

SCOTTISH LAW COMMISSION
THE EFFECT OF THE EXECUTION OF
DILIGENCE ON THE OPERATION
OF PRESCRIPTION
CONSULTATION PAPER

April 1990

SCOTTISH LAW COMMISSION
THE EFFECT OF THE EXECUTION OF
DILIGENCE ON THE OPERATION
OF PRESCRIPTION
CONSULTATION PAPER

April 1990

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

The Commission would be grateful if comments on this Consultation Paper were submitted by 30 June 1990. All correspondence should be addressed to:-

Mrs L A Lilleker
Scottish Law Commission
140 Causewayside
Edinburgh
EH9 1PR

(Telephone: 031-668 2131)

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

**THE EFFECT OF THE EXECUTION OF DILIGENCE ON THE
OPERATION OF PRESCRIPTION**

Contents

	<u>Para</u>	<u>Page</u>
<u>Part I - Introduction</u>		
Background	1.1	1
Scope of Discussion Paper	1.9	4
 <u>Part II - The effect of the execution of diligence on the operation of the twenty year long negative prescription</u>		
Introduction	2.1	7
Categories of Diligence Involved	2.4	8
(i) Diligences executed only in relation to moveable property		
(a) Arrestment (General)	2.5	9
(b) Earnings arrestments	2.9	11
(c) Poining	2.11	12
(ii) Diligences executed only in relation to heritable property		
(a) Inhibition	2.14	14
(b) Adjudication	2.17	15
(iii) Diligence which may affect the debtor's heritable or moveable property		
Confirmation of executor- creditor	2.23	19
 Options for Reform		
The First Option	2.27	21
The Second Option	2.29	22
The date when diligence will commence to operate	2.34	23
The date when diligence ceases to have effect	2.38	26

Contents (cont'd)

	<u>Para</u>	<u>Page</u>
Further comments on the Second Option	2.43	31
(i) The consequences of sequestration/liquidation on the execution of diligence	2.46	31
(ii) Where the creditor's claim is not fully satisfied by the execution of diligence	2.49	33
Summary of Second Option	2.51	33
Conclusions	2.52	35
<u>Part III - Miscellaneous Diligences - the effect of the execution of these diligences on the operation of prescription</u>		
Introduction	3.1	37
Poinding of the Ground	3.4	38
Maills and Duties	3.7	40
Sequestration for rent	3.10	41
Arrestment <u>in rem</u>	3.14	43
The effect of the execution of such miscellaneous diligences under current law on the operation of prescription	3.17	45
Proposals for reform	3.21	46
<u>Part IV - Summary of Provisional Proposals</u>		52

THE EFFECT OF THE 'EXECUTION OF DILIGENCE' ON THE OPERATION OF PRESCRIPTION

Part I Introduction

Background

1.1 In terms of the Prescription and Limitation (Scotland) Act 1973 ('the 1973 Act') the making of a 'relevant claim' by or on behalf of the creditor for implement or part-implement of an obligation serves to interrupt the running of the two, five and twenty year negative prescriptions.¹

1.2 A "relevant claim" is defined by section 9 of the 1973 Act.² Briefly it covers a claim made in any competent court proceedings (except proceedings in the Court of Session initiated by a summons which is not subsequently called); in an arbitration in Scotland, or in another country providing the arbitral award is enforceable in Scotland; by the presentation of or the concurring in a petition for sequestration or liquidation; by lodgment with a trustee appointed by the court in sequestration proceedings or by the debtor under a voluntary trust deed for creditors,³ or with a liquidator; and by executing diligence directed to the enforcement of the obligation.

1.3 In our Report published in 1970 on the Law Relating to Prescription and Limitation of Actions⁴ we intended that the

¹ S 6(1)(a) of the 1973 Act with regard to the five year short negative prescription; s 8A(1)(a) with regard to the two year short negative prescription; and s 7(1)(a) with regard to the twenty year long negative prescription.

² As amended by the Prescription (Scotland) Act 1987.

³ The trust deed for creditors is defined in s 5(2)(c) of the Bankruptcy (Scotland) Act 1985.

⁴ Scot Law Com No 15, para 99.

effect of the interruption of prescription by the making of a 'relevant claim' "would be that the prescription would commence anew as from the date of the interruption". Judicial dicta in the British Railways Board v. Strathclyde Regional Council¹ and George A Hood and Co v. Dumbarton District Council² raise doubts, however, that this objective has been achieved by sections 6, 7 and 8A of the 1973 Act which provide that if an obligation has subsisted for a continuous period of two, five or twenty years (as the case may be) without any 'relevant claim' having been made in relation to the obligation then as from the expiration of that period the obligation shall be extinguished.

1.4 Accordingly in our Consultative Memorandum on Prescription and Limitation of Actions (Latent Damage) (The Memorandum) published in September 1987³ the opportunity was taken once again to consider as a matter of policy what effect the making of a 'relevant claim' should achieve on the running of the prescriptive periods, and five possible options were put forward for consideration. The aim was to identify the option which secured an equitable balance between the interests of the creditor, who seeks sufficient time in which to enforce his claim, and those of the defender who wishes a limit placed on the time during which his obligation to account can be enforced.

1.5 After consultation the Commission decided to recommend adoption of the Fifth Option referred to in the Memorandum (subject to one qualification relative to arbitration and

¹ 1981 SC 90.

² 1983 SLT 238.

³ Consultative Memorandum No 74 - see paras 6.42 - 6.80.

insolvencies).¹ This Option offered a different approach from that achieved by the other four options in working out the effect of the making of a 'relevant claim' during a prescriptive period - the effect being to extend in certain circumstances, rather than to interrupt or suspend, the running of that period.

1.6 The formula provides that if a 'relevant claim' has been made during but has not been disposed of finally by the end of the prescriptive period, the obligation to which the claim relates will not be extinguished under this Option until the claim is finally disposed of or abandoned.² As we point out in our Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues) ('our Report') this Option, in contrast to what is believed to be the position under the present law, improves the defender's position by reducing the period during which his obligation to account can be enforced, and at the same time provides the claimant with the opportunity to pursue his claim beyond the prescriptive period providing it is started off during that period.³

¹ Paras 6.69 - 6.71 of the Memorandum and see Recommendations 24, 26 and 28 in our Report on Prescription and Limitation of Actions (Latent Damage and other related issues) (Scot Law Com No 122) published subsequent to Consultative Memorandum No 74 in October 1989.

² A similar formula is already adopted in relation to the defective products scheme under the Consumer Protection Act 1987 - see Sched I Pt 2.

³ See para 4.45 of our Report.

1.7 An attempt to apply the Fifth Option formula, however, to the execution of diligence gave rise to difficult policy issues - issues which we had not specifically consulted upon in the Memorandum. Such issues arise not only in relation to applying the Fifth Option formula to the various kinds of diligence which are competent - for example, in relation to each type of diligence identifying when the claim has been made and finally disposed of -, but also in deciding whether we can justify adopting the Fifth Option in a situation where diligence is executed to enforce a decree of court, an arbitration award or an order of a tribunal or authority.

1.8 In the circumstances the decision was taken to recommend in our Report the application of the Fifth Option formula only in relation to a claim made in court, arbitration, sequestration or liquidation proceedings, or under a voluntary trust deed for creditors, but not in relation to the execution of diligence.¹ The objective was to consider in a separate exercise what effect the execution of diligence should have upon the operation of prescription. Accordingly the purpose of this Consultation Paper is to examine this issue.

Scope of Discussion Paper

1.9 As Graham Stewart indicates at the beginning of his treatise on the "Law of Diligence"² diligence has been defined as "the legal procedure by which a creditor attaches the property or person of his debtor, with the object of forcing him either (1) to appear in court to answer an action at the creditor's instance,³ or (2) to find security for implement of the judgment which may be

¹ This was achieved in the Bill annexed to our Report by excluding from the s 9 definition of 'relevant claim' - 'the execution of diligence'.

² p 1.

³ An arrestment to found jurisdiction for the purpose of instituting court proceedings against the defender.

pronounced against him in such an action,¹ or (3) to implement a judgment already pronounced".²

1.10 As the institution of a court action already constitutes a 'relevant claim' within the meaning of section 9 of the 1973 Act and, under our proposals for reform referred to above, will extend the running of a prescriptive period, we do not consider that the execution of diligence to found jurisdiction, or on the dependence of a court action, should affect the operation of prescription.

1.11 Accordingly this Consultation Paper is primarily concerned with what effect the execution of diligence should have upon the running of prescription after a court decree, arbitration award, or an order of a tribunal or some other statutory authority has been granted. As an obligation to recognise or obtemper a court decree, award or order is subject to the twenty year long negative prescription³ the main function of this Paper is to examine what effect the execution of diligence should have on this prescriptive period. Part II of this Paper examines this issue.

