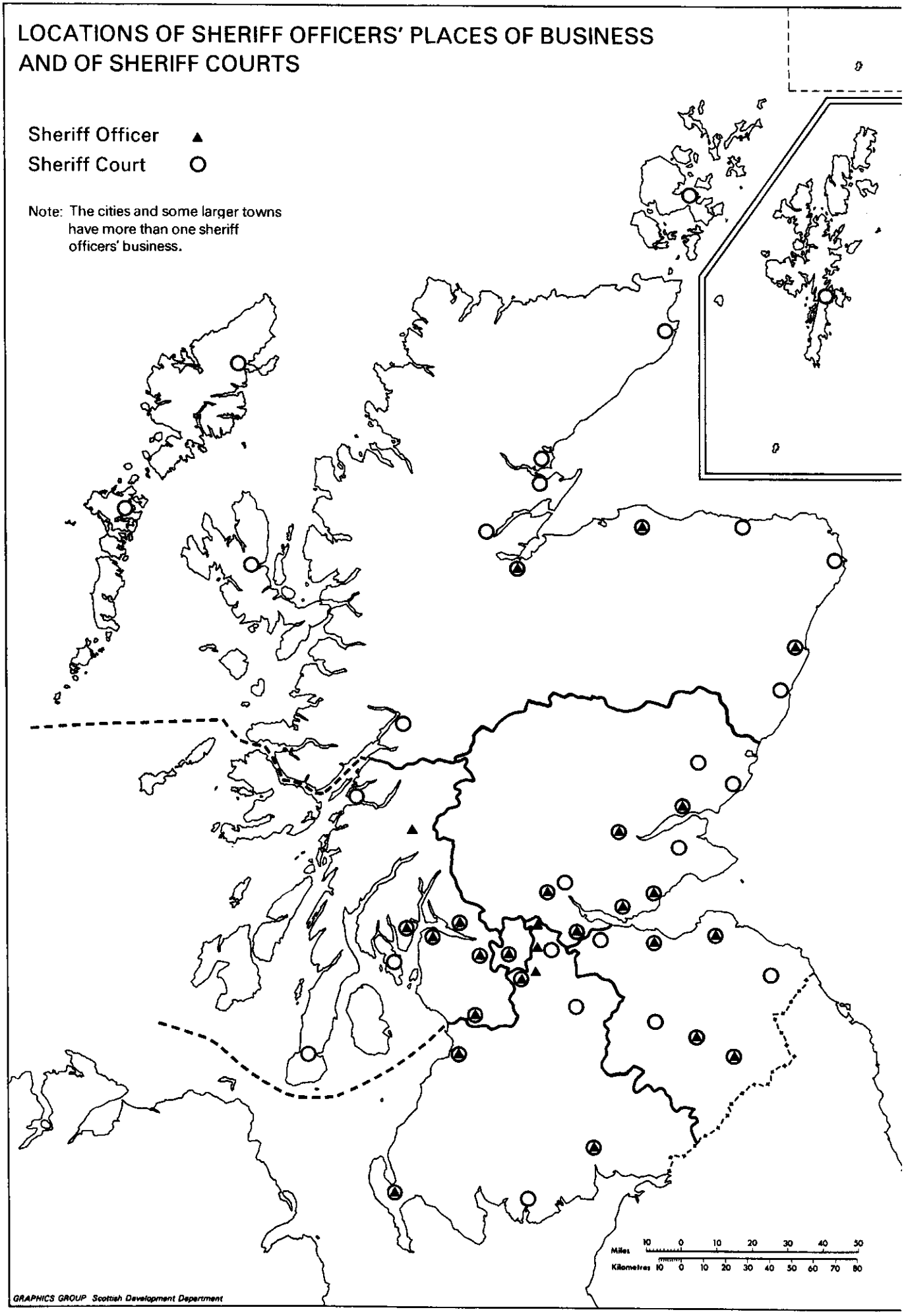
3.42 In some respects, our general proposals would help to solve the problem: as mentioned above, we suggest that all arrestments of earnings, and not merely those based on summary cause decrees, should be served by recorded delivery post.[2] Further, witnesses would not be required to personal service of arrestments[3]. In Memorandum No. 48, we suggest that where

[1] For example, in 1978, in the sheriffdom of Grampian, Highland and Islands there were 21 summary cause actions disposed of per 1,000 population as compared with 25 actions per 1,000 in Scotland as a whole and 39 per 1,000 in Glasgow and Strathkelvin (CRU Court Survey, Table 5A).