1.12 We consider very briefly in Part III of this Paper certain miscellaneous diligences which are used very infrequently in practice, and do not fit easily into the above categories of diligences. These diligences are the diligence of poinding of the ground, maills and duties, an arrestment in rem of a ship or her cargo in an Admiralty action in rem, and the landlord's sequestration for rent.

¹ The execution of diligence on the dependence of a court action.

² The execution of diligence to enforce a decree of court.

³ See s 7 and Sched 1 para 2(a) of the 1973 Act.

1.13 For the purposes of this Paper we propose to adopt the following definition of "a decree of court". A decree of court includes -

- (i) an extract of a document which is registered for execution in the Books of Council and Session or in sheriff court books;
- (ii) a summary warrant granted under or by virtue of any of the enactments mentioned in Schedule 4 to the Debtors (Scotland) Act 1987; and under or by virtue of Schedule 2 paragraph 7 of the Abolition of Domestic Rates Etc (Scotland) Act 1987 (as amended by Schedule 12 paragraph 36(9) of the Local Government Finance Act 1988)¹;
- (iii) an order or determination which by virtue of any enactment is enforceable as if it were an extract registered decree arbitral bearing a warrant for execution issued by the sheriff;
- (iv) a civil judgment granted outside Scotland by a court, tribunal or arbiter which by virtue of any enactment or rule of law is enforceable in Scotland.
- (v) a document or settlement which by virtue of an Order in Council made under section 13 of the Civil Jurisdiction

¹ S 17(11) of the Abolition of Domestic Rates Etc (Scotland) Act 1987 provides that civil penalties are to be recovered as if they were arrears of community charges.

and Judgments Act 1982 is enforceable in Scotland.¹

Part II The effect of the execution of diligence on the operation of the twenty year long negative prescription

Introduction

2.1 Section 7 of the 1973 Act provides that if after the date when an obligation has become enforceable it has subsisted for a continuous period of twenty years without any 'relevant claim' having been made in relation to the obligation then as from the expiration of that period the obligation shall be extinguished.

2.2 It is thought, but it is by no means certain,² that under current law the making of a 'relevant claim'³ interrupts and brings to an end the prescriptive period, and starts the running of a new twenty year period. Accordingly where, for example, diligence has been executed in order to enforce a decree, the creditor is given another twenty years in which to seek full satisfaction of his claim against the debtor. It is not clear, however, whether the new twenty year period starts to operate immediately the diligence is executed, or only after it has ceased to have effect.

¹ This definition is based on the definition provided in Sched 1 para 11(c) of the Prescription (Scotland) Bill annexed to our Report, updated to incorporate a reference to summary warrants granted by virtue of Sched 2 para 7 of the Abolition of Domestic Rates etc (Scotland) Act 1987.

² See para 1.3 above.

³ Which includes 'the execution of diligence' - see para 1.2 above.

2.3 Before formulating our options for reform it may be useful to make the point at this stage that a debtor's monetary obligation under a decree, order or award will normally have been discharged, or alternatively written off, long before the end of the twenty year period. Circumstances can, of course, be envisaged, where a creditor is obliged to enforce his decree shortly before the end of the prescriptive period - for example, where the debtor has disappeared abroad after decree is granted and is only traced after many years, or where at the time decree is granted it is discovered that he has no assets, and some time later he inherits an estate on the death of a relative. These circumstances, however, are likely to occur infrequently. As we are, therefore, only concerned in this part of the Consultation Paper with the few cases where the debtor's obligation is still outstanding twenty years after decree etc has been granted it would seem preferable if a fairly simple solution could be found for the problem under consideration. At the same time, however, any recommendations for reform should endeavour, as indicated above,¹ to secure an equitable balance between the interests of the claimant, who seeks sufficient time in which to enforce his claim, and those of the defender, who wishes a limit placed on the time during which his obligation to account can be enforced.

Categories of Diligence Involved

2.4 Before examining, however, what effect, if any, the execution of diligence should have upon the running of the twenty year long negative prescription after a court decree, award or order has been granted, we think that it would be helpful to identify, first of all, the main categories of diligence involved.

¹ See para 1.4 above.

(i) Diligences executed only in relation to moveable property

(a) Arrestment (General)

2.5 Arrestment is the diligence appropriate for the attachment of moveable property (corporeal and incorporeal) belonging to the debtor. With the exception of the arrestment of a ship, referred to in paragraph 2.6 below, which adopts a different procedure from that outlined in this paragraph, the arrestment of the debtor's moveable property must be served on a third party. Although the effect of an arrestment is to prohibit that third party ('the arrestee') from parting with the subjects arrested, it is an incomplete diligence, in that the arresting creditor does not acquire a real right to the arrested property or the proceeds of sale thereof until he has obtained a decree in an action of furthcoming¹ raised against the arrestee and the debtor (normally referred to as 'the common debtor').

2.6 An arrestment of a ship, on the other hand, differs from other arrestments in that there is no arrestee - the diligence being directed against the vessel itself even although it is in the possession of the defender at that time. The arrestment is executed by affixing the schedule of arrestment to the mast or main mast (or some other prominent part of the ship if there is no mast), and chalking the Sovereign's initials "ER" above it.² The diligence is completed by a process of sale rather than by an action of furthcoming.

¹ Where money has been arrested the pursuer's plea-in-law will be that he is entitled to have the same made furthcoming so far as necessary in satisfaction of his debt. Where goods have been arrested the plea-in-law will be that he is entitled to have the same made furthcoming and realised so far as necessary in satisfaction of his debt.

² Graham Stewart The Law of Diligence, p 41.

2.7 An arrestment is generally said to impose a nexus which gives a preference in processes of ranking, and consequently has effects beyond (a) prohibiting the arrestee from parting with the arrested property and (b) in the case of a ship, fixing or immobilising the ship in the place where she is located at the time of the execution of the arrestment. In relation to the arrestment of debts however (as opposed to corporeal moveables) the term nexus must have a special meaning because an arrestment of a debt does not impose a nexus on any particular funds in the arrestee's hands. The debt is payable out of the arrestee's general funds which are not laid under any embargo. He must simply find the money to make it furthcoming when the time for payment arrives.

2.8 An arrestment (other than an arrestment of a ship) will cease to have effect if it is not followed by an action of furthcoming within three years from the date of the arrestment.¹ It may also be recalled by the court or by the creditor.² An arrestment will be "reduced"³ by the subsequent sequestration/liquidation of the debtor's estates within 60 days of the arrestment.⁴ It will be ineffective against a floating charge which has attached to the assets of the debtor company by the appointment of a receiver.⁵

¹ Debtors (Scotland) Act 1838, s22 which refers to the 'prescription' of an arrestment within three years.

² Graham Stewart The Law of Diligence, p195.

³ ie rendered ineffectual in a question with the trustee or liquidator.

⁴ S 37 of the Bankruptcy (Scotland) Act 1985 ('the 1985 Act') and s 185 of the Insolvency Act 1986 ('the 1986 Act'). The creditor will have a preference for certain expenses incurred by him from the arrested estate or the proceeds of sale thereof.

⁵ See Lord Advocate v Royal Bank of Scotland 1977 SC 155.

(b) Earnings arrestments

2.9 This form of diligence effected against the earnings of a debtor was introduced by Part III of the Debtors (Scotland) Act 1987 ('the 1987 Act').¹ It is preceded by a charge to pay within a specified period.² On the expiry of the charge without payment an earnings arrestment schedule is served upon the debtor's employer requiring the employer to deduct a sum from the debtor's net earnings on each pay-day occurring after service and to pay it to the arresting creditor. Unlike the arrestment referred to above it operates as a completed diligence in that no further steps (such as raising an action of furthcoming) require to be taken by the creditor, and it continues until the debt is paid unless for some reason it ceases to have effect before then - for example where the debtor's employment with that employer has come to an end; the creditor recalls the arrestment; or the debtor's estate is sequestrated.³

2.10 Where another creditor or creditors seek to arrest the same debtor's earnings the 1987 Act introduces a way of sharing out 'the fruits of diligence' by means of a conjoined arrestment order.⁴ The second creditor who seeks to arrest the debtor's wages applies to the sheriff for such an order, which, if granted,

¹ Ss47-50. The 1987 Act also introduced current maintenance arrestments, but as they only involve each maintenance payment as it falls due, we do not think it is necessary for the current exercise to examine the procedures involved.

² 14 days if the person on whom it is served resides in the United Kingdom and 28 days if he is outside the United Kingdom or his whereabouts are unknown - s90(1) and (3) of the 1987 Act.

³ S72 of the 1987 Act.

⁴ S. 60 of the 1987 Act.

comes into effect 7 days after a copy of it has been served upon the employer, on the debtor, and on the creditor in an earnings arrestment or current maintenance arrestment. A conjoined arrestment order recalls any prior earnings arrestment or current maintenance arrestment.¹ In terms of the order the employer remits the deductions made from the debtor's earnings to the court, which in turn apportions them between the conjoined creditors.² A conjoined arrestment order remains in force until a copy of an order recalling the order is served on the employer or the debtor ceases to be employed by him.³ A recall may be made where the sheriff is satisfied that the order is invalid, the debts paid, or the debtor's estate has been sequestrated.⁴ A creditor may apply to be included in a conjoined arrestment order, and if the application is granted, his inclusion will come into effect 7 days after a copy of the variation of the order is served upon the employer.⁵

(c) Poin ding

2.11 A poin ding is the appropriate diligence for the attachment of corporeal moveables belonging to the debtor which are in his possession, and requires to be preceded by a charge for payment.⁶ It imposes a nexus which gives a preference in processes of ranking. Once again a poin ding is an incomplete diligence, and to secure for the creditor the proceeds of sale of the poin ded goods, or the goods themselves in default of sale, a warrant of sale of

¹ S 60(3)(a) of the 1987 Act.

² Ss 60(3)(b) and 64 of the 1987 Act.

³ S 60(5)(b) of the 1987 Act.

⁴ S 66 of the 1987 Act.

⁵ S 62(5) and (7) and S 69(2) of the 1987 Act.

⁶ S90(1) of the 1987 Act.

the poinded goods must be obtained from the sheriff and duly put into effect.¹ The poinding creditor only obtains a real right of ownership in the poinded goods if they are adjudged and delivered to him in default of a warrant sale.

2.12 A poinding ceases to have effect one year after the date of its execution unless during that period a warrant of sale in relation to the poinded articles has been applied for, or the sheriff has authorised an extension of the one-year period.² A poinding may also be declared invalid, or recalled, by the sheriff,³ withdrawn by the creditor, or "reduced" by the subsequent sequestration/liquidation of the debtor's estates.⁴ It will also be ineffective against a floating charge which has attached to the assets of the debtor company by the appointment of a receiver.⁵

2.13 The poinding procedure required to enforce summary warrants for the recovery of arrears of non-domestic rates and taxes is laid down under Schedule 5 to the 1979 Act, and for the recovery of arrears of community charges (including civil penalties for failure to provide the necessary information for registration purposes)⁶ under Schedule 2 of the Abolition of Domestic Rates etc (Scotland) Act 1987. The following are the main differences in this more expedited procedure from that operated under an ordinary poinding. The poinding is not preceded by a charge for payment; no report of the poinding or subsequent sale requires to be made to the sheriff; and no application for a warrant of sale

¹ For procedure governing warrant sales - see ss30-39 of the 1987 Act.

² S27 of the 1987 Act.

³ S24 of the 1987 Act.

⁴ See footnote 4 on page 10.

⁵ See Lord Advocate v Royal Bank of Scotland 1977 SC 155.

⁶ See s 17(11) of the Abolition of Domestic Rates Etc (Scotland) Act 1987.

is needed as such a warrant is already included in the summary warrant.

(ii) Diligences executed only in relation to heritable property

(a) Inhibition

2.14 An inhibition is effected by presenting to the Petition Department of the Court of Session a Bill for Letters of Inhibition together with the Sheriff Court or Court of Session decree granted against the debtor. The signed Letters are then served on the debtor and thereafter the Letters, with a Certificate of Execution endorsed thereon, are registered in the Register of Inhibitions and Adjudications. The Inhibition is effective as from the date of registration.¹

2.15 An inhibition is not a complete diligence and has been described as a 'prohibitory and preventive' diligence.² It affects all heritage owned by the debtor, whether or not he has completed title to it.³ Its effect is to prohibit the debtor from granting future voluntary deeds to the inhibitor's prejudice, and consequently strikes at any future sale of, or the granting of a heritable security over, property belonging to the debtor at the time the inhibition becomes effective.⁴ It also strikes at debts "contracted" after the effective date of the inhibition. An inhibition does not impose a nexus or create a real right in the nature of a security right. Rather it gives the inhibitor a right to reduce deeds violating the inhibition and a right in any process

¹ Before service of the Letters a Notice of Inhibition may be registered in the Register of Inhibitions and Adjudications and providing the duly executed Letters of Inhibition are subsequently registered within 21 days of the registration of the notice, the inhibition takes effect from the date of registration of the notice.

² Professor W A Wilson - The Law of Scotland Relating to Debt p236.

³ Dryburgh v Gordon (1896) 24 R 1.

⁴ It does not affect heritable property acquired by the debtor after the date of registration of the inhibition.

of ranking on the debtor's heritable estate to draw such a dividend as he would have drawn if post-inhibition debts had not been contracted and post-inhibition voluntary deeds had not been granted.

2.16 An inhibition ceases to have effect on the lapse of five years from its effective date.¹ An inhibition may also be recalled by the court if it is satisfied that in the circumstances its use is oppressive² or where the debt in respect of which the inhibition is used has been repaid and the creditor has omitted to clear the record by registering a discharge of the inhibition. It may be "reduced" by the subsequent sequestration/liquidation of the debtor's estates³ and will be ineffective against a floating charge which has attached by the appointment of a receiver if granted after the date of the floating charge.⁴

(b) Adjudication⁵

2.17 An adjudication proceeds by way of an action of

¹ Conveyancing (Scotland) Act 1924, s44(3)(a) which provides that the inhibition prescribes on the lapse of five years.

² Mackintosh v Miller (1864) 2 M 452; Burns v Burns (1879) 7 R 355.

³ S 37 of the 1985 Act and s 185 of the 1986 Act.

⁴ See the Lord Advocate v The Royal Bank of Scotland 1977 SC 155. Armour and Mycroft, Petitioners, 1983 SLT 453 and Greene and Fletcher - The Law and Practice of Receivership in Scotland - paras 2.14, 2.15, 8.14 - 8.16.

⁵ We have put forward proposals for reform of the law applicable to adjudications in our Discussion Paper No 78 - Adjudications for Debt and Related Matters - published in November 1988. The current law, however, is referred to in this Discussion Paper.

adjudication raised in the Court of Session.¹ The summons identifies either all of the heritable properties belonging to the debtor or a portion of his estate sufficient to meet the debt due, and craves that such subjects shall be adjudged from the defender to the pursuer.² The decree, when granted, is recorded in the Register of Sasines (or presented to the Keeper of the Land Register), but although the creditor thus becomes infeft, he is infeft only in the nature of a heritable security. The adjudication, however, gives him the right to enter into possession of the subjects, and consequently to grant leases and receive rents so as to recover part, if not the whole, of his claim against the debtor. In the event of the creditor obtaining repayment of the debt in this manner the adjudication will be redeemed and the former debtor given repossession of his property. No reconveyance by the creditor of the adjudged subjects in these circumstances is necessary but the normal practice is for him to record in the Register of Sasines (or present to the Keeper of the Land Register) an appropriate discharge.

2.18 If the debt remains unpaid for a period of 10 years after decree of adjudication has been granted ('the legal') the creditor may convert his right to the subjects into one of absolute

¹ Note - With one exception an action of adjudication cannot now proceed on a liquid document of debt unless the debt has been constituted by a decree - see s 101 of the 1987 Act.

² Service of a summons of adjudication, if followed by the registration of a notice in a statutory form in the General Register of Inhibitions and Adjudications renders the subjects litigious, thus impliedly prohibiting voluntary alienation of the subjects by the debtor - Conveyancing (Scotland) Act 1924 s. 44. Such a notice prescribes after 5 years.

ownership ('foreclosure') by obtaining decree in an action for declarator of expiry of the legal. Graham Stewart in his treatise 'The Law of Diligence'¹ advises that a decree of declarator of the expiry of the legal does not extinguish the debt so that if the creditor is subsequently evicted from the whole or part of the lands adjudged his claim against the debtor revives to the extent of the loss sustained if the lands retained are not sufficient to meet the debt. He does suggest, however, that some take the view that the debt will be extinguished if the creditor sells the lands, or even if he merely continues in possession of the same² - a view which he does not support.

2.19 Where the creditor does not obtain a decree of declarator of the expiry of the legal he may still secure absolute ownership of the subjects by the operation of prescription, but as George L Gretton points out in his article 'Prescription and Foreclosure of Adjudications',³ fundamental problems exist as to how and when foreclosure occurs in this context - problems which were focused by the task of interpreting section 1(3) of the 1973 Act which provides that in the computation of the period of positive prescription for the purposes of section 1, "in a case where the deed in question is a decree of adjudication for debt, any period before the expiry of the legal shall be disregarded".

2.20 On the one hand Professor David Walker, in giving his interpretation of section 1(3),⁴ suggests (a) that if declarator of the expiry of the legal is obtained the ten year positive prescription runs from that time to cure any defect in the adjudger's title and on the expiry of the prescriptive period

¹ P660.