[2] Memorandum No. 49, paras. 2.35-2.39.

[3] Idem.

LOCATIONS OF SHERIFF OFFICERS' PLACES OF BUSINESS AND OF SHERIFF COURTS



personal service of a charge is executed, witnesses should not be required[1]. These proposals would save fees for mileage in the case of arrestments and charges.

3.43 One solution would be to extend the Execution of Diligence (Scotland) Act 1926, section 2(1)(b) (which relates only to charges on summary cause decrees), to allow postal service of charges on Court of Session and sheriff court ordinary action decrees where the place of execution is outwith the 12 mile limit or in the islands in terms of the section. Against this, it has been suggested that postal service of arrestments and charges might reduce still further the numbers of officers in the remote areas, so that in those areas it would become more difficult than at present to execute the stages (poindings and warrant sales) requiring visits by officers.[2] We think that this forecast is probably exaggerated.

3.44 The major problem, however, already relates to the stages of poinding and warrant sale rather than charges and arrestments[3] and our proposals for removal of poinded goods to auction rooms for sale might make that problem more acute by raising expenses to prohibitive levels. In Memorandum No. 48 therefore, we have sought views on whether the requirement of removal should be dispensed with in those areas in certain circumstances or an Exchequer subsidy made available for removal to auction rooms.[4]

3.45 Other solutions which have been suggested to us include (a) that all decrees should be lodged with the

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[1] Memorandum No. 48, paras. 3.12-3.15.

[2] See e.g. McKechnie Report, op. cit., para. 245.

[3] While an average of 34% of charges served proceed to poinding in Scotland as a whole, the proportion is only 27% in Grampian, Highland and Islands: see C.R.U. Diligence Survey, para. 6.5.

[4] Memorandum No. 48, paras. 5.30 and 5.40. It has been suggested to us that poindings and warrant sales in the remoter areas suffer from the disadvantage that the debtor's neighbours are unwilling to appear at sales in the debtor's home to bid for the poinded goods. The research studies, however, show that bad attendance at warrant sales is a nation-wide phenomenon.

sheriff clerk who would then instruct officers with a commission for the area on a rota basis so that the officers would have a number of decrees to enforce at one time:. (b) subsidising the removal of poinded goods to sale rooms in the nearest towns; (c) appointing sheriff clerks as enforcement officers; (d) recruiting suitable persons as state salaried sheriff officers resident within the jurisdiction of outlying sheriff courts; (e) the concession of 'annual fee grants' to officers in remote areas based on the numbers of cases dealt with (to encourage a quicker service); (f) giving retaining allowances for sheriff officers in remote areas; (g) introducing flat rate fees for each step in diligence involving travelling in a remote area, eg the excess mileage charges above a prescribed mileage being paid by the Exchequer; and (h) modification and simplification of the Remote Areas Diligence Payments Scheme. We suggest that the choice lies between the last two options.

3.46 Either of these options would require a special study by the competent authorities and we confine ourselves here to some general remarks. The first option is to introduce a flat rate fee in place of mileage charges where the place of execution of a poinding or warrant sale is a prescribed distance (say 10 miles) from the nearest sheriff court or officer's place of business. It is assumed that persons living within the 10 mile limit would pay the existing scale fee, and persons outwith that limit would pay the maximum fee due at 10 miles. The balance would be subsidised by the Exchequer.

3.47 About 513,000 persons (i.e. about 10 per cent of the Scottish home population) reside more than 10 miles from their nearest court.[1] In a single year, the diligence of charge poinding and warrant sale is initiated in about 10 cases per

[1] Population estimates based on the 1971 Census. There are three sheriff officer businesses in population settlements having no sheriff court, i.e. East Kilbride, Cumbernauld and Dalmally. Only Dalmally is outwith the 10 mile limit and since the population is small no account is taken of this in the calculations.