² P660 and footnote 2.

³ 1983/84 Juridical Review 177.

⁴ Law of Prescription and Limitation of Actions in Scotland (3rd. ed. 1981 p. 17).

provides the creditor with absolute ownership of the subjects but (b) if declarator is not obtained foreclosure is only achieved after the expiry of the long negative prescription of 20 years which begins to run from the time when the adjudger could have secured a decree of declarator. On the other hand Professor Wilson's view is that redemption by the debtor may be effected at any time until either a period of 10 years (the 'legal') has expired and the adjudger has obtained decree in an action of declarator of expiry of the legal or the legal has expired and possession for the period of 10 years of positive prescription has followed upon the date when a decree of declarator could have been obtained.¹

2.21 Accordingly although the view is taken that where the creditor omits to obtain a declarator of expiry of the legal he can secure foreclosure by prescription, the problem is whether the relevant prescription is the 10 year positive prescription or 20 year negative prescription. According to Mr Gretton's article this problem remains unresolved.²

2.22 Where a debtor is willing to discharge the balance of his debt, or considers that the debt has been extinguished during the creditor's possession of the adjudged subjects, he may, before decree of the expiry of the legal is obtained, seek a declarator of extinction of the adjudication, or of reduction and extinction, or of redemption, which if successful, will bring the adjudication to an end. Graham Stewart³ points out, however, that it may not be necessary to proceed with such a declarator to secure extinction -

¹ The Law of Scotland Relating to Debt 1982 p238 as further clarified by George L Gretton in his article p179.

² This problem is examined in our Discussion Paper No 78 - Adjudications for Debt and Related Matters - para 5.176 - and provisional proposals for reform are put forward in para 5.177 (Proposition 5.31).

³ The Law of Diligence p663.

the adjudication ex ipso falling where, for example, before the legal has expired the adjudger had intromitted with rents exigible from the adjudged subjects sufficient to discharge his claim. Where insolvency proceedings (sequestration or liquidation) are commenced within the period of a year and a day after the first effectual adjudication the adjudger's claim and the claims of other creditors adjudging within that period will rank pari passu with the claims of the unsecured creditors.¹ The diligence will be, in all probability, ineffective against a floating charge which has attached to the debtor company's heritable estate on the appointment of a receiver if the attachment takes place before decree of adjudication has been granted and recorded in the Register of Sasines (or registered in the Land Register), notwithstanding that a notice of litigiousity has been registered in the Register of Inhibitions or Adjudications in connection with the adjudication before that date.²

(iii) Diligence which may affect the debtor's heritable or moveable property

Confirmation of executor-creditor

2.23 Where a debtor dies and no executor has been confirmed, or an executor has omitted to confirm to part of the estate, a creditor is entitled to confirm to the deceased's heritable or moveable estate as an executor-creditor or to that part omitted from the confirmation, as the case may be. Confirmation as

¹ The Diligence Act 1661, the Adjudication Act 1672, s 37 of the 1985 Act and s 185 of the 1986 Act.

² See The Lord Advocate v The Royal Bank of Scotland 1977 S C 155. J A D H "Inhibitions and Company Insolvencies: a Contrary View" 1983 SLT (News) 177 (commenting on Gretton "Inhibition and Company Insolvencies" 1983 SLT (News) 145).

executor-creditor is a form of diligence which enables the creditor to satisfy his debt out of the debtor's estate, and must be preceded by a decree for the debt obtained during the debtor's lifetime.¹

2.24 The application for appointment is by the submission of a petition to the appropriate sheriff court (similar to that submitted for the appointment of an executor-dative), together with the decree. Immediately thereafter intimation is made in the normal manner on the walls of court, and the pursuer is ordered to publish notification of the application in the Edinburgh Gazette. To obtain confirmation a full and complete inventory of the estate must be given up notwithstanding that the confirmation applied for will in all probability be limited to assets sufficient to cover the amount of the debt. A bond of caution is required covering the whole amount of the deceased's estate, and not merely that amount to be confirmed, unless the sheriff otherwise directs.

2.25 The effect of confirmation is to confer upon the executor-creditor title to uplift and realise the deceased's assets identified in the confirmation for the purpose of discharging his claim. It creates a nexus on the assets which is limited by the amount of the debt and the value in the confirmation. The confirmation imposes a stronger nexus than that achieved with an arrestment or poiding. It secures a preference over (a) a prior arrestment which has not proceeded to a decree of furthcoming before confirmation is granted and (b) a prior poiding which has not resulted in a sale of the poided goods by that time.² There is

¹ Where the debt is not so constituted during the debtor's lifetime the creditor must raise an action against all the known heirs of the deceased for a decree cognitionis causa tantum (for the purpose of constituting a debt against the estate, not against the person).

² Graham Stewart The Law of Diligence pp 451-452.

a duty on the executor to ingather all of the assets disclosed in the confirmation and to account for any surplus available after the debt is discharged.

2.26 Where a deceased's estate is sequestrated or a judicial factor is appointed to administer his estate (in a case where the estate is absolutely insolvent) within 12 months after the debtor's death then, subject to the payment of certain expenses incurred by the creditor, no confirmation as executor-creditor on that estate will be effectual in a question with the permanent trustee or judicial factor.¹

Options for Reform

The First Option

2.27 As an obligation recognised by a decree, order or award, will in most instances have arisen some time before that decree etc is granted - except possibly in relation to constructive decrees or summary warrants² - it is arguable that a further period of twenty years calculated from the date of the decree should be regarded as long enough to enable the claimant to enforce the obligation.

2.28 Under this Option, therefore, the execution of diligence would not affect the running of the twenty year prescriptive period.

¹ S 37(9) of the 1985 Act.

² See definition of decree of court provided in para 1.13 above. For constructive decrees see also paras 6.103-6.104 of the Memorandum.

The Second Option

2.29 At first sight the First Option appears to be inconsistent with the approach adopted in our Report in relation to the effect which a 'relevant claim'¹ should have upon the operation of the twenty year long negative prescription in relation to all other obligations prescribable thereunder.² In our view, however, a distinction can be drawn between these obligations and an obligation to obtemper a decree, order or award. In relation to the former the twenty year period runs from the date the obligation first becomes enforceable. With regard to the latter, as indicated above, whereas the obligation will normally have become enforceable some time before decree is granted³, the creditor has, in addition to that period, a further twenty years from the date of the decree to enforce the obligation.

2.30 Having said that, however, it is arguable that if a creditor is in the process of enforcing a decree at the end of the twenty year period he should, at least, be allowed to complete the diligence in operation, before the obligation arising under that decree prescribes. To allow the obligation to prescribe while diligence is being executed may be regarded as unprincipled.

2.31 Accordingly the Second Option would adopt the formula already recommended in our Report, and referred to therein as 'the Fifth Option'. That formula, as indicated above,⁴ provides

¹ Redefined in the draft Bill annexed to our Report to exclude 'the execution of diligence'.

² See Recommendations 26 and 28 in our Report.

³ Except possibly where we are concerned with a constructive decree or a summary warrant.

⁴ See para 1.6 above.

that if a 'relevant claim' has been made during, but has not been disposed of finally by the end of, the prescriptive period the obligation to which the claim relates will not be extinguished until the claim is finally disposed of or abandoned.

2.32 Within the context of the execution of diligence this formula would operate on the basis that if by the expiration of the twenty year prescriptive period diligence has commenced but has not ceased to have effect, the obligation to comply with the decree of court, award or order will not be extinguished until that diligence ceases to have effect.

2.33 In order to ascertain how this Second Option would work out in practice we think that it would be helpful to identify at this stage in relation to each of the diligences referred to above when any such diligence (a) commences to operate and (b) ceases to have effect.

The date when diligence will commence to operate

2.34 When considering in legislation the time of commencement of the diligences referred to above, we had hoped to find one general formula for this purpose which could apply to all of them, thus avoiding the need to specify 'commencement' in relation to each category of diligence.

2.35 One possibility which came to mind in this context was to use the concept of diligence creating a nexus over the debtor's property. However, as indicated above,¹ an inhibition does not create a nexus, and moreover the concept of a nexus has, or may have, a different meaning in relation to arrestments of debts from

¹ See para 2.15 above.

that which it has in relation to corporeal subjects. Furthermore, the traditional concept of a nexus has not, or not yet, been applied to an earnings arrestment or conjoined arrestment order whose effects are governed by the 1987 Act in terms which do not invoke the concept of a nexus. Therefore the concept of a nexus, while useful in policy terms, cannot be the sole criterion for defining the 'commencement of diligence'.

2.36 The safest course is that the legislation should specifically identify, in relation to each diligence, the stage or step in the diligence which will be treated as 'commencement' for the purposes of the formula proposed under the Second Option.

2.37 On this basis, we would suggest, subject to consultees' views to the contrary, that any legislation introduced to implement the Second Option should identify the commencement date in relation to each diligence on the following lines:-

Arrestment (General) - the date of execution of the arrestment, being the date when the schedule of arrestment is served upon the arrestee; or where the arrestment is of a ship, when the schedule of arrestment is affixed to the mast or main mast (or some other prominent part of the ship if there is no mast) and the Sovereign's initials 'ER' chalked above it.

Poining - the date of execution of the poining, being the date when the poining schedule has been delivered or left on the premises in pursuance of sections 20(6)(b) and 21(7) of the 1987 Act (in relation to an ordinary poining), and of paragraphs 5(6)(b) and 6(7) of Schedule 5 to the 1987 Act (in relation to a poining under a summary warrant).

Earnings arrestment.

- (a) - the date of its execution, being the date when the earnings arrestment schedule is served on the debtor's employer in pursuance of section 47(2)(a) of the 1987 Act.
- (b) - the date of submission by a creditor to the sheriff court of an application under section 60 of the 1987 Act for a conjoined arrestment order.
- (c) - the date of submission by a creditor to the sheriff court of an application under section 62(5) of the 1987 Act for inclusion in a conjoined arrestment order.

Inhibition - the date when Letters of Inhibition, with a Certificate of Execution endorsed thereon, are registered in the Register of Inhibitions and Adjudications, or, if before service of the Letters a Notice of Inhibition is so registered, the date of registration of that notice providing the duly executed Letters are subsequently registered within 21 days of the registration of the notice.

Adjudication - the date of the institution of court proceedings in an action of adjudication.

Confirmation of executor-creditor - the date of the making of an application to the sheriff court for appointment as executor-creditor to the deceased debtor.

The date when diligence ceases to have effect

2.38 The diligences referred to above would cease to have effect (otherwise than on discharge of the debt) in the following circumstances.

Arrestments and poindings

- (i) where the arrestee makes the arrested funds forthcoming to the creditor; on completion of a warrant sale of poinded goods or a sale consequent to an action of forthcoming, or a sale of an arrested ship; when unsold goods are adjudged and delivered to the creditor.
- (ii) on the recall of the arrestment or poinding;
- (iii) on the "reduction" of the arrestment or poinding as a consequence of the sequestration/liquidation of the debtor's estates;¹
- (iv) by prescription of diligence - in the case of arrestments if not "pursued and insisted on" within a period of three years;² in the case of an ordinary poinding, on the expiry of a period of one year after the date of execution of the poinding, unless during that period an application has been made under section 30(1) of the 1987 Act for a warrant of sale of the poinded articles,³ or the sheriff has agreed to an extension of the one-year period;⁴ in the case of a poinding pursuant to a summary warrant, on the expiry of a period of one year after the date of execution of the poinding unless the creditor's application to the sheriff for

¹ S 37 of the 1985 Act and s 185 of the 1986 Act.

² S 22 of the Debtors (Scotland) Act 1838.

³ S 27(1) of the 1987 Act.

⁴ S 27(2) of the 1987 Act.

an extension of this period is granted.¹

- (v) where a receiver appointed by a floating charge holder disposes of pointed or arrested assets.²

Earnings arrestments (including conjoined arrestment orders)

- (i) by an order granted by the sheriff under section 50 of the 1987 Act that the earnings arrestment is invalid or has ceased to have effect, duly intimated by the sheriff clerk to the debtor, the creditor, and the arrestee;
- (ii) on the recall of the earnings arrestment by the granting of a conjoined arrestment order,³ on the recall of the earnings arrestment or conjoined arrestment order by the court⁴
- (iii) where the debtor leaves the employment of the person or concern with whom the earnings arrestment has been lodged;
- (iv) where the debtor's estate is sequestrated.⁵

¹ Para 11(2)-(5) of Sched 5 to the 1987 Act.

² This disposal may require the court's authority if the diligence holder fails to give his consent to the disposal - s 61(1) of the Insolvency Act 1986.

³ S 60(3)(a). A conjoined arrestment order comes into effect under s.60(5) 7 days after a copy of it has been served upon the employer, on the debtor, and on the creditor in an earnings arrestment or current maintenance arrestment.

⁴ S 66 of the 1987 Act.;

⁵ S 72 of the 1987 Act.

Adjudications

- (i) Where the adjudication secures absolute ownership in the adjudged subjects (whether achieved by a decree of expiry of the legal or by prescription);¹
- (ii) where the subjects are redeemed during the legal or the debtor seeks and obtains a declarator of the extinction of the adjudication, or of reduction and extinction.
- (iii) where the debtor's estates are sequestrated or liquidated within one year and one day of the granting of the decree of adjudication.²
- (iv) where a receiver appointed by a floating charge holder before decree of adjudication has been obtained, disposes of the debtor company's heritable property.

Inhibitions

- (i) where the inhibition is recalled;
- (ii) on the recording of a discharge of the inhibition;
- (iii) by prescription, five years from the date on which the inhibition takes effect.³

¹ See paras 2.18 - 2.21 above.

² See para 2.22 and footnote 1 on page 19 .

³ Conveyancing (Scotland) Act 1924, s 44(3).

- (iv) on the "reduction" of the inhibition as a consequence of the sequestration/liquidation of the debtor's estates.¹
- (v) where a receiver appointed by a floating charge holder disposes of the debtor company's heritable property against which an inhibition has been registered.²

Confirmation as executor-dative

- (i) On realisation by the executor-creditor of the assets included in the confirmation.
- (ii) Where the deceased's estate is sequestrated or a judicial factor appointed to administer the deceased's estate, within 12 months after the debtor's death.³

2.39 If the Second Option were adopted the obligation to obtemper the decree, order or award, would be extinguished when diligence in operation at the end of the prescriptive period ceases to have effect thereafter. Unlike the approach recommended for identifying when each diligence commences to operate, we do not think, subject to the two exceptions referred to in paragraphs 2.40 and 2.41 below, that any implementing legislation would need to identify, for each diligence, the circumstances described above which bring that diligence to an end.

¹ See footnote 3 on page 15.

² This disposal may require the court's authority if the inhibitor fails to give his consent to the sale of the heritable property - see s 61(1) of the 1986 Act and Armour and Mycroft, Petitioners 1983 SLT 453.

³ See para 2.26 above.

2.40 The first exception referred to above concerns arrestments and poindings. As we have already indicated the diligence of arrestment or poinding will cease to have effect on the completion of a warrant sale of poinded goods, a sale consequent to an action of furthcoming, or a sale of an arrested ship. Whereas the normal practice on completion of such a sale is to remit the proceeds of sale direct to the arresting or poinding creditor, the alternative or additional procedure of consigning the proceeds into court may be adopted if other creditors lay claim to a share of the fund. Should such circumstances arise it would not be appropriate for the obligation to be extinguished on completion of the diligence but only when the process of ranking on the fund in court has taken place and the proceeds of diligence duly distributed among the claimants.

2.41 The second exception concerns an earnings arrestment. An earnings arrestment ceases to have effect when a conjoined arrestment order is made under section 60(2) of the 1987 Act. We do not consider that an earnings arrestment, recalled in such circumstances, should be regarded as ceasing to have effect within the context of the Second Option. In our view the diligence should be regarded as still technically in operation under the conjoined arrestment order for the purposes of prescription.

2.42 Consequently any legislation required to implement the Second Option formula would need to provide specifically for these two exceptions to the rule that the obligation will be extinguished when the diligence ceases to have effect.

Further comments on the Second Option

2.43 Accordingly, to sum up, the Second Option would provide that if diligence has commenced to operate, as defined above,¹ but has not ceased to have effect by the end of the twenty year long negative prescriptive period, the obligation to comply with the decree of court, award or order, will not be extinguished until that diligence ceases to have effect. Although the reference is to a single diligence, where more than one diligence has commenced to operate before the end of the prescriptive period the obligation would not be extinguished until all diligences in operation cease to have effect.

2.44 In determining whether a diligence has ceased to have effect (i) where a process of ranking takes place on the proceeds of diligence, the diligence will not cease to have effect until the proceeds have been distributed among the claimants; (ii) where an earnings arrestment is superseded by a conjoined arrestment order, the former will not be regarded as ceasing to have effect but will be continued in existence by virtue of that order.

2.45 Two problems arise from the operation of this formula which we now refer to briefly below.

i. The consequences of sequestration/liquidation on the execution of diligence

2.46 Where diligence is executed shortly before the end of the prescriptive period and is "reduced" thereafter on the sequestration/liquidation of the debtor's estate, or on the appointment of a judicial factor to administer a deceased debtor's

¹ See para 2.37 above.

insolvent estate, (referred to hereafter collectively as "insolvency proceedings") the obligation to obtemper the decree etc under the Second Option would be extinguished at that time. Arguably, it would be appropriate to prevent extinction of the obligation in these circumstances, so as to secure for the creditor the right to lodge his claim for payment in the insolvency proceedings.