1,000 population;[1] that is to say about 5,000 debtors might be affected at the charge stage; 2,500 at the poinding stage; and 30 at the sale executed stage[2]. If an average additional distance of 50 miles is assumed (i.e. a total return journey of 120 miles), the costs of a subsidy for mileage above 10 miles from the court or officer's place of business might be as shown in the following Table:-

Table D

Service of Charge	All decree debtors	"Personal" debtors only**
5000 cases x 50 miles x 44* pence	= £110,000	£93,500
Poinding		
2500 cases x 50 miles x 44 pence	= £55,000	£45,650
Sale Executed		
30 cases x 50 miles x 44 pence	= £660	£508
TOTAL***	= £165,660	£139,658
	(say)	£140,000

Notes: *Return mileage rate (prescribed by act of sederunt) in force in September 1980.

**C.R.U. Diligence Survey estimates a ratio of 85% "personal" (i.e. non-business) debtors at charge stage and 15% commercial debtors; 83% and 17% respectively at poinding stage; and 77% and 23% respectively at sale executed stage.

***Administration costs are excluded.

[1]The C.R.U. Diligence Survey estimates that about 46,000 charges were served in Scotland in 1978; i.e. 9 per 1,000 population. This has been rounded up to 10 per 1,000 population for the purposes of the calculations.

[2]These fall-off rates are based on the C.R.U. Diligence Survey.

3.48 If the prescribed distance were 20 miles rather than 10,[1] then the subsidy might be about £29,000 for all debtors[2] and £25,000 for "personal" debtors, to which administration costs would be added.

3.49 If (as seems appropriate) postal service of charges were to be allowed as the normal mode of service when the relevant distance was more than 10 miles, (or 12 miles), then the subsidy would be largely limited to the poinding and warrant sale stages, viz £46,000 at 10 miles and about £10,000 at 20 miles. The subsidy might increase the numbers of cases in which diligence is executed in the remote areas, but any such increase would probably not be substantial.

3.50 As regards the second option, revision of the Remote Areas Diligence Payments Scheme, the main aim would be to make the procedure less complicated than it is at present.[4] We think that the Scheme should presuppose (as at present) that an officer will execute several diligences on one journey, and this suggests that responsibility for applying for the subsidy should be firmly imposed on officers of court, who are best placed to collate a number of decrees for execution, rather than solicitors or creditors.

3.52 To sum up -

(1) In addition to postal service of arrestments (proposed in Memorandum No. 49), it is suggested that the Execution of Diligence (Scotland) Act 1926, section 2(2)(b) (which provides for recorded delivery service on summary cause decrees where the place of

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[1] About 88,000 persons (2% of the Scottish home population) live more than 20 miles from their nearest court house. On this basis, there might be about 880 charges, 440 poindings and 10 sales to be subsidised.

[2] Viz. made up as follows: charge stage = £19,360; poinding stage = £9.680; sale executed stage - £220; a total of £29,260.

[3] Viz. made up as follows: charge stage = £16,456; poinding stage = £8,034; sale executed stage = £247; a total of £24,737.

[4] See Appendix E, paras. 5 and 6.

execution is in the islands, or 12 miles from the court granting decree etc) should be extended to Court of Session and sheriff court ordinary action decrees.

(2) Views are invited on whether provision should be made to reduce the fees exigible in respect of poindings or warrant sales executed more than a prescribed distance from the nearest court house or officer's place of business. Comments are sought on two alternative types of provision, namely:-

(a) a flat rate fee for the execution of diligence outwith the prescribed distance subsidised along the lines described at paras. 3.46-47; or

(b) the simplification and improvement of the Remote Areas Diligence Payments Scheme.

On balance, we think that the introduction of flat rate fees would be a preferable solution.

C. Diligence-related instalment settlements

3.53 Some debtors interviewed for the Edinburgh University Debtors Survey claimed that the creditor or debt collection agency pursuing their debts had instructed a stage in diligence notwithstanding that (in some cases) the debt had been paid in full or (in other cases) an arrangement for payment by instalments had been made and that the debtor was, as he alleged, complying with the arrangement. While the only evidence we have so far is based on these uncorroborated statements by debtors,[1] it seems likely that cases of this type do in fact occur from time to time: payments can be made to the "wrong" person or mistakes in accounting can be made.

[1] The debtors' statements were confidential and could not be corroborated or disproved by further investigations.

3.54 Where payment has been made in full, the debtor has, or may have, a remedy: an action of damages for wrongful diligence. We do not propose to examine that remedy in the present context.[1]

3.55 Where the debt is still not wholly paid and the debtor is complying with an arrangement to pay by instalments, the debtor's remedy depends on the law of voluntary obligations.[2] Where the creditor, in giving the debtor time to pay (by instalments or otherwise) has made a promise, or entered into an agreement, that he would not use diligence while the arrangement was being complied with, then, if diligence is used in breach of the promise or agreement, the debtor may obtain damages.[3] The promise or agreement may be express or implied. The mere statement by the creditor, however, of an intention not to use diligence will not infer an obligation to refrain from diligence unless the creditor showed that he meant to be bound by the statement.[4] In the absence of an express promise or agreement by a creditor not to use diligence while an instalment arrangement was being complied with, it would often be difficult for the courts to infer, from the arrangement, a binding obligation on the creditor's part to refrain from diligence.

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[1] The orthodox view is that the creditor is not liable for a mere mistake in instructing diligence; the debtor must aver and prove malice and want of probable cause: see Gloag and Henderson, Introduction to the Law of Scotland (8th edn.) p.553. But payment in full of a debt and expenses due under a decree operates as implement of the decree and the diligence thereafter is, strictly speaking, diligence executed without warrant which normally attracts strict liability. The basis of liability for wrongful diligence appears to require clarification, and there may be a case to consider for basing liability on the wider ground of negligence rather than the narrower ground of malice and want of probable cause. We shall revert to this matter in a later Memorandum.

[2] It appears unlikely that the debtor could rely on personal bar: a debtor is not normally prejudiced by paying a debt by instalments. Moreover, to rely on personal bar, the debtor would have to plead a representation as to a state of facts whereas an agreement to give the debtor time to pay is not a representation as to a state of facts.

[3] Cameron v. Mortimer (1872) 10 M. 461; Mackersy v. Davis & Sons Ltd (1895) 22 R. 368: it is unclear whether the basis of the action is contractual (breach of an express or implied term of the agreement) or delictual (the delict being the wrongful use of diligence

[4] Mackersy v. Davis & Sons Ltd, supra, at p.371.

3.56 It would we think be inappropriate to enact an inflexible rule whereby an agreement or promise to give time to pay by instalments should always infer an obligation on the creditor's part to refrain from using diligence so long as the instalments were being duly paid. Such a rule might be restricted to consumer debt, but apart from that, there might be consumer debt cases where such a rule would have the effect that the creditor giving time would be shut out by the diligence of a swifter creditor, or lose the preference which he had obtained by a prior poinding.[1] If, on the other hand, creditors could "contract out" from such a rule, then debt collection agencies and other organisations making instalment arrangements with consumer debtors would be likely to make a practice of contracting out in all cases. Moreover, the need for the rule may be less if debtors have the opportunity to object to warrant of sale and the sheriff can refuse warrant on equitable grounds, and if advertisements publicising indebtedness are virtually abolished.[2] Nevertheless, a debtor complying with an instalment arrangement will be justifiably aggrieved if a debt collection agency presses on with an arrestment or poinding and some legislative provision seems desirable.

3.57 Views are invited on the following -

(1) Should it be an implied term of any agreement or promise by a creditor to accept payment of a debt by instalments that the creditor waives the right to proceed with diligence for so long as the instalments are paid.

(2) Should the creditor be entitled to "contract out" of any such implied waiver by an express provision, in the promise or agreement, that he reserves the right to proceed with diligence notwithstanding compliance with instalment arrangements?

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[1] Priority between competing poindings depends on priority of the warrant sale: see Graham Stewart, op.cit., p. 366.

[2] See our Memorandum No. 48.

(3) Should the court be expressly empowered to refuse warrant of sale if a prior charge, poinding, or application for warrant of sale had been proceeded with notwithstanding that the debtor was complying with an arrangement for payment by instalments?

(4) Should the foregoing proposals be restricted to consumer debt cases?