2.47 Accordingly if this approach is acceptable in principle it would seem necessary to propose, as a consequential to the Second Option, that in the event of diligence being "reduced", as indicated above, (a) the prescriptive period will be extended for a further six months so as to enable the creditor to lodge a claim in the insolvency proceedings, and (b) if such a claim is lodged during that period the obligation to account under the decree will not prescribe until the insolvency proceedings have come to an end.

2.48 This proposal, however, leads to a further complication. We make the point in the Memorandum¹ and in our subsequent Report² that insolvency proceedings can come to an end in various circumstances before the claim has been adjudicated upon - for example - in a sequestration, by the granting of a petition for its recall; by an action of reduction, where recall is no longer competent; and by recourse to the nobile officium in the rare case where recall and reduction are both incompetent. Another example concerns the voluntary trust deed where the trustee or a non-acceding creditor petitions for an award of sequestration. Should such a situation arise the obligation to obtemper the decree etc would prescribe at the same time. Such a result again would seem inappropriate and in our view where insolvency proceedings come to an end before the claim is adjudicated upon,

¹ See para 6.61.

² See para 4.51.

the prescriptive period should be extended for another six month period to enable the creditor to continue to pursue his claim, presumably by the execution of further diligence.

ii. Where the creditor's claim is not fully satisfied by the execution of diligence

2.49 The Second Option could give rise to yet another problem where the creditor, who is in the process of executing diligence at the end of the prescriptive period, discovers thereafter that realisation of the assets attached by the diligence does not result in full satisfaction of his claim. It would appear that under this Option the creditor's rights to the outstanding balance of the debt would prescribe in such a situation.

2.50 To resolve this problem it is suggested that should such circumstances arise there will be an automatic extension of the prescriptive period for six months calculated from the date the diligence ceases to have effect. This proposal would enable the creditor to carry out further diligence as required, and to secure, where necessary, further extensions of the prescriptive period.

Summary of Second Option

2.51 Accordingly, to sum up, the Second Option would provide as follows:-

- (1) (a) If by the expiration of the twenty year prescriptive period diligence has commenced to operate (as defined above),¹ and has not ceased to have effect, the obligation to comply with the decree of court, award or order, will not be extinguished until that diligence ceases to have

¹ See para 2.37.

effect.¹

(b) In determining whether a diligence has ceased to have effect (i) where a process of ranking takes place on the proceeds of diligence the diligence will not cease to have effect until the proceeds have been distributed among the claimants; (ii) where an earnings arrestment is superseded by a conjoined arrestment order the former will not be regarded as ceasing to have effect but will be continued in existence by virtue of that order.

(2) Notwithstanding (1) above, and subject to (3) and (4) below, where diligence has not ceased to have effect on the expiry of the 20 year period but

(a) is "reduced" thereafter on the sequestration/liquidation of the debtor's estate or on the appointment of a judicial factor to administer a deceased debtor's insolvent estate, or

(b) does not result in full satisfaction of the creditor's claim;

the obligation to comply with the decree of court, award or order will not be extinguished until six months have elapsed commencing with the date on which the diligence ceases to have effect.

¹ Where more than one diligence has commenced before the end of the prescriptive period the obligation would not be extinguished until all diligences in operation cease to have effect.

- (3) If during the six month period referred to in (2) above a claim has been made in insolvency proceedings and such proceedings have come to an end before the claim has been adjudicated upon, the obligation to comply with the decree etc will not be extinguished until six months after the proceedings have come to an end.
- (4) If during the six month period referred to in (2) or (3) above further diligence is executed the said period will be subject to extension in accordance with (1) above.

Conclusions

2.52 We favour the First Option for two reasons. First, in our view it achieves an equitable balance between the interests of the creditor and the debtor. It provides the creditor with a reasonable period in which to seek settlement of his claim - usually more than twenty years after the claim has arisen -, and at the same time places a clear limit on the period during which the debtor is under an obligation to account to the creditor for the debt due.

2.53 Second, as we are concerned here with only the few cases where the claimant has been unsuccessful in securing satisfaction of his claim under the decree etc within a period of twenty years, it offers a simple solution to this issue.

2.54 The Second Option, on the other hand, although possibly more principled in its approach, involves the introduction of fairly complicated statutory rules. Its implementation would necessitate having to define for each category of diligence when such diligence commences to operate, and although it would seem to be

possible to produce a general formula for identifying when the prescriptive period comes to an end - when 'the diligence ceases to have effect' -, it would be necessary to qualify this formula, as indicated above, in relation to an earnings arrestment, or where a process of ranking takes place on the proceeds of diligence. Furthermore the proposed six monthly extensions of the prescriptive period create uncertainty for the debtor as to the period of his accountability.

2.55 Accordingly, consultees are invited to respond to the following provisional proposal.

Provisional proposal

The execution of diligence for the purpose of enforcing a decree of court, an arbitration award or an order of a tribunal or authority exercising jurisdiction under any enactment, will not affect the running of the twenty year long negative prescription.

(Proposition 1)

Part III - Miscellaneous Diligences - the effect of the execution of these diligences on the operation of prescription

Introduction

3.1 We explained in Part I of this Consultation Paper that as the institution of court proceedings already constitutes a 'relevant claim' within the meaning of section 9 of the 1973 Act we do not consider that it is necessary to provide that diligence executed to found jurisdiction for the purpose of raising a court action against a particular defender, or diligence executed on the dependence of a court action, should affect the operation of prescription. Consequently Part II of this Paper was confined to examining the effect upon the twenty year long negative prescription of diligence executed to enforce a court decree, arbitration award or an order of a tribunal or other statutory authority.

3.2 There are, however, certain miscellaneous diligences - used infrequently in practice, except possibly arrestments in rem - which arguably do not fall within any of the above categories of diligence. This Part of the Paper is concerned with such miscellaneous diligences, and whether they should affect the running of prescription.

3.3 Poinding of the ground, mails and duties, the landlord's sequestration for rent and an arrestment in rem of a ship or her cargo in an Admiralty action in rem form a separate category from those referred to in Part II of the Paper in that they are used, not to enforce a decree for a debt due, but to enforce a secured debt. We outline briefly below in what manner each of these diligences operate.

Poining of the Ground¹

3.4 Poining of the ground is a real diligence for attaching moveables. It is a diligence which is open only to a creditor holding a debitum fundi ie. who has his debt secured upon the land - for example - the superior for payment of his feuduties; or a heritable creditor (unless under an ex facie absolute disposition) for payment of loan repayments; the creditor in a real burden secured over land;² the creditor in a ground annual;³ or the creditor in a decree of mails and duties.⁴ The obligation to discharge arrears of feuduty, ground annual, or periodical payments under a land obligation are subject to the five year short negative prescription.⁵ The twenty year long negative prescription applies to arrears of loan repayments which arise under a probative writ.⁶

3.5 The creditor raises an action in the Court of Session or sheriff court in which he craves warrant to poind and distrain all

¹ In our Discussion Paper No. 78 Adjudications for Debt and Related Matters we propose abolition of poining of the ground - Proposition 8.2, para 8.11.

² Scottish Heritable Security Co v Allan, Campbell, & Co (1876) 3R 333.

³ Bells Trs v J Copeland and Company & Others (1896) 23 R 650.

⁴ Henderson v Wallace & Others (1875) 2 R 272.

⁵ Paras 1(a)(iii), 1(a)(iv) and 1(a)(vii) of Sched 1 to the 1973 Act.

⁶ Para 2(c) of Sched 1 to the 1973 Act but Recommendation 28 of our Report on Requirements of Writing (Scot Law Com No 112) recommends that obligations which are constituted or evidenced by a probative writ should be subject to the normal five year short negative prescription.

moveables belonging to the debtor or to his tenants¹ or possessors of the lands over which the debitum fundi is constituted; warrant to sell the poinded goods and to pay over to the pursuer the proceeds of sale in satisfaction or to account of the debt due; warrant for the expenses of the action; and in the meantime warrant to officers of the court to inventory the said moveables.² The plea-in-law states that the principal sum, interest and penalties, being resting owing to the pursuer, and being debita fundi on the subjects and others condescended on, the pursuer is entitled to warrant as craved. Service of the writ creates a nexus upon the effects which, at the date of service, are actually on the ground.³ The proprietor of the land over which the security is granted (normally the debtor, unless the proprietor happens to be a guarantor for the debtor) and any tenants of that land are called as defenders.

3.6 The decree, which is in the form of a warrant to poind,⁴ can be carried into effect by a procedure similar to that in personal poinding.⁵ A poinding of the ground executed within 60 days before or on or after the date of sequestration/liquidation of the debtor's estates is 'reduced' except in respect of interest on the debt for the current half-yearly term and one year's arrears.⁶

¹ Moveables belonging to the tenants may be attached insofar as their value does not exceed rents due and unpaid.

² See Dobie - Styles for Use in the Sheriff Courts in Scotland p 372 - 374.

³ Lyons v. Anderson (1880) 8 R 24.

⁴ See s 87(5) of the 1987 Act.

⁵ See paras 2.11 - 2.12 above.

⁶ See s 37(6) of the 1985 Act and s 185 of the 1986 Act.

Maills and Duties

3.7 This is a diligence carried out by a creditor under a bond and disposition in security (by virtue of the assignation of rents clause incorporated in that deed) for arrears of loan repayments or the outstanding balance of the loan, and by a creditor in a ground annual for arrears of ground annual.¹ It is a diligence by which the creditor may attach rents due by the tenants of the subjects over which his security extends. As indicated above, the obligation to discharge arrears of ground annual prescribes under the five year short negative prescription, and the obligation to discharge arrears of loan repayments or the outstanding balance of the loan at present prescribes under the twenty year long negative prescription.

3.8 The creditor proceeds by raising an action in the Court of Session or sheriff court, in which the defender is the proprietor of the lands over which the creditor has his security. The tenants do not require to be called as defenders but a notice of the raising of the action is given to them in a statutory form,² which has the effect of interpellating them from making payment of their rents to the proprietor. The writ narrates the sum due by the debtor to the creditor and craves a decree of maills and duties.³

3.9 When decree is obtained a further statutory notice⁴ is given to the tenants directing payment by the tenants of the rents, maills and duties due by them to the creditor. The effect

¹ Somerville v Johnston (1899) 1F 726.

² The Heritable Securities Act 1894 (57 and 58 Vict) c 44 ('the 1894 Act') s 3 - Sched B.

³ See Dobie - Styles for Use in the Sheriff Courts in Scotland p 310 - 312.

⁴ The 1894 Act Sched C.

of the decree, therefore, is 'to transform the preference over the rents given to the holder of the heritable security [or the creditor in a contract of ground annual] into an active right to uplift the rents'.¹ The sequestration/liquidation of the debtor's estate does not "reduce" the diligence of mails and duties.²

Sequestration for rent

3.10 This form of diligence arises from a landlord's hypothec or right of security, for recovery of his rent, over his tenant's moveables such as ordinary equipment, household furniture, stock-in-trade in a shop. This hypothec is enforced by an action of sequestration for rent. There are two kinds of sequestration - sequestration in payment, where the rent has fallen into arrears, and sequestration in security, where the term of payment has not yet arrived. In this exercise we are only concerned with the former on the basis that prescription only starts to run when the rent payments are in arrears. The hypothec, in these circumstances, only secures one year's rent, and not prior arrears, and falls if it is not put in force by sequestration within 3 months of the last term of payment. An obligation to discharge arrears of rent prescribes under the five year short negative prescription.³

¹ See Gloag and Henderson (9th ed) - Introduction to the Law of Scotland p 856.

² Graham Stewart The Law of Diligence, p 524. See also our Report on Bankruptcy and Related Aspects of Insolvency and Liquidation (Scot Law Com No 68) -- para 13.19.

³ Para 1(a)(v) of Sched 1 to the 1973 Act.

3.11 To enforce his security the landlord proceeds by way of an initial writ presented to the sheriff court. The writ usually craves inter alia (a) sequestration for payment of rent; (b) warrant to sell and for payment to the pursuer from the proceeds; (c) decree against the defender for any balance due. Sometimes the form of writ craves decree for payment of the rent and also for sequestration, possibly because the pursuer thinks that he may receive the rent without the need for sequestration.¹

3.12 A warrant for sequestration is granted on presentation of the initial writ and the sheriff officer thereafter inventories the tenant's goods to which the sequestration extends; leaves a copy with the tenant; and lodges the principal in court. A warrant is then sought to sell the inventoried goods by public roup or auction, and after a report of the sale has been submitted to the court the proceeds are then remitted to the landlord in satisfaction or part satisfaction of his unpaid rent, the tenant being entitled to any surplus.

3.13 Presumably decree will only be required for any balance due after the sequestration has taken place. The landlord's right of hypothec is unaffected by the debtor's sequestration² or liquidation.³ Where a receiver is appointed to a debtor company the decision reached in Cumbernauld Development Corporation v. Mustone Ltd⁴ suggests that the receivers' rights prevail over the landlord's hypothec. This decision, however, has been criticised by William G Simmons in his article - 'A legal black hole'⁵ and by George L Gretton in his article 'Receivership and Sequestration

¹ Dobie - Styles for Use in the Sheriff Courts in Scotland p 466 - 470.

² S 33(2) of the 1985 Act.

³ Anderson's Trs v Donaldson & Co Ltd (in liquidation) 1908 S C 38; Scottish Metropolitan Co Ltd v Sutherlands Ltd, 1934 SLT (Sh Ct) 62.

⁴ 1983 SLT (Sh Ct) 55.

⁵ 1983 JLSS 352.

for Rent'.¹

Arrestment in rem²

3.14 An arrestment in rem of a ship enforces a maritime lien (hypothec)³ which is a form of security over a ship, her cargo or freight ('res'). An Admiralty action in rem is the process for enforcing this hypothec for a sum of money - eg damages in respect of a collision, arrears of wages due to a seaman -, and can be raised in either the Court of Session or in a sheriff court.⁴ The obligation which gives rise to an arrestment in rem may prescribe under the five or twenty year negative prescriptions depending upon whether or not the obligation is constituted by a probative writ.

3.15 The action is brought against the ship and the owners and any other parties interested therein. The warrant to arrest the particular res is contained in the signeted summons or initial writ, and it would appear that the execution of the arrestment in rem should precede the service of the writ.⁵ The conclusions in the action are for:-

¹ 1983 SLT (News) 277.

² For full details of this form of diligence reference is made to our Discussion Paper No 84 - 'Diligence on the Dependence and Admiralty Arrestments', published in December 1989 - Part III.

³ The principal maritime liens recognised by common law are:- damage done by a ship; bonds of bottomry or respondentia (now obsolete); seamen's wages; masters' wages and disbursements; and salvage. Other maritime liens have been created by statute.

⁴ The sheriff court has exclusive jurisdiction in Admiralty causes below £500 in value.

⁵ Mill v Fildes 1982 SLT 147.

- (a) declarator that the pursuer has a (maritime) lien over the ship or cargo for a specified sum and interest;
- (b) declarator that the pursuer's lien to the extent of the specified sum is preferable to the right of all others having, or pretending to have, rights in the ship or cargo;
- (c) warrant to sell the ship or cargo on the lien being declared and to apply the proceeds in satisfaction of the lien over or towards payment of the sum claimed.¹

3.16 A decree of declarator of the lien for a specified sum will be granted by the court, after which the pursuer applies to the Court by motion to order the sale of the ship or other arrested property at such upset price as the Court may fix.² The proceeds of sale are consigned into Court and where there are competing claims to the consigned fund, distribution of the fund, after deduction of expenses, may take the form of a procedure similar to a multiplepointing. If the pursuer anticipates that the proceeds of sale of the res will be insufficient to discharge the whole of his claim it would appear that, in order to secure a decree for any deficit, the Admiralty action in rem should be combined with an action in personam.³ There is some uncertainty as to whether an arrestment in rem would be 'reduced' if executed within a period of 60 days of the sequestration⁴ of the debtor's estates. On the one hand section 37(4) of the 1985 Act provides for 'reduction' of an arrestment (without qualification) if executed within the 60 day period. On the other hand section 33(3) provides that the right of a secured creditor is preferable to that of the permanent trustee. The section 73 definition of a secured creditor includes a creditor who has a right of lien over subjects

¹ RC Appendix, Form 2(9).

² RC 143.

³ An action in personam is brought by the creditor against the owners or parties interested in the ship, or its cargo and concludes for a decree in common form against the defenders, RC 136 and 138.

⁴ The sequestration provisions are also applied in relation to the liquidation of a debtor's estates - see s 185 of the 1986 Act.

belonging to the debtor. On balance we take the view that an arrestment in rem would not be affected by the debtor's sequestration/liquidation notwithstanding that decree of declarator of the maritime lien is not granted by the court at that time.¹ This approach would be consistent with that adopted in relation to a landlord's hypothec for arrears of rent.²

The effect of the execution of such miscellaneous diligences under current law on the operation of prescription

3.17 Each of the above four diligences proceeds by way of a court action which identifies the debt due and craves warrant to carry out the necessary diligence. In a poiding of the ground the decree granted is a warrant for poiding. In an action of mails and duties the decree constitutes authority, when duly intimated to the tenants, to seek payment of the rents from the tenant until the debt is discharged.

3.18 In an action of sequestration for rent the procedure appears to be slightly different in that normally the poiding will take place during the currency of the action and decree is only granted for any balance due if the proceeds of sale of the poided assets do not satisfy the debt. Similarly in an Admiralty action in rem the arrestment in rem takes place, pursuant to a warrant to arrest incorporated in the signeted summons or initial writ, prior to the service of the action and before the court grants a decree of declarator of the lien.

¹ A maritime lien gives the creditor a hypothec or security without possession from the moment when circumstances occur out of which the lien arises - See Thomas Maritime Liens (1980) p 2.

² See s 33(2) of the 1985 Act.

3.19 As indicated above 'relevant claim', as defined by section 9 of the 1973 Act includes among other claims:-

(First) a claim made by the creditor for implement, or part implement, of the obligation in appropriate proceedings¹;

(Second) the execution by the creditor in an obligation of any form of diligence directed to the enforcement of the obligation.

3.20 In our view the effect of these miscellaneous diligences upon the operation of prescription under the current law is by no means certain. Notwithstanding that their execution each requires the institution of court proceedings we find it difficult to decide whether the procedures involved would constitute a 'relevant claim' under the first category referred to above and also a 'relevant claim' under the second category, or alternatively whether the whole procedure should be regarded as a means of executing diligence bringing it only within the scope of the second category. In addition to this difficulty there is the problem already referred to in this Paper of ascertaining what effect the making of a 'relevant claim' has under the current law upon the running of prescription.²

Proposals for reform

3.21 As we have pointed out earlier in this Part of the Consultation Paper we understand that, with the possible exception

¹ S 4(2) of the 1973 Act defines 'appropriate proceedings'.

² See paras 1.3 and 2.2.

of arrestments in rem these miscellaneous diligences are rarely used in practice. Furthermore in our Discussion Paper No. 78 Adjudications for Debt and Related Matters we propose abolition of poinding of the ground. Nevertheless notwithstanding the infrequent use of these diligences it is for consideration whether we can, for this reason alone, justify recommending adoption in this context of our favoured First Option in relation to diligences carried out to enforce a decree, order or award, - that the execution of any of these miscellaneous diligences should not affect the running of prescription.

3.22 We are concerned here with some obligations¹ which prescribe under the twenty year long negative prescription, and others² which are subject to the much shorter five year prescription. If, however, Recommendation 28 of our Report on the Requirements of Writing (Scot. Law Com. No. 112)³ is implemented all the obligations with which we are concerned in Part III of this Consultation Paper will prescribe under the five year period.

3.23 Accordingly, in putting forward proposals for identifying what effect the execution of these miscellaneous diligences should have upon the operation of prescription we do not think that we can recommend adoption of the favoured First Option which we justified on the ground that twenty years gave the creditor a long enough period in which to enforce an obligation to obtemper or recognise a decree.

¹ Obligations which arise under a probative writ - for example - the obligation to discharge arrears of loan repayments.

² For example - an obligation to discharge arrears of feuduty, ground annual, rent, or an obligation to make reparation.

³ See footnote 6 on page 38.

3.24 Logically we feel bound to propose, for consultees' consideration, adoption of the Second Option put forward in Part II of this Paper - that if by the expiry of the prescriptive period one of these miscellaneous diligences has commenced to operate, but has not ceased to have effect, the obligation to account will not be extinguished until that diligence does cease to have effect.

3.25 In working out this formula within the context of these miscellaneous diligences we propose that the diligences of poinding of the ground, maills and duties, and an arrestment in rem¹ will be deemed to come into operation when court proceedings have been instituted.

3.26 In general, the diligences of poinding of the ground, maills and duties, or an arrestment in rem, will cease to have effect when the proceedings instituted, for the purpose of obtaining the courts' authority to execute the diligence, are withdrawn by the creditor, or dismissed by the court, or when the debt is fully discharged. In addition, a poinding of the ground will cease to have effect on completion of a warrant sale of poinded goods or when the goods are adjudged and delivered to the creditor in default of a warrant sale; or by prescription of the diligence;² and will partly cease to have effect when, on sequestration/liquidation of the debtor's estates, the diligence is 'reduced' to the extent that the poinder's preference is restricted to the interest due on the debt for the current half-yearly term,

¹ We have omitted here a reference to the landlord's sequestration for arrears of rent as such a diligence can never be current at the end of the prescriptive period in that it must commence within three months of the rent falling into arrears. Accordingly the institution of court proceedings in this context will not affect the running of prescription.

² See para 2.38 item (iv) above.

and one year's arrears.¹ The diligence of mails and duties will cease to have effect if the tenancies, from which the rents have been uplifted, are terminated; and an arrestment in rem will come to an end when the proceeds from the sale of the arrested ship (cargo or freight) have been consigned into court.

3.27 Subject to the one exception referred to below, and following the same approach as that adopted in relation to diligences executed in the enforcement of a decree, we take the view that any legislation introduced to implement the Second Option formula in relation to the miscellaneous diligences would not require to identify when such a diligence ceases to have effect.

3.28 The one exception concerns arrestments in rem and poindings of the ground. As it would be inappropriate for the obligation to account to be extinguished before the proceeds of the sale of the poinded goods or the arrested ship (cargo or freight) have been distributed, it would be necessary to provide in any legislation implementing our suggested formula that, in determining whether a poinding of the ground or an arrestment in rem has ceased to have effect, where a process of ranking takes place on the proceeds of that diligence the diligence will not cease to have effect until the proceeds have been distributed among the claimants.²

3.29 It is for consideration, however, whether it would be necessary to adopt, in respect of these miscellaneous diligences, the following two consequential issues arising from the Second

¹ See s 37(6) of the 1985 Act and s 185 of the 1986 Act.

² See paras 2.40 and 2.51 (1)(b) above.

Options which are concerned with preventing an obligation to account being extinguished or partly extinguished (i) where diligence executed shortly before the end of the prescriptive period is 'reduced' or partly 'reduced' thereafter on the sequestration/liquidation of the debtor's estates or (ii) where the creditor discovers on completion of the diligence that the realisation of the assets does not result in full satisfaction of his claim.

3.30 Our initial reaction is to disregard these consequential issues in this context. In the light of the rarity of these miscellaneous diligences we are reluctant to propose reforms which will, in implementation, require the introduction of fairly complicated legislative provisions.

3.31 Our inclination is to keep our recommendations for reform as simple as possible, and accordingly, subject to consultees' views to the contrary, our proposal would be to disregard these consequential issues in relation to the miscellaneous diligences. We are encouraged in this approach for two reasons. First, poiding of the ground (which we have already proposed should be abolished) is likely to be the only one of the miscellaneous diligences which is affected by the sequestration/liquidation of the debtor's estates. Second, whereas poiding of the ground, and mails and duties, might not, on completion, result in full satisfaction of the creditor's claim, we anticipate that this situation is unlikely to arise in an arrestment in rem. If a creditor anticipates in an Admiralty action in rem that the sale of the arrested ship may not fully satisfy his claim he is likely to combine the action in rem with an action in personam seeking decree for any deficit on realisation. Such a

decree will give the creditor twenty years thereafter in which to enforce the debt outstanding.

3.32 Accordingly consultees are invited to respond to the following provisional proposals.

- (1) If by the expiration of the prescriptive period an arrestment in rem, maills and duties or a poinding of the ground has commenced to operate for the purpose of enforcing an obligation to account, and has not ceased to have effect, the said obligation will not be extinguished until that diligence does cease to have effect.
- (2) For the purposes of (1) above the said diligences referred to therein will be deemed to come into operation when an Admiralty action in rem, an action of maills and duties, or an action of poinding of the ground (as the case may be) has been commenced.
- (3) In determining when any of the said diligences referred to in (1) above has ceased to have effect, where a process of ranking takes place on the proceeds of any such diligence that diligence will not cease to have effect until the proceeds have been distributed among the claimants.

(Proposition 2)

Part IV - Summary of Provisional Proposals

1.

The execution of diligence for the purpose of enforcing a decree of court, an arbitration award or an order of a tribunal or authority exercising jurisdiction under any enactment, will not affect the running of the twenty year long negative prescription.

(Para. 2.55).

2.

- (1) If by the expiration of the prescriptive period an arrestment in rem, maills and duties or a poiding of the ground has commenced to operate for the purpose of enforcing an obligation to account, and has not ceased to have effect, the said obligation will not be extinguished until that diligence does cease to have effect.
- (2) For the purposes of (1) above the said diligences referred to therein will be deemed to come into operation when an Admiralty action in rem, an action of maills and duties, or an action of poiding of the ground (as the case may be) has been commenced.
- (3) In determining when any of the said diligences referred to in (1) above has ceased to have effect, where a process of ranking takes place on the proceeds of any such diligence that diligence will not cease to have effect until the proceeds have been distributed among the claimants.

(Para. 3.32